**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**GENERAL DIVISION**

2024 NLSC 18 (CanLII)

**Citation**: *Pelley v. College of Physicians and Surgeons of Newfoundland and Labrador*, 2024 NLSC 18
**Date**: January 29, 2024
**Docket**: 201204G0122

BETWEEN:

**VERDON HOWARD PELLEY AND FREDERICK REXTON PELLEY**

APPELLANTS

AND:

**COLLEGE OF PHYSICIANS AND SURGEONS OF NEWFOUNDLAND AND LABRADOR**

RESPONDENT

AND:

**ABDUL SHAIKH**

INTERVENOR

-AND-

**Docket**: 201604G0071

BETWEEN:

**VERDON HOWARD PELLEY AND FREDERICK REXTON PELLEY**

APPELLANTS

AND:

**COLLEGE OF PHYSICIANS AND SURGEONS OF NEWFOUNDLAND AND LABRADOR**

RESPONDENT

AND:

**MERVYN MAYNARD DEAN**

INTERVENOR

2024 NLSC 18 (CanLII)

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**Before:** Justice George L. Murphy

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**On Appeal From:** A Decision of the Complaints Authorization Committee of the College of Physicians and Surgeons of Newfoundland and Labrador pursuant to subs. 44(2) of the *Medical Act, 2011*, S.N.L. 2011, c. M-4.02, dated the 8th day of May, 2012.

**On Appeal From:** A Decision of the Complaints Authorization Committee of the College of Physicians and Surgeons of Newfoundland and Labrador pursuant to subs. 44(2) of the *Medical Act, 2011*, S.N.L. 2011, c. M-4.02, dated the 10th day of March, 2016.

**Place of Hearing:** St. John’s, Newfoundland and Labrador

**Dates of Hearing:** April 19, 2023 and April 20, 2023

**Summary:**

The Court dismissed appeals under s. 44(10) of the *Medical Act, 2011* from decisions of the Complaints Authorization Committee of the Respondent finding that there were no reasonable grounds to believe that the Intervenors had engaged in conduct deserving of sanction. The Court determined that the investigation of the complaints by the Complaints Authorization Committee and the ultimate decisions reached withstood review based on both the standard of reasonableness and the appellate standard. The Respondent and the Intervenors were awarded costs against the Appellants.

2024 NLSC 18 (CanLII)

**Appearances:**

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|---|---|
| Verdon Pelley and Frederick Pelley | Appearing on their own behalf |
| Paul L. Coxworthy | Appearing on behalf of the Respondent |
| Robin F. Cook and Shane R. Belbin | Appearing on behalf of the Intervenors |

**Authorities Cited:**

**CASES CONSIDERED:** *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29; *Oleynik v. Law Society of Newfoundland and Labrador*, 2022 NLSC 151; *Aylward v. Law Society of Newfoundland and Labrador*, 2013 NLCA 68; *Gulliver v. Law Society Complaints Authorization Committee*, 2023 NLSC 23; *Gulliver v. College of Physicians and Surgeons (Newfoundland and Labrador)*, 2012 NLTD(G) 29; *Reddoch v. Yukon Medical Council*, 2001 YKCA 13; and *Gulliver v. College of Physicians of Surgeons Newfoundland and Labrador*, 2012 NLTD(G) 29

**STATUTES CONSIDERED:** *Medical Act, 2011*, S.N.L. 2011, c. M-4.02; *Law Society Act, 1999*, S.N.L. 1999, c. L-9.1; *Criminal Code*, R.S.C. 1985, c. C-46; *Advance Health Care Directives Act*, S.N.L. 1995, c. A-4.1; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11; *Judicature Act*, R.S.N.L. 1990, c. J-4; and *Medical Act, 2005*, S.N.L. 2005, c. M-4.01

**RULES CONSIDERED:** *Rules of the Supreme Court, 1986,* S.N.L. 1986, c. 42, Sch. D

## REASONS FOR JUDGMENT

**MURPHY, J.:**

## INTRODUCTION

[1] This decision relates to two appeals filed with this Court by the Appellants pursuant to subs. 44(10) of the *Medical Act, 2011*, S.N.L. 2011, c. M-4.02 (the "*Act*"). That section provides:

> 44. (10) A complainant whose allegation is dismissed by the complaints authorization committee under subsection (2) may, within 30 days after receiving notice of the dismissal, appeal the dismissal to the Supreme Court by filing a notice of appeal with the court.

[2] The appeals are from decisions of the Complaints Authorization Committee (the "CAC") of the Respondent which dismissed complaints made by the Appellants against each of the Intervenors. The complaints were dismissed based on findings by the CAC in each case that there were no reasonable grounds to believe that either the Intervenor, Dr. Abdul Shaikh, or the Intervenor, Dr. Mervyn Dean, had engaged in conduct deserving of sanction.

## FACTUAL BACKGROUND TO THE ALLEGATIONS AGAINST DR. ABDUL SHAIKH

[3] On or about August 11, 2009, the Appellants filed a complaint (the "Shaikh Allegation") with the Respondent in relation to the medical care provided to their mother, Ida Louise Pelley ("Mrs. Pelley"), by Dr. Shaikh while Mrs. Pelley was a patient at Western Memorial Regional Hospital in Corner Brook between August 2, 2008 and August 6, 2008.

2024 NLSC 18 (CanLII)

[4] In accordance with the procedures provided for in the *Act*, the Shaikh Allegation was referred to the CAC. The CAC investigated the Shaikh Allegation and in a written decision dated May 8, 2012 it held that there were no reasonable grounds to believe that Dr. Shaikh had engaged in conduct deserving of sanction in relation to the care he provided to Mrs. Pelley. As a result and in accordance with subs. 44(2) of the *Act*, it dismissed the allegation against Dr. Shaikh. It was from this decision dismissing the Shaikh Allegation that the Appellants appealed to this Court in accordance with subs. 44(10) of the *Act*.

2024 NLSC 18 (CanLII)

**FACTUAL BACKGROUND TO THE ALLEGATIONS AGAINST DR. MERVYN DEAN**

[5] By letter to the Respondent dated July 29, 2014 and received by the Respondent on August 1, 2014, the Appellants filed a complaint (the "Dean Allegation") with the Respondent in relation to the medical care provided to Mrs. Pelley by Dr. Dean while Mrs. Pelley was a patient at Western Memorial Regional Hospital during the time period, as stated by the Appellants, of "on or about August 2 to August 6 and 7, 2008".

[6] In accordance with the procedures provided for in the *Act*, the Dean Allegation was referred to the CAC. The CAC investigated the Dean Allegation and in a written decision dated March 10, 2016 it held that there were no reasonable grounds to believe that Dr. Dean had engaged in conduct deserving of sanction in relation to the care provided to Mrs. Pelley. As a result and in accordance with subs. 44(2) of the *Act*, it dismissed the complaint against Dr. Dean. It was from this decision dismissing the Dean Allegation that the Appellants appealed to this Court in accordance with subs. 44(10) of the *Act*.

