

IN THE MATTER OF *THE PSYCHOLOGISTS ACT, 1997* AND BYLAWS AND IN THE MATTER OF AN APPEAL TO THE COUNCIL OF THE COLLEGE OF PSYCHOLOGISTS BY JO NANSON, REGISTERED DOCTORAL PSYCHOLOGIST, OF SASKATOON, SASKATCHEWAN.

APPEAL DECISION
of
Council of the Saskatchewan College of Psychologists

Council Members:

Dr. Karen L. Todd, Chair
Dr. Jenny Keller, Member at Large
Dr. Tim Claypool, Member at Large
Cathy Fieldgate, Member at Large
Joan Dudgeon, Public Representative
Marion McKenzie, Public Representative

James Gillis, appearing on behalf of Dr. Nanson
Karen Prisciak, Q.C. appearing on behalf of the Professional Conduct Committee
Dirk Silversides, legal counsel to the Council

INTRODUCTION:

1. This is an appeal by Dr. Jo Nanson to the Council of the College of Psychologists (the “College”) pursuant to Section 36 of *The Psychologists Act, 1997* (“the Act”) of a decision/orders of the Discipline Committee dated April 20, 2010, wherein Dr. Nanson was found guilty of professional misconduct and the following orders were made:

- “1. That Dr. Jo Nanson is hereby reprimanded and shall in future conduct herself at all times in accordance with the Code of Ethics of the College and, in particular, to:
- (a) accurately describe the nature of referrals to her for psychological services involving children;

- (b) not provide psychological services to children without the written, informed consent of both parents;
 - (c) not provide psychological services to people in circumstances where she, or a member of her family, has a relationship to a third party who may be interviewed as part of an assessment and to consult with another psychologist if she is in doubt as to the existence of a conflict;
 - (d) not discuss a parenting assessment without the involvement of both parents;
 - (e) obtain written, informed consent when obtaining information from third parties;
 - (f) not share information between individuals interviewed in parenting associations; and
2. That Dr. Jo Nanson shall pay the sum of \$3,000 in respect of the costs of the inquiry and hearing into her conduct and related costs, to be paid in full within 30 days from the date of this Order, and, if all or any of that amount remains unpaid after that date, she shall be suspended from the College after that date and until such payment is received in full.”

2. By Notice of Appeal received at the offices of the College on May 14, 2010, Dr. Nanson appealed the said decision/orders on the following grounds:

“THAT the Discipline Committee erred in having rejected the terms of a joint submission of counsel for the Appellant and counsel for the Professional Conduct Committee without sufficient legal or factual justification.”

3. In the Notice of Appeal, Dr. Nanson requested the following relief:

“1) An order quashing the order of the Discipline Committee issued on the 20th day of April, 2009; and substituting therefore an order embodying the terms of the joint submission of the Appellant and the Professional Conduct Committee.

2) An order granting the Appellant the costs of this appeal.”

4. Although the Notice of Appeal only references an appeal of the “order” of the Discipline Committee, both the written submissions of Dr. Nanson’s counsel and the oral submissions made by him before Council made it clear that Dr. Nanson was appealing both the decision of the Discipline Committee finding Dr. Nanson guilty of professional misconduct and all orders of the Discipline Committee. Counsel for the Professional Conduct Committee did not raise any concerns or objections to the wording used by Dr. Nanson’s counsel in the Notice of Appeal and

also addressed her comments in both her written and oral submissions to the “decision” of the Discipline Committee.

BACKGROUND:

5. Written complaints against Dr. Nanson were received by the College from three (3) individuals in June and August of 2006.

6. The Professional Conduct Committee investigated the complaints and prepared reports which recommended that the Discipline Committee hear and determine the complaints.

7. A Notice of Hearing dated February 14, 2008, with the particulars of the alleged misconduct and professional incompetence was forwarded to Dr. Nanson.

