SUPREME COURT OF YUKON

Citation: *VZ v Licensed Practical Nurses Committee of Inquiry*, 2016 YKSC 22

Date: 20160318
S.C. No. 14-AP015
Registry: Whitehorse

Between:

VZ

PETITIONER

And

LICENSED PRACTICAL NURSES COMMITTEE OF INQUIRY

RESPONDENT

Before Mr. Justice L.F. Gower

Appearances:

André W.L. Roothman	Counsel for the Petitioner
Richard A. Buchan	Counsel for the Respondent
Mike Reynolds	Counsel for the Advisory Committee

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for judicial review by the petitioner, VZ, who is a licensed practical nurse (the "nurse") and who was employed by the Yukon Government (“YG”) at the material time. In April 2013, YG filed a complaint against the nurse under the *Licensed Practical Nurses Act*, R.S.Y. 2002, c. 138, (the “*LPN Act*”) and *Regulation*, O.I.C. 2010/113, (the “*LPN Regulation*”) for being unsafe when administering medication and making nursing care decisions (the “initial complaint”). As a result, YG placed restrictions on the nurse’s continuing employment. The professional discipline complaint then proceeded through a rather tortuous and convoluted administrative and procedural route, which ultimately gave rise to this application.

[2] For reasons which will become more obvious below, the main issue on this judicial review is whether there is a basis for quashing the complaint due to an abuse of process resulting from unreasonable delay in the entirety of the proceedings to date.

BACKGROUND SUMMARY

[3] Because the facts in this case are rather lengthy and convoluted, I will attempt to give an initial overview to provide context before getting into the details.

[4] The initial complaint was directed to the Licensed Practical Nurses Advisory Committee (the "advisory committee"), which empanelled a committee of inquiry to investigate and adjudicate the complaint (the "first committee of inquiry"). This body decided, in June 2014, on the application of the nurse, that YG's complaint needed to be further specified and that YG was required to make full disclosure of its evidence before the matter would proceed to a discipline hearing. When YG re-submitted the complaint and the supporting disclosure (the "reformulated complaint"), the advisory committee determined that the first committee of inquiry was *functus officio* in relation to the initial complaint. It therefore referred the reformulated complaint to a new committee of inquiry (the "second committee of inquiry").

[5] Then there were a couple of significant administrative bungles. Although the nurse retained Mr. Roothman as counsel as far back as November 2013, when the advisory committee informed the nurse of the decision to refer the reformulated complaint to a second committee of inquiry, in August 2014, it failed to copy the correspondence to Mr. Roothman. Then, even though the nurse had advised the registrar assisting the advisory committee of a change of his address from Whitehorse to Oliver, British Columbia, when the second committee of inquiry wrote to inform the

nurse in November 2014 that it had established a deadline of December 19, 2014, for a written reply to the complaint, the correspondence was sent to the nurse's former Whitehorse address. And, yet again, Mr. Roothman was not provided a copy of the correspondence.

[6] When Mr. Roothman found out about the second committee of inquiry and the deadline for a response to the complaint, he wrote to the chair of the second committee seeking an opportunity to bring an application before the committee to quash the complaint because of unreasonable delay. The chair extended the deadline for reply to December 31, 2014, but refused to hear an application to quash based on delay. Mr. Roothman interpreted this response as giving rise to a reasonable apprehension of bias on the part of the chair. He in turn responded with notice that he would be bringing on this application for judicial review.

[7] Mr. Roothman filed the within petition on February 17, 2015, following a brief delay due to personal family matters.

[8] This judicial review application was originally scheduled to be argued on November 12 and 13, 2015. However, a series of events conspired to prevent that from happening. In April 2015, two of the three members of the second committee of inquiry either resigned or withdrew. Then, in October 2015, the chair indicated that she was stepping down. A new three-member committee of inquiry was appointed later in October (the "the third committee of inquiry"), but because of the timing of that appointment, counsel for the respondent, Mr. Buchan, was unable to obtain instructions in time for the November hearing dates. Accordingly, the matter was brought forward in case management and the hearing was adjourned by consent to February 24, 2016. At

that case management, Mr. Roothman, on behalf of the nurse, indicated that the bias argument was no longer a stand-alone ground to quash the complaint, but rather should be factored in to the overall delay. That continues to be his position on this judicial review.

