NOVA SCOTIA COURT OF APPEAL

Citation: *Fox v. Registered Nurses Association of Nova Scotia*, 2002 NSCA 141

Date: 20021113
Docket: CA 179201
Registry: Halifax

Between:

Robert Fox

Appellant

v.

Registered Nurses Association of Nova Scotia

Respondent

Judges: Roscoe, Chipman and Bateman, JJ.A.

Appeal Heard: September 26, 2002, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Bateman, J.A.; Chipman and Roscoe, JJ.A. concurring.

Counsel: Bruce T. MacIntosh, Q.C. and Joel Sellers, for the appellant
Margorie A. Hickey, Q.C. and Michelle Higgins, for the respondent

Reasons for judgment:

[1] This is an appeal by Robert N. Fox, formerly a registered nurse, from a decision of the Appeal Committee of the Registered Nurses Association of Nova Scotia ("RNANS") dismissing an appeal from a decision of the Professional Conduct Committee which found that Mr. Fox was guilty of professional misconduct and revoked his license.

BACKGROUND:

[2] For a number of years Mr. Fox had been employed as a nurse at the Colchester Regional Hospital in Truro, Nova Scotia. In the spring of 1998 the hospital administration received unsolicited complaints about Mr. Fox from a patient, the family of a patient and from a colleague. Mr. Fox's employment at the hospital was terminated on June 24, 1998.

[3] By letter dated that same day, Wanda MacMillan, RN, Director of Patient Care Services, at the hospital, filed a complaint with RNANS, against Mr. Fox, enclosing a summary of the allegations against him.

[4] The allegations arose from complaints by both patients and staff and generally related to his treatment of patients in May of 1998. Summarizing from the formal letter of complaint, Mr. Fox allegedly used derogatory language in speaking to an elderly patient; used excessive force in returning a patient to bed; disclosed confidential information about one patient to another; showed a lack of concern and diligence in the overnight care of a patient whose condition was worsening; spoke disrespectfully to the same patient while attempting to medicate him; was rough in his physical handling of the same patient; spoke disrespectfully to another patient who was found on the floor of her room; and used excessive force in an attempt to straighten a male patient's contracted arms and shoulders.

[5] After investigation of the matters raised in the letter of June 24, 1998, a meeting of the Complaints Committee of RNANS was convened for October 30, 1998 to consider the complaints, with Mr. Fox and his then counsel, Leanne MacMillan, invited to attend. At the request of the Complaints Committee, Ms. MacMillan provided a copy of Robert Fox's personnel file. The Committee met as planned on October 30, 1998 with Mr. Fox and his counsel in attendance.

[6] The Committee subsequently invited Mr. Fox and his counsel to appear before it again on December 21, 1998, to make representations in relation to an additional seven conduct incidents of concern arising from the Committee's review of his personnel file. Those incidents allegedly occurred over the years 1988 to 1998.

[7] In a decision dated January 8, 1999 the Complaints Committee referred several of the conduct matters which had been discussed at the two meetings to a hearing of the Professional Conduct Committee.

[8] By preliminary motion to the Professional Conduct Committee, Mr. Fox sought a stay of proceedings in relation to the alleged misconduct predating 1998 on the basis of undue delay in prosecuting those matters. It was Mr. Fox's position that his employer had dealt with the earlier conduct issues in an apparently satisfactory manner at the time of the incidents and that they, therefore, should not form any further basis for complaint. Mr. Fox had raised this same objection with the Complaints Committee.

[9] The application for a stay of proceedings was heard by a panel of the Professional Conduct Committee on March 22, 1999. William H. Kydd, Q.C., provided independent legal advice to that Committee on the stay hearing. In an oral decision delivered that same day the Committee denied the stay. Written reasons dated March 29, 1999 were provided ("the stay decision"). Mr. Fox did not appeal that decision.

[10] The hearing on the merits of the allegations was held on April 6, 7, 8, 26 and May 6, 1999, before a differently constituted panel of the Professional Conduct Committee. Mr. Kydd, Q.C. was in attendance as independent legal counsel to that Professional Conduct Committee, for the portions of the Hearing held on April 26, 1999 and May 6, 1999.

[11] The Committee, in a written decision dated June 24, 1999 ("the merits decision"), found Mr. Fox guilty of professional misconduct. A disposition hearing was held on September 28, 1999. By written decision dated November 4, 1999 ("the penalty decision"), Robert Fox's license to practice nursing was revoked.

[12] Bruce T. Macintosh, Q.C., on Mr. Fox's behalf, appealed the Professional Conduct Committee's merits and penalty decisions to the Appeal Committee of RNANS.

[13] A preliminary motion by Mr. Fox to set aside the decisions of the Professional Conduct Committee on account of jurisdictional irregularities relating to alleged defects in the constitution of each of the Complaints Committee and the Professional Conduct Committee was heard by the Appeal Committee and dismissed by decision dated September 29, 2000.

[14] The appeal was heard by the Appeal Committee on April 9, 10, 11, and 12, 2001. On that appeal Mr. Fox raised concerns about the roles played by William H. Kydd, Q.C. and Leona Telfer, Manager of Professional Conduct Services for RNANS, in the proceedings before the Professional Conduct Committee. By agreement, fresh evidence on these issues was received during the Appeal. Mr. Kydd, Ms. Telfer and Leona Bradley, Chair of the Professional Conduct Committee, testified before the Appeal Committee.