8. An application was made to the Court of Queen’s Bench by Dr. Nanson with respect to a preliminary issue that arose at the commencement of the hearing before the Discipline Committee, namely, whether the allegations of misconduct contained in the Notice of Hearing could vary in any manner from the reports submitted by the Professional Conduct Committee to the Discipline Committee. The Discipline Committee had ruled that the variation was acceptable, but in a Judgment dated February 17, 2009, Justice Koch set aside the Discipline Committee’s decision in that regard, with the result that the allegations against Dr. Nanson were restricted to the allegations contained in the reports prepared by the Professional Conduct Committee.

9. At the hearing on December 8, 2009, counsel for Dr. Nanson and counsel for the Professional Conduct Committee presented an Agreement as to Facts, a copy of which is attached as Exhibit “A” to this Appeal Decision. In essence, Dr. Nanson acknowledged certain conduct in relation to each of the complaints (of those which were not withdrawn by the Professional Conduct Committee) and made certain undertakings related to such conduct.

10. Counsel for Dr. Nanson and counsel for the Professional Conduct Committee also submitted a written Undertaking dated December 7, 2009, and signed by Dr. Nanson, a copy of which is Exhibit “B” to this Appeal Decision. In addition to her undertakings, Dr. Nanson stipulated that she understood that her failure to comply with the undertakings “may lead to disciplinary proceedings” against her by the College.

11. In a decision dated April 20, 2010, the Discipline Committee held the following:

“[9] The Discipline Committee accepts the acknowledgments provided by Dr. Nanson as pleas of guilty to the described complaints, which constitute failure to comply with the Code of Ethics of the College. A failure to comply with the Code of Ethics is a breach of section 14 of the College’s Regulatory Bylaws, which requires all members so to comply. A breach of a bylaw is, as described in clause 25(c) of *The Psychologists Act, 1997*, professional misconduct. The Discipline Committee therefore finds that Dr. Nanson is guilty of professional misconduct as a result of the acknowledgments contained in the Agreement as to Facts submitted by the Committee. The Discipline Committee must therefore determine the appropriate consequence to follow as a result of that finding.

...

[12] In this case, the jointly proposed disposition of the complaints against Dr. Nanson is through a series of “undertakings” to be provided by her. The Discipline Committee notes that this is an unusual means of approaching the matter of attaching consequences to admitted cases of professional misconduct or professional incompetence. Section 32 of *The Psychologists Act, 1997* sets out the powers of the Discipline Committee where it finds a member guilty of professional incompetence or professional misconduct. This provision establishes, firstly, that the Discipline Committee has no power to do anything unless there is a finding of guilt and, secondly, that the powers it does have are those enumerated in the list contained in the provision. The range of powers available to the Discipline Committee runs from expulsion to reprimand, and includes the ordering of counselling or a requirement to take certain courses, among other things. The list is apparently designed to give the Discipline Committee as broad a discretion as possible to tailor its order to the needs of the situation, so as to ensure that the disposition of the complaint will accomplish the goal of protecting the public while respecting the interests of members. The list concludes with a broad power to make any order that the Discipline Committee thinks is “just”. However, in all cases the Discipline Committee must make an “order”. As a result, it is the Discipline Committee’s opinion that it is not able to accept an “undertaking” from a member where it has found that the member is guilty of professional misconduct or professional incompetence; it must make an order.

[13] As well, it is not possible to simply convert the undertakings provided into a form of order. The undertakings are specific examples of the particular ways in which Dr. Nanson failed to comply with the Code of Ethics, which she is obliged to comply with because section 14 of the Regulatory Bylaws requires compliance. That failure, which she has acknowledged, must, however result in a consequence. If there are no consequences for acknowledged failures to comply with the requirements of the legislation, the public interest is not properly protected. For that reason, the Discipline Committee is of the opinion that a reprimand should be ordered, in addition to an order directed at the manner in which Dr. Nanson shall be required to ensure that she complies with the Code of Ethics.

[14] The Discipline Committee also notes that there are a number of inconsistencies in terms of the precise language of each of the proposed undertakings, and it has revised the language used in the joint submission to provide clarity and consistency in its order.

[15] The joint submission calls for the payment by the member of \$2,500 in the form of costs. The Discipline Committee acknowledges that by pleading guilty and taking responsibility for her actions, Dr. Nanson has significantly reduced the cost of the hearing; however, the Discipline Committee is not concerned that the order for costs should be fair in relation to similar orders made in other discipline cases it has decided. For that reason, the Discipline Committee is of the view that costs should be \$3,000 in this case.”

