

SUPREME COURT OF NOVA SCOTIA

Citation: MacNeil v. College of Registered Nurses or Nova Scotia, 2010 NSSC 83

Date: 20100304

Docket: Hfx. No. 318130

Registry: Halifax

Between:

James Gerard MacNeil

Applicant

v.

Leona Telfer, in her capacity as delegate of the Executive Director
of the College of Registered Nurses of Nova Scotia

Respondent

PUBLICATION BAN: Medical Report at Tab 6 of the Record

(see Order of Coughlan, J. at Tab 6 of the Record)

LIBRARY HEADING

Restriction on Publication: Medical report at Tab 6 of the Record
(See Order of Coughlan, J. at Tab 6 of the Record)

Judge: The Honourable Justice Suzanne M. Hood

Heard: February 4, 2010 in Halifax, Nova Scotia

Written Decision: March 4, 2010

Subject: Judicial Review

Summary: The applicant seeks judicial review of the decision of the delegate of the Executive Director of the College of Registered Nurses of Nova Scotia (“CRNNS”) to deny him entry to the Fitness to Practice process established under the *Registered Nurses Act*, S.N.S. 2006 c. 21.

Issues:

1. Are the Fitness to Practice Eligibility criteria (the “Criteria”) inconsistent with the *Act* and Regulations?
2. If not inconsistent, was the decision reasonable?

Result: Application for judicial review dismissed.

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D E C I S I O N

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Counsel: Michael Coyle for the Applicant
Marjorie Hickey, Q.C. for the Respondent

By the Court:

INTRODUCTION

[1] The applicant seeks judicial review of the decision of the delegate of the Executive Director of the College of Registered Nurses of Nova Scotia (“CRNNS”) to deny him entry to the Fitness to Practice process established under the *Registered Nurses Act*, S.N.S. 2006 c. 21.

ISSUES

1. Are the Fitness to Practice Eligibility criteria (the “Criteria”) inconsistent with the *Act* and Regulations?
2. If not inconsistent, was the decision reasonable?

FACTS

[2] A complaint to CRNNS was received from the applicant’s employer on April 16, 2009. The matter was referred to the Professional Conduct process and, as a result, a Preliminary Investigation was conducted. Thereafter, an assessment

was consented to by the applicant and prepared by Mary McGrath, a registered psychologist, on August 7, 2009.

[3] As a result of the assessment, legal counsel for the Nova Scotia Nurses' Union ("NSNU"), Michael Coyle, on September 14, 2009 requested, on the applicant's behalf, his entry to the Fitness to Practice process provided for under the *Registered Nurses Act and Regulations* and Policy 19 which was passed pursuant to the Regulations.

[4] That request was denied by the Executive Director's delegate, Leona Telfer, the Director of Professional Conduct Services, on September 16, 2009. After a request for "clarification" by counsel for the NSNU dated September 17, 2009, a further letter was sent by Leona Telfer on September 25. A Notice for Judicial Review of the decision was filed on October 6, 2009.

[5] At the judicial review hearing, the Affidavit of Leona Telfer ("Telfer affidavit") was in evidence and she was cross-examined by counsel for the NSNU. There was a brief re-examination by counsel for the CRNNS, Marjorie Hickey, Q.C.

The Framework

[6] *The Registered Nurses Act*, S.N.S. 2006, c. 21 provides:

2 (g) ‘complaint’ means a notice in writing pursuant to this Act, indicating possible professional misconduct, conduct unbecoming the profession, incompetence or incapacity of a member;

(s) ‘incapacity’ means the status whereby a respondent, at the time of the subject-matter of a complaint or a report pursuant to subsection 73(1), suffered from a medical, physical, mental or emotional condition, disorder or addiction that rendered the respondent unable to practise with reasonable skill or judgment or that may have endangered the health or safety of clients;

4 In order to

(a) serve and protect the public interest;

(b) preserve the integrity of the nursing profession; and

(c) maintain public confidence in the ability of the nursing profession to regulate itself,

the College shall

(d) regulate the practice of nursing and the practice of a nurse practitioner through

(i) the registration, licensing, professional conduct and other processes set out in this Act and the regulations;

(ii) the approval and promotion of a code of ethics;

(iii) the development, approval and promotion of standards for nursing practice, standards for nurse practitioners, entry-level competencies, nurse practitioner competencies and a continuing competence program;

(e) subject to clause (d), and in the public interest, advance and promote the practice of nursing and the practice of a nurse practitioner;

(f) encourage members to participate in affairs promoting the practice of nursing and the practice of a nurse practitioner, in the best interests of the public; and

(g) do such other lawful acts and things as are incidental to the attainment of the purpose and objects of the College.

