INVESTIGATION COMMITTEE
of the
COLLEGE OF REGISTERED NURSES OF SASKATCHEWAN

-and-

Jessica J. V. McCulloch
Saskatchewan RN #0039641

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**DECISION**

of the

**DISCIPLINE COMMITTEE**

of the

COLLEGE OF REGISTERED NURSES OF SASKATCHEWAN

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| Legal Counsel for the Investigation Committee: | Roger Lepage and Titli Datta |
| Legal Counsel for Jessica McCulloch | Scott Hopley |
| Legal Counsel for the Discipline Committee: | Brittnee Holliday |
| Chairperson for the Discipline Committee: | Chris Etcheverry |

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| Date of Hearing: | **November 22, 2024** |
| Location: | *Via Videoconference*<br>College of Registered Nurses of Saskatchewan<br>1-3710 Eastgate Drive<br>Regina, Saskatchewan<br>S4Z 1A5 |
| Date of Decision: | **March 7, 2025** |

## I. INTRODUCTION

1. The Discipline Committee of the College of Registered Nurses of Saskatchewan ("CRNS") was reconvened to hear and determine the issue of appropriate penalty, following a partially successful Appeal by Jessica McCulloch, Registered Nurse #0039641, to the Court of King's Bench regarding the Discipline Committee's October 25, 2021 Liability Decision ("Liability Decision") and March 25, 2022 Penalty Decision ("Penalty Decision").

2. As will be discussed below, Justice Layh, of the Court of King's Bench, set aside two findings of guilt from the Liability Decision and, in accordance with section 34(5)(c) of *The Registered Nurses Act, 1988* ("the Act"), remitted the matter back to the Discipline Committee to determine penalty in light of the reduced findings of guilt.

3. A Penalty Hearing was set for August 30, 2024 via Zoom.

4. On August 22, 2024, legal counsel for Ms. McCulloch served an Application for a Remedy for Abuse of Process and Breach of Fiduciary Duty by the Investigation Committee of the CRNS ("Abuse of Process Application"). On behalf of Ms. McCulloch, legal counsel later served:

    (a) Affidavit of Jessica McCulloch, dated September 19, 2024;
    (b) Affidavit of Brandi Rintoul, dated September 23, 2024; and,
    (c) A Brief of Law, dated September 9, 2024.

5. The Abuse of Process Application was set to be heard by the Discipline Committee on November 22, 2024.

6. On October 18, 2024, legal counsel for the Investigation Committee filed a Brief of Law in support of a Preliminary Objection to the Abuse of Process Application on the ground of lack of jurisdiction ("Preliminary Objection").

7. At a Case Management Conference, it was discussed and, while counsel for Ms. McCulloch initially opposed bifurcation of the issues, it was ultimately agreed that the Investigation

Committee's Preliminary Objection Application would proceed on November 22, 2024 and that the Discipline Committee would issue a decision on the Preliminary Objection prior to hearing argument on the Abuse of Process Application.

8. What follows is the Discipline Committee's Decision on the Investigation Committee's Preliminary Objection to the Abuse of Process Application.

## II. PROCEDURAL HISTORY

9. In the September 25, 2023 decision, *McCulloch v Investigation Committee of the Saskatchewan Registered Nurses Association*, 2023 SKKB 203 (the "King's Bench Decision"), the Honourable Justice D. H. Layh set out some relevant procedural history at paragraph 4:

> **[4] The discipline proceedings relate to allegations of misconduct beginning in 2015 and include an extensive (and expensive at $537,000.00) procedural history, summarized as follows:**
>
> **(a) a hearing over 14 days, including one in-person session from September 21, 2020 to September 25, 2020 and two video conference sessions, the first from October 19, 2020 to October 23, 2020, and the second from February 8, 2021 to February 11, 2021;**
> **(b) 42 witnesses, 27 called by the Investigation Committee and 15 called by Ms. McCulloch;**
> **(c) extensive documentary evidence filling five three-ringed binders;**
> **(d) lengthy briefs of law filed in support of arguments on April 14, 2021;**
> **(e) a decision of the Discipline Committee on October 25, 2021, with findings of "guilty" and "not guilty" respecting the charges;**
> **(f) a penalty hearing on December 15, 2021;**
> **(g) a Penalty Decision of the Discipline Committee of the College of Registered Nurses of Saskatchewan on March 25, 2022;**
> **(h) a notice of appeal filed April 22, 2022; and**
> **(i) a hearing before me on June 28, 2023, when I ordered counsel for Ms. McCulloch to file pinpointed references to the transcript.**

10. The Discipline Committee's Liability Decision was summarized by Justice Layh, as follows, at paragraph 2:

> **[2] The formal charges against Ms. McCulloch, as found in the "Notice of Hearing of Complaints" served upon her on January 29, 2020, include allegations of misconduct from March 2015 to April 2016 while she was**

**employed at the Regional Psychiatric Centre [RPC] in Saskatoon, Saskatchewan (Charges 1 to 6) and from April 2016 to April 2019 while she was employed at the Saskatchewan Hospital at North Battleford, Saskatchewan [Sask Hospital] (Charges 7 to 10). The charges and the ultimate findings of the Discipline Committee are as follows (Decision of the Discipline Committee of October 25, 2021 [Decision] at pages 2-6):**