STANDARD OF REVIEW

12. Submissions were made to Council by both counsel for Dr. Nanson and counsel for the Professional Conduct Committee as to the standard of review to be adopted at the appeal hearing. Council noted with interest a portion of the written submissions from counsel for the Professional Conduct Committee where she noted, after referring to the text “Principles of Administrative Law”, that the authors “suggest that different standards of review may apply to different issues...What results from this discussion is a lack of clarity as to the standard of review that should be applied in any particular circumstances.”

13. After considering the submissions, however, Council is persuaded by counsel for the Professional Conduct Committee that the correct standard of review is “reasonableness” and is cognizant of what is entailed by that standard as described in her written brief of law:

“A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

As she also notes, “the onus is on Council to determine if the decision of the Discipline Committee is reasonable”.

BASIS OF APPEAL/ANALYSIS

14. Counsel for Dr. Nanson summarized the main points (or grounds) of her appeal in his written submissions as follows:

- “1. The scope of the finding of professional misconduct, and the order for future compliance (each purporting to cover the Code in general, rather than any particular provisions) exceeded the Discipline Committee’s jurisdiction.
2. The Discipline Committee erred in issuing a reprimand and order in relation to matters which did not constitute breaches of the Code.
3. The Discipline Committee erred in finding Dr. Nanson guilty of professional misconduct on the charges properly before the Committee.
4. The Discipline Committee erred in failing to give proper deference to the parties’ joint submission.
5. There were additional circumstances not taken into account by the Discipline Committee which favour the disposition of the matter as jointly submitted by the parties.”

ANALYSIS

15. We shall address each of the grounds of appeal in order.

Grounds 1 & 2

1. The scope of the finding of professional misconduct, and the order for future compliance (each purporting to cover the Code in general, rather than any particular provisions) exceeded the Discipline Committee’s jurisdiction.
 2. The Discipline Committee erred in issuing a reprimand and order in relation to matters which did not constitute breaches of the Code.
16. The following is a list of the six (6) complaints set out in the Agreement as to Facts (and listed by letters A, D, F, G, H, and I) and the acknowledgments by Dr. Nanson with respect to each of them.
 - A. Dr. Nanson was inaccurate in her written communication concerning the treatment of Mr. Z’s son child A.

Dr. Nanson acknowledges that she was inaccurate in her communication about the referral from Dr. Golubuff and hereby undertakes to accurately describe the nature of referrals to her for psychological services involving children.
 - D. Dr. Nanson did not obtain informed consent from Mr. Z who has a joint custody agreement with the child’s mother.

Dr. Nanson agrees not to provide psychological services to children without the written consent of both parents where the parents are estranged.

- F. Dr. Nanson was in a position of conflict of interested (sic) with respect to her personal relationship with the boyfriend of the complainant's ex-wife. This resulted in inappropriate and biased information being passed to Dr. Nanson which compromised the investigation.

Dr. Nanson acknowledges that her handling of the situation with the parents did not fully address the conflict of interest contrary to the Code III.33 and III.35. She acknowledges the information she received from Mr. B. had the potential to compromise her investigation of the family.

- G. Psychologist did not maintain confidentiality when she discussed the complainant's information with his ex-wife.

After a parenting assessment is completed, Dr. Nanson undertakes not to discuss a parenting assessment without the involvement of both parents. She accepts her conduct was contrary to the Code 1.45, 1.12 and III.11.

- H. Dr. Nanson acted unethically when she did not obtain Ms. Y's consent to gather information from Ms. Y. regarding her involvement with the children of her common law partner.

Dr. Nanson interviewed Ms. Y. in the course of her parenting assessment of Mr. X and Ms. C. children. Dr. Nanson did not obtain Ms. Y's written consent to gather information about Ms. Y.'s personal circumstances or about her involvement with Mr. X's children.

- I. Dr. Nanson acted in an unprofessional manner by breaching confidentiality when she shared information Ms. Y. had told her with the babysitter of the children of Ms. Y.'s common-law partner.

