BEFORE COUNCIL OF THE SASKATCHEWAN COLLEGE OF PSYCHOLOGISTS

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 36 OF *THE PSYCHOLOGISTS ACT, 1997* OF A DECISION OF THE DISCIPLINE COMMITTEE OF THE SASKATCHEWAN COLLEGE OF PSYCHOLOGISTS RESPECTING DR. RICHARD LEBELL, MEMBER OF THE SASKATCHEWAN COLLEGE OF PSYCHOLOGISTS

BETWEEN:

DR. RICHARD LEBELL, MEMBER OF THE SASKATCHEWAN COLLEGE OF PSYCHOLOGISTS

(the "Member" or "Appellant")

AND:

THE PROFESSIONAL CONDUCT COMMITTEE OF THE SASKATCHEWAN COLLEGE OF PSYCHOLOGISTS

(the "PCC or "Respondent")

APPEAL DECISION

Executive Council Members hearing the appeal:

Chair:	Dr. Karen Litke, President
Members:	Ms. Pamela Olson, President-Elect (Acting)
	Ms. Rori Lee, Past-President
	Ms. Darcia Evans, Member-at-Large
	Dr. Deborah Parker-Loewen, Member-at-Large
Public Representative:	Mr. David Butt

Counsel for the PCC:	Karen Prisciak, Q.C.
Counsel for the Member:	Amanda Quayle, Q.C.
Counsel for the Executive Council Members:	Faith Baron

I. INTRODUCTION

1. In accordance with *The Psychologists Act, 1997*, SS 1997, c P-36.01 (the "**Act**"), a majority of Executive Council (the "**Council**") convened on April 12, 2021, by video conference to hear the appeal of Dr. Richard Lebell of the Decision of the Discipline Committee, dated June 18, 2020,

regarding guilt, and the Decision of the Discipline Committee, dated October 21, 2020, regarding penalty.

2. In conjunction with the appeal, Council also heard submissions regarding an Application to Adduce Fresh Evidence brought by the Member.

3. Upon hearing from counsel for the PCC and counsel for the Member, and upon reading the materials all filed, and pursuant to the authority granted to Council under subsection 36(5) of the Act, the Council dismisses the appeal for the reasons set out below.

II. BACKGROUND TO THE APPEAL

3. Dr. Lebell, of Regina, Saskatchewan, is a member of the Saskatchewan College of Psychologists (the "**College**"). Prior to the above-referenced decisions, Dr. Lebell was ordered by the College to, among other things, cease communicating diagnoses contrary to section 23 of the Act (i.e. without an Authorized Practice Endorsement, or "**APE**"). That order was issued on March 16, 2018.

4. On February 20, 2019, a Formal Complaint was submitted to the PCC against Dr. Lebell alleging that the March 16, 2018 had been breached. The PCC recommended on February 26, 2019, that the matter be heard and determined by the Discipline Committee, which was convened to hear the matter on May 21, 2020. The charges were that Dr. Lebell:

> Charge 1: Contravened the Discipline Order dated March 16, 2018 by continuing to diagnose patients referred from the CompanyX when he did not have an Authorized Practice Endorsement contrary to Professional Practice Guidelines 7.1 and 7.5; contrary to *The Psychologists Act, 1997,* Section 23; and, contrary to Regulatory Bylaw 13.
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> Charge 2: Misrepresented to the CompanyX that he had arrangementsin place to have a registered psychologist cosign his reports when such arrangements werenot in place in violation of *Canadian Code of Ethics for Psychologists,* 3rd ed., 2000, and more specifically Principle III.

5. Dr. Lebell entered a guilty plea on the first charge and a plea of not guilty to the second charge. Following a hearing of the matter, the Discipline Committee determined that he was guilty of Charge 2. The Discipline Committee reconvened on September 4, 2021, to hear submissions on sanctions and, in a decision dated October 21, 2020, ordered Dr. Lebell to satisfactorily complete an ethics course approved by the PCC within one year of the date of the Order (among other sanctions which are not at issue in the present appeal). The Discipline Committee also ordered Dr. Lebell pay costs in an amount of $30,740.00, which was equal to 75% of the legal costs and disbursements of the Discipline Committee and of the PCC. The decision on sanctions was released to the parties on October 30, 2020.

6. Section 36 of the Act provides a member with a right of appeal to Council with respect to any order or decision of a discipline committee.

7. On November 26, 2020, Dr. Lebell submitted a Notice of Appeal to Council for the Saskatchewan College of Psychologists, which identified the following grounds of appeal:

> 1) That the Discipline Committee erred in its determination of the Appellant's and Witness1's credibility and the reliability of their respective testimony. Specifically, the Discipline Committee erred by:
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> a. Preferring hearsay evidence tendered by the Professional Conduct Committee over in-person and uncontradicted testimony of the Appellant and Witness1;
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> b. Misapprehending Witness1's testimony in reaching the conclusion that the CompanyX imposed a condition on the Appellant to have a co-signer of his reports in place immediately following the March 16, 2016 Discipline Decision. This misapprehension of evidence contributed to the Discipline Committee's adverse findings with respect to credibility and reliability;
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> c. Relying upon the findings in the March 16, 2016 Discipline Decision as grounds for its adverse findings of credibility and reliability in respect of the alleged conduct involved in Charge 2. In doing so, the Discipline Committee unreasonably concluded that the Appellant had a propensity or predisposition of misleading others;
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> d. Relying upon inconsequential and minor inconsistencies in the witnesses' testimony with respect to collateral facts to ground its findings with respect to credibility and reliability;
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> 2) That the finding of guilt with respect to Charge 2 had an effect on the penalty imposed by the Discipline Committee; and
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> 3) Upon such further and other grounds as counsel may advise and Council may allow.