[15] The Appeal Committee rendered a written decision dated January 7, 2002 dismissing the appeal in all material respects.

[16] Mr. Fox appeals to this Court.

GROUNDS OF APPEAL:

[17] Mr. Fox stated nine grounds of appeal. One of those was struck by a judge of this Court on application by the Appellant. (see **Fox v. Registered Nurses' Assn. of Nova Scotia**, [2002] N.S.J. No. 376 (Q.L.); 2002 NSCA 106). The remaining eight grounds are:

> 1. The Appeal Committee erred in law in refusing to permit the Appellant to argue that the Professional Conduct Committee erred in receiving and considering complaints based upon a fundamentally flawed investigative and adjudicative process by the Complaints Committee that failed to follow statutory pre-requisites to jurisdiction, including *inter alia*, a statutory failure to act in good faith and in the public interest in the interim suspension of the Appellant;
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> 2. The Appeal Committee erred at law in failing to find that the Professional Conduct Committee was improperly influenced and/or improperly delegated all or

parts of its adjudicative authority to legal counsel to the Professional Conduct Committee;

3. The Appeal Committee erred at law in failing to find that the Appellant had been denied his rights to procedural fairness, due process and natural justice in the investigation, interim suspension of license, adjudication, and appeal of the Complaint against the Appellant. Without restricting the generality of the foregoing, the Appeal Committee failed to recognize, *inter alia*, that:

a) The Professional Conduct Committee made improper use of staff of the Respondent by allowing such staff access to and influence over the Committee's deliberations and decisions, including advice or information to the Committee in the absence of the Appellant;

b) The Professional Conduct Committee was prejudicially tainted by unproven allegations of the Respondent, which allegations were improperly placed before the Professional Conduct Committee, some of which allegations remained and some of which were withdrawn by the Respondent after having been prejudicially placed on record before the Committee;

c) The Professional Conduct Committee improperly and unfairly relied upon inadmissible or unproven allegations, either fully or in part, as corroborative proof of other findings of professional misconduct;

d) The Professional Conduct Committee improperly relied upon hearsay evidence, purported corroborative evidence, purported similar fact evidence, and the absence of remorse and a guilty plea from the Appellant, and otherwise fundamentally misunderstood and misapplied generally accepted principles of reasoned, quasi-judicial decision making;

e) Both the Professional Conduct Committee and the Appeal Committee conducted proceedings in a manner that caused the Appellant a reasonable apprehension of bias and partiality, including *inter alia* factual findings and legal conclusions unsupported by the evidence and arguments of the parties.

4. The Appeal Committee made palpable and overriding errors of fact and law in failing to give proper or any weight to material evidence and arguments placed before it, including evidence and arguments as to the motives, involvement,

relevance and competence of witnesses, and including a failure to follow an articulated reasoning process in arriving at its findings of fact and law;

5. The Appeal Committee erred at law in failing to find that the Professional Conduct Committee improperly considered and applied sentencing principles, including the concepts of rehabilitation as required by Section 12(1) [sic] of the *Registered Nurses Act*, the concepts of condonation, progressive disciplinary action, mitigation and the finding that the revocation was the only available sentencing alternative.

6. The Appeal Committee initially erred in failing to find that the Professional Conduct Committee erroneously interpreted and applied Section 26(g)(vii) of the *Registered Nurses Act*; and further erred by unilaterally amending the Complaint without notice, so as to erroneously find the Appellant guilty of professional misconduct by breach of the 1997 Code of Ethics.

7. The Appeal Committee erred at law in failing to render its decision within 30 days from the date of the conclusion of proceedings before it, pursuant to Section 50 of the *Registered Nurses Act*, R.S.N.S. 1996, c. 30.

8. The Appeal Committee erred at law in failing to award the Appellant solicitor and client costs, or a contribution towards costs.

ANALYSIS:

[18] The findings of the Appeal Committee are reviewable by this Court for errors of law (**Registered Nurses Act**, S.N.S. 1996, c. 30 s.52(1)).

[19] In my view this appeal is, in all respects, without merit. I will individually address only certain of the stated grounds.

[20] The alleged misconduct cited in the Notice of Hearing and considered by the Professional Conduct Committee included an improper disclosure of confidential information in 1998; failure to appropriately handle the keys to the drug locker in 1991; falsification of a chart in 1989; verbal and physical abuse of patients from 1989 to 1998; failure to communicate appropriately with families and colleagues throughout the period 1989 to 1998; and, during the same period, failure to assume responsibility for his own actions.

Ground 1 - Alleged Error by the Appeal Committee in Refusing to Hear Mr. Fox's Challenge to the Investigative Process

[21] In a Pre-Hearing Memorandum filed by his counsel preparatory to the Appeal Committee hearing, Mr. Fox raised several issues respecting the conduct of the investigation of the complaints by RNANS and the role of the Complaints Committee in determining the issues that were to be forwarded for a formal hearing and in imposing an interim suspension on the Appellant.

[22] It was RNANS's position that matters involving the Complaints Committee's investigative process were beyond the Appeal Committee's jurisdiction, not having been advanced before the Professional Conduct Committee. Nor had this issue been raised by Mr. Fox as a ground in his Notice of Appeal to the Appeal Committee.

[23] After hearing the submissions of both parties, the Appeal Committee, by oral decision delivered on April 10, 2001, concluded that it did not have jurisdiction to deal with the investigative process issue. Mr. Fox says that the Appeal Committee erred in so ruling.