Dr. Nanson agrees she should not have shared any information received by her from Ms. Y. to the babysitter as required by the Code I.45. She undertakes not to share information between individuals interviewed in parenting assessments.

17. In his written Brief of Law, counsel for Dr. Nanson submitted the following:

“The Discipline Committee did not confine its findings or its orders to the matters before it, but rather found Dr. Nanson guilty of professional misconduct in relation to the Code in general, reprimanded her for that, and ordered her to comply with the Code in general at all times in the future.

.....

“It is further submitted that the Discipline Committee has no jurisdiction to base findings of professional misconduct, reprimands, or orders on matters which do not constitute breaches of the Code, the Bylaws of the College, or *The Psychologists Act, 1997* (the “Act”). Of the six complaints addressed in the Agreement, only three of them, namely F, G, and I, involve allegations which could lead to Code infractions. While the other three complaints (collectively involving accuracy in communication and obtaining written consents) may address matters of professional practice, the Code does not elevate them to matters of professional conduct. Accordingly, the Discipline Committee should not have referred to the matters in paragraphs A, D, or H in its findings of misconduct, sanctions, or orders.”

18. In its decision, the Discipline Committee held that the acknowledgments by Dr. Nanson amounted to pleas of guilty to each of the described complaints and as such amounted to “failures to comply with the Code of Ethics of the College”.

19. Professional Misconduct is defined in Section 25 of the Act as a question of fact and includes any breach of the Act or Bylaws. Section 14 of the Regulatory Bylaws provides that

“Every member shall comply with the Canadian Code of Ethics for Psychologists 3rd Edition (2000)”.

As such, a breach of any provisions of the Code of Ethics is a breach of the Bylaws.

20. As noted above, counsel for Dr. Nanson concedes that the complaints described as F, G, and I above “would lead to Code infractions.” However, he contends that it is the remainder of the complaints - described as A, D, and H - that could not be Code infractions, but rather are matters only of professional practice.

21. It is regrettable that the Discipline Committee, in reaching its findings, did not identify which specific provisions of the Canadian Code of Ethics for Psychologists (the “Code”) was breached. Instead, the Discipline Committee stated that the acknowledgement by Dr. Nanson of having engaged in the conduct described in all of the complaints amounted to failures to comply with the Code.

22. It is not difficult however, from a perusal of the Code, to determine that each of the three complaints described as A, D, and H also breach certain provisions of the Code.

For example, with respect to the inaccurate written communication made by Dr. Nanson in complaint A, this conduct represents a lapse in the ethical standards described in Principle III, entitled “Integrity in Relationships” and in particular, the provisions relating to accuracy/honesty and straightforwardness/openness.

With respect to the failure to obtain informed consents as described in complaints D and H, these represent lapses in the ethical standards set out in Principle I, entitled “Respect for the Dignity of the Person” and in particular, the provisions relating to informed consent.

23. In summary, we do not agree with counsel for Dr. Nanson that the complaints described in A, D, and H do not involve contraventions of the Code - they do involve ethical lapses and contraventions of the Code and therefore were charges properly before the Discipline Committee.

24. Accordingly, we have concluded that the Discipline Committee did confine its findings and orders to the matters before it - the conduct described in the Agreement as to Facts which amounted to breaches of the Code by Dr. Nanson - and was justified in concluding that the same amounted to professional misconduct.

25. We are, however, in agreement with counsel’s contention that the portion of the Order which directed Dr. Nanson to “in future conduct herself at all times in accordance with the Code of Ethics of the College” need not have been part of the Order.

All members of the College are obliged to comply with the Code and it was redundant and unnecessary to include this direction as part of the Discipline Committees orders.

26. Ground 3

3. The Discipline Committee erred in finding Dr. Nanson guilty of professional misconduct on the charges properly before the Committee.

27. In his written Brief of Law, counsel for Dr. Nanson submitted:

“At paragraph 9 of the Decision the Discipline Committee stated that it accepts the acknowledgments made by Dr. Nanson in the Agreement as pleas of guilty on each of the six complaints. It is submitted that the Committee was not correct in doing so.