**Charge Number 1**

**…[O]n or about March 13, 2015 …[y]ou completed a medication return form on which there were two entries for acetaminophen with Codeine 30 mg tablets (Tylenol #3). One entry listed five tabs while the other listed 49 tabs for a total of 54 tabs. The 54 tabs of Tylenol #3 were not received by the pharmacy. You could not provide an explanation as to the disappearance of the Tylenol #3. The missing narcotics were never recovered. You failed in your obligation to properly secure and return the narcotics as required by the standards of the SRNA.**

**NOT GUILTY**

**Charge Number 2**

**…[O]n October 4 and 5, 2015…[y]ou were the RN on shift when 40 acetaminophen with codeine 30 mg tabs belonging to a Churchill Unit patient went missing. On October 4, 2015 at 2210 hours, you documented on the Narcotic Administration Record "wasted rack fell, meds stepped on" and you proceeded to change the documented count from 40 to 0. You did not sign the Narcotic Administration Record nor did you have another RN co-sign that the narcotics had been wasted. You failed to follow the proper procedure to account for drug wastage. You changed your explanation during the investigation. You failed to honestly account for the missing drugs. There was no evidence that the drugs had been wasted as you stated. you failed in your obligation to properly secure and account for the drugs under your control. You failed to properly account for the drugs and the missing medication card.**

**GUILTY**

**Charge Number 3**

**…[O]n or about January 20, 2016…[y]ou received a card from an inmate stating, "Sorry I pissed you off this morning. I was only joking and didn't realize that you were stressed out. "My bad!" If you aren't getting anything good, just steal a few days worth of mine. (It should make you fell [sic] better!) I think you're an awesome nurse and don't want to add to any stressors." You failed to establish and maintain appropriate professional boundaries with patients, including the distinction between social interaction and therapeutic relationship. You shared private and personal details about yourself with inmates. Your conduct put you and your coworkers and patients at risk of harm.**

**NOT GUILTY**

**Charge Number 4**

**…[O]n or about January 21, 2016 … [a]n Autopak roll consisting of nine 150 mg tablets of Wellbutrin prescribed to a patient recently admitted were found in the front foyer of the Bow Unit. You were asked how this medication ended up in the front foyer and you stated, "I have no idea, but those are the medications I just put in the return bin this morning." Later that day, you told your nursing supervisor that "I realize what happened. They must have been stuck to my butt. You know the Velcro on the back of the CPR masks. It must have stuck to that on my belt and fallen off in the foyer when I went for my break." A witness viewed video footage that confirmed that you had been in the foyer where the medications were located, four minutes before the medication had been found. You failed to properly secure and account for drugs as required by the SRNA standards.**

**NOT GUILTY**

**Charge Number 5**

**…[O]n February 26, 2016…[y]ou falsely documented the administration and wastage of narcotics and then wrote the name of a correctional officer as a witness to the wastage. You failed to follow the appropriate standards in relations to the administration of narcotics as well as to account for narcotics and/or wastage. You falsely documented on the Narcotic Administration Record the name of a person who did not witness the alleged wastage of a narcotic. You administered double the dose that had been prescribed. Your actions have potentially contributed to the underground economy of the drug trade among the inmate population at RPG. This can increase the propensity for violence and unrest by creating and sustaining the black market currency in the institution.**

**GUILTY**

**Charge Number 6**

**…[B]etween the dates of March 13, 2015 and April 4, 2016…[y]ou failed to recognize that you were unfit to practice nursing, to remove yourself from working as an RN and, contrary to the Code of Ethics, to advise your employer that you were unfit to practice nursing.**

**NOT GUILTY**

**Charge Number 7**

**..[O]n April 29, 2016…[y]ou failed to advise your potential employer that you were suffering from a longstanding mental health diagnosis that may impact your fitness to practice as an RN.**

**NOT GUILTY**

**Charge Number 8**

**…[B]etween the dates of January 1, 2019 and April 25, 2019…:**

**(a) You carried on your person and consumed personal medication in front of patients;**

**NOT GUILTY**

**(b) You brought contraband items such as Q-tips® and newspapers for specific patients onto the corrections unit;**

**GUILTY**

**(c) You brought inappropriate movies rated 18A/R for patients without approval of the health care team and employer;**

**NOT GUILTY**

**(d) You consumed patient canteen products contrary to the training provided by our employer;**

**NOT GUILTY**

**(e) You completed a patient's puzzle in his absence knowing that it would be upsetting to the patient and stated that you were doing it just to "piss him off";**

**GUILTY**

**(f) You would make and leave sticky notes with confidential patient information in an area shared with non-medical staff who did not have the right to know about this confidential patient information;**

**NOT GUILTY**

**(g) You failed to maintain a proper therapeutic patient relationship with patients by making inappropriate jokes with patients regarding conducting cavity searches.**

**NOT GUILTY**

**Your behavior put you, the patients and other staff at risk by compromising the safety of the unit.**

**Charge Number 9**

**[B]etween the dates of April 9 and 10, 2019…[y]ou failed to meet the SRNA Standards and Foundation Competencies and the Standards and Policies and Procedures of your employer, the Saskatchewan Health Authority as follows:**

