# *THE COURT OF APPEAL FOR SASKATCHEWAN*

Citation: 2008 SKCA 006 Date: 20080116

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Between: Docket: 1338

William Whatcott

Appellant

- and -

The Saskatchewan Association of Licensed Practical Nurses

Respondent

- and –

Canadian Civil Liberties Association

Intervenor

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Coram:
Jackson, Richards & Hunter JJ.A.

Counsel:
Thomas A. Schuck for the Appellant
Bettyann Cox for the Respondent
Andrew K. Lokan and Brydie Bethell for the Intervenor

Appeal:

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| From: | 2006 SKQB 325 |
| Heard: | June 12, 2007 |
| Disposition: | Appeal Allowed |
| Written Reasons: | January 16, 2008 |
| By: | The Honourable Madam Justice Jackson |
| In Concurrence: | The Honourable Mr. Justice Richards |
| | The Honourable Madam Justice Hunter |

**Jackson J.A.**

I. Introduction

[1] This appeal concerns a finding of professional misconduct made by a professional nursing body against one of its members for words expressed in opposition to the activities of a Planned Parenthood organization. It raises constitutional law issues pertaining to freedom of expression in the administrative law context.



[2] William Whatcott was a member of the Saskatchewan Association of Licensed Practical Nurses ("SALPN"). In 2002, he picketed in front of the offices of Planned Parenthood Regina ("PPR"). As a result of a complaint made by PPR to the SALPN, two charges of professional misconduct were levelled against him. The charges are replicated in Appendix "A". At hearings at which Mr. Whatcott testified, he essentially admitted the key allegations contained in each of the charges.

[3] In relation to the first charge, he admitted:

(a) he carried signs with pictures of foetuses and captions saying "Planned Parenthood Aborts Babies";

(b) he shouted such phrases as "Planned Parenthood will give you Aids," "This place is the world's biggest baby killer," "Don't let Planned Parenthood corrupt you," and "Planned Parenthood murders innocent babies;" and

(c) he stated that "fornicators will not inherit the kingdom of heaven."[1]

[4] In relation to the second charge, he admitted:

(a) he demonstrated in front of PPR on the eve of his August 27, 2003 discipline hearing;

(b) he carried signs with the words "Planned Parenthood refers for abortions," "God's gift of life" and "choice is abortion;"

(c) he said "Planned Parenthood corrupts young women" and "Planned Parenthood kills babies with chemicals" or words to that effect. [2]

He testified that the notion he intended to convey, by the last statement, was that Planned Parenthood aborts babies through chemicals. He also testified that he was drawing a distinction between the national body and the local body, by sometimes referring to PPR and sometimes referring to Planned Parenthood.

[5] The Discipline Committee of the SALPN found Mr. Whatcott guilty of professional misconduct on both charges and fined him. It also suspended his membership in the SALPN until such time as his fines were paid. The Discipline Committee did not address the extent to which Mr. Whatcott's activities were protected by the *Canadian Charter of Rights and Freedoms*. Indeed, the *Charter* is not mentioned in the Committee's decision. On appeal

[1] Decision of Saskatchewan Association of Licensed Practical Nurses, November 16, 2004 ("2004 Discipline Committee Decision"), Appeal Book at pp. 17a and 22a.
[2] *Ibid*. at p. 22a.

to the Court of Queen's Bench, Mr. Whatcott's appeal was dismissed. With that, he launched this appeal.



## II. Issues

[6] These are the issues:

1. What is the appropriate judicial review model: administrative law or constitutional law? In other words, did the chambers judge err in finding the administrative law model, and the standard of review of reasonableness, to be the appropriate model to be followed and applied?
2. Since the Discipline Committee did not address the issues raised before it in relation to the *Canadian Charter of Rights and Freedoms*, should the matter be remitted to the Committee for a consideration of the *Charter* arguments?
3. On a standard of review of correctness, does the Discipline Committee's decision infringe Mr. Whatcott's right to freedom of expression guaranteed by s. 2(b) of the *Charter*?
4. If the answer to question #3 is yes, does such infringement constitute a reasonable limit prescribed by law and demonstrably justifiable in a free and democratic society pursuant to s. 1 of the *Charter*?
5. If the infringement is not justifiable under s. 1 of the *Charter*, what is the appropriate remedy pursuant to s. 24(1) of the *Charter*?

## III. Legislative Framework

[7] Professional misconduct is defined to be a question of fact by s. 24 of *The Licensed Practical Nurses Act, 2000*[3] ("the *Act*"):

> 24 Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonourable, is professional misconduct within the meaning of this Act if:
>
> (a) it is harmful to the best interests of the public or the members;
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> (b) it tends to harm the standing of the profession;
>
> (c) it is a breach of this Act or the bylaws; or
>
> (d) it is a failure to comply with an order of the counselling and investigation committee, the discipline committee or the council.



[8] The *Act* establishes a Counselling and Investigation Committee as well as a Discipline Committee. The powers of the Counselling and Investigation Committee are set out s. 26(1) and (2), but are not relevant to this appeal.

[9] According to s. 28(1), the Discipline Committee is composed of at least three persons of whom the majority must be SALPN members and one of whom must be a member of the Council of the Association:

> 28(1) The discipline committee is established consisting of at least three persons appointed by the council, the majority of whom are to be practising members and one of whom is a member of the council appointed pursuant to section 8.

[10] Section 29(3) requires the Discipline Committee to hear the formal complaint and determine whether the member is guilty of professional misconduct:

> 29(3) The discipline committee shall hear the formal complaint and shall determine whether or not the member is guilty of professional misconduct or professional incompetence, notwithstanding that the determination of a question of

[3] S.S. 2000, c. L-14.2.

fact may be involved, and the discipline committee need not refer any question to a court for adjudication.

Sections 29(4) to (7) establish the Discipline Committee's powers and procedures, including the power to employ legal assistance:

29 (4) The discipline committee may accept any evidence that it considers appropriate and is not bound by rules of law concerning evidence.

(5) The discipline committee may employ, at the expense of the association, any legal or other assistance that it considers necessary, and the member whose conduct is the subject of the hearing, at his or her own expense, may be represented by counsel.

(6) The testimony of witnesses is to be under oath or affirmation administered by the chairperson of the discipline committee.

(7) At a hearing by the discipline committee, there is to be full right:

(a) to examine, cross-examine and re-examine all witnesses; and

(b) to present evidence in defence and reply.

[11] If the Discipline Committee finds professional misconduct, it has the authority to make one or more of the orders set forth in s. 30:

30(1) Where the discipline committee finds a member guilty of professional misconduct or professional incompetence, it may make one or more of the following orders:

(a) an order that the member be expelled from the association and that the member's name be struck from the register;

(b) an order that the member's licence be suspended for a specified period;

(c) an order that the member's licence be suspended pending the satisfaction and completion of any conditions specified in the order;

(d) an order that the member may continue to practise, but only under conditions specified in the order, which may include, but are not restricted to, an order that the member:

(i) not do specified types of work;

(ii) successfully complete specified classes or courses of instruction;

(iii) obtain medical or other treatment or counselling or both;

(e) an order reprimanding the member;

> (f) any other order that the discipline committee considers just.
>
> (2) In addition to any order made pursuant to subsection (1), the discipline committee may order:
>
> (a) that the member pay to the association, within a fixed period:
>
> (i) a fine in a specified amount not exceeding $5,000; and
>
> (ii) the costs of the investigation and hearing into the member's conduct and related costs, including the expenses of the counselling and investigation committee and the discipline committee and costs of legal services and witnesses; and
>
> (b) where a member fails to make payment in accordance with an order pursuant to clause (a), that the member's licence be suspended.
>
> (3) The executive director shall send a copy of an order made pursuant to this section to the member whose conduct is the subject of the order and to the person, if any, who made the complaint.
>
> (4) Where a member is expelled from the association or a member's licence is suspended, the registrar shall strike the name of the member from the register or indicate the suspension on the register, as the case may be.
>
> (5) The discipline committee may inform a member's employer of the order made against that member where that member has been found guilty of professional misconduct or professional incompetence.

