

NOVA SCOTIA COURT OF APPEAL

Citation: *Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26

Date: 20130222

Docket: CA 392882

Registry: Halifax

Between: Tamala Fadelle

Appellant

v.

Nova Scotia College of Pharmacists and
the Attorney General of Nova Scotia

Respondents



Judges: Fichaud, Farrar and Bryson, JJ.A.

Appeal Heard: January 31, 2013, in Halifax, Nova Scotia

Held: Appeal dismissed with costs of \$4,000 plus
disbursements, per reasons for judgment of Fichaud,
J.A., Farrar and Bryson, JJ.A. concurring

Counsel: Jim O'Neil for the appellant
Scott Sterns and Erin Cain for the respondent

IN THE NOVA SCOTIA
COURT OF APPEAL

I hereby certify that the foregoing document,
identified by the Seal of the Court, is a true
copy of the original document on file herein.

Dated the 22nd day of February A.D., 2013


Deputy Registrar

Donna Angel
Deputy Registrar
Nova Scotia Court of Appeal

Reasons for judgment:

[1] Ms. Fadelle is a pharmacist. She was charged with professional misconduct under the *Pharmacy Act*. A Hearing Committee under that *Act* determined that Ms. Fadelle had committed infractions, and the Committee issued sanctions. The *Act* permits an appeal to this Court on issues of law. Ms. Fadelle appeals from the Committee's findings that infractions had been committed and from the sanctions. The grounds of appeal cite issues of evidence and fact respecting the infractions and submit that the sanctions were too severe. An underlying issue is whether, or how this Court can come to grips with the factual grounds under the statutory ground of appeal and the administrative standard of review.

Background

[2] Ms. Fadelle is a licensed pharmacist. She owns and has operated the River Hebert Pharmacy, in River Hebert, Cumberland County.

[3] The *Pharmacy Act*, S.N.S. 2001, c. 36, as amended, ss. 47-56 establishes the process for the hearing and determination by a Hearing Committee of allegations of a pharmacist's professional misconduct and conduct unbecoming.

[4] On August 19, 2011, the Registrar of the Nova Scotia College of Pharmacists ("College") issued to Ms. Fadelle a Notice of Hearing, under the *Pharmacy Act*, with particulars of her alleged professional misconduct and conduct unbecoming. The essence of the charges was that Ms. Fadelle had created false prescriptions and unlawfully dispensed or diverted controlled substances or narcotics, and had kept false or misleading records.

[5] As prescribed by s. 47 of the *Pharmacy Act*, the Hearing Committee comprised two pharmacists, members of the College, and a public representative, who is not a pharmacist. The Hearing began on December 2, 2011 and, after ten days of hearing, concluded on January 20, 2012. Sixteen witnesses testified, nine called by the College and seven, including Ms. Fadelle, for the defence.

[6] On February 24, 2012, the Hearing Committee issued a 63 page decision ("Infractions Decision"). The Infractions Decision dismissed some of the allegations, but found that allegations 1 through 5 and 7 were proven:

- (a) **Allegation # 1:** Ms. Fadelle created and dispensed invalid and unauthentic prescriptions for a controlled substance, Alprazolam, and failed to maintain proper prescription records. The Committee found that the records cited a fictitious patient, initialized by the Committee's decision as "RJ". The evidence demonstrated thirteen false prescriptions for Alprazolam.
- (b) **Allegation # 2:** Ms. Fadelle failed to keep proper records and failed to maintain inventory of a controlled substance resulting in 1430 missing tablets of Teva-alprazolam, a targeted substance. The Committee noted an unusual number of manual adjustments to the records.
- (c) **Allegation # 3:** Ms. Fadelle acted without honesty or integrity in creating and dispensing invalid and unauthentic prescriptions, constituting trafficking within the meaning of the *Controlled Drugs and Substances Act*, for Lorazepam. The Committee accepted the testimony of the physician JA, who denied authorizing a prescription.
- (d) **Allegation # 4:** Ms. Fadelle improperly dispensed Endocet, a narcotic, to patient RR, while intentionally creating a false record, and, as manager, failed to ensure that patient records were prepared and maintained in accordance with the Standards of Practice of the Nova Scotia College of Pharmacists. The Hearing Committee found that RR did not receive 100 tablets of Endocet on four occasions in 2010, the numbers of tablets processed by the pharmacy. The Committee said that Ms. Fadelle's actions constituted trafficking as defined by the *Controlled Drugs and Substances Act*.
- (e) **Allegation # 5:** Ms. Fadelle labelled RR's November 15, 2010 Endocet prescription as "No Refill" when part fills were available. The Committee found that the mislabelling was intentional and designed to mislead.
- (f) **Allegation # 7:** Ms. Fadelle created and dispensed invalid prescriptions for Viagra, fraudulently billed insurers for those