6 (2) The Executive Director may delegate any functions assigned to the Executive Director by this Act, the regulations or the by-laws.

31 (1) In accordance with the objects of the College, the professional conduct process shall seek to inhibit professional misconduct, conduct unbecoming a nurse, incompetence and incapacity by investigating, on its own initiative or on the complaints of others, alleged instances of such misconduct, conduct unbecoming a nurse, incompetence or incapacity and, where appropriate, disposing of the matter or matters in accordance with the regulations.

(2) Except where prejudicial to the attainment of the objects of the College, the professional conduct process must take into account the potential for the rehabilitation of the respondent

34 (1) The Council shall appoint a Fitness to Practise Committee comprised of such number of members and public representatives as determined by the Council.

(12) The fitness to Practise Committee shall perform such functions as set out in this Act and the regulations.

38 Upon receipt of a complaint, the complaint shall be processed in accordance with the regulations.

39 (1) Notwithstanding anything contained in this Act or the regulations, where a complaint involves allegations of incapacity, or where a member, in the absence of a complaint, discloses to the College that a member may be incapacitated, the Executive Director may refer the matter to the Fitness to Practise Committee in accordance with the regulations.

(2) Where a matter is referred to the Fitness to Practise Committee, the matter shall be disposed of in accordance with the regulations.

(3) The Fitness to Practice Committee or the Executive Director may refer a matter to the Complaints Committee in the circumstances set out in the regulations.

(4) Where a matter is referred by the Fitness to Practise Committee or the Executive Director to the Complaints Committee pursuant to subsection (3), the matter shall be considered a complaint and shall be processed as any other complaint pursuant to this Act.

[7] Regulations pursuant to the *Registered Nurses Act* provide as follows:

65 (1) When considering whether to refer a matter to the Fitness to Practice Committee under Section 39 of the Act, the Executive Director must consider whether the member is eligible for referral to the Fitness to Practise Committee according to criteria for eligibility approved by the Council, and only then may request that the member undergo an assessment for incapacity.

(5) If a member is not eligible for referral to the Fitness to Practise Committee according to criteria for eligibility approved by the Council, the Executive Director must determine whether any aspect of the matter requires further action under the Act or these regulations.

[8] Appendix A to Policy No. 19, Eligibility for Fitness to Practice Process sets out “Who is Eligible?” It continues:

The executive director has the discretion to determine eligibility for the Fitness to Practice process ...

[9] Appendix A also sets out “Who May Not Be Eligible?” as follows:

The following factors will be taken into consideration and may result in Registered Nurses being ineligible for the process. The Registered Nurses who may be ineligible are those who have:

- previously received a licensing sanction related to Incapacity;
- been terminated previously from the Fitness to Practice process, or any other such process;

- sold drugs or engaged in other criminal activity;
- caused patient harm or death; or
- particular circumstances related to the matter where eligibility would not be in the best interest of the public and/or the profession.

[10] There are two processes available pursuant to the *Registered Nurses Act*, according to the Telfer affidavit, paras. 3, 8 & 10:

3. Under the framework of the current and prior *Registered Nurses Acts* and their accompanying Regulations, the CRNNS has authority to deal with complaints concerning issues of professional misconduct, conduct unbecoming the profession, incompetence and incapacity. Prior to the passage of the current *Registered Nurses Act* on April 1, 2009, issues involving professional misconduct, conduct unbecoming the profession, incompetence and incapacity were required to be dealt with using a process of referral to a Complaints Committee for investigation purposes, following which a Complaints Committee would determine whether matters required a formal hearing by the Professional Conduct Committee. Results of the investigative and hearing processes that saw a finding of professional misconduct, conduct unbecoming the profession, incompetence or incapacity were considered to be disciplinary matters, forming part of a registered nurse's record of standing, and were disclosable to the public.
8. Based on the review from other jurisdictions and in consultation with a variety of stakeholders, including the unions representing registered nurses, the CRNNS "Fitness to Practice process" was proposed to be included in a revised *Registered Nurses Act*.
10. During these discussions, it was emphasized that the Fitness to Practice Program was to provide a regime where nurses could receive treatment without being subjected to the traditional disciplinary approach. It was

meant to be a rehabilitative program, focusing on the nurse's healthy return to practice. The process was designed to create a "Remedial Agreement" between the College and the nurse, where the Remedial Agreement was defined as "an agreement approved by the Fitness to Practice Committee setting out the terms and conditions to be met by a member to address issues of incapacity.

