Health Professions Review Board
Suite 900, 747 Fort Street, Victoria, BC V8W 3E9

CITATION: Complainant v. College of Psychologists of British Columbia

DECISION NO.: 2017-HPA-157(b)

DATE: January 21, 2019

In the matter of an application (the "Application") under section 50.6 of the *Health Professions Act,* R.S.B.C. 1996, c. 183, (the "Act") for review of a complaint disposition made by, or considered to be a disposition by, an inquiry committee

BETWEEN:	The Complainant	**COMPLAINANT**
AND:	The College of Psychologists of British Columbia	**COLLEGE**
AND:	A Psychologist	**REGISTRANT**
BEFORE:	Deborah Lynn Zutter, Panel Chair	**REVIEW BOARD**
HEARING DATE:	Conducted by way of written submissions closing on December 12, 2018	
APPEARING:	For the Complainant:	Self-represented
	For the College:	Jason Herbert, Counsel
	For the Registrant:	Michael Schalke, Counsel

I STAGE 2 PROCEEDING

[1] This is a Stage 2 proceeding of the Application to review a disposition of the College of Psychologists of British Columbia's (the "College") Inquiry Committee.

II HISTORY AT THE COLLEGE

A. The Complaint to the College (May 9, 2016)

[2] This Complaint, filed with the College on May 9, 2016, arises from two written opinions that the Registrant, a clinical psychologist, provided to an Alberta Court in the context of a high conflict parenting dispute surrounding the then 9-year old boy (the "Child") who had recently moved to British Columbia ("BC") with the Child's mother, step-father and younger half-siblings.

B. Background to the Complaint

[3] The Registrant has been a long-time registered psychologist with the College with significant academic experience. On a part-time basis, she provided clinical treatment for issues such as anxiety disorder, depression, trauma and assessments for

children's learning disability. There are no limitations of practice or public notices with respect to the Registrant listed on the College's website. This was the second family law matter that she had undertaken.

[4] The Complainant is the Child's natural father. His complaint alleged that the Registrant, who had been retained by the mother, was unprofessional and unethical in her communications and assessment of the child related to court proceedings.

[5] The Registrant met with the Child on February 1, February 13 and March 8, 2016. On February 8, 2016, the *Behavior Assessment System for Children, Third* (BASC-3), a psychological assessment tool, was completed by the 9 year old Child. There was no indication in the documents forwarded by the Registrant to the College about where the Child completed the BASC-3 although subsequent correspondence in the investigation showed that the Child completed the BASC-3 test in the Child's mother's home without supervision from the Registrant.

[6] On February 15, 2016, the Registrant wrote her first opinion to the mother and her partner. The opinion noted that the Child did not want to return to Alberta to see his father since staying there from December 27, 2015, to January 2, 2016, and that the mother did not send the Child to the most recent scheduled visit (February 4 to 8, 2016). This opinion, which referenced the Child's bed-wetting and refusal to visit his father, noted that the Registrant had requested the mother, her partner, the Child and the Child's teacher to fill out the BASC-3. Based on these results, the Registrant formed the opinion that the Child "displays clinically significant symptoms of anxiety and stress" while still maintaining good functioning in many areas of his life, including academics and creative pursuits. She stated that the Child wants to stop visiting or talking to his father on the phone, that he expressed those views both alone and in front of his mother and that "at no time did I observe [the mother or her partner] coaching" the Child.

[7] On February 27, 2016, the Registrant advised the Child's mother by email that she had spoken with a colleague in Calgary who recommended that the Registrant "try to reach out to [the Complainant] now, prior to the court date, so I can at least say I tried to talk to him." The Child's mother gave her consent and provided the Complainant's phone number immediately. On February 28, 2016, the Registrant advised the mother by email that she wanted to talk with the Child again to discuss the pros and cons of calling the Complainant: "I think I owe [the Child] that degree of control. I will meet you on March 8, and I will discuss the pros and cons of calling [the Complainant] with [the Child] at that meeting, and before I call [the Complainant]. Thank you for being so in tune with your son – it is a huge help to me."

