

IN THE MATTER OF *THE PSYCHOLOGISTS ACT, 1997* AND BYLAWS
AND IN THE MATTER OF A COMPLAINT AGAINST BRIAN McDONALD,
REGISTERED PSYCHOLOGIST, OF REGINA, SASKATCHEWAN

DECISION

of

Saskatchewan College of Psychologists

DISCIPLINE COMMITTEE

Discipline Committee Members:

Mary Hampton, Registered Doctoral Psychologist, Chair
Ian MacAusland-Berg, Registered Psychologist
Daniel Ash, Public Representative

Karen Prisciak, Q.C., appearing on behalf of the Professional Conduct Committee
Brian McDonald, appearing on his own behalf
Zena Charowsky, legal counsel for the Discipline Committee

INTRODUCTION

[1] The Discipline Committee convened on April 8, 2015, via conference call, as agreed by the parties. The Member was served with the Notice of Hearing dated September 16, 2014, which was served on the Member as required by *The Psychologists Act, 1997* ["the Act"].¹ The Notice of Hearing alleged that Mr. McDonald was guilty of professional misconduct and/or professional incompetence, within the meaning of the Act.

[2] At all times material to the complaints against him, Mr. McDonald was a member of the Saskatchewan College of Psychologists and licensed to practise in the Province of Saskatchewan.

THE FORMAL COMPLAINT

[3] The Formal Complaint, which was amended with the consent of the parties, charges that by virtue of his contravention Mr. McDonald is guilty of professional misconduct and/or professional incompetence as defined in sections 25 and 26 of the Act and/or section 14 of the Regulatory Bylaws in that:

¹ Exhibit B to the Affidavit of Karen Messer-Engel, dated October 17, 2014, and filed in evidence in this hearing as an Exhibit.

1. He failed to use best practice assessment procedures to compensate for the fact that evidence-based procedures were lacking in the area of risk assessment of client X contrary to the *Canadian Code of Ethics for Psychologists*, 3rd ed., 2000 (hereinafter referred to as "the Code"), and more specifically Sections II.21, particulars of which include, but are not limited to, the following:
 - a. He did not administer the ERASOR assessment which is an empirically supported risk assessment tool nor any other risk measure to provide evidence for his opinion.
 - b. He administered the Jesness Inventory and scored it according to incorrect gender norms. Client X was a minor male who was scored as a female.
 - c. He incorrectly interpreted the Jesness Inventory results in that he did not identify there were no significantly elevated "t" scores.
2. He improperly recorded and communicated information and failed to clearly communicate his opinion in violation of Code II.30, particulars of which include, but are not limited to, the following:
 - a. The source of his opinion was unreported and unclear.
 - b. He scored and interpreted the Jesness Inventory according to incorrect gender norms.
 - c. He used poorly phrased sentences that did not accurately convey the significance of events in the client's history.
3. He did not communicate objectively and did not provide appropriate skill, accuracy and assessment in violation of Code III.11 and Saskatchewan Practice Guidelines 3.7, 3.16 and 11.6, particulars of which include, but are not limited to, the following:
 - a. He did not clearly delineate between facts, opinions, theories and hypothesis.
 - b. He did not clearly identify his opinion or the document(s) from which the information was obtained.
 - c. He did not provide any evidence to support his conclusion and relied on erroneous scoring interpretation of the Jesness Inventory, did not identify there were no significantly elevated "t" scores and did not use the ERASOR assessment.

FACTS

[4] An Agreed Statement of Facts was submitted to the Discipline Committee by the parties, the relevant text of which (excluding headings and repetition of the charges) is as follows:

2. Brian McDonald, is, at all times material to this proceeding, registered with the College of Psychologists in Saskatchewan (hereinafter referred to as "the

College"), and accordingly , is subject to *The Psychologists Act, 1997*, SS 1997, c. P-36.01, the regulatory bylaws, the *Canadian Code of Ethics for Psychologists*, 3rd ed., 2000 (hereinafter referred to as "the Code") and the Saskatchewan College of Psychologists Practice Guidelines (hereinafter referred to as "the Guidelines"). Attached at Tab 1 is the Certificate of the Registrar of the College confirming Brian McDonald's practicing status.