[24] The alleged inadequacy of the investigation by the Complaints Committee of the pre-1998 allegations was not an issue raised by Mr. Fox before the Professional Conduct Committee, save to the extent that it might have been relevant to his preliminary application for a stay of proceedings. That application was heard by a differently constituted Professional Conduct Committee, was dismissed and was not appealed.

[25] The **Act** provided that the appeal to the Appeal Committee is from the decision of the Professional Conduct Committee and required that the grounds of appeal be stated:

> 43. A party to a proceeding before a professional conduct committee may appeal the decision of the professional conduct committee to an appeal committee by filing a written notice of appeal at the office of the Association, either in

> person or by registered mail, not later than thirty days from the date of service of the decision.
>
> 44. A notice of appeal shall set forth the grounds of the appeal and state the relief sought.

[26] The Appeal Committee was correct, in my view, in accepting the position of RNANS and ruling that it did not have jurisdiction to entertain a ground of appeal from the Professional Conduct Committee concerning alleged flaws in the investigative process which had not been raised before the Professional Conduct Committee. In so deciding I need not and do not express an opinion as to whether the adequacy of the investigative process was an issue that could have been raised before the Professional Conduct Committee.

Ground 2 - Alleged Error Regarding Improper Role of Legal Counsel

[27] In his pre-hearing submissions to the Appeal Committee, Mr. Fox asserted that Mr. Kydd "misunderstood and breached" his role as independent legal counsel to the Professional Conduct Committee. In order to address this allegation and other complaints about the Professional Conduct Committee's processes, the Appeal Committee heard evidence from Mr. Kydd, Leona Telfer and Louise Bradley. This was done by agreement of counsel. The principle of deliberative secrecy and its application, if any, to the Appeal Committee's receipt of such testimony was apparently not raised.

[28] The Appeal Committee concluded that Mr. Kydd's role in the process did not extend beyond appropriate assistance to the Professional Conduct Committee. That finding is challenged by Mr. Fox on this appeal.

[29] Mr. Fox says that Mr. Kydd, in his service as counsel to the Professional Conduct Committee, breached the "principles of natural justice". This broad allegation could encompass a variety of complaints, as noted in **Ellis-Don Ltd. v. Ontario (Labour Relations Board)**, [2001] 1 S.C.R. 221; 2001 SCC 4, where LeBel J., writing for the majority, said:

> 47 . . . Breaches of natural justice are grounds for judicial review, but this complex notion covers a number of very diverse situations, particularly bias and

> lack of independence of the adjudicator and the *audi alteram partem* rule in all its variations.

[30] Mr. Fox identifies several areas of concern: (i) Mr. Kydd prepared the draft of the written decision to dismiss the stay application, which confirmed the oral decision of the Committee rendered at the conclusion of the hearing of the application; (ii) Mr. Kydd suggested changes to the decisions on the merits and on penalty, which, Mr. Fox submits, "went beyond mere clarification"; (iii) the Committee did not meet and approve the changes suggested by Mr. Kydd which are said by Mr. Fox to be material changes; (iv) Mr. Kydd overstepped his role in providing legal advice to the Professional Conduct Committee; and, (v) Mr. Kydd sat in on Committee deliberations.

[31] The **Registered Nurses Act**, S.N.S. 1996 c. 30 expressly authorizes the use of independent legal counsel. Section 40 provides:

> 40 For the purpose of the execution of their duties under this Act, the Association and a professional conduct committee may retain such legal or other assistance as the Association or the professional conduct committee may think necessary or proper, and the costs of such legal or other assistance may be included, in whole or in part, in an award of costs by the professional conduct committee.

[32] As to the involvement of counsel in the decision drafting process, the following passage from **Khan v. College of Physicians & Surgeons of Ontario** 94 D.L.R. (4th) 193, (reversing 76 D.L.R. (4th) 179), per Doherty J.A. for the Court is instructive. Commencing at p. 223:

> . . . The ultimate aim of the drafting process is a set of reasons which accurately and fully reflects the thought processes of the Committee. To the extent that consultation with counsel promotes that aim, it is to be encouraged. The debate must fix, not on the Committee's entitlement to assistance in the drafting of reasons, but on the acceptable limits of that assistance.
>
> The line between permissible assistance and that which is forbidden must be drawn by regard to the effect of counsel's involvement in the drafting process, on the fairness of the proceedings and the integrity of the overall discipline process. Without attempting an exhaustive description of these concepts, <u>fairness includes considerations of bias, real or apprehended, independence, and each party's right to know the case made against them and to present their own case</u>. Integrity

> concerns encompass those fairness concerns but include the broader need to ensure that the body charged with the responsibility of making the particular decision in fact makes that decision after a proper consideration of the merits. If the reasons presented for the decision are not those of the decision-maker, or do not appear to be so, it raises real concerns about the validity of the decision and the genuineness of the entire inquiry.
> (Emphasis added)

[33] Where the Committee, as here (NS. Reg 72/97 r.27), is required to give reasons for its decision involving legal considerations, it is entitled to have its lawyer assist in the task. (**Snider v. Manitoba Association of Registered Nurses**, [2000] M.J. No. 59 (Man.C.A.)).

[34] The Appeal Committee had the benefit of the evidence from Mr. Kydd outlining his role in the various hearings before the Professional Conduct Committee(s). Louise Bradley, Chair of the Committee hearing the merits of the complaints, testified as well.