prescriptions, and failed to maintain proper records. The Committee found eight such occasions for patient TH and thirteen occasions for patient TOM.

The Committee determined that these infractions constituted professional misconduct, conduct unbecoming and contraventions of provisions in the *Pharmacy Act*, its *Practice of Pharmacy Regulations*, N.S. Reg. 193/2003, the *Code of Ethics*, *Nova Scotia College of Pharmacists*, the *Model Standards of Practice for Canadian Pharmacists*, *Professional Competency*, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, the *Benzodiazepines and Other Targeted Substances Regulations*, SOR/2000-217 under the *Controlled Drugs and Substances Act*, the *Food and Drugs Act*, R.S.C. 1985, c. F-27, and the *Food and Drug Regulations*, C.R.C., c. 870 under the *Food and Drugs Act*.

[7] On April 4, 2012, the Committee heard submissions on sanctions, then issued a decision on May 3, 2012 (“Sanctions Decision”). The sanctions were a two year suspension of Ms. Fadelle’s license to practice, conditions of re-entry including attendance at educational programs, restrictions on practice and unannounced audits for three years following reinstatement, a \$10,000 fine, costs of \$100,000, and publication and disclosure of the Committee’s Decisions.

[8] Ms. Fadelle has appealed the Infractions and Sanctions Decisions to the Court of Appeal under s. 58(1) of the *Pharmacy Act*, which says:

58(1) The member or pharmacy complained against may, within thirty days of the date of the decision of the hearing committee, appeal from the findings of the hearing committee to the Nova Scotia Court of Appeal on any point of law.

Issues

[9] Ms. Fadelle has withdrawn grounds 1 through 4 that appeared in her initial Notice of Appeal. Those grounds included an allegation of bias. Her remaining ground 5 is that the Committee “erred in law” and the Infractions Decision was “incorrect and / or unreasonable” because:

- (i) There was “no credible evidence to find that the appellant had personal knowledge of the dispensing of false prescriptions” and “the

evidence was that PH, an employee of the Appellant, was solely responsible”.

- (ii) There was “no evidence upon which to base a finding that PH had no motive to steal alprazolam, the Committee ignored all of the evidence proving that PH had a strong motive to steal alprazolam, and the Committee ignored or misapprehended the evidence establishing that PH was addicted to narcotic medication, and had actually stolen alprazolam”.
- (iii) The Committee “accepted the evidence of a witness whose credibility was impeached in favour of the relevant evidence of the appellant”.
- (iv) There “was no credible evidence that the patient, RR, did not receive all of his medication”.
- (v) There “was no credible evidence that prescriptions were labelled improperly”.
- (vi) There “was no credible evidence upon which to make the findings with respect to Viagra prescriptions”.

Each ground alleges that the Committee “ignored relevant evidence, misapprehended the evidence, reached incorrect inferences and conclusions”.

[10] Ms. Fadelle’s ground 6 says that the Committee “erred in law” in the Sanctions Decision because “the sanctions ... are all incorrect and / or unreasonable”, the two year suspension is unreasonably high, and the \$100,000 costs award is an unreasonable “deterrent to other pharmacists from disputing charges of misconduct”.