8. On January 13, 2021, Dr. Lebell submitted an Amended Notice of Appeal wherein an additional ground of appeal was submitted:

> 2) That the chair of the Discipline Committee failed to disclose a conflict of interest involving Witness1, a key witness called by the Appellant in his defence of Charge 2, and she failed to recuse herself as a result of that conflict. The conflict of interest impacted her ability to impartially assess the reliability and credibility of Witness1's testimony. The conflict of interest gives rise to a reasonable apprehension of bias and is a breach of the duty of fairness owed to the Appellant;

9. Since this additional ground of appeal was based on information that allegedly came to light after the Discipline Committee had rendered its decisions, the Member submitted an Application to Adduce Fresh Evidence, dated March 8, 2021. The Application asks Council to consider as fresh evidence the Affidavit of Witness1, sworn March 5, 2021.

10. Counsel for the Member provided Written Submissions, dated March 26, 2021, in support of the Application for Fresh Evidence and in support of the Appeal generally. Counsel for the

PCC provided Written Submissions, dated April 1, 2021, opposing the Application for Fresh Evidence and responding to the Appeal generally. Transcripts of both hearings as well as the Discipline Decisions on guilt and on sanctions were also made available to the members of Council hearing this Appeal.

III. APPLICATION TO ADDUCE FRESH EVIDENCE

11. As part of the appeal, Council is required to consider and rule on the Appellant's application to adduce fresh evidence.

12. In order to adduce fresh evidence on an appeal, the Appellant submitted that the applicable test is the following, from *Palmer v The Queen*, [1980] 1 SCR 759 at p 775, 106 DLR (3d) 212:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen.*
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> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
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> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

13. The Appellant submitted that all four of these requirements have been met.

14. First, in the Affidavit of Witness1, sworn March 5, 2021 (the "**Witness1 Affidavit**"), Witness1 explains that he/she was not aware that Dr. Regan Hart was the chair of theDiscipline Committee until he/she read the March 2018 Discipline Decision. He/She had never met Dr. Hart in person and was not introduced to the members prior to testifying.

15. Second, the Witness1 Affidavit explains why a reasonable apprehension of bias existed. His/Her evidence is that he/she and Dr. Hart had a strained and difficult working relationship, that their disagreements were not addressed professionally, and that he/she had arranged for Dr. Hart's removal from a particular treatment team.

16. Third, the Witness1 Affidavit is credible as it is a sworn document and there is no reason to suggest that he/she is not telling the truth.

17. Fourth, the Witness1 Affidavit describes a relationship that, if known to a reasonable observer, would give rise to a reasonable apprehension of bias such that one would conclude that Dr. Lebell did not receive a fair hearing. As a decision-maker, Dr. Hart was involved in making determinations of credibility and reliability of witnesses. Either consciously or unconsciously, her past dealings with Witness1 could reasonably be expected to have affected the result.

18. The Appellant therefore requested that Council admit and consider the Witness1 Affidavit inrelation to the ground of appeal alleging that there was a reasonable apprehension of bias. Counsel for the Appellant did not offer any case law on the question of whether a reasonable apprehension of bias existed or not but asserted that the question is case specific and requires a contextual analysis of the alleged grounds of bias. The Appellant also asserted that it is not necessary to prove that actual bias existed, nor is it necessary to prove a conscious bias. When looking at the Witness1 Affidavit, the Appellant submitted that the extent of the strained relationship would cause anyone to conclude that there was a reasonable apprehension of bias towards Witness1, a key witness for Dr. Lebell, and that such bias effected the way the Discipline Committee dealt with Witness1's evidence. That is, he/she was found not to be credible and his/her evidence was a crucial aspect of Dr. Lebell's defence.

19. In opposition to the Application to Adduce Fresh Evidence, the Respondent agreed with the Appellant as to the applicable test, quoted above, but submitted that the evidence should not be admitted into evidence in this Appeal.

20. The Respondent also submitted that certain portions of the affidavit should be struck because they are improper. These objections include the numerous statements by Witness1 about Dr. Hart's state of mind (at paragraphs 12, 13, and 14) as well as opinion evidence (at paragraphs 13 and 17) and legal arguments as to Dr. Hart's alleged bias (at paragraphs 16, 17, and18).

21. With respect to the first factor on the applicable test for fresh evidence, the Respondent suggested that the evidence should not be admitted because Dr. Lebell should have informed his only witness about who was sitting on the Discipline Committee. He had opportunity to do so and was aware that conflicts of interest can have an impact on the proceedings. This is a failure of due diligence on his part.

