Decision doesn't address nurse's freedom of expression rights

June 19, 2018 – A recent court decision is concerning because of the way it chose not to interfere with a discipline committee’s sanction of a nurse who expressed criticisms on Facebook about her dying grandfather’s care in a Saskatchewan facility, Toronto health lawyer Tracey Tremayne-Lloyd tells AdvocateDaily.com.

“What’s significant about this decision is how far discipline committees are attempting to routinely encroach into the personal lives and rights of the members of their profession in their prosecutions,” she says. “I believe it’s a violation of their jurisdiction and powers.”

Tremayne-Lloyd, principal of TTL Health Law, says the role of professional disciplinary committees is to protect the public from incompetent health professionals whose knowledge, skills and judgment might put people at risk.

“That’s their mandate,” she says.

“The committee isn’t protecting the public from an uneducated, incompetent nurse by disciplining her. What are they protecting by doing that? The social media post criticizes, without names, the nurses in the facility where her grandfather was dying.”

This nurse was simply exercising her right to freedom of speech on her Facebook, Tremayne-Lloyd says.

“The discipline committee is inserting itself into her personal life,” she says. “It’s a trend that’s showing itself all over the country in professional discipline matters. I find that very alarming.
"It’s a worry that professional tribunals appear to be trying to overstep their mandate and jurisdiction, and it should be a concern to all the professions who are self-governing.”

The nurse’s comments on social media in 2015 about the end-of-life care her grandfather received criticized the competence and professionalism of staff — including nurses — who worked at the facility, says the court decision. After a hearing, the Saskatchewan Registered Nurses Association discipline committee said that in posting the comments, she engaged in professional misconduct and ordered her to pay a fine and costs ($26,000), it says.

The nurse appealed the committee’s decision and the matter attracted the attention of commentators who said the appeal is about her right to freedom of expression, and whether the professional regulator has the power to restrict a registered nurse’s right to it, says the decision.

The court said the focus of the appeal is not about the nurse’s right to freedom of expression, but rather whether the discipline committee made a mistake in its decision. The court ruled that the committee’s decision fell “within the leeway that the law allows” and allowed it to stand. The court dismissed the woman’s appeal.

Tremayne-Lloyd explains that when a regulated health professional is disciplined by their self-governing body for professional misconduct it is akin to being prosecuted for a quasi-criminal offence — the only difference is what’s at stake isn’t one’s liberty, but their licence to practice and their reputation.

“A discipline committee lays charges against the professional to say they’ve committed an act of professional misconduct and the person pleads guilty or not guilty. If they’ve pleaded not guilty, they have counsel who defends them against the accusation,” she says. “The committee then makes a decision about whether they are guilty of that act.”

If the professional is convicted of the offence, they are sentenced to a penalty, which could range from a monetary fine, a suspension of the right to practise, a
reprimand that goes on their professional record or they could lose their licence altogether, Tremayne adds.

“The idea is that the penalty has to be a reasonable one for the offence,” she says.

Professionals have a right to appeal the discipline committee’s decision to a court, Tremayne-Lloyd says.

The nurse’s case raises important legal issues that need to be addressed, she adds.

But the Saskatchewan court failed to examine whether the discipline committee’s decision was within its jurisdiction, Tremayne-Lloyd says.

“It didn't examine whether the committee had the right to interfere with her right to freedom of speech and expression,” she says.

Tremayne-Lloyd contends that the nurse’s criticism on social media of the facility where her grandfather received care is irrelevant to her practice of nursing, and the committee’s finding of guilt would appear to be a violation of her right to freedom of speech and expression.”