STATUTORY SCHEME

[9] The scheme of the legislation for processing disciplinary complaints against licensed practical nurses begins with the complainant making their complaint to the registrar of licensed practical nurses under s. 8(1) of the *LPN Act*.

[10] On receiving a complaint, the registrar must refer the matter to the advisory committee.

[11] The advisory committee must review every complaint referred to it by the registrar and must, pursuant to s. 8(3) of the *LPN Act*:

> a) reject the complaint if the complaint is frivolous; or
>
> b) refer the complaint to a committee of inquiry if there are reasonable grounds for the complaint.

More will be said about this provision later.

[12] If a complaint is referred to a committee of inquiry, the chair of the advisory committee must appoint at least three members of the discipline panel to be the committee of inquiry for the purpose of hearing that complaint (s. 9(1) of the *LPN Act*). The discipline panel is essentially a roster of licensed practical nurses and other individuals eligible to be appointed to these committees of inquiry.

[13] The committee of inquiry is required under s. 9(3) of the *LPN Act* to "investigate, hear and determine" complaints referred to it by the advisory committee. In doing so, it also has the powers of a board of inquiry under the *Public Inquiries Act*, R.S.Y. 2002,

c. 177, including powers to enforce attendance of witnesses and to compel the production of documents (s. 5).

[14] If a committee of inquiry determines that a complaint is justified, it may reprimand the nurse or suspend or cancel their registration.

[15] YG does not provide either the committee of inquiry or the advisory committee with any dedicated secretariat services. Up until September 2015, it appears that both committees relied upon the registrar to perform administrative and secretarial services.

CHRONOLOGY OF EVENTS

[16] On April 24, 2013, YG filed a complaint against the nurse alleging that he had been unsafe in administering medication and making nursing care decisions. The complaint provided no details of the allegations with respect to dates, times, patients or the nurse's impugned actions.

[17] On June 3, 2013, the advisory committee informed the nurse of the complaint and provided him with an unofficial package of related documentation.

[18] On August 21, 2013, the first committee of inquiry advised YG and the nurse that the complaint had been referred to it and provided a timeline for its investigation process.

[19] On September 16, 2013, YG provided the first committee of inquiry with a package of documents relating to the complaint, which was forwarded by the committee to the nurse.

[20] On October 20, 2013, the nurse, who was then unrepresented, wrote to the first committee of inquiry and provided a package of documentation in response.

[21] On October 25, 2013, YG wrote to the registrar responding to the nurse's package of material and complaining of a breach of confidentiality by him respecting certain patient records.

[22] On October 30, 2013, the registrar wrote to the nurse on behalf of the first committee of inquiry, advising him that he had an opportunity to respond to YG's case.

[23] On November 18, 2013, Mr. Roothman wrote to the first committee of inquiry, advising that he had been retained and confirmed that the nurse had handed over all patient records to him and that these records were necessary for the nurse's defence to the complaint.

[24] On December 5, 2013, the first committee of inquiry advised Mr. Roothman that its investigation was completed and that it was required to proceed to a hearing to determine the complaint.

[25] On January 6, 2014, the first committee of inquiry delivered a notice of hearing to Mr. Roothman setting the hearing for March 11 and 12, 2014.

[26] On March 6, 2014, Mr. Roothman wrote to YG requesting disclosure of certain documentation thought to be relevant to the complaint.

[27] On March 10, 2014, Mr. Roothman filed a notice of application with the first committee of inquiry seeking a dismissal of the complaint, or alternatively, an order adjourning the hearing until the complaint could be specified and requiring that YG provide disclosure of the previously requested documents.

[28] On March 12, 2014, the hearing of the nurse's application was addressed as a preliminary issue before the hearing of the complaint. However, the matter had to be adjourned to May 20 and 21, 2014, due to the unavailability of the chair of the advisory

committee, and also to provide YG with the opportunity to retain legal counsel to respond to the nurse's application.