22. Second, the evidence to be tendered is essentially speculation and not relevant. Witness1's affidavit is merely opinion evidence that Dr. Lebell was found guilty of Charge 2 becausethe chair of the Discipline Committee does not like Witness1. The Respondent submitted that the evidence is scandalous and should not be considered.

23. Third, the affidavit evidence is not credible because it is filled with opinions and speculations about the mind set of another person.

24. Fourth, the affidavit evidence should not be admitted because it would not effect the result. When the speculations and opinions of Witness1 are disregarded (and the Respondent submitted they should be), very few facts remain and amount to only Witness1's account of a difficult past working relationship between him/her and the chair of the Discipline Committee. Such evidence does not provide a sufficient basis to conclude that a conflict of interest did exist. Further, the chair of the Discipline Committee was only one of three members.

25. While the Respondent's main submission was that the alleged fresh evidence should not be admitted at all (such that there is no basis at all for the ground of appeal alleging bias), the Respondent addressed the question of whether the additional ground of appeal should be dismissed in any event.

26. While the importance of impartiality in any decision-making process is fundamental, the Respondent submitted that there is a strong presumption of impartiality and the onus to show that disqualification is warranted is on the party alleging bias (see *Wewaykum Indian Band v Canada*, 2003 SCC 45 [*Wewaykum*] at paras 57 to 59). The test is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude thata reasonable apprehension of bias exists (see *Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 SCR 369, 1976 CanLII 2 (SCC) at p 394). Cogent evidence is required to displace the presumption of impartiality and the analysis is a highly fact-specific inquiry, as described in *Wewaykum, supra,* at para 77:

> [77] ….As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expressionof views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

27. The Respondent also offered the case of *Sharma v BC Veterinary Medical Assn.,* 2008 BCSC 240 [*Sharma*], wherein the Court determined there was no reasonable apprehension of bias even though two members of a panel had previous dealings with a key witness. The Court in *Sharma* stated that the test is not satisfied "unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly" (at para 78).

28. On the basis of these authorities, the Respondent argued that Council cannot conclude that there was a reasonable apprehension of bias in these circumstances. Witness1's evidence is highly speculative and scant, drawing upon his/her own view that Dr. Hart found it difficult to work with him/her and that Dr. Hart knew of Witness1's involvement in certain decisions affecting Dr. Hart's work. The Respondent submits it is not surprising that a member of a tribunal panel mighthave prior knowledge of or interaction with a witness in such a hearing, given the size of the psychological community in Saskatchewan. The evidence submitted does not establish that a reasonable person viewing all the circumstances would conclude that Dr. Hart would not decide the matter fairly.

Analysis and Conclusion on Application to Adduce Fresh Evidence

29. The parties were not at odds with each other as to the factors Council should consider on the application to adduce fresh evidence. If the application is allowed, then Council should consider the additional ground of appeal regarding procedural fairness and whether there was a reasonable apprehension of bias.

30. Before turning to the factors requiring consideration, it should be noted that Council agreed with the Respondent that there are portions of the affidavit where Witness1 offers his/her opinion about Dr. Hart's state of mind, her professional abilities, her willingness to work with COMPANYX, her knowledge of Witness1's involvement in her removal from a treatment team, and that Dr. Hartshould have recused herself. Witness1 has no particular expertise to provide the opinions he/she gave nor did he/she identify the basis as to why he/she believes certain facts to be true, nor can he/she attest to Dr. Hart's feelings, knowledge, or perspectives. Council was careful to consider only the portions of the affidavit speaking to the facts of which Witness1 could have knowledge when considering the merits of this application.

31. On the first factor, being whether the evidence could have been adduced at the initial hearing, Council had no reason to disbelieve Witness1's assertion that he/she was not aware that Dr. Hart was chair of the Discipline Committee until he/she read the March 2018 decision. While it would have been appropriate for the committee members to be introduced to the witness upon her appearance, it is possible that this was overlooked, and it is also possible that Witness1 had never met Dr. Hart in person. It may also have been appropriate for the Appellant to have reviewed the members identities with his sole witness, but this too was not viewed as an egregious failure on the Appellant's part.

32. The second and third factors are also met. The proposed evidence does speak to the facts relevant to the ground of appeal regarding an alleged apprehension of bias. There is also no reason to assume that the affiant is not reliable or credible with respect to his/her account of past dealings with Dr. Hart (that is, when the assumptions, opinions, and arguments contained in the affidavit are disregarded). Council had no reason to believe that Witness1's account of his/her interactions with Dr. Hart were not truthful.

33. The fourth factor was determinative for Council. Even if the affidavit evidence is taken at face value (when the improper evidence is disregarded), Council did not expect that it would have changed things for Dr. Lebell. For one thing, Dr. Hart is a professional and is presumed to be an impartial decision-maker unless cogent evidence displaces this presumption. She was only one of three members of the Discipline Committee. Council noted that there was nothing in the transcripts or the Discipline Decision (or even the proposed affidavit) to suggest that Dr. Hart's conduct was unprofessional or that she displayed bias towards Witness1 during the hearing.