**PARTICULARS OF THE SHAIKH ALLEGATION**

[7] In its decision in respect of the Shaikh Allegation, the CAC outlined that it believed the complaint of the Appellants could be summarized as follows:

2024 NLSC 18 (CanLII)

> Summary of the Complaint
>
> The Committee believed that the complaint can be summarized as follows:
>
> - Mr. Frederick Pelley alleged that “all life support and enhancements were completely dismantled without significant senior family consent or other authority directive;
> - Mr. Frederick Pelley and/or Mr. Verdon Pelley implied that the care provided to their mother by Dr. Shaikh was with the inappropriate consent of their younger brother, Mr. Calvin Pelley; and
> - Mr. Frederick Pelley and/or Mr. Verdon Pelley raised questions regarding the actual management provided to their mother by Dr. Shaikh.

[8] Based on my review of the various documents reviewed by the CAC as referenced in its decision in respect of the Shaikh Allegation dated May 8, 2012, I am of the view that the CAC’s summary of the complaint of the Appellants regarding the care provided by Dr. Shaikh to Mrs. Pelley was accurate.

## PARTICULARS OF THE DEAN ALLEGATION

[9] In its decision in respect of the Dean Allegation, the CAC outlined that it understood the allegation of the Appellants relating to Dr. Dean to be that:

> Summary of the Complaint
>
> After reviewing the above Complaint Record, the Committee understood the allegation of Mr. Frederick Pelley and Mr. Verdon Pelley to be that:
>
> - Dr. Dean brought about the early death of their mother, Ms. Ida Louise Pelley, by providing only palliative rather than active care.
> - Dr. Dean did not take appropriate steps to establish the identity of the individual that had substitute decision making authority on behalf of Ms. Pelley.

[10] Based on my review of the various documents reviewed by the CAC as referenced in its decision in respect of the Dean Allegation dated March 10, 2016, I

am of the view that the CAC's summary of the complaint of the Appellants regarding the care provided by Dr. Dean to Mrs. Pelley was accurate.

**APPELLANTS' ORAL SUBMISSION ON THE PARTICULARS OF THE SHAIKH AND DEAN ALLEGATIONS**

[11] At the oral hearing of these appeals, I asked the Appellants to confirm what they alleged the Intervenors did or did not do in the treatment of Mrs. Pelley and which, in their opinions, amounted to conduct deserving of sanction. Their response was that the doctors had improperly authorized the removal of life sustaining supports or measures and had improperly authorized an overdosage of drugs to their mother and these actions or measures caused her death. The allegations of improper authorization were based on the underlying argument that Calvin Pelley, the brother of the Appellants who purported to have the authority to make healthcare decisions for Mrs. Pelley, did not have such authority.

**STANDARD OF REVIEW**

[12] The Supreme Court of Canada in its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 attempted to clarify the determination and application of the standard of review for courts when reviewing decisions of administrative tribunals such as the CAC.

[13] At para. 10 of the Joint Reasons for Judgment of the majority of the Court in *Vavilov*, it was stated:

> [10] This process has led us to conclude that a reconsideration of this Court's approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.

2024 NLSC 18 (CanLII)

[14] Thus, the presumptive starting point for the standard of review analysis is reasonableness. However, as noted, there are certain situations and circumstances where it is necessary to depart from the presumption of reasonableness. One of those situations is where the legislation provides for a different standard of review.

2024 NLSC 18 (CanLII)

[15] As noted earlier in this case, these matters are before this Court as appeals under subs. 44(10) of the *Act*. *Vavilov* discussed the standard of review in situations where the legislature had provided for a specific right of appeal. At paras. 33 – 37, it was stated:

> B. Derogation From the Presumption of Reasonableness Review on the Basis of Legislative Intent
>
> [33] This Court has described respect for legislative intent as the "polar star" of judicial review: C.U.P.E. v. Ontario (Minister of Labour), 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 149. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker. Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.
>
> (1) Legislated Standards of Review
>
> [34] Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: see, e.g., R. v. Owen, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 31-32; Khosa, at paras. 18-19; British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 20; Moore v. British Columbia (Education), 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 55; McCormick v. Fasken Martineau DuMoulin LLP, 2014 SCC 39, [2014] 2 S.C.R. 108, at para. 16; British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority, 2016 SCC 25, [2016] 1 S.C.R. 587, at paras. 8 and 29; British Columbia Human Rights Tribunal v. Schrenk, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 28.

[35] It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the Administrative Tribunals Act, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C. Human Rights Tribunal is to be correctness: ibid., s. 59(1); Human Rights Code, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

2024 NLSC 18 (CanLII)

(2) Statutory Appeal Mechanisms

[36] We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": Seneca College of Applied Arts and Technology v. Bhadauria, 1981 CanLII 29 (SCC), [1981] 2 S.C.R. 181, at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in her factum, [TRANSLATION] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

[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.

2024 NLSC 18 (CanLII)

[16] Subsequent to *Vavilov*, there was some uncertainty whether the Court's reasoning applied only to substantive issues or whether it extended to issues of procedural fairness. The uncertainty was clarified in the decision of the Supreme Court of Canada in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29. Rowe, J.A. for the majority of the Court said at paras. 26 – 30:

> A. Standard of Review
>
> [26] This case allows the Court to clarify the standard of review applicable to questions of procedural fairness and abuse of process in a statutory appeal. The Court received submissions from the parties and interveners on this point.
>
> [27] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the Court held that when the legislature provides for a statutory appeal mechanism from an administrative decision maker to a court, this indicates that appellate standards are to apply: paras. 33 and 36-52. While this proposition was stated in the context of substantive review, the direction that appeals are to be decided according to the appellate standards of review was categorical. Thus, where questions of procedural fairness are dealt with through a statutory appeal mechanism, they are subject to appellate standards of review.
>
> [28] This does not depart from *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, and *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, as those decisions related to judicial review and to the granting of prerogative writs. Here, we are dealing with a statutory appeal. As our Court has stated in *Vavilov*, at para. 36, "[w]here a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis."
>
> [29] This case is a statutory appeal pursuant to *The Legal Profession Act, 1990*. Therefore, the standard of review is correctness for questions of law and palpable and overriding error for questions of fact and of mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, at paras. 24-25.

> [30] Whether there has been an abuse of process is a question of law. Thus, the applicable standard of review is correctness.

[17] Thus, the Supreme Court of Canada confirmed that the standard of review for both substantive and procedural issues in the case of statutory appeals is the appellate standard. That means the standard of review is correctness for questions of law, including questions of statutory interpretation, and palpable and overriding error for questions of fact and of mixed fact and law.

2024 NLSC 18 (CanLII)

[18] I would note that in *Oleynik v. Law Society of Newfoundland and Labrador*, 2022 NLSC 151, my colleague Noel, J. dealt with the issue of the applicable standard of review in an appeal from a decision of the complaints authorization committee of the Law Society of Newfoundland and Labrador dismissing allegations against a Law Society member. Subsection 45(7) of the *Law Society Act, 1999*, S.N.L. 1999, c. L-9.1 provided a statutory right of appeal for complainants from decisions of the complaints authorization committee of the Law Society. The wording of subs. 45(7) is almost identical to the wording of subs. 44(10) of the *Act*. Subection 45(7) states:

> 45(7) A complainant whose allegation is dismissed by the complaints authorization committee under subsection (2) may, within 30 days after receiving notice of the dismissal, appeal the dismissal to the Supreme Court by filing a notice of appeal with the court.