[29] On April 3, 2014, YG's counsel, Ms. Wenckebach, wrote to the first committee of inquiry requesting a copy of their hearing policy and procedures. She repeated this request on April 10, 2014.

[30] On April 15, 2014, counsel for the first committee of inquiry responded to YG and advised that no regulations, formal policy or procedure respecting the conduct of its investigations or the hearing of complaints existed, and that it had previously provided detailed written directions to the parties as to how the investigation and hearing would proceed.

[31] On April 22, 2014, YG's counsel wrote to the first committee of inquiry discussing the need for independent counsel to lead the proceedings and YG's role in the proceedings.

[32] On May 7, 2014, YG's counsel advised Mr. Roothman that, due to privacy concerns, in order for YG to produce the documents requested by him, the nurse would either have to make an application under the *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1, ("*ATIPP*") or obtain an order from the first committee of inquiry for such production.

[33] On May 13, 2014, Mr. Reynolds, counsel for the advisory committee, wrote to the first committee of inquiry advising that the advisory committee was *functus officio* once the complaint was referred to an inquiry and could not assist in providing further documentation to the committee of inquiry.

[34] On May 20, 2014, the first committee of inquiry heard the nurse's application that the initial complaint be further specified and that full disclosure be provided to him.

[35] On June 7, 2014, the first committee of inquiry released its written decision granting the nurse's application and directing that the reformulated complaint be returned to the advisory committee for the purpose of determining whether it is frivolous or whether it should be referred to a committee of inquiry.

[36] On July 25, 2014, YG provided its reformulated complaint and full disclosure to the advisory committee.

[37] August 29, 2014, the advisory committee informed the nurse that it had decided there were reasonable grounds for the reformulated complaint and that it had referred the matter to the second committee of inquiry. The advisory committee regarded the reformulated complaint as a new complaint and determined that it was appropriate to appoint a new committee of inquiry. Unfortunately, as noted earlier, the advisory committee's letter was not copied to the nurse's counsel, Mr. Roothman.

[38] On September 29, 2014, the nurse advised the registrar of his new address in Oliver, British Columbia.

[39] On November 20, 2014, the chair of the second committee of inquiry, Ms. Goodwin-Chief, wrote to the nurse to inform him that it had been appointed to investigate and hear the reformulated complaint, and requiring the nurse to provide a written reply by December 19, 2014. Again, unfortunately, the letter was not sent to the nurse's new address in Oliver, British Columbia, but rather was sent to the nurse's former Whitehorse address. Worse still, the letter was not copied to Mr. Roothman.

[40] On December 10, 2014, Mr. Roothman wrote to the second committee of inquiry complaining about the fact that he was not copied with the committee's letter of November 20th and seeking a date before the committee for an application by the nurse to quash the complaint on the basis of unreasonable delay.

[41] On December 12, 2014, Ms. Goodwin-Chief wrote to Mr. Roothman explaining that the registrar had not provided the committee with the nurse's new address. However, in light of the mix-up, she was prepared to extend the deadline for a response from the nurse to December 31, 2014. She then stated that the second committee of inquiry would be meeting on January 14, 2015, to decide what it would do next. She failed to expressly respond to Mr. Roothman's request for an opportunity to make an application to quash the complaint on the basis of unreasonable delay.

[42] On December 16, 2014, Mr. Roothman wrote to Ms. Goodwin-Chief complaining that he would not have time to respond to the complaint by December 31, 2014, because of the added difficulties of communicating with his client by long-distance and also because of the intervening Christmas holidays. He repeated his request for an opportunity to apply to the second committee of inquiry to quash the complaint for unreasonable delay before being required to provide a response.

[43] Also on December 16th, Ms. Goodwin-Chief wrote to Mr. Roothman declining his request for a hearing on the delay issue, and restating the requirement that the nurse provide his reply by December 31, 2014. In that letter, Ms. Goodwin-Chief made the following statement, implicitly with reference to the proposed application:

> … you as his counsel are only delaying this for your client by blocking our work at the beginning stages. If you would like to challenge our procedures, you can bring an appeal to the

> Supreme Court under section 10 of the [*LPN Act*] after a decision is made by our committee…

[44] On December 22, 2014, Mr. Roothman wrote to Ms. Goodwin-Chief stating that he would not be complying with the December 31, 2014 deadline, but that he would be filing a petition in the Supreme Court of Yukon to quash the complaint.