[12] Section 36(1) permits a member to appeal the Discipline Committee's decision to the Council of the Association pursuant to s. 35 or to the Court of Queen's Bench pursuant to s. 36:

> 36(1) A member whose conduct is the subject of an order of the discipline committee pursuant to section 30 or 32 or the council pursuant to section 35 may appeal that order to a judge of the court within 30 days after the date of the order of the discipline committee or the council, and section 35 applies with any necessary modification.

In this case, Mr. Whatcott exercised his right of appeal to the Court of Queen's Bench, as s. 36(1) permits him to do.

[13] As will be seen from s. 36(1) of the *Act*, s. 35 applies, with any necessary modification, to an appeal to the Court of Queen's Bench. Section 35, in material part, reads:

> 35
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> …
>
> (5) On hearing an appeal, the council may:
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> (a) dismiss the appeal;
>
> (b) quash the finding of guilt;
>
> (c) direct a new hearing or further inquiries by the discipline committee;
>
> (d) vary the order of the discipline committee; or
>
> (e) substitute its own decision for the decision appealed from.
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> (6) The council may make any order as to costs that it considers appropriate.

In light of s. 36(1) of the *Act*, the Court of Queen's Bench has the same broad powers as the Council, including the authority to substitute its own decision for the Discipline Committee's decision.

[14] Section 36(2) provides that the affected member may appeal the decision of the Court of Queen's Bench to the Court of Appeal on a point of law:

> 36(2) A decision of the court pursuant to subsection (1) may be appealed on a point of law to the Court of Appeal by the member who made the appeal or the association, within 30 days after the date of the decision.

[15] The above are all of the relevant statutory provisions for the purposes of reviewing the decisions of the Discipline Committee and the Court of Queen's Bench.

## IV. Background and Procedural History

[16] Mr. Whatcott picketed the PPR offices during five days in April, May and June 2002. PPR took two steps relevant to this appeal.

[17] First, PPR commenced legal action. It issued a statement of claim on June 7, 2002 seeking damages from Mr. Whatcott as well as an injunction prohibiting him from engaging in similar actions. By motion dated June 24, 2002, it sought, *inter alia*, an interim injunction prohibiting him from displaying signs or other defamatory material outside of its offices. In a written decision, the Court of Queen's Bench granted a partial injunction.[4] The chambers judge wrote:

> [14] It is therefore evident that the significant and powerful right to picket as an aspect of freedom of expression requires the one who pickets to be conscious of and be sensitive to the rights of others which come in conflict with or intersect the right of expression sought by the picketer. Put another way, one who insists on his or her rights to picket should not be slow to recognize a concurrent duty or responsibility to respect the rights of others be that a right of passage, a right of reputation, a right to do business or a right not to be intimidated.
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> …
>
> [16] Insofar as the defendant's activities are informational, persuasive or soliciting support for his particular views on abortion, such activities, without more, will not be restrained. The fact that "party girl" brochures were passed out, that the pictures might be characterized as distasteful or disturbing by some, or that the picketing made others nervous, embarrassed or distressed do not constitute grounds upon which the picketing activity should be curtailed or constrained. The competing rights of others are not engaged.
>
> [17] Where however the complainant can show a strong *prima facie* case of violation of its legal rights by the tortious or criminal conduct of the picketer

[4] *Planned Parenthood Regina Inc. v. Whatcott*, 2002 SKQB 312, (2002), 222 Sask. R. 163 *per* Foley J.

restriction of activity and injunctive relief may well be appropriate to create an appropriate balance. The issue is whether such conduct has been demonstrated.

1. Defamation

(a) The signs carried by Mr. Whatcott and the other picketers and the comments they made asserted that Planned Parenthood was a murderer which performed abortions in the building being picketed. Such allegations assert the commission of criminal offences and are *prima facie* defamatory and actionable *per se* whether expressed in writing or orally, i.e. either a libel or a slander. It may well be that in the eventual trial the defendant's defence that the impugned references were not made of the plaintiff but of some other body will succeed but this does not detract from my conclusion that a strong *prima facie* case made out that these apparent untruths were made by the respondents and violated the plaintiff's right not to be defamed.

(b) The plaintiff complained of the assertion that the plaintiff would give its clients AIDS. AIDS is a communicable disease and this comment is again *prima facie* defamatory and actionable *per se* without proof of special damage. Again, at trial it may be that the defendant's rather convoluted explanation as to how this statement is true will be accepted. For the present, the plaintiff has established the strong *prima facie* case required for this aspect of injunctive relief.

(c) Complaint also was made of the use of the word "fornicator". However not only was there no connection between such an allegation and any of the plaintiffs, the evidence as to whether the word was ever used was conflicting consequently falls short of establishing the requisite *prima facie* case. See: *Gatley on Libel and Slander*, 7th ed. (London: Sweet & Maxwell Limited, 1974), at c. 4, paras. 143, 157, 187.

2. Intimidation

[18] It was not evident from the materials that any intimidation took place. There was no clear evidence of an intentional infliction of fear by unlawful means nor was there a coercion by threats of violence or other unlawful action. This tort was not established.

5. Conclusion:

[19] In this case, an order restraining the defendant from asserting that the plaintiff was party to or participated in murder, actually performed abortions or disseminated AIDS is warranted as not only has the plaintiff established the requisite strong *prima facie* case its reputation being so sullied constitutes an irreparable harm for which damages cannot adequately provide compensation. The balance of convenience also runs in the plaintiff's favour as no significant restriction occurs to the defendant's freedom of expression by imposing such an

> order whereas to allow such allegations to continue would significantly damage the plaintiff's reputation before the trial.
>
> [20] The plaintiff's application for an injunction on the wide terms requested is denied but the defendant and all other persons who demonstrate near the plaintiff's premises and picket against abortion activities are restrained until trial from referring to the plaintiff or its employees as murderers, abortionists or disseminators of AIDS nor shall the plaintiff's premises be referred to as a site at which abortions take place. The requisite undertaking as to damages has been filed.



[18] Second, in addition to taking legal action and obtaining the above interim injunction, PPR filed a complaint with SALPN, which gave rise to the hearing and decision of the Discipline Committee and ultimate appeal to the Queen's Bench and to this Court.

[19] Prior to the Discipline Committee convening to hear the complaints against Mr. Whatcott, he applied to the Court of Queen's Bench for an order prohibiting the Committee from proceeding with the hearing into his conduct on the grounds that his *Charter* rights would be infringed if the Discipline Committee were to determine that his manner of picketing amounted to professional misconduct. The chambers judge on that matter determined: (i) there was an adequate alternative remedy by way of appeal from the Discipline Committee to the court under the *Act*; and (ii) it would be impossible to determine whether Mr. Whatcott's *Charter* rights would be infringed without a hearing to determine the facts.[5] With that, she dismissed Mr. Whatcott's application to prohibit the Discipline Committee from hearing the matter.

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[5] *Whatcott v. Saskatchewan Association of Licensed Practical Nurses*, 2003 SKQB 3, (2003), 229 Sask. R. 182 *per* Gunn J.