34. Further, the reason the Discipline Committee found Witness1's testimony to lack reliability was because his/her explanations did not make sense in the circumstances. The Discipline Committee gave reasons for their findings in this regard. Perhaps most importantly, the Discipline Committee found Dr. Lebell guilty of Charge 2 because he submitted reports to COMPANYX when he knew or ought to have known that a co-signer was required. The finding of misrepresentation wasultimately about Dr. Lebell's conduct alone and had little or nothing to do with Witness1's testimony as to what Dr. Lebell told him/her. Whether Witness1 was found to be credible or not had very little to do with the Discipline Committee's ultimate decision.

35. The Appellant has contended that Dr. Lebell did not receive a fair hearing because there was a reasonable apprehension of bias on the part of the chair of the Discipline Committee, who consciously or unconsciously, influenced the other members with respect to Dr. Lebell's key witness, such that Witness1's evidence was rejected for not being credible, and this resulted in the finding of guilt on Charge 2. The major flaw in this argument is that the Discipline Committee's decision did not turn on the basis of Witness1's testimony. The argument presented by the Appellant as to how the evidence could have affected the result stretches the bounds of logic to an untenable degree.

36. To adduce fresh evidence, all four elements of the test enunciated in *Palmer*, *supra,* must be met. The Appellant has failed to satisfy the fourth element of the test, and for that reason Council dismisses the application to adduce fresh evidence. Since the proposed evidence was the only evidence speaking to the additional ground of appeal respecting bias, Council dismisses that ground of appeal.

IV. THE PARTIES' POSITIONS: STANDARD OF REVIEW AND GROUNDS OF APPEAL

Appellant's Case

37. Counsel for Dr. Lebell made written and oral submissions on several topics, beginning with the applicable standard of review. Relying on *Yee v Chartered Professional Accountants of Alberta,* 2020 ABCA 98 [*Yee*], the Appellant argued that internal appeal tribunals are not expected to apply the same standard of review as a court. Rather, Council should review the decision "holistically". The Appellant submitted this standard allows for more freedom to intervene:

> [35] When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review: ***Halifax (Regional Municipality) v Anglican Diocesan Centre Corporation***, 2010 NSCA 38 at para. 23, 290 NSR (2d) 361. The following guidelines may be helpful:
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> > (a) findings of fact made by the discipline tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference;
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> > (b) likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;
> >
> > (c) with respect to decisions on questions of law by the discipline tribunal arising from the profession's home statute, the appeal tribunal is equally well positioned to make the necessary findings. Regard should obviously be had to the view of the discipline tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained;
> >
> > (d) with respect to matters engaging the expertise of the profession, such as those relating to setting standards of conduct, the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct ***Newton*** at para. 79. It obviously should not disregard the views of the discipline tribunal, or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening, it is entitled to do so;

> (e) the appeal tribunal is also well-positioned to review the entire decision and conclusions of the discipline tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;
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> (f) the appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.

38. With respect to the first substantive ground of appeal, being that the Discipline Committee erred in its findings of credibility and reliability of the testimonies of Dr. Lebell and of Witness1, the Appellant contended that the Discipline Committee preferred hearsay evidence over uncontroverted testimonies. In particular, the October 1, 2018, letter signed by a Ms. XXX XXX was wrongly accepted as conclusive evidence that Dr. Lebell "notified COMPANYX that Dr. XXXX would sign off on [his] reports". The full text of the letter reads as follows:

> Dear Dr. Lebell,
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> With the recent decision of the Sask College of Psychology regarding your credentials, specifically the lack of Authorized Practice Endorsement, COMPANYX arranged for you to provides services to COMPANYX clients as long as your reports are signed by a doctoral level psychologist whohas achieved that designation.
>
> Though you notified COMPANYX that Dr. XXXX would sign off on your reports, an audit of reports from your office and from Queen City Mental Health Program confirmed that Dr. XXXXhas not been cosigning reports.
>
> Please arrange for Dr. XXXX to cosign future reports immediately so that COMPANYX can continue to use your services. To ensure compliance with SCP requirements, COMPANYX will need to review for compliance in the next few weeks and, lacking a cosigner, COMPANYX will, regretfully, be unable to use your services.
>
> Sincerely,
>
> XXX XXX
> CompanyX

39. The Appellant argued that Witness1's testimony about the accuracy of the letter should have carried more weight. That is, he/she testified the letter was accurate in all respects except that Dr. Lebell had not actually "notified" COMPANYX that Dr. XXXX would cosign. Rather, Witness1 testified he/she had a discussion with Dr. Lebell wherein he indicated that he would ask Dr. XXXXto cosign his reports. Dr. Lebell confirmed that this is what he told Witness1. The Appellant argued that he did not mislead COMPANYX and the Discipline Committee should not have accepted the letter as conclusive evidence that he did.

40. With respect to the second substantive ground of appeal, the Appellant argued that Witness1's testimony was misapprehended by the Discipline Committee when it determined that COMPANYX had imposed a condition "immediately" following the March 2018 order. The Appellant says that Witness1 did not testify to this. Rather, he/she testified that a cosigner was required by COMPANYX and that he had been granted time to find one.