[19] While Noel, J. concluded, based on *Vavilov* and subs. 45(7) of the *Law Society Act, 1999*, that appellate standards of review applied to decisions of the complaints authorization committee of the Law Society, he went on to find, based on *Aylward v. Law Society of Newfoundland and Labrador*, 2013 NLCA 68, that the standard of review applicable to a decision of the complaints authorization committee was reasonableness.

[20] Subsequently, in *Gulliver v. Law Society Complaints Authorization Committee*, 2023 NLSC 23, Browne, J. of this Court dealt with the standard of review in the context of an appeal from a decision of the complaints authorization committee of the Law Society. The decision was that there were no reasonable grounds to believe that a member had engaged in conduct deserving of sanction. At para. 47, Browne, J. said:

> 47 Based on my reading of the wording contained in section 45(7) of the *Act*, and relying on the Supreme Court's analysis as set out in paragraph 33 and paragraphs 36 to 38 of *Vavilov*, and paragraphs 27 to 29 of *Abrametz*, I conclude the legislature intended the appellate standard to be applied to appeals from a decision of the CAC dismissing an allegation. The standard of reasonableness is to be reserved exclusively for statutory wording which permits a Court to conduct a judicial review.

2024 NLSC 18 (CanLII)

[21] Thus, there are conflicting authorities in this Court on the appropriate standard of review applicable to appeals from decisions of complaints authorization committees. I understand that both of these decisions are under appeal and hopefully the results of such appeals will provide clarity as to the standard of review in such cases.

[22] In any event, I find it unnecessary to decide whether the approach in *Oleynik* or *Gulliver* is correct because my decision in this case would be the same whether the reasonableness or appellate standard applied.

## ANALYSIS

### Collateral arguments

[23] The Appellants attempted on multiple occasions to expand this proceeding beyond what it is, namely a statutory appeal under the *Act*. In particular, the Appellants:

a. made express and implied allegations of criminal conduct and/or violations of the *Criminal Code*, R.S.C. 1985, c. C-46 by Dr. Shaikh and Dr. Dean;

b. alleged that the *Act* and the *Advance Health Care Directives Act*, S.N.L. 1995, c. A-4.1 ("*AHCDA*") were in conflict with the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11; and

c. alleged that the Respondent had misled them with respect to the appeal process under the *Act*.

2024 NLSC 18 (CanLII)

[24] These appeals were case managed commencing on November 2, 2020 and as part of the case management process the Appellants were advised well in advance of the hearing of the appeals that allegations set forth in para. 23 above and arguments regarding same would not be considered as part of these appeals.

[25] As early as a case management meeting of June 22, 2021, the Appellants were told that the Court would not consider a *Charter* application they had previously filed challenging the constitutionality of the *Act* and the *AHCDA* because, despite being advised of the need to do so, they had not provided the required notice of such application to the Attorneys General of Newfoundland and Labrador and Canada as required by the *Judicature Act*, R.S.N.L. 1990, c. J-4. Notwithstanding being so advised during the case management process, the Appellants again raised the issue of the aforementioned legislation being inconsistent with the *Charter* in their Supplemental Factum filed on July 7, 2022.

[26] In the context of a decision on these appeals, it would be improper for this Court to consider the issue of the constitutionality of the legislation in question. There are a number of reasons why that is so. Firstly, the Appellants were already told in June of 2021 that the Court would not consider such arguments because they had not given the required notice. Nothing in that regard changed as there is still no evidence that the required notices were given. In addition, it would be fundamentally unfair to require the Respondent or the Intervenors to respond to these arguments when the Court told the Appellants in June of 2021 and on subsequent occasions that the Court would not consider these arguments in the context of these appeals. In addition, and most importantly, the nature of a statutory appeal such as this is that the Court is conducting a review of decisions of the CAC to assess, depending on

what one accepts as the appropriate standard of review, whether they meet the appellate or reasonableness standard. Their decisions were made within the context of the *Act* and the *AHCDA* as they existed at the time and any review by this Court must be conducted within the same legislative framework not some different legislative framework that might result from certain parts of either or both of these pieces of legislation being found to be in violation of the *Charter*.

2024 NLSC 18 (CanLII)

[27] As for the express and implied allegations of criminal conduct on the part of the Intervenors which were made by the Appellants, they were told on multiple occasions, again as part of the case management process, that neither the work carried out by the CAC nor the review of same by this Court on an appeal was in the nature of a criminal proceeding. They were also told that the Court would not be making any examination of whether any conduct on the part of either of the Intervenors was criminal in nature. Despite this, the Appellants still attempted to allege criminal conduct on the part of the Intervenors at the hearing of these appeals.

[28] Neither the Respondent nor the CAC had any legal authority to investigate allegations as alleged violations of the *Criminal Code*. Equally, they had no legal authority to make findings that there had been any breaches of the *Criminal Code*. Further, and most importantly at this point, this Court does not have the jurisdiction in the context of appeals from decisions of the CAC to determine whether or not any action, conduct or inaction was criminal in nature or constituted a violation of the *Criminal Code*.

[29] All of the foregoing being said, I do think it is important and appropriate for the Court to say that based on a review of the Record in both proceedings before the CAC and all other material put before the Court on these appeals, I see absolutely no merit in the allegation that the conduct of either of the Intervenors was criminal in nature or amounted to a violation of the *Criminal Code*.

[30] Finally, I will deal with the allegation that the Respondent had misled the Appellants with respect to the appeal process under the *Act*. The essence of this allegation is that the Appellants said they were told by the Respondent to pursue the appeal process to this Court when such procedure could not, even if they were

successful, give them the remedies they were seeking. This allegation by the Appellants was based on the fact the Respondent argued in its initial Memorandum of Fact of Law filed on April 8, 2014 that this Court had no jurisdiction on an appeal from a decision of the CAC to make a finding that a doctor was guilty of conduct deserving of sanction. The basis of this argument by the Respondent was that since the CAC had no legislative authority to make a finding that a doctor was guilty of conduct deserving of sanction (that power being reserved to an adjudication tribunal under the *Act*) then the Court on review of such a decision on an appeal was similarly constrained.

2024 NLSC 18 (CanLII)

[31] There is no evidence whatsoever to support the allegation that the Respondent told the Appellants to pursue this appeal process. The Appellants received a letter from the Respondent in respect of each complaint which contained the following paragraph:

> Under subsection 44 (10) of the *Medical Act, 2011*, a complainant whose allegation is dismissed by the Complaints Authorization Committee may, within thirty (30) days after receiving notice of the dismissal, appeal the dismissal to the Trial Division by filing a Notice of Appeal with the Registrar of the Supreme Court. Complainants who are considering an appeal are advised to familiarize themselves, or obtain legal advice, regarding the procedural requirements of filing and proceeding with an appeal.

This is certainly not a directive by the Respondent telling the Appellants what to do. Instead, it merely advised the Appellants of a right to appeal provided for in the *Act*. The letter said nothing about the potential remedies available through that appeal process and the Respondent had no obligation to advise the Appellants as to what the Respondent believed were the potential remedies.