[20] The Discipline Committee held hearings in 2003 and 2004. By the time final argument was heard in June of 2004, Mr. Whatcott was no longer a member in good standing of the SALPN, as he had declined to pay his fees for the preceding licence year.[6] The Committee nonetheless concluded that Mr. Whatcott was still a member of the Association whether he had paid his annual licence fee or not.[7]



[21] In written reasons dated November 16, 2004, the Committee found Mr. Whatcott guilty of professional misconduct within the meaning of s. 24 the *Act*. The Committee wrote:

> Professional incompetence is behaviour of a member relating to the provision of professional services and, by its nature, will arise in the workplace. Professional misconduct, on the other hand, relates to a member's conduct as a member of a profession, and may or may not relate to actions in the workplace, so long as the conduct complained of if it is behaviour that fits the description set out in any one of clause (a) to (d) [of s. 24 of the *Act*]. The conduct complained of in this case does not relate to the failure to comply with an order of the Counselling and Investigation Committee, or the Discipline Committee or the Council, and that clause does not apply. The possible application of clauses (a), (b) and (c), however, must be examined more carefully.
>
> The mere fact that Mr. Whatcott was picketing is not in and of itself professional misconduct. However, the manner [in] which he conducts himself while picketing may constitute professional misconduct. Lying and uttering defamatory comments are unprofessional activities in that they harm the standing of the profession and bring members into disrespect. Such actions are also contrary to the Code of Ethics, which is included in the Bylaws of the Association, so that a breach of the Code of Ethics is a breach of the Bylaws. Mr. Whatcott testified that he said, while picketing in front of Planned Parenthood, that "Planned Parenthood will give you AIDS". This is blatantly false. Stating that Planned Parenthood "corrupts young people" is false. Describing Planned Parenthood as "baby killers" is false.

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[6] 2004 Discipline Committee Decision, *supra* note 1, Appeal Book at p. 23a.
[7] *Ibid.*, Appeal Book at p. 25a.

Planned Parenthood also obtained an injunction to restrain Mr. Whatcott from making certain false statements in the course of his picketing. In that injunction, it was ordered that Mr. Whatcott be "restrained until trial from referring [to] the plaintiff [Planned Parenthood] or its employees as murderers, abortionists or disseminators of AIDS" and prohibited him from referring to the Planned Parenthood premises as "a site at which abortions take place". In addition to being defamatory, at least some of the comments made by Mr. Whatcott in the course of his picketing were contrary to the Order of the Court of Queen's Bench. Failure to abide by an order of a court is also unprofessional conduct.

In the case of the second charge, which was added by the Discipline Committee in its Interim Decision as described above, Mr. Whatcott engaged in the same conduct and repeated many of the same false statements: that Planned Parenthood "aborts babies through chemicals" and "corrupts women". In addition, he engaged in this behaviour while the hearing into his conduct on the original complaint was being held. In other words, Mr. Whatcott showed great disrespect to the Association's discipline process in repeating the impugned conduct while the very question of the propriety of that conduct was a matter before this Committee.[8]

[22] The Discipline Committee convened at a later date and imposed the following penalty in reasons dated January 24, 2005:

1. That William Whatcott be and is hereby suspended from the Saskatchewan Association of Licensed Practical Nurses:

   (a) for a period of 15 days from January 14, 2005, with respect to Charge 1 of the complaint against him; and

   (b) for a period of 30 days with respect to Charge 2 of the complaint against him, to be served consecutively with the suspension ordered pursuant to clause (a); and

2. That William Whatcott pay to the Saskatchewan Association of Licensed Practical Nurses the sum of $15,000.00 in respect of the costs of the investigation and hearing into his conduct and related costs; and that William Whatcott be and is hereby suspended from the Saskatchewan Association of Licensed Practical Nurses until the said $15,000.00 is paid in full."[9]

[8] *Ibid.*, Appeal Book at pp. 27a-28a.

[9] Decision of Saskatchewan Association of Licensed Practical Nurses, January 24, 2005 ("2005 Discipline Committee Decision"), Appeal Book at p. 31a.

Mr. Whatcott appealed this decision to the Court of Queen's Bench pursuant to s. 36 of the *Act*.



[23] The learned chambers judge began by stating these were the issues argued on appeal: "1. The Discipline Committee erred in [its] interpretation of s. 24 of the *Act*, which led to the conclusion the appellant was acting in his professional capacity while picketing? 2. Do the activities of the appellant in his manner of picketing and in particular the comments he made infringe upon the appellant's freedom of expression protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms*."[10]

[24] He then proceeded to ascertain the applicable administrative law standard of review. In this connection, he referred to: *Dr. Q v. College of Physicians and Surgeons of British Columbia*[11] and *Law Society of New Brunswick v. Ryan*.[12] He noted that in *Ryan* the Supreme Court of Canada stated that a more deferential standard of review than correctness is suggested by: (i) the expertise of the Discipline Committee; (ii) the purpose of its enabling statute' (iii) the nature of the question in dispute; and (iv) a statutory right of appeal from the Committee's decisions.[13] On the basis of a consideration of these four factors, the chambers judge concluded that reasonableness *simpliciter* is the appropriate standard of review, and that the

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[10] *Whatcott v. The Saskatchewan Association of Licensed Practical Nurses*, 2006 SKQB 325, (2006), 272 D.L.R. (4th) 552 at para. 17.
[11] 2003 SCC 19, [2003] 1 S.C.R. 226.
[12] 2003 SCC 20, [2003] 1 S.C.R. 247.
[13] *Whatcott*, *supra* note 10 at para. 20.

decision is reasonable. He went on to say he would have reached the same result if he had applied the correctness standard.[14]

[25] On the first issue identified by him as to whether the Discipline Committee erred in its interpretation of s. 24 of the *Act*, the chambers judge found that professional misconduct is a matter for the Committee to determine and that it was not for the Court to substitute its opinion for that of the Committee as to what constitutes professional misconduct. He wrote:

> [33] Patients who were attending the centre for medical assistance were accosted by the appellant and, as many of them were young and vulnerable, they became distressed, angry and frightened. These actions of the appellant therefore caused harm. This conduct of the appellant negatively impacted the professional service provided by the centre.
>
> [34] Even though the appellant was off duty while these acts occurred, his actions caused harm to the patients of the Planned Parenthood centre which provides health services to the community. In other words, the activities or conduct of the appellant negatively impacted the health system as it relates to the Planned Parenthood centre.
>
> [35] Section 14 of the Bylaws provides that all members shall conduct themselves in an honourable and ethical manner, upholding the values of truth and honesty and that the members shall observe the standard of conduct set out in the Code of Ethics. The Code of Ethics then stipulates that the member shall respect the physical and emotional health of the patients and will work cooperatively and collaboratively with his colleagues and other health care professionals.
>
> [36] In my view the evidence clearly discloses that the appellant is clearly in violation of the Act, the Bylaws and Code of Ethics.
>
> [37] What is and what is not professional misconduct is a matter for the Discipline Committee of the Association to determine and the Court must be careful not to interfere with this decision as it is based on a professional standard which only they, being members of the profession, can properly apply. Here, there is ample evidence to support the findings of the Discipline Committee and I agree with their conclusions that the appellant is guilty of professional misconduct. [15]

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[14] *Ibid*. at paras. 22 and 23.
[15] *Ibid*.

[26] With respect to the second question, he found, following *Irwin Toy Ltd. v. Québec (Attorney General)*[16] and *Kempling v. College of Teachers (British Columbia),*[17] that "nearly all form of expression, regardless of the message, is encompassed by s. 2(b) of the *Charter*."[18] He did not, at this point, say what infringed Mr. Whatcott's freedom of expression, but proceeded directly to consider whether the infringement is justified under s. 1 of the *Charter*, and then dismissed the appeal.



[27] The chambers judge dismissed the appeal from penalty as well. He found that the Discipline Committee did not commit any reversible error in imposing the sanctions that it did and granted both the Discipline Committee and the Investigation Committee of the SALPN their costs.

[28] Mr. Whatcott appealed all aspects of the decision. In this Court, the Canadian Civil Liberties Association was granted leave to intervene.[19]

## V. Analysis

1. What is the appropriate judicial review model: administrative law or constitutional law? In other words, did the chambers judge err in finding the administrative law model, and the standard of review of reasonableness, to be the appropriate model to be followed and applied?

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[16] [1989] 1 S.C.R. 927.
[17] 2005 BCCA 327, 255 D.L.R. (4th) 169, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 381 (QL).
[18] *Whatcott, supra* note 10 at para. 39.
[19] 2007 SKCA 49.