41. On the third substantive ground of appeal, the Appellant argued that the Discipline Committee wrongly considered past sworn testimony given by Dr. Lebell to the Court of Queen's Bench in 2014, which was found to be incorrect testimony. Essentially, the Discipline Committee put Dr. Lebell on trial for his past misconduct again. The evidence of his past testimony was more prejudicial than probative and should not have been considered. The Appellant contended that considering this evidence led the Discipline Committee to conclude that Dr. Lebell was not credible.

42. Fourth and finally, the Appellant argued the inconsistencies noted by the Discipline Committee in the testimonies of Dr. Lebell and Witness1 were minor and inconsequential, and should not have caused the Discipline Committee to conclude that the witnesses were not credible and/or reliable. In particular, the Appellant says it should not have mattered that Witness1 said he/she received the March 2018 decision from Dr. Lebell, who did not recall if he had done this or not. It should also not have mattered that Witness1 stated that the requirement to have a cosigner was put into place following the March 2018 order but that Dr. Lebell stated he did not know this requirement until he received the October 1, 2018 letter. The personal relationship between Dr. Lebell and Witness1 was said to have "coloured" his/her testimony. Finally, the Appellant argued that the Discipline Committee wrongly asked itself why an audit was performed if Dr. Lebell had not notified COMPANYX that he would obtain a cosigner. These inconsistencies were either too minor toraise concern about credibility or had reasonable explanations. In fact, the Appellant suggested that it would be more suspicious if these two witnesses had testified to facts in the exact same way.Inconsistencies are expected and these were minor and peripheral to the key evidence.

43. The Appellant says that all of the above-noted errors contributed to the Discipline Committee's rejection of Witness1's and Dr. Lebell's testimonies as not reliable and/or credible, and this was why the Discipline Committee found Dr. Lebell guilty of Charge 2.

44. The Appellant submitted that Council should quash the finding of guilt on Charge 2 and modify the sanction imposed. While Dr. Lebell accepts the majority of sanctions as appropriate to address his guilty plea on Charge 1, he posited that the requirement to take an ethics course and to pay costs of $30,740.00 should be set aside if Council determines that he should not have been found guilty of Charge 2.

45. In support of this, the Appellant says that his breach of the March 2018 order was "inadvertent". The reports submitted to COMPANYX after the order merely communicated prior diagnoses made (i.e. they were treatment reports). This was not an ethical breach but rather a technical one that has been acknowledged.

46. On the costs issue, the Appellant posited that the calculation of such award was based on 75% of the legal costs and disbursements of both the Discipline Committee and the PCC. If this Appeal is successful on Charge 2, then Dr. Lebell should not be responsible for this amount since the first hearing would not have been necessary at all. The Appellant says that this costs award should be reduced to 25% of the total incurred (calculated to be $11,393.01).

Respondent's Case

47. On the applicable standard of review, counsel for the Respondent distinguished between "external" reviews performed by a court and "internal" reviews performed by a tribunal within the profession. Under section 36 of the Act, a member of the College has a right of appeal of a disciplinary decision to Council. In these circumstances, the Respondent contended that the leading case in Saskatchewan on the applicable standard of review is *City Centre Equities Inc. v Regina (City),* 2018 SKCA 43 [*City Centre Equities*], wherein the Court of Appeal emphasized that the question depends on statutory interpretation:

> [58] Conflicting approaches have been taken in the above-noted decisions but, in general terms, there is one common element among them: the intention of the legislature as revealed by statutory interpretation ultimately determines what standard of review an appellate tribunal should apply. I agree with Jenkins C.J.P.E.I., who expressed the following in *Dyment*:
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> [40] Counsel cited jurisprudence in this and other jurisdictions as examples of hybrid standards of review. While this case law provides a window on the world of internal standard of review, it provides only limited assistance on the standard of review issue in this appeal. It always depends on the language of the enabling statute; all cases cited share the view that standard of review is a matter that depends on statutory interpretation. None suggest that a new standard is called for only because *Dunsmuir* and its progeny call for deference in judicial review of administrative decision-making. Those cases come to a variety of conclusions; and most do not necessarily prescribe deference. It always depends. Some, or most, of the decisions acknowledge virtues of deference; however, the particular decision on extent of deference is often left with the appellate tribunal rather than being imposed as a judicial requirement.
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> (Emphasis added)
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> [59] In my view, this is the proper approach to determining the standard of review that the Committee should apply in the present case. The standard of review should be determined by conducting a full exercise in statutory interpretation, which ultimately will answer what respective roles the Legislature intended the Committee and Board to fulfill. Consequently, I will now turn to the governing principles of statutory interpretation, which demonstrate the Legislature intended for the Committee to fulfill a traditional appellate role such that it gives deference to the Board on questions of fact.
> …
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> [99] The Committee's role within the assessment regime supports a deferential standard of review on questions of fact. The Committee is an appellate tribunal charged with hearing and determining appeals. Unlike the Board, it is not a tribunal of first instance. The Board receives evidence and hears witnesses. The Committee reviews the record of the Board and only hears new evidence in narrow circumstances, not unlike the role of an appellate court. Consequently, it fulfills a traditional appellate role in that it determines appeals on the record. Its function is not to conduct trials *de novo*, but to review for *error* and if an error has been found, to correct it.