.....

Further, as the language of each acknowledgment makes clear, the Agreement contained no guilty pleas. Its intent was simply to have Dr.

Nanson acknowledge certain specific acts or omissions in relation to the various charges, framing undertakings by her on these matters to govern her future professional conduct. This was consistent with the overall intent that the complaints should be resolved through practice directives rather than punitive sanctions.

28. It is correct that there is no explicit “guilty plea” in the two documents - the Agreement as to Facts and Undertakings - which were placed before the Discipline Committee on the date of the hearing. However, there was an explicit acknowledgement of the conduct described in each of the six complaints set out in the Agreement as to Facts.

29. We agree with the Discipline Committee that an acknowledgment of conduct - all of which, as noted above, we consider breaches of the Code, is tantamount to a guilty plea. In other words, the omission of the word “guilty” in the Agreement as to Facts and Undertakings does not take away from the acknowledgment of conduct which was which was contrary to the Code.

30. In addition, there was a tacit guilty plea made at the hearing itself. The following exchange occurred at the hearing:

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THE CHAIRPERSON: Okay. I just want to clarify that given the agreed- upon facts, that the member is essentially pleading guilty? We want that for the record.

MS. PRISCIAK: She is accepting the charges as they are there, yes.

THE CHAIRPERSON: The charges as - okay, wonderful.

MS. PRISCIAK: And not all the charges, I should say, but that is - that is set out right in the context of the agreed statement of facts.

31. We note again that Dr. Nanson did not specifically indicate that she was pleading guilty but Ms. Prisciak, as counsel for the Professional Conduct Committee and one of the two parties to the Agreement as to Facts, indicated that Dr. Nanson was “accepting the charges as they are” and neither Dr. Nanson or her counsel objected or denied the same. Again, in our view, this was tantamount to a guilty plea.

Accordingly, we find there is no merit to this ground of appeal.

32. Ground 4

4. The Discipline Committee erred in failing to give proper deference to the parties' joint submission.
33. In his written Brief of Law, counsel for Dr. Nanson submitted:
 "Even if Dr. Nanson was properly found guilty of charges F, G and I, it is submitted that the Discipline Committee's decision to impose sanctions upon her in the face of a contrary joint submission constituted an error of law."
34. In its decision, the Discipline Committee reviewed the recent decision of *Rault v. Law Society of Saskatchewan* [2009] S.J. No. 436 and noted that it is only in situations where the Discipline Committee is persuaded that the sentence agreed to in a joint submission is unfit or unreasonable or contrary to the public interest that it would not accept the joint submission.
35. The Discipline Committee, having determined that Dr. Nanson was guilty of professional misconduct, noted that Section 32 of the Act then set out a range of orders that it could make and concluded that it could only, however, make "Orders", not accept "Undertakings".
36. Counsel for Dr. Nanson, in his Brief of Law, submits that the Discipline Committee's interpretation of Section 32 was:
 "...legally incorrect. That provision does not *require* the Committee to make an order between reprimand and expulsion in every case of professional conduct which comes before it, but merely *empowers* it to do so. The provision quoted at paragraph 7 of the Decision states:
 Where the discipline committee finds a member guilty of professional incompetence or professional misconduct, it *may* make one or more of the following orders: ... (*emphasis added*)
 This provision recognizes that obvious need to confer upon the Discipline Committee the authority to appropriately address cases where no sanction is necessary or desirable despite the occurrence of professional misconduct."
- Counsel for Dr. Nanson also submitted that the Discipline Committee failed to consider - or at least provide its reasons - for not accepting the Undertakings as is.
37. Section 32 of the Act only permits the Discipline Committee to make Orders and it is clear to Council in this case that the Discipline Committee desired to make an Order reprimanding Dr. Nanson and that it set out its reasoning for doing so.
38. It noted - in paragraph 13 of the Decision - that a failure to comply with the Code must result in a consequence, for if "there was no consequence for acknowledged failures to comply with the requirements of the legislation, the public interest is not protected" (our emphasis).

It was for this stated reason - the protection of the public interest - that the Discipline Committee ordered that Dr. Nanson be reprimanded and it was for that reason, by implication, that the Discipline Committee found a series of undertakings alone to be contrary to the public interest.