[8] On March 8, 2016, the Registrant met with the Child for the last time. She did not contact the Complainant prior to finalizing her second opinion on April 2, 2016. Her second opinion states that she did not do so because the Child was in his mother's care at the time of the first meeting, the Registrant concluded that the mother had parental responsibility and could "solely" make a decision about health care for the Child, and the work was presented as urgent due to the Child's considerable emotional distress over an upcoming visit.

[9] The Registrant's April 2, 2016, opinion, written following the March 8, 2016, meeting and two days before the Court hearing, stated that "I am very concerned about [the Child's] mental well-being if he is forced to visit [the Complainant] at this time. I am concerned about [the Child's] potential for self-harm given the degree of hopelessness he expresses and his changed answer to the BASC-3 question regarding hurting himself."

[10] The Registrant offered this opinion while also stating that she only met the Child on three occasions, did not assess the Child's parents, did not speak to the Child while he was with the Complainant and considered the Child's BASC-3 scaled scores "not valid."[1]

[11] The Registrant's April 2, 2016, opinion relied on her March 8, 2016, interview with the Child and her discussions and correspondence with the mother. The opinion did not explain how she reconciled her conclusion that the BASC-3 scaled scores were not valid, while at the same time relying on the "changed answer" to the BASC-3 question regarding hurting himself (originally true, now false). The opinion also did not speak to how the Child's answers during the March 8, 2016, meeting - where the Registrant probed what was "presented to me as urgent due to [the Child's] considerable emotional distress about an upcoming visit with [the Complainant]" – supported the very serious concern in a document prepared for court: "I am concerned for [the Child's] potential for <u>self harm</u> if he is forced to visit [the Complainant]".[2] (emphasis added)

---

[1] The April 2, 2016 opinion stated that, in answer to the BASC-3 question "I have never been to sleep", the child filled in "True" on February 8, 2016. At the March 8, 2016, interview, the child "told me that he was confused by that question" and "thought it meant he had trouble falling asleep sometimes". In response to his "True" answer on BASC-3 to "Sometimes I want to hurt myself," the child stated he would answer "False" now and did not elaborate. The Report stated: "Given [the child's] response to these follow up queries … I have concluded that the scaled scores derived from the [BASC-3] completed by the child were not valid and cannot be relied on to inform opinion regarding his current functioning and well being."

[2] The April 2, 2016, opinion states that during the March 8 interview, the child "was apprehensive about the idea of stating his reasons," "he did not know how his father would react"; "I asked [the child] if he thought his father would be violent or aggressive and he said "no," "his father gets angry" if the child calls him by his first name and not "dad," the Complainant tells other people what the child says and they tell the child's friends; the Complainant "plans activities that [the child] does not like"; the "most fun" at the Complainant's is when they go to visit his cousin "and even that is not much fun" and when they stay home, the Complainant "might watch TV and ask [the child] to get him things." The Registrant suggested that she help the child "write a sentence to summarize his message to his father in the kindest possible way." They wrote: "<u>Dad</u>, I don't want to hurt your feelings <u>but</u> it is really hard on me to come to your house <u>because</u> you are not treating me best. You make fun of me with whiney "Ann-naj" talk." The underlined words were added by the Registrant. [The term "Ann-naj" is a term the Complainant used when the child was younger and now says it "in a whiney way, kind of like a kid, not grown up, and did not stop when asked]. The child told the Registrant "he thinks [the Complainant] does not know how to treat [him] well" and gave an example where the child's name for a puppy was not picked. "I ended the conversation at this point because [the child] looked distressed and said he was trying really hard not to remember negative things." The Report then describes information from the mother, and states "My opinion is that [the child] is being truthful and sincere in his desire not to visit [the Complainant]. I believe [the child] is guarded and cautious in his statements to me for fear of negative consequences and perceived lack of safety. I have the impression that [the child] does not trust adults who tell him it will be okay to go visit [the Complainant]. [The child] does not believe that adults will help him and has developed feelings of hopelessness about the situation. I am very concerned about [the child's] mental

[12] The Complaint to the College attached an April 2016 hearing transcript from the Alberta Provincial Court. At the hearing, the mother of the Child attempted to introduce the February 15, 2016, and April 2, 2016, opinions prepared by the Registrant [the "Registrant's Opinions"]. In determining whether to accept the Registrant's Opinions as being expert evidence, the Court conducted a telephone interview with the Registrant. The Registrant acknowledged that she had not contacted the Complainant and offered various reasons for failing to do so:

> Q. Now, assuming for the moment that I have no difficulty with your taking those – those proceedings in a timely fashion and without contacting [the Complainant], I don't understand why you would have had a second meeting with the child and the child – the child's mother and her step – his stepfather approximately five weeks after the first meeting with the child without contacting his father. Can you explain that?
>
> A. Right. Okay. So when I initially started, okay, so I didn't -- I didn't contact him initially because of the urgency.
>
> Q. Yes?
>
> A. And then afterwards I felt I wanted to get this letter prepared before I contacted the father. And unfortunately, due to my poor health and various things happening in the months of February and March, I was unable to get the letter done until just last week. And I -- I di --
>
> Q. There are some who might say that that was an unethical way to proceed, what do you say?
>
> A. I would have preferred to contact [the Complainant], yes. I felt I didn't know what was going on well enough with [the Child] to avoid putting [the Child] at risk by contacting [the Complainant] so I did not contact [the Complainant].
>
> Q. <u>At risk of what?</u>
>
> A. <u>Well, I'm not sure</u>. [The Child] was very cautious with me so I didn't know what was going on. I still don't really have a good sense of what's going on… (emphasis added)

[13] The trial judge was critical of the Registrant because she formed opinions after speaking only to the Child and to one "side" in a high conflict dispute, and did not seek information from or the perspective of the Complainant at any point in her assessment process. The Court held that the Registrant's conclusions and recommendations were of "no value to the Court because they predetermine the issue. You cannot arrive at a valid finding about a child's distress in the absence of half of the information." The Court stated:

> I – I will have to struggle with – with the - issue of whether I'm reporting [the Registrant] to her professional society, that's how bad this is in my view. This isn't just a little glitch, this goes to the essence of her professional obligations and the quality of the information that she has provided to the Court.

---

well-being if he is forced to visit [the father] at this time. I am concerned about the potential for self-harm given the degree of hopelessness he expresses and his changed answer to the BASC-3 question regarding hurting himself…."

[14] At the conclusion of the April 4, 2016, hearing, the Alberta Court suspended visitation of any kind between the Complainant and the Child pending an evaluation of the Child in Alberta by a named Alberta psychologist. In order to facilitate a quick determination of the matter, the Alberta Court further ordered a telephone conference hearing for April 21, 2016, so that the Alberta psychologist could provide scheduling and cost information. The Registrant sent an email to the mother and stepfather on April 5, 2016. From the contents of this email it is clear that the Registrant was aware of the foregoing terms of the Alberta Court order.

[15] The May 1, 2016, Complaint also alleged that the Registrant made matters worse when, following the Alberta Court hearing, the Registrant "made new assertions that my son poses an urgent danger to himself, which has resulted in further court action in British Columbia at a tremendous cost of time and money to my family." Later in the Complaint process, the Complainant would provide the College with direct evidence regarding this part of the Complaint.

[16] Specifically the Complainant alleged that, in answer to questions posed by a BC lawyer for a BC Court hearing, the Registrant gave the following opinions just days after her opinion was rejected by the Alberta Court:

> … I believe that [the Child] is at significant risk of harm is he is required to visit [the Complainant] and/or [the Complainant's] family on his own without the mother or the step-father present.
>
> … For unsupervised forced visit to [the Complainant's] home, the risk to [the Child] due to self-harm is significant and elevated. I think it is almost certain that [the Child] would try to hurt himself with intent to commit suicide if he is forced to visit [the Complainant] on his own at the present time…
>
> … [the Child] indicated he was thinking of harming himself on Feb. 8 when he completed the BASC 3 questionnaire. On that day, [the Child] knew he was missing a court-ordered visit with his father and he would have been feeling very stressed. On March 8, [the Child] told me he would change his answer to that question, indicating he was no longer thinking of hurting himself. At that time, [the Child] knew unsupervised visits and phone calls with the Complainant were suspended. [the Child] would not elaborate on his thoughts of self harm on March 8 when I asked him to tell me more. I interpret [the Child's] unwillingness to say more as indicating that his intent to self harm is very serious… My sense was that [the Child] was frightened to express his views because of fear but I could not ascertain the cause for [the Child's] fear. I could not make [the Child] feel entirely comfortable and safe during our meetings. I was left with the impression that [the Child] was guarded and cautious throughout his interactions with me. (emphasis added)

[17] There is no statement in either opinion presented to the Alberta court on April 4, 2016, that "[the Child] would try to hurt himself with intent to commit suicide if he is forced to visit [the Complainant] on his own at the present time."