[35] The evidence reveals that, in relation to the March 1999 stay hearing and resulting decision, Mr. Kydd received copies of the pre-hearing briefs submitted by counsel for both parties and was present both for the hearing and the Committee's deliberations immediately thereafter. The application for a stay was denied in an oral decision given by the Committee that same day (March 29, 1999).

[36] Each party, in a pre-hearing memorandum to the Professional Conduct Committee, and orally, referred to legal authority purportedly supporting the granting or refusal of the stay. The principal case relied upon by Mr. Fox was a recent decision of the Privy Council concerning a disciplinary matter arising in Jamaica. RNANS cited a decision of the Supreme Court of Canada. At the Committee's request, Mr. Kydd explained to them his understanding of the law of legal precedence as between the Privy Council case and that from the Supreme Court of Canada. No authorities or issues not addressed by counsel for the parties were raised or discussed by Mr. Kydd with the Committee. At the Committee's request, Mr. Kydd prepared a draft written decision confirming the denial of the stay.

[37] It was Mr. Kydd's testimony that the written stay decision reflected the Committee's oral deliberations, for which he was present. His evidence in this

regard was accepted by the Appeal Committee. The operative part of the Professional Conduct Committee's decision is as follows:

> In the present case Mr. Fox's counsel argues that all of the allegations were dealt with by his Employer at the time that they occurred, and that at all relevant times prior to the complaint on June 24, 1998 Ms. Wanda McMillan [sic], as Mr. Fox's superior, and a registered Nurse, never made any complaint to the R.N.A.N.S.. She points out that for two to three years from about 1992 to 1994 Ms. MacMillan was a member of the discipline committee of R.N.A.N.S. She suggests the Ms. McMillan's [sic] knowledge should be ascribed to R.N.A.N.S., so that this case is analogous to cases where post charge delays have resulted in stays. This Committee rejects this submission as Ms. MacMillan [sic] had no individual responsibilities or authority to make determinations on behalf of R.N.A.N.S.. Her responsibilities were the same as any other member of R.N.A.N.S. with respect to the obligation to report professional misconduct. The fact that she did not do so until June 24, 1998 does not bind the Association, or impute knowledge to it. It may well be that Ms. MacMillan , or the other nurses who had knowledge of the incidents in Mr. Fox's personnel file, thought that matter had not yet reached the stage as to amount to professional misconduct, or they may have had other reasons. That presumably will be one of the things that will be considered by the professional conduct committee at the hearing when it examines the evidence needed to support the allegations against Mr. Fox.

[38] This paragraph was preceded by a recitation of the history of the matter, a statement of the parties' respective positions and a reference to the key cases which had been the subject of submission by counsel to the Committee. The decision is straightforward and does not reflect complex reasoning which could not have been the product of the Committee's post-hearing deliberations which resulted in the oral dismissal of the stay application.

[39] I again note that the stay decision was not the subject of an appeal to the Appeal Committee. Consequently, I question how Mr. Kydd's involvement in this part of the proceedings, is relevant here. For completeness, however, I have considered this aspect of Mr. Fox's concerns about Mr. Kydd's role as legal counsel.

[40] In relation to the hearing on the merits, Mr. Kydd was not in attendance for the first three days of the hearing, not having been retained by RNANS. On the third day of the hearing, April 8, 1999, the Chair asked that legal counsel be arranged to assist the Committee when the hearing resumed on April 26. Mr. Kydd

was retained and provided with a transcript of the evidence to that point. He attended the balance of the hearing. Mr. Kydd was present for the Committee's deliberations. At the conclusion of those deliberations the Committee reached a consensus that the charges had been substantiated. According to the evidence of the Chair, Louise Bradley, the Committee discussed the allegations of misconduct and the evidence presented and made a decision on each, individually. She kept notes of those discussions. Ms. Bradley prepared a draft decision, which was forwarded to the Committee members and to Mr. Kydd for review "for accuracy, clarity, major gaps and potential legal difficulties". Mr. Kydd recommended some changes to the draft as did one or two Committee members, which changes were, generally, incorporated into the decision by the Chair. Mr. Kydd did not propose any changes to the conclusions of misconduct, nor to the Committee's decisions on the credibility of the witnesses. The Committee reconvened by telephone to review the second draft and make any further revisions. Ms. Bradley testified that the decision was that of the Committee, that it was approved in substance by the Committee and that any changes suggested by Mr. Kydd or individual members of the Committee and incorporated were endorsed by the Committee as a whole.

[41] In considering the evidence and submissions on this issue, the Appeal Committee had before it, for comparison, the first draft of the decision, a copy containing Mr. Kydd's handwritten suggestions for change and the final decision. The alterations suggested by Mr. Kydd were reviewed in detail for the Appeal Committee by counsel for Mr. Fox in his cross-examination of both Mr. Kydd and Ms. Bradley.

[42] With respect to the decision on penalty, Mr. Kydd received a copy of the pre-hearing briefs submitted by counsel. He reviewed the draft decision prepared by the Committee and provided his comments to Louise Bradley by telephone. Mr. Kydd testified that it was his understanding that he was to review the penalty decision and advise the Committee if there were legal questions to be addressed. This is what he did. He did not propose alteration of the penalty. Louise Bradley confirmed in her evidence that, as with the decision on the merits, the penalty decision was that of the Committee.