[11] Ms. Fadelle also moves to add fresh evidence to the record.

Appealable Grounds

[12] Before superimposing the administrative standard of review, the Court isolates the threshold grounds of appeal that are permitted by the statute: *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, para 36; *Royal Environmental Inc. v. Halifax (Regional Municipality)*, 2012 NSCA 62, para 39. Section 58(1) of the *Pharmacy Act* permits an appeal to the Court of Appeal on “any point of law”. There is no appeal on issues of fact.

[13] Ms. Fadelle’s grounds allege errors in assessing credibility, apprehending and weighing evidence, drawing inferences and making findings of fact.

[14] In *Young v. Nova Scotia (Workers’ Compensation Appeals Tribunal)*, 2009 NSCA 35, paras 17-25, this Court reviewed the authorities respecting when an error in an administrative tribunal’s fact finding process may constitute an appealable error of law.

[15] Put simply, a finding based on no evidence is arbitrary. Tribunals are not supposed to act arbitrarily in any aspect of their process, including fact finding: *Toronto (City) Board of Education v. O.S.S.T.F.*, [1997] 1 S.C.R. 487, para 44, per Cory, J. for the majority, referring to *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, at 277. So an arbitrary finding, based on no evidence, is an error of law. I add that a fact finding tribunal is entitled to draw inferences, meaning the evidential foundation need not be direct evidence. Further, I am not commenting on judicial notice, which has no application to this appeal.

[16] If there is evidence, then a submission that the tribunal gave the evidence either too much weight and wrongly preferred it over other evidence, or too little weight and wrongly discounted it compared to other evidence, raises an issue of fact: *Toronto (City) Board of Education*, paras 44-45, 48; *Young*, para 22. Whether the tribunal should draw an inference from the evidence is a question of fact: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras 19-25. Similarly, “[a]ssessments of credibility are quintessentially questions of fact”: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, para 38.

[17] In short, Ms. Fadelle's factual grounds are beyond this Court's appellate jurisdiction, that is confined to errors of law under s. 58(1) of the *Pharmacy Act*, except insofar as they suggest that the Hearing Committee made an arbitrary finding based on no evidence.

Standard of Review

[18] Turning to the standard of review, this Court has determined that reasonableness governs the articulation and application of the standards of professional conduct by a professional disciplinary tribunal: *Creager v. Nova Scotia (Provincial Dental Board)*, 2005 NSCA 9, para 20(a); *Hills v. Nova Scotia (Provincial Dental Board)*, 2009 NSCA 13, paras 32-34; *Osif v. College of Physicians and Surgeons of Nova Scotia*, 2009 NSCA 28, paras 58-59. See also *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, para 42. Similarly, reasonableness applies to the tribunal's discretionary application of the factors for sanctions and costs: *Osif*, paras 184, 196-97; *Creager*, para 93; *Hills*, para 64.

[19] Formerly, an arbitrary finding of fact unsupported by any evidence would be patently unreasonable: *Toronto (City) Board of Education*, paras 44-45, 48. Since *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, it would be unreasonable: *Young*, paras 22-24.

[20] Reasonableness means the reviewing court respects the Legislature's choice of a decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of possible outcomes: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras 11, 14-17, per Abella, J., for the Court; *Jivalian v. Nova Scotia (Community Services)*, 2013 NSCA 2, para 15.

Fresh Evidence

[21] Ms. Fadelle moves for an order that this Court permit the addition of fresh evidence, namely affidavits of Mr. Ronald McClary, Ms. Mary McClary, Mr. Charles Beaver and Ms. Fadelle.