ANALYSIS

1. Are the Fitness to Practice Eligibility criteria (the "Criteria") inconsistent with the *Act* and Regulations?

[11] The applicant's first argument is that the criteria are invalid as they are inconsistent with the *Act* and Regulations.

[12] The applicant says that the Criteria set out in Policy No. 19 of the Professional Conduct Services Policy Manual purport to give the Executive Director or her delegate "unfettered discretion" to determine eligibility, which is inconsistent with the *Act* and Regulations.

[13] In *Dunsmuir v. New Brunswick*, [2008] SCC 9, Bastarache and LeBel, JJ., writing for the court, said in para. 28:

28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. ...

[14] There must be authority in the *Registered Nurses Act* for the Executive Director or her delegate to make the decision on eligibility.

[15] In interpreting a statute, one must look not only at the words used but their context and the scheme the Act and its purpose. Iacobucci, J. in *Rizzo v. Rizzo Shoes, Re*, [1998] S.C.J. No. 2 said in para. 21:

... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Both parties agree that this is the proper approach.

[16] The *Act* uses the word “may” in s. 39 (1). It provides that the Executive Director “may” refer the matter to the Fitness to Practice Committee in circumstances set out in that subsection.

[17] The applicant says this unfettered discretion is inconsistent with the context of the *Act* and its purpose in that the intent was that a member who is “incapacitated” as defined should almost automatically be referred to the Fitness to Practice Committee. He says there should be no discretion for the Executive Director to deny this referral except in the most exceptional circumstances. He says the intent of the *Act* is to rehabilitate nurses who have an “incapacity” and this discretion in the Executive Director is contrary to that.

[18] He also says it is in conflict with human rights authorities such as *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1997] 3 S.C.R. 868. In that case, McLachlin, J. (as she then was) said at p. 15:

... Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation

into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics. Such characteristics are frequently based on bias and historical prejudice and cannot form the basis of reasonably necessary standards. ...

[19] The applicant says the respondent has an obligation to provide accommodations for those with disabilities and this scheme does not accomplish that.

[20] This issue was raised in the applicant's written submissions but was not pursued in oral argument. I conclude the applicant abandoned this position at the hearing.

[21] In response, the respondent CRNNS says that the focus of the *Act* as set out in s. 4 is the protection of the public interest and, only in the context of that public interest, is its focus rehabilitation of nurses. She submits that, since the public interest is the primary focus of the *Act*, there must be discretion in the Executive Director to decide if the public interest is in fact protected by referring a nurse to the Fitness to Practice process. The respondent says this is consistent with the context and purpose of the *Act* and not just its literal meaning.

[22] In addition, the respondent refers to s. 39(3) of the *Act* which provides that the Fitness to Practice Committee or the Executive Director may refer a matter to the Complaints Committee.

[23] The Executive Director has discretion with respect to complaints generally. The *Act* provides in s. 38 that “the complaint shall be processed in accordance with the regulations.” Section 51 of the regulations is entitled “Executive Director actions on receiving complaint.” Pursuant to that regulation, the Executive Director has the authority to dismiss the complaint under certain circumstances, informally resolve it, authorize a member’s resignation or “(d) if the matter is not referred to the Fitness to Practise Committee, begin an investigation” Accordingly, there are other instances where the Executive Director can use her discretion with respect to a complaint to dispose of it at an early stage or otherwise deal with it.

[24] In addition, the respondent refers to s. 65 of the Regulations which provide that the Executive Director or her delegate must consider whether the member is eligible for referral to the Fitness to Practice Committee. She has to do so according to the criteria approved by the Council of the CRNNS. This regulation

contemplates a discretion in the Executive Director (or her delegate). It also contemplates that the CRNNS is to establish the criteria for eligibility.

[25] The CRNNS approved Policy No. 19 with respect to eligibility for the Freedom to Practice process, and it has been amended on two occasions.

[26] The primary purpose of the *Act* is the protection of the public. To do so, the CRNNS is given authority to regulate the profession of nursing. That is the context within which I must consider the Fitness to Practice regime set out in the *Act* and Regulations. To ensure that goal is met, the Legislature gave discretion to the Executive Director or her delegate, *inter alia*, to determine if a member should be referred to the Fitness to Practice process or not.

[27] In my view, this is consistent with the purpose of the *Act* and Regulations. If a member is referred to the Fitness to Practice process, any complaints concerning that member do not go through the Professional Conduct process. The public is protected if a nurse who has an incapacity issue has that incapacity dealt with. If there is a complaint not relating to incapacity, protection of the public is

only ensured if the complaint is handled pursuant to the regulations: “Part V: Professional Conduct.”