3. Brian McDonald is currently the subject of a formal complaint dated March 12, 2014. The formal complaint is comprised of the allegations noted above. The original formal complaint was served on Brian McDonald on April 4, 2014. Attached at Tab 2 is a copy of the original formal complaint along with proof of service in the form of service by registered mail.

...

4. The Complainant, Y, was the mother of the youth assessed by Mr. McDonald. The complaint was investigated by the Professional Conduct Committee of the College.

...

5. Mr. McDonald conducted a psychological assessment of a minor boy – Client X on October 27, 2010. He was requested to do so by the Order of a Saskatoon Provincial Court Judge. The assessment is attached as Tab 3. The purpose of the assessment was to determine Client X's risk to sexually reoffend.

6. Following the assessment, Mr. McDonald concluded Client X would be viewed as an extremely high risk for further sexual reoffending.

7. As part of the assessment, Mr. McDonald administered the Jesness Inventory-Revised which is a self-report instrument used with individuals ages eight to adult. It is a unique personality classification system for delinquent and conduct disordered youths and adults. It was designed to assist psychologists and other mental health specialists better understand the nature and differences that define the groups of people with whom they work. The Jesness Inventory-Revised is not a psychological assessment tool designed to measure the risks for sexual reoffending.

8. The Jesness Inventory-Revised is scored using "T-scores". A T-score of 50 is an average score with a normal range being a score from 40 to 60. T-scores below 30 or above 70 usually represent unusually low (below 30) or high (above 70) performance.

9. Mr. McDonald scored Client X's results of the Jesness Inventory-Revised as a female when Client X was a minor male. The improper gender reported results for Client X were interpreted to support a profile described as "Pragmatic Manipulation/Immature Conformist" without referring to Client X's actual T-scores. The actual T-scores revealed Client X scored 57 on the repression scale

and 58 on the asocial scale. These T-scores are not psychologically significantly elevated as they are within the normative scores of 40 to 60.

10. The Report identified Client X as "Pragmatic Manipulation/Immature Conformist" as follows:

Individuals with this profile tend to conform to whatever power structure they see as in place at the moment. However, this conformity is not usually based on a mature decision but instead in an attempt to respond to deep feelings of anxiety and inadequacy. Further, such conformity tends to be surface only and may change quickly when not being directly supervised. Consequently their behaviour can be unpredictable. Individuals with this profile tend to display pro-social behaviour when they are interacting with pro-social peers but their behaviour can become radically different and highly antisocial when they are involved with antisocial peers. These individuals also tend to view it as important to be in control if they can and will try to directly or subtly usurp such control if possible. As a result, they tend to be involved in a great deal of deception, conning or scamming. Individuals with this type of profile have an Above Average risk of failure when in the community.

11. Mr. McDonald did not administer a psychological instrument to measure Client X's risk of reoffending. One empirically supported risk assessment tool is "The Estimate of Risk of Adolescent Sexual Offence Recidivism" [the ERASOR] designed to estimate the short term risk of sexual re-offence for youths aged 12 to 18. It consists of 25 risk factors evaluated under the headings of Sexual Interests, Attitudes and Behaviors, Historical Sexual Assaults, Psychosocial Functioning, Family/Environment Functioning and Treatment.

12. Mr. McDonald did not use the ERASOR or any empirical or evidence-based psychological instrument to assess Client X's risk of sexual reoffending.

...

13. Mr. McDonald's conclusion was that Client X was "an extremely high risk of sexual reoffending" without identifying the source of his opinion or documents from which information was obtained in the assessment process. In doing so, he used poorly phrased sentences which did not accurately convey the significance of Client X's history. For example, the report indicated Client X "had been exposed to _____ at a young age" and also stated "he [the client] could be viewed as victim" which statements confused the perception of Client X's victimization.

...