> [100] Both tribunals serve specialized roles that have been created by the Legislature. It is clear that the legislative intent remains that the Committee fulfil an appellate role such that it gives deference to the Board's findings of fact.
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> [101] Ultimately, based on the Legislature's intention regarding the role of the Committee, I am of the view the most appropriate standard of review to be applied by the Committee to the Board's factual findings and to questions of mixed fact and law where there is no extricable question of law, expressed in traditional terms, is reasonableness. I say this because a standard of palpable and overriding error, the most deferential standard of review and one that applies in the appellate context, would limit the Committee's role beyond what the Legislature intended. While deference must be afforded to the Board's findings of fact, the Committee must be empowered to intervene where such findings are unreasonable or unsupported by the evidence. Expressing the standard of review in this way is consistent with the approach taken by this Court in *Redhead.*

48. Citing the similarities between the present circumstances and *City Centre Equities, supra,* the Respondent contended that deference on questions of fact should be given to the Discipline Committee's decision. That is, the applicable standard of review on questions of fact is reasonableness and not the "holistic" approach suggested by the Appellant. Further, the case relied upon by the Appellant (*Yee, supra,* at para 35) also endorses a deferential approach on questions of fact:

> (a) findings of fact made by the discipline tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference;
>
> (b) likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;

49. The Respondent also offered *Nanson v Saskatchewan College of Psychologists,* 2013 SKQB 191, and *Sydiaha v Saskatchewan College of Psychologists,* 2014 SKQB 112, wherein the Council was noted to have undertaken a reasonableness standard of review. As a tribunal of experts in their profession, the Respondent asserted that the decision of the Discipline Committeeattracts deference on determinations of fact. On review, Council must only determine whether the decision was reasonable or not; it is not for this Council to say that it would have come to a different conclusion. The Discipline Decision must be found unreasonable for the appeal to succeed.

50. Turning to the first substantive ground of appeal respecting hearsay, the Respondent noted first that the Discipline Committee is not bound to the strict rules of evidence under subsection 31(4) of the Act. Additionally, the October 1, 2018 letter (which is called hearsay by the Appellant) is not hearsay. Rather, it was Witness1's evidence that the letter was sent to Dr. Lebell under his/her instruction or dictation. He/She was the best witness to tender the evidence because it was sent under his/her authority.

51. The Respondent contended that it was open to the Discipline Committee to accept the letter as preferred evidence over the witness testimonies at the hearing. Witness1 did not correct the October 1, 2018 letter prior to the hearing, which occurred 20 months after the letter was sent. The only error he/she pointed out was that Dr. Lebell did not "notify" him/her that Dr. XXXX would cosign his reports. The letter also stated that "COMPANYX arranged for you to provide services to COMPANYX clients as long as your reports are signed by a doctoral level psychologist who has achieved that designation". It referred to Dr. XXXX specifically as the cosigner Dr. Lebell mentioned to Witness1. The contents of the October 1, 2018 letter corresponded with the actions of Witness1 in triggering an audit of Dr. Lebell's reports. If Witness1 did not assume at that time that Dr. Lebell had a co-signor by reason of some kind of representation made by him, then it does not make sense that he/she

performed an audit of his reports. Additionally, Dr. Lebell's testimony that the October 1, 2018 letter was the first time he had been alerted to the requirement of a cosigner does not align with Witness1's recollection that they discussed it prior to that date.

52. The Respondent pointed out that in addition to these inconsistencies noted by the Discipline Committee, Dr. Lebell's representations to Dr. XXXX when he asked him/her to cosign his reports also give rise to credibility concerns. For one thing, it appears that the first time Dr. Lebell approached Dr. XXXX with this request was on October 4, 2018. Additionally, the handwritten note he left for his/her contained inaccuracies. For reference, the handwritten note stated:

> XXXX:
>
> As you may know I had some conflict with the College over APE as they will not retroactively grant me the ability to do assessments. COMPANYX has certified me to do clinical and assessment work but the College over-ruled them. I have a request related to my ability to do work forCOMPANYX. They are asking that you co-sign reports that they received from me. That does notrefer to clinical notes that take [sic] when seeing clients regularly.
>
> I will be happy to pay you for the time it takes to quickly review and sign off. I am guessing a couple of hours per month. I'm still wanting to continue to do work for COMPANYX and therefore need your help to address their demands,
>
> Thanks Rick
>
> PS: we should also look at increasing our fees for the next year

53. The Respondent submitted that the first two sentences contained in this note are not true. First, the College had been advising Dr. Lebell for several years that he required an APE. Second, COMPANYX's certification is unrelated to the mandate under section 23 of the Act that no person shall communicate a diagnoses unless they are a practicing member authorized by council (i.e. the member has an APE).