**(a) You provided canteen privileges to patients who had lost their privileges;**

**GUILTY**

**(b) You provided a patient with his canteen privileges in a cup hidden by a rubber glove and allowed the patient to proceed to his room;**

**GUILTY**

**(c) You failed to be truthful with your work colleagues about providing the canteen privileges to two patients;**

**GUILTY**

**(d) You untruthfully charted the events surrounding the provision of canteen privileges to these two patients by altering the time stamp on the chart and falsifying the chart; and**

**NOT GUILTY**

**(e) Your interaction with these two patients violated your obligation to maintain a therapeutic relationship with patients.**

**GUILTY**

**Charge Number 10**

**[B]etween the dates of January 1, 2019 and April 29, 2019…[y]ou failed to recognize that you were unfit to practice nursing, to remove yourself from working as an RN and, contrary to the Code of Ethics, to advise your employer that you were unfit to practice nursing.**

**NOT GUILTY**

11. Per the above summary, the Discipline Committee found Ms. McCulloch guilty of professional misconduct and professional incompetence respecting 8 out of a total of 20 charges, including sub-charges, and imposed the following penalty at paragraph 35 of the Penalty Decision:

**35. The Discipline Committee makes the following Order:**

**1. Pursuant to section 31(1)(b) of the Act, Jessica McCulloch shall be suspended and remain suspended until the following conditions are met:**

**(a) Ms. McCulloch shall provide a report or reports to the Registrar from her treating psychiatrist (and her treating psychologist) if any which reports shall address the following:**

**(i) Confirmation that Ms. McCulloch's mental health has been stable for at least twelve consecutive months prior to the date of the report;**

**(ii) Confirmation that Ms. McCulloch has complied with the treatment recommendations regarding [redacted] including regularly attending office visits, participating in recommended programing and taking medication as prescribed for at least twelve months prior to writing the report.**

**(iii) Whether Ms. McCulloch's mental health is such that she is capable of returning to the practice of nursing safely, competently and without risk of harm to patients.**

**(b) In addition to a report or reports from her treating psychiatrist and/or treating psychologist if any, Ms. McCulloch shall undergo a neuro-psychological assessment by a qualified psychologist who will conduct a comprehensive evaluation of her cognitive abilities and cognitive functioning. Arising out of the assessment, the psychologist shall produce a report addressing whether Ms. McCulloch has the cognitive abilities and cognitive functioning to safely and competently**

**practice as a nurse. Ms. McCulloch shall bear any and all costs of the assessment and report.**

**2. Pursuant to section 31(1)(c) of the Act and upon reinstatement and commencement of registered nursing employment:**

**(a) For the first 480 hours of practice, Ms. McCulloch shall not practice nursing unless she is under the direct supervision of a registered nurse or registered psychiatric nurse.**

**(b) For the next 500 hours of practice, Ms. McCulloch shall be under the indirect supervision of a registered nurse or registered psychiatric nurse.**

**(c) For a period of one year, Ms. McCulloch shall be restricted from practicing nursing in the corrections system.**

**(d) For so long as Ms. McCulloch holds a practicing license, she shall not, at any time have access to nor administer substances listed in the *Controlled Drugs and Substances Act,* the Regulations under that Act and those listed in the Prescription Review Program of the College of Physicians and Surgeons unless she is under the direct supervision of another registered nurse or registered psychiatric nurse.**

**(e) For a period of one year, Ms. McCulloch shall not assume any overtime hours or serve in a supervisory role in any nursing environment.**

**3. Ms. McCulloch's nursing employer shall file with the Registrar written performance reviews confirming Ms. McCulloch's professional competence and professional conduct. Any unfavorable reviews shall be reported by the Registrar to the Investigation Committee. Performance reviews shall be provided at the following increments:**

**(a) After 240 hours of RN practice**

**(b) After 480 hours of RN practice**

**(c) After 960 hours of RN practice**

**(d) After 1500 hours of RN practice**

**(e) After 2000 hours of practice**

**4. Pursuant to section 31(1)(c)(ii) of the Act and within 60 days of commencing nursing employment, Ms. McCulloch shall complete the Code of Ethics online learning modules and provide proof of completion**

> **to the Registrar. Ms. McCulloch shall bear the costs if any of these online courses.**
>
> **5. Ms. McCulloch shall provide a copy of this decision to all prospective nursing employers prior to the commencement of her employment and provide written verification to the Registrar that she has done so.**
>
> **6. Pursuant to section 31(2)(a)(ii) of the Act, Ms. McCulloch shall pay the costs of the investigation and hearing fixed in the amount of $50,000.00. Such costs shall be paid on or before April 1, 2026. Failing payment on April 1, 2026, Ms. McCulloch's license, if any, shall be suspended until payment is made pursuant to section 31(2)(b) of the Act.**

12. Ms. McCulloch appealed the Liability and Penalty Decisions to the Court of King's Bench, pursuant to section 34(1)(b) of the Act:

> **34(1) A nurse who has been found guilty by the discipline committee or who has been expelled pursuant to section 33 may appeal the decision or any order of the discipline committee within 30 days of the decision or order to:**
>
> **…**
>
> **(b) a judge of the court by serving the executive director with a copy of the notice of appeal and filing it with a local registrar of the court.**

