Court of Appeal for Saskatchewan

Docket: CACV4008

Citation: ***The College of Physicians and Surgeons of Saskatchewan v Leontowicz,*** **2023 SKCA 110**

Date: 2023-09-29

Between:

The College of Physicians and Surgeons of Saskatchewan

Appellant/Respondent on Cross-Appeal
(Respondent/Plaintiff)

And

Jesse Leontowicz

Respondent/Appellant on Cross-Appeal
(Appellant/Respondent)

Panel:	Richards C.J.S., Schwann and Leurer JJ.A.
Disposition:	Appeal allowed in part; cross-appeal allowed in part
Written reasons by:	The Honourable Madam Justice Schwann
In concurrence:	The Honourable Chief Justice Richards The Honourable Mr. Justice Leurer
On appeal from:	2022 SKQB 98, Regina
Appeals heard:	January 17, 2023
Counsel:	Rochelle Wempe for the Appellant Darren Kraushaar and Lauren Wihak for the Respondent

Schwann J.A.

I. INTRODUCTION

[1] This appeal raises the challenging question of the extent to which a professional regulatory body can discipline a member of its profession for off-duty conduct. The demarcation between conduct that is private and beyond the scope of the regulatory discipline and that which is unprofessional is often difficult to determine.

[2] The College of Physicians and Surgeons of Saskatchewan [College] charged Jesse Leontowicz, M.D., with one count of professional misconduct arising from an off-duty sexual encounter he had with a woman who was not his patient. The Discipline Hearing Committee [Committee] accepted the complainant's evidence and found Dr. Leontowicz guilty of unbecoming, improper, unprofessional or discreditable conduct within the meaning of s. 46(o) of *The Medical Profession Act, 1981*, SS 1980-81, c M-10.1 [*MPA*]: *Leontowicz v The College of Physicians and Surgeons of Saskatchewan* (11 June 2020) Saskatoon, CPSS [*Committee Decision*]. By way of penalty, the Council of the College [Council] suspended Dr. Leontowicz's licence indefinitely and issued a reprimand: *Leontowicz v The College of Physicians and Surgeons of Saskatchewan* (25 September 2020) Saskatoon, Council of the CPSS (Sask) [*Penalty Decision*]. The Council later imposed a full indemnity costs award against him totalling $96,577.10: *Leontowicz v College of Physicians and Surgeons of Saskatchewan* (20 November 2020), Saskatoon, Council of the CPSS (Sask) [*Costs Decision*].

[3] Dr. Leontowicz appealed the three decisions to what was then the Court of Queen's Bench, pursuant to s. 62 of the *MPA*. The judge who heard the matter concluded that the Committee had erred in finding Dr. Leontowicz guilty of off-duty professional misconduct, quashed its decision and dismissed the charge against him: *Leontowicz v The College of Physicians and Surgeons of Saskatchewan*, 2022 SKQB 98 [*QB Decision*]. Having reached that conclusion, the judge said it was unnecessary for him to consider Dr. Leontowicz's arguments on the penalty and costs imposed by the Council. However, in *obiter* reasons, he stated that had it been necessary to decide the issue, he would have set aside both the penalty and award of costs and remitted these matters to the Council for reconsideration.

[4] The College was granted leave to appeal the *QB Decision* to this Court, pursuant to s. 66 of the *MPA*. Dr. Leontowicz was granted leave to cross-appeal on three questions bearing on whether the judge erred in failing to find error with the Committee's handling of the medical evidence of Lori Haskell, Ph.D., and Huse Kamencic, M.D., and in failing to make an order quashing the penalty and costs decision.

[5] For the reasons that follow, I conclude the judge erred in quashing the *Committee Decision* and in vacating the professional misconduct charge against Dr. Leontowicz. That part of the College's appeal must be allowed and the finding of professional misconduct against Dr. Leontowicz restored. However, the College's appeal from the part of the *QB Decision* that dealt with penalty and costs is dismissed. I am satisfied that the Council erred in making those orders and that the appropriate remedy is to set them aside and remit the matter of penalty and costs to the Council for reconsideration.

[6] Dr. Leontowicz's cross-appeal is allowed only to the limited extent of quashing the penalty and costs order that were made by the Council. The balance of his cross-appeal is dismissed.

II. FACTS

[7] At the time of the events in question, Dr. Leontowicz was in the fourth year of his medical studies with the College of Medicine at the University of Saskatchewan. He and the complainant, J.T., had connected online through a well-known dating application. They met at a local restaurant, had supper and a few drinks, and generally appeared to get along.

[8] Dr. Leontowicz and J.T. ended up at his apartment and proceeded to his bedroom a short while later. J.T. agreed to have sexual intercourse with Dr. Leontowicz, but asked him to wear a condom. He obliged. During the intercourse that followed, Dr. Leontowicz inquired if she liked rough sex. J.T. said she did. He then slapped her lightly and manhandled her limbs. After the intercourse ended, Dr. Leontowicz went to the bathroom and removed his condom.

[9] The parties differed on what followed next. According to J.T., Dr. Leontowicz pinned her down by the sternum and penetrated her vaginally without wearing a condom. She also testified that he struck her repeatedly on the face (roughly 50 times) and that she was "beaten … to the point of seeing stars". She said he then put his penis in her mouth, masturbated and ejaculated on her face.

[10] J.T. agreed that she had consented to having vaginal sex with Dr. Leontowicz with a condom and some amount of rough sex (which she interpreted as manhandling, hard thrusting, gentle slapping, spanking and hair pulling), but maintained that she did not consent to sex without a condom or to the infliction of pain and bruises.

[11] In key respects, Dr. Leontowicz's testimony differed from J.T.'s. He recounted four separate, sequential episodes of consensual sex, with each occasion lasting about 20 minutes. He claimed to have worn a condom on the first three times they engaged in sexual intercourse but not the last because J.T. had initiated things by getting on top of him. Dr. Leontowicz described that episode as being spontaneous and consensual. Like J.T.'s evidence, he said their interaction ended with oral sex and him ejaculating into her mouth. Dr. Leontowicz was adamant that J.T. had consented to all of the sexual activities they had engaged in throughout the evening.

[12] Their testimony also differed on the extent and severity of the physical contact Dr. Leontowicz had inflicted on J.T. During their first sexual encounter, Dr. Leontowicz said J.T. agreed to having what he called rough sex and that, after a few slaps, he inquired if she was okay with it. He claimed to have repeatedly checked in with J.T. about the rough sex throughout the time they had sexual intercourse and said that J.T. willingly agreed to it and even reciprocated by choking him with both hands. In total, Dr. Leontowicz said he slapped J.T. five to seven times, spit on her, and ejaculated on her face and called her a "dirty slut". He steadfastly maintained that all of his actions were consensual.

[13] Although the parties initially exchanged innocuous, if not friendly, texts in the days that immediately followed their encounter, three days later J.T.'s tone changed. She called Dr. Leontowicz a "nut case", insisted that she had told him not to remove his condom and that, while she had agreed to having rough sex, it did not involve "beating me about the face so hard that I am covered in bruises". J.T. reported her interaction with Dr. Leontowicz to the Regina Police Service; however, no criminal charges ensued. More than a year later, J.T. gave her account of what had occurred to the College. Following an investigation into the matter, the College charged Dr. Leontowicz with unbecoming, improper, unprofessional or discreditable conduct, contrary to s. 46(o) of the *MPA*.

[14] The particulars of that charge are as follows:

> You Jesse Leontowicz are guilty of unbecoming, improper, unprofessional, or discreditable conduct contrary to the provisions of section 46(o) of *The Medical Profession Act, 1981*.
>
> The evidence that will be led in support of this charge will include some or all of the following:
>
> 1) You engaged in sexual intercourse with J.T. without her consent.
>
> 2) You applied physical force to J.T. without her consent.
>
> 3) You met J.T. on Tinder and went on a date on the evening of January 22, 2018.
>
> 4) You and J.T. went back to your apartment after the date. You and J.T. took your clothes off, kissed, you put a condom on, and engaged in consensual vaginal intercourse with J.T.
>
> 5) After some time you took the condom off. J.T. told you to put a condom back on and that she was not consenting to vaginal sex without a condom. You forced her to have vaginal sex without a condom.
>
> 6) Although J.T. consented to rough sex, after you took the condom off you held her down, hit her repeatedly causing significant bruising to her body, forced your penis into her mouth, and spit on her.

III. THE *COMMITTEE DECISION*

[15] The Committee was composed of two physicians and one lawyer. It presided over a three-day hearing in May of 2020 and subsequently rendered its written decision on June 11, 2020. The Committee began its written decision with a summary of the testimony of the College's witnesses – J.T., Dr. Haskell, Dr. Kamencic, J.M. (a co-worker of J.T.'s) and B.M. (a work supervisor) – and of Dr. Leontowicz, who had testified on his own behalf.

[16] Next, the Committee noted that the College bore the burden of proof in professional discipline matters and that it was required to prove the charge on a balance of probabilities. It understood that the evidence of the two principal witnesses – J.T. and Dr. Leontowicz – diverged in relation to what had transpired on the night in question on these three key points:

(a) the number of times they had sexual intercourse;

(b) the force Dr. Leontowicz used during the so-called rough sex; and

(c) what precisely J.T. had consented to.

[17] The Committee found J.T. to be a credible witness and that her evidence was supported by the testimony of some of the other witnesses. For instance, J.T. testified that, because she suffered from endometriosis, penile penetration more than once was painful and not something she could endure. Dr. Kamencic, J.T.'s gynecologist, confirmed her medical condition and opined generally that pain during sexual intercourse was a common symptom of endometriosis. This led the Committee to find Dr. Kamencic's evidence "persuasively corroborative of [J.T.'s] claim of only one instance of vaginal intercourse with Dr. Leontowicz" (*Committee Decision* at para 125).

[18] The Committee moved on to consider J.T.'s allegation about the degree of force that had been applied by Dr. Leontowicz throughout their sexual encounter. It examined the photographs J.T. had taken of herself immediately following her night with Dr. Leontowicz and those of the Regina Police Service when she had reported the incident several days later. It noted bruising to J.T.'s jaw and neck, as depicted in the photographs. The Committee also referenced the testimony of J.T.'s co-workers, J.M. and B.M., who had testified to seeing bruising on J.T. and noticing a marked change in her demeanor.

[19] While the Committee said it was unable to make any finding about the amount of force Dr. Leontowicz had applied, it found J.T.'s testimony more consistent with the photographic evidence and the observations of her co-workers. It concluded by stating, "What we can say is that the bruising we saw in the photographs all along [J.T.'s] left jaw, could not be the result of a few light slaps" (at para 129). The Committee returned to the topic of rough sex later in its decision, noting there was a "significant difference between the 'rough sex' … to which [J.T.] consented and full on hard hits" (at para 137). In the end result, it accepted J.T.'s evidence about what had occurred.

[20] Turning next to J.T.'s allegation of unprotected sexual intercourse, the Committee recognized that both J.T. and Dr. Leontowicz had agreed that it had occurred but had differed on whether J.T. had consented to it. The Committee rejected Dr. Leontowicz's testimony in this regard. It pointed to J.T.'s insistence that he wear a condom, which even Dr. Leontowicz had acknowledged in his examination-in-chief. It said J.T.'s insistence on condom use "was explicit, clear and unmistakable. She consented only to the act of sexual intercourse if his penis was sheathed" and saw no credible evidence to suggest that she had changed her mind (at para 133). In the result, the Committee concluded that J.T. "did not consent to unprotected vaginal/penile intercourse" (at paras 134).

[21] Before leaving its credibility analysis, the Committee paused to consider the various inconsistencies in the parties' respective evidence and J.T.'s possible motive for initiating a complaint with the College. It also pondered what to make of J.T.'s failure to flee after they had had sex and why she appeared to be interested in seeing Dr. Leontowicz again after their encounter. To resolve this supposed dissonance, the Committee found Dr. Haskell's opinion helpful as it provided a satisfactory explanation for such matters and, thus, determined that it did not undermine J.T.'s credibility. To conclude on the topic of credibility the Committee said this:

> 149. In conclusion on the subject of credibility and reliability, we are satisfied on a thorough review of all the evidence, that [J.T.'s] testimony is consistent with the independent evidence presented and is in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in these circumstances. Where the testimony of [J.T.] conflicts with that of Dr. Leontowicz, we prefer [J.T.'s] account for the reasons articulated above.

[22] Those matters resolved, the Committee returned to the core issue: whether the College had established that Dr. Leontowicz's off-duty conduct constituted conduct unbecoming, improper, unprofessional or discreditable within the meaning of s. 46(o) of the *MPA*. In answering that question, the Committee said (a) it was entitled to use its own knowledge of the profession to determine, if proven, whether the "conduct is unprofessional" (at para 152), (b) while not criminally charged, Dr. Leontowicz's conduct "meets the definition of sexual assault" (at para 154), and (c) the complaint, "[e]xcept insofar as the hearing of this matter was public", had not been publicized (at para 154).

IV. THE *PENALTY DECISION*

[23] Pursuant to s. 54 of the *MPA*, where a member is found guilty of professional misconduct, it falls to the Council to impose an appropriate penalty.

