PROVINCE OF PRINCE EDWARD ISLAND
PRINCE EDWARD ISLAND COURT OF APPEAL

Citation: ***Llewellyn v. College of Registered Nurses of PEI***, 2024 PECA 15

Date: 20240731
Docket: S1-CA-1491
Registry: Charlottetown

BETWEEN:

TONYA LLEWELLYN

APPELLANT

AND:

COLLEGE OF REGISTERED NURSES OF PRINCE EDWARD ISLAND

RESPONDENT

Before: Chief Justice James W. Gormley
Justice Michele M. Murphy
Justice Thomas P. Laughlin

Appearances:
Marcus R. Davies, counsel for the Appellant

Douglas R. Drysdale, K.C. and Melissa Trowsdale, counsel for the Respondent

Place and Date of Hearing	Charlottetown, Prince Edward Island February 28, 2024
Place and Date of Judgment	Charlottetown, Prince Edward Island July 31, 2024

Written Reasons by:
Chief Justice James W. Gormley

Concurred in by:
Justice Michele M. Murphy
Justice Thomas P. Laughlin

HEALTH LAW – Regulation of health professionals – Nurses - Discipline

The appellant, a nurse, was found guilty of professional misconduct and incompetence by a Hearing Committee of the College of Registered Nurses of Prince Edward Island. She appealed to the Supreme Court of Prince Edward Island which allowed one ground of appeal that reduced the financial penalty imposed. All other findings of the College were confirmed.

The appellant appeals to this Court alleging a number of grounds. This Court dismissed all grounds but one finding, regarding the penalty, it was unfair for the Hearing Committee to hear submissions on penalty prior to making a decision on professional misconduct and incompetence, thereby foreclosing the appellant an opportunity to make submissions. However, the Court of Appeal confirmed the decision of the Supreme Court appeal judge including the finding of professional misconduct and incompetence.

Appeal dismissed.

Authorities Cited:

CASES CONSIDERED:* *Canada (Minister of Citizenship and Immigration) v. Vavilov, [2019] S.C.J. No. 65; ***Prince Edward Island v. King,*** 2020 PECA 13; ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19; ***College of Physicians and Surgeons of Saskatchewan v. Leontowicz***, 2023 SKCA 110; ***Guindon v. Canada***, 2015 SCC 41; ***Ontario (Minister of Labour) v. Cobra Float Service Inc.***, 2020 ONCA 527; ***Strom v. Saskatchewan Registered Nurses Association***, 2020 SKCA 112; ***Capital Markets Technologies, Inc. v. Prince Edward Island***, 2020 PECA 12; ***College of Physicians and Surgeons (Ontario) v. Gillen***, 1993 CanLII 8641 (ONCA); ***Quaidoo v. Edmonton Police Service***, 2015 ABCA 381.

STATUTES CONSIDERED:* *Regulated Health Professions Act, R.S.P.E.I. 1988, Cap. R-10.1, ss. 1.1; 4(2)(a); 35-59; 52(5); 55, 55 (4), (5); 57(1), (2); 58(1), (2), (4); 59(2), 59(2)(b); ***Canadian Charter of Rights and Freedoms***, s.52 of the ***Constitution Act, 1982***, ss. 2(b), 7; ***Judicature Act***, R.S.P.E.I. 1988, Cap. J-2.1, s. 60.

DOCUMENTS REFERRED TO: *Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons*, (2006) CanLII Documents 691.

Reasons for judgment:

GORMLEY C.J.P.E.I.:

Introduction

[1] Tonya Llewellyn (the "appellant") is a registered nurse in Prince Edward Island. The College of Registered Nurses of Prince Edward Island (the "College" or the "respondent") is responsible for the regulation of the nursing profession in this Province. Its legislative authority flows from the ***Regulated Health Professions Act***, R.S.P.E.I. 1988, Cap. R-10.1 (the "RHPA").