[32] I would note two further points in respect of this allegation. Firstly, the Appellants were for a period of time represented by counsel in respect of the appeal relating to the Shaikh Allegation and it was their counsel who filed a Memorandum of Fact and Law on behalf of the Appellants in that appeal on March 20, 2014. In that Memorandum of Fact and Law counsel for the Appellants included a submission as to the remedy being sought. While that submission included an argument that this Court should dispose of the appeal by finding Dr. Shaikh deserving of sanction, it

also included as an alternative claim that the decision of the CAC be struck down and the matter returned to the Respondent with specific directions as to how the complaint be reconsidered by the Respondent. This submission by the Appellants through their counsel indicates that the Appellants were aware as early as March of 2014 and likely earlier that a possible remedy for a successful appeal was simply that the matter be referred back to the Respondent without any finding by this Court of wrongdoing on the part of Dr. Shaikh.

2024 NLSC 18 (CanLII)

[33] Further, even if the Appellants for some reason did not initially understand the limitations on the possible remedies available to them through the complaint process under the *Act* and the appeal process arising therefrom, they were certainly aware of it by March of 2014. I would note that this was before the filing of the appeal relating to the Dean Allegation and was over nine years prior to the hearing of these appeals in this Court. If the Appellants were not happy with the possible remedies available through the appeal process, they could have abandoned the appeals long ago or continued with the appeals and at the same time sought the other remedies they believed were appropriate through some other legal process.

[34] Overall, I find no merit in the allegation of the Appellants that they were misled by the Respondent.

**The report of Dr. Henner-Kluge**

[35] The Appellants when represented by counsel earlier in the course of these appeals file with the Court what was purported to be an expert opinion report prepared by Dr. Erik Henner-Kluge. It offered certain opinions on the care provided to Mrs. Pelley by the Intervenors. The Appellants attempted to rely on this report in support of their arguments on the appeals. The Intervenors objected to this report being considered for both procedural and substantive reasons.

[36] While the admission of fresh evidence may be possible on an appeal such as this as was recognized by Orsborn, J. in *Gulliver v. College of Physicians and Surgeons (Newfoundland and Labrador)*, 2012 NLTD(G) 29. Orsborn, J. also

pointed out that the threshold for the introduction of such evidence is considerably higher than in the context of inter partes litigation.

2024 NLSC 18 (CanLII)

[37] In any event, it is not necessary for me to consider if the threshold is reached in this case. That is because it would be fundamentally unfair to the Intervenors to rely on this report given the procedural history of this matter.

[38] The issue of this report came up during the case management process and the Appellants were told on more than one occasion that if they wished to have any evidence that was not before the CAC considered on these appeals they would have to file an application seeking an order permitting such evidence to be considered. No such application was filed. The report as filed with the Court amounts to hearsay opinion evidence from a witness whose qualifications have not been assessed by the Court. It would be fundamentally unfair to the Respondent and to the Intervenors to simply consider such evidence without the Respondent and the Intervenors having an opportunity to challenge through cross-examination the qualifications of Dr. Henner-Kluge or the opinions offered by him. As a result, I have not considered the report of Dr. Henner-Kluge in making my decision on these appeals.

**Substantive complaints**

[39] I will now deal with the substantive complaints of the Appellants regarding the care provided to Mrs. Pelley by the Intervenors and the decisions of the CAC dismissing the complaints. As noted earlier, the CAC found that there were no reasonable grounds to believe that either of the Intervenors had engaged in conduct deserving of sanction. The Court's role on this appeal is to examine these decisions by the CAC in light of the applicable standard of review and determine whether the CAC made any error which would justify the Court interfering with their decisions.

[40] It was not crystal clear exactly what the Appellants felt was wrong with the decisions of the Complaints Authorization Committee; however, as best as I could determine, they took issue with the investigation carried out and the ultimate conclusion reached by the CAC. I will address both of these issues.

## THE INVESTIGATION OF THE ALLEGATIONS AGAINST DR. SHAIKH

[41] I previously indicated at para. 8 of this decision that the CAC had accurately summarized the complaints of the Appellants against Dr. Shaikh. Essentially, the Appellants alleged that Dr. Shaikh committed professional misconduct by providing care to Mrs. Pelley on instructions from her son, Calvin Pelley, on the basis that he had the legal authority to make decisions on the health care to be provided to her but without taking appropriate steps to determine he did in fact have such legal authority.

2024 NLSC 18 (CanLII)

[42] The issue for the CAC to examine was whether there were reasonable grounds to believe Dr. Shaikh committed professional misconduct by proceeding on the basis that Calvin Pelley had the legal authority to make health care decisions for Mrs. Pelley. I would note that whether or not Calvin Pelley actually had such legal authority was not the determinative factor. That is because even if he did not, which appears to have been the case, that did not mean that Dr. Shaikh committed professional misconduct by proceeding on the basis that he did. Instead, an investigation of whether there were reasonable grounds to believe Dr. Shaikh had committed professional misconduct in this case required the CAC to examine the information that was presented or available to Dr. Shaikh related to the issue and whether his decision that Calvin Pelley had the legal authority was reasonable in the circumstances based on that information.

[43] In its decision in respect of the Shaikh Allegation, the CAC outlined at page 2 the documents which it reviewed in arriving at its decision as follows:

> The Documents Reviewed by the Committee
>
> The Committee reviewed the following documents:
>
> - Original allegation from Mr. Frederick Pelley dated August 11, 2009, with further correspondence dated November 6, 2009 with attachments:
>
>   i. Letter to Dr. Susan Gillam from Mr. Frederick Pelley dated October 22, 2009;
>   ii. Letter to Dr. Shaikh dated October 30, 2009 from Mr. Frederick Pelley and Mr. Verdon Pelley;

iii. Consent form for release of hospital records related to Mrs. Ida Louisa (sic) Pelley's admission to the Western Regional Memorial Hospital on August 2-6, 2008; and
iv. Letter to Dr. Young dated October 19, 2009 from Mr. Frederick Pelley.

- Further correspondence from Mr. Verdon Pelley dated May 21, 2010;
- Further correspondence from Mr. Verdon Pelley dated October 25, 2010;
- Further correspondence from Mr. Verdon Pelley dated November 24, 2010;
- Response from Dr. Shaikh dated February 11, 2011 with attachments:

i. Copy of correspondence dated August 8, 2009 from Mr. Frederick Pelley to Dr. Shaikh;
ii. Copy of correspondence dated August 31, 2009 from Dr. Shaikh to Mr. Frederick Pelley;
iii. Copy of correspondence from Mr. Frederick Pelley and Mr. Verdon Pelley to Dr. Shaikh dated October 30, 2009;
iv. Copy of correspondence from Dr. Shaikh to Mr. Frederick Pelley dated November 17, 2009;
v. Copy of questions posed by Mr. Pelley to Dr. Jenkins dated November 26, 2010; and
vi. Copy of correspondence to Dr. Jenkins from Dr. Shaikh dated December 15, 2010.