39. When determining the wording of the Orders, the Discipline Committee noted that there were inconsistencies in terms of the precise language of each of the proposed undertakings and accordingly it “revised the language used in the joint submission to provide clarity and consistency in its order.”

In doing so, it appears that the Discipline Committee did attempt to uphold and incorporate the agreed upon undertakings in the only manner - an Order - available to the Discipline Committee to deal with Dr. Nanson after its finding of professional misconduct.

40. Although Council acknowledges the Discipline Committee’s efforts to incorporate the agreed upon Undertaking into its Order, we do not agree with that portion of the decision which ordered Dr. Nanson to pay the sum of \$3,000.00 in respect of the cost of the inquiry, rather than the previously agreed upon sum of \$2,500.00. The Discipline Committee noted only, in its Decision, that the order for costs “should be fair in relation to similar orders made in other discipline cases it has decided.” It did not, however, reference any other cases or the amount of costs ordered in any other cases and accordingly, the decision to alter the costs agreed upon between the parties in their joint submissions should not be upheld.

41. Ground 5

5. There were additional circumstances not taken into account by the Discipline Committee which favour the disposition of the matter as jointly submitted by the parties.”

42. In his written Brief of Law, counsel for Dr. Nanson submitted:

“As is substantiated in an Affidavit which Dr. Nanson will seek leave to file, there were additional circumstances surrounding the agreement which show the overall outcome involved substantial sanctions to Dr. Nanson not revealed on the face of the Agreement.”

43. Counsel for Dr. Nanson did not seek leave to file, nor did he file, an Affidavit of Dr. Nanson outlining any additional circumstances surrounding the Agreement as to Facts and, accordingly, this ground of appeal was not pursued by him.

POWERS OF COUNCIL

44. Sections 36(5) and (6) of the *Act* provide as follows:

“(5) In hearing an appeal, the council shall:

- (a) dismiss the appeal;
- (b) quash the finding of guilt;
- (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.

(6) The council may make any order as to costs that the council considers appropriate.”

DECISION

45. Council hereby upholds the decision of the Discipline Committee of the College finding Dr. Jo Nanson guilty of professional misconduct for failure to comply with the Code of Ethics of the College, contrary to Section 14 of the College’s Regulatory Bylaws, and pursuant to Section 32 of *The Psychologists Act, 1997*.

Council varies the Orders of the Discipline Committee of the College by:

- (a) deleting that portion of the Order which directs Dr. Jo Nanson to “in future conduct herself at all times in accordance with the Code of Ethics of the College” and
- (b) substituting the sum of \$2,500.00 that Dr. Jo Nanson is ordered to pay in respect to the costs of the inquiry in place of the \$3,000.00 that was ordered by the Discipline Committee.

Except for the variances above, the remainder of the Orders is upheld.

46. There will be no award as to costs.

DATED this 22nd day of August, 2011.

Original signed by: _____

Dr. Karen L. Todd, Chair
On behalf of the Council of the
Saskatchewan College of Psychologists

On May 17, 2013, Justice Danyliuk of the Court of Queen's Bench removed the reprimand from the decision of the Executive Council. Therefore, the Order is:

1. That Dr. Nanson shall, in particular:

- (a) accurately describe the nature of referrals to her for psychological services involving children;**
- (b) not provide psychological services to children without the written, informed consent of both parents;**
- (c) not provide psychological services to people in circumstances where she, or a member of her family, has a relationship to a third party who may be interviewed as part of an assessment and to consult with another psychologist if she is in doubt as to the existence of a conflict;**
- (d) not discuss a parenting assessment without the involvement of both parents;**
- (e) obtain written, informed consent when obtaining information from third parties;**
- (f) not share information between individuals interviewed in parenting assessments; and**

2. That Dr. Nanson shall pay the sum of \$2,500.00 in respect of the costs of the inquiry and hearing into her conduct and related costs, to be paid in full within 30 days from the date of this Order and, if all or any of that amount remains unpaid after that date, she shall be suspended from the College after that date and until such payment is received.