[45] As a result of personal family matters, Mr. Roothman was not able to file the petition until February 17, 2015. The petition is for a judicial review of the process of the initial and reformulated complaint and seeks to quash the complaint principally on the basis of unreasonable delay. Mr. Roothman also alleged in the petition that the statement by Ms. Goodwin-Chief quoted above (para. 43) gave rise to a reasonable apprehension of bias.

[46] In April 2015, two members of the second committee of inquiry either resigned or withdrew.

[47] On May 15, 2015, the appointments to the roster of nurses and other persons on the discipline panel under the *LPN Act* all expired, and a new discipline panel was not appointed until June 19, 2015. The advisory committee was not consulted by YG on that appointment process.

[48] On August 26, 2015, counsel for the advisory committee, Mr. Reynolds, informed Mr. Roothman that because of the resignations of the two members of the second committee of inquiry, and the appointment of a new discipline panel, it would be necessary for the advisory committee to appoint a third committee of inquiry to hear the complaint.

[49] On September 4, 2015, Mr. Roothman wrote to Mr. Reynolds stating that the first committee of inquiry “was seized with the matter” and objecting to the appointment of

another committee of inquiry. He also threatened to bring an application for a stay of proceedings pending the outcome of the hearing on the petition. At the hearing of this judicial review, Mr. Roothman withdrew his position that the first committee of inquiry was seized with the complaint.

[50] The dates initially scheduled for the judicial review application were November 12 and 13, 2015. The advisory committee decided to delay the appointment of a further committee of inquiry until shortly before those dates for two reasons: first, to reduce the risk of yet a further court application for an interim stay of proceedings pending the hearing of the petition; and second, to ensure that a committee of inquiry would be able to immediately proceed with processing the reformulated complaint, depending on the outcome of the hearing of the petition. As a result, the advisory committee did not begin the process of appointing the third committee of inquiry until late September 2015.

[51] During the week of October 19, 2015, Ms. Goodwin-Chief informed the advisory committee that she would be stepping down as an appointee to the next committee of inquiry. This was done in order to avoid creating an appearance of bias by being an appointee to the third consecutive committee of inquiry responding to essentially the same complaint against the nurse.

[52] On October 23, 2015, the advisory committee informed counsel for the third committee of inquiry of the appointment of the three members of that committee. The nurse was advised of these appointments on November 3, 2015.

[53] On November 6, 2015, the matter came into case management before me. Mr. Buchan, counsel for the third committee of inquiry, indicated that because of the changes in the membership of the committee of inquiry over the previous two years, he

was having difficulty getting clear instructions for responding to the petition. All three counsel, Mr. Buchan, Mr. Roothman and Mr. Reynolds, effectively agreed to an adjournment to February 24, 2016, for the hearing of the petition. At that time, Mr. Roothman also conceded that the bias issue had largely become moot because of the resignation of Ms. Goodwin-Chief, but that it still played a role in the overall period of delay.

[54] At the hearing of the petition on February 24, 2016, Mr. Roothman orally informed me that after his client's move to British Columbia, the nurse had returned to the Yukon from time to time to do "piecemeal" work here. Further, in late 2015, the nurse decided to move back to the Yukon with his spouse and is currently working at the Whitehorse General Hospital. No further details were provided, and no updated affidavit material was provided by either party on this point

[55] Mr. Roothman also confirmed at the hearing on February 24th that bias was no longer a stand-alone issue, but rather had become a component of the overall period of delay. He also abandoned the argument for *Charter* relief set out in the original petition.