54. Relying on *Sautner v Saskatchewan Teachers' Federation*, 2017 SKCA 65, the Respondent submitted that the Discipline Committee was entitled to accept and reject evidence, just as the Saskatchewan Court of Appeal concluded:

> [37] …The Committee was entitled to review all the evidence, and determine what evidence it deemed relevant, reliable and probative. The Committee was therefore entitled to,after considering all the evidence, accept or reject it as useful in coming to its final decision.

55. With respect to the second substantive ground of appeal, namely the Appellant's suggestion that the Discipline Committee misapprehended evidence when it concluded that COMPANYX imposed acondition on Dr. Lebell to have a cosigner in place "immediately" following the March 2018 order,

the Respondent pointed to Witness1's testimony. That is, Witness1 did testify that shortly after the March 2018 order he/she had a conversation with Dr. Lebell wherein he/she told him he should begin to obtain a cosigner. Further, if there was no cosigner requirement imposed by COMPANYX, thenthere would have been no reason to perform an audit of Dr. Lebell's reports submitted to COMPANYX after the March 2018 order.

56. With respect to the third substantive ground of appeal, namely that the Discipline Committee allegedly erred when it considered evidence relating to Dr. Lebell's previous testimony before the Court of Queen's Bench in 2014, the Respondent referred Council to the Discipline Decision itself. In the analysis section, the Discipline Committee refers to this evidence when it summarized each parties' submissions. However, in the paragraph wherein its findings and analysis are described, the evidence of his previous testimony is not mentioned. The Discipline Committee did not actually rely upon this evidence for its finding that Dr. Lebell was not credible.

57. With respect to the fourth substantive ground of appeal, the Respondent submitted that the inconsistencies in the witnesses' testimonies were neither minor nor inconsequential. In contrast to the Appellant's view on this point, the Respondent again reminded Council that the Discipline Committee was entitled to accept or reject evidence provided by the witnesses. The testimonies were inconsistent in some key respects, including whether Dr. Lebell gave Witness1 a copy of the March 2018 decision, and whether and when they had discussions about the cosigner requirement. It was also reasonable to consider whether the witnesses' personal relationship affected Witness1's handling of the matter. Finally, it was open to the Discipline Committee to conclude that Witness1's explanation as to why he/she conducted an audit of Dr. Lebell's files didnot make sense unless the requirement to have a cosigner was in place.

58. Turning to the final issue of whether the sanction should be adjusted in the event that Council allows the appeal, the Respondent submitted that the requirement to complete an ethics course should not be disturbed. Dr. Lebell pled guilty to Charge 1, meaning that he admitted to communicating diagnoses after the March 2018 order was imposed. There was nothing ambiguous about the order and Dr. Lebell's failure to follow it was unethical.

59. On the issue of the costs award contained in the Discipline Decision, the Respondent agreed that if Council sets aside the finding of guilt on Charge 2, then an adjustment to the costs award is warranted.

V. ANALYSIS

60. Council has considered the appropriate standard of review to apply to this appeal, along with each of the points raised by the Appellant.

Standard of Review

61. The members of Council hearing this Appeal noted that there is no standard of review stipulated in the Act. Upon review of the cases presented, Council accepted the Respondent's submissions with respect to the applicable standard of review and therefore has reviewed the Discipline Committee's decision on a reasonableness standard. In any event, the grounds of appeal submitted by the Appellant concerning the decision itself are all about the Discipline Committee's

handling of evidence, determinations on credibility and reliability, and findings of fact. In *Yee, supra* (the case relied upon by the Appellant on this issue), such findings were deserving of "significant deference" even in the context of a "holistic" approach. Council's task is not to determine the case again, but rather to ask themselves whether the decision was reasonable.

Hearsay evidence

62. Council was not convinced that the October 1, 2018 letter was hearsay at all or, if it was, the Discipline Committee was permitted to accept it into evidence pursuant to the relaxed rules of evidence as found in subsection 31(4) of the Act. While the letter was not signed by Witness1 herself, he/she testified that he/she either dictated it or provided instruction as to its content. It was sent under his/her authorization and Council found that he/she was the best witness to tender the evidence and speak to its contents.

63. In any event, Council's view was that the Discipline Committee appreciated that Witness1 affirmed the letter's content as true except for one inaccuracy, which was that Dr. Lebell had not "notified" COMPANYX that he had a cosigner in place. The Discipline Committee was in the best position to hear and assess the witness testimony and, upon review of the reasons contained in the Discipline Decision, Council had confidence that the Discipline Committee reached a reasonable assessment of this evidence. In fact, the Discipline Committee did not rely solely on the word "notified" as contained in that letter. Rather, the reasoning included a discussion about the audit Witness1 performed on Dr. Lebell's reports, which suggested he/she assumed he had a cosigner in place. Further, the Discipline Committee relied on other statements in the letter to conclude Dr. Lebell misled COMPANYX, "whether or not he 'notified' COMPANYX that Dr. XXXX would act as the cosigner." Council was of the view that the Discipline Committee was entitled to weigh the evidence and its conclusions with respect to the October 1, 2018 letter were reasonable ones.