[18] The Registrant received a text message apparently from the Child's stepfather dated April 29, 2016, in connection with the BC Court hearing:

> Good day, [the Child's mother] and I just wanted to let you know that we are still grateful for your services to help [the Child]. The BC court has accepted your report and has

> ordered that [the Child] not to be removed from BC or to have any contact with [the Complainant]…

[19] The Registrant responded "Hallelujah! I'm very happy to hear this news. Thank you for updating me. Please convey my best wishes to [the Child and mother]."

[20] The Complainant made the following statement (in bold print) in his May 1, 2016, letter of complaint to the College:

> … [the Registrant] is continuing to communicate with (the Child's mother) and her lawyer in regards to my son, and as of the writing of this letter (May 1, 2016), STILL has not reached out to me. She has now made new assertions that my son poses an urgent damage to himself, which has resulted in further court action in British Columbia at a tremendous cost of time and money to my family.

C. The College Investigation Process

[21] By letters dated May 10, 2016, the College acknowledged to the Complainant its receipt of the complaint and advised the Registrant of the complaint. The College's letters identified that the options for resolving a complaint included (a) taking no further action, (b) entering into a formal agreement with the Registrant under s.36(1) of the Act following a request by the Inquiry Committee that the Registrant undertake not to repeat conduct, take specified educational courses, consent to a reprimand or undertake or consent to any other action specified by the Inquiry Committee; (c) informal resolution without resort to a formal agreement under s.36(1) or (d) a discipline hearing: "Matters that cannot otherwise be resolved may be referred to hearing before the College's discipline committee. This option is typically reserved for very serious matters in which efforts by the College to obtain a consensual resolution have not succeeded."

[22] On May 19, 2016, the letter of complaint was brought to the attention of the Inquiry Committee for preliminary review. The Minutes record the "Action" taken as "preliminary review."

[23] On July 15, 2016, the College wrote to the Registrant requesting that she provide her clinical records and report in accordance with a detailed checklist of documents.

[24] On July 21, 2016, the Inquiry Committee passed a motion that a letter be issued under s.3(1) of the Act requesting a response to the allegations as set out in the complaint summary form.

[25] On July 28, 2016, the Registrant provided records and files amounting to 333 pages. On August 18, 2016, the College issued a letter requesting that the Registrant respond to specific issues raised in the complaint with reference to specified standards of the College. The letter included the following "Questions of the Committee":

> You are free to provide the Committee with whatever information you believe the Committee should consider in assessing the Complaint. The Committee requests, however, that you provide written responses to the following specific issues raised by the Complainant in the letter of complaint, with particular reference to the CPBC Code of Conduct standards as noted below:

1. That you did not obtain the Complainant's consent to assess his child in the context of a custody dispute. Please reply in accordance with Standards 4.1, 4.2, 4.3, 4.4, 4.5.

2. That you did not contact the Complainant to gather sufficient background information and understanding of the circumstances before offering an opinion, and therefore offered an opinion without sufficient basis. Please reply in accordance with standards 3.12, 3.13, 3.14, 3.16, 3.18.

3. That you continue to have a professional role with the Complainant's child and former spouse without the consent of the Complainant. Please reply in accordance with Standards 4.1, 4.2, 4.3, 4.4, 4.5.

4. Please provide the Committee with information regarding your education, training and experience in conducting court-related assessments relating to child custody issues and information about the percentage of your private practice devoted to such assessments. Please reply in accordance with Standards 3.5, 3.6, 3.26.