[2] This appeal arises from a complaint that arose as a result of events that transpired in the Kings County Memorial Hospital (the "KCMH") in late 2018. At the time, the appellant's mother ("R.L.") was a patient at the KCMH. The appellant was visiting her mother. The appellant worked for the same employer but at a different health facility located in Charlottetown, Prince Edward Island.

[3] The complaints against the appellant relate to her conduct at the KCMH on December 15 and 16, 2018, as well as a voicemail left with the Director of Nursing of the KCMH approximately a month later. The complaints proceeded to a four-day hearing before a Hearing Committee of the College. Findings of professional misconduct and incompetence were made by the committee and penalties and costs were imposed against the appellant.

[4] The College receives its authority from the ***RHPA*** which includes reference to the purpose of the legislation:

> 1.1 The purpose of this Act is to provide for the regulation of certain health professions where it is in the public interest and self-regulation of the health professions is appropriate taking into consideration relevant circumstances and factors.

[5] Section 4(2)(a) establishes the objects of the College and specifically provides the College the ability to *"govern its members in accordance with the Act, regulations and bylaws."*

[6] Sections 35-59 set out the discipline procedure which include definition sections defining professional misconduct (s.57(1)) and incompetence (s. 57(2)). Section 55 establishes the powers and basic procedures of a hearing committee.

Matters not in issue

[7] The appellant is not challenging any of the factual findings of the Hearing Committee. She unsuccessfully raised issues of findings of fact at the first level of statutory appeal including findings of credibility and the failure to address contradictions in witness testimony by the Hearing Committee. These issues are no longer under appeal.

Factual findings at the hearing

[8] At the four-day hearing the College called seven witnesses including the Director of Nursing at the KCMH who was also the complainant. In addition, the College called one of the attending physicians and four staff who interacted with the appellant at the hospital. The appellant called eight witnesses who were all members of her family. The appellant also provided evidence on her own behalf. In addition, hospital records and documents setting out the basis of the complaint prepared by the staff of the KCMH were also filed with the committee. The Hearing Committee heard evidence that the appellant's mother was ill and attended at the KCMH Emergency Department on December 14, 2018, and was subsequently admitted to the in-patient unit with unknown etiology of her illness. She was placed on infection control procedures and did not improve. In fact, her condition deteriorated during her stay at the KCMH. The appellant arrived on the evening of December 15, 2018, and stayed with her mother from then until the morning of December 16, 2018, at which time R.L. was transferred to the Queen Elizabeth Hospital in Charlottetown. R.L. later recovered.

Decision of the Hearing Committee of the College

[9] The Hearing Committee focused on three allegations of professional misconduct and incompetence which were recorded as follows:

1. On December 15 and 16, 2018, while visiting a family member who was ill at the Kings County Memorial Hospital ("KCMH"), you engaged in conduct which violated the provisions of the Act, in that you failed to follow established policies and procedures with respect to Infection Prevention and Control while visiting this family member and providing related nursing care;

2. On December 15, 16, 2018, while visiting a family member who was ill at the KCMH, you engaged in conduct which violated provisions of the Act, in that you treated nursing staff and other health care providers in a demeaning, disrespectful and unprofessional manner; and

3. On or about January 14, 2019, after becoming aware of complaints regarding your conduct at the KCMH on December 15 and 16, you engaged in conduct which violated the provisions of the Act, in that you left a voicemail with the complainant, Sandra MacKay, which was both threatening and unprofessional in nature.