[24] Not surprisingly, the parties took opposing positions at the penalty hearing. The College urged the Council to revoke Dr. Leontowicz's licence, issue a reprimand and make an order directing him to pay the full amount of the cost of the investigation and hearing. For his part, Dr. Leontowicz observed that he had effectively served the equivalent of a 12-month suspension by the time the Council heard argument on penalty and suggested that a definite term suspension be imposed equal to time served, plus the imposition of conditions on his return to practice. He filed a number of letters in support.

[25] The Council briefly reviewed the Committee's findings, some case authority and the submissions of the parties. By way of general principle, it noted how the penalty imposed must protect the public and that the reasonableness of any sentence depends on the facts of each case and the circumstances of the offence and the offender. That said, the Council accepted the College's proposition that, given the circumstances at hand, general and specific deterrence was the overriding consideration.

[26] The Council acknowledged that the letters of support filed by Dr. Leontowicz spoke in positive terms about his academic performance and clinical acumen; however, it found them to be irrelevant because the sanctionable conduct occurred off-duty. By the same token, it also discounted various letters of support that had been filed by his friends and family, stating, "no evidence of general good character could possibly validate or mitigate a violent sexual assault even on the premise that such an assault was an isolated event that occurred in a fleeting moment of time" (*Penalty Decision* at para 14).

[27] The Council took umbrage with Dr. Leontowicz's failure to accept responsibility for his actions, pointedly noting that "he has demonstrated no treatment specific to the rehabilitation of a *rapist*, he has not undergone any assessment of his risk to society for this behavior to recur and has not admitted to charges under the *Criminal Code*" (emphasis added, at para 17). Similarly, the Council found it troubling that Dr. Leontowicz did not express remorse for his deeds.

[28] In the end result, "by the narrowest of margins" the Council declined to revoke Dr. Leontowicz's licence (at para 22). Instead, it imposed an indefinite suspension without spelling out any conditions for reapplication, reasoning that "a practitioner who is indefinitely suspended faces the same total removal from practice while under suspension but is able to make application to the Council to end the suspension" (at para 22). In this way, the Council said the door was left open for Dr. Leontowicz's return to practice "given a demonstration of rehabilitation and proof of minimal risk to reoffend" (at para 22).

[29] To summarize, the penalty imposed by the Council was as follows:

> **Council's decision**
>
> The Council of the College of Physicians and Surgeons imposes the following penalty on Dr. Jesse Leontowicz pursuant to *The Medical Profession Act, 1981* (the "Act"):

> 1) Dr. Leontowicz no longer has a licence to practise medicine.
>
> 2) Pursuant to Section 54(1)(b) of *The Medical Profession Act, 1981*, Dr. Leontowicz is immediately suspended from the privileges of a duly qualified medical practitioner under this Act until Council rescinds or modifies the suspension.
>
> 3) The Council reserves to itself, upon application by Dr. Leontowicz, the right to rescind or modify the suspension.
>
> 4) Pursuant to Section 54(1)(e) of *The Medical Profession Act, 1981*, the Council hereby reprimands Dr. Leontowicz. The format of that reprimand will be determined by the Council. Dr. Leontowicz is required to appear before the next regularly scheduled meeting of the Council to be present to have the reprimand administered in person.

[30] The Council's two-page *Costs Decision* was rendered on November 20, 2020. In it, the Council ordered Dr. Leontowicz to pay full indemnity costs of $96,577.10.

V. THE *QB DECISION*

[31] Dr. Leontowicz appealed all matters to the Court of Queen's Bench. The judge began his decision by thoroughly reviewing the evidence that was before the Committee, the Committee's reasoning underpinning its decision, and the relevant provisions of the *MPA* and the *Regulatory Bylaws for Medical Practice in Saskatchewan* (August 2020) [*Regulatory Bylaws*].

[32] Turning next to the standard of review for an appeal brought under s. 62 of the *MPA*, the judge took guidance from *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*]. Because s. 62 created a statutory right of appeal, he said he was obliged to apply the appellate standards of review in his consideration of the *Committee Decision*. This meant that, as per *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*], he would review Dr. Leontowicz's allegations of legal error on the correctness standard and errors of fact and mixed fact and law (absent an extricable question of law) for palpable and overriding error.

[33] The judge was also alert to this Court's decision in *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112, 453 DLR (4th) 472 [*Strom*], where it was determined that a finding of professional misconduct was a discretionary decision. As such, he said, appellate intervention is only warranted "if the decision-maker erred in principle, misapprehended or failed to consider material evidence, failed to act judicially, or reached a decision so clearly wrong that

it would result in an injustice" (*QB Decision* at para 68, quoting *Strom* at para 60). He went on to remark that, given the similarities of the legislative structure between that in *Strom* and the *MPA*, the *Strom* analysis would be applied "to the question of whether Dr. Leontowicz's conduct in the circumstances of this case amounted to professional misconduct as defined by the *MPA, 1981*" (*QB Decision* at para 70).

[34] Regarding the standard of review on which he was to assess the *Penalty Decision*, the judge noted two streams of thought on the matter, as elucidated by decisions such as *Alsaadi v Alberta College of Pharmacy*, 2021 ABCA 313, 463 DLR (4th) 335 [*Alsaadi*], and *Dhalla v College of Physicians and Surgeons of Manitoba*, 2022 MBCA 7, [2022] 6 WWR 388. Ultimately, the judge settled on the reasonableness standard, which he interpreted to mean that "an administrative penalty should not be disturbed on appeal except where it is shown to be (i) demonstrably unfit such that it is disproportionate or falls outside the range of penalties imposed in other cases, or (ii) based on an error in principle" (*QB Decision* at para 79).

[35] As to Dr. Leontowicz's nine grounds of appeal, the judge found no palpable and overriding error in the Committee's findings of fact but held that it had erred in three ways in its professional misconduct analysis. First, he reasoned that, since the *Regulatory Bylaws* do not speak directly to sexual misconduct outside of a physician–patient relationship, "a proper interpretation of ss. 46(o) and (p) of the *MPA, 1981* does not support the conclusion that it qualifies as 'unbecoming, improper, unprofessional or discreditable' conduct under that subsection" (*QB Decision* at para 184). Second, he focused on what he saw as the Committee's determination that a criminal offence had been made out. He found the Committee erred because "this characterization of Dr. Leontowicz's conduct appears to have infected the Committee's analysis of whether his conduct amounted to unprofessional conduct for [the] purposes of s. 46(o) of the *MPA, 1981*" (at para 191). The third and final error he identified was his conclusion that there was no evidentiary basis for the Committee to have believed that the charge against Dr. Leontowicz would generate reputational concerns for either him or the medical profession at large.

[36] All of this caused the judge to conclude that the Committee had committed errors in its nexus analysis sufficient to warrant appellate intervention. He said as follows:

> [201] Taking account of the "full panoply of contextual factors" peculiar to Dr. Leontowicz's case, I am persuaded the Committee erred in principle when finding him guilty of professional misconduct as set out in s. 46(o) of the *MPA, 1981*. Respectfully, the Committee's analysis was "one dimensional", to quote *Strom* at para 128. To be sure, Dr. Leontowicz's conduct that night exhibited a grievous error in judgment and lapse of personal responsibility. Yet, no true nexus, let alone a significant one, had been established between his sexual encounter with the complainant on January 22, 2018, and the Committee's finding that because of it, he could not be trusted to practice medicine safely, a career for which he has trained for many years, and has the educational credentials to pursue.

[37] The judge allowed the appeal, quashed the *Committee Decision* and dismissed the charge of unprofessional conduct against Dr. Leontowicz. Given that result, and while he found it unnecessary to determine Dr. Leontowicz's appeal from the *Penalty Decision*, the judge went on to briefly address it, concluding that it was stringent, demonstrably unfit and "disproportionate as it is an indefinite and not a definite suspension" (*QB Decision* at para 216). He also determined that the costs award was fraught with several errors in principle: the most egregious being the Council's acceptance of full indemnity as its default position without weighing and balancing the applicable factors and, most notably, considering whether it delivered a "'crushing financial blow' to Dr. Leontowicz in these circumstances" (at para 219).

[38] The judge closed his analysis on penalty and costs by stating that had it been necessary for him to address these matters, he would have allowed Dr. Leontowicz's appeal, set aside those decisions and remitted the matters to the Council for reconsideration.

VI. ISSUES

[39] The College was granted leave to appeal on the following five grounds:

(a) Did the judge misapply the standard of review and merely substitute his own view for what constitutes unprofessional conduct? Did the judge fail to treat the *Committee Decision* with deference?

(b) Did the judge err by applying a higher level of scrutiny to the Committee's decision because the impugned conduct is not specifically defined as unprofessional conduct under *The Medical Profession Act, 1981*, or the College of Physicians and Surgeons of Saskatchewan's *Regulatory Bylaws*?

(c) Did the judge err by concluding the Committee had erred in finding Dr. Leontowicz's conduct constituted sexual assault within the meaning of the *Criminal Code*?

(d) Did the judge err in concluding the Committee had improperly analyzed the nexus issue? Did the judge err in determining that evidence of a nexus was required?

(e) Did the judge err in relation to his decision on penalty and costs by

(i) selecting and applying the wrong standard of review;

(ii) concluding the penalty was demonstrably unfit and disproportionate in the circumstances at hand; and

(iii) concluding that the penalty fell outside the range for penalties for similar conduct committed in similar circumstances?

[40] Dr. Leontowicz was granted leave to cross-appeal on the following issues:

(a) Did the judge err in law by finding that the Committee did not err in accepting and relying on the expert evidence of Dr. Haskell and, if so, did that error have an impact on its assessment of the credibility and reliability of the complainant?

(b) Did the judge err in law by finding that the Committee did not err in its treatment and use of the evidence of Dr. Kamencic and, if so, did that error have an impact on its assessment of the credibility and reliability of the complainant?

(c) Did the judge err in failing to make an order quashing the penalty and costs order?

VII. ANALYSIS

A. The College's appeal from the *QB Decision*

[41] As noted, the College was granted leave to appeal on five grounds. I will deal with each ground in turn, with the first two matters addressed together because they raise similar issues.

1. Failure to approach the *Committee Decision* with deference

[42] The matter before the judge was a statutory appeal. The parties are of one mind that, in Saskatchewan at least, the standard of appellate review to be applied by a reviewing judge respecting a professional disciplinary decision is that set out in *Strom*. This means that the Committee's determination that Dr. Leontowicz's behaviour constituted professional misconduct was a discretionary decision that had to be assessed by the judge in accordance with the standard of review for those sorts of decisions.

[43] *Kot v Kot*, 2021 SKCA 4, 63 ETR (4th) 161 [*Kot*], provides a recent summation of the standard of review for discretionary decisions:

> [20] In summary, these cases confirm that appellate intervention in a discretionary decision is appropriate where the judge made a palpable and overriding error in their assessment of the facts, including as a result of misapprehending or failing to consider material evidence. Appellate intervention is also appropriate where the judge failed to correctly identify the legal criteria which governed the exercise of their discretion or misapplied those criteria, thereby committing an error of law. Such errors may include a failure to give any or sufficient weight to a relevant consideration.

[44] Although the College concedes that the judge identified the correct standard of review, it says he erred by failing "to give the Discipline Hearing Committee the deference required and instead substituted his own views on whether Dr. Leontowicz's off-duty conduct constituted unprofessional conduct". This argument is grounded in what the College refers to as a long, unbroken line of authority to the effect that "members of a self-regulated profession are best suited to determine the ethics of their profession". Further, it says, because they have the requisite knowledge, understanding and first-hand experience about the "core values and principles of the profession", members of the profession are, by extension, best suited to determine the correlation between a member's impugned conduct and the profession. The College builds on its argument by pointing to the wording of s. 46(o) of the *MPA*, which expressly confers broad discretion on discipline hearing committees to determine whether a set of circumstances amounts to conduct that is unbecoming, improper, unprofessional or discreditable. Further, it says that, much like trial judges, the Committee had the benefit of hearing and seeing the witnesses and, ultimately, bore the task of making credibility and reliability findings. Those findings, it says, "significantly informed their decision on whether Dr. Leontowicz's off-duty conduct was unprofessional".

[45] To sum up its position, I take the College to argue that since the Committee did not err in any of the ways described in *Kot*, the judge had no basis to interfere with the *Committee Decision*. In the result, it says the judge did no more than substitute his own view for whether Dr. Leontowicz was guilty of professional misconduct for that of the Committee.

[46] In assessing this argument, I begin by reminding myself of the role this Court plays in sitting as a secondary appellate court. In that regard, an appellate court is to determine whether the judge chose the correct standard of review and applied it properly. This is a question of law, reviewable on the correctness standard: *Dr. Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paras 43–44, [2003] 1 SCR 226. In practice, once the appellate court has identified the correct standard of review, it "steps into the shoes" of the reviewing court and reviews the decision of the administrative tribunal in accordance with that standard (*Teamsters Canada Rail Conference v Canadian National Railway Company*, 2021 SKCA 62 at para 41, 327 LAC (4th) 322).

[47] As I see it, the College's argument under this heading is built around four somewhat interrelated lines of reasoning. As discussed below, I conclude that none of those pillars – individually or collectively – provides a basis for appellate intervention.