[22] *Rule* 90.47(1) allows this Court, “on special grounds”, to admit fresh evidence. The test for special grounds stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Admission depends on a balance of four factors: (1) whether there was due diligence in the moving party’s effort to adduce the evidence at the trial, (2) relevance, (3) credibility of the fresh evidence, and (4) whether the evidence could reasonably have affected the result in the tribunal appealed from. Further, the evidence must be in admissible form. Inadmissible evidence cannot affect the result under the fourth factor. The test applies to civil as well as criminal cases, though “due diligence” may soften in a criminal appeal. The test abates for some issues of procedural fairness. Generally, the Court accepts (without admitting) the evidence provisionally, hears the argument on admission in tandem with the argument on the merits, then issues reasons to deal concurrently with the fresh evidence motion and the merits. See *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, paras 74, 77-79, leave to appeal denied [2012] S.C.C.A. No. 237, and authorities there cited.

[23] The affidavits of Ronald and Mary McClary state that on April 15, 2012 they met Ms. Fadelle’s former pharmacy assistant, described in the Committee’s Decision as “PH”, and that PH offered to sell them pain medication which PH said she had at her house. Ms. Fadelle submits this is evidence that the culprit was PH, not Ms. Fadelle.

[24] Mr. Beaver deposed that he owns Bayside Pharmacy in Bass River, Nova Scotia. He refers to pp. 335-36 of the transcript of Ms. Fadelle’s hearing before the Committee. There, a witness for the College said that they examined the experience of Bayside Pharmacy with the Nexxsys software system. Ms. Fadelle had attributed her manual adjustments in the records to the introduction of the Nexxsys system. The College submitted that Ms. Fadelle’s adjustments could not be explained by the Nexxsys system alone, and that the Bayside experience supported that view. Mr. Beaver’s affidavit said that “Bayside Pharmacy does not now nor has it ever used the Nexxsys software system”.

[25] Ms. Fadelle’s affidavit refers to a Settlement Agreement she had signed with the College in March, 2009, dealing with earlier charges. That Agreement settled numerous charges of professional misconduct against Ms. Fadelle including two occasions of failure to properly dispose of a narcotic. In 2009 Ms. Fadelle had asserted that one of those occasions could be explained. The College

accepted that explanation in 2009, but the 2009 Settlement Agreement was not formally amended. In 2012, after the Infractions Decision, the College provided the 2009 Settlement Agreement to the Hearing Committee for the Committee's sanctions analysis. Ms. Fadelle's affidavit, tendered as fresh evidence, points out that this charge from 2009 was unfounded, and that the College had so agreed at the time. The affidavit attaches a number of documents to support that fact.

[26] At the hearing in the Court of Appeal, counsel for the College acknowledged that Bayside Pharmacy had no Nexxsys system, and that the College's investigator had erred in this respect. He also acknowledged that the 2009 Settlement Agreement should be read with the proviso that Ms. Fadelle had provided an acceptable explanation for one charge of narcotics disposal. He agreed that, rather than this Court simply taking his stipulations as the facts, it was appropriate that the College consent to the admission of the tendered fresh evidence on those two points. For that reason, I am of the view that the Court should admit the affidavits of Mr. Beaver, on the Nexxsys issue, and of Ms. Fadelle, to clarify the explanation of one charge of disposal in the 2009 Settlement Agreement.

[27] That leaves the Affidavits of Ronald and Mary McClary. In my view this evidence should not be admitted. The tendered affidavits relate to issues of fact. The *Pharmacy Act* limits this Court to considering questions of law. As I will discuss, the Hearing Committee considered at length Ms. Fadelle's allegations that PH was the lone culprit. The Hearing Committee heard evidence from Ms. Fadelle, from PH and from other sources on that matter. The Committee found clearly that Ms. Fadelle was the protagonist. There was evidence to support that finding. That exhausts this Court's appellate authority over the factual matter under s. 58(1) of the *Pharmacy Act*. There is no issue of law to which the tendered fresh evidence might pertain, and the evidence could not affect the result in this Court.

Grounds Related to the Infractions

[28] Ms. Fadelle's submissions that relate to the infractions all turn on issues of fact. I refer to the Allegations 1-5 and 7 for which the Committee upheld the charges, and which are summarized above (para 6).