[10] Regarding the first allegation, the Hearing Committee stated it was not a safe practice for the appellant to provide nursing care for her mother, specifically, when she attempted to place an IV twice with the same cathlon, and second, by not following proper safety protocols and infection control measurers when she entered and exited her mother's room in the same PPE equipment. These circumstances grounded the findings of professional misconduct. A number of the same findings grounded the Hearing Committee's determination that the appellant was also guilty of incompetence. Specifically, the Hearing Committee stated as follows:

> As for incompetence, Tonya Llewellyn demonstrated lack of knowledge and professional judgment when she initiated an IV on her mother. She exposed her mother to risk by attempting to use the same cathlon twice, contrary to basic nursing practice. The Committee is concerned that Tonya Llewellyn would attempt the IV while another nurse was donning PPE to come in to the patient room for that purpose. Attempting to insert an IV on her mother was not safe, competent or ethical care.
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> On a broader scale, it is not acceptable nursing practice for a registered nurse to perform invasive procedures on family members. Although it is permissible for a registered nurse to assist a family member in a health care setting such as a hospital by performing such tasks as bathing or ambulation, invasive procedures are different. Even if nursing staff on duty requests help, a registered nurse should take care to only provide the help that is sought, and not to act as the family member's nurse. Acting as she did in this case, Tonya Llewellyn showed poor judgment, and lack of knowledge about proper policy.

[11] On the second allegation, the Hearing Committee found the appellant guilty of professional misconduct by treating the nursing staff in a demeaning, disrespectful and unprofessional manner. The committee made findings that on numerous occasions the staff felt threatened and that the appellant was providing instructions to her family members in defiance of the staff at the KCMH. In regard to one incident, the Hearing Committee characterizes the situation as "*volatile*". The testimony provided by the witnesses and accepted by the committee confirmed the finding.

[12] In regard to the third allegation, this arose as a result of threats made in a voicemail approximately a month after the sentinel events. The Hearing Committee characterized the voicemail as an attempt to threaten the nurse manager who was also the complainant. This behaviour was also found to constitute professional misconduct on behalf of the appellant.

Penalty imposed by the Hearing Committee

[13] Section 58 of the ***Act*** provides the authority for the Hearing Committee to impose penalties after a determination of professional misconduct or incompetence.

[14] The orders imposed by the Hearing Committee were as follows:

a) suspension of the appellant's registration to practice for two months;
b) a requirement to complete ethics training with a nursing expert at the appellant's expense;
c) a fine in the amount of $5,000.;
d) pay the expenses incurred by the College in the amount of $10,000.;
e) provide a written copy of the decision to her present or any new employer.

Appeal to the Supreme Court of Prince Edward Island

[15] The appellant appealed the decision and findings of the Hearing Committee to the Supreme Court of Prince Edward Island pursuant to s. 59(2) of the ***Act***.

Standard of Review

[16] The Legislature, by s. 59(2)(b) of ***RHPA*** provided for an appeal from the Hearing Committee to the Supreme Court of Prince Edward Island. The Supreme Court of Canada has stated that appellate standards of review apply. In ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, [2019] S.C.J. No. 65, para. 37 states:

> [37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with ***Housen v. Nikolaisen***, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see ***Housen***, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[17] This court succinctly confirmed the four categories of appellate review in ***Prince Edward Island v. King,*** 2020 PECA 13, as follows:

> [36] The appellate standard of review depends on the nature of the matter being reviewed. These principles were established in ***Housen v. Nikolaisen***, 2002 SCC 33. A pure question of law is reviewed on a standard of correctness and an appellate court is free to replace the opinion of the trial judge with its own. Findings of fact, on the other hand, cannot be reversed unless the trial judge made a palpable and overriding error. A question of mixed fact and law is subject to the standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law and the applicable standard is correctness.

[18] These are the standards of review which were to be applied at the appeal in the Supreme Court of Prince Edward Island.

Role of the Court of Appeal

[19] It is important to be mindful of the role played by this court when delineating the appropriate standard of review. The Supreme Court of Canada stated as follows in ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19:

> [43] The Court of Appeal stated that "[t]he standard that we must apply in assessing the judgment of Madam Justice Koenigsberg is whether in her re-weighing of the evidence she was clearly wrong" (para. 25). This is not the appropriate test at the secondary appellate level. The role of the Court of Appeal was to determine whether the reviewing judge had chosen and applied the correct standard of review, and in the event she had not, to assess the administrative body's decision in light of the correct standard of review, reasonableness. At this stage in the analysis, the Court of Appeal is dealing with appellate review of a subordinate court, not judicial review of an administrative decision. As such, the normal rules of appellate review of lower courts as articulated in ***Housen, supra***, apply. The question of the right standard to select and apply is one of law and, therefore, must be answered correctly by a reviewing judge. The Court of Appeal erred by affording deference where none was due.
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> [44] The Court of Appeal should have corrected the reviewing judge's error, substituted the appropriate standard of administrative review, and assessed the Committee's decision on this basis. Judged on the proper standard of reasonableness, there was ample evidence to support the Committee's conclusions on credibility, burden of proof and application of the burden of proof to the factual findings. It follows that the decisions of the reviewing judge and the Court of Appeal should be set aside and the order of the College restored.
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> [Emphasis added.]

[20] This view has been endorsed recently in ***College of Physicians and Surgeons of Saskatchewan v. Leontowicz***, 2023 SKCA 110, wherein the court stated:

> [46] In assessing this argument, I begin by reminding myself of the role this Court plays in sitting as a secondary appellate court. In that regard, an appellate court is to determine whether the judge chose the correct standard of review and applied it properly. This is a question of law, reviewable on the correctness standard: ***Dr. Q v College of Physicians and Surgeons of British Columbia***, 2003 SCC 19 at paras 43-44, [2003] 1 SCR 226. In practice, once the appellate court has identified the correct standard of review, it "steps into the shoes" of the reviewing court and reviews the decision of the administrative tribunal in accordance with that standard ***(Teamsters Canada Rail Conference v Canadian National Railway Company,*** 2021 SKCA 62 at para 41, 327 LAC (4th) 322).

[21] This creates a two-stage analysis for a court of appeal at the secondary appellate level. The court determines if the judge at the first stage of review chose the correct standard of review. The second stage requires the court to determine whether the judge at the first stage of review erred in the application of the appropriate standard of review. As previous decisions have noted, this invites the secondary appellate court to "*step into the shoes*" of the reviewing court at the second stage. This requires a review of the decision of the administrative decision maker in accordance with the appropriate appellate standard. This is the approach and the appropriate standard of review for a secondary appellate court to follow.

Issues on appeal

[22] The appellant had raised a total of nine grounds of appeal at the first level of appeal. For purposes of her argument before this Court, she has reduced her grounds to four. I have re-ordered the grounds and reframed them as follows:

1. Did the appeal judge err by dismissing grounds 5 and 6 of the appellant's appeal on the basis that the appellant's claim of constitutional protection constituted a new argument, when that argument had been previously raised by the appellant?

2. Did the appeal judge err in law that destruction of evidence constituted a new argument when the appellant had previously raised the issue?

3. Did the appeal judge err in law by holding a self-represented litigant to the standards of a legal professional? and

4. Did the appeal judge err in law by upholding a penalty which used remorse as justification, despite penalty submissions being made prior to a finding of guilt?

Issue #1: Did the judge on appeal err when she decided that the claim for Charter protection by the appellant constituted a new argument on appeal and exercised her discretion not to entertain the issue?

[23] The appellant takes the position that the judge erred in law by finding she did not raise her Charter rights at the hearing and that her arguments pursuant to s. 7 and s. 2(b) of the ***Charter of Rights and Freedoms*** were a new issue raised on appeal. Specifically, she argues that the Hearing Committee had to consider the rights of the patient and the appellant pursuant to s. 7 of the Charter. For purposes of review of the decision by the appeal judge, I must first determine whether she identified the appropriate test to be applied when a new issue is raised for the first time on appeal.