LAW

[56] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 ("*Blencoe*"), is a leading case on when delay in an administrative law context results in an abuse of process and a stay of proceedings. In that case, Bastarache J. wrote for the five-to-four majority. Mr. Blencoe, while serving as a minister in the Government of British Columbia, was accused by one of his assistants of sexual harassment. A month later, the Premier removed him from the Cabinet and dismissed him from the NDP caucus. Two other women filed complaints of sexual harassment with what is now the

British Columbia Human Rights Commission. The complaints centered on various incidents alleged to have occurred between March 1993 and March 1995. Mr. Blencoe was informed of the first complaint in July 1995 and the second in September 1995. After the Commission's investigation, hearings were scheduled before the British Columbia Human Rights Tribunal in March 1998, over 30 months after the initial complaints were filed. Mr. Blencoe applied in November 1997 for judicial review to have the complaints stayed on the basis of unreasonable delay in processing them. He alleged that the unreasonable delay caused serious prejudice to him and his family which amounted to an abuse of process and a denial of natural justice.

[57] At paras. 101 through 133 of the judgment, Bastarache J. described how unreasonable delay can lead to an abuse of process if there has been either: (a) prejudice to the fairness of the hearing; or (b) other forms of prejudice such as psychological or sociological harm.

[58] *Blencoe* begins with the proposition that, in the administrative law context, state-caused delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Rather, there must be proof of significant prejudice which results from an unacceptable delay (para. 101). Bastarache J. continued on this theme as follows:

> 115 I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process…. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where

> there is no prejudice to hearing fairness, the delay must be **clearly unacceptable** and have **directly caused** a **significant prejudice** to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute… (my emphasis)

[59] For a delay to be unacceptable, it must have been either unreasonable or inordinate: *Blencoe*, at para. 121.

[60] Further, Bastarache J. set a high threshold for when a delay might give rise to an abuse of process:

> 120 In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" …. According to L'Heureux-Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive. (my emphasis)

[61] On the facts in *Blencoe*, Bastarache J. accepted the calculation of the delay by Lowry J. of the Supreme Court of British Columbia, the judge on the initial judicial review, as being the period between the filing of the complaint to the end of the investigation process. That then reduced the delay from a total of 32 months to a 24-month period (para. 124).

[62] Then, after comparing the delay in that case to other analogous cases, Bastarache J. commented that, unlike the comparator cases, Mr. Blencoe's case did not

exhibit “complete inactivity for extremely lengthy periods”, except for one five-month period of inexplicable delay. Nevertheless, he also observed that there was “ongoing communication between the parties”, and in the result found that the 24-month period from the filing of the complaints to the referral to the Human Rights Tribunal was not so inordinate or inexcusable as to amount to an abuse of process:

> 130 The delay in the case at bar should be compared to that in analogous cases. In *Nisbett*, the sexual harassment complaint had been outstanding for approximately three years. In *Canadian Airlines*, there was a 50-month delay between the filing of the complaint and the appointment of an investigator. In *Stefani*, there was a delay of two years and three months between the complaint and the inspection and an additional six- or seven-month delay which followed. In *Brown*, a three-year period had elapsed prior to serving the petitioner with notice of the inquiry. In *Misra*, there was a five-year delay during which time Misra was suspended from the practice of medicine. Finally, in *Ratzlaff*, it had been seven years before the physician received a hearing notice.
>
> 131 A review of the facts in this case demonstrates that, unlike the aforementioned cases where there was complete inactivity for extremely lengthy periods, the communication between the parties in the case at bar was ongoing. While Lowry J. acknowledged the five-month delay of inactivity, on balance, he found no unacceptable delay and considered the time that elapsed to be nothing more "than the time required to process complaints of this kind given the limitations imposed by the resources available…
>
> 132 … In my opinion, the five-month inexplicable delay or even the 24-month period from the filing of the Complaints to the referral to the Tribunal was not so inordinate or inexcusable as to amount to an abuse of process. Taking into account the ongoing communication between the parties, the delay in this case does not strike me as one that would offend the community's sense of decency and fairness. While I would not presume to fix a specified period for a reasonable delay, I am satisfied that the delay in this case was not so inordinate as to amount to an abuse of process. (my emphasis)

ANALYSIS

[63] In my view, *Blencoe* is dispositive of the case at bar.

[64] First, relative to the periods of delay referred to in the cases cited in *Blencoe*, I am not persuaded that the total period of delay here was either unreasonable or inordinate.