[26] On September 12, 2016, the College received the Registrant's written response dated September 8, 2016. The Registrant's letter to the College refers to the Child as being in "considerable distress" and "at risk of harming himself." The Registrant stated:

> I spoke with [the Child's mother] on Feb. 18, 2016, at which time she advised me that the judge had asked her why I had seen [the Child] without notifying the Complainant. [The Child's mother] also told me that the judge was likely going to change the parenting order so that all three of [the Child's] legal guardians (i.e. the Child's mother, the Child's step-father and the Complainant) would have to be involved in decision-making about [the Child's] medical care. I interpreted that statement as meaning that my original interpretation of the current parenting order was correct – that [the Child's mother] had the right to consent to the work I was doing and that [the Complainant's] consent was not required.
>
> I met [the Child] again on March 8 and found him to be in a helpless state of mind and fearful of what would happen once [the Complainant] heard what [the Child] had to say. Weighing competing ethical concerns, I decided I had to prioritize [the Child's] safety needs over the consent rights of his father. My professional opinion that [the Child] is at risk of self-harm if he is forced to visit his father without appropriate intervention to support their relationship was reinforced by what I observed and heard from [the Child] on March 8.

[27] The Registrant took the position that she was working within the bounds of her professional competencies, and that she complied with each of the referenced standards that were applicable. Her position was that her opinions were objective and directed at the Child's best interests, and that the limitations on her assessment were stated in her second letter. She acknowledged that the late date of her second opinion (3 weeks after her meeting with the Child) meant that the father "could not respond in any meaningful way." The Registrant concluded her letter with:

> There are a limited number of psychologists practicing in [a region of BC] and none routinely perform custody assessments for family court. The family had no options for alternative services that could assist them in responding to [the Child's] considerable distress. Once I understood the extent and severity of [the Child's] distress, I had a professional obligation to assist him.

[28] On September 15, 2016, the College Registrar provided an update to the Committee in connection with the Registrant's response.

[29] On September 19, 2016, the College invited the Complainant to provide "any further documentation you may have on the matter, including any court Orders or other documents outlining your rights to access your son's personal medical information."

[30] On October 17, 2016, the Complainant wrote to the College attaching various court orders, and also attaching the April 11, 2016, email the Registrant wrote to the mother's lawyer. He wrote:

> Also attached to the Court Order Exhibits is an email, "Exhibit A", which was sent to the other parties' lawyer after the April 4th appearance. This has caused an incomprehensible amount of stress on our entire family and I believe this is directly related to [the Registrant]. After the Alberta Court found her reports inadmissible and admonished her unethical practice, she still proceeded to email [the BC lawyer] (lawyer for other parties), basically saying that [the Child] would hurt himself or even commit suicide if forced to participate in an Alberta Assessment or forced to see me. Her carelessness and disregard to understand the whole context and history relating to [the Child] is inexcusable. I have been a Legal Guardian for [the Child] since 2008 and have always had the same responsibilities as any other Guardians relating to their child. To not even attempt to get a view of the Father is unacceptable when dealing with family matters.
>
> I have completed my part of the assessment and the court concluded that "there is nothing to justify any limits on conditions to the father's parenting time with the child" (August 26, 2016 Alberta Court Order).

[31] As noted above, the Registrant's April 11, 2016, email, sent only days after the April 2, 2016, Alberta Provincial Court hearing where the Registrant was criticized by the judge for failing to speak to both parties, stated *inter alia* that "I think it is almost certain that [the Child] would try to hurt himself **with intent to commit suicide** if he is forced to visit [the Complainant] on his own at the present time." The email also stated that the mother and her partner "have been forced by court orders to over-ride what they think is best for [the Child]". (emphasis added)

[32] On October 21, 2016, the College sent the Complainant's October 17, 2016, email to the Registrant and requested that she provide any comment by November 4, 2016.

[33] On October 27, 2016, the Registrar updated Committee members on the progress of the file.

[34] On October 31, 2016, the Registrant responded. This response did not speak to her April 11, 2016, email to the BC lawyer, and was limited to the point that her first opinion was provided to the Complainant on February 16, 2016, and that she emailed both her opinion letters to the Complainant on April 2, 2016.