13. Ultimately, Justice Layh quashed two findings of professional misconduct, being sub-charges 8(b) and (e), reducing the findings of guilt from Charges 2, 5, 8(b) and (e), and 9(a), (b), (c), and (e), to Charges 2, 5, and 9(a), (b), (c), and (e):

> **[38] I find that Ms. McCulloch did exercise due diligence, particularly in light of the vagueness of the rules at the Sask Hospital and, specifically, what items might constitute contraband. Although [redacted] apparently told staff that Q-tips were inappropriate to bring to the unit, one must suspect that her direction, which specifically identified the Q-tips, arose after she learned that Ms. McCulloch had brought Q-tips. In my view, Ms. McCulloch's uncontroverted evidence that she gave one Q-tip to one patient, supervised its use, and saw to its return and disposal constitutes "due diligence." In the Discipline Committee's Decision, I find no application of this evidence to the principle of due diligence. Accordingly, the Discipline Committee's finding of guilt respecting charge 8(b) is quashed.**
>
> **…**
>
> **[70] A well-known principle of statutory interpretation holds that general words that are followed by specific examples in a list must be construed as**

> **referring to the types of things identified by the specific examples, the *ejusdem generis rule*. Placing the conduct alleged in charges 8(b) and 8(e) into the enumerated list of s. 26(2) of the *RN Act* would be glaringly suspect. To permanently mar a nurse's professional reputation for allowing one patient to use one Q-tip (even if it could be considered "contraband") or for potentially upsetting a patient when completing a jigsaw puzzle is not the type of misconduct contemplated by s. 26 of the *RN Act.***
>
> **[71] The Discipline Committee has applied the wrong law, and so has made an error of law. Consequently, aside from other reasons previously explained, the Discipline Committee's finding of "Guilty" for charges 8(b) and (e) must be quashed.**

14. Justice Layh issued the King's Bench Decision on September 25, 2023, quashing two of the findings of professional misconduct and remitting the issue of appropriate penalty to the Discipline Committee, at paragraph 107:

> **[107] Because I have quashed two of the findings of professional misconduct, the issue of appropriate penalty is remitted back to the Discipline Committee. The Discipline Committee will have an opportunity to determine an appropriate penalty in light of the reduced findings of professional misconduct. Undoubtedly the Discipline Committee will ask counsel to make further submissions.**

15. Ms. McCulloch then appealed to the Saskatchewan Court of Appeal, pursuant to section 35 of the Act, on October 25, 2023. The Discipline Committee understands there were various applications before Court of Appeal, and eventually, on May 13, 2024, Ms. McCulloch abandoned her Appeal to the Saskatchewan Court of Appeal.

## III. SUMMARY OF APPLICATIONS

**Abuse of Process Application – Ms. McCulloch**

16. The Abuse of Process Application is described as an Application for Remedy for Abuse of Process and Breach of Fiduciary Duty by the Investigation Committee of the CRNS. The Abuse of Process Application alleges 6 grounds (the "Grounds") in support of Ms. McCulloch's Application. By way of summary, the Grounds allege that the Investigation Committee caused an abuse of process and breached its fiduciary duty by:

(a) Proceeding to a hearing on all 20 counts in the Notice of Hearing when the counts were not supported by evidence and never had a possibility of being established;

(b) Engaging in a concerted effort to attack the character of Ms. McCulloch, related to allegations that Ms. McCulloch was a [redacted] to the inmate population, aggravated further by a 'take no prisoners approach' to the prosecution of regulatory offences, seeking to prevent Ms. McCulloch from resuming practice as a nurse on the basis of her mental health issues, and pursuing the wrongful allegation that Ms. McCulloch did not [redacted] from a workplace hostage taking incident where she had successfully obtained [redacted] and attempting to relitigate this determination.

(c) Persecuting Ms. McCulloch for working as a nurse and having mental health problems and alleging, in the face of contrary evidence, that Ms. McCulloch's mental health issues made her unfit to practice nursing and that she was aware of this unfitness. Further, Ms. McCulloch alleges that the Investigation Committee pursued bad faith prosecution by introducing irrelevant and personal health information about Ms. McCulloch and her family for no other purpose than to impugn Ms. McCulloch's character and person for having mental health problems, to perpetuate a myth that people with life difficulties and mental health problems are unfit to work, and to embarrass and traumatize Ms. McCulloch;

(d) Continuing to prosecute all counts, or any of the counts, after obtaining a surrender of Ms. McCulloch's license along with her agreement that before returning to nursing she would need to satisfy the CRNS that she was fit to work as a nurse and thus the Investigation Committee had satisfied any perceived risk to the public alleged;

(e) Incurring investigation and prosecution expenses in amounts which are unquestionably shocking to the community, in pursuing the majority of charges without evidence and in pursuing allegations that were too trifling to amount to professional misconduct or incompetence; and,

(f) Failing to prosecute the complaints without unreasonable delay, alleging prejudice to Ms. McCulloch related to delay since surrendering her license, making her unable to satisfy hours of work and continuing education requirements required on a renewal or relicensing. Further prejudice alleged by Ms. McCulloch related to delay is the

amount of legal fees paid, damage to Ms. McCulloch's reputation, and detriment to her overall mental health.