[65] Attached to these reasons as Schedule "A" is a table describing: the various events which led to delay; the time periods between these events; whether the resulting delay was caused by the nurse or was due to other reasons; and the accumulating delay between the filing of the initial complaint with the registrar on April 24, 2013 and the filing of the nurses petition in this Court on February 17, 2015. The total period of accumulated delay was 665 days, or approximately 22-months.

[66] Here, I agree with Mr. Buchan, on behalf of the respondent committee of inquiry, that any delay occurring after the petition was filed ought not to be considered, since this petition proceeding effectively stayed the current third committee of inquiry from holding a hearing, pending the outcome of this judicial review. Any additional delay suffered by the nurse since the petition was filed is either attributable to the counsel involved, or is systemic to the operation of the court system. In any event, the respondent committee of inquiry cannot be held responsible for that time.

[67] I also agree that the delay between the filing of the initial complaint on April 24, 2013, and Mr. Roothman's application to the first committee of inquiry seeking a specified complaint and full disclosure is also not attributable to the respondent committee of inquiry. Rather, it was the result of the position taken by YG's counsel, in the spring of 2014, that because of privacy concerns, YG was unable to make

disclosure of the sought-after patient records unless there was a successful *ATIPP* application by the nurse or an order from the committee of inquiry.

[68] As it turned out, it appears that the position of YG's counsel at that time has been vindicated by the decision of Kenny J. in *Yukon v. O.G.*, 2014 YKSC 52 ("*O.G.*"). As in the case at bar, YG had made a complaint to the registrar alleging that O.G. was unsafe in providing medications, and placed restrictions on her employment. When the complaint was in turn referred to the advisory committee, it was rejected on the basis that it was frivolous. Mr. Reynolds, counsel for the advisory committee, advised me in this hearing that the complaint in *O.G.* was virtually identical to the one in the case at bar. Kenny J. concluded that the decision of the advisory committee was unreasonable and remitted the complaint back to the advisory committee for redetermination.

[69] Kenny J. noted that there is nothing in the governing legislation that details what information must be provided in a complaint, nor is evidence required in a complaint from an employer. Indeed, such a complaint may not even need to be in writing.

[70] Section. 21(1) of the *LPN Regulations* provides:

> 21(1) A person who terminates the employment of a registrant or revokes, suspends or imposes restrictions or conditions on the employment duties of a registrant shall promptly report to the registrar the termination, suspension or imposition of restrictions or conditions if it was based on a belief, held on reasonable and probable grounds, that
>
> (a) the registrant is unfit to continue to practise;
>
> (b) the actions of the registrant constitute unprofessional conduct or professional incompetence or indicate incapacity; or
>
> (c) the continued practice of the registrant might constitute a danger to persons in their care.

[71] Section 8(3) of the *LPN Act* provides:

> (3) The advisory committee shall review every complaint referred to it by the registrar and shall
>
> (a) reject the complaint if the complaint is frivolous; or
>
> (b) refer the complaint to a committee of inquiry if there are reasonable grounds for the complaint.

[72] Kenny J. concluded from the interplay between these provisions, that when the advisory committee receives a complaint from an employer, it can presume that the complaint is based on a belief, held on reasonable and probable grounds, as that is a precondition for the employer to make the complaint in the first place:

> 25 In this case, the employer provided the name of the LPN, that she was unsafe in providing medications, that she had been put on a mentorship program for 8 weeks to assist her in this regard, and that at the end of that program, the employer had determined she could not work safely in a role responsible for medication management. In addition to that information, the advisory committee knows that the employer believes, on reasonable and probable grounds, that the LPN is unfit to continue to practice or the actions of the LPN constitute unprofessional conduct or professional incompetence or incapacity or that the continued practice of the LPN might constitute a danger to persons in care. They know that because the LPNR says that the employer must believe this before they make a report under s. 21.

Accordingly, Kenny J. held that it was unreasonable for the advisory committee to find that the complaint was frivolous.