[48] The College begins by pointing to case law, which, it submits, has repeatedly held that members of a self-regulated profession are best suited to determine the ethics of their own profession and to identify the profession's core values and principles. I do not take the judge, or Dr. Leontowicz for that matter, to suggest otherwise. Indeed, the fact that the Legislature entrusted the medical profession with the responsibility of self-regulating its members explicitly makes that point. However, it is also of significance that the Legislature gave members an express right of appeal from a Committee's decision as per s. 62 of the *MPA*. This underscores the fact that the Committee's decision-making authority is not unfettered nor impervious to judicial intervention where warranted. A similar point was made by this Court in *Law Society of Saskatchewan v Abrametz*, 2020 SKCA 81 [*CA-Abrametz 2020*], rev'd 2022 SCC 29, 470 DLR (4th) 328 [*SCC-Abrametz*] (but not on this issue), noting that the presence of a statutory appeal is a clear signal "that the Legislature intended to subject the decision-maker to appellate oversight and the application of the appellate standard" (*CA-Abrametz 2020* at para 75).

[49] Second, the College says the breadth of the wording in s. 46(o) confers broad discretionary authority on the Committee to determine whether a set of facts gives rise to conduct that is unbecoming, improper, unprofessional or discreditable. I agree. The wording of the provision is clearly open-ended. It states as follows:

> **Charges**
>
> **46** Without restricting the generality of "unbecoming, improper, unprofessional or discreditable conduct", a person whose name is entered on a register is guilty of unbecoming, improper, unprofessional or discreditable conduct, if he or she:
>
> …
>
> (o) does or fails to do any act or thing *where the discipline hearing committee considers that action or failure to be unbecoming, improper, unprofessional or discreditable* … .
>
> (Emphasis added)

[50] Neither am I persuaded by the College's implicit argument that, when considering the bottom-line question of whether a member of the medical profession is guilty of misconduct, great deference must be shown to the Committee because it is called upon to make a finding of fact. With respect, that is an overly simplistic proposition and is at odds with *Strom*, where the same argument was advanced but rejected. Speaking for the Court on that occasion, Barrington-Foote J.A. had this to say in response to that proposition:

> [73] In the result, a discipline committee deciding whether a registered nurse is guilty of professional misconduct is not deciding a question of fact for standard of review purposes. It is either deciding a question of mixed fact and law or making a discretionary decision. As to which, there is no bright line which neatly divides these two categories. Both call for the decision-maker to find the facts and apply legal principles to those facts.

The import of that observation is that, although discretionary in nature, the *Committee Decision* remained subject to judicial oversight, albeit through the lens of the applicable standard of review.

[51] As mentioned, *Strom* settled the point that a discipline hearing committee's decision is discretionary in nature. However, that discretion is not unfettered: see *Rimmer v Adshead*, 2002 SKCA 12 at para 58, [2002] 4 WWR 119 [*Rimmer*]. Furthermore, one must not lose sight of the fact that the standard of review applied by an appellate court in assessing a discretionary decision "depends on the *nature* of the error alleged to have been made and not on the *type* of judicial decision that was made" (emphasis added, *Kolodziejski v Maximiuk*, 2023 SKCA 103 at para 24, referencing *MacInnis v Bayer Inc.*, 2023 SKCA 37 at para 38).

[52] By way of its third proposition, the College points to the fact that the Committee had the benefit of seeing and hearing the witnesses and was therefore best positioned to make credibility findings, which, in turn, informed the question of whether Dr. Leontowicz's conduct was unprofessional. Once again, I take no issue with that general proposition; indeed, credibility findings fall within the domain of triers of fact and warrant deference on appeal. However, the Committee's ability to hold a hearing, hear evidence and make findings of fact, including assessing the credibility and reliability of the witnesses, does not necessarily mean that inferences drawn from those facts or, as discussed above, the bottom-line conclusion of professional misconduct, is impervious to appellate scrutiny. *Strom* says as much. In any event, the judge did not overturn the *Committee Decision* on issues of credibility or reliability. He did so because he found the conclusion was grounded in legal error.

[53] This leaves the College's wide-ranging submission that a reviewing court owes something akin to an additional or super-added layer of deference to the Committee in connection with its disciplinary decisions. Respectfully, this argument is inconsistent with the jurisprudence and must be rejected. While the College has cited a plethora of case authority to support its position on deference, none of them are persuasive, largely because they all predate *Vavilov* and are at odds with the shift in direction provided by that decision. Where the legislation allows for a statutory appeal to be taken (as it does here), the Legislature can be understood to have intended that the normal appellate standards of review apply: see *Vavilov* at para 36.

[54] I am satisfied the judge understood the proper legal framework within which he was to review the Committee's decision and that, contrary to the College's position, the applicable standard of review did not oblige him to approach the Committee's determination with an enhanced level of deference. Respectfully, the issue on this appeal is whether the judge erred in his *application* of the proper standard of review of the *Committee Decision*, and it is to that issue that I now turn.

2. Application of the standard of review

[55] The College says the judge erred in his application of the standard of review by

(a) applying a higher level of scrutiny to the impugned conduct because it was not specifically defined as *unprofessional conduct* in the *MPA* or the *Regulatory Bylaws*;

(b) concluding the Committee erred in finding that Dr. Leontowicz's conduct constituted sexual assault within the meaning of the *Criminal* Code; and

(c) improperly analyzing the nexus between private, off-duty conduct and the practice of medicine.

[56] I will deal with each argument in turn.

a. Professional misconduct and the *Regulatory Bylaws*

[57] The judge was critical of the Committee for failing to undertake an analysis of the governing legislation – notably the phrase *professional misconduct* – or to meaningfully consider how Dr. Leontowicz's off-duty actions fell within the ambit of that term as used in s. 46(o) of the *MPA*. He also found the Committee's failure to reference the *Regulatory Bylaws* to be a significant oversight. Given what he saw as the Committee's analytical shortcomings, the judge said a "closer scrutiny of the Committee's conclusions on this issue is warranted" (*QB Decision* at para 183).

[58] The provisions identified by the judge include s. 46(o) of the *MPA* (which is repeated here for ease of reference) and s. 8.1 of the *Regulatory Bylaws*:

> **Charges**
>
> **46** Without restricting the generality of "unbecoming, improper, unprofessional or discreditable conduct", a person whose name is entered on a register is guilty of unbecoming, improper, unprofessional or discreditable conduct, if he or she:
>
> …
>
> (o) does or fails to do any act or thing where the discipline hearing committee considers that action or failure to be unbecoming, improper, unprofessional or discreditable … .
>
> **8.1 Bylaws Defining Unbecoming, Improper, Unprofessional or Discreditable Conduct**
>
> (a) In this section:
>
> …
>
> (iv) "Sexual misconduct" means the threatened, attempted or actual conduct of a physician towards or with a patient that is of a sexual nature and includes any of the following conduct:

> 1. sexual intercourse between a physician and a patient of that physician;
>
> 2. genital to genital, genital to anal, oral to genital, or oral to anal contact between a physician and a patient of that physician;
>
> 3. masturbation of a physician by, or in the presence of, a patient of that physician;
>
> 4. masturbation of a physician's patient by that physician;
>
> 5. encouraging a physician's patient to masturbate in the presence of that physician;
>
> 6. touching of a sexual nature of any part of a patient's body, including a patient's genitals, anus, breasts or buttocks by a physician. For the purpose of this paragraph "touching of a sexual nature" does not include performing an appropriate physical examination that is appropriate to the service provided;
>
> 7. kissing of a sexual nature with a patient;
>
> 8. sexual acts by the physician in the presence of the patient;
>
> 9. any incident or repeated incidents of objectionable or unwelcome conduct, behaviour or remarks of a sexual nature by a physician towards a patient that the physician knows or ought reasonably to know will or would cause offence or humiliation to the patient or adversely affect the patient's health and wellbeing. For the purpose of this paragraph "sexual nature" does not include any conduct, behaviour or remarks that are appropriate to the service provided;
>
> 10. acts or behaviours which are seductive or sexually-demeaning to a patient or which reflect a lack of respect for the patient's privacy, such as examining a patient in the presence of third parties without the patient's consent or sexual comments about a patient's body or underclothing;
>
> 11. making sexualized or sexually demeaning comments to a patient;
>
> 12. requesting details of sexual history or sexual likes or dislikes when not clinically indicated;
>
> 13. making a request to date a patient or dating a patient;
>
> 14. initiating or participating in a conversation regarding the sexual problems, preferences or fantasies of the physician … .

[59] In general terms, the College takes issue with the judge's self-instruction to pay closer scrutiny to the Committee's conclusion because it did not specifically engage in an analysis of the *MPA* or the *Regulatory Bylaws*.

[60] I see no error in his approach. An examination of paragraph 183 of the *QB Decision* demonstrates that the judge understood that the critical issue before the Committee was whether Dr. Leontowicz's actions constituted professional misconduct. He was, therefore, correct to begin his analysis by focusing on how the Committee had interpreted and applied s. 46(o) of the *MPA* and the *Regulatory Bylaws*.

[61] The College next asserts the judge erred in concluding that, because Dr. Leontowicz's conduct did not fall within the specifically defined examples of unprofessional conduct set out in the *MPA* (presumably referring to s. 46(a) to s. 46(n)), nor fall within the list of what constitutes *sexual misconduct* under s. 8.1 of the *Regulatory Bylaws*, his behavior was less likely to constitute unprofessional and sanctionable conduct.

[62] The alleged error is said to arise from paragraph 184 of the *QB Decision*, where the judge said as follows:

> [184] Second, as the *Regulatory Bylaws* did not cover the kind of conduct which the Committee found Dr. Leontowicz engaged in – namely sexual misconduct wholly outside a physician–patient relationship – a proper interpretation of ss. 46(o) and (p) of the *MPA, 1981* does not support the conclusion that it qualifies as "unbecoming, improper, unprofessional or discreditable" conduct under that subsection.

[63] I understand the judge to have made two points. Sexual misconduct that occurs off-duty and outside of a physician–patient relationship does not fall under the definition of sexual misconduct in s. 8.1 of the *Regulatory Bylaws*. This should be interpreted to mean, he said, that (a) s. 46(o) cannot be used to backfill the *Regulatory Bylaws*, and, as such, s. 46(o) should be interpreted narrowly, and (b) the conduct must be seen as *removed from the profession* and less likely to amount to professional misconduct.

[64] The error embedded in the first prong of that reasoning process is obvious. The wording of the *MPA* reveals a legislative intent to bestow broad discretion on a discipline hearing committee to determine, on a case-by-case basis, if any act or thing done or failed to be done by a physician is "unbecoming, improper, unprofessional or discreditable" (s. 46(o)). This point was made by Josh Koziebrocki and Lidiya Yermakova, "Off-Duty Conduct: Issues to Consider for Regulators, Practitioners and Professionals" (Spring 2019) 37 Adv J No 4, 12–14 (QL):

> [12] … in most regulated professions, it is an act of professional misconduct to engage in "conduct unbecoming" the profession, or conduct that would be regarded by others in the profession as "disgraceful, dishonourable or unprofessional" terms which are not further defined. Allegations of wrongdoing which take place off-duty are typically brought under these broad and all-encompassing categories of professional misconduct.
>
> (Footnotes omitted)

[65] While it is true to say that s. 46(p) envisions the possibility of a bylaw being enacted that defines a specific act or failure to act to be unbecoming conduct, and so on, that provision should not be read in a way that limits, colours or confines the operation of s. 46(o). For that to be the case, s. 46(o) would have to be prefaced with limiting words such as, *subject to the provisions of any bylaw*, but it is not.

[66] Further, s. 46(o) cannot be read in isolation from the lead-in language of the section, which evinces a conscious legislative choice not to draw hard boundaries around what might constitute sanctionable conduct under the *MPA*. By prefacing s. 46 with the words "without restricting the generality of 'unbecoming, improper, unprofessional or discreditable conduct'", the Legislature indicated that sanctionable conduct was not exhaustively limited to the types of activities, actions or omissions listed in s. 46(a) to s. 46(p). Put another way, inclusion of the phrase "without restricting the generality of" at the commencement of s. 46, followed by a list of specific examples of what constitutes sanctionable conduct, is an indicator that the list is not all-inclusive. Ruth Sullivan in her text *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at c 4, §4.04, makes the same point in her discussion of drafting protocols:

> **[3] Non-exhaustive definitions** …
>
> Ironically, when faced with a list of examples, interpreters sometimes disregard the general language the examples are meant to illustrate and rely on the examples to read down the scope of the general language. To preclude this possibility, drafters sometimes rely on the phrase "without limiting the generality of the foregoing" or words to that effect.
>
> (Footnotes omitted)

See also *Strom* at paras 76 and 94.

[67] A somewhat similar argument arose in *Kapoor v Law Society of Saskatchewan*, 2019 SKCA 85, 438 DLR (4th) 672 [*Kapoor*], where the appellant was found guilty of conduct unbecoming a member of a law society when he failed to bring relevant and adverse authorities to the attention of the presiding judge. That particular conduct was not specifically proscribed by the legal profession's *Code of Professional Conduct* [*Code*]. On appeal, the appellant argued that because the *Code* did not particularize the impugned conduct as being conduct unbecoming, by necessary implication, it did not constitute conduct unbecoming. That argument was rejected by this Court:

> [24] … In contrast, the preface to the *Code* — specifically said to form part of the *Code* — was reasonably relied upon by the hearing committee as providing "some assistance in interpreting and applying it in the context of the discipline process" (*Hearing Committee Decision* [2016 SKLSS 13] at para 33). The preface states that "[i]t is impossible for any code to prescriptively or exhaustively establish what might constitute conduct unbecoming". Instead, the preface reminds that this determination is left to the Benchers, "who are *guided* by the legislation, this *Code*" (emphasis added) and other matters.