17. Ms. McCulloch also sets out the specific Remedies sought in the Abuse of Process Application, which the Discipline Committee summarizes as:
    (a) Full indemnity for Ms. McCulloch's legal fees;
    (b) Disgorgement of all costs of the investigation and hearing, including all fees paid to counsel for the Investigation Committee and compensation paid to members of the Investigation Committee, all fees paid to counsel for the Discipline Committee and compensation paid to members of the Discipline Committee, and expert witness fees paid to the Investigation Committee's expert; and
    (c) A stay of the remaining Charges, being Charges 2, 5, and 9.

18. Ms. McCulloch suggests that the above remedies, in particular, the disgorgement of legal fees and investigation and discipline set out in paragraph 17(b) above, would be required to remedy the alleged breaches of fiduciary duty and unjust enrichment flowing from the alleged abuse of process.

**Preliminary Objection – Investigation Committee**

19. The Investigation Committee raised a Preliminary Objection to the Discipline Committee hearing and determining the Application for Abuse of Process, suggesting that the Discipline Committee does not have the jurisdictional authority to hear Ms. McCulloch's Application for Abuse of Process either by way of statute or common law.

20. The Investigation Committee states that the Discipline Committee is confined to the express powers given to it in the Act, being the statutory jurisdiction to hear submissions on the Charges, determine whether Ms. McCulloch was guilty of professional misconduct or incompetence, and issue orders pertaining to penalty. The Investigation Committee suggests that the Discipline Committee's jurisdiction ended when the Liability and Penalty Decisions were rendered, with the only remaining recourse for Ms. McCulloch being the appeal processes set out in the Act.

21. The Investigation Committee suggests that the Discipline Committee is *functus officio* as it already issued the Liability and Penalty Decisions in final form and the allegations in Ms. McCulloch's Application for Abuse of Process are barred due to lack of jurisdiction based on principles related to the finality of decisions, including issue estoppel, *res judicata* or cause of action estoppel. Additionally, the Investigation Committee suggests the Discipline Committee has no jurisdiction to grant the remedies sought in the Application for Abuse of Process.

**Response to Preliminary Objection – Ms. McCulloch**

22. Ms. McCulloch relies on the statutory and common law authority of the Discipline Committee in suggesting the Discipline Committee may now hear and determine Ms. McCulloch's Abuse of Process Application. Ms. McCulloch says that the duty of fairness is a fundamental principle in administrative proceedings and that the Discipline Committee has the power to assess whether an abuse of process has occurred, suggesting that such application should be brought at first instance, before the administrative tribunal and not a court with a supervisory role. Ms. McCulloch suggests that the timing of her application is appropriate as the Discipline Committee is still seized with the matter and that it would have been premature to raise the abuse of process concerns at the Court of King's Bench.

23. In responding to the Investigation Committee's arguments in support of its Preliminary Objection, Ms. McCulloch states that all decision-making powers and discretion afforded to the Discipline Committee must be exercised and discharged in the public interest and that the Discipline Committee has the power (and duty) to control its own process in the interests of fairness.

24. Ms. McCulloch further argues that issue estoppel does not apply to the Abuse of Process Application as the first precondition to issue estoppel is that the matter or question had been previously decided. Ms. McCulloch argues that there has been no prior abuse of process determination on the issues raised, such that issue estoppel is not applicable.

25. With respect to *res judicata* or cause of action estoppel arguments, Ms. McCulloch argues that these principles apply when a lawsuit has been finally resolved and a party to that lawsuit later commences a new lawsuit seeking to re-argue the same dispute or disputes.

26. In terms of the finality of decision arguments relied on by the Investigation Committee, Ms. McCulloch suggests that there is no finality as the administrative proceeding is between the stage of findings of guilt and penalty. Regarding the Investigation Committee's argument that the Discipline Committee is *functus officio*, except with respect to reconsidering penalty in light of the reduced findings of guilty by the Court of King's Bench, Ms. McCulloch reiterates that the Discipline Committee is not being asked to revisit these final decisions, but to consider whether the administrative process has been procedurally fair for Ms. McCulloch.

## V. DISCUSSION

27. The Discipline Committee appreciates the Briefs prepared by counsel for Ms. McCulloch and counsel for the Investigation Committee.

28. The issue before the Discipline Committee is whether the Discipline Committee has jurisdiction to hear and decide the Application for Abuse of Process. Relevant to consideration of this jurisdictional question is the statutory and common law duties and authority of the Discipline Committee, abuse of process in the context of administrative proceedings, and the principles of issue estoppel, *res judicata* or cause of action estoppel, finality of decisions, and timing of the Application for Abuse of Process.

29. The Discipline Committee has specific statutory jurisdiction to hear and determine charges of professional misconduct and professional incompetence as set out in section 30(3) of the Act. The entirety of section 30 is attached as Appendix "A" to this Decision. Section 30(3) specifically provides that the Discipline Committee is not required to refer matters of professional misconduct or professional incompetence to a court for adjudication. The remaining subsections of section 30 of the Act provide statutory authority and instruction regarding such matters as the conduct of the hearing, majority decisions, evidence, retaining legal or other advice, and adding or amending the charges. Section 31 of the Act, also attached as Appendix "A" to this Decision, sets out the Discipline Committee's disciplinary powers.