- The response from Mr. Verdon Pelley dated March 31, 2011;
- Memo from Dr. Duguid, Internist and Assistant Registrar, dated June 8, 2011;
- Two memos from Dr. Collingwood dated August 23, 2011 and November 7, 2011, both regarding telephone conversations with Mr. Calvin Pelley;
- Correspondence from Mr. Verdon Pelley dated August 18, 2011 with attachments:

i. Copy of letter to Dr. Robert Young dated November 24, 2010;
ii. Copy of letter to Dr. Robert Young dated March 31, 2011;
iii. Copy of letter to Dr. Ken Jenkins dated April 19, 2011; and
iv. Copy of letter to Dr. Ken Jenkins dated June 27, 2011.

- Correspondence from Mr. V.H. Pelley dated August 31, 2022 with attachments:

i. Copy of letter to Dr. Simon Avis dated May 12, 2010;
ii. Copy of letter to Dr. Simon Avis dated January 31, 2011; and

- Medical records from Western Memorial Regional Hospital pertinent to the admission of Mrs. Ida Louise Pelley from August 2 to August 6, 2008.

2024 NLSC 18 (CanLII)

[44] The *Medical Act, 2005*, S.N.L. 2005, c. M-4.01, which was applicable at the time the Shaikh Allegation was made, had an identical provision as the *Act* dealing with the powers of investigation of the CAC. That provision in the *Medical Act, 2005* was s. 39(1)(b) and in the *Act* is 44(1)(d). It provides:

> 44 (1) After an allegation has been submitted to the complaints authorization committee, the committee may exercise one or more of the following powers:
>
> . . .
>
> (d) conduct an investigation itself or appoint a person to conduct an investigation on its behalf;

[45] Thus, the legislation permits but does not mandate that an investigation be conducted. In this case, an investigation was conducted in that the CAC appointed an investigator, namely Dr. Duguid, to prepare a report and this was one of the documents reviewed by the CAC.

[46] I would note that the CAC is a specialized body that in this case had three medical practitioners as members. The CAC has the legislative authority to review allegations and determine within the applicable legislative parameters how they should be dealt with. Given the statutory power of the CAC and its specialized knowledge, their decisions, including decisions on the type or manner of an investigation carried out in each case, are subject to significant deference.

[47] I am of the view that the documents reviewed by the CAC were sufficient to provide them with the evidentiary background to make the necessary findings of fact to deal with the Shaikh Allegation. There is nothing to indicate that the CAC failed to investigate some material aspect of the Allegation or that it was otherwise deficient in their investigation in any material manner. Overall, I see no basis to interfere with the decision of the CAC based on them not having conducted a proper investigation.

2024 NLSC 18 (CanLII)

## THE INVESTIGATION OF THE DEAN ALLEGATION

[48] I previously indicated at para. 10 of this decision that the CAC had accurately summarized the complaint of the Appellants against Dr. Dean. Essentially, the Appellants alleged that Dr. Dean had committed professional misconduct by providing only palliative rather than active care and related thereto that he did not take appropriate steps to determine whether in fact Calvin Pelley had substitute decision-making authority on behalf of Mrs. Pelley.

2024 NLSC 18 (CanLII)

[49] As I discussed in relation to the Shaikh Allegation, an investigation of that issue required the CAC to examine the information that was available to Dr. Dean and the basis upon which he concluded that Calvin Pelley had substitute decision-making authority for Mrs. Pelley.

[50] In its decision in respect of the Dean Allegation, the CAC outlined the documents it reviewed starting at page 2 of its decision as follows:

> - Correspondence from Mr. Frederick Pelley and Mr. Verdon Pelley to the College dated July 29, 2014 and filed with the College on August 1, 2014.
> - Correspondence from Dr. Dean to the College dated September 25, 2014 and filed with the College on October 6, 2014.
> - Correspondence from Mr. Frederick Pelley and Mr. Verdon Pelley to the College dated October 31, 2014 and filed with the College on November 3, 2014.
> - Correspondence from Dr. Dean to the College dated December 18, 2014 and filed with the College on January 5, 2015.
> - Correspondence from Mr. Frederick Pelley and Mr. Verdon Pelley to the College dated March 2, 2015 and filed with the College on March 4, 2015.
> - Correspondence from Dr. Dean to the College dated April 13, 2015 and filed with the College on April 17, 2015.
> - Correspondence from Dr. Dean to the College dated August 6, 2015 and filed with the College on August 10, 2015.
>
> The complete hospital record was available to the Committee during their meeting, with the full records reviewed by the clinical investigator who provided relevant details to the Complaints Authorization Committee.

2024 NLSC 18 (CanLII)

[51] My comments earlier in relation to the investigation of the Shaikh Allegation regarding the powers of investigation available to the CAC apply equally to the investigation of the Dean Allegation. Similarly, my comments earlier that decisions of the CAC regarding the type or manner of the investigation carried out in a particular case being entitled to significant deference are also equally applicable.

[52] I am of the view that the documents reviewed by the CAC were sufficient to provide it with the evidentiary background to make the necessary findings of fact to deal with the Dean Allegation. There is nothing to indicate that the CAC failed to investigate some material aspect of the Allegation or that it was otherwise deficient in their investigation in any material way. Overall, I see no basis to interfere with the decision of the CAC based on them not having conducted a proper investigation.

**THE DECISION ON THE SHAIKH ALLEGATION**

[53] I will now deal with the decision of the CAC regarding the Shaikh Allegation. It concluded there were no reasonable grounds to believe that Dr. Shaikh had engaged in conduct deserving of sanction.

[54] In assessing the conclusion of the CAC it is necessary to review their decision in its entirety and to keep in mind that the role of the CAC was to determine whether there were reasonable grounds to believe that Dr. Shaikh had engaged in conduct deserving of sanction.

[55] Subsection 34(c) of the *Medical Act, 2005*, defined “conduct deserving of sanction” as follows:

> 34. In sections 35 to 51
>
> (c) "conduct deserving of sanction" includes
> (i) professional misconduct,
> (ii) professional incompetence,
> (iii) conduct unbecoming a medical practitioner,

> (iv) incapacity or unfitness to engage in the practice of medicine, and
> (v) acting in breach of this Act, the regulations or the code of ethics made under section 12;

This version of the *Medical Act* was in force at the time of the conduct complained of. I would note that s. 39(c) of the *Act* contains virtually the same definition.

2024 NLSC 18 (CanLII)

[56] The *Medical Act, 2005*, did not provide a definition for the terms enumerated in subs. 34(c). However, the Respondent had adopted a by-law which was in effect at the relevant time period and which defined the terms “professional misconduct” and “professional incompetence”. These are the only terms from those enumerated in subs. 34(c) which were potentially applicable to the complaints made by the Appellants.

[57] By-law 5: Code of Ethics of the Respondent defines “professional misconduct” in relation to standards of practice at section 4(h) as follows:

> 4. Professional misconduct for the purposes of sections 34 to 51 of the Act shall include:
>
> (h) Failing to maintain the generally accepted standards of practice expected by the profession in the branches of medicine in which a medial practitioner is practising, such as to indicate gross negligence or reckless disregard for the health and well-being of a patient.

[58] It defines “professional incompetence” at section 6 as follows:

> 6. Professional incompetence for the purposes of sections 34 to 51 of the Act means the demonstration by a medical practitioner’s care of one or more patients that he or she lacks skill or judgment, of a nature or to an extent that the medical practitioner is unfit to continue to practice, or that his or her practice should be restricted, or that the medial practitioner should comply with one or more of the remedial measures which may be ordered pursuant to subsection 43(2) or 44(3) of the Act.