Misapprehension of Evidence

64. The Discipline Committee found that the requirement of a cosigner was put into place by COMPANYX "immediately" after the March 2018 order. With the benefit of the transcripts, it is true thatthis is not quite what Witness1 testified to. Nonetheless, Council was not convinced that this detail matters much and did not think it would have changed the overall findings of the DisciplineCommittee. There was a requirement for a cosigner on Dr. Lebell's reports. Witness1 had communicated that requirement to Dr. Lebell, who suggested he would ask Dr. XXXX to cosign.He did not obtain a cosigner but continued to submit reports to COMPANYX. Whether the requirement was put into place "immediately" after the March 2018 order or not was not particularly germaneto the Discipline Committee's findings.

Consideration of Past Misconduct

65. The Discipline Committee heard evidence of Dr. Lebell's prior testimony before the Court of Queen's Bench in relation to the previous charge against him, which led to the March 2018 order. The evidence was objected to as irrelevant to the proceedings (i.e. that the evidence was more prejudicial than probative). Nonetheless, the Discipline Committee made reference to this evidence as presented by the PCC at the hearing at paragraph 25 of the Discipline Decision.

66. The Discipline Committee was permitted to consider evidence even if under the strict rules of evidence it would not be admitted in a court of law. Even so, Council observed that the Discipline Committee does not appear to have relied heavily upon this evidence, if at all, for its finding that Dr. Lebell was not credible. Rather, when discussing the evidence beginning at paragraph 27 of the Discipline Decision, the Committee pointed to internal inconsistencies and odd responses to certain questions when considering whether Dr. Lebell's testimony was credible. Council agreed with the observations of the Discipline Committee in this regard.

Reliance on Minor Inconsistencies

67. Council did not agree with the Appellant that the inconsistencies between the testimonies of Dr. Lebell and Witness1 were minor. Further, the Discipline Committee heard and weighed the evidence at the hearing and concluded that certain inconsistencies gave rise to concerns of credibility and reliability. The Discipline Committee was in the best position to assess this evidence and entitled to reject or accept evidence provided by the witnesses. Council had the same concerns about the explanations offered and the inconsistencies in the testimonies.

Credibility and Reliability Findings Generally

68. Having considered all of the points raised by the Appellant and not finding any of them convincing, Council found no particular reason to interfere with the decision based on the first ground of appeal. That is, the Discipline Committee was in the position to assess and weigh the evidence before it and determined that the Appellant was not credible and that his witness was not reliable. The reasons given in the Discipline Decision for these factual findings attract significant deference, and Council could not articulate any convincing reason to disagree with the Discipline Committee's findings.

69. Further, Council considered that even if it agreed with the points raised by the Appellant with respect to how the Discipline Committee dealt with the evidence before it, the key facts were that Dr. Lebell was ordered to cease communicating diagnoses in March 2018 and was told by COMPANYX that a cosigner was required on his reports. Council agreed with the Discipline Committeethat the misrepresentation occurred when Dr. Lebell continued to submit reports to COMPANYX withouta cosigner, knowing that he was not permitted to do so. The details as to what Witness1 and Dr.Lebell discussed and when such discussions occurred were considered extraneous to the main issue, which was that Dr. Lebell continued to submit reports to COMPANYX without a cosigner. Indeed,it was not until after the October 1, 2018 letter was sent that Dr. Lebell made an effort to even askDr. XXXX if he/she would do this for him. The Discipline Committee viewed the circumstances in a similar manner. That is, the crucial aspect of Dr. Lebell's conduct for the Discipline Committeewas the fact that "COMPANYX thought arrangements were in place for a cosigner immediately after the March 16, 2018 decision, and Dr. Lebell knew or ought to have known that COMPANYX was relying onhim to act with the integrity expected of a member of the psychology profession. By failing to doso, he misrepresented to COMPANYX that he had arrangements in place to have his reports properly cosigned." Council could not disagree with this conclusion and therefore dismisses the Appeal. The sanctions imposed were appropriate, including the costs award, given the finding of guilt on Charge 2.

VI. COSTS

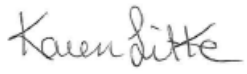
70. The Appellant has been unsuccessful in this Appeal and on the Application to Adduce Fresh Evidence. Pursuant to subsection 36(6) of the Act, Council may make any order as to costs.

71. Council therefore orders the Appellant to pay the costs and disbursements of the PCC and of Council related to this Appeal. If the amount of such costs cannot be agreed upon by counsel, then the parties can return the matter before these members of Council to hear and determine the amount of costs.

VII. DISPOSITION BY APPEAL BOARD

72. In summary, Council dismisses this Appeal and the Appellant shall pay costs, as described above.

DATED this__13th__day of May, 2021



Dr. Karen Litke, Chair
and on behalf of Ms. Pamela Olson,
Ms. Rori Lee,
Ms. Darcia Evans,
Dr. Deborah Parker-Loewen, and
Mr. David Butt

Distribution:

Ms. Amanda Quayle, Q.C., for the Member
Ms. Karen Prisciak, Q.C., for the PCC
Ms. Carmel Kleisinger, Registrar for the College

DATED this --1.3_ day of May, 2021

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