[68] Returning to the matter at hand, I conclude the judge also erred in his conclusion that because Dr. Leontowicz's actions fell outside of the definition of *sexual misconduct* contained in the *Regulatory Bylaws* they were somehow removed from the scope of professional misconduct. This omission is a factor in the interpretation of the legislation to be sure, but one that fits more comfortably in the nexus analysis.

[69] To conclude on this ground of appeal, I find the judge erred in law in his approach to s. 46 of the *MPA* and its interrelationship with the *Regulatory Bylaws*. Sexual misconduct that takes place outside of a clinical or physician–patient relationship is not specified as being misconduct under the *Regulatory Bylaws*; but that fact does not preclude a discipline hearing committee from concluding that, in an appropriate case, the impugned action is unbecoming, improper, unprofessional or discreditable.

b. The Committee's determination of sexual assault

[70] The judge also concluded that the Committee fell into error by analyzing Dr. Leontowicz's conduct through a criminal law lens. The judge's analysis on this point focused on the following two paragraphs of the *Committee Decision*:

> 153. The conduct under consideration here is that Dr. Leontowicz (then a fourth year medical student, now an M.D.), on a date with the Complainant, without her consent had unprotected sex with her and hit her multiple times with such force as to cause injury to her face. [J.T.] was not a patient and the assault did not occur in the context of Dr. Leontowicz's medical practice.
>
> 154. Dr. Leontowicz was not criminally charged although the matter was reported to the police. While Dr. Leontowicz was not criminally charged, his conduct in the context of this proceeding, *meets the definition of sexual assault*.
>
> (Emphasis added)

[71] On the Queen's Bench appeal, Dr. Leontowicz argued that, in framing his conduct as sexual assault *in the criminal law sense of the term*, the Committee failed to assess whether all of the elements of that offence had been made out. The judge agreed with Dr. Leontowicz, stating, "As I read these two paragraphs, particularly para. 154, the Committee appears to refer to the criminal definition of sexual assault contained in s. 271 of the *Criminal Code*, RSC 1985, c C-46, when they concluded Dr. Leontowicz's conduct satisfied 'the definition of sexual assault'. Respectfully, this is an error of law …" (*QB Decision* at para 188). Later, he said the Committee fell into error "when they purported to find that the elements of the criminal offence of sexual assault had been met" (at para 191).

[72] The judge went on to detail why he found that conclusion to be legally problematic. First, he said it was "not insignificant" that Dr. Leontowicz was not charged criminally, and in consequence "no criminal court has found that Dr. Leontowicz's conduct constituted sexual assault" (at para 189). Additionally, he reasoned that (a) an administrative hearing "could not determine criminal liability", (b) "Dr. Leontowicz did not have the protections afforded to accused persons by s. 11 of the *Charter*", (c) the College was not required to "prove the factual allegations set out in its charge beyond a reasonable doubt", and (d) the Committee did not "have to grapple with issues such as the requisite *mens rea* or the more difficult question of honest but mistaken belief in communicated consent either or both of which arise in many criminal prosecutions for sexual assault" (at para 190).

[73] Those points made, the judge concluded that the Committee fell into error "when they purported to find that the *elements* of the criminal offence of sexual assault had been met" (emphasis added). This finding was significant because, as the judge went on to say, "this characterization of Dr. Leontowicz's conduct appears to have infected the Committee's analysis of whether his conduct amounted to unprofessional conduct for [the] purposes of s. 46(o) of the *MPA, 1981*" (at para 191).

[74] It is the College's position on appeal that the judge misunderstood the Committee's function and misconstrued its characterization of Dr. Leontowicz's actions as sexual assault in the criminal sense of the term. I agree with the College.

[75] First, the Committee did not err simply because it used a term that has a meaning in a criminal law context. The term *sexual assault* is one that has a colloquial or general usage in a variety of civil and administrative law contexts. Bodies like the Committee are empowered to label certain impugned behavior as sexual assault in the same manner that decision-makers in civil actions refer to actions like fraud or theft, which also constitute crimes. The jurisprudence is replete with case law where the term sexual assault is used in a non-criminal context: see, for instance, *Calgary (City) v Canadian Union of Public Employees Local 37*, 2019 ABCA 388, 439 DLR (4th) 405, where, in the context of the review of a labour arbitration decision concerning sexual harassment in the workplace, the Alberta Court of Appeal said, "There can be no doubt that the grabbing and squeezing of another's breast without consent is sexual *assault*. Sexual *assault*, by its very definition, is serious misconduct" (emphasis in original, at para 11), and "Many courts and arbitrators have been quick to recognize that harassment with a physical component constitutes a form of sexual assault and is among the most serious form of workplace misconduct" (at para 31): see also *Professional Institute of the Public Service of Canada v Communications, Energy and Paperworkers' Union of Canada, Local 3011*, 2013 ONSC 2725 at para 20, 308 OAC 191.

[76] Second, there was nothing wrong in law with the Committee concluding that the elements of a criminal offence had been proven to have occurred based on the evidence before it and then relying on those proven facts as amounting to professional misconduct.

[77] This does not mean that the Committee was empowered to make a finding of criminal liability. Criminal liability can only be determined based on proof beyond a reasonable doubt, after all procedures appropriate to the making of such a finding have been followed. However, the Committee did not purport to make a finding of *criminal* liability.

[78] In this context, I see no error with the Committee determining that Dr. Leontowicz's "conduct in the context of this proceeding, meets the definition of sexual assault" (*Committee Decision* at para 154). Moreover, these words must be read in situ and not taken in isolation. In the immediately preceding paragraph, the Committee expressed what it understood to be the impugned conduct at issue in this way (repeated here for reference):

> 153. The conduct under consideration here is that Dr. Leontowicz (then a fourth year medical student, now an M.D.), on a date with the Complainant, without her consent had unprotected sex with her and hit her multiple times with such force as to cause injury to her face. [J.T.] was not a patient and the assault did not occur in the context of Dr. Leontowicz's medical practice.

Nothing in that paragraph suggests that the Committee saw itself as being tasked with making criminal findings. As I see it, the Committee was merely trying to get a handle on whether Dr. Leontowicz's conduct constituted unwanted sexual touching for purposes of establishing the relative seriousness of the alleged misconduct within the broader context of determining if it amounted to professional misconduct under s. 46(o) of the *MPA*.

[79] Paragraph 154 of the *Committee Decision* is also of interest. It, as well, is repeated here for ease of reference: "Dr. Leontowicz was not criminally charged although the matter was reported to the police. While Dr. Leontowicz was not criminally charged, his conduct in the context of this proceeding, meets the definition of sexual assault".

[80] In stating that although the Committee knew that Dr. Leontowicz had not been criminally charged, it understood that its purpose was to examine his conduct; as it said, it found that conduct to be sexual assault *in the context of this proceeding*. By this, I understand the Committee to say that all of the elements of a criminal offence had been proven on a balance of probabilities and that these proven facts amounted to professional misconduct. A second and most obvious point is that paragraph 154 does not mention the *Criminal Code* nor link it to sexual assault in a criminal context.

[81] In summary, I take the Committee in this case to have done nothing different than reason on a basis that was similar to cases such as *Laroche v Beirsdorfer* (1981), 131 DLR (3d) 152 (FCA), when, in its assessment of the relative seriousness of the impugned conduct, it saw something that was effectively equivalent to criminal behaviour.

[82] The third point I would make is the fact that Dr. Leontowicz had not been charged criminally did not prevent the Committee from finding that actions that might amount to a criminal offence had been proven to have occurred based on the evidence before it. Proof of a conviction might have precluded Dr. Leontowicz from arguing that a criminal offence had not taken place: *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63 at para 57, [2003] 3 SCR 77. However, the opposite is not true. There are many reasons why criminal charges may not have been brought. In the absence of admissible evidence explaining why this decision was taken, and why it was probative to the questions before the Committee, there was no basis for the judge to say that it was "not insignificant … no criminal charges were laid" (*QB Decision* at para 189).

[83] To conclude, I agree with the College that the judge erred in law in finding fault with the Committee basing its finding of professional misconduct on its conclusion that a sexual assault had occurred.

c. The nexus issue

i. General principles on nexus

[84] It is generally accepted that professional regulatory bodies have the authority to investigate and discipline members of their profession for conduct that arises outside of the execution of their professional duties. The extent of the authority to investigate and sanction a member for off-duty conduct typically falls under the broad umbrella of conduct that is unbecoming, improper, unprofessional or discreditable. Canadian courts have thus far been consistent in their articulation of the standard required for a finding of professional misconduct to be made. That said, the application of that standard to the facts of each case remains challenging, if not uncertain. As concluded by Bryan Salte, *The Law of Professional Regulation*, 2d ed (Toronto: LexisNexis, 2023), the "issue of discipline for off-duty conduct remains a difficult one for Discipline Committees and courts to address. It is difficult to enunciate and apply principles that differentiate off-duty conduct that is unprofessional and subject to discipline and conduct that is not subject to discipline" (at §6.08).

[85] At one time, the demarcation between off-duty conduct that is unprofessional and that which is beyond the reach of the regulator was thought to be whether the conduct was "reprehensible in anyone" (*Marten v Disciplinary Committee of the Royal College of Veterinary Surgeons*, [1965] 1 All ER 949 at 953). That approach was subsequently found to be overly simplified and has been rejected. For instance, in *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98, 9 Alta LR (7th) 10, the Alberta Court of Appeal said many factors must go into the consideration, and "[t]he closer the conduct comes to the activities of the profession, the more possible it is that personal misconduct will amount to professional misconduct" (at para 45).

[86] Similarly, *Strom* also rejected the general proposition that an egregious event or one that is reprehensible, distasteful, undesirable or improper on its own amounts to professional misconduct. As clarified in *Strom*, off-duty conduct may be professional misconduct "if there is a sufficient

nexus or relationship of the appropriate kind between the personal conduct and the profession to engage the regulator's obligation to promote and protect the public interest" (at para 89). The test is whether the impugned conduct was such that it would have a "sufficiently negative impact on the ability of the professional to carry out their professional duties or on the profession to constitute misconduct" (at para 89): see also *Klop v College of Naturopathic Physicians of British Columbia*, 2022 BCSC 2086 at para 110, leave to appeal to BCCA refused, 2023 BCCA 125.

[87] *Strom* went on to identify three competing interests at stake in connection with fair and effective self-governance: those of the public, those of the profession at large and those of the member. Balancing these interests requires a professional disciplinary body to examine the circumstances and have regard for the "full panoply of contextual factors particular to an individual case before making that determination" (*Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 83, [2018] 1 SCR 772 [*Groia*]) – see also *Strom* at para 113. However, precisely where that balance is struck is for the disciplinary body to determine, "provided that there is no reviewable error" (*Strom* at para 114).

[88] Determining whether the required nexus exists calls for a contextual analysis. Factors relevant to that analysis include "the nature of the profession; the relationship of the misconduct to the work of the profession or the personal characteristics considered necessary to practice the profession; and whether the person charged is identified or purported to act as a member of that profession are relevant" (at para 90).

[89] Thus, the question for the judge was not whether he would have come to a different conclusion than the one arrived at by the Committee but whether, framed in the standard of review context, "the Discipline Committee failed to apply or misapplied the criteria governing the exercise of its discretion, thereby committing an error of law" (*Strom* at para 111).

ii. The *QB Decision* on nexus

[90] Like the judge, I agree that the Committee might have devoted more of its analysis to the question as to whether Dr. Leontowicz's off-duty conduct constituted professional misconduct as envisioned by s. 46 of the *MPA*. Since the Committee's findings are brief, I will replicate them in their entirety:

> 161. A core value of the medical profession is to do no harm. Further, the essence of the work of the profession is to help and heal other human beings. Sexual assault is the antithesis of this creed and unacceptable to the profession. Though the conduct here did not take place in the course of duty, it discredits both Dr. Leontowicz and the profession. Dr. Leontowicz, in practice, will undoubtedly deal with female patients, disrobed and vulnerable. He has shown himself, by his conduct towards [J.T.], as unworthy of the trust which is placed in physicians by their female patients and the public generally. His conduct, as found in this case, is not only damaging to his own reputation but to that of the profession at large. By his conduct Dr. Leontowicz not only did physical harm to the Complainant but demonstrated disregard for the very notion of consent – a foundation of the physician/patient relationship.
>
> 162. The medical profession holds its members to high standards both in their personal lives and their professional lives. Maintaining those standards of personal and professional conduct engenders and ensures public trust. Physicians hold positions of elevated status in society for their technical and intellectual abilities but also because they are trusted always to heal not harm. Dr. Leontowicz's conduct was such as to erode the confidence the public now has that they can feel safe with their physician.

[91] The judge began his consideration of the nexus issue by instructing himself to apply the precepts of *Strom* in analyzing the Committee's reasoning. Ultimately, he concluded that the Committee took "an overly narrow view of the situation" and did not "appropriately analyze the nexus between [Dr. Leontowicz's] private conduct and the medical profession" (*QB Decision* at para 196). He gave two specific examples of what he saw to be the Committee's deficiency in this regard.