[29] As I have indicated, the chambers judge found the appropriate standard of review to be one of reasonableness *simpliciter*. He wrote:

> [22] In this case I am applying the reasonableness *simpliciter* test as the standard of review.
>
> [23] If I am in error as to the test to be applied as to the standard of review in this case and correctness review is the test, I would have applied that standard and would have held that I agree with the decision of the Discipline Committee.[20]

When he considered the ground of appeal relating to freedom of expression, he wrote:

> [52] Here, the level of protection to which expression may be entitled will vary with the nature of the expression. The farther that expression is from the core values of this right, the greater will be the ability to justify the statement's restricted action. (See *Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (Re R. v. Carson)*, [1996] 3 S.C.R. 480).
>
> [53] The purpose of s. 24 of the Act is to protect the reputation of the member against deliberate attacks using statements that are known to be false. I am comforted by the comments of McLachlin C.J.C. who stated at para. 120 in *Lucas, supra* [[1998] 1 S.C.R. 439], "The case at bar readily demonstrates why there is no need to lower the standard of justification for expression that falls far from the core values underlying s. 2(b)." By analogy, these reasons apply here.
>
> [54] The publication of defamatory libels is an activity that is protected by s. 2(b) of the *Charter*, but it does not meet the threshold test under s. 1 of the *Charter* and therefore cannot be upheld under that section.
>
> [55] In other words, s. 24 of *The Licensed Practical Nurses Act, 2000*, (Professional Misconduct) is an infringement on freedom of expression guaranteed by s. 2(b) of the *Charter*. However, it does <u>not</u> meet the test under s. 1 of the *Charter* and therefore cannot be upheld under that section. [Emphasis in original]
>
> [56] For all the above reasons the appeal by the appellant is dismissed.[21]

Thus, the chambers judge does not analyze the Discipline Committee's decision, to determine whether it infringes Mr. Whatcott's freedom of expression, but instead he considers whether two laws: s. 24 of the *Act* and the law of defamatory libel, can be justified under s. 1 of the *Charter*. While the

[20] *Whatcott, supra* note 10.
[21] *Ibid*.

chambers judge's decision is difficult to understand on this point, he ultimately dismissed Mr. Whatcott's appeal. From his dismissal of the appeal, we must take it that he found the law of defamatory libel can support the decision and that this law is justified under s. 1.



[30] Since the decision in *Multani v. Commission Scolaire Marguerite-Bourgeoys*,[22] the approach by the chambers judge is no longer correct, but, in all fairness to the Discipline Committee and the chambers judge, *Multani* was decided shortly after this matter was argued in Queen's Bench and appears not to have been drawn to the Court's attention.

[31] In light of the majority decision in *Multani*, two matters are clear. First, an administrative tribunal's decision can be challenged on the basis that the decision itself has infringed *Charter* rights. Second, the issues and arguments raised in relation to the decision must be considered to determine which standard of review model—administrative or constitutional—is to be applied. While the majority and the minority opinions in *Multani* demonstrate how involved these issues are, some matters are now settled by the Supreme Court.

[32] Charron J., in majority reasons in *Multani*, wrote:

> [17] As this Court recognized in *Ross* [[1996] 1 S.C.R. 825], judicial review may involve a constitutional law component and an administrative law component (at para. 22). In that case, for example, the appeal raised two broad issues. From the point of view of administrative law, the Court first had to determine whether, based on the appropriate administrative law standard of review, namely reasonableness, the human rights board of inquiry had erred in making a finding of discrimination under s. 5(1) of the *Human Rights Act*, R.S.N.B. 1973, c. H-11, and whether that

[22] 2006 SCC 6, [2006] 1 S.C.R. 256.

> Act gave it jurisdiction to make the order in issue. (It should be noted here that the Court did not confuse the protection against discrimination provided for in s. 5(1) of the Act with the right guaranteed in s. 15 of the *Canadian Charter*.) However, the conclusion that there was discrimination and that the Act granted the board of inquiry a very broad power to make orders did not end the analysis. Since the respondent had also argued that the decision infringed his freedom of expression and religion under the *Canadian Charter*, the Court also had to determine whether the board of inquiry's order that the school board remove the respondent from his teaching position was valid from the point of view of constitutional law. As the Court recognized, "an administrative tribunal acting pursuant to its delegated powers exceeds its jurisdiction if it makes an order that infringes the *Charter*" (at para. 31; see also *Slaight Communications* [[1989] 1 S.C.R. 1038]). The Court therefore conducted an analysis under ss. 2(*a*) and (*b*) and 1 of the *Canadian Charter* to decide the constitutional issue. The administrative law standard of review is not applicable to the constitutional component of judicial review. [23] [Emphasis added.]



[33] From this I conclude that the chambers judge erred in considering either s. 24 of the *Act* or the law of defamatory libel as the laws that infringed Mr. Whatcott's freedom of expression. It is the Discipline Committee's decision that infringed Mr. Whatcott's freedom of expression. The fundamental effect of the decision is to preclude Mr. Whatcott from both picketing in the manner he chose and working as a nurse until he pays the fine. He is denied the ability both to express himself in the way he has chosen and to work.

[34] In *Multani*, Charron J. concluded that it was the compliance of the commissioners' decision with the requirements of the *Charter* that was central to the appeal, not the decision's validity from the point of view of administrative law:

> [18 ] As stated above, it is the compliance of the commissioners' decision with the requirements of the *Canadian Charter* that is central to this appeal, not the decision's validity from the point of view of administrative law.…

[23] *Ibid.*

> [19] There is no suggestion that the council of commissioners did not have jurisdiction, from an administrative law standpoint, to approve the *Code de vie*. Nor, it should be noted, is the administrative and constitutional validity of the *rule* against carrying weapons and dangerous objects in issue. It would appear that the *Code de vie* was never even introduced into evidence by the parties. Rather, the appellant argues that it was in applying the rule, that is, in categorically denying Gurbaj Singh the right to wear his kirpan, that the governing board, and subsequently the council of commissioners when it upheld the original decision, infringed Gurbaj Singh's freedom of religion under the *Canadian Charter*.
>
> [20] The complaint is based entirely on this constitutional freedom. The Court of Appeal therefore erred in applying the reasonableness standard to its constitutional analysis. The administrative law standard of review was not relevant. Moreover, if this appeal had instead concerned the review of an administrative decision based on the application and interpretation of the *Canadian Charter*, it would, according to the case law of this Court, have been necessary to apply the correctness standard (*Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 31).
>
> [21] Thus, it is the constitutionality of the *decision* that is in issue in this appeal, which means that a constitutional analysis must be conducted....
>
> . . .
>
> [23] ... It is thus necessary to determine, as the Court did in *Slaight Communications*, whether the council of commissioners' decision infringes, as alleged, Gurbaj Singh's freedom of religion. As Lamer J. explained (at pp. 1079-80), where the legislation pursuant to which an administrative body has made a contested decision confers a discretion (in the instant case, the choice of means to keep schools safe) and does not confer, either expressly or by implication, the power to limit the rights and freedoms guaranteed by the *Canadian Charter*, the decision should, if there is an infringement, be subjected to the test set out in s. 1 of the *Canadian Charter* to ascertain whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society. If it is not justified, the administrative body has exceeded its authority in making the contested decision.[24]
>
> [Italics in original, underlining mine]

The Court then proceeded to analyze the administrative tribunal's decision to determine whether *the decision* infringed the *Charter*.

[24] *Ibid.*

[35] This case is like *Multani.* As with *Multani*, it is the compliance of the Discipline Committee's decision with the requirements of the *Charter* that is central to the within appeal. While administrative law arguments were made initially, as the appeal evolved in light of *Multani*, it became clear that it is not the correctness or reasonableness of the decision from an administrative law viewpoint that is at stake in this appeal, but the effect of the decision on the constitutional guarantee of freedom of expression that is in issue. Thus, as was said by the majority in *Multani,* it is necessary to leave aside the administrative standard of review and consider whether the Discipline Committee's decision, or compliance with it, infringes Mr. Whatcott's freedom of expression.

