

## Trying to Make Sense of the Use of Social Media by Practitioners

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The Canadian regulatory world has waited impatiently for the decision of the Saskatchewan Court of Appeal in the case of *Strom v. Saskatchewan Registered Nurses' Association*. The decision finally came down this week. It provides some guidance but leaves many questions unanswered.

In that case nurse Strom posted comments on Facebook about the care that her grandfather had received during his final days at a care home in Saskatchewan. The comments did not identify any specific staff at the home and recognized some, again unidentified staff, for their compassionate care. However, the comments indicated that her grandfather had received “subpar” care that was not “up to date” and lacked compassion. The posting urged others to raise any concerns about the care of their loved ones with the facility. Ms. Strom also tweeted a link to the posts to “the provincial Minister of Health and the provincial Leader of the Opposition” which made them much more public.

Ms. Strom was disciplined for harming the reputation of the nursing staff at the home and undermining the public confidence in the staff at that facility. In part the tribunal was concerned that Ms. Strom had failed to adequately ascertain the facts, relying instead on reports from other family members. In addition, she had not attempted to raise the concerns through proper channels. Also, she identified herself as a registered nurse in one of the posts and made them generally available to the public, undermining the argument that the posts were a private matter.

The Court of Appeal held that the discipline panel failed to take a “contextual” approach in assessing whether this off-duty conduct was unprofessional and whether the finding was a proportional response to the infringement of Ms. Strom’s freedom of expression under the *Canadian Charter of Rights and Freedoms*.

The Court summarized some of the contextual factors as follows:

Ms. Strom posted as a granddaughter who had lost one grandparent and was concerned for the future of another. That fact was front and center for a reader of the posts. Although she identified as a nurse and an advocate, she was not and did not purport to be carrying out her duties as a nurse. She was on maternity leave and spoke to the quality of care provided by a distant facility with which she had no professional relationship. The private aspect of the posts was made clear and was significant. Further, and as has been noted, the posts have not been shown to be false or exaggerated and, on the face of it, would appear to be balanced.

The Court did not accept the discipline panel’s contention that Ms. Strom should have followed formal channels of communicating concerns in the circumstances of this case. It was a disproportionate limitation on the freedom of expression to prevent practitioners from choosing “their means of communication and audience”.

In setting aside the misconduct finding, the Court was careful to not extend its reasoning too far:

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It is entirely legitimate for a professional regulator to impose requirements relating to civility, respectful communication, confidentiality, advertising, and other matters that impact freedom of expression. Failing to abide by such rules can be found to constitute professional misconduct.

The Court's reasons suggest that so long as a contextualized approach is taken by regulators in scrutinizing social media posts by practitioners, findings of professional misconduct would likely be upheld.

The Court's decision will soon be available on [www.canlii.org](http://www.canlii.org).

Even while the *Strom* case was pending, there have been a number of other developments on the issue of practitioners using social media.

## **Backlash Against Narrow View of Professionalism**

This past summer a scholarly paper entitled "Prevalence of unprofessional social media content among young vascular surgeons" was posted by the Journal of Vascular Surgery. It characterized various forms of unprofessional posts on social media that it suggested could cause difficulties for the practitioners later in their career. Two of the categories of "potentially unprofessional" conduct included pictures taken while wearing swimwear and holding alcoholic drinks. The response was viral with hundreds, if not thousands, of health practitioners posting pictures of themselves in swimwear holding drinks. See:

<https://www.cnn.com/2020/07/25/cnn10/medbikini-backlash-and-apologies-trnd/index.html>.

The Journal retracted the paper. See: [https://www.jvascsurg.org/article/S0741-5214\(19\)32587-X/fulltext](https://www.jvascsurg.org/article/S0741-5214(19)32587-X/fulltext).

## **Serious Consequences in Serious Cases**

The proposed sanction in *Strom* did not involve a suspension. It does appear that suspension is not the usual sanction for inappropriate social media posts. For example, recently a teacher in British Columbia was reprimanded, without a suspension, for "intemperate and insulting comments about religion" on an open Facebook post. The teacher "agreed his conduct constituted professional misconduct and conduct unbecoming a teacher." He also agreed that his posts "could undermine his efforts to provide an inclusive learning environment for his students." See: <https://www.timescolonist.com/news/local/b-c-teacher-reprimanded-for-posting-insulting-comments-about-islam-1.24084516>.

Similarly, in the UK a barrister was recently reprimanded and fined £1000 for a sexually and racially offensive tweet in the context of a debate over the colonial nature of the curriculum at English universities. See:

<https://www.bailii.org/ew/cases/EWHC/Admin/2020/467.html>.

However, suspensions are available in serious cases. For, example, an Ontario physician was suspended for one month for using "a slang term for female genitalia" in reference to two physicians during an intra-professional dispute. See:

<https://lfpres.com/news/local-news/local-surgeon-suspended-over-tweet-as-regulatory-body-starts-eyeing-online-decorum>.

Similarly, a UK physician was suspended for four weeks for numerous highly offensive posts on race,

pedophilia and terrorism. Those posts were made before the physician was registered. See:

<https://lfpres.com/news/local-news/local-surgeon-suspended-over-tweet-as-regulatory-body-starts-eyeing-online-decorum>.

Thus highly inappropriate social media posts can result in significant consequences.

## **Evidence of Incapacity**

Some social media posts can be so bizarre or disturbing as to suggest that a practitioner is suffering from a mental illness. For example, an Australian psychiatrist who posted bizarre “alt-right” conspiracy theories about President Trump and the “Deep State” on his practice website had his registration revoked. He called his regulator a “pedophile protection agency”. A psychiatric assessment, to which he brought 600 pages of documents to prove the accuracy of his views, concluded that he suffered from paranoia. See:

<https://www.theguardian.com/australia-news/2020/feb/07/psychiatrist-struck-off-for-posting-bizarre-qanon-conspiracy-theories>.

## **Duty to Report Colleagues**

Further complicating the issue, there may be circumstances where a practitioner observing the social media posts of a colleague may have a professional obligation to report them to the regulator. For example, the College of Nurses of Ontario describes a scenario where this duty to report might arise on a social media post by a colleague who says he needs to have a drink before facing work. The duty to report could arise from Principle 4 of their Code of Conduct: “Nurses work respectfully with colleagues to best meet patients’ needs.” See webcast on

Principle 4 at: <http://www.cno.org/code-of-conduct-webcast#principle4>.

## **Conclusion**

While social media posts have many similarities with other inappropriate verbal or written comments, there is something unique to them as well. Societal (and perhaps generational) views about the use of such media to express personal views can conflict with some traditional professional expectations. In addition, the more experience regulators have with social media postings, the more unanticipated issues may arise.