Allegation # 1 (Invalid Prescriptions to Fictitious Patient “RJ”)

[29] Ms. Fadelle’s factum says the Committee “failed to give any consideration whatsoever to relevant evidence as to the possible motive of PH.” She cites evidence that Ms. Fadelle’s assistant, initialized by the Committee’s decision as PH, “was very upset”, “was going to take Tammy [Fadelle] down” and “was urging people to move their prescriptions”. She submits this proves that PH was to blame and acted alone, and that Ms. Fadelle was not involved. According to the factum, the Committee erred because “a conclusion reached on half or less than all of the relevant evidence is not reasonable or correct”.

[30] The Committee found that, even if PH was involved, Ms. Fadelle also participated in the invalid prescriptions. The Committee said:

It stretches credulity to accept that over many months, a targeted substance that requires special scrutiny and is simultaneously the source of an atypically large number of manual inventory adjustments, despite having so few patients, wouldn’t raise significant red flags to a pharmacist given the small size of the store, and the close community it serves.

For the reasons cited above, the Hearing Committee concludes, on a balance of probabilities, that the Registrant knew about the prescriptions for RJ. ...

[31] There was evidence to support the Committee’s inference of Ms. Fadelle’s knowledge. Ms. Fadelle admitted that the so-called patient RJ was unknown. Ms. Ingersoll, Manager of Professional Accountability for the College, reviewed the records of Ms. Fadelle’s pharmacy, but located only five hard copies of the thirteen supposed prescriptions for the fictitious patient RJ. Ms. Ingersoll said that Ms. Fadelle’s signature appeared on those five prescriptions. The records showed that most of the prescriptions for RJ occurred during regular business hours when Ms. Fadelle was present. The Committee specifically considered whether PH had motive to act alone, respecting the fictitious patient profile and false prescriptions, and rejected that suggestion.

[32] The Committee did not act in the absence of evidence. There is no error of law within s. 58(1). Neither were the findings outside the range of possible findings under the reasonableness standard of review.

Allegation # 2 (Missing Tablets of Teva-alprazolam)

[33] As with Allegation # 1, Ms. Fadelle submits that the Committee erred by failing to find that PH acted alone and without Ms. Fadelle's knowledge. Her factum says that "[i]n finding that PH had no motive to steal, the committee erroneously completely discounted that possibility and in doing so, it acted both unreasonably and incorrectly". The factum noted "the committee relied heavily on negative inferences drawn from manual adjustments to records made by the appellant", and "[t]he committee was quite prepared to draw an inference that PH would not act recklessly but it was not prepared to extend the same benefit to the appellant". Ms. Fadelle also submits that any deficiency in the records resulted from a software conversion within the pharmacy.

[34] The Committee found that Ms. Fadelle failed to manage inventory and proper records of this controlled substance. The Committee rejected the suggestion that PH was the culprit:

... the Hearing Committee rejects the Registrant's testimony that PH stole ALP [alprazolam] from RHP [River Hebert Pharmacy]. The Hearing Committee also rejects the Registrant's claim that her computer problems were of sufficient magnitude to relieve her of her responsibility to control her inventory.

Turning first to the issue of whether PH stole ALP from RHP, the Hearing Committee has already found, as part of its decision in relation to Allegation 1 that PH had no motive to steal ALP.

The Committee said there were "sufficient red flags to alert the Registrant to a problem regardless of any mitigating circumstances related to the computer conversion". The Committee found:

In reviewing the evidence related to the role played by computer issues outside of the Registrant's control, the Hearing Committee does not accept that they are of sufficient severity to relieve the Registrant of her responsibility to control her inventory. In fact, if the computer problems were as bad as the Registrant alleges, the Hearing Committee concludes that they would heighten the obligation of the Registrant's involvement, due diligence, and security for all controlled substances.

[35] There was evidence to support the Committee's findings. Ms. Fadelle acknowledged there were missing tablets. The Committee heard testimony from PH. The Committee reviewed the Nexxsys remedial logs, that showed only twelve calls from the pharmacy from the outset of the computer conversion to the stage when Ms. Fadelle said the system was "going much better at the store" in an entry of April 15, 2010.