[24] After a review of the four volumes of transcript and the written submissions, the appeal judge determined that the Charter issues were new issues being raised for the first time on appeal. I agree. There is one instance referring to provincial and federal rights at the original hearing. This refers to a right to privacy and free speech. The reference goes no further, and it does not link to any evidence which would show where or how the appellant's rights to free speech were thwarted. On the contrary, the record is replete with instances of the appellant being forceful and advocating for her mother on numerous occasions. Nowhere in the record are there examples of the appellant's right to free speech being curtailed. It is important to remember that this is not a case of the appellant publishing critical comments about the care her mother received online or on social media. This is a case of a nurse breaching professional standards while providing nursing care to a family member. I find, based on the record, that the appeal judge made no error when she found that the potential Charter claims were new issues being raised on appeal.

[25] Having found that the Charter issues were new issues raised on appeal, the appeal judge was then tasked with applying the appropriate legal test to the arguments to determine if she should exercise her discretion and allow the issues to be raised for the first time on appeal. In support of her decision, the appeal judge referred to the leading appellate decisions that deal with this issue including ***Guindon v. Canada***, 2015 SCC 41, and ***Ontario (Minister of Labour) v. Cobra Float Service Inc.***, 2020 ONCA 527. Both decisions reviewed the basic principles a court should consider when new issues on appeal arise. A number of the same principles consistently occur. Generally, appeal courts will decline to hear new arguments on appeal. The test to be considered is stringent (***Ontario (Minister of Labour) v. Cobra***,

paras. 19 and 20). The policy for a reluctance for new issues to be raised on appeal includes concern for prejudice to the other side arising from an inability to adduce necessary evidence, and the lack of a sufficient record to make necessary findings of fact. In addition, the societal interest in finality of litigation is undermined if new issues are raised on appeal. Considering the standard of review, it would be intellectually confusing to attempt to review matters not raised at trial or a hearing for the first time on appeal. Difficulties and potential prejudices are obvious. As a result, a strict test to accept new issues being raised on appeal is appropriate. Specifically in ***Ontario (Minister of Labour) v. Cobra*** the court stated:

> [20] The test for whether new issues should be considered on appeal is stringent. The discretion to hear a new constitutional issue on appeal "*should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties*": ***Guindon*** at para. 23. When determining whether to exercise this discretion, a judge should consider "*all of the circumstances*", including the state of the record, fairness to all parties, the importance of having the court resolve the issues, and the broader interests of the administration of justice: ***Guindon***, at para. 20.

[26] As indicated, the appellant in these circumstances bears a burden to demonstrate that the consideration of new issues does not result in prejudice to the other party. The appellant's position is that her rights pursuant to Charter s. 7 and 2(b) to freedom of expression and freedom of speech were infringed both as an advocate for her mother and for herself. She also frames the issue as one of general advocacy done by members of the nursing profession and argues this role which is both personal to her and her mother also includes a more general systemic aspect which should be weighed in favour of allowing her to raise these issues on appeal.

[27] On the issue of the appeal judge's characterization of the law on this issue, I find no reversible error in her description of the law. She correctly characterized the law and on a correctness review, I find she committed no error.

[28] On her application of the law to the facts, which would be an application of a legal test to a factual context, I find the appeal judge committed no reviewable error. In particular, the appeal judge pointed out that the College indicated that had the Charter issues been raised at the hearing, questions could have been posed to the numerous witnesses in order to create an appropriate record. No such questions were posed by either the appellant or the respondent. In other words, the appeal judge would be left in a factual vacuum and would have to manufacture a factual context. This would fly in the face of one of the primary concerns identified in the common law which justifies why appeal courts are reluctant to hear new issues for the first time on appeal. As the appeal judge stated, the appellant did not meet the burden to prove that the respondent would not suffer prejudice on appeal.

[29] As the appeal judge exercised her discretion to refrain from entertaining the new issues for the policy reasons stated, it was not necessary for her to address the underlying issues raised by the appellant.

[30] I do note the appellant has raised the decision of ***Strom v. Saskatchewan Registered Nurses Association***, 2020 SKCA 112.