[92] The first related to the nature of the profession, the relationship of the misconduct to the work of the profession and the personal characteristics considered necessary to practice in that profession. To repeat on this point, the Committee linked Dr. Leontowicz's future interactions with female patients who (it assumed) may be disrobed and vulnerable, with whether Dr. Leontowicz could be trusted to respect the issue of consent in his interactions with patients. In fact, it found he was "unworthy of the trust which is placed in physicians by their female patients and the public generally" (*Committee Decision* at para 161).

[93] The judge found the first part of that statement to be no more than speculation, stating that there was "no evidence before the Committee which shows Dr. Leontowicz had ever ignored or disregarded a patient's wishes in violation of the physician–patient relationship" (*QB Decision* at para 195). I interpret the judge to have reasoned that, because there was nothing before the Committee to show that Dr. Leontowicz had previously disregarded a patient's wishes or violated the physician–patient relationship, the Committee's conclusion had no foundation in the evidence.

[94] The second error the judge found related to whether the private conduct would have an adverse effect on Dr. Leontowicz's ability to carry out his professional obligations or have an adverse effect on the medical profession at large. The judge reasoned that because the allegations against Dr. Leontowicz had not been publicized there was no basis in the evidence to suggest the charge against him would result in a "loss of public confidence in [his] abilities as a medical professional or cast the profession as a whole in a negative light" (at para 193).

[95] Having found error, the judge undertook his own analysis of the nexus question by applying what he called a "full panoply of contextual factors" (at para 198, referencing *Groia* at para 83 and *Strom* at para 113), all of which led him to conclude that the Committee had erred in finding Dr. Leontowicz guilty of professional misconduct.

iii. Analysis on nexus

[96] Even though its analysis was brief, the College argues that the Committee operated from an understanding that (a) it could not sanction Dr. Leontowicz just because it found his actions reprehensible, and (b) there had to be a link or nexus between his conduct and his ability to practice medicine and to the profession at large. While the Committee did not use the word *nexus* (because *Strom* had not yet been released at the time of its decision), its reasons demonstrate that it was alert to the idea that the test is nuanced and contextual, as shown by the following passage of the *Committee Decision*:

> 151. Counsel for the parties agree that "off-duty" conduct may constitute conduct unbecoming, improper, unprofessional or discreditable. Further, that the factors to be considered in determining whether this is the case are summarized in *The Law of Professional Regulation*, Bryan Salte, LexisNexis Canada Inc. 2015, at page 126, as follows:
>
> > 1. Whether the conduct damages the member's reputation with the public;
> >
> > 2. Whether the conduct damages the profession's reputation with the public;
> >
> > 3. Whether the conduct has a negative effect on the member's ability to practice his or her profession;
> >
> > 4. Whether the conduct is more unacceptable for a person in the member's profession than for members of the public.

[97] Dr. Leontowicz does not take issue with how the Committee framed its analysis.

[98] Before delving into the main thread of the College's argument, I wish to address its submission that the judge erred by improperly relying on *Strom* and *Hughes v Law Society of New Brunswick*, 2020 NBCA 68, 94 Admin LR (6th) 210 [*Hughes*], which it says were distinguishable on their facts.

[99] In my view, the judge used *Strom* as no more than a roadmap from which he drew general legal principles respecting the discipline of a member by their professional body for off-duty conduct. While the facts in *Strom* engaged questions about off-duty freedom of speech and the need for enhanced emphasis on personal autonomy, I do not interpret the judge's reasoning to be oblivious to this distinction or to have blindly followed the result in *Strom* in rendering his decision. Neither do I see *Hughes* to be problematic. True, the facts in that case are distinguishable in several ways from the matter at hand, but the judge did not rely on *Hughes* to draw parallels to the factual circumstance before him. He did no more than cite *Hughes* to make the point that a disciplinary body must consider broader factors before determining whether a misconduct charge is made out. The Supreme Court made the same point in *Groia*. The judge relied on *Hughes* to that limited extent.

[100] Next, the College says the Committee undertook the required analysis and drew appropriate inferences about the reputational interests at stake based on its knowledge of the profession, which allowed it to draw an inference that Dr. Leontowicz's conduct had a negative impact on the medical profession at large and his ability to practice. The College says the judge erred in concluding that the College had to adduce direct evidence to establish impairment and that, in any event, it would be next to impossible to adduce that sort of generalized evidence. There is support for the College's position in the jurisprudence.

[101] The decision in *Fountain v British Columbia College of Teachers*, 2007 BCSC 830, [2007] 11 WWR 281 [*Fountain 2007*], and the subsequent appeal from a reconsideration decision, *Fountain v British Columbia College of Teachers*, 2013 BCSC 773 [*Fountain 2013*], offers helpful guidance. Mr. Fountain, a teacher, had a contentious relationship with his adult sons. What started as a verbal domestic dispute escalated into a physical altercation, with Mr. Fountain's two sons physically assaulting him. That, in turn, caused Mr. Fountain to fire his gun in the direction of his fleeing sons, though upward at a 45-degree angle. Mr. Fountain was charged and convicted of careless use of a firearm. Even though that conviction was later overturned, his professional regulatory body found him guilty of conduct unbecoming.

[102] Much like the argument advanced by Dr. Leontowicz, Mr. Fountain's actions took place outside of his professional workplace setting. This led him to argue that, to constitute conduct unbecoming, the regulator had to adduce direct evidence to establish that his conduct had an adverse effect on the school system (to which he, as a teacher, owed a duty of responsibility) or upon his ability to carry out his professional obligations. Similar to the College's position in the matter at hand, the regulatory body argued that direct evidence was not required and that harm to the profession in the form of the community's loss of confidence in the school system could be inferred from Mr. Fountain's egregious conduct.

[103] The BC Supreme Court in *Fountain 2007* agreed with the regulator's position. Its analysis began with *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455 [*Fraser*], where the Supreme Court spoke of two aspects of impairment. The first, direct impairment – which refers to the impairment of the regulatee's ability to perform their specific job – requires direct evidence. However, as *Fraser* emphasized, this rule is not absolute: "When, as here, the nature of the public servant's occupation is both important and sensitive and when, as here, the substance, form and context of the public servant's criticism is extreme, then an inference of impairment can be drawn" (at 472). Based in part on *Fraser*, the BC Supreme Court concluded that "direct evidence of impairment" was not necessarily required and that "impairment can be inferred" (*Fountain 2007* at para 65(c)).

[104] The decision in *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825 [*Ross*], which followed *Fraser*, was also touched upon in *Fountain 2007*. In *Ross*, a teacher had disseminated racist and anti-Semitic views outside of the classroom. Mr. Ross argued that, since there was no proof of harm, he could not be sanctioned. Speaking for the Supreme Court, La Forest J. agreed with the arbitrator:

> [49] … As to whether there is impairment on a broader scale, I conclude on the authority of *Fraser, supra,* that a reasonable inference is sufficient in this case to support a finding that the continued employment of the respondent impaired the educational environment generally in creating a "poisoned" environment characterized by a lack of equality and tolerance. The respondent's off-duty conduct impaired his ability to be impartial and impacted upon the educational environment in which he taught.

See also *Kempling v British Columbia College of Teachers*, 2005 BCCA 327, 255 DLR (4th) 169, leave to appeal to SCC refused, 2006 CanLII 1117.

[105] Drawing from these authorities, the BC Supreme Court in *Fountain 2007* summarized when an inference of impairment can be made:

> [59] In summary, the case law establishes that in appropriate circumstances it is permissible to draw an inference of direct impairment or of impairment in the wider sense in the absence of direct evidence. Relevant factors to be considered include:
>
> (a) the nature of the conduct at issue [derived from *Ross* and *Fraser*];
>
> (b) the nature of the position [*Ross* and *Fraser*];
>
> (c) whether there is evidence of a pattern of conduct [*Kempling v British Columbia College of Teachers*, 2004 BCSC 133, leave to appeal to SCC refused, 2006 CanLII 1117 [*Kempling 1*], and *Kempling v British Columbia College of Teachers*, 2005 BCCA 327 [*Kempling 2*]];
>
> (d) evidence of controversy surrounding the conduct [*Ross* and *Kempling 1*];
>
> (e) evidence that the private conduct has been made public [*Ross* and *Kempling 1*]; and
>
> (f) evidence that the private conduct has been linked by the member to the professional status of the member [*Kempling* 1 and 2].

This list is not exhaustive.

[106] The final two factors mentioned above, i.e., evidence of controversy surrounding the conduct and evidence that a private matter has been made public, deserve mention. On the latter point, the BC Supreme Court in *Fountain 2013* found that no "direct evidence was given that this private matter was made public, but in any event the panel drew the inference that harm to the school system had occurred" and held that this was not a reasonable inference to draw (at para 44). The BC Supreme Court found that Mr. Fountain's incident was "not like certain criminal acts, such as indecency, that can establish evidence of harm from the conduct, by its very nature, which will present a 'significant risk of harm'" (at para 45, referencing *R v Butler*, [1992] 1 SCR 452, and *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728). What I take from that comment in *Fountain 2013* is that some conduct is inherently evidence of harm.

[107] In this case, the Committee found as a fact that Dr. Leontowicz had committed the alleged misconduct: i.e., administering blows that exceeded what the complainant had consented to and removing his condom against her expressed wishes. That finding was not disturbed by the judge, who went so far as to say that his decision should "not be taken as excusing [Dr. Leontowicz's] conduct in any way. Truly, it deserves disapprobation" (*QB Decision* at para 225) and that these events "bring [Dr. Leontowicz] no credit and, indeed, represent a stain on his personal integrity

and reputation" (at para 194). Despite these rather telling statements about the grievousness of what Dr. Leontowicz was found to have done, the judge did not find it was enough for professional sanction.

[108] Respectfully, I find the judge placed too much stock in the brevity of the Committee's reasons and the lack of direct evidence of a connection to the professional setting and too little on the nature of the conduct and how it relates to the profession itself. Indeed, this point was recognized in *Jha v College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (Div Ct), where the Ontario Superior Court of Justice observed that the behaviour of a professional in their private life may be such as to be self-evidently inconsistent with the core values of the profession and the need to maintain the confidence of the public in the profession.

[109] The Committee identified that a "core value of the medical profession is to do no harm" and that the "foundation of the physician–patient relationship" is consent (*Committee Decision* at para 161). Given that physicians hold positions of elevated status in society because "they are trusted always to heal not harm" (at para 162), the College drew an inference that Dr. Leontowicz was thus "unworthy of the trust which is placed in physicians by their female patients and the public generally" (at para 161). While this conduct did not occur in a professional setting, I do not find it to be an unreasonable inference that a person who violated the physical safety and integrity of an intimate partner with which he was entrusted might also not respect personal boundaries in a professional setting.

[110] Further, the Committee observed that private behaviour that is so fundamentally at odds with these integral aspects of the practice of medicine does damage to the integrity of the profession as a whole. Critically, it identified the point that physicians are "trusted always to heal [and] not harm", and thus, this conduct was such as to "erode the confidence the public now has that they can feel safe with their physician" (at para 162). With the greatest respect, I am of the opinion that the judge's analysis placed too much emphasis on whether the incident occurred in Dr. Leontowicz's capacity as a professional at the expense of the more robust analysis of the circumstances as a whole.

[111] In addition to the concerns raised about the nature of the profession, the judge said there was "no basis in the evidence which would suggest the College's charge against him would result in a loss of public confidence in Dr. Leontowicz's abilities as a medical professional or cast the profession as a whole in a negative light" (*QB Decision* at para 193). While the public nature of the misconduct is one of the factors identified in the jurisprudence as being helpful to consider in the overall analysis, I find that he erred in his application of the standard of review because the Committee was entitled to infer harm from the conduct itself.

[112] In my view, the *Committee Decision*, brief though it is, was responsive to the considerations related to the nature of this particular profession and the circumstances of this case by effectively addressing questions such as these:

(a) Is it within the public interest to allow doctors who have been found to have committed these kinds of acts to continue to have close contact with patients in close and vulnerable settings?

(b) Does the conduct negatively reflect on the characteristics required to be a competent and ethical member of the profession?

(c) Can a competent and ethical member of the profession ignore the bodily autonomy, integrity and consent of others in his personal life but be trusted to protect them in his professional realm?

(d) Does the conduct harm the standing or reputation of the medical profession? and, the related question, would this conduct impair a patient's trust in the profession?

iv. Conclusion on nexus between professional and off-duty conduct

[113] For the reasons articulated above, I am satisfied the judge did not appreciate that direct evidence was not required at law to support a finding of loss of public confidence in Dr. Leontowicz's abilities as a practitioner or to cast the profession in a negative light because of his behavior. Respectfully, it was open to the Committee to have drawn an inference of such harm from the totality of the evidence. Accordingly, there was no basis for the judge to have interfered with the Committee's decision on the nexus issue.

d. Conclusion on the application of the standards of review

[114] In summary, while the judge did not err in his identification of the standard by which he was to review the *Committee Decision*, as I have discussed, he erred in its application. Those errors led him to substitute his own conclusion on the nexus issue for that of the Committee.