[28] The regulations as well contemplate there being discretion in the hands of the Executive Director. Section 65(1)S provides that the Executive Director must determine eligibility for the Fitness to Practise process “according to the criteria for eligibility approved by the Council ...”

[29] There is nothing in the *Act* or Regulations that requires that those criteria must be approved by the Legislature. This was left squarely in the hands of the CRNNS by the Legislature, in the same way as was the complaints process. Section 39(1) provides for referral to the Fitness to Practise Committee “in accordance with the regulations,” just as the *Act* provides for complaints to be processed “in accordance with the regulations.”

[30] In my view, the discretion given to the CRNNS could not be clearer. It is not only consistent with the *Act* and Regulations but I conclude it is in fact contemplated by the *Act* and Regulations. If it were otherwise, there would be no need for s. 39(1) to say that the Executive Director “may” refer the matter to the

Fitness to Practise Committee. It would say instead that the matter shall be referred to the Committee.

[31] I therefore do not conclude that the criteria are inconsistent with the *Act* and Regulations and therefore invalid. They do not usurp the role of the Fitness to Practise Committee established by the *Act*.

2. Was the decision reasonable?

[32] In determining whether the decision was reasonable, I am not to substitute my conclusion on the issue for that of Leona Telfer. I am to give deference to her decision. In doing so, I am to determine if the decision is reasonable using the test in *Dunsmuir, supra*. Bastarache and Le, J.J. said in para. 47:

47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a

range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[33] The decision must be one that could be reached based upon the evidence before Leona Telfer. The decision-making process, according to *Dunsmuir*, must be justified, transparent and intelligible. The result must fall within a range of possible and acceptable outcomes which can be defended based upon the facts and law.

[34] Leona Telfer replied to the request from legal counsel for the NSNU that the applicant enter the Fitness to Practice process based upon the results of the assessment. She denied the request. I must assess her denial based upon the above criteria, having regard to the material she had before her. The applicant submits she ignored parts of the assessment in coming to her conclusion. He therefore says her decision is unreasonable using the *Dunsmuir* test.

[35] Leona Telfer had before her the complaint from the applicant's employer, the Investigator's Preliminary Report and the Assessment by Mary McGrath. She referred to the criteria and, in particular, she referred to two of these criteria. What did she say in her responses to counsel for the NSNU?

[36] In her first letter to counsel for the NSNU on September 16, 2009, she quoted the two criteria for ineligibility upon which she relied:

- An incapacity that cannot be successfully treated or remedied or where the Executive Director or delegate believes the member is unlikely to successfully pursue any required remediation or treatment.
- Engaged in professional misconduct/incompetence or conduct unbecoming the profession.

[37] With respect to the former, she referred to the portion of the assessment where Mary McGrath said:

Although Mr. MacNeil accepts his dependency diagnosis, he is ambivalent about abstinence, saying that he is 'unsure' about what he wants. 'I don't necessarily want to continue drinking but I don't want to feel uncomfortable if somebody puts a glass of wine beside me.' He said that he feels 'weak' because he has an alcohol problem and that he does not want to draw unwanted attention to himself by telling someone he no longer drinks. Paradoxically, he has consistently drawn attention to himself when he becomes inebriated and engages in inappropriate or dangerous behavior.

On the one hand, Mr. MacNeil said that he might consider abstinence, while on the other hand he said that he wants to try controlled drinking despite having been unsuccessful with this approach in the past. I advised Mr. MacNeil that it would be highly unlikely he could resume safe and controlled drinking for any significant time. What is most telling about his fear of embracing abstinence is his admission that he would no longer have the 'escape' that alcohol brings him.

[38] She referred to two previous occasions when remediation agreements with the applicant's employer were not successful.

[39] Leona Telfer then referred to the latter criterion upon which she relied. She said that the complaint alleges "activities that could amount to professional misconduct." She mentioned two of the allegations: administration of a drug and drawing of blood. She went on to say:

There is no indication that he was under the influence of alcohol on that day. As such, this behavior does not appear to be related to substance abuse issues.

[40] She concluded:

Mr. MacNeil will therefore continue in the professional conduct process.

[41] In response to a request for clarification from Michael Coyle on September 17, she wrote a further letter on September 25, 2009. In that letter, she referred to the letter of complaint of April 16, 2009. She said:

... The actions of Mr. MacNeil as expressed by the complainant identified activities that created potential harm to this patient. Given the nature of this incident, in combination with the allegations involving Mr. MacNeil's general conduct, I determined that the particular circumstances of this case rendered

Mr. MacNeil ineligible for the Fitness to Practice Program at the time I reviewed the complaint. The Fitness to Practice Program is designed to focus on the remediation of members who bring a cooperative attitude toward rehabilitation, and where the issues involved in a complaint principally relate to incapacity.