[43] Mr. Fox does not directly suggest that there was a violation of the *audi alteram partem* rule. The evidence is that Mr. Kydd did not introduce issues or authorities to the Committee which were not part of counsels' submissions. Breach of the *audi alteram partem* rule requires demonstration of an <u>actual</u>, rather

than an apprehended, breach. (see **Ellis-Don**, **supra**, at para. 48) There was therefore no departure from the rules of natural justice on that account.

[44] The mere presence of counsel during the deliberation stage is not a breach of the rules of natural justice. (**Snider v. Manitoba Association of Registered Nurses**, **supra**).

[45] In **Khan, supra**, an issue arose as to whether counsel for the Committee had provided legal advice outside the time frame contemplated by s. 12(3) of the **Health Disciplines Act**, R.S.O. 1990, c. H.4. While that is not the nature of the complaint here, I find the comments of Doherty, J.A. apt. He implicitly approves of exactly the kind of assistance provided to the Committee by Mr. Kydd. At p. 221:

> I cannot accept the view that any advice given by counsel for the Committee which affects the substance of the Committee's reasons amounts to legal advice. It is the nature of the advice, not its effect on the final product, which must be considered. The phrase "legal advice" in s. 12(3) must refer to advice on matters of law. Advice intended to improve the quality of the Committee's reasons by, for example, deleting erroneous references to the evidence or adding additional relevant references to the evidence, is not advice on a matter of law but is rather advice as to how the Committee should frame its reasons in support of its decision. If the Committee accepts such advice, it may improve the quality of the reasons ultimately provided by the Committee and render the decision of the Committee less susceptible to reversal on appeal. This does not, however, transform advice as to the content and formulation of reasons into advice on a matter of law.
> (Emphasis added)

[46] Having reviewed the transcript of evidence on this issue as contained in the record before the Appeal Committee, as well as the initial drafts of the merits and penalty decisions, the changes suggested by Mr. Kydd and the final decisions, I am not persuaded that by reason of Mr. Kydd's involvement in these matters the principles of natural justice were violated. The Appeal Committee accepted that, consistent with the testimony of Mr. Kydd, ". . . the decisions on all of the issues were made by the Professional Conduct Committee." I am satisfied that such a factual finding was open to the Appeal Committee on the evidence before it, is deserving of deference and does not reflect palpable or overriding error. There was no evidence which would support an inference to the contrary. Similarly, I am

satisfied that the Committee's finding that, for all three Committees, ". . . [Mr. Kydd] was there to act as legal advisor, he did not indicate in any way his opinions on the factual issues or determinations that were the responsibility of the Committee", is appropriate and supportable on the record. Mr. Kydd was vigorously cross-examined by counsel for Mr. Fox, who, in that examination, focussed upon the alleged problem areas. The fairness issues were canvassed in a lengthy, post hearing, written submission to the Appeals Committee from counsel for Mr. Fox. The Appeal Committee could not but have been alive to the issues raised by Mr. Fox both through the written submissions of counsel and their oral presentations. In particular, nothing in the record indicates that Mr. Kydd's provision of legal advice or his involvement in the drafting of the stay decision, or in his suggestion of changes to the merits and penalty decisions, compromised the impartiality or independence of the Professional Conduct Committee nor did it render the proceedings unfair or raise a reasonable apprehension of bias.

Ground 3(a) - Alleged Error Regarding Role of RNANS staff

[47] Leona Telfer is the Manager of Professional Conduct Services for RNANS. Mr. Fox says that she was inappropriately involved in the Professional Conduct Committee's decision making process which created "the appearance that the process was not procedurally fair". Mr. Fox does not identify precisely what elements of procedural fairness were absent.

[48] The duty of fairness is defined contextually. In **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817 (S.C.C.), L'Heureux-Dubé J., writing for the majority, said:

> 21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, per Sopinka J.

[49] As with Mr. Kydd, the Appeal Committee received evidence from Leona Telfer addressing her connection with this discipline process. The evidence of Louise Bradley was also relevant to this issue.

[50] Ms. Telfer's limited contact with the Committee members was not consultative but of a purely administrative nature. She had no input into the Committees' decisions. According to the evidence: (i) On October 7, 1998 Ms.Telfer wrote to Wanda MacMillan (¶ 3 above) requesting copies of nursing notes and physician orders for several of the patients who were the subject of the allegations in Ms. MacMillan's letter of complaint; (ii) At an October 30, 1998 meeting of the Complaints Committee Ms. Telfer provided a copy of Mr. Fox's personnel file, as had been forwarded by his counsel. Mr. Fox and his counsel were in attendance; (iii) She attended the December 21, 1998 meeting of the Complaints Committee in order to take notes of the discussions. As before, Mr. Fox and his counsel were in attendance; (iv) On the third day of the hearing before the Professional Conduct Committee, the Chair, Louise Bradley, asked Leona Telfer to arrange for independent legal counsel for the Committee. Ms. Telfer contacted Mr. Kydd, who had acted on such matters in the past. He agreed to serve. She had no discussions of substance with him; (v) Ms. Telfer forwarded to Mr. Kydd, and to counsel for the parties, a transcript of the first three days of the proceeding. (vi) Ms. Telfer was not present for the hearing or for the Committee's deliberations; (vii) As is her usual practice, following the hearing on the merits, Ms. Telfer provided the Chair of the Committee with a copy of the Professional Conduct Digest in order to provide examples of the format for Decisions. The Digest is a public document containing copies of decisions of open hearings; (viii) Ms. Telfer advised the Committee Chair, Louise Bradley, that the secretarial department of RNANS was available if required. She did so because many of the chairs did not have secretarial services available to them. Even where such support was available, it was desirable that the matters in which the Committee was involved be kept confidential. The chair's duties often involved preparation and transmission of lengthy documents. This could best be done through the offices of RNANS; (ix) After the merits hearing Mr. Fox's counsel contacted Ms. Telfer inquiring when the Professional Conduct Committee's decision would be available. Ms. Telfer telephoned the Chair of the Committee asking about the expected timing of the decision and conveyed that information to counsel for Mr. Fox. Ms. Telfer had no discussion with Ms. Bradley about the contents of the Committee's decision; (x) Drafts of the decision were sent between the Chair and Ms. Telfer's secretarial assistant for forwarding to the other Committee members. Ms. Telfer did not see these drafts. (xi) On one occasion, Louise Bradley asked Leona Telfer to contact Mr. Kydd and clarify at what point in the draft decision he was suggesting that a particular change be inserted. Ms. Telfer spoke with Mr. Kydd and noted the