[31] In ***Strom*** a nurse had posted critical comments on social media which concerned the nursing care her grandfather had received in a long-term facility prior to his death. The comments criticized home care staff including other nurses. Strom faced professional discipline from her regulator. On appeal, Strom was successful and the court agreed with her that her s. 2(b) Charter rights to freedom of expression had been infringed. The appellant argues the ***Strom*** decision is key to this case. I disagree. ***Strom*** is easily distinguished from the facts in this matter. In ***Strom***, the nurse's action consisted solely of online criticism of other nurses in a long-term care facility. In this case, the appellant actually performed duties of a nurse on her mother while attending in person in a facility owned and controlled by her employer while she was off duty. This matter is not about freedom of expression. The facts in ***Strom*** are distinguishable from the present case.

[32] This case does not deal with speech related to health care. It relates to the provision of health care by an off-duty nurse at a health facility to a family member. In addition, it deals with rude and aggressive behaviour to other health professionals including threats to attempt to discourage a potential complainant from filing a complaint. As a result, the decision in ***Strom*** is easily distinguished from the present fact scenario.

[33] I find the appellant judge made no reviewable error concerning the appellant's argument that Charter rights had been violated, and I dismiss these two grounds of appeal.

Issue #2: Did the appeal judge err by dismissing the spoliation argument as a new issue raised on appeal when the appellant had previously raised the issue at the hearing?

[34] The appeal judge applied the same principles with respect to the raising of new issues on appeal in regard to the issues of spoliation and destruction of evidence. She determined these were both new grounds of appeal and applied the same test previously mentioned and outlined in ***Ontario (Ministry of Labour) v. Cobra Float***. More importantly, the appeal judge stated:

> [43] … Most compelling, upon reviewing the record before me, I conclude not only that the issues are newly raised but also that the fact of spoliation was not established by the evidence before the Committee.

[35] For the following reasons, I agree with the analysis of the appeal judge.

[36] Spoliation and its requisite elements have been canvassed in this Court on several occasions including in ***Capital Markets Technologies, Inc. v. Prince Edward Island***, 2020 PECA 12, where it stated the following:

> [43] ***McDougall v. Black and Decker, supra***, states the law of spoliation:
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> > [18] ***St. Louis***, therefore, stands for the following proposition. Spoliation in law does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.
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> [44] ***Catalyst Capital Group Inc. v. Moyse***, 2016 ONSC 52716, states the four elements of spoliation:
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> > [136] ... a finding of spoliation requires four elements to be established on a balance of probabilities, namely:
> > (1) the missing evidence must be relevant;
> > (2) the missing evidence must have been destroyed intentionally;
> > (3) at the time of destruction, litigation must have been ongoing or contemplated; and
> > (4) it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation.

[37] The appeal judge did not specify why she found spoliation was not established by the evidence before the Committee. I would point to three concerns which arise from a review of the record. First, the incidents which ground this matter arose on December 15 and 16, 2018. The limited evidence suggested, that by the time the issue of any surveillance or video evidence was raised by the appellant, the recordings were deleted in the normal course by the hospital. In other words, there was no intentional destruction of evidence. Consequently, the second element as defined in ***CMT*** is not met. Second, as the video was erased in the normal course and before the appellant requested it, it is not reasonable to attempt to characterize the erasing of any such evidence as having been done while litigation was ongoing nor

contemplated. It is important to recall the Kings County Memorial Hospital which controlled the video evidence is a provincially owned facility under Health PEI. The appellant has not provided any proof that any litigation was contemplated or ongoing, particularly in regard to Health PEI when the evidence was deleted. Third the ***RHPA*** specifically defines those who qualify as parties to a hearing committee. In s. 55(4) it states:

> 55. ...
>
> **Parties**
>
> (4) The parties to a hearing are the respondent and the college and each party has the right to appear, be represented by legal counsel and examine, cross-examine and re-examine witnesses at a hearing.