[36] As in *Multani*, it is the constitutionality of the decision that is in issue, which means a constitutional analysis must be conducted. And as in *Multani*, the standard of review is one of correctness.

2. Since the Discipline Committee did not address the issues raised before it in relation to the *Canadian Charter of Rights and Freedoms*, should the matter be remitted to the Committee for a consideration of the *Charter* arguments?

[37] In *Tranchemontagne v. Ontario (Director, Disability Support Program)*,[25] the majority of the Supreme Court of Canada found that the Social Benefits Tribunal of Ontario (the "SBT") had the authority to consider whether a section of its governing statute was inapplicable by virtue of the Ontario *Human Rights Code*. With this finding, the Court remitted the matter

[25] [2006] 1 S.C.R. 513.

to the SBT. A constituent part of the majority's reasoning in *Tranchemontagne* was the fact that the SBT had the authority to decide questions of law.



[38] *Tranchemontagne* is, however, distinguishable. The Discipline Committee was not asked to choose between conflicting legislative provisions, and declined to do so, on the basis of a lack of jurisdiction or authority. Unlike the SBT in *Tranchemontagne*, the Discipline Committee did not state that it did not have the authority or jurisdiction to address the *Charter*. The Discipline Committee simply did not address Mr. Whatcott's *Charter* arguments.

[39] There are also other reasons why it does not seem appropriate to remit the matter to the Discipline Committee. Mr. Whatcott alerted the Committee to the issue long before the hearing by his application for prohibition to the Court of Queen's Bench [26] and by service of a notice pursuant to *The Constitutional Questions Act*[27] raising the very issue that was raised before the Queen's Bench and this Court.[28] Then, in his hearing before the Discipline Committee, Mr. Whatcott made submissions regarding the *Charter*.[29] Finally, I note that even if this Court were to determine that the Discipline Committee could decide questions of law and was therefore required to undertake a

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[26] *Whatcott v. Saskatchewan Association of Licensed Practical Nurses, supra* note 5.
[27] R.S.S. 1978, c. C-29.
[28] Appeal Book. p. 70a.
[29] 2004 Discipline Committee Decision, *supra* note 1, Appeal Book at p. 23a.

constitutional analysis, it could not render a decision that was in breach of the *Charter*. See: *Slaight Communications Inc. v. Davidson*.[30]



[40] In such circumstances, it does not seem appropriate to remit the matter to the Discipline Committee giving it a second chance to do what it should have done, and was asked to do, in the first place. Indeed, neither affected party before this Court wanted us to do this. Instead, they urged upon the Court that we take on the matter as though the Discipline Committee had crafted its decision with the *Charter* in mind.

[41] This is not without its difficulties in that we do not have the views of the Discipline Committee, beyond the decision it has rendered, about how it balanced Mr. Whatcott's freedom of expression with what the Committee perceived its objective in making the decision to be. We do, however, have the submissions of counsel for the SALPN and, given the long delays in this matter, and the jeopardy that Mr. Whatcott has faced throughout this time, this Court has decided to review the decision on the constitutional basis previously identified.

[42] That brings us to the question that is at the heart of this appeal: does the Discipline Committee's decision infringe Mr. Whatcott's freedom of expression?

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[30] [1989] 1 S.C.R. 1038.

3. On a standard of review of correctness, does the Discipline Committee's decision infringe Mr. Whatcott's right to freedom of expression guaranteed by s. 2(b) of the *Charter*?

3.1 Framework

[43] *Baier v. Alberta* [31] is the most recent decision of the Supreme Court of Canada analyzing the *Charter* guarantee of freedom of expression. Rothstein J., speaking for the majority, reviews the framework:

> [19] In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, a two-part analysis was established for determining whether a violation of freedom of expression has occurred. The first step asks whether the activity is within the protected sphere of free expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. Once it is established that the activity is protected, the second step asks if the impugned legislation infringes that protection, either in purpose or effect. This analysis has been used in many subsequent cases (e.g. *R. v. Zundel*, [1992] 2 S.C.R. 731, *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083).

Thus, the framework requires answers to these questions: (i) does Mr. Whatcott's picketing fall within the protected sphere of free expression; and (ii) does the Discipline Committee's decision, by suspending and fining him for picketing, infringe that protection, either in purpose or effect?

[44] On this point, Mr. Whatcott bears the burden of persuading us that his freedom of expression has been infringed. It is, however, given the extensive jurisprudence from the Supreme Court of Canada, not a difficult burden to discharge.

[31] 2007 SCC 31, 283 D.L.R. (4th) 1.

3.2 Does Mr. Whatcott's picketing fall within the protected sphere of freedom of expression?

[45] This case does not engage the difficult issue of determining the broad limits of what human activities are encompassed by s. 2(b) that was addressed in *Baier*, but concerns the more traditional application of the *Charter* and the definition of freedom of expression as contained in *Irwin Toy v.Québec (Attorney General)*,[32] *R. v. Keegstra*,[33] and *R. v. Zundel*.[34]

[46] *Keegstra* and *Zundel* are particularly apt comparisons to this case in that in those cases, as in this one, the expression engaged can be said by many to be distasteful and hurtful.

[47] In *Keegstra*, the accused, an Alberta high school teacher, was charged under s. 319(2) of the *Criminal Code* with wilfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students. On the first step of the analysis contained in *Irwin Toy*, which is whether the expression conveys or attempts to convey meaning, Dickson C.J., writing for the majority in *Keegstra*, said:

> Having reviewed the *Irwin Toy* test, it remains to determine whether the impugned legislation in this appeal – s. 319(2) of the *Criminal Code* – infringes the freedom of expression guarantee of s. 2(b). Communications which wilfully promote hatred against an identifiable group without doubt convey a meaning, and are intended to do so by those who make them. Because *Irwin Toy* stresses that the type of meaning conveyed is irrelevant to the question of whether s. 2(b) is infringed, that the expression covered by s. 319(2) is invidious and obnoxious is beside the point. It is enough that those who publicly and wilfully promote hatred

[32] *Irwin Toy, supra* note 16.
[33] [1990] 3 S.C.R. 697.
[34] [1992] 2 S.C.R. 731.

> convey or attempt to convey a meaning, and it must therefore be concluded that the first step of the *Irwin Toy* test is satisfied.[35]

[48] In *Zundel*, the accused was charged with spreading false news contrary to s. 181 of the *Criminal Code*, which provides that "[e]very one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment...".[36] The question before the Court was whether s. 181 of the *Code* infringes the guarantee of freedom of expression in s. 2(b) of the *Charter* and, if so, whether s. 181 is justifiable under s. 1 of the *Charter*.

[49] As to whether the communication in *Zundel*, which was alleged to be false, constituted an attempt to convey meaning, McLachlin C.J., writing for the majority, said:

> The jurisprudence supports this conclusion. This Court in *Keegstra* held that the hate propaganda there at issue was protected by s. 2(b) of the *Charter*. There is no ground for refusing the same protection to the communications at issue in this case. This Court has repeatedly affirmed that all communications which convey or attempt to convey meaning are protected by s. 2(b), unless the physical form by which the communication is made (for example, by a violent act) excludes protection: *Irwin Toy, supra*, at p. 970, *per* Dickson C.J. and Lamer and Wilson JJ. In determining whether a communication falls under s. 2(b), this Court has consistently refused to take into account the content of the communication, adhering to the precept that it is often the unpopular statement which is most in need of protection under the guarantee of free speech: see, e.g., *Keegstra*, *supra*, at p. 828, *per* McLachlin J.; *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 488, *per* Sopinka J.
>
> The respondent argues that the falsity of the publication at issue takes it outside of the purview of s. 2(b) of the *Charter*. It is difficult to see how this

[35] *Keegstra, supra* note 33 at p. 730.
[36] *Zundel, supra* note 34 at p. 743.