[36] There was evidence to support the Committee's findings, and no error of law under s. 58(1) of the *Act*. The Committee's findings occupied the range of possible outcomes under the reasonableness standard of review.

Allegation # 3 (Unauthorized Prescriptions of Lorazepam)

[37] The College alleged that two prescriptions for Lorazepam were dispensed for Ms. Fadelle's ex-spouse, but that those prescriptions had not been authorized by the named prescribing physician, initialized by the Committee's decision as "JA". JA testified that he did not prescribe the medications. Ms. Fadelle said that, during conversations over dinner and in JA's driveway, JA had authorized the prescriptions. Before the Hearing Committee, Ms. Fadelle challenged JA's credibility. The Committee expressly found JA to be credible and accepted his testimony over Ms. Fadelle's.

[38] In this Court, Ms. Fadelle points out that JA "had a motive to be less than candid", reiterates her challenge to JA's credibility, and says the Committee's finding is plainly wrong. This is an argument of fact, and outside the Court's appellate jurisdiction under s. 58(1) of the *Pharmacy Act*.

Allegation # 4 (Prescriptions of Endocet to RR)

[39] The Hearing Committee found that Ms. Fadelle had improperly dispensed Endocet to a patient initialized as "RR", and had intentionally kept a false record. The Committee found that RR had not received all of the 100 pills monthly that the pharmacy's records had processed in his name. This was particularly concerning because Endocet is addictive with a high street value.

[40] RR testified that he only used a maximum of two pills per day, sometimes none, and would have no use for the 100 pills per month that had been processed

in his name according to the pharmacy's records. He said that, if he had received 100 pills monthly, there would be some remaining after the month and he would not have refilled the prescription.

[41] Ms. Fadelle's factum submits that, on cross-examination, RR modified his evidence. The Committee considered that point, and found that RR appeared confused during cross examination. So the Committee placed more weight on RR's direct testimony. Ms. Fadelle's factum submits that "[t]he committee incorrectly found he appeared confused in responding to questions on cross examination" and that the Committee's finding, based on that assignment of weight, is mistaken.

[42] There was evidence to support the Committee's finding. Ms. Fadelle challenges the Committee's assignment of weight to that evidence. This is an argument of fact, and outside this Court's appellate jurisdiction under s. 58(1) of the *Act*.

Allegation # 5 (Intentional Mislabeling of RR's Endocet)

[43] The Hearing Committee found that Ms. Fadelle had, with intent to mislead, mislabelled RR's November 15, 2010 Endocet prescription "No Refill", when part fills were available.

[44] Ms. Fadelle's factum says that "the finding of the committee with respect to the labelling is unreasonable and incorrect because it is not supported by evidence on the record and is contradicted by the evidence on the record".

[45] The Committee referred to Ms. Fadelle's testimony on the issue, that her software did not permit a refill setting for narcotics. Later, after Ms. Fadelle was informed that her software could generate refill labels, she said that the default setting was "No Refill". The Committee considered evidence of the Nexxsys preferences screen and explanation from the systems manager, Pharmacy Systems Atlantic. Based on that evidence, the Hearing Committee rejected the allegation that the default was "No Refills" at the time of installation in the River Hebert Pharmacy.

[46] The Committee considered Ms. Fadelle's explanation, and rejected it. There was evidence to support the Committee's view. There is no error of law under s. 58(1). The Committee's conclusion occupies the range of possible outcomes under the reasonableness standard of review.

Allegation # 7 (Invalid Viagra Prescriptions)

[47] The Committee found that Ms. Fadelle created invalid Viagra prescriptions and fraudulently billed insurers for those prescriptions.

[48] Ms. Fadelle's factum says "[t]he crux of the matter is that the committee did not seem prepared to give the benefit of doubt to the appellant in regards to any crucial matter". It continues "since the committee found early on that even PH was more credible than the appellant, it is unlikely they would have ever believed anything the appellant said in relation to any of the other allegations". Her factum says little else to support her ground of appeal from the infraction findings for Viagra prescriptions. Her factum concludes, on this point:

In summary, the decision of the committee on this allegation is incorrect and unreasonable because it fails to consider all of the evidence which would support the testimony of the appellant.