[38] The definition of "*parties to the hearing*" is important. It relates directly to any arguments of spoliation or destruction of evidence. The appellant indicated she requested the surveillance evidence from the complainant approximately a month after the events. The complainant was a nurse manager at the KCMH and is not a party to the regulatory hearing pursuant to the legislation and does not have standing at the hearing. The complainant does not have the ability to retain counsel, cross-examine witnesses or participate in a hearing committee. She neither benefits nor is at risk in a disciplinary hearing. Spoliation results in negative inferences being applied to parties in traditional adversarial settings. It does not extend to inferences against non party witnesses to disciplinary proceedings. The only parties to this matter are the College which has carriage of the complaint (***RHPA**, s. 52(5)*), and the respondent, as defined in the legislation. Neither party has provided any argument to support the position that non-parties to a disciplinary committee should be subject to an evidentiary inference. As a result, I find that the appeal judge made no error in law when she exercised her discretion to treat both the issues of spoliation or destruction of evidence as new issues on appeal and her decision not to entertain these issues. I also agree with her characterization that spoliation was not established on the record. As a result, these two grounds of appeal cannot succeed.

Issue #3: Did the appeal judge err in law by holding a self-represented litigant to the standards of a legal professional?

[39] This is a confusing ground of appeal. The appellant was self-represented at the hearing committee. The appellant was represented by experienced counsel at the statutory appeal. This ground of appeal alleges the appeal judge erred by holding the self-represented litigant to the standard of a lawyer. In the written submissions of the appellant after a lengthy recital of decisions and the *Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons*, (2006) CanLII Documents 691, the appellant refers to one specific aspect of the evidence of

the Hearing Committee. Specifically, she argues there was a positive duty on the Hearing Committee and its lawyers to inquire of the appellant what she meant when she stated she had a "*right to free speech and a right to speak for her family*." This assertion of the purported failure by the Hearing Committee in its obligations to the appellant was not one of the nine grounds of appeal raised at the statutory appeal. The appeal judge was not asked if the Hearing Committee made such an error. This is an appeal of the decision in ***Llewellyn v. College of Registered Nurses of P.E.I.*** The appeal judge made no finding and was not asked to make any ruling in relation to the self-represented status of the appellant. As a result, raising this issue now is an attempt to raise a new issue on appeal. Consequently, pursuant to the principles as enunciated in ***Ontario (Minister of Labour) v. Cobra Float Services Inc.***, I exercise my discretion not to entertain this new issue, particularly as this is the second appellate review in this process. The appellant has not met her obligation and burden pursuant to the test set out in ***Ontario (Minister of Labour) v. Cobra Float***. As a result, I dismiss this ground of appeal summarily.

Issue 4: Did the appeal judge err in law by upholding a penalty which used lack of remorse as justification, despite penalty submissions being made prior to a finding of guilt?

[40] Due to disagreement between the parties as to what constituted completion of a hearing as defined in s. 58(4) of the ***Act***, and due to the unavailability of appropriate hearing dates to resume the hearing, the Committee decided to hear submissions on penalty prior to making and communicating a decision on the issue of findings of professional misconduct and incompetence. The parties were instructed to provide written submissions on penalty by April 8th with respondent's submissions due on or before April 24, 2020. This date was prior to a finding of professional misconduct or incompetence of the appellant. In the circumstances of this matter, the procedure followed was less than ideal. This was exacerbated by the COVID-19 pandemic which began at the same time this matter was reaching a termination. On June 16th a single written decision was provided which covered findings of professional misconduct, incompetence and penalty. The appellant points to the following portion of the Hearing Committee's decision:

> Tonya Llewellyn's lack of remorse is of significant concern for the committee. She did not take responsibility or accountability for her conduct. Even when given the opportunity to address the penalty which might be imposed if the committee found her guilty of anything, she could not bring herself to suggest an appropriate penalty.

[41] I agree with the appellant that the reliance by the Hearing Committee on a lack of remorse expressed by the appellant is an error of law.