B. Appeal from the *Penalty Decision* and the *Costs Decision*

[115] As mentioned, because the judge quashed the Committee's finding on professional misconduct, he found it unnecessary to decide Dr. Leontowicz's appeal against the Council's decision on penalty and costs. By way of *obiter* reasons, however, he explained why he would have allowed Dr. Leontowicz's appeal, set aside those orders and remitted the matters to the Council for reconsideration.

[116] While the College was granted leave to appeal in relation to the judge's handling of penalty and costs, on reflection, it is likely that leave should not have been granted because an appeal is to be taken from the result, not the reasons; however, no determination of those matters was made by the judge in this case.

[117] That said, all of the issues raised by the College in the court below remain alive in this appeal. The reason for this is that Dr. Leontowicz's alternative position, advanced in his cross-appeal, is that if this Court determines that the Committee's misconduct finding should be restored, he urges us to conclude that the Council erred in its decision on penalty and costs.

1. The *Penalty Decision*

a. General background on penalty

[118] Where a discipline committee finds a member guilty of unbecoming, improper, unprofessional or discreditable conduct, the Council is entrusted with the responsibility of determining a fit penalty: see s. 54 of the *MPA*. Penalties can range from the revocation of a licence, at the high end, to fines and reprimands, at the lower rung. In Dr. Leontowicz's case, the Council imposed an indefinite suspension and issued a reprimand.

[119] The College urged the Council to revoke Dr. Leontowicz's licence, whereas Dr. Leontowicz argued for the imposition of a definite term suspension equal to time served, which, by that point, was nearly 12 months.

[120] The Council issued a 23-paragraph decision on September 25, 2020. After outlining the parties' respective positions, it narrowed what it saw as the range of appropriate penalties for Dr. Leontowicz as being licence revocation, licence suspension without terms or suspension with terms for reinstatement. By way of bottom-line result, the Council chose to suspend Dr. Leontowicz without terms for reinstatement by reasoning that, similar to a revocation situation, a practitioner who is indefinitely suspended faces the total removal from practice "but is able to make application to the Council to end the suspension" (*Penalty Decision* at para 22). It saw that sort of penalty as being "somewhat more nuanced" because, as it wrote, there existed an implicit "route for return to practice … given a demonstration of rehabilitation and proof of minimal risk to reoffend" (at para 22).

[121] The judge began his comments on the penalty by stating that "reasonableness is the appropriate standard of review on appeals of administrative penalties post-*Vavilov*" (*QB Decision* at para 79). He stated his understanding that an "administrative penalty should not be disturbed on appeal unless it is shown to be demonstrably unfit or an error in principle" (at para 209).

[122] Following a relatively brief analysis, the judge expressed the view that the penalty imposed by the Council departed from the principle of proportionality and was demonstrably unfit. He found none of the authorities the College had relied on involved physicians in similar circumstances to Dr. Leontowicz personally or to his situation. Thus, by imposing an indefinite suspension, he said, "Council applied precedents involving sexual relationships between physicians and patients", which this was not, and that, even if those precedents had been used for guidance purposes only, "the penalty imposed on Dr. Leontowicz … is disproportionate as it is an indefinite and not a definite suspension" (*QB Decision* at para 216).

[123] Before addressing the College's argument, I wish to address a jurisdictional issue.

[124] In relation to the jurisdictional issue, by the time the penalty was imposed, Dr. Leontowicz had graduated from the College of Medicine but was not in a residency program or actively practicing medicine. Given this rather nebulous situation, one wonders if he possessed a licence at that time that was capable of being revoked or suspended. The Council alluded to but did not directly address this so-called jurisdictional question but ultimately determined it had the authority to impose sentence on Dr. Leontowicz. As none of this was explained on appeal, nor raised by Dr. Leontowicz in his cross-appeal, I will proceed on the basis that there were no jurisdictional impediments to the Council proceeding as it did.

b. The standard of review for appeals from penalty decisions

[125] Dr. Leontowicz's request to have a judge review the *Penalty Decision* was by way of an appeal pursuant to s. 62 of the *MPA*. Following *Vavilov*, appellate courts across Canada appear to be divided on the standard of review applicable to an appeal from a penalty decision made by a professional disciplinary body. Some courts have adopted the reasonableness standard. The Court of Appeal of Alberta is one such court, as seen in *Alsaadi*. Its reasoning on the matter is reflected in the following passage from the judgment: "Sanctions in professional disciplinary matters involve mixed questions of fact and law and engage the professional judgment of the governing bodies, and they are therefore reviewed for reasonableness" (at para 16). The Court of Appeal went on to inject a measure of deference into that calculus in observing that sanctions in professional misconduct cases "should not be disturbed on appeal unless the sanction is demonstrably unfit or based on an error in principle" (at para 16).

[126] Ontario courts have not only endorsed the reasonableness standard but have aligned it more with how that concept is understood in a criminal law setting. In *Mitelman v College of Veterinarians of Ontario*, 2020 ONSC 3039 (Div Ct), for instance, the Superior Court of Justice concluded that the reasonableness threshold should apply, describing it in similar terms to those used in criminal matters: "The courts in the criminal context have used a variety of expressions to describe a sentence that reaches this threshold, including 'demonstrably unfit', 'clearly unreasonable', 'clearly or manifestly excessive', 'clearly excessive or inadequate' or representing a 'substantial and marked departure' from penalties in similar cases" (at para 18).

[127] The Court of Appeal of Manitoba charted a different course in *Dhalla v College of Physicians and Surgeons of Manitoba*, 2022 MBCA 7, [2022] 6 WWR 388 [*Dhalla*], when it reaffirmed its earlier stance that penalty decisions are to be treated as being discretionary in nature and thus reviewable in accordance with the applicable standard for such matters. Although the Manitoba court recognized that the standard of review may be in flux in light of *Vavilov*, it was not prepared to depart from its previous jurisprudence, notably *Perth Services Ltd. v Quinton*, 2009 MBCA 81, [2010] 1 WWR 246. *Dhalla* concluded by offering this observation: "absent direction from the Supreme Court or a duly constituted panel of five members of this Court reconsidering the decision in *Perth Services*, the deferential standard applicable to discretionary decisions made in the civil context should continue to be applied by this Court" (at para 69).

[128] Dr. Leontowicz invites this Court to resolve this uncertainty in the law. He says that extending *Strom* to the penalty part of decisions made by professional regulatory bodies is logically consistent with *Vavilov*. Since the matter before the judge was a statutory appeal, the judge should have applied the *Housen* standards in his review of the penalty and costs decisions. This means, Dr. Leontowicz says, that in Saskatchewan reasonableness should no longer be considered the appropriate standard and the Manitoba approach should be adopted.

[129] Dr. Leontowicz did not refer to this Court's decision in *MacKay v Saskatchewan*, 2021 SKCA 99 [*MacKay*], which was decided after *Vavilov* and before the within matter. *MacKay* identified the pre-*Vavilov* standard of review "respecting misconduct and penalty [as] reasonableness, except for questions of law and procedural fairness" (at para 20, referencing *Kapoor* at para 18 and *Groia* at para 43). However, in light of *Vavilov*, *MacKay* adjusted the standard of review by reasoning in the following way:

> [21] *Vavilov* substantially recalibrated the standards of review that apply to decisions of statutory bodies: "where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision" (at para 37). See also *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81, leave to appeal to SCC granted, 2021 CanLII 13273 [*Abrametz 2020*].
>
> [22] The applicable standard of review will vary depending on the issue and on the nature of the question posed on appeal. This means that the appellate standards of review for statutory appeals, including appeals under s. 56(1) of [*The Legal Profession Act, 1990*, SS 1990-91, c L-10.1], are those set out in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*].

[130] I see no reason to depart from the result in *MacKay*. While decisions of that sort involve the application of the legal criteria that govern the exercise of direction to the facts, the standard of review that applies on an appeal from it depends on whether the alleged error engages an issue of law, fact, or mixed fact and law: see *Stromberg v Olafson*, 2023 SKCA 67 at paras 117–122. Putting it in more concrete terms, this Court may intervene in the face of an error by the Council in the identification or application of the legal criteria that governs the exercise of its discretion. Intervention is also permissible where there has been a material error of fact or mixed fact and law. Pulling it altogether, this means the standard of appellate review applicable with regard to allegations of legal error is correctness; and, for allegations of errors of fact and mixed fact and law, it is palpable and overriding error.

[131] However, as I have already intimated, and will further discuss, I see no error with the judge's assessment of the Council's decisions on the matter of sanction and costs, albeit in *obiter* reasons. Both the *Penalty Decision* and the *Costs Decision* were the product of legal errors that justify appellate intervention.

c. Application to the facts

[132] Because the judge did not identify the correct standard of review for the *Penalty Decision*, it falls to this Court to review it afresh. In this case, I am satisfied that the Council committed errors of principle in its approach to the penalty imposed on Dr. Leontowicz.

[133] On appeal, the College says that, regardless of the standard of review, this Court must approach the Council's decision from a deferential stance. The College asserts that, absent an error in principle, which it says there were none, if the penalty falls within the range of sentences imposed for similar offences committed by similarly situated physicians in similar circumstances, there is no room for appellate intervention.

[134] I will deal first with the College's argument about range. The College acknowledges that penalty decisions for sexual misconduct perpetrated by physicians have generated a wide range of penalties from licence revocation to definite term suspensions of 3 to 15 months. All things considered, it says the penalty imposed on Dr. Leontowicz fell within that range, albeit at the higher end, but was justified because it was determined by physicians who were attuned to the issues at hand. As such, says the College, their judgment should not be disturbed on appeal.

[135] The Council appears to have relied heavily on the decision in *Ontario (College of Physicians and Surgeons) v Minnes*, 2015 ONCPSD 3, aff'd 2016 ONSC 1186 (Div Ct) [*Minnes*]. The College says *Minnes* is the most comparable to Dr. Leontowicz's situation because it involved sexual misconduct with a non-patient where no criminal charges were laid. In *Minnes*, a disciplinary committee made two separate findings of professional misconduct against Dr. Minnes, where both involved conduct that was found to be disgraceful, dishonorable or unprofessional. The first pertained to a number of boundary violations with female nursing staff at the hospital where he worked as a pediatrician and the second related to a finding that he was engaged in a coercive sexual relationship with a 17-year-old counsellor at a camp where he acted as a physician. The disciplinary committee found that, while the camp counsellor in question was not a patient of Dr. Minnes, the doctor nonetheless abused his position of trust and authority and the power imbalance attendant with it to have sexual contact with her. In determining the appropriate penalty, the disciplinary committee acknowledged that the revocation of a physician's license is a severe penalty. It also emphasized that protection of the public is a paramount consideration in imposing a penalty for professional misconduct. The disciplinary committee went on to note that it must impose a penalty "necessary to adequately address the issues of maintenance of public confidence in the integrity and reputation of the medical profession, and in effective self-governance in the public interest" (at 14).

[136] All things considered, the disciplinary committee determined that Dr. Minnes's licence should be revoked, with the caveat that this was not a professional death sentence as he would be eligible to reapply for reinstatement after one year. It concluded that the revocation of Dr. Minnes's licence was appropriate on the camp incident alone; although, as is clear from its decision, the appropriateness of the penalty imposed was strengthened by their findings on the hospital incidents as well.

[137] Respectfully, I am not persuaded by the College's argument on range. I say this because, as I discuss below, as a matter of general principle, range alone does not dictate the appropriate penalty.

[138] In my review of the *Penalty Decision*, I begin with the obvious. From a professional discipline perspective, Dr. Leontowicz's situation was unusual. He did not engage in sexual misconduct with a patient, an employee or anyone from a clinical setting. Nor was he in a position of trust vis-à-vis the complainant, as was seen in the case of Dr. Minnes. This was conduct that took place in the privacy of his apartment on one single occasion while he was still a student. Further, unlike many of the cases the College urged the Council and this Court to consider, Dr. Leontowicz was never charged with a criminal offence, much less convicted of one. That left the Council with no case law directly on point for appropriate guidance.

[139] The Council appeared to have notionally understood the idea that each case must be decided on its own particular facts when it said as much at the start of its decision: see paragraph 8 of the *Penalty Decision*. Also, noting the decision in *Camgoz v College of Physicians and Surgeons of Saskatchewan* (1993), 114 Sask R 161 (QB) [*Camgoz*], the Council appeared to grasp the concept that it should use the factors set out in that decision for guidance purposes.

[140] *Camgoz* outlines a list of non-exhaustive factors for use by professional discipline bodies in fashioning an appropriate sentence. I will return to this point later in my reasons; however, it is sufficient for present purposes to note that, apart from identifying the importance of specific and general deterrence (being one of the *Camgoz* factors), the Council did not comment on any other consideration – some of which might have assisted Dr. Leontowicz. Examples of factors that might have benefited Dr. Leontowicz included his lack of any previous record, his relative youth, the extreme effect the sanction had on his ability to secure a residency position and the fact that this was an isolated incident with no pattern of repetitive conduct. The Council appears to have given no effect to these considerations.