[49] The Hearing Committee's decision considered Ms. Fadelle's testimony and the records of Ms. Fadelle's pharmacy on the Viagra issue. The records stated that Dr. MM had prescribed the Viagra for patient TH. Ms. Fadelle said that Dr. MM had verbally approved the prescription. Dr. MM denied that he had authorized the disputed prescription. The Committee expressly determined that MM's testimony was credible, and found that he had not authorized the disputed prescription. The Committee rejected Ms. Fadelle's contrary evidence. The Committee's Decision said:

On balance, the Hearing Committee finds MM's testimony to be more credible than the Registrant's. The Hearing Committee concludes that the prescriptions for Viagra that were dispensed to TH on eight occasions in 2009 for 64 tablets were false. ...

[50] The Committee also determined that Ms. Fadelle had "created false prescriptions and thereby fraudulently collected reimbursement" on thirteen

occasions for another patient, TOM. The pharmacy records said that TOM's prescriptions had been authorized by TOM's physician, Dr. AK. AK testified, and denied authorizing the disputed prescriptions.

[51] There was evidence to support the Committee's findings. The ground of appeal turns on the credibility of that evidence. There is no appealable issue of law under s. 58(1) of the *Act*.

[52] In summary, I would dismiss all Ms. Fadelle's grounds of appeal against the Hearing Committee's Infractions Decision.

Grounds Related to the Sanctions

[53] Ms. Fadelle's factum summarily cites decisions of disciplinary bodies in Ontario and Alberta, whose sanctions were lower than those imposed on Ms. Fadelle. From this, Ms. Fadelle submits that "the length of the suspension in the present case [is] excessive, unduly harsh, is not proportionate to similar cases, and therefore is not reasonable". Ms. Fadelle's submission does not discuss the factors, particular to Ms. Fadelle's case, that the Hearing Committee's Sanctions Decision cited to support her two year suspension.

[54] The Hearing Committee's Sanctions Decision acknowledged that Ms. Fadelle's "2 year suspension from practice is at the higher end of those reviewed in similar cases". The Committee cited other cases where the suspension exceeded two years. The Committee determined that the two year suspension was justified because of the particular factors of Ms. Fadelle's case.

[55] The Committee said it operated from the perspective that was described in a passage from *Ontario (College of Pharmacists) v. Chabursky*, 2011 ONCPDC 27 (CanLII): *i.e.* the disciplinary proceeding's function primarily is (1) protection of the public, but also involves (2) the interest of the profession as a whole and (3) the circumstances of the pharmacist. According to this passage, as to the public interest, "the public must have confidence that the profession will police itself and do so with the best interests of the community as its primary concern" and the committee should "consider the extent to which the public requires protection from any sort of misconduct". To the profession, the committee is responsible to maintain "high standards of practice" and must consider "what extent a message to

the profession is required to make it clear that misconduct will not be tolerated”. Finally, the penalty must be fair and reasonable, considering the circumstances of the pharmacist and the proven allegations.

[56] The Committee then applied those principles. Its Sanctions Decision characterized Ms. Fadelle’s conduct as “at the most serious end of the scale” that forms “part of a pattern of behaviour”. The Committee noted:

... The Hearing Committee finds that the Registrant’s actions were in part intended to deceive the College during a period in which she was negotiating a settlement agreement for previous infractions and undergoing monitoring by the College. ...

It is essential to effective self-governance that members of a profession submit to governance by their professional body. Ms. Fadelle committed new infractions while she was negotiating a settlement for earlier infractions. In the Committee’s view, this highlighted the need for a significant penalty. The Committee’s decision continued:

... The Registrant’s conduct falls outside the range of acceptable behaviour for a member of the profession, and the Hearing Committee finds that in this case, there is a need for both specific and general deterrence, protection of the public, and a need to maintain the public’s confidence in the integrity of the profession.