insertion point, in her own hand, on the draft; (xii) Ms. Telfer did not recall having any discussions with the Chair or any of the Committee members with respect to the content or the format of the drafts of the decisions; (xiii) At Louise Bradley's request, Ms. Telfer arranged a teleconference of the Committee members in order to determine whether they were in agreement with the final draft of the decision as prepared by Ms. Bradley. Ms. Bradley was unavailable for the call and asked Ms. Telfer to sit in on the call in her stead. During the telephone call no issues of substance were discussed among the Committee members. They agreed that the decision, in the form circulated, should be sent.

[51] Mr. Fox does not suggest the process, on account of Ms. Telfer's role, was in fact unfair but that it appeared to be unfair. He states in his factum "[h]er involvement, whatever the motive, creates the appearance that the process was not procedurally fair. It must be emphasized that it matters little whether Committee members actually were impeded or improperly influenced in their decision making; it is sufficient that such could have been the case." I will assume that Mr. Fox is here suggesting that Ms. Telfer's role in the process created a reasonable apprehension of bias by the decision makers.

[52] A "reasonable apprehension of bias" speaks of a perceived lack of independence or impartiality in the decision maker(s). "Impartiality" refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. "Independence" connotes not only a state of mind but also a status or relationship to others.

[53] The apprehension of bias must be a reasonable one seen through the eyes of an informed person, viewing the matter realistically and practically and based upon substantial grounds. There must be a real likelihood of bias. Mere suspicion is not enough. A majority of the Supreme Court of Canada has, on a number of occasions (see, for example, **Valente v. The Queen**, [1985] 2 S.C.R. 673; **R. v. Lippé**, [1991] 2 S.C.R. 114; **Ruffo v. Conseil de la magistrature**, [1995] 4 S.C.R. 267), endorsed Justice de Grandpré's articulation of the test for bias in his dissenting reasons in **Committee for Justice and Liberty v. National Energy Board**, [1978] 1 S.C.R. 369, at p. 394:

> ... [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [That] test is "what would an informed person,

> viewing the matter realistically and practically — and having thought the matter through — conclude. . . .
>
> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
> (Emphasis added)

[54] On this issue, Mr. Fox refers to the decision of the Supreme Court of Canada in **Tremblay v. Quebec (Commission des affaires sociales)**, [1992], 1 S.C.R. 952, asserting that there is a close parallel between that case and the circumstances here.

[55] In **Tremblay** a claimant applied to the Commission des affaires sociales for reimbursement of “medical equipment” expenses under the **Social Aid Act**, R.S.Q. 1977, c. A-16. The issue for determination was whether dressings and bandages were “medical equipment”. The applicant’s claim was heard by three commissioners. Two commissioners favoured her position. Their decision, prior to release, was forwarded to the President of the Commission for review. The President expressed a contrary view and placed the matter before a plenary meeting of the Commission for consideration as was permitted by the rules governing the Commission’s procedure. At that meeting a majority of commissioners supported the President’s view. One of the two commissioners favourable to the respondent changed her mind, resulting in a denial of the claim. The applicant applied for judicial review, which proceeding progressed to the Supreme Court of Canada.

[56] Among other issues, the Court considered whether the part played by the President of the Commission breached the rules of natural justice. The discussion focussed upon the institutionalized consultation process which was followed and whether that process compromised the decisional independence of the commissioners hearing the claim. The Court held that the rules for holding plenary meetings of the Commission disclosed a number of points which, collectively, could create an appearance of bias.

[57] The Court found that compulsory consultation, which could be initiated by the President created an appearance of lack of independence. The mere fact that the

President could, on his own motion, refer a matter for plenary discussion may in itself be a constraint on decision makers. Other factors pointing to an apparent lack of independence included the open voting by a show of hands at plenary meetings of the Commission and the taking of attendance and the keeping of minutes which could exert undue pressure on decision makers. In addition to these points which flowed from the formal consultative rules, the fact that the President of the Commission expressed his opinion to the commissioners responsible for making the decision, inviting them to reconsider it, and then became a decision maker was inconsistent with the rules of natural justice. There is no similarity between the tribunal's processes in **Tremblay** and those here.