30. Section 34 of the Act also offers modes of appeal for a nurse who is aggrieved by a decision of the Discipline Committee, as at Appendix "A". A nurse may appeal a decision of the Discipline Committee to CRNS Council (s.34(1)(a)) or the Court (s.34(1)(b)). Section 34(5) of the Act states:

> **34(5) In hearing an appeal, the council or the judge, as the case may be, shall:**
> **(a) dismiss the appeal;**
> **(b) quash the finding of guilty;**
> **(c) direct a new hearing or further inquiries by the discipline committee;**
> **(d) vary the order of the discipline committee; or**
> **(e) substitute its own decision for the decision of the discipline committee;**
>
> **and may make any order as to costs that it or he considers appropriate.**

31. The Act further provides for an appeal from a decision of the Court of King's Bench to the Court of Appeal; however, an appeal to the Court of Appeal may only be made on a point of law (section 36.1 of the Act).

32. While the Discipline Committee's statutory powers are set out in the legislation, it is also subject to the application of common law principles.

33. In *Prassad v Canada (Minister of Employment and Immigration)*, 1989 CanLII 131 (SCC), [1989] 1 SCR 560, the majority of the Supreme Court of Canada described the powers of an administrative tribunal as follows:

> **In order to arrive at the correct interpretation of statutory provisions that are susceptible of different meanings, they must be examined in the setting in which they appear. We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice….**

34. Ms. McCulloch has correctly stated that procedural fairness is a fundamental principle that applies to all administrative tribunals in Canada. The principles of procedural fairness relative to administrative tribunals were specifically addressed by the Supreme Court of Canada in

*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 ["*Baker*"]:

> **[21] The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal, supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170, *per* Sopinka J.**
>
> **[22] Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.**

35. In *Baker*, at paragraphs 23 to 27, several factors relevant to determining the content of the duty of fairness were outlined: the nature of the decision being made and process followed in making it, the nature of the statutory scheme and the terms of the statute pursuant to which the body operates, the importance of the decision to the individual or individuals affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself. The Supreme Court of Canada specifically noted that the list of factors was not exhaustive:

> **28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial,**

> **and open process, appropriate to the statutory, institutional, and social context of the decision.**

36. Administrative tribunals have the power to control their own processes and there can be no debate that the duty of fairness and the principles of natural justice apply to the Discipline Committee. The Discipline Committee must operate within the statutory framework, while also recognizing that it must comply with the rules of fairness and natural justice.

37. The Supreme Court of Canada dealt with abuse of process related to administrative delay in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 [*Blencoe*]. As stated by the Supreme Court of Canada in *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 [*Abrametz*]:

> **[38] In administrative proceedings, abuse of process is a question of procedural fairness: *Blencoe*, at paras. 105-7 and 121; G. Régimbald, *Canadian Administrative Law* (3rd ed. 2021), at pp. 344-350; P. Garant, with P. Garant and J. Garant, *Droit administratif* (7th ed. 2017), at pp. 766-67). This Court dealt with abuse of process as it relates to administrative delay in *Blencoe*. Our Court recognized that decision makers have, as a corollary to their duty to act fairly, the power to assess allegedly abusive delay.**

38. While the issues in *Blencoe* and *Abrametz* were regarding abuse of process related to delay in administrative proceedings, the Discipline Committee is satisfied that, generally, it has jurisdiction to consider applications for abuse of process; however, the Discipline Committee must also consider whether the timing and content of the Application precludes such determination at this stage.

39. Thus far, the Discipline Committee has issued a Liability Decision, finding Ms. McCulloch guilty of 8 out of 20 sub-charges, and a Penalty Decision, both of which were appealed to the Court of King's Bench pursuant to section 34 of the Act. The Court of King's Bench overturned two findings of guilt on sub-charges and had the statutory authority to vary or substitute its own decision in place of the Discipline Committee's Penalty Decision; however, instead, the Court of King's Bench remitted the matter of penalty back to the Discipline Committee in light of the reduced findings of guilt, pursuant to section 34(5)(c) of the Act.

40. Ms. McCulloch has relied on *R v Mack*, [1988] 2 SCR 903 [*Mack*], presumably to discount any suggestion that the Application for Abuse of Process should have been brought before the Court of King's Bench on her Appeal. Ms. McCulloch suggests that an application for relief for an abuse of process in an administrative matter should be brought at first instance before the administrative tribunal and not before a court with a supervisory role. *Mack* was a criminal case related to the doctrine of entrapment. In that case, the Court determined that before a judge considers a stay of proceedings due to entrapment, it must be clear that all essential elements of the offence had been established and if not, the guilt or innocence of the accused must be determined in order to protect the right of an accused to an acquittal. Ms. McCulloch has suggested that *Mack* creates flexibility in the timing of the Application for Abuse of Process.

41. Ms. McCulloch further relies on a few judicial review cases, such as *Hemminger v Law Society of British Columbia, 2023 BCCA 36* [*Hemminger*], to support the premise that a Court should not interfere in an ongoing matter before an administrative tribunal unless exceptional circumstances are present. In *Hemminger*, after hearing the evidence and prior to final submissions regarding the liability portion of the tribunal's decision, the member sought to re-open the hearing to submit and/or call evidence regarding her psychological condition, suggesting it was relevant to her conduct. The tribunal declined to hear the application to re-open the hearing. Within two days, the tribunal had reversed its decision and cured its mistake, advising that it would hear the application and provide an opportunity for written submissions. The member declined and instead proceeded with a judicial review application based primarily on allegations of bias against the tribunal for initially refusing to hear her application. Her judicial review application was dismissed as premature and that decision was upheld by the Court of Appeal.