The Committee concludes that the Registrant’s behaviour warrants a significant suspension, a fine, conditions on re-entry to practice, and payment of a portion of costs.

[57] The Committee rejected the College’s request that, as a condition of re-entry, there be three years restrictions on dispensing benzodiazepines and narcotics, working alone and creating patient profiles without obtaining two pieces of identification. The Committee says that “these conditions could make the Registrant unemployable, having the unintended consequence of effectively revoking her license”.

[58] The Committee drew sanctioning principles that were both consistent with its statutory mandate under the *Pharmacy Act*, and available in the menu of disciplinary precedent in the profession. The Committee expressed its reasoning transparently to tailor its application of those principles to Ms. Fadelle’s case. The

penalties were within the range of permissible outcomes under the reasonableness standard of review.

[59] Ms. Fadelle also challenges the costs of \$100,000 “because it will be a deterrent to ... the appellant and other pharmacists from disputing charges of misconduct”.

[60] The Hearing Committee’s Sanctions Decision discussed that concern:

The Hearing Committee assessed the reasonableness of the costs considering the standard offered in *Provincial Dental Board of Nova Scotia v. Dr. Clive Creager* [2005] NSCA 9. Consideration was given to the total amount of the costs and the impact they would have on the Registrant’s ability to defend herself, and the possibility of effectively barring the Registrant from practice if the total costs were too high.

In the Registrant’s case, given the length of the hearing and the number of charges and witnesses, it is not surprising that the costs are high. Determining whether these costs will effectively bar a Registrant from disputing charges of misconduct is very difficult. The Hearing Committee does not have information about the Registrant’s financial circumstances or ability to pay before it. On balance, and weighing the information, the Committee does not conclude that the allocation of costs would restrict a Registrant from disputing charges of misconduct.

The Committee held a separate hearing for sanctions. The parties were given an opportunity to present evidence. Ms. Fadelle provided written and oral submissions, but did not present evidence.

[61] The Committee calculated the \$100,000 costs order as 65% of the full costs of the proceeding. That percentage represented the 6.5 charges that the Committee found to be proven, out of 10 charges laid by the College. That allocation follows the approach endorsed by this Court in *Hills v. Nova Scotia (Provincial Dental Board)*, paras 65-66.


[62] The Hearing Committee acknowledged that Ms. Fadelle might be unable to pay the costs while under suspension. So the payment of costs was scheduled to begin upon her return to practice, in monthly installments of \$3,000.

[63] The Committee's costs decision was deduced from principle, rationally applied to Ms. Fadelle's circumstances, and explained with transparency. It satisfies the reasonableness standard of review.

[64] I would dismiss the grounds of appeal against the Sanctions Decision.

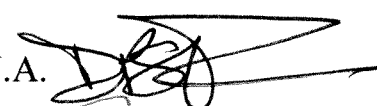
Conclusion

[65] I would admit the two items of fresh evidence that were discussed earlier. I would dismiss the appeal, with costs of \$4,000 plus reasonable disbursements payable by Ms. Fadelle to the College.

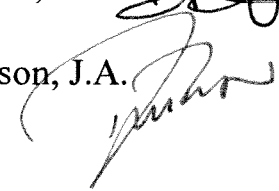


Fichaud, J.A.

Concurred: Farrar, J.A.



Bryson, J.A.



Nova Scotia College of Pharmacists

IN THE MATTER OF: The *Pharmacy Act*, R.S.N.S. 2001, c. 36 and Regulations made
thereunder,

and

IN THE MATTER OF: Ms. Tamala Fadelle

REFERENCE SHEET

Before: The Hearing Committee consisting of: Susan Halliday Mahar (Chair), Aiysha Al-
Wardian and Tom Mahaffey

Place: Offices of the Nova Scotia College of Pharmacists, Halifax, Nova Scotia

Heard: December 2, 5, 6, 7, 9, 2011 and January 4, 6, 11, 13 and 20, 2012 and April 4,
2012