[59] The term professional misconduct has also been considered by courts. In *Reddoch v. Yukon Medical Council*, 2001 YKCA 13, the Yukon Territory Court of Appeal had to deal with the issue of the meaning of the professional misconduct in the context of a complaint against a medical doctor. The Court of Appeal considered whether the term unprofessional conduct in the applicable legislation could encompass the failure to exercise reasonable care and skill in the management of one patient. In deciding, it did not, Southin, J. for the Court said at paras 56 – 61:

> 55 There being no evidence of local practice differing from what Dr. Assad said was proper medical practice, we cannot give effect to this ground of appeal.
>
> 56 As the argument before us developed, the critical issue on this appeal became apparent. It is whether the words "unprofessional conduct" in this statute encompass the appellant's acts of omission which, on the findings of the Committee, can be summed up as a failure to exercise reasonable care and skill in the management of one patient whom neither he nor three other physicians believed to be gravely ill. In my opinion, the answer to that question is "no". The route which should have been gone down is not the route of s. 24 but the route of s. 22, an investigation into the standard of practice of the appellant.
>
> 57 A great many authorities were cited to us. I do not propose to analyse them as the facts differ from case to case, and the statutes under consideration, while in *pari materia*, are not identical.
>
> 58 It is open to the Legislature of the Yukon to define "unprofessional conduct" as including a single failure to exercise reasonable care and skill in the management of one patient. If it chooses to do so, it is not improbable that every physician in the Yukon will be guilty at some time or another of an offence. As I remarked in *de la Giroday v. Brough* (1997), 33 B.C.L.R. (3d) 171 at 175:
>
>> I doubt that there is a professional man or woman, no matter how generally competent and experienced, who has never had occasion to say to himself or herself, "How could I have been so blind?" Such might well have been the reflection of the defendant in *Lankenau v. Dutton*, [1991] 5 W.W.R. 71, 79 D.L.R. (4th) 705, 55 B.C.L.R. (2d) 218 (B.C.C.A.), who was, on the evidence, a most competent surgeon.
>
> 59 In coming to this conclusion, I am not in any way differing from the Inquiry Committee's conclusion as to what proper practice was in the circumstances or their conclusions as to what had in fact happened.
>
> 60 What I do say is that when the issue is one of a failure of reasonable care, the conduct of the physician in order to constitute "unprofessional conduct" must have

2024 NLSC 18 (CanLII)

> about it some quality of blatancy - some cavalier disregard for the patient and the patient's well being.
>
> 61 There was no blatant disregard in this case.

2024 NLSC 18 (CanLII)

[60] In this province, Orsborn, CJTD in *Gulliver v. College of Physicians of Surgeons Newfoundland and Labrador*, 2012 NLTD(G) 29 dealt with the issue of the meaning of professional misconduct in the context of the function of the CAC of the Respondent. At paras. 40 – 42, he said as follows:

> 40 In the context of conduct deserving of sanction, the legislation and the associated Code of Ethics define professional misconduct as including a failure "to maintain the generally accepted standards of practice expected by the profession in the branches of medicine in which a medical practitioner is practising, such as to indicate gross negligence or reckless disregard for the health and well-being of a patient".
>
> 41 The term "misconduct" connotes something other than negligence in and of itself. In the above extract from the Code of Ethics, the use of the words "maintain" and "gross negligence or reckless disregard" connotes either an ongoing failure to meet acceptable standards or a radical departure from those standards.
>
> 42 In my view, the notions of sanction and misconduct in the context of the discipline regime under the *Act* contemplate something other than an isolated case of 'ordinary' negligence. The legislature would of course be aware that a failure to meet professional standards may in some cases merit a civil remedy but not require disciplinary action by the profession. Without in any way condoning or minimizing negligent conduct, it seems to me unlikely that in crafting the statutory regime for ongoing management and regulation of the profession in the public interest, the legislature intended that disciplinary procedures would be invoked following an isolated non-reckless failure to meet the standards of the profession.

[61] In determining whether there are reasonable grounds to believe that a doctor who is the subject of a complaint has engaged in conduct deserving of sanction, the CAC acts as a screening body. If the CAC concludes there are reasonable grounds, it does not make a finding that the doctor has engaged in conduct deserving of sanction but instead the matter goes to an adjudication tribunal for a hearing to determine that question. However, where the issue is whether a doctor committed professional misconduct, the CAC as part of its screening function is still required to take into consideration that the standard for professional misconduct is very high.

To adopt the wording of Orsborn, CJTD, before making a finding that there are reasonable grounds to believe that the conduct of a doctor amounted to professional misconduct, the CAC would have to be satisfied that the doctor's actions or inactions were of such a nature as to constitute an ongoing failure to meet acceptable standards or a radical departure from those standards. It is my view that the standard for professional incompetence is similarly high.

2024 NLSC 18 (CanLII)

[62] In the context of the complaint of the Appellants against Dr. Shaikh, what the CAC had to consider was whether Dr. Shaikh's conduct in accepting that Calvin Pelley had the legal authority to make healthcare decisions on behalf of his mother and the care he provided as a result thereof was a radical departure from the generally accepted standards of practice. That is because there was no issue in this case of an ongoing failure to meet acceptable standards.

[63] In examining this issue, it is necessary to consider the *AHCDA* which provides a legislative framework whereby a person can appoint a substitute decision-maker to make healthcare decisions on his or her behalf. Such an appointment must be in writing. It also outlines a procedure for determining who may act as a substitute decision-maker where a person is incompetent, has not appointed a substitute decision-maker and does not have a guardian. This procedure is found in s. 10 of the *AHCDA* which provides:

> 10. (1) Where a person requires the administration of health care but lacks the competency to make a health care decision and has not, while he or she was competent, appointed a substitute decision maker, or a guardian has not been appointed for the purpose by a court, or a person has been appointed but is unable or refuses to act, the first named person or a member of the category of persons on the following list may, if he or she is at least 19 years of age, act as a substitute decision maker:
>
> (a) the incompetent person's spouse;
> (b) the incompetent person's children;
> (c) the incompetent person's parents;
> (d) the incompetent person's siblings;
> (e) the incompetent person's grandchildren;
> (f) the incompetent person's grandparents;
> (g) the incompetent person's uncles and aunts;
> (h) the incompetent person's nephews or nieces;

(i) another relative of the incompetent person; and
(j) the incompetent person's health care professional who is responsible for the proposed health care.

(2) Notwithstanding subsection (1), where a substitute decision maker is not available, or is unable or unwilling to make the health care decision, the substitute decision maker for that decision becomes the next available person or category of persons listed in subsection (1).

(3) Notwithstanding subsection (1), where a person has indicated in an advance health care directive that he or she does not wish an individual to act as his or her substitute decision maker, the individual may only act as the substitute decision maker where he or she is the person's guardian appointed by the court or the Provincial Director of Adults in Need of Protective Intervention under the *Adult Protection Act, 2021.*

(4) Notwithstanding subsection (1), a substitute decision maker referred to in that subsection, other than a court appointed guardian, the Provincial Director of Adults in Need of Protective Intervention under the *Adult Protection Act, 2021* , or a health care professional, may not act as a substitute decision maker unless he or she has had personal involvement with the incompetent person at some time during the preceding 12 months.