[58] Mr. Fox referred, as well, to the Supreme Court's decision in **International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.**, [1990] 1 S.C.R. 282. There, in applications under the **Labour Relations Act**, the Ontario Labor Relations Board ordinarily sits in panels of three. However, it was the practice to hold a full Board meeting to discuss policy issues arising from the panels' draft decision. When the proceeding reached the Supreme Court of Canada, Gonthier, J. summarized the appellant's argument as follows at pp. 322 - 323:

> . . . While the appellant does not claim that the panel was biased, it does claim that full board meetings may prevent a panel member from deciding the topic of discussion freely and independently from the opinions voiced at the meeting. Independence is an essential ingredient of the capacity to act fairly and judicially and any procedure or practice which unduly reduces this capacity must surely be contrary to the rules of natural justice.

[59] In finding that the process did not offend the principles of natural justice Gonthier, J. said at pp. 333 - 335:

> It is pointed out that "justice should not only be done, but should manifestly and undoubtedly be seen to be done": see *Rex v. Sussex Justices*, [1924] 1 K.B. 256, at p. 259. This maxim applies whenever the circumstances create the danger of an injustice, for example when there is a reasonable apprehension of bias, even if the decision maker has completely disregarded these circumstances. However, in my opinion and for the reasons which follow, the danger that full board meetings may fetter the judicial independence of panel members is not sufficiently present to give rise to a reasonable apprehension of bias or lack of independence . . .

> A full board meeting set up in accordance with the procedure described by Chairman Adams is not imposed: it is called at the request of the hearing panel or any of its members. It is carefully designed to foster discussion without trying to verify whether a consensus has been reached: no minutes are kept, no votes are taken, attendance is voluntary and presence at the full board meeting is not recorded. The decision is left entirely to the hearing panel. It cannot be said that this practice is meant to convey to panel members the message that the opinion of the majority of the Board members present has to be followed. On the other hand, it is true that a consensus can be measured without a vote and that this institutionalization of the consultation process carries with it a potential for greater influence on the panel members. However, the criteria for independence is not absence of influence but rather the freedom to decide according to one's own conscience and opinions. In fact, the record shows that each panel member held to his own opinion since Mr. Wightman dissented and Mr. Lee only concurred in part with Chairman Adams. It is my opinion, in agreement with the Court of Appeal, that the full board meeting was an important element of a legitimate consultation process and not a participation in the decision of persons who had not heard the parties. The Board's practice of holding full board meetings or the full board meeting held on September 23, 1983 would not be perceived by an informed person viewing the matter realistically and practically — and having thought the matter through — as having breached his right to a decision reached by an independent tribunal thereby infringing this principle of natural justice.
> (Emphasis added)

[60] There was no evidence that Leona Telfer personally desired a particular outcome in relation to the complaints against Mr. Fox. Those complaints originated outside of RNANS. It was the Complaints Committee of RNANS, not Ms. Telfer, that determined that the matter be forwarded for hearing and added complaints arising from issues revealed in his personnel file.

[61] As is clear from the evidence, Ms. Telfer's role was a limited one and restricted to administrative support. The evidence is uncontradicted that at no stage did Leona Telfer express an opinion to the decision makers on the merits of the complaints against Mr. Fox. She did not become aware of the results of the hearing until the decision was in final form. There is no evidence or suggestion that, by virtue of her position as Manager of Professional Conduct, she held any authority or influence over the members of the Professional Conduct Committee, even had she attempted to influence them. According to the evidence of Leona Bradley, the Committee reached its decision on the complaints immediately after the completion of the hearing. Nothing in the evolution of the decision from first to final draft suggests Ms. Telfer's influence.

[62] I do agree that it would have been preferable had Ms. Telfer not had contact with the Committee members during the final telephone conference. In my view, however, neither her role in that regard, nor any of her prior activity, is sufficient to raise a reasonable apprehension of bias. Tracking the words of Gonthier, J., above at ¶ 59, Leona Telfer's limited role in the hearing of the complaints against Mr. Fox ". . . would not be perceived by an informed person viewing the matter realistically and practically — and having thought the matter through — as having breached his right to a decision reached by an independent tribunal thereby infringing this principle of natural justice".

[63] Mr. Fox complains, as well, about the brevity of the Appeal Committee's reference in its decision to the allegation of bias, asserting that it is reflective of that Committee's failure to grasp the issue. The Appeal Committee devoted few words to this ground, stating, simply, that "[o]ur review of the transcripts of the Professional Conduct Committee hearing did not reveal any evidence to indicate bias or reasonable apprehension of bias".

[64] Ms. Telfer's "involvement" with the proceedings was reviewed in considerable detail through counsels' examination and cross-examination of the witnesses at the Appeal Committee hearing. The parties filed detailed post-hearing submissions addressing this issue among others. I am satisfied that the Appeal Committee was alive to Mr. Fox's concerns about Ms. Telfer's role in the process. In finding no reasonable apprehension of bias, they reached a result consistent with my analysis above. I would therefore not infer, as urged by Mr. Fox, that the brevity of the Appeal Committee's decision in this regard reflects a lack of appreciation of the issue before it.

Ground 4 - Alleged Errors in the Findings of Fact

[65] In **Dhawan v. College of Physicians and Surgeons (N.S.)** (1998), 168 N.S.R. (2d) 201; N.S.J. No. 170 (Q.L.), Chipman, J.A., for this Court, in considering a similarly worded provision of the **Medical Act**, S.N.S.1995-1996, c.10, addressed the standard of review where the appellant complains that there was an insufficiency of cogent and convincing evidence, as Mr. Fox says here. Chipman, J.A. accepted as descriptive of the nature of evidentiary findings and reasons which give rise to an error of law, the following passage from deSmith's

Judicial Review of Administrative Action (5th) where the authors said at page 286:

> The concept of error of law includes the giving of reasons that are bad in law or (where there is a duty to give reasons) inconsistent, unintelligible or substantially inadequate. It includes also the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, exercising a discretion on the basis of any other incorrect legal principles, misdirection as to the burden of proof, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence. Error of law also includes decisions which are unreasonably burdensome or oppressive . . .