> distinguishes the case on appeal from *Keegstra*, where the statements at issue were for the most part statements of fact which almost all people would consider false. That aside, I proceed to the arguments advanced under the head of falsity.
>
> Two arguments are advanced. The first is that a deliberate lie constitutes an illegitimate "form" of expression, which, like a violent act, is not protected. A similar argument was advanced and rejected with respect to hate literature in *Keegstra* on the ground that "form" in *Irwin Toy* refers to the physical form in which the message is communicated and does not extend to its content. The same point is determinative of the argument in this case. [Emphasis in original]
>
> The second argument advanced is that the appellant's publication is not protected because it serves none of the values underlying s. 2(b). A deliberate lie, it is said, does not promote truth, political or social participation, or self-fulfilment. Therefore, it is not deserving of protection.
>
> Apart from the fact that acceptance of this argument would require this Court to depart from its view that the content of a statement should not determine whether it falls within s. 2(b), the submission presents two difficulties which are, in my view, insurmountable....[37]

Relying on *Keegstra* to conclude that the publication at issue was protected by s. 2(b) of the *Charter*, McLachlin C.J. quoted from Dickson C.J. in *Keegstra*, *supra*:

> ...
>
> > ... it must be emphasized that the protection of extreme statements, even where they attack those principles underlying the freedom of expression, is not completely divorced from the aims of s. 2(b) of the *Charter*.... [I]t is partly through clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive.... [C]ondoning a democracy's collective decision to protect itself from certain types of expression may lead to a slippery slope on which encroachments on expression central to s. 2(b) values are permitted. To guard against such a result, the protection of communications virulently unsupportive of free expression values may be necessary in order to ensure that expression more compatible with these values is never unjustifiably limited.[38]

[37] *Ibid.* at pp. 753-54.
[38] *Ibid*. at p. 759.

[50] The more recent jurisprudence from the Supreme Court of Canada confirms this broad approach. In *Libman v. Quebec (Attorney General)*,[39] a unanimous Court reaffirmed the broad interpretative approach to be given to freedom of expression from *Irwin Toy*:

> [31] … The Court favours a very broad interpretation of freedom of expression in order to extend the guarantee under the Canadian *Charter* to as many expressive activities as possible. Unless the expression is communicated in a manner that excludes the protection, such as violence, the Court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(b) of the Canadian *Charter* (*Irwin Toy*, *supra*, at p. 970; *Zundel*, *supra*, at p. 753).



[51] Thus, notwithstanding the assertion in support of SALPN that what Mr. Whatcott said could be considered hateful and false, the communication by Mr. Whatcott passes the first step in *Irwin Toy*. He was engaged in communicative activity that conveyed, or attempted to convey, meaning, and is thus afforded protection by s. 2(b).

### 3.3 Does the Discipline Committee's decision infringe the protection of s. 2(b)?

[52] That brings us to the second step in the *Irwin Toy* analysis: does the decision of the SALPN infringe the protection of s. 2(b), either in purpose or effect.

[53] This is what the Discipline Committee found to constitute professional misconduct:

(a) that he lied, and thereby defamed PPR, by some of his statements;

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[39] [1997] 3 S.C.R. 569.

(b) that he contravened the interim injunction; and

(c) that he picketed, and continued to lie, while the hearing in relation to the first complaint was being conducted.

It suspended him for 45 days and ordered him to pay $15,000, and until the fine was paid, prohibited him from engaging his livelihood as a licensed practical nurse.



[54] It is quite clear that not only the purpose, but the effect of the Discipline Committee's decision, is to infringe Mr. Whatcott's freedom of expression. The SALPN does not want him to picket in the manner that he has chosen. Thus, the purpose of the decision is to curtail his communication. The effect of the decision is the same. He cannot picket in the manner he has chosen and be a member of the SALPN. Indeed, until he pays the fine, he is expressly precluded from being a member of the SALPN.

4. Does such infringement constitute a reasonable limit prescribed by law and demonstrably justifiable in a free and democratic society pursuant to s. 1 of the *Charter*?

[55] The SALPN bears the burden at this point.[40] It must demonstrate, on a balance of probabilities, that the Discipline Committee's decision is justified under s. 1.

[56] In *R. v. Sharpe*,[41] McLachlin C.J. reviewed the approach to determine the proportionality of a law that infringes a *Charter* right:

[40] *R. v. Oakes*, [1986] 1 S.C.R. 103.

> [78] ... To justify the intrusion on free expression, the government must demonstrate, through evidence supplemented by common sense and inferential reasoning, that the law meets the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, and refined in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. The goal must be pressing and substantial, and the law enacted to achieve that goal must be proportionate in the sense of furthering the goal, being carefully tailored to avoid excessive impairment of the right, and productive of benefits that outweigh the detriment to freedom of expression.



4.1 What is the objective of the Discipline Committee's decision?

[57] In C*anada (Attorney General) v. JTI-Macdonald Corp.*,[42] the latter alleged that some provisions of the *Tobacco Act*[43] limited its right to freedom of expression under s. 2(b) of the *Charter* by, for example, prohibiting lifestyle advertising and promotion to young persons. McLachlin C.J., writing for a unanimous Court, described the type of objective that a reviewing court searches for at this stage of the inquiry:

> [37] … An objective will be deemed proper if it is for the realization of collective goals of fundamental importance: P. W. Hogg, *Constitutional Law of Canada*, (loose-leaf ed.), vol. 2 at p. 38-22; *Oakes*, at p. 136. In the words of *Oakes*, the objective must be "pressing and substantial".

The Chief Justice went on to describe the nature of the quest for the objective further:

> [38] As discussed in *RJR* [*RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199], determining the objective of a statute for the purposes of the proportionality analysis may be difficult. Statutes may have different objectives, at different levels of abstraction. The broader and more expansive the objective, the harder it may be to show that the means adopted to promote it impair rights minimally. In this case, Parliament has stated its overall objective broadly: protecting the health of Canadians and responding to a national public health

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[41] 2001 SCC 2, [2001] 1 S.C.R. 45.
[42] 2007 SCC 30.
[43] S.C. 1997, c. 13.

> problem. No one disputes the importance of this objective. But Parliament has also stated its objectives more narrowly, linking the broader purpose to the objective of the particular provisions at issue, for example protecting young persons and others from inducements to use tobacco and enhancing public awareness of the health hazards of using tobacco. By defining its objective with such precision, Parliament has taken care not to overstate it or exaggerate its importance: *RJR*, at para. 144. [Emphasis added]



[58] In the case at bar, it is necessary to determine not the objective of the *Act*, but of the decision. This is the exercise engaged by the Court in *Multani*. In *Multani*, the decision under review did not articulate its objective in terms of an *Oakes* analysis, but both the Quebec Superior Court and the Court of Appeal articulated an objective. As Charron J. wrote:

> [44] As stated by the Court of Appeal, the council of commissioners' decision [TRANSLATION] "was motivated by [a pressing and substantial] objective, namely, to ensure an environment conducive to the development and learning of the students. This requires [the CSMB] to ensure the safety of the students and the staff. This duty is at the core of the mandate entrusted to educational institutions" (para. 77). The appellant concedes that this objective is laudable and that it passes the first stage of the test. The respondents also submitted fairly detailed evidence consisting of affidavits from various stakeholders in the educational community explaining the importance of safety in schools and the upsurge in problems relating to weapons and violence in schools.
>
> [45] Clearly, the objective of ensuring safety in schools is sufficiently important to warrant overriding a constitutionally protected right or freedom. It remains to be determined what level of safety the governing board was seeking to achieve by prohibiting the carrying of weapons and dangerous objects, and what degree of risk would accordingly be tolerated. As in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para. 25, the possibilities range from a desire to ensure absolute safety to a total lack of concern for safety. Between these two extremes lies a concern to ensure a reasonable level of safety. [44]

[44] *Multani, supra* note 22.

[59] In the within case, counsel did not agree on an objective for the decision. It falls to this Court to determine the objective.