(5) A substitute decision maker other than a court appointed guardian, the Provincial Director of Adults in Need of Protective Intervention under the *Adult Protection Act, 2021* or health care professional may apply to the Trial Division to shorten or waive the 12 month requirement under subsection (4).

[64] Section 11 of the *AHCDA* outlines the mechanism for determining who may act as a substitute decision-maker where more than one person in a category of persons under s. 10 is qualified to act as substitute decision-maker. It provides:

11. (1) Where more than 1 person in a category is qualified to act as a substitute decision maker, the decision of the majority prevails, and in the absence of a majority decision, the substitute decision maker becomes the next available person or category of persons listed in subsection 10(1).

(2) Where more than 1 person is qualified to act as a substitute decision maker, the persons shall designate 1 person from among themselves to communicate their health care decisions to the health care professional and the professional may assume that the person is communicating the health care decision of the majority of the substitute decision makers unless the health care professional has reasonable grounds to believe that it is not so.

2024 NLSC 18 (CanLII)

> (3) Where the substitute decision makers fail to designate a person under subsection (2), the substitute decision maker becomes the next available person or category of persons in subsection 10(1).

2024 NLSC 18 (CanLII)

[65] There is no dispute that Dr. Shaikh accepted that Calvin Pelley was entitled to make healthcare decisions on behalf of his mother. It is also undisputed that the information before the CAC did not disclose that Mrs. Pelley had signed an Advance Health Care Directive appointing a substitute decision-maker pursuant to the *AHCDA*. The relevant medical records indicate that while Mrs. Pelley may have been in a condition when first admitted to the hospital where she was capable of making healthcare decisions for herself, when the time came for a decision regarding palliative care and the withdrawal of life support, she was incapable of making those decisions, thus bringing the *AHCDA* into play.

[66] Before moving on, I will address the argument of the Appellants in their Memorandum of Fact and Law originally filed in this matter that Dr. Shaikh ought to have anticipated that because of her condition when first admitted to hospital that she would rapidly deteriorate to the point she would not be able to make or communicate healthcare decisions for herself. As such, the Appellants argued that Dr. Shaikh ought to have obtained an informed consent or directive from Mrs. Pelley that would have addressed the issues of palliative care and the withdrawal of life supporting treatment.

[67] This argument, in my view, has no merit. While there is no doubt that a medical doctor should ideally wherever possible seek to determine a patient’s wishes about the initiation, continuation and cessation of life-sustaining treatment and regarding palliative care, the failure to do so in this case does not amount to a marked and substantial departure from the proper standard of care. An isolated case of such a failure would not rise to the threshold of professional misconduct or professional incompetence and that is even more so in a case such as this where Mrs. Pelley’s condition deteriorated quickly after she was admitted to hospital.

[68] I will now examine what happened after Mrs. Pelley got to the point where she was incapable of making healthcare decisions. Dr. Shaikh proceeded on the basis

that Calvin Pelley was a substitute decision-maker for his mother. In this regard, the following entries in the medical records of Mrs. Pelley pertaining to the period in question are relevant:

a. Medical Admission Nursing Assessment dated August 2, 2008: This record first lists Calvin Pelley as the person to notify in the event of an emergency. The record then also lists another son, Rex, who is the Appellant, Frederick Rexton Pelley, and a person Ivy who was a caretaker for Mrs. Pelley as other people to contact in the event of an emergency. The telephone numbers for all three individuals are entered in this record. Mrs. Pelley and Calvin Pelley are shown to have the same telephone number.

b. Emergency Record dated August 2, 2008: this record identifies Calvin Pelley as next of kin and emergency contact. Mrs. Pelley and Calvin are shown to have the same telephone number.

c. Patient Information and Billing Record dated August 2, 2008: This record also shows Calvin Pelley as next of kin and lists the same telephone number for Mrs. Pelley and Calvin Pelley.

d. Western Health Admission/Separation Record dated August 2, 2008: This record also identifies Calvin Pelley as next of kin and emergency contact and lists the same telephone number for Mrs. Pelley and Calvin Pelley.

e. Western Health Discharge Summary dated August 6, 2008: This record indicates that Mrs. Pelley's medical circumstances were discussed with her family, including son who had power of attorney and that subsequently family agreed to DO NOT RESUSCITATE and also agreed to consider for palliative care though Mrs. Pelley's rest of family members did not come up with consensus for palliative care.

2024 NLSC 18 (CanLII)

f. Western Health Consultation Report of Dr. Dean dated August 4, 2008: This report contains the following paragraph:

> We have interviewed her son and we emphasized the fact that she is dying and she needs to be transferred to the Palliative Care, but he didn't like the philosophy of palliative care at this time and, also felt that other family members would think likewise. He asked to have more time to think about this issue. We asked him to contact the nurse in the ICU in case he changes his mind.

g. Physicians Orders and Progress Notes dated August 4, 2008: This record indicates an initial discussion regarding palliative care and comfort measures with the family of Mrs. Pelley.

h. Nutrition Consultation Report dated August 5, 2008: This record indicates Calvin Pelley as next of kin.

i. Physicians Orders and Progress Notes dated August 5/6, 2008: This record indicates that family members of Mrs. Pelley have asked for comfort measures and re-consultation to palliative care.

j. Physicians Order and Progress Notes dated August 6, 2008: This record indicates Mrs. Pelley's family was in agreement for palliative care and comfort measures.

k. Medical Patient Care Plan: This record has entries for August 2 and 3, 2008. It indicates that Mrs. Pelley's son, Calvin, has power of attorney and that all decisions must go through him no one else.

l. Chart Record dated August 5 and 6, 2008: An entry in this record at 2345 on August 5, 2008 made by nurse, Deanne Clarke, says:

2024 NLSC 18 (CanLII)

> 2345 Spoke [with] pt son Calvin. Same requesting all current treatments be stopped. When asked if he was requesting comfort measures only, Calvin responded "I want to respect my mothers wishes. She would not want to live if she had be bedridden. I want the treatments stopped so I can let her die naturally." Son admitted that not all family members are in agreement [with] this decision but as pts decision maker & power of attorney, he feels he has to make this decision on his own. Dr. Shaikh contacted – orders received @2300 hrs. Family (son) requesting to be present when BIPAP & IV & NG d/c. Pain medication orders received from Dr. Shaikh as per family (son) request. Spoke [with] Colleen Wells re: transfer to palliative care. Transfer to be reassessed after reconsultation [with] Dr. Dean in a.m.

2024 NLSC 18 (CanLII)

m. Chart Record (which seems to be from August 6, 2008): An entry in this record indicates that Dr. Dean spoke with Mrs. Pelley's son, Calvin, who has agreed to palliative care.

n. Chart Record from August 6, 2008: An entry at 1650 hours indicates that Mrs. Pelley was transferred to palliative care at approximately 1430 hours. It also indicates that Mrs. Pelley's sons were at her bedside and that her family was given orientation to the palliative care unit. An entry at 2320 hours indicates that Mrs. Pelley became pulseless, breathless and pupils fixed and that her family were present.