15. Overall, the report did not identify the facts, opinions, theories and hypothesis involved in the psychological assessment of Client X. Mr. McDonald did not clearly identify his conclusion as arising from specific facts or documents in psychological testing. His conclusion did not refer to any evidence and referred

to erroneous scoring interpretation of the Jesness Inventory-Revised as referred to in paragraphs 9 and 10 herein.

...

16. Mr. Brian McDonald enters a guilty plea to each of the charges...

LEGISLATION

[5] The Act defines professional misconduct and professional incompetence as follows:

Professional misconduct

25 Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonourable, that:

- (a) is harmful to the best interests of the public or the members of the college;
- (b) tends to harm the standing of the profession;
- (c) is a breach of this Act or the bylaws; or
- (d) is a failure to comply with an order of the professional conduct committee, the discipline committee or the council;

is professional misconduct within the meaning of this Act.

Professional incompetence

26 Professional incompetence is a question of fact, but the display by a member of a lack of knowledge, skill or judgment, or a disregard for the welfare of a member of the public served by the profession of a nature or to an extent that demonstrates that the member is unfit to:

- (a) continue in the practice of the profession; or
- (b) provide one or more services ordinarily provided as a part of the practice of the profession;

is professional incompetence within the meaning of this Act.

[6] *The Saskatchewan College of Psychologists Regulatory Bylaws, 2004* also contain provisions relating to what constitutes professional misconduct and professional incompetence:

6(2) For the purposes of sections 25 and 26 of the Act, the committee may find a psychologist guilty of professional incompetence and/or professional misconduct where the member:

- (a) abused a client physically, sexually, verbally, or psychologically;
- (b) wilfully endangered the safety of a client;
- (c) influenced a client to change the client's last will and testament;

- (d) wrongfully abandoned a client;
- (e) misappropriated property belonging to a client, employer or fellow employee;
- (f) failed to exercise discretion with respect to the disclosure of confidential information about a client;
- (g) failed to maintain or falsified any client record;
- (h) failed to inform any employer or any client of the psychologist's inability to accept specific responsibility in areas where special training is required or where the psychologist does not feel competent to function without supervision;
- (i) failed to report the incompetence or misconduct of a member or colleague;
- (G) failed to comply with the Code of Ethics of the college or failed to comply with established standards of practice;
- (k) failed without reasonable cause to respond to inquiries from the college regarding alleged professional misconduct or professional incompetence;
- (l) conspired to participate in any act of misconduct or counselled a participant in any act of misconduct;
- (m) obtained registration by misrepresentation or fraud; or
- (n) contravened any provision of the Act or these bylaws.

[7] Where a member is found to be guilty of professional misconduct and/or professional incompetence, the Discipline Committee is authorized to make orders directed at improving the conduct or competence. Section 32 of the Act provides the Discipline Committee with the following authority:

Disciplinary powers

32(1) Where the discipline committee finds a member guilty of professional incompetence or professional misconduct, it may make one or more of the following orders:

- (a) an order that the member be expelled from the college and that the member's name be struck from the register;
- (b) an order that the member be suspended from the college for a specified period;
- (c) an order that the member be suspended from the college pending the satisfaction and completion of any conditions specified in the order;
- (d) an order that the member may continue to practise only under conditions specified in the order, which may include, but are not restricted to, an order that the member:

- (i) not do specified types of work;
 - (ii) successfully complete specified classes or courses of instruction;
 - (iii) obtain treatment, counselling or both;
 - (e) an order that reprimands the member; or
 - (f) any other order that to it seems just.
- (2) In addition to any order made pursuant to subsection (1), the discipline committee may order:
- (a) that the member pay to the college within a fixed period:
 - (i) a fine in a specified amount not to exceed \$5,000; and
 - (ii) the costs of the investigation and hearing into the member's conduct and related costs, including the expenses of the professional conduct committee and the discipline committee and the costs of legal services and witnesses; and
 - (b) where a member fails to make payment in accordance with an order pursuant to clause (a), that the member be suspended from the college.