[141] As Dr. Leontowicz points out to this Court on appeal, the Council's failure to consider *any* other factors beyond deterrence resulted in a one-dimensional analysis of what an appropriate sentence should be for him. In the words of *Kot* and *Rimmer*, this amounted to a failure to consider all of the factors relevant to the exercise of discretion in this case. Had the Council considered all relevant factors, it would have presented a more thorough, balanced and thoughtful analysis. To be clear, while the Council was not required to go through the *Camgoz* list in a rote fashion, it had to at least engage in a meaningful consideration of the factors that were relevant to Dr. Leontowicz, and the situation at hand, in fashioning an appropriate penalty for him. That included those that might have tempered the result.

[142] Instead, as I see it, the Council's focus was firmly, if not exclusively, directed to the gravity of what had happened and its adoption of the idea that this was criminal or criminal-type behaviour. That approach is reflected in several places in the *Penalty Decision*. To start, the Council repeated the Committee's finding that Dr. Leontowicz had committed criminal sexual assault (see the *Penalty Decision* at paragraphs 4 and 7) and its conclusion that "no evidence of general good character could possibly validate or mitigate a violent sexual assault" (at para 14). Most tellingly, in considering the possibility of rehabilitation, the Council was critical of Dr. Leontowicz for failing to demonstrate treatment options that were "specific to the rehabilitation of a *rapist*" (emphasis added, at para 17). This is strong language that evinces a punitive mindset.

[143] Finally, the Council's decision can be seen as a backdoor effort to penalize Dr. Leontowicz for his perceived criminality, after the police refused to prosecute him. As it enunciated, "The Council believes that justice must be served and must be seen to be served" (at para 21). Respectfully, it was not its prerogative to serve as a surrogate for the criminal justice system in sentencing Dr. Leontowicz for professional misconduct.

[144] There is one final point to be made. At the heart of the *Penalty Decision* is the Council's concern with Dr. Leontowicz's failure to accept responsibility for his actions and to have "rehabilitated himself to a degree that he can demonstrate he poses no risk to the public of reoffence" (at para 21). The Council put it more bluntly when it said this: "he has not accepted responsibility for the violent sexual assault he perpetrated upon [J.T.]" (at para 21). Although the Council did not impose any conditions for reinstatement, it implied that, at a minimum, an acknowledgment of guilt was required.

[145] I have no issue with the Council considering the lack of remorse at the time of sentencing or referring to Dr. Leontowicz's failure to take any steps to rehabilitate himself. However, the way in which the Council approached these matters was flawed in several respects.

[146] First and foremost, at the time of the penalty hearing, Dr. Leontowicz was not facing criminal charges. Had he done as the Council suggested, it would have led him to make an admission against his interest that could potentially have been used against him if criminal charges were preferred: see *R v Lo*, 2020 ONCA 622 at para 70, 393 CCC (3d) 543. While one cannot predict whether a statement of this sort would be admissible in a subsequent criminal trial, it was

clearly possible that this condition of reinstatement had the potential to place Dr. Leontowicz in criminal jeopardy and force him to forgo his *Charter* protections. Although I cannot be certain how much weight the Council placed on Dr. Leontowicz's failure to accept responsibility, its reasons lead me to conclude that it was instrumental in producing a more stringent sentence.

[147] Second, while an expression of remorse can and often does serve as a mitigating factor in *criminal* sentencing, the failure to express remorse is not an aggravating factor under that regime. At best, it is the absence of a mitigating factor.

[148] Third, contrary to what the Council said, there was evidence of attempts at rehabilitation. Dr. Leontowicz had filed a report from his treating physician which reported no concerning psychiatric findings, and that he had already undergone professional boundaries counselling.

d. Conclusion on penalty and remedy

[149] In summary, a careful examination of the Council's reasons in the *Penalty Decision*, in light of the applicable jurisprudence and sentencing principles, leads me to conclude that its decision contains legal errors and should be set aside.

[150] This leaves the appropriate remedy. The judge said he would have remitted the question of sanction to the Council for reconsideration. Although that option is open to this Court, I have also considered whether to invoke s. 12(1)(d) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, which authorizes this Court to "make any decision that could have been made by the court or tribunal appealed from". I say that because the events that gave rise to the sexual misconduct charge took place in January of 2018, with the hearing and sentencing occurring in 2020. Dr. Leontowicz's appeal to the Court of Queen's Bench was heard in 2021, and a decision was rendered by that court in April of 2022. By the time this appeal concludes, the matter will have been embroiled in litigation for over five years. During this span of time, we are advised that Dr. Leontowicz has been unable to secure a residency position and further his education. For all practical purposes, his career is in limbo, if not perilously close to ending before it gets started. It is possible that he may need to retrain.

[151] That said, the Legislature has assigned the important responsibility of professional self-regulation – including the assessment of an appropriate penalty for a finding of professional misconduct – to the Council. In the circumstances of this case, the Council is in the best position to fashion an appropriate penalty: bearing in mind, of course, the principles of sentencing that have been identified above. For that reason, I conclude that an order should be made setting aside the Council's decision on penalty and remitting the matter to it for reconsideration.

2. The *Costs Decision*

[152] As mentioned, the judge was also of the view that the Council had erred in ordering Dr. Leontowicz to pay full indemnity costs of $96,577.10. Although he did not decide that issue, his reasoning was solid. The judge looked to this Court's decision in *Abrametz v The Law Society of Saskatchewan*, 2018 SKCA 37 [*Abrametz 2018*], for guidance on the factors a discipline tribunal should take into account when assessing the imposition of a costs award against a member. He also identified the following foundational principles set out in *Alsaadi* and *K.C. v College of Physical Therapists of Alberta*, 1999 ABCA 253, [1999] 12 WWR 339 [*K.C.*]: "(1) costs on a full indemnity basis should not be a default position, and (2) costs are not a penalty, and the magnitude of a costs award should not deliver a 'crushing financial blow' on the person, particularly when the sanction imposed prohibits him or her from practicing their profession" (*QB Decision* at para 218). With that legal framework in mind, the judge concluded that the Council had erred in two respects.

[153] The first error was said to rest in the Council's endorsement of the proposition that "the costs associated with the appropriate discipline process for professional misconduct should be borne by the guilty party" (at para 219 and *Costs Decision* at 2). The judge disagreed with that approach (*QB Decision*):

> [219] … Plainly, Council accepted this as the default position, yet failed to weigh important factors such as the significant student debt load Dr. Leontowicz carries; his inability to qualify as a physician and to practice medicine, and current difficulties in obtaining employment which would enable him to earn income sufficient to satisfy the cost order. Moreover, Council failed to weigh appropriately whether the costs order it imposed delivered a "crushing financial blow" to Dr. Leontowicz in these circumstances.

[154] The judge also observed that the Council fell into error by characterizing Dr. Leontowicz's decision to engage private legal counsel to defend himself as an aggravating factor. As the judge noted, this was an error "effectively penalizing [Dr. Leontowicz] for retaining legal counsel" (at para 220). It was a consideration that significantly influenced the Council's decision.

[155] When a finding of misconduct is made, s. 54(1) of the *MPA* empowers the Council to make an order of costs:

> **Penalties**
>
> **54**(1) Upon receipt of a report pursuant to section 52, in the case of a person found by the discipline hearing committee to be guilty of unbecoming, improper, unprofessional or discreditable conduct, the council may:
>
> …
>
> (i) direct the person to pay the costs of and incidental to the investigation and hearing, including the costs of solicitors, members of the preliminary inquiry committee, members of the discipline hearing committee, members of the council, assessors, court reporters and witnesses, and all other costs related to the investigation and hearing, or any part of those costs.

The word *may* signals that a costs award is permissive not mandatory.

[156] There is no shortage of cases that have addressed the principles associated with the granting of a costs award by a professional regulatory body. I wish to highlight two of them: *Abrametz 2018* and *Alsaadi*.

[157] In *Abrametz 2018*, the regulator imposed a costs award, equivalent to the full amount of the expenses incurred by the tribunal in prosecuting Mr. Abrametz, including the notional cost of legal fees for in-house counsel. In setting aside that award, this Court reaffirmed a set of principles applicable to the decision-making process for costs in a professional, regulatory setting. First, absent a legislative provision to the contrary, costs are not obligatory; they are at the discretion of the regulatory body. Second, the purpose of a costs award is not to indemnify the opposing party (as is typical in civil actions) but to have "the sanctioned member to bear the costs of disciplinary proceedings as an aspect of the burden of being a member … and not to visit those expenses on the collective membership" (at para 44). However, as was made clear in that decision, "the burden of membership principle that underpins a costs order does not necessarily mean full indemnification" (at para 45). A costs award should not be punitive, nor should it be "so prohibitive as to prevent a member from defending his or her right to practice in the chosen profession, or from being able to dispute misconduct charges" (at para 45).

[158] Finally, *Abrametz 2018* set out a list of factors that should be weighed in determining if and how much a costs award should be:

[46] Apart from these broad principles, courts have taken a variety of factors into account in undertaking a reasonableness review of a costs award. The factors that emerge from case authority, as identified by Bryan Salte in *The Law of Professional Regulation*, (Markham: LexisNexis, 2015) at 262 [*Professional Regulation*], are the following:

> 1. Whether the costs are so large that the costs are punitive;
>
> 2. Whether the costs are so large that they are likely to deter a member from raising a legitimate defence;
>
> 3. The member's financial status;
>
> 4. A member has an obligation to provide financial information to support a contention that a cost award will impose an undue hardship;
>
> 5. The regulatory body should provide full supporting material for the amount of costs claimed;
>
> 6. The regulatory body should provide the individual with an opportunity to respond to the information and respond to the total quantum of costs which may be ordered before costs are imposed;
>
> 7. The regulatory body should provide reasons for reaching the decision that it made;
>
> 8. If the decision is made in British Columbia, it appears that the cost award will have to be based upon the tariff of costs that is awarded in court actions.

[47] A more concise statement of factors can be found in the Nova Scotia Court of Appeal decision of *Hills v Nova Scotia (Provincial Dental Board)*, 2009 NSCA 13, 307 DLR (4th) 341 [*Hills*]. There, the Court reduced the salient considerations to the following:

> [61] … the Committee referred to the *Regulation* prescribing the sanctions which it could impose, summarized the expenses … and identified and addressed the following factors:
>
> > a. The balance between the effect of a cost award on the Appellant and the need for the Provincial Dental Board to be able to effectively administer the disciplinary process;
> >
> > b. The respective degrees of success of the parties;
> >
> > c. Costs awards ought not to be punitive;
> >
> > d. The other sanctions imposed and the expenses associated therewith;
> >
> > e. The relative time and expense of the investigation and hearing associated with each of the charges and *in particular those on which guilt were entered and those where the Appellant was found not guilty.*
>
> (Emphasis in original)

[159] Many of the *Abrametz 2018* themes are reflected in the reasons of Khullar J.A. (as she then was) in *Alsaadi*. In relation to the so-called default position, Khullar J.A. spoke to the necessity of taking a more thoughtful approach to the question of expenses or disbursements:

> [120] A more deliberate approach to calculating the expenses that will be payable is necessary. Factors such as those described in *KC* [1999 ABCA 253] should be kept in mind. A hearing tribunal should first consider whether a costs award is warranted at all. If so, then the next step is to consider how to calculate the amount. What expenses should be included? Should it be the full or partial amount of the included expenses? Is the final amount a reasonable number? In other words, a hearing tribunal should be considering all the factors set out in *KC*, in exercising its discretion whether to award costs, and on what basis. And of course, it should provide a justification for its decision.

[160] *Alsaadi* reiterated the point that "[w]hen the magnitude of a costs award delivers a crushing financial blow, it deserves careful scrutiny" (footnotes omitted, *K.C.* at para 94) and that the financial impact on the member is "one factor to consider in determining whether a hearing tribunal has exercised its discretion reasonably" (*Alsaadi* at para 121): see also *Cameron v The Saskatchewan Institute of Agrologists*, 2018 SKCA 91 at para 71; *Chartered Professional Accountants of Ontario v Gujral*, 2020 ONCJ 307 at para 135, 77 Admin LR (6th) 1; and James T. Casey, *The Regulation of Professions in Canada*, loose-leaf (Rel 5, 7/2023) vol 1 (Toronto: Thomson Reuters, 2023) at §14.4.

[161] On appeal, the College asserts that the Council did not treat Dr. Leontowicz's decision to defend himself as an aggravating factor nor did it fail to consider whether a costs award would deliver a crushing financial blow to him. It says the fact that the Council gave Dr. Leontowicz time to satisfy the order demonstrates how this point was not lost on the Council.

[162] I am not persuaded by the College's arguments. The *Costs Decision* is short; nonetheless, it is plainly evident to me that the Council failed to apply the principles underlying the imposition of costs in exercising its discretion.

[163] With respect to the College's first argument, as I read the Council's decision, it directly linked Dr. Leontowicz's decision to retain private legal counsel to its observation that he had done so because he had engaged in "*reprehensible conduct* whilst a medical student and when faced with the appropriate discipline process for that matter" (emphasis added, *Costs Decision* at 2). The point to be made here is that the Council's comment has to be understood as chastising Dr. Leontowicz for taking appropriate measures to defend himself against the charge. Respectfully, this line of thinking shows the Council to be remarkably tone deaf to the severity of the charge Dr. Leontowicz faced and for the potential impact it could have on him personally and professionally. To suggest that he should not have retained legal counsel – which appears to be the

implicit suggestion in the Council's comment – is, to say the least, unusual and demonstrates a lack of understanding of the quasi-judicial nature of the professional disciplinary process the Council is charged to oversee.