[73] In coming to this determination, Kenny J. nevertheless observed that the wording of s. 8(3) of the *LPN Act* is:

> [23] … problematic and causes confusion and uncertainty for those mandated to carry out their duties under that section. As written, it sets out two different standards of proof for the one question of whether to send a complaint to a committee of inquiry. I have found that the standard of

> proof is whether or not a complaint is frivolous. Should the legislature determined that is not the intended standard, amendments will need to be made to the legislation to clarify that intent.

[74] I can find no flaw in Kenny J.'s logic in *O.G.*, and I echo her comments regarding the confusing and problematic wording of s. 8(3) of the *LPN Act*. It effectively guts the advisory committee of playing any kind of a screening or gatekeeper function in responding to employer complaints, before significant resources are called into play in the disciplinary process.

[75] In any event, as a result of YG's position on disclosure of private documents, it was necessary for Mr. Roothman to make his application to the first committee of inquiry on the nurse's behalf. While that was entirely proper and necessary, it did lead to further delay between the date on which the first committee of inquiry was scheduled to deal with the complaint, i.e. March 12, 2014, and the date on which YG ultimately complied the committee's order to provide a more specific complaint and full disclosure, i.e. July 25, 2014. This is a total block of time amounting to 135 days, however, it is not a delay attributable to the respondent committee of inquiry.

[76] Rather, I find that the pertinent time period on this application is from the issuance of the reformulated complaint on July 25, 2014, until the nurse issued his petition on February 17, 2015. That is the time period relating to the second committee of inquiry. I do not find that it was unreasonable or inordinate.

[77] Indeed, even considering the entire period of almost 22 months from the filing of the initial complaint to the filing of the petition, I am not persuaded that there were any lengthy periods of inactivity. Rather, I tend to agree with counsel for the respondent committee of inquiry that, during the entire process following the issuance of the initial

complaint, there was a regular back and forth communication between the nurse, the complainant, and the administrative tribunals concerned. There were no identifiable substantial gaps of inactivity on the part of any of the players.

[78] Further, if I am in error here and there was inordinate delay, there is insufficient evidence that the delay caused the nurse material prejudice, in terms of psychological or sociological effects.

[79] On behalf of the nurse, Mr. Roothman has acknowledged, in both his written outline and his oral submissions, he is only seeking to establish prejudice in the form of either psychological or sociological harm. He did not argue that the delay in this case has affected the fairness of the hearing process.

[80] The only evidence of such prejudice is in the nurse's first affidavit, where he refers to the following subjective experiences resulting from the complaint and the delay in its processing:

1) The complaint affected the nurse and his wife “emotionally” on a daily basis;
2) The nurse feared seeing former co-workers in public;
3) Walking past former places of employment an “unpleasant experience” for the nurse;
4) The nurse needed to change his environment so that he could “forget as much as possible" about the complaint;
5) The case made it "extremely difficult" for the nurse's wife to work with or around the people who had reported him; and

6) The nurse and his wife decided to move to British Columbia because they "could not wait any longer" for the case to be resolved.

[81] Given the very high threshold for this form of prejudice to give rise to an abuse of process set out in *Blencoe*, I once again agree with counsel for the respondent committee of inquiry that the nurse ought to have provided something more than merely subjective evidence of the extent of the psychological and/or sociological adverse impacts of the complaint and the administrative process surrounding it. For example, I cannot imagine that it would have been onerous for the nurse to obtain a report from a medical or psychological professional detailing the nature of his stress and his inability to remain working in the Yukon. And yet, no such objective confirmation of the nurse's subjective prejudice was provided by him.

[82] Worse still, only at the hearing was I provided with information from the nurse's counsel that he was never fired from his employment with YG during the discipline process. Rather, he chose to resign when he moved to British Columbia with his family. However, I was further advised that the nurse was able to return to the Yukon from time to time to do piecemeal work in the nursing field. Still later, I was informed by his counsel that when he determined that it was too inconvenient to his family to be traveling back and forth, the nurse decided to move back to Yukon with his family in late 2015, and has since returned to employment at the Whitehorse General Hospital. As I alluded to above, none of this information was in affidavit form, but it nevertheless significantly undermines, in my view, any ongoing prejudice to the nurse

[83] Accordingly, even if there was inordinate delay, the nurse has not made a case that he was sufficiently prejudiced to give rise to an abuse of process.

