

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

DECISION
Saskatchewan College of Psychologists
DISCIPLINE COMMITTEE

Discipline Committee Members:

Tom Robinson, Registered Doctoral Psychologist, Chair
Daniel Ash, Public Representative
Tanya Lyons-Belt, Registered Psychologist, Member
Kendra Nesbitt, Registered Psychologist, Member

Karen Prisciak, Q.C., appearing on behalf of the Professional Conduct Committee
Merrilee Rasmussen, Q.C., legal counsel for the Discipline Committee
Dennis Arbuthnott, Registered Psychologist, on his own behalf

INTRODUCTION

[1] The Discipline Committee convened on April 5, 2016, via conference call, as agreed by the parties. The Member was served with a copy of a formal complaint concerning his practice on May 27, 2015 and with the Notice of Hearing on March 18, 2016, as required by *The Psychologists Act, 1997* [“the Act”].¹

[2] As acknowledged in the Agreed Statement of Facts and Admissions filed by Mr. Arbuthnott and legal counsel for the Professional Conduct Committee,² at all times material to the complaints against him, Mr. Arbuthnott was a member of the Saskatchewan College of Psychologists, licensed to practise in the Province of Saskatchewan subject to the Act, the regulatory bylaws of the College, and the *Canadian Code of Ethics for Psychologists*³ (“the

¹ Affidavit of Karen Messer-Engel filed in evidence in this hearing as Exhibit A.

² Filed in evidence in this hearing as Exhibit B.

³ 3rd Ed., 2000 (“the Code”).

Code”) and related Saskatchewan College of Psychologists Practice Guidelines (“the Guidelines”).

THE FORMAL COMPLAINT

[3] The Formal Complaint contains the following charges in relation to Mr. Arbuthnott’s professional conduct in his role as supervisor of provisional member, H. Norman Grayston, who was involved in a counselling relationship with CLIENT A. and CLIENT B in or about September 2013:

“(a) condoned the provisional member’s decision to offer an opinion regarding child custody and access to the child of CLIENT A. and CLIENT B in correspondence dated December 9, 2013:

- i. Without collecting sufficient information to support the opinion.
- ii. Without the qualifications to render the opinion.
- iii. Without documenting the limits of the opinion.
- iv. By using words that did not convey the provisional member’s intention,

contrary to the Canadian Code of Ethics for Psychologists, 3rd ed., 2000, (hereinafter referred to as “the Code”) and more specifically Section II.30 and Saskatchewan Practice Guidelines 3.8, 3.19 and 11.31.

“(b) Condoned the provisional member’s breach of CLIENT A.’s confidentiality by sending his opinion on custody and access to CLIENT B’s lawyer in correspondence dated December 9, 2013 without CLIENT A.’s consent and contrary to the Code and more specifically Section I.45 and Saskatchewan Practice Guidelines 6.2 and 6.16.

“(c) Approved the provisional member’s correspondence dated December 9, 2013 portray[ing] CLIENT A. in negative terms and more specifically he attributed CLIENT B’s difficulties solely to CLIENT A.’s behavior contrary to the Code and more specifically Sections II.1, II.2, II.30 and Saskatchewan Practice Guideline 11.30.

“(d) Failed to ensure the provisional member completed clinical notes and failed to sign the provisional member’s December 9, 2013 correspondence until a later date and failed to sign the session notes and documents forwarded to third parties contrary to the Saskatchewan Practice Guidelines 3.5.1, 13.6 and Saskatchewan College of Psychologists Membership Advisory “Responsibilities of the Supervisor”, point 7.”

FACTS

[4] As noted above, the parties submitted an Agreed Statement of Facts and Admissions to the Discipline Committee, the relevant text of which (excluding headings and repetition of the charges) is set out below with respect to each of the charges contained in the formal complaint.

Agreed Facts relating to Charge (a) in the Formal Complaint:

4. Mr. Arbuthnott, at all times material to this proceeding, served in the role of supervisor of provisional member, H. Norman Grayston. Grayston was contacted by CLIENT A. through his Employee Assistance Program for couples counselling with CLIENT B, the mother of CLIENT A.'s infant child. Two counselling sessions were conducted on September 5 and September 26, 2003. Grayston also held individual counselling sessions with CLIENT B

5. On December 9, 2013 Grayston offered a recommendation to CLIENT B's lawyer regarding child access/custody without conducting a child access/custody assessment or indicating his qualifications/limitations in making such a recommendation. The opinion given was "I would strongly recommend that their CHILD Y remain in [REDACTED] mother's full custody, and that she may alter the visitation schedule at her discretion. I would also recommend a custody assessment be conducted. I would suggest that such an assessment include CLIENT A. [REDACTED]"

6. Arbuthnott was consulted by Grayston about this case in September and November 2013. Specifically, the December 9, 2013 correspondence from Grayston to CLIENT B's lawyer was discussed between them prior to the letter being sent.

7. Grayston acknowledges that custody assessments are not an area of competence in his practice. Arbuthnott acknowledges that neither he nor Grayston conducted a child access/custody assessment in this case.

Agreed Facts relating to Charge (b) in the Formal Complaint:

8. The December 9, 2013 correspondence from Grayston to CLIENT B's lawyer was not provided to CLIENT A. or to CLIENT A.'s lawyer.