[69] While the Appellants took significant issue with whether Calvin Pelley was a proper substitute decision-maker for Mrs. Pelley, this was not a question the CAC had to decide as noted earlier. Instead, what was more important to them, given their role in reviewing the complaint against Dr. Shaikh, was whether his conduct in proceeding on the basis that Calvin Pelley was a proper substitute decision-maker amounted to professional misconduct or professional incompetence.

[70] As part of the CAC's investigation of the complaint, Dr. Nigel Duguid was asked to conduct a review of the medical records. He prepared a report which formed part of the documents reviewed by the CAC. The medical records of Mrs. Pelley also formed part of the documents reviewed by the CAC. In Dr. Duguid's report he noted at p. 5:

> Dr. Shaikh clearly felt that the appropriate decision maker was fully informed and in agreement with his decision.

2024 NLSC 18 (CanLII)

[71] Based on a review of the decision of the CAC, the medical records of Mrs. Pelley, the report of Dr. Duguid and the other information before the CAC, I see nothing unreasonable about the conclusion of the CAC that there were no reasonable grounds to believe that Dr. Shaikh had engaged in conduct deserving of sanction. Further, based on the appellate standard of review, I see nothing in the decision of the CAC that would amount to palpable and overriding error.

## THE DECISION ON THE DEAN ALLEGATION

[72] Next I will deal with the decision of the CAC regarding the Dean Allegation. It concluded that there were no reasonable grounds to believe that Dr. Dean had engaged in conduct deserving of sanction. In this regard, my comments earlier at paras. 55 – 61 in relation to the Shaikh Allegation apply equally to the Dean Allegation.

[73] In assessing the conclusion of the CAC it is necessary to review their decision in its entirety and to keep in mind that the role of the CAC was to determine whether there were reasonable grounds to believe that Dr. Dean had engaged in conduct deserving of sanction.

[74] In the context of the complaint of the Appellants against Dr. Dean, the CAC had to consider whether Dr. Dean's conduct in accepting that Calvin Pelley had the legal authority to make healthcare decisions on behalf of his mother was a radical departure from the generally accepted standards of practice. As in the case involving Dr. Shaikh, there is no issue in this case of an ongoing failure to meet acceptable standards.

[75] In looking at this issue, paras. 63 and 64 of this decision apply equally to the Dean Allegation. As with Dr. Shaikh, there is no dispute that Dr. Dean also accepted

that Calvin Pelley was entitled to make healthcare decisions on behalf of his mother. It is also undisputed that the information before the CAC did not disclose that Mrs. Pelley had signed an Advance Health Care Directive appointing a substitute decision-maker pursuant to the *AHCDA*.

2024 NLSC 18 (CanLII)

[76] In the case of Dr. Dean, he did not become involved in the care of Mrs. Pelley until August 4, 2008, according to her medical records. Those same records indicate that at this point Mrs. Pelley was incapable of making healthcare decisions for herself. Thus, in relation to Dr. Dean, there is no need to examine the issue of whether he ought to have obtained an informed consent or directive from Mrs. Pelley when he first became involved in her care, addressing the issues of palliative care and the withdrawal of life supporting treatment. She was already incapable of making such decisions by the time he became involved in her care.

[77] In terms of Dr. Dean's actions in proceeding on the basis that Calvin Pelley was a substitute decision-maker for his mother, the same entries on the medical records of Mrs. Pelley as were referenced at para. 68 of this decision in relation to Dr. Shaikh are also relevant in respect of Dr. Dean's actions. While he did not become involved in the care of Mrs. Pelley until August 4, 2008, the entries in her medical records from when she was first admitted to the hospital on August 2, 2008 would have been available to Dr. Dean.

[78] As I said earlier in relation to Dr. Shaikh, whether Calvin Pelley was a proper substitute decision-maker was not a question the CAC had to decide when assessing Dr. Dean's conduct. Instead, given the role of the CAC, the question they had to consider was whether Dr. Dean's conduct in proceeding on the basis that Calvin Pelley was a proper substitute decision-maker amounted to professional misconduct or professional incompetence.

[79] The CAC in its decision in respect of the Dean Allegation on this issue at page 7 said:

> The Committee considered that the decision by Dr. Dean to accept Mr. Calvin Pelley's decision making as a substitute decision maker for Ms. Pelley was within

> the standard of care. The medical record identified Mr. Calvin Pelley as the next of kin and indeed stated that Mr. Calvin Pelley had power of attorney. Dr. Dean was aware that Ms. Pelley was living with her son Calvin. The Committee was of the view that had Mr. Frederick Pelley or Mr. Verdon Pelley wished to do so, there was opportunity for them to have spoken with either Dr. Shaikh or Dr. Dean to express their views regarding Ms. Pelley's management. There was no evidence from the medical record or from the correspondence of Dr. Dean that either had attempted to do so.

2024 NLSC 18 (CanLII)

[80] Based on a review of the decision of the CAC, the medical records of Mrs. Pelley and the other information before the CAC, I see nothing unreasonable about the conclusion of the CAC that Dr. Dean's decision to accept Calvin Pelley as a substitute decision-maker for Mrs. Pelley was within the applicable standard of care. Accordingly, I see nothing unreasonable about the conclusion of the CAC that there were no reasonable grounds to believe that Dr. Dean had engaged in conduct deserving of sanction. In addition, based on the appellate standard of review, I see nothing in the decision of the CAC that would amount to palpable and overriding error.

**SUMMARY AND CONCLUSION**

[81] In respect of the Shaikh Allegation, the investigation carried out by the CAC met both the standard of reasonableness and the appellate standard. There is nothing to suggest that the CAC was in any material way deficient in their investigation of the Allegation. Further, the conclusion of the CAC that there were no reasonable grounds to believe that Dr. Shaikh had engaged in conduct deserving of sanction was not unreasonable and I see nothing in the decision that would amount to palpable and overriding error.

[82] In respect of the Dean Allegation, the investigation carried out by the CAC met both the standard of reasonableness and the appellate standard. There is nothing to suggest that the CAC was in any material way deficient in their investigation of the Allegation. Further, the conclusion of the CAC that there were no reasonable grounds to believe that Dr. Dean had engaged in conduct deserving of sanction was

not unreasonable and I see nothing in the decision that would amount to palpable and overriding error.

[83] Accordingly, both appeals are dismissed and the Respondent and the Intervenors shall be entitled to their party and party costs against the Appellants on the basis of Column 5 of the Scale of Costs in the Appendix to Rule 55 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D. I have chosen Column 5 party and party costs largely because of the manner in which the Appellants conducted themselves with respect to the collateral arguments advanced by them. The Appellants were told such arguments would not be considered as part of the appeals but persisted in making them anyway. In addition, the allegations of criminal conduct on the part of the Intervenors and the argument that the Appellants were misled were wholly without merit in my view based on the Record in each matter and the arguments advanced by the Appellants. Such conduct warrants a higher costs award than might otherwise be made.

**GEORGE L. MURPHY**
Justice

2024 NLSC 18 (CanLII)