[42] She said she “reviewed the allegations contained in the letter of complaint ...” and lists them.

[43] She concluded on page 5 of that letter:

I have concluded that in the particular circumstances of this matter it would not be in the best interest of the public and/or the profession to have this matter diverted from the traditional professional conduct process. The entire legislative scheme of the Act, and in particular its objects as set out in Section 4, have assisted me in reaching this conclusion.

[44] Is the conclusion she arrived at one which is reasonable within the meaning of the test in *Dunsmuir, supra*? Leona Telfer set out the two criteria upon which she relied. She concluded in her September 16 letter that “The College does not believe that Mr. MacNeil is likely to successfully pursue any required remediation or treatment at this time.” (She agreed in cross-examination that in this context she is speaking for the College as a delegate of the Executive Director.)

[45] The applicant says in his written submissions that the Executive Director's delegate ignored parts of the assessment in coming to this conclusion. At the hearing, he said it is more accurate to say that Leona Telfer read the report "selectively" and ignored things inconsistent with her conclusion, such as the "psycho-social issues."

[46] Leona Telfer quoted from the portion of the assessment entitled "Degree of Recovery." In my view, these paragraphs are consistent with Mary McGrath's "CONCLUSIONS" on page 12 of her report. Because the report is subject to the Publication Ban, this paragraph is not quoted.

[47] In my view, Mary McGrath's conclusion follows naturally from the paragraphs Leona Telfer quoted. I therefore conclude that Leona Telfer's decision denying eligibility for that reason is justified by that information. She has clearly set it out, so her reasons are transparent. She has articulated her conclusion in an intelligible way. She did not ignore incapacity issues but outlined how they can be dealt with in the professional conduct process as they were in the past, before the Fitness to Practise process was initiated.

[48] She concluded that the applicant failed to meet one of the criteria. I conclude that her decision was a reasonable one based upon the evidence before her. It is a possible and acceptable outcome based upon what she had before her.

[49] I therefore do not need to deal with the other criterion to which Leona Telfer referred, but I will do so in the event that I am wrong with respect to my conclusion on the first one.

[50] The second criterion and upon which Leona Telfer based her decision is quoted above. The applicant says Leona Telfer treated the allegations against him by his employer as if they were true. These are serious allegations. In her letter of September 16, Leona Telfer says these allegations could be activities amounting to “professional misconduct.” She adds that:

There is no indication that he was under the influence of alcohol on that day. As such, this behaviour does not appear to be related to substance abuse issues.

[51] She reiterated that on cross-examination. However, she also said that the applicant did not admit the key allegation in the complaint - that he tampered with

“the IV pump” settings providing medication to a patient. Leona Telfer concluded the applicant should continue in the Professional Conduct process.

[52] In her subsequent letter to Michael Coyle dated September 25, 2009, Leona Telfer referred on page 3 to a summary of the complaints. She then on p. 4 of her letter expressed the opinion that the allegations

... identified activities that created potential harm to this patient ...

[53] She therefore determined that, in all the circumstances, the applicant was not eligible for the Fitness to Practise process, considering the best interests of the public and the profession.

[54] In my view, Leona Telfer’s reasons are obvious from her letters and therefore her conclusion is transparent. She has justified her conclusion about this criterion by referring to the serious “allegations” and by relating this to the protection of the public in the scheme of the *Act* and Regulations. In my view, this justifies her reasons and explains them in an intelligible way. Other results could have been possible and acceptable but, in my view, this decision is well within the range of reasonable outcomes.

[55] Accordingly, the application for judicial review is dismissed.

COSTS

[56] The respondent is entitled to its costs. Although Michael Coyle, for the applicant, said there are often no costs awarded in such cases, that has not been my experience, nor is it appropriate in this case.

[57] I conclude the respondent is entitled to have its costs. Tariff C provides for costs of \$1,000.00 to \$2,000.00 in a case such as this. Although applications for judicial review are usually complex matters, the parties agreed on the standard of review which lessens the complexity. The parties' oral and written submissions were succinct and the affidavit of Leona Telfer was not a lengthy one, although

she was cross-examined on it for approximately one hour. I therefore conclude, in my discretion, that in all the circumstances, the respondent should have its costs of \$1,500.00.

Hood, J.