[164] Neither do I see merit in the College's argument that the Council had, in fact, considered the financial blow Dr. Leontowicz would face with a large costs award. Dr. Leontowicz provided evidence about his considerable student loan debt and inability to begin his residency program because of the pending charges. While the Council referenced this evidence in describing Dr. Leontowicz's argument, its remarks under the "Reasons for Decision" part of its decision underscore how it was heavily influenced by the idea that "costs associated with the appropriate discipline process for professional misconduct should be borne by the guilty party" (at 2). In my view, the Council never assessed Dr. Leontowicz's argument as to what the appropriate *amount* of costs should be in light of the applicable legal principles; it did so only to the extent of giving him some time to pay. Respectfully, this was not a meaningful exercise of its discretionary authority.

[165] To conclude, the Council's decision on costs reflects several errors in principle and must be set aside and remitted to the Council for reconsideration.

C. The Cross-appeal

[166] Dr. Leontowicz was granted leave to cross-appeal on the misconduct issue if this Court were to conclude that the judge committed a reversible error in quashing the *Committee Decision*. He submits that the *QB Decision* should be sustained and the *Committee Decision* set aside on different grounds, namely that the judge erred in law in finding that the Committee had not erred in relying on the expert evidence of Drs. Haskell and Kamencic, which, he says, had a corresponding impact on the Committee's assessment of the credibility and reliability of the complainant. Dr. Leontowicz further submits that if this Court sustains the *QB Decision* on the misconduct issue, the judge's order on penalty and costs should be varied by quashing and setting aside the Council's decision on those matters.

1. Weight of expert testimony: A question of fact

[167] Before turning to the specifics of Dr. Leontowicz's arguments regarding the medical evidence, I find it useful to begin by restating this Court's jurisdiction to hear an appeal from the

QB Decision. In that regard, s. 66 of the *MPA* provides for a qualified right of appeal, with leave of this Court:

> **Appeal to Court of Appeal**
>
> **66** With leave of the Court of Appeal, the council or a person who makes an appeal pursuant to section 62 may appeal a decision of the court on a point of law to the Court of Appeal.

[168] Given the scope of an appeal brought under s. 66, the first question to be determined is whether Dr. Leontowicz's cross-appeal raises a question of law.

[169] Dr. Leontowicz says the Committee improperly used the expert witnesses' body of evidence to bolster J.T.'s credibility and assist it in resolving the ultimate issue. As it pertains to the medical evidence, Dr. Leontowicz asserts the issue at play is whether the judge's conclusion – that the Committee treated the medical evidence as a question of weight – sidestepped the argument before him about its relevance and the proper use that can be made of the expert testimony.

[170] Dr. Haskell was qualified by the Committee to provide expert opinion evidence in the area of the neurobiology of trauma and its effects on the conduct and actions of victims. At the Committee hearing, Dr. Leontowicz took *no* issue with Dr. Haskell's expertise or the admissibility of her expert opinion evidence. In fact, Dr. Leontowicz consented to its *use* but argued that it should be given little to no *weight*.

[171] On appeal to the Court of Queen's Bench, Dr. Leontowicz argued that the Committee had erred by "giving too much weight to the general concepts without having the proper contextual factors to assess how each of these concepts fits with the evidence and the specifics of the Complainant". He said the Committee also erred by using Dr. Haskell's non-expert opinion portion of her testimony to "explain away every contradiction or suspicious behavior" and the frailties in J.T.'s version of events. At root, his submission before the judge was that the Committee had used Dr. Haskell's evidence to support the conclusion that an assault had occurred. The judge rejected that argument (*QB Decision*):

> [163] … the Committee employed her testimony to better understand and evaluate what objectively might seem to be inexplicable post-event behaviour exhibited by an individual who has experienced a sexual assault or other traumatic personal encounter. In this way, the Committee viewed and weighed the credibility of the complainant's evidence on these issues with an informed appreciation of the neurobiology of trauma, and its effects on the conduct, and actions, of victims.

[172] The judge found the Committee committed no palpable and overriding error in how it dealt with Dr. Haskell's evidence.

[173] Interestingly, the arguments Dr. Leontowicz makes on his cross-appeal are substantially the same as those his counsel put to the Committee as to why Dr. Haskell's evidence should be given little weight; but, this time, it is characterized as legal error. Put another way, Dr. Leontowicz's complaint about the use the Committee made of Dr. Haskell's evidence does not differ in substance from the arguments he initially identified as reasons that Dr. Haskell's evidence should be of limited value: for example, that he and the complainant were not in a relationship and that Dr. Haskell had no knowledge of the complainant's personal circumstances.

[174] In my view, the judge properly considered Dr. Leontowicz's argument about weight as it was originally put to the Committee. He found no palpable and overriding error in the weight assigned to Dr. Haskell's opinion by the Committee and in the limited manner that it used the evidence to contextualize aspects of the complainant's behavior. This Court has been clear on numerous occasions that the weighing of evidence is a question of fact, not a question of law: see, for example, *Silzer v Saskatchewan Government Insurance*, 2021 SKCA 59 at para 62.

[175] Respectfully, Dr. Leontowicz's argument is no more than an attempt to reframe Dr. Haskell's evidence into a question of law, which is appealable under s. 66 of the *MPA*, from a matter of weight, which is not. While he makes a valiant attempt to transform this question of fact into a question of law, and thus one this Court has jurisdiction to review, ultimately it must fail. Furthermore, not only is Dr. Leontowicz precluded from appealing questions of fact, but his position appears to be a new argument on appeal, which this Court has consistently discouraged: see, for instance, *Zunti v Saskatchewan Government Insurance*, 2023 SKCA 82 at para 29, and *Hawkeye Tanks & Equipment Inc. v Farr-Mor Fertilizer Services Ltd.*, 2002 SKCA 44 at para 3, 219 Sask R 148.

2. The Committee's use of the expert testimony

[176] In the interest of completeness, I will briefly address the Committee's use of Drs. Haskell's and Kamencic's evidence. As I have already discussed, Dr. Leontowicz argues that the Committee erred in law by improperly using expert evidence to bolster the complainant's credibility. Respectfully, this argument cannot be sustained.

[177] As a matter of law, it is unacceptable for a trier of fact to use expert evidence to decide the ultimate issue. That said, it remains open to triers of fact to use certain kinds of evidence to assist in contextualizing human behavior that might otherwise be difficult to apprehend. In *R v Marquard*, [1993] 4 SCR 223 at 248 to 250, the Supreme Court discussed the constraints on the use that may be made of expert evidence in the context of credibility assessments. It said as follows (at 248):

> A judge or jury who simply accepts an expert's opinion on the credibility of a witness would be abandoning its duty to itself determine the credibility of the witness. Credibility must always be the product of the judge or jury's view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter.

[178] However, as the Supreme Court went on to note, there remains room for the admissibility of expert evidence where there are "features of a witness's evidence which go beyond the ability of a lay person to understand, and hence which may justify expert evidence" (at 248–249). By way of example, the Supreme Court referred to the use of such evidence in a sexual assault prosecution where (for instance) a child complainant fails to complain promptly (at 249):

> [T]he ordinary inference from failure to complain promptly about a sexual assault might be that the story is a fabricated afterthought, born of malice or some other calculated stratagem. Expert evidence has been properly led to explain the reasons why young victims of sexual abuse often do not complain immediately.

[179] The Supreme Court in *Marquard* concluded by crafting the following statement about the proper use of expert evidence in attempting to understand human conduct that, on first blush, may seem incongruous (at 249–250):

> For this reason, there is a growing consensus that while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, *provided the testimony goes beyond the ordinary experience of the trier of fact*. Professor A. Mewett describes the permissible use of this sort of evidence as "putting the witness's testimony in its proper context". He states in the editorial "Credibility and Consistency" (1991), 33 *Crim. L.Q.* 385, at p. 386:
>
> > The relevance of his testimony is to assist -- no more -- the jury in determining whether there is an explanation for what might otherwise be regarded as conduct that is inconsistent with that of a truthful witness. It does, of course, bolster the credibility of that witness, but it is evidence of how certain people react to certain experiences. Its relevance lies not in testimony that the prior witness is telling the truth but in testimony as to human behaviour.

> There are concerns. As the court stated in *R. v. J.(F.E.)*, [(1990), 53 C.C.C. (3d) 94, 74 C.R. (3d) 269, 36 O.A.C. 348 (C.A.)], and *R. v. C.(R.A.)* (1990), 57 C.C.C. (3d) 522, 78 C.R. (3d) 390, the court must require that the witness be an expert in the particular area of human conduct in question; the evidence must be of the sort that the jury needs because the problem is beyond their ordinary experience; and the jury must be carefully instructed as to its function and duty in making the final decision without being unduly influenced by the expert nature of the evidence.
>
> The conditions set out by Professor Mewett, reflecting the observations of various appellate courts which have considered the matter, recommend themselves as sound. To accept this approach is not to open the floodgates to expert testimony on whether witnesses are lying or telling the truth. It is rather to recognize that certain aspects of human behaviour which are important to the judge or jury's assessment of credibility may not be understood by the lay person and hence *require elucidation by experts* in human behaviour.
>
> (Emphasis added)

[180] Expert evidence can sometimes be useful in the context of a sexual assault, where it is widely recognized that pervasive myths and stereotypes have long impeded the ability of triers of fact to properly understand how or why a complainant might behave in a particular way after this kind of traumatic event: *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577. This is the kind of circumstance in which a trier may benefit from expert evidence to assist in qualifying and contextualizing behavior that would otherwise seem counter-intuitive or inexplicable. In the matter at hand, the judge was alert to this possible use when he noted, "A court or other tribunal commits an error of law if it assesses a sexual assault complainant's credibility based solely on expectations as to how a stereotypical victim will or ought to react" (*QB Decision* at para 162). Expert evidence about human behavior can be useful in avoiding such an error.

[181] In light of the direction in *Marquard*, I see no error in the Committee's use of Dr. Haskell's evidence. This was not, as Dr. Leontowicz suggests, a situation where the Committee applied her evidence to explain away the complainant's contradictions and evade their responsibility to make a proper credibility assessment. Rather, as the judge observed, this body of evidence was used by the Committee to "better understand and evaluate what objectively might seem to be inexplicable post-event behaviour exhibited by an individual who has experienced a sexual assault or other traumatic personal encounter" (*QB Decision* at para 163). It allowed the Committee to view and weigh the complainant's credibility with "an informed appreciation of the neurobiology of trauma, and its effects on the conduct, and actions, of victims" (at para 163). That was not a misapplication of the law of evidence, but a helpful lens into complex human behavior. It was the kind of use contemplated by *Marquard* where expert evidence is permitted. As a result, I see no error of law with how the Committee used this evidence.

[182] That leaves Dr. Kamencic's evidence. Dr. Leontowicz asserts the Committee misapprehended Dr. Kamencic's evidence as standing for factual propositions that he did not testify to and further erred by using this erroneous understanding of his evidence to bolster J.T.'s testimony.

[183] I disagree. Unlike Dr. Haskell, Dr. Kamencic was not called as a witness to provide expert opinion evidence. J.T. was his patient. Dr. K did no more than confirm J.T.'s diagnosis, give an overview of the treatment and surgeries she had undergone, and discuss her symptoms, including that she had reportedly experienced pain during sexual intercourse. The Committee did not dwell on Dr. Kamencic's evidence. As to the use it made of his testimony, it found Dr. Kamencic's evidence to be "persuasively corroborative of [J.T.'s] *claim* of only one instance of vaginal intercourse with Dr. Leontowicz" (*Committee Decision* at para 125). Respectfully, the Committee did not use his evidence as a basis to conclude that only one episode of sexual intercourse took place between J.T. and Dr. Leontowicz on the evening in question. It simply found Dr. Kamencic's evidence capable of supporting J.T.'s testimony that multiple rounds of intercourse would be painful for her.

3. Conclusion on the cross-appeal

[184] In summary, the judge properly identified that the Committee had approached the medical evidence as a question of weight, as it was put to it by Dr. Leontowicz. In my view, his arguments before the judge did not substantially change. Those issues engage a question of fact that are not appealable under s. 66 of the *MPA*. However, even if I am incorrect, and Dr. Leontowicz's cross-appeal properly raises a question of law, I find no error with how the judge evaluated the Committee's use of this body of evidence.

[185] Apart from the issue of penalty and costs, the cross-appeal must be dismissed.

VIII. CONCLUSION

[186] In the result, I would allow the College's appeal from the *QB Decision*, set aside the decision quashing the misconduct finding, and restore the Committee's determination that Dr. Leontowicz is guilty of unbecoming, improper, unprofessional or discreditable conduct. I would also set aside the Council's decision on penalty and costs and remit those matters to it for reconsideration in accordance with this decision.

[187] Dr. Leontowicz's cross-appeal is dismissed, except to the limited extent of imposing an order setting aside the Council's decision on penalty and costs and remitting those matters to the Council for reconsideration.

[188] Given the mixed result on appeal, I make no order as to costs on the appeal proper or the leave to appeal application.

"Schwann J.A."

Schwann J.A.

I concur. "Richards C.J.S."

Richards C.J.S.

I concur. "Leurer J.A."

Leurer J.A.