[35] On November 23, 2016, the Complainant provided the College with a further detailed response to the Registrant's letters. The Complainant denied that he had ever received any communication from the Registrant, and submitted that:

(a) The Registrant had an ethical duty to contact him despite what she was told by the Child's mother;

(b) It showed "terrible judgment" to send the mother and Child home with the BASC-3 forms to complete without any supervision to ensure the Child was not being coached;

(c) It was outrageous for the Registrant to state that she was "prioritizing the child's safety over the consent rights of the father" after just two visits alone with the Child and when the Registrant was aware of the complicated family situation;

(d) "Any reasonable professional would not be satisfied with hearing one side of a contentious parental situation";

(e) The Registrant's statement that she did not attempt to evaluate the behavior of either parent could not be accepted when she was at the same time attributing the Child's stress solely to the father;

(f) The Registrant's "face value" interpretations of what only the mother was reporting caused serious damage to the Child and the other side of his family who were never consulted;

(g) Only a few days after the April 2, 2016, court hearing which rendered her findings inadmissible, the Registrant elevated her assessment of harm and for the first time mentioned suicide in her opinion to the lawyer, which opinion was relied on in court. He stated:

> This information was communicated to the Judge in BC and has been used against me in court. Of course any judge who hears that a child is at risk of suicide has an obligation to investigate and provide additional directives to address immediate safety concerns. The [mother's side] have used [the Registrant's] suicide allegation to delay me seeing my son for months now. The emotional, relational, and financial repercussions for our family – myself, my wife, my daughter and of course [the Child] – have been devastating. The legal costs I have endured are astronomical and still continue, thanks to [the Registrant's] rush judgments and "interpretation" of circumstances…

[36] On December 7, 2016, the College provided the Registrant with the Complainant's November 23, 2016, letter and enclosures, advising that she could comment by December 20, 2016.

[37] On December 8, 2016, the Registrar updated the Inquiry Committee.

[38] By letter dated January 12, 2017, after grant of an extension, the Registrant responded in writing. The Registrant advised the College that:

(a) She was aware that "it would have been ethically desirable" to contact the Complainant, but "I also perceived and continue to believe that [the Child] would not talk to me about his situation if he knew I was in direct contact with [the Complainant]";

(b) She was "well aware" that she did not know the full history of the family's conflict but her "primary focus was on [the Child's] current distress; the history of the conflict between [the Child's] parents was not my primary concern";

(c) She never stated that the Complainant's right should be taken away; she was referring to her right to work with the Child without the father's consent; her opinion was only that the Child should not be forced to visit him and she made recommendations that might work toward healing the relationship;

(d) With regard to the consequences of her opinions in court she stated: "I acknowledge that I am responsible for the content of my letters, but I cannot be held accountable for others' actions and decisions";

(e) Her April 2016 letter focused on the Child, not the parents;

(f) With reference to her use of the word "suicide," she stated:

> I agree I changed the words, and I did so in part to establish a sense of urgency because I was very concerned about [the Child's] safety…. Please note that I did not get a chance to assess the risk of self-harm when I spoke in court, as the judge ruled my work inadmissible before I testified.

[39] The Registrant concluded: "I believe I have executed my professional responsibilities to the standards expected by the College of Psychologists of BC."

D. Inquiry Committee Minutes' Reference to "Suspension"

[40] On January 26, 2017, the Registrar provided an update to the Inquiry Committee, including a reference to the correspondence the College had received from the Complainant and Registrant between August 18, 2016, and January 12, 2017.

[41] In the Minutes, under the column "Notes," is the word "Suspension." If there was any discussion relating to the Committee's use of that term for the first time in the Minutes in this matter, it was not provided to the Review Board as part of the College's investigative record (the "Record").

E. College letter to the Registrant to discuss "Potential Resolution"

[42] On February 7, 2017, two weeks after the Committee meeting where the word "Suspension" was noted, College staff wrote to the Registrant "to schedule a time to discuss the above referenced complaint and potential resolution." The letter advised that such discussions are in the College's experience most productive when legal counsel are not present, but that if the Registrant preferred to have counsel present, the College would do the same. The College requested a response by February 20, 2017.

[43] The Record does not include reference to the contacts that took place between the College and the Registrant between February 7 and March 3, 2017. However, it does include March 3, 2017, emails from College staff to Inquiry Committee members enclosing a draft Resolution Agreement for their review and response on a motion to attempt to resolve the matter under s.33(6)(c) of the Act. Return emails approved the motion.