[84] Finally, there is a strong public policy argument to decline the nurse's application for relief. The mandate of the committee's inquiry under the *LPN Act* is to maintain the safety and integrity of the public health system in relation to the activities of licensed practical nurses. While it is important to give due regard to the fairness of the process when disciplining such professional nurses, the fairness of the process has not been raised by the petitioner nurse in this particular application for judicial review. Therefore, I conclude that where the protection of public health is concerned, substantial weight ought to be placed on the public interest over the individual concerns of the nurse.

CONCLUSION

[85] The application is dismissed.

[86] However, given the significant expenditure of time and resources by the nurse in pursuing a specific complaint and full and proper disclosure, to which he would have otherwise been entitled, but for the flawed legislation at play in this process, I feel it is appropriate that the parties should each bear their own costs.

GOWER J.

SCHEDULE "A"

Delay Factors:

Dates	Events/Reasons	VZ-caused	Other-caused	Total # of Days (Delay)
Apr 24, 2013	Meade complaint to Registrar			
June 3, 2013	Advisory Committee letter to VZ advising of complaint		40	40
	Appointment of Committee of Inquiry			
Aug 21, 2013	Committee of Inquiry letter to Complainant regarding investigation process.		79	119
Oct 20, 2013	VZ letter to Committee of Inquiry.	60		179
Oct 25, 2013	Complainant letter to LPN Registrar with additional grounds of complaint		5	184
Oct 30, 2013	Registrar letter to VZ regarding Complainant's rebuttal		5	189
Nov 18, 2013	Roothman letter to Committee of Inquiry	19		208
Dec 5, 2013	Committee of Inquiry letter to Roothman: intention to proceed to hearing		17	225
Jan 6, 2014	Committee of Inquiry letter to Roothman: Notice of Hearing (March 11/12, 2014)		32	257
Mar 6, 2014	Roothman letter to Complainant: requesting document disclosure	60		317
Mar 12, 2014	VZ Notice of Application seeking complaint dismissal, adjournment, particulars of complaint, disclosure of documents	6		323

Dates	Events/Reasons	VZ-caused	Other-caused	Total # of Days (Delay)
Mar 12, 2014	Committee of Inquiry decision letter: application for adjournment is granted; application hearing scheduled to reconvene May 20/21, 2014.			
May 15, 2014	VZ Amended Notice of Application	64		387
May 20, 2014	Hearing of VZ Application	5		392
Jun 7, 2014	Committee of Inquiry Reasons for Decision, effectively finding in favour of VZ		18	410
Jun 13, 2014	Registrar e-mail to Roothman to deliver Reasons for Decision		6	416
Jul 25, 2014	Complainant's legal counsel letter to Advisory Committee with reformulated complaint and supporting documents		42	458
Aug 29, 2014	Advisory Committee letter to VZ to forward reformulated complaint		35	493
Sep 23, 2014	Advisory Committee appoints second Committee of Inquiry to hear reformulated complaint		25	518
Oct 23, 2014	Committee of Inquiry #2 meets for first time		30	548
Nov 20, 2014	Committee of Inquiry letter to VZ (sent to Whitehorse address)		28	576
Dec 5-9, 2014	Roothman-Bell correspondence exchanged regarding VZ address and procedural matters		17	593
Dec 7, 2014	VZ receives Committee of Inquiry letter			
Dec 10, 2014	Roothman letter to Committee of Inquiry	3		596

Dates	Events/Reasons	VZ-caused	Other-caused	Total # of Days (Delay)
Dec 12, 2014	Committee of Inquiry reply letter to Roothman		2	598
Dec 15, 2014	Bell email to Roothman with Committee of Inquiry letter		3	601
Dec 16, 2014	Roothman letter to Committee of Inquiry		1	602
Dec 16, 2014	Committee of Inquiry letter to Roothman			
Dec 17, 2014	Bell email to Roothman with Committee letter		1	603
Dec 22, 2014	Roothman letter to Committee of Inquiry giving notice of intention to seek judicial review	5		608
Feb 17, 2015	VZ Petition filed	57		665
	Grand Totals	**279**	**386**	**665**