[42] The appellant relies upon the decision of ***College of Physicians and Surgeons (Ontario) v. Gillen***, 1993 CanLII 8641 (ONCA), and in particular the following passage:

> [6] It is not clear from the reasons whether the Committee was "*punishing*" the doctor for denying the charges or if it had concluded that the only way to adequately protect the public was to revoke his licence and force him to get psychiatric treatment before applying for reinstatement. In either event, the Committee would be wrong. Any doctor is entitled to deny allegations made against him or her and to require the College to establish such allegations. If he or she chooses to admit the allegations, that may be taken into account in appropriate circumstances in setting a penalty, but in no circumstances should denial serve to increase what would otherwise be an appropriate penalty.

[43] Similar concerns arose from the statement made by the College in this disciplinary process. I agree that the process which required the appellant to provide submissions on penalty prior to receiving a determination on responsibility for the allegations of professional misconduct and incompetence coupled with the focus on the lack of remorse in the submissions is an error of law. The appropriate procedure the College should have followed is to make a decision on the complaints followed by an opportunity after such decision has been communicated to the respondent nurse to adduce evidence and make submissions on the appropriate penalty pursuant to s. 58(2) of the ***Act***. To do otherwise can lead to situations such as this where a lack of remorse can be interpreted as an aggravating factor affecting the imposition of a penalty when it should only be considered after a finding of professional misconduct or incompetence is made pursuant to s. 58(1) of the ***Act***. The statement by the Hearing Committee which criticized the appellant for her lack of remorse and inaction, is not appropriate from the perspective of procedural fairness. If one considers that to make an appropriate submission the appellant would hypothetically have to predict if the College was to make a finding against her, what would that finding be? Would it be for a minor transgression or a finding only of professional misconduct, or only of incompetence or both? A professional subject to penalties from a self-regulatory body should not have to guess what transgressions they have committed. Nor should they be subject to the risk of a greater penalty for not taking responsibility or for not demonstrating remorse prior to a decision being made by a professional regulator.

[44] It would appear from the decision that the Committee took this action in part due to a concern that the legislation is unclear as to when a "*hearing*" is completed pursuant to s. 58(4) of the legislation but this does not justify putting a professional at risk for a disproportionate penalty when they are not seen as acting responsibly or with remorse prior to the determination of the underlying finding. This is an error of

law by the Committee and an error of law by the appeal judge who supported the Committee's finding.

[45] As a matter of course, a denial of allegations up to the time a determination of professional misconduct or incompetence is made should not result in a consideration by a professional disciplinary body when attempting to arrive at an appropriate penalty. Otherwise, the message being sent is "*accept responsibility early or risk a more stringent penalty*." I do note the decision of the Alberta Court of Appeal which was relied upon by the appeal judge. In ***Quaidoo v. Edmonton Police Service***, 2015 ABCA 381, the court stated as follows:

> [43] While a guilty plea can be mitigating, the absence of a guilty plea is not aggravating. Moreover, the presence or absence of insight, acceptance of responsibility and remorse at a hearing are properly considered at sentencing: …

[46] Respectfully, this does not address the concern of the appellant. It is not that a lack of remorse is not to be considered on sentencing. A lack of remorse at sentencing is an appropriate consideration but when an individual is asked to express remorse prior to a finding of responsibility being made, that is a bridge too far. As a result, I agree with the position of the appellant that reliance by the Hearing Committee on a lack of remorse prior to a finding of liability for either professional misconduct or incompetence is an error in law.

Penalty

[47] Notwithstanding the error made by both the Hearing Committee and the appeal judge regarding a lack of remorse, this error in no way impacts on or has any consequence on the findings of professional misconduct and incompetence of the appellant. As a result, the penalty imposed by the appeal judge is confirmed.

Costs of the appeal

[48] Although the appellant did succeed on the issue of remorse, that has no impact on the substantial findings of professional misconduct and incompetence. Accordingly, I would fix costs at $5,000. inclusive of HST and disbursements to be paid by the appellant to the College.

Chief Justice James W. Gormley

I AGREE: ______________________
Justice Michele M. Murphy

I AGREE: ______________________
Justice Thomas P. Laughlin