9. CLIENT A. did not consent to Grayston's December 9, 2013 to CLIENT B's lawyer and did not agree with its contents which contained Grayston's observations and opinions, negative in nature, about CLIENT A.

10. At the time Grayston met with CLIENT A. and CLIENT B for counselling, CLIENT A. and CLIENT B were involved in litigation over child access and custody. The stated purpose of the counselling was to assist CLIENT B and CLIENT A. with improving their communication and reducing conflict between them. The purpose was not to collect information regarding custody and access.

11. Arbuthnott was aware of the purpose of the counselling sessions, the contents of the December 9, 2013 correspondence from Grayston to CLIENT B's lawyer and the fact that it was released without CLIENT A.'s consent.

Agreed Facts relating to Charge (c) in the Formal Complaint:

12. Grayston's December 9, 2013 correspondence contained comments arising from his individual sessions with CLIENT B Grayston noted the following comments about CLIENT B:

[REDACTED]

13. The above comments were offered in referring to CLIENT A. as "[REDACTED]". It was also stated that the behaviors experienced with CLIENT A. were "consistent with [REDACTED]".

14. Grayston further stated that “each of these points consistently illustrate [REDACTED]”.

15. The comments in the December 9, 2013 correspondence were one-sided, inaccurate and unrelated to the reason for the counselling sessions. At no time was CLIENT A. advised that his conduct during the sessions would be the subject of a child custody/access opinion.

16. Arbuthnott was aware of and approved Grayston’s correspondence of December 9, 2013 to CLIENT B’s lawyer.

Agreed Facts relating to Charge (d) in the Formal Complaint:

17. Grayston’s notes of the joint sessions in September 2013 were incomplete as follows:

- They did not reflect the full names of the clients in the session.
- The notes did not indicate relevant information on the interventions offered.
- There was no indication as to how the therapeutic relationship ended with CLIENT A.

18. Grayston’s December 9, 2013 correspondence to CLIENT B’s lawyer was initially sent without Arbuthnott’s signature. On December 9, 2013 Arbuthnott affixed his signature to the correspondence and forwarded it to Grayston who sent the signature page to CLIENT B’s counsel.

19. Arbuthnott did not sign off on Grayston’s session notes or documents forwarded by Grayston to the third party Employee Assistance Program.

Agreed Facts relating to Plea to all Charges in the Formal Complaint:

20. Arbuthnott pleads guilty to all charges set out in the formal complaint.

LEGISLATION

[5] The Act defines professional misconduct 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.

[6] Section 14 of *The Saskatchewan College of Psychologists Regulatory Bylaws, 2004* requires members to comply with the Code of Ethics of the College and also contains 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;
- (j) 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. [*emphasis added*]

[7] Where a member is found to be guilty of professional misconduct, 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. Arbuthnott in the Agreed Statement of Facts and Admissions in relation to the charges contained in the Formal Complaint. 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 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. Arbuthnott is guilty of professional misconduct as a result of the guilty plea contained in the Agreed Statement of Facts and Admissions.

[9] 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”.

[10] The parties have also presented the Discipline Committee with Joint Submissions – Sentence⁴, which state as follows:

1. The Member shall receive a reprimand.

⁴ Filed as Exhibit C.

2. The Member is prohibited from making any custody, access, guardianship or visitation recommendations in family matters until such time as competence is demonstrated to the satisfaction of the Saskatchewan College of Psychologists in this area.
3. The Member shall complete a course pre-approved by the College of Psychologists within two years of being eligible to supervise again.
4. The Member is prohibited from supervising any provisional practice member until such time as the course referred to in the preceding paragraph has been completed.
5. The Member shall pay costs of the Professional Conduct Committee, legal fees and Discipline Committee expenses in the amount of \$5,500.00 to be paid within one year of the date of the Order of the Discipline Committee.

[11] In its decision in the case of *Rault v. Law Society of Saskatchewan*⁵, the Saskatchewan Court of Appeal made it clear that a discipline committee must give serious consideration to a joint submission on sentencing that has been agreed to 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.⁶ 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.

⁵ 2009 SKCA 81.

⁶ *Ibid*, at paragraph 13.

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.

[12] 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, with one minor exception.

ORDER

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

1. Mr. Arbuthnott is hereby reprimanded;
2. Mr. Arbuthnott is prohibited from making any custody, access, guardianship or visitation recommendations in family matters until such time as competence is demonstrated to the satisfaction of the Saskatchewan College of Psychologists;

3. Mr. Arbuthnott shall complete a course on supervision pre-approved by the Saskatchewan College of Psychologists within two years of being eligible to supervise again;
4. Mr. Arbuthnott is prohibited from supervising any provisional practice member until such time as he satisfactorily completes the course described in paragraph 3; and
5. Mr. Arbuthnott shall pay costs of the Professional Conduct Committee, legal fees and Discipline Committee expenses in the amount of \$5,500.00 to be paid on or before April 8, 2017, and, if payment is not received by the College on or before that date, the Member shall be suspended from the College until payment is received in full.

Dated at Regina, Saskatchewan this 8th day of April 2016.

SASKATCHEWAN COLLEGE OF PSYCHOLOGISTS,
DISCIPLINE COMMITTEE


Tom Robinson,
Registered Doctoral Psychologist, Chair