[66] He expressly approved the test for review expressed by MacKeigan, C.J.N.S. in **Cape Breton Development Corp. et al. v. Penny (No. 2)** (1977), 20 N.S.R. (2d) 292; 76 D.L.R. (3d) 186 at p. 188 (D.L.R.):

> Thus, if, as is here the case, a material body of evidence reasonably supports the decision, this court cannot touch it. It follows also that where the decision is so supported by material evidence one cannot say, to use the words used by counsel, that "it is one that no reasonable men acting judicially could have reached".

[67] I have reviewed the evidence before the Professional Conduct Committee. The Committee's findings of misconduct, as related to patient care, were predicated solely upon incidents which occurred in 1998. In my view those findings are supported by evidence which the Committee could and did consider credible. The Committee's conclusions of misconduct toward his colleagues and the families of patients, was based upon evidence covering a period from 1990 to 1998. That evidence revealed an unabated pattern of aggression and arrogance on the part of Mr. Fox in his relationship with others, in many cases displayed by his own written responses to concerns raised by the administration.

[68] Mr. Fox does not seriously suggest that the conduct alleged, if proved, is not "misconduct". His position is, in the main, that the events complained of did not happen or, to the extent that they occurred at all, were not placed in proper context. Mr. Fox's stance throughout these proceedings is accurately described by the Professional Conduct Committee in the June 24, 1999 decision on the merits at p. 11:

> The evidence provided for all of the previous allegations has been consistently refuted by Mr. Fox. Despite colleagues, as well as patients who were placed in the care of Mr. Fox coming forth with serious and grievous complaints about his behavior, Mr. Fox has accepted little to no responsibility for any of these actions. On the rare occasion when he did admit that he would have done things differently now . . . it appears that this was done reluctantly at best. His coworkers, who provided evidence, have observed many of these behaviours frequently and for a long period of time. . . .
>
> Mr. Fox, however, would have the Committee accept that all of the evidence provided were examples of a plot to somehow vilify his character. His view was that any reporting to the hospital was done to get him in trouble. The evidence suggests that he further believed that the witnesses were willing to perjure themselves before this Committee. Any attempts made by the hospital administration to bring to light Mr. Fox's behaviors were taken by Mr. Fox as completely unfounded criticisms of him. . . .

[69] It is my view that the evidence before the Professional Conduct Committee amply supported findings of misconduct by Mr. Fox which findings led to the revocation of his licence.

[70] In a lengthy post-hearing submission to the Appeal Committee counsel for Mr. Fox devoted 40 typed pages to a detailed review of the evidentiary grounds of appeal and, in particular, elaborated upon the perceived inadequacies in the evidence. The Appeal Committee, considering each allegation of misconduct individually, confirmed the findings of the Professional Conduct Committee with the exception of that in relation to an alleged mishandling of the keys to the drug locker. On that issue, Mr. Fox's appeal to the Appeal Committee was allowed. I would find no error on the part of the Appeal Committee insofar as it confirmed the findings of the Professional Conduct Committee.

Other Grounds of Appeal:

[71] As earlier indicated, I will not individually address the remaining grounds of appeal, which along with those discussed above, I find to be without merit.

[72] Certain of the additional grounds of appeal raise issues concerning the fairness of the process. Suffice it to say, Mr. Fox was apprised of the case against him; afforded the opportunity to and did fully participate in a hearing process which included the right to call evidence and to examine and cross-examine witnesses;

was provided in each instance with a written, reasoned decision; and exercised his right to a meaningful and comprehensive appeal. I am satisfied that the process was procedurally fair and did not violate the principles of natural justice.

[73] As to penalty, the gravity of Mr. Fox's misconduct is captured in the following part of the Professional Conduct Committee's November 4, 1999 decision:

> . . . such physical and verbal abuse of patients strikes at the very heart of the caring and trusting relationship that is inherent in the nurse-patient relationship and of paramount importance to the very vulnerable patients whose abuse at the hands of Mr. Fox was detailed during this hearing.
>
> The Committee views Robert Fox's treatment of colleagues as a lack of respect to the extent that the integrity of the profession is compromised. Such behaviour does not support an environment of safe, ethical nursing care.

[74] At the penalty hearing Mr. Fox continued, through his counsel, to deny, as he does now, that the events underpinning the findings of mistreatment of patients or colleagues occurred at all or constituted professional misconduct. There was no evidence before the Committee to suggest that Mr. Fox was genuinely amenable to counselling or that his behaviour could be modified. I am satisfied that in revoking Mr. Fox's licence, the Committee imposed the only penalty realistically appropriate on this record of misconduct.

DISPOSITION:

[75] I would dismiss the appeal. In my view this is appropriate case for an award of costs to the respondent. I would fix costs in the amount of 40% of those awarded by the Appeal Committee. Accordingly, the appellant shall pay to the respondent $6000.00 inclusive of disbursements.

Bateman, J.A.

Concurred in:

Chipman, J.A.
Roscoe, J.A.