ANALYSIS AND DECISION

[8] The Discipline Committee accepts the guilty pleas provided by Mr. McDonald in the Agreed Statement of Facts in relation to the three revised charges. He has acknowledged that the conduct occurred and that the conduct constitutes failures 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 Regulatory Bylaws, which requires all members to comply with the Code. A breach of a bylaw is professional misconduct, as set out in clause 25(c) of the Act. The Discipline Committee therefore finds that Mr. McDonald is guilty of professional misconduct as a result of the guilty pleas contained in the Agreed Statement of Facts.

[9] The conduct, which Mr. McDonald acknowledges to have occurred, demonstrated a lack of knowledge or judgment when he failed to administer the ERASOR assessment, which was best suited to the task at hand. He also demonstrated a lack of skill when he incorrectly scored and interpreted the Jesness Inventory; failed to identify his opinion and its source; failed to accurately convey the significance of events in the client's history; and failed to distinguish between facts, opinions, theories and hypotheses. Because "the display by a member of a lack of knowledge, skill or judgment ... of a nature or to an extent that demonstrates that the member is unfit to provide one or more services ordinarily provided as a part of the practice of the profession" is professional incompetence, as set out in section 26 of the Act, the Discipline Committee therefore also finds that Mr. McDonald is guilty of professional incompetence as a result of the guilty pleas contained in the Agreed Statement of Facts.

[10] The Discipline Committee must therefore determine the appropriate consequence to follow as a result of its findings. Section 32 of the Act sets out the powers of the Discipline

Committee where it finds a member guilty of professional incompetence or professional misconduct. This provision establishes, first, that the Discipline Committee has no power to do anything unless there is a finding of guilt and, second, 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 reprimand to expulsion, 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".

[11] The parties have also presented the Discipline Committee with Joint Submissions - Sentence, which, state as follows:

The Professional Conduct Committee and the Member jointly submit the following as discipline for the Member:

1. The Member shall receive a reprimand.
2. The Member shall provide a signed undertaking to voluntarily cease working in the forensic area.
3. The Member shall provide a signed undertaking to voluntarily remove his declared competency in forensic assessment and an agreement not to reinstate this competency without demonstrating to the satisfaction of the College of Psychologists as to how the competency has been obtained.
4. In the event the Member takes on any future employment that requires psychological assessment involving psychometric testing and report-writing, he will agree to be supervised by a pre-approved College registered psychologist for one year. The supervisor will be retained at his expense and involve a minimum of twelve (12) assessments with an emphasis on scoring, interpreting and writing psychological reports.
5. The Member shall pay costs in the amount of \$4,500.00 to the Saskatchewan College of Psychologists within twelve (12) months of the date of signing this submission.
6. The Member understands that the failure to comply with Paragraphs 2 to 5 above may lead to disciplinary proceedings against him by the Saskatchewan College of Psychologists.

The Member signed the Joint Submissions - Sentence on April 7, 2015.

[12] Shortly after the date of the hearing, the Member provided to the Professional Conduct Committee a signed undertaking, which states as follows:

1. Effective immediately I agree not to work in the forensic area.

2. I hereby remove my declared competency in forensic assessment and agree not to reinstate this competency without demonstrating to the satisfaction of the Saskatchewan College of Psychologists as to how the competency has been obtained.

3. I understand that my failure to comply with the above undertakings may lead to disciplinary proceedings against me by the College of Psychologists.

[13] In its decision in the case of *Rault v. Law Society of Saskatchewan*², the Saskatchewan Court of Appeal made it clear that a discipline committee must give serious consideration to a joint submission on sentencing agreed upon by counsel unless the sentence is unfit or unreasonable, or contrary to the public interest, and it should not be departed from unless there are good or cogent reasons for doing so.³ The Court went on to say, in relation to the discipline process applicable to members of the Law Society of Saskatchewan (which is similar to the process applicable to psychologists):

The discipline process in the Act has many similarities to the criminal process and as such the bargaining process is undermined if a joint submission, the product of compromise, is readily rejected by the Discipline Committee. There is a formal process for the handling of complaints, including the appointment of an Investigation Committee, which may set out a Formal Complaint outlining the allegations which may constitute a finding of guilt as to conduct unbecoming a lawyer. This can lead to the appointment of a Hearing Committee which determines if the allegations in the Formal Complaint are well-founded and, if so, the matter is referred to the Discipline Committee for sentencing on the charges.