42. The prematurity principle was summarized in *Diaz-Rodriguez v British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221 [*Diaz-Rodriguez*]:

> **[29] Generally, a court will not hear a judicial review petition before a tribunal has rendered its final decision: *ICBC v. Yuan*, 2009 BCCA 279 at para. 24. The prematurity principle is aimed at letting the tribunal get on with its work and preventing fragmented and piecemeal proceedings with all the attendant costs and delays associated with premature forays into**

> **court. The principle is also aimed at avoiding the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may ultimately succeed at the end of the administrative process.**
>
> **…**
>
> **[33] … there is no hard and fast rule that a court will not hear a judicial review petition before a tribunal has rendered its final decision. There are many situations in which demands of justice and efficiency weigh in favour of early review by the courts. In other words, prematurity is not an absolute bar, but a discretionary one: *Yuan* at para. 24. …**
>
> **[Emphasis in original]**

43. The Discipline Committee agrees that an application for abuse of process would typically be brought before the administrative tribunal at first instance; however, the *Diaz-Rodriguez* decision also stands for the proposition that the prematurity principle is not an absolute bar and is discretionary.

44. In considering the principle of "first instance", the Discipline Committee finds parallels with the doctrine of *res judicata* or cause of action estoppel.

45. The doctrine of *res judicata* has two distinct aspects concisely laid out in *Erschbamer v Wallster*, 2013 BCCA 76 ["*Erschbamer*"]:

> **[12] The general principles of the doctrine of *res judicata* were reviewed by this Court relatively recently in *Cliffs Over Maple Bay*. The doctrine has two aspects, issue estoppel and cause of action estoppel. In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters. [Emphasis added]**

46. The Discipline Committee finds that issue estoppel has no application in the present case. While certain topics may have been referenced in the prior proceedings, the Discipline Committee has not found that any of the Grounds have been specifically decided previously.

47. With respect to cause of action estoppel, British Columbia Court of Appeal in *Erschbamer* then went on to state:

> **[14] With respect to cause of action estoppel, Newbury J.A. quoted, at para. 13, from the seminal case of *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 at 319 (Ch.):**
>
> > **In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.**
>
> **She noted, at para. 14, that this language has been somewhat narrowed by the decision in *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153, 162 N.S.R. (2d) 321, where Mr. Justice Cromwell stated that the doctrine should apply to "issues which the parties had the opportunity to raise and, in all the circumstances, should have raised" (para. 37).**
>
> **[15] Madam Justice Newbury set out the requirements of cause of action estoppel at para. 28 (from *Grandview v. Doering*, 1975 CanLII 16 (SCC), [1976] 2 S.C.R. 621, as summarized in *Bjarnarson v. Manitoba* (1987), 1987 CanLII 993 (MB KB), 38 D.L.R. (4th) 32 (Man. Q.B.) at 34, aff'd (1987), 1987 CanLII 5396 (MB CA), 45 D.L.R. (4th) 766 (Man. C.A.)):**
>
> 1. **There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];**
> 2. **The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];**
> 3. **The cause of action in the prior action must not be separate and distinct; and**

> **4. The issues which the parties had the opportunity to raise and, in all the circumstances, should have raised.**
>
> **[Emphasis added]**

48. As outlined above, the Court of Appeal in *Hoque v Montreal Trust Co. of Canada*, 1997 NSCA 153, 162 N.S.R. (2d) 321, considered cause of action estoppel and concluded that less broad language should be applied:

> **Although many of these authorities cite with approval the broad language of Henderson v. Henderson, supra, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.**

49. The Discipline Committee finds that the first three requirements for cause of action estoppel have been met.

50. In considering the fourth factor, as to whether the Grounds raise issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, the Discipline Committee is mindful of *Baker* and the principles of procedural fairness and natural justice. These principles require that an individual affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision. The Discipline Committee is satisfied that Ms. McCulloch had the opportunity to present her case fully and fairly, and have decisions affecting her rights made in a fair, impartial and open process.

51. In returning to the specific Grounds raised in Ms. McCulloch's Application, the Discipline Committee concludes that Grounds 1 through 6 were all explicitly known to Ms. McCulloch

and her counsel prior to the Penalty Decision. It was abundantly clear after the Liability Decision that Ms. McCulloch was found guilty of only 8 out of 20 charges. Ms. McCulloch was further aware of all allegations and evidence led regarding her character, fitness to practice, and the personal health information placed in evidence by the Investigation Committee. Ms. McCulloch was also aware of the impact of surrendering her licence, the time it took to prosecute the Charges, and the costs of the Investigation and Hearing.

52. In all respects, the Discipline Committee is satisfied that Ms. McCulloch was aware of and had many opportunities to raise any, and all, of the 6 Grounds throughout the proceedings before the Discipline Committee or at the Court of King's Bench. Having not done so, and having exhausted or abandoned opportunities for appeal on the question of liability, Ms. McCulloch now wishes to raise issues that could and should have been raised in prior proceedings.