[60] The Committee's decision was brief. The crux of its decision is this:

- "[T]he manner [in] which he conducts himself while picketing may constitute professional misconduct. Lying and uttering defamatory comments are unprofessional activities in that they harm the standing of the profession and bring members into disrespect."
- "Such actions are also contrary to the Code of Ethics, which is included in the Bylaws of the Association, so that a breach of the Code of Ethics is a breach of the Bylaws."
- "In addition to being defamatory, at least some of the comments made by Mr. Whatcott in the course of his picketing were contrary to the Order of the Court of Queen's Bench. Failure to abide by an order of a court is also unprofessional conduct."
- "In the case of the second charge, which was added by the Discipline Committee in its Interim Decision as described above, Mr. Whatcott engaged in the same conduct and repeated many of the same false statements: that Planned Parenthood 'aborts babies through chemicals' and 'corrupts women'."
- "In addition, he engaged in this behaviour while the hearing into his conduct on the original complaint was being held. In other words, Mr. Whatcott showed great disrespect to the Association's discipline process in repeating the impugned conduct while the very question of the propriety of that conduct was a matter before this Committee."[45]

In reviewing these reasons, it is important to have in mind s. 24 of the *Act*, which defines "professional misconduct:"

> 24 Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonourable, is professional misconduct within the meaning of this Act if:
>
> (a) it is harmful to the best interests of the public or the members;
>
> (b) it tends to harm the standing of the profession;
>
> (c) it is a breach of this Act or the bylaws; or

[45] 2004 Discipline Committee Decision, s*upra* note 1, Appeal Book at pp. 27a-28a.

> (d) it is a failure to comply with an order of the counselling and investigation committee, the discipline committee or the council.[46]

[61] The Committee's emphasis on "unprofessional" conduct, and its reference to harming "the standing of the profession" and bringing "members into disrepute," reflects s. 24(b) and leads me to conclude that the objective of the decision was to ensure respect for the status and standing of the licensed practical nurse.



4.2 Is this goal pressing and substantial?

[62] It would be impossible to take issue with this objective. It is consistent with the legislative framework. The legislative and regulatory review indicates the importance of the objective to the legislature. See for example s. 14(2) of the *Act*, which confers regulatory power upon the SALPN to make standards, bylaws and a code of ethics for the profession of licensed practical nurses. Indeed, it can be safely said that in establishing the SALPN, the Legislature intended to create a professional body with maintenance of the image of the profession as one of its goals.

4.3 Is the Discipline Committee's decision a proportionate response to achieving this objective?

[63] It is at this next stage that the Court considers whether the means chosen by the Discipline Committee: (i) are rationally connected to the objective; (ii) impair the right in a minimal way; and (iii) are proportionate or balanced in

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[46] *The Licensed Practical Nurses Act, 2000, supra* note 3.

effect. In my view, the Committee's decision falters clearly on both the first and third bases. Given this, and the lack of reasons from the Committee regarding minimal impairment, I need not take on the second issue.



4.3.1 Rational Connection

[64] In *JTI-Macdonald Corp.* the Chief Justice provided these helpful comments:

> [40] Few cases have foundered on the requirement of rational connection. That, however, does not mean that this step is unimportant. The government must establish that the means it has chosen are linked to the objective. At the very least, it must be possible to argue that the means may help to bring about the objective. This was a problem in *RJR*, where the trial judge found that while the government had completely banned commercial advertising, it had not established that pure information or brand-preference advertising was connected to an increase in consumption. In the current Act, Parliament sought to avoid this difficulty by permitting information and brand-preference advertising, subject to exceptions. [Emphasis added.]
>
> [41] Deference may be appropriate in assessing whether the requirement of rational connection is made out. Effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament's decision as to what means to adopt should be accorded considerable deference in such cases.[47]

[65] As we are addressing the question of rational connection between a decision made by an administrative body and the objective of that decision, we have the benefit of the views of that body, to some extent, in assessing whether there is a rational connection. Clearly the Discipline Committee believed that by disciplining Mr. Whatcott, and thereby prohibiting him from

[47] *JTI-Macdonald Corp.*, *supra* note 42.

picketing in the manner that he did, the outcome would maintain public respect for the status and standing of the nurse.



[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.[48]

[67] To draw a link between Mr. Whatcott's off-duty time and his work as a nurse, one must find the connection based on the fact that abortions are medical procedures or that some of the employees at PPR are medical officers, which appears tangential at best.

[68] What is at stake is the image of the licensed nursing profession, but there is no evidence that any member of the public thinks or will think less of nurses because of Mr. Whatcott's behaviour. In the absence of evidence, one way or the other, one might as easily hypothesize that licensed practical nurses are respected, as a general rule, not for what occurs during their off duty hours, but for their direct activities in the care of patients. Thus, I conclude there is no rational connection between the decision and the

[48] Appeal Book, pp. 243a and 244a.

objective of maintaining respect for the position of the nurse in the interests of the public. The Discipline Committee's decision founders at this step of the proportionality test.



### 4.3.2 Proportionate or Balanced Effect

[69] The Chief Justice re-states this aspect of the *Oakes* test in *JTI-Macdonald Corp.*:

> [45] The final question is whether there is proportionality between the effects of the measure that limits the right and the law's objective. This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified? [Emphasis in original]
>
> [46] Although cases are most often resolved on the issue of minimal impairment, the final inquiry into proportionality of effects is essential. It is the only place where the attainment of the objective may be weighed against the impact on the right. If rational connection and minimal impairment were to be met, and the analysis were to end there, the result might be to uphold a severe impairment on a right in the face of a less important objective.[49]

[70] The impugned conduct is not professional misconduct during office hours or on hospital property. The general or overall health of the public is not affected. The link to Mr. Whatcott's profession is tangential. In that respect, this case is clearly distinguishable from *Ross v. New Brunswick School District No. 15*,[50] which concerned the activities of a public school teacher who publicly made racist and discriminatory comments against Jews during his off-duty time.

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[49] *JTI-Macdonald Corp., supra* note 42.
[50] [1996] 1 S.C.R. 825.

[71] As this Court has said in *Saskatchewan (Human Rights Commission) v. Bell*,[51] "the very purpose of s. 2(b) is to protect expression which is offensive to somebody." As counsel for the Canadian Civil Liberties Association points out, these words apply with particular force to polemical statements on matters of moral debate.



[72] Counsel for the Canadian Civil Liberties Association goes on to identity these factors as contextually important in this case:

- Mr. Whatcott was expressing his opinion on moral issues;
- Mr. Whatcott was using “short form” speech: picket signs and slogans;
- Mr. Whatcott was speaking in his personal capacity.

I do not intend to spend any time on the latter points, as they are largely self-evident and, to the extent broader issues are raised, any more detailed comment is best left to another day. But with respect to the first point, it is worth repeating what has been said before the Supreme Court of Canada.

[73] The Discipline Committee characterized as "false" statements to the effect that "Planned Parenthood corrupts women." The chambers judge accepted this characterization when he said that Mr. Whatcott made lying and defamatory comments. But it is difficult to apply a test of "true or false" to such statements. They are an expression linked to belief and opinion. It is a matter that individuals in a society can debate. McLachlin C.J. addressed the difficulty with determining whether statements were false or true in *Zundel*:

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[51] (1994), 114 D.L.R. (4th) 370 (Sask.C.A.) at p. 381.

…The first stems from the difficulty of concluding categorically that all deliberate lies are entirely unrelated to the values underlying s. 2(b) of the *Charter*. The second lies in the difficulty of determining the meaning of a statement and whether it is false.

The first difficulty results from the premise that deliberate lies can never have value. Exaggeration—even clear falsification—may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., 'cruelty to animals is increasing and must be stopped'. A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salman Rushdie's *Satanic Verses*, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet.

All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfilment. To accept the proposition that deliberate lies can never fall under s. 2(b) would be to exclude statements such as the examples above from the possibility of constitutional protection. I cannot accept that such was the intention of the framers of the Constitution.