This process can be time-consuming for Benchers involved in the various stages leading to the final penalty imposed by the Discipline Committee and can involve significant costs for both the member and the Law Society. Therefore, all members and the Law Society have a vested interest in ensuring that matters proceed expeditiously. If the member co-operates with the investigation and hearing process and, as happened in the instant case, pleads guilty, and puts an Agreed Statement of Facts before the Hearing Committee, the Law Society is relieved of the burden of proving the allegations in what could, in some instances, be a complicated and protracted hearing with the usual risks and vagaries that may occur in the course of such hearings. If the parties negotiating compromise agreements cannot expect their efforts will be respected, there is little incentive to attempt to negotiate a resolution. For this reason, joint submissions on sentence should be considered by the Discipline Committee in a principled way similar to the jurisprudence in criminal matters and as applied by discipline committees in the provinces noted above.

² 2009 SKCA 81.

³ *Ibid*, at paragraph 13.

[14] As a result, it is only in a situation 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 the Discipline Committee would not accept the joint submission. The Discipline Committee is also mindful of the fact that the objective of professional discipline proceedings is not punishment, but correction or improvement of conduct or competence to ensure, to the extent that it is reasonably practicable to do so, that the public is protected from substandard conduct or competence on the part of psychologists who are members of the College. The Discipline Committee found no good or cogent reason to depart in substance from the sentence agreed to in the joint submissions provided by the parties.

[15] As noted at paragraph 11 above, the joint submissions, which amount to a request for an order, propose that the Member provide signed undertakings to do certain acts voluntarily. As the Saskatchewan Court of Queen's Bench stated in *Nanson v. Saskatchewan College of Psychologists*,⁴ the Discipline Committee has:

only an enumerated power to make orders. There is no power to accept undertakings from members set out in the legislation.

While the Discipline Committee acknowledges that it has received the Member's signed undertakings, and appreciates that the Member has acted quickly to provide them, given the nature of its powers as confirmed by the Court, the Discipline Committee understands that it must technically "order" the Member to do or not do the things to which the undertakings relate. Its formal order, therefore, modifies the Joint Submissions to the extent necessary to fall within the Discipline Committee's power to order.

ORDER

[14] For all of the reasons set out above, the Discipline Committee of the Saskatchewan College of Psychologists therefore finds Brian McDonald guilty of professional misconduct and professional incompetence, and, pursuant to section 32 of *The Psychologists Act, 1997*, orders that:

1. The Member is hereby reprimanded;
2. The Member shall cease working in the forensic area;
3. The Member shall remove his declared competency in forensic assessment and shall not to reinstate this competency without demonstrating to the satisfaction of the College as to how the competency has been obtained;

⁴ 2013 SKQB 191, at paragraph 32.

4. If he takes on any future employment that requires psychological assessment involving psychometric testing and report writing, the Member shall be supervised by a pre-approved College registered psychologist for one year, and the supervisor will be retained at the Member's expense and involve a minimum of 12 assessments with an emphasis on scoring, interpreting and writing psychological reports;

5. The Member shall pay costs in the amount of \$4,500.00 to the College by April 7, 2016, and, if such payment is not received by the College on or before that date, he shall be suspended from the College until such payment is received in full.

Dated at Regina, Saskatchewan this 16 day of June, 2015.

SASKATCHEWAN COLLEGE OF PSYCHOLOGISTS,
DISCIPLINE COMMITTEE

A handwritten signature in blue ink that reads "Dr. Mary Hampton". The signature is written over a horizontal line.

Mary Hampton
Registered Doctoral Psychologist, Chair