53. The Discipline Committee views the Application for Abuse of Process at this late stage as *res judicata* by way of cause of action estoppel and the principles outlined above. The Discipline Committee finds the Application to be a collateral attack on the earlier findings, clouded by an attempt to rely on "new" evidence, which is really information that is not at all new and was fully known prior to the Penalty Decision and before the appeal to the Court of King's Bench. As noted in paragraph 9 of the Brief of Law filed on behalf of Ms. McCulloch, dated September 9, 2024:

> **The instances of abuse of process alleged in this Application are ongoing and cumulative. Delay, for example, was not an issue for the first few years after the start of the investigation. However, the successful appeal to King's Bench reinforced the complaint that the majority of the charges should never have been prosecuted and provided clear evidence delay is now very much part of the abuse of process analysis. [Emphasis added]**

Paragraph 16 of the same Brief of Law states:

> **Ms. McCulloch's case is a compelling example of one of the reasons why the duty starts at the onset and that the abuse of process has been ongoing. Despite a pointed dismissal of most of the charges by the Discipline Committee, at the initial sentencing the Investigation Committee carried on at sentencing as if Ms. McCulloch was responsible for the decision on the 10 charges. [Emphasis added]**

54. While the Discipline Committee recognizes Ms. McCulloch's argument that it could not raise the issues before the Court of King's Bench at first instance, the Discipline Committee is of the view that "first instance" was when the alleged abuse of process and breach of fiduciary duty was known, and all of this was specifically known prior to the Penalty Decision.

55. The Discipline Committee is of the view that even if the issues had not been raised before it prior to the Penalty Decision, that these issues certainly should have and could have been raised before the Court of King's Bench. At that stage, Justice Layh could have considered the Application or sent the matter back to the Discipline Committee.

56. It is not lost on the Discipline Committee that this matter is only now before it because Justice Layh chose not to vary the Discipline Committee's Penalty Order following the reduced findings of guilt and instead remitted the matter of Penalty back to the Discipline Committee. Should Justice Layh have varied the Penalty Order, counsel for Ms. McCulloch was candid in acknowledging that she would have no venue to now raise the Application for Abuse of Process and that it was "fortuitous" that Justice Layh directed the matter of penalty back to the Discipline Committee.

57. In coming to its conclusion that Ms. McCulloch's Application for Abuse of Process is barred due to *res judicata* and cause of action estoppel, the Discipline Committee also finds comments made by the British Columbia Court of Appeal in *Eckervogt v British Columbia*, 2004 BCCA 398, related to the topic of waiver of objection of bias as helpful:

> **[48] I do not think it is proper for a party to hold in reserve a ground of disqualification for use only if the outcome turns out badly. Bias allegations have serious implications for the reputation of the tribunal and in fairness they should be made directly and promptly, not held back as a tactic in the litigation. Such a tactic should, I think, carry the risk of a finding of waiver. Furthermore, the genuineness of the apprehension becomes suspect when it is not acted on right away.**
>
> **[49] On the subject of waiver, Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publication, looseleaf, 2003) said this at 11:5500:**
>
> > **A leading English text expresses the general principle as follows:**
> > **a party may waive his objections to a decision-maker who would otherwise be disqualified on grounds of bias. Objection is generally**

> **deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity. But there is no presumption of waiver if the disqualified adjudicator failed to make a complete disclosure of his interest, or if the party affected was prevented by surprise from taking the objection at the appropriate time, or if he was unrepresented by counsel and did not know of his right to object at the time.**

58. While the *Eckervogt* decision related specifically to allegations of bias against the decision-maker, the Discipline Committee is of the opinion that issues of procedural fairness should be raised promptly, directly, and at the earliest opportunity.

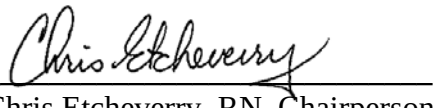
59. The Discipline Committee does also note in *Erschbamer*, at paragraph 45, the Court stated: *"*If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters". The Ontario Superior Court in *Malizia v Re/Max West Realty Inc.*, 2021 ONSC 6150, has also said:

> **[18] As Molloy J. explained in *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin & Younger* (2001), 2001 CanLII 28042 (ON SC), 53 O.R. (3d) 208 (S.C.) the court's authority to dismiss an action for abuse of process is rooted in its inherent jurisdiction and r. 21.01(3) of Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. One of the common situations in which the principle is invoked is to prevent a multiplicity of proceedings or the re-litigation of issues already decided so as to avoid the danger of inconsistent verdicts. <u>It also encompasses a situation in which the party now raising an issue before the court could have raised it in earlier proceedings, but chose not to</u>. [<u>Emphasis added</u>]**

60. Due to its conclusion that Ms. McCulloch's Application is barred, the Discipline Committee does not feel it necessary to review any additional doctrines of finality, arguments raised in the Briefs of Law, or whether the Application should be dismissed as an abuse of process itself.

## V. CONCLUSION

61. The Discipline Committee has concluded that the Application for Abuse of Process is barred due to the principle of *res judicata* and cause of action estoppel. In light of this decision, the Discipline Committee will reconvene to hear submissions on penalty.



**March 7, 2025**

Chris Etcheverry, RN, Chairperson
*On behalf of Members of the Discipline Committee*
Stella Swertz, RN(Retired)
Janna Balkwill, RN
Russ Marchuk, Public Representative