. . .

The second difficulty lies in the assumption that we can identify the essence of the communication and determine that it is false with sufficient accuracy to make falsity a fair criterion for denial of constitutional protection. In approaching this question, we must bear in mind that tests which involve interpretation and balancing of conflicting values and interests, while useful under s. 1 of the *Charter*, can be unfair if used to deny *prima facie* protection.

One problem lies in determining the meaning which is to be judged to be true or false. A given expression may offer many meanings, some which seem false, others, of a metaphorical or allegorical nature, which may possess some validity. Moreover, meaning is not a datum so much as an interactive process, depending on the listener as well as the speaker. Different people may draw from the same statement different meanings at different times. The guarantee of freedom of expression seeks to protect not only the meaning intended to be communicated by the publisher but also the meaning or meanings understood by the reader: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 767, and *Irwin Toy, supra*, at p. 976. The result is that a statement that is true on one level or for one person may be false on another level for a different person.

. . .

> A second problem arises in determining whether the particular meaning assigned to the statement is true or false. This may be easy in many cases; it may even be easy in this case. But in others, particularly where complex social and historical facts are involved, it may prove exceedingly difficult.
>
> . . .
>
> Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. The criterion of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity. Applying the broad, purposive interpretation of the freedom of expression guaranteed by s. 2(b) hitherto adhered to by this Court, I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech. I would rather hold that such speech is protected by s. 2(b), leaving arguments relating to its value in relation to its prejudicial effect to be dealt with under s. 1.[52]
>
> [Emphasis added]

Admittedly, these comments were made at the first stage of the constitutional analysis in determining whether "false" statements are protected by the freedom of expression guarantee in s. 2(b) of the *Charter*. Nonetheless, they remain applicable at this stage as indicative of the difficulty in determining what is false and what is true.

[74] In the within case, the effect of the decision is to prohibit Mr. Whatcott from picketing in the manner he has chosen and remain a member of the SALPN. The Discipline Committee did not engage in any of the balancing necessary to weigh Mr. Whatcott's right to work, the high standards to which nurses must aspire and free speech. Given the existence of the interim

[52] *Zundel*, *supra* note 34 at pp. 754-58.

injunction and the means to enforce it, one would not think the Discipline Committee's decision was a proportionate response.



4.4 Conclusion on the Section One Analysis

[75] The Discipline Committee's decision is required to be justified in accordance with s. 1 of the *Charter*. The onus was on the SALPN to prove that the infringement is reasonable and can be demonstrably justified in a free and democratic society. The SALPN has failed to discharge the burden upon it and the decision is thus unconstitutional.

5. What is the appropriate remedy pursuant to s. 24(1) of the *Charter*?

[76] Since I have found that the infringement is not justified under s. 1 of the *Charter*, I must go on to consider what an appropriate remedy would be. In the ultimate result, the Discipline Committee's decision must be set aside, but is something more required under s. 24(1) of the *Charter*? Section 24(1) of the *Charter* enables one whose *Charter* rights have been infringed to apply to a "court of competent jurisdiction" for such remedy as the court considers appropriate and just in the circumstances. Mr. Whatcott relies on s. 24(1) to request that costs be awarded on an extraordinary basis.

[77] Mr. Whatcott has not worked as a practical nurse since the decision of the Discipline Committee, but this has been, in significant part, his own choice. He did not, as I have indicated, pay his fees for the licence year

2003-2004.[53] We do not know whether he declined to pay to avoid the strictures of discipline or to permit him to continue to picket. In the absence of this evidence, I do not think that any compensation needs to be paid to him for lost employment revenue. It was also open to him to apply at any time for a stay of the Discipline Committee's decision pursuant to s. 37 of the *Act*, a remedy he did not seek.



[78] While I note the comments in *R. v. Pawlowski*[54] to the effect that s. 24(1) of the *Charter* has enlarged the grounds upon which a court can exercise its discretion to grant costs, in my view, this is not an appropriate case to grant costs beyond those to which Mr. Whatcott would otherwise be entitled.

VI. Conclusion

[79] The appeal is allowed. The decision of the Court of Queen's Bench is set aside. The Discipline Committee's decision is found to be unconstitutional and quashed. Mr. Whatcott is entitled to his costs against the SALPN in this Court on Column 4 and in the Court of Queen's Bench in the usual way. There is no order for costs either for or against the Canadian Civil Liberties Association.

DATED at the City of Regina, in the Province of Saskatchewan, this 16th day of January, 2008.

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[53] 2004 Discipline Committee Decision, supra note 1, Appeal Book, p. 23a.
[54] (1993), 101 D.L.R. (4th) 267 (Ont. C.A.); leave to appeal to S.C.C. refused [1993] 3 S.C.R. viii.

__"Jackson J.A."_____
Jackson J.A.

__"Richards J.A. _____
Richards J.A.

__"Hunter J.A._____
Hunter J.A.

# Appendix "A"

Charge 1

(a) That William Whatcott, a member of the Saskatchewan Association of Licensed Practical Nurses, is guilty of professional misconduct contrary to section 24 of the Act by engaging in conduct that displayed actions that:

(i) were harmful to the best interests of the public or the members and/or;

(ii) tended to harm the standing of the profession, and/or;

(iii) are a breach of the Act or the bylaws, including the Code of Ethics;

(b) That William Whatcott is guilty of such professional misconduct by reason of the following facts:

(i) On or about April 19 and April 26, 2002, May 10, 2002, May 16, 2002, and June 28, 2002, he publicly demonstrated/picketed with approximately five other people outside of the office of Planned Parenthood, Regina's Sexual Health Centre located at 1431 Victoria Avenue in the City of Regina;

(ii) He carried signs which were seen by the public and patients or potential patients of the health facility that were printed with words to the effect "Planned Parenthood Aborts Babies." He also shouted such phrases as "Planned Parenthood will give you Aids," "This place is the world's biggest baby killer," "Don't let Planned Parenthood corrupt you," and "Planned Parenthood murders innocent babies," etc. The statements referred to are incorrect and he knew or should have known them to be incorrect about Regina Planned Parenthood.

(iii) He shouted at patients or potential patients of the health care facility that they were "fornicators" and showed people pictures of aborted fetuses;

(iv) He took photographs of the demonstration;

(v) Patients and staff of the health care facility were intimidated by this conduct;

(vi) People or patients were potentially denied their rights to health care as a result of these actions;

(vii) Patients or potential patients of the health care facility had or may have had their identity revealed through the taking of photographs.

Charge 2

(a) That William Whatcott, a member of the Saskatchewan Association of Licensed Practical Nurses, is guilty of professional misconduct contrary to section 24 of the Act by engaging in conduct that displayed actions that:

(i) were harmful to the best interests of the public or the members and/or;

(ii) tended to harm the standing of the profession, and/or;

(iii) are a breach of the Act or the bylaws, including the Code of Ethics;

(b) That William Whatcott is guilty of such professional misconduct by reason of the following facts:

(i) On or about August 26, 2003 he publicly demonstrated/picketed with approximately two other people outside of the office of Planned Parenthood, Regina's Sexual Health Centre located at 1431 Victoria Avenue in the City of Regina;

(ii) He carried signs which were seen by the public and patients or potential patients of the health facility that were printed with words to the effect "Planned Parenthood refers for abortions," "God's gift of life" and "choice is abortion." He also shouted such phrases as "Planned Parenthood corrupts young women" and that "Planned Parenthood kills babies with chemicals" etc. The statements referred to are incorrect and he knew or should have known them to be incorrect about Regina Planned Parenthood. In addition, some or all of these statements were made in contravention of the Order of Mr. Justice Foley of the Court of Queen's Bench for Saskatchewan, dated July 25, 2002;

(iii) Patients and staff of the health care facility were intimidated by this conduct;

(iv) People or patients were potentially denied their right to health care as a result of these actions;