[44] On March 8, 2017, the College Registrar sent the Registrant a draft Resolution Agreement.

[45] On March 9, 2017, the Inquiry Committee passed two motions in relation to the reference document: “Draft Resolution Agreement”:

(a) To attempt to resolve matter under s. 33(6)(c) of the Act*;*

(b) To ratify the email motion proposed March 3, 2017.

F. The draft Resolution Agreement (March 8, 2017)

[46] After setting out various recitals, including a statement that “I am prepared to undertake and consent to the terms and conditions herein … and in particular am prepared to undertake and consent to the actions specified herein by the Inquiry Committee pursuant to Section 36(1) of the Act*,*” the draft Resolution Agreement set out the following proposed agreements on the part of the Registrant:

1. I agree to write a letter of regret to the Complainant and to send the letter of regret to the Inquiry Committee for approval and that the letter will include the following:

   (a) That I based my decision making on the best interests of the child, based on the information that I had at that time,
   (b) That after reflection and with the benefit of hindsight, do regret the experience of the Complainant;
   (c) That I offered an opinion based on limited information that should have been made clearer and more explicit in my report;
   (d) That I acknowledge my opinion might have been different had I conducted a more thorough assessment; and
   (e) I am now of the view that I could have contacted the Complainant prior to conducting the assessment to obtain his consent and to gather information from him.

2. I agree not to accept any new referrals for the conduct of any assessments for family law related purposes.

3. I agree that if I change my mind or am otherwise obliged to respond to a matter that is family law related, to place myself under supervision by a registrant appointed by the College for as long as I have conduct of the family law related file,

   (a) I acknowledge that I would have a limitation on my practice at that point, indicating that I am under supervision and that this limitation will be entered on the College Register;
   (b) I agree to follow all directions from the supervisor related to the completion of any additional education and training;
   (c) That the supervisor would be given a copy of the above complaint matter at the time of onset of any supervision and the College may provide the supervisor with additional information at any point during the supervision and vice versa; and
   (d) That I would be responsible for all costs related to the supervision at the rate of $160/hr.

4. I acknowledge that I am aware of my legal rights as they pertain to this matter. I have had the opportunity to receive legal advice concerning the contents of this Agreement and I hereby expressly waive any and all rights of appeal to the Supreme Court of British Columbia or judicial review, concerning any of the matters set out herein and particularly concerning any of the limitations, restrictions or conditions contained in this Agreement. I acknowledge that it is understood by the College that this waiver does not relate to matters that may arise resulting from the implementation or enforcement of the terms of this Agreement after the date hereof.

5. I hereby expressly agree and consent that no term, condition, undertaking, agreement, restriction, or limitation in this Agreement may be varied in any way without the express written agreement of the Registrar on behalf of the Inquiry Committee of the College of Psychologists and me.

6. I acknowledge that this Undertaking and Consent is given in response to a request under s. 36(1) of the Act, and acknowledge that should I fail to comply with this Undertaking and Consent, the Inquiry Committee may direct the Registrar to issue a citation for a hearing of the Discipline Committee. I acknowledge and agree that any failure to comply with this Undertaking and Consent constitutes professional misconduct.

7. I hereby acknowledge that this Agreement contains all of the terms of the agreement between me and the College and that there are no other agreements.

[47] On March 28, 2017, the Registrant sent a voicemail and email to the College Registrar requesting a meeting. The College responded with a conference call proposal for April 5 or 6, 2017.

[48] On April 20, 2017, the Registrar provided an update to the Inquiry Committee. Under “Notes,” the Minutes only state “attempt to.” If there was any recorded discussion set out in the Minutes of this meeting, it was not included in the record provided to the Review Board.

G. The Signed Resolution Agreement (May 11, 2017)

[49] On April 25, 2017, the College Registrar sent the Registrant a revised Resolution Agreement, and requested the return of a fully executed agreement.

[50] On May 11, 2017, the Registrant’s legal counsel provided the signed agreement to the College.

[51] The signed Resolution Agreement was identical to the March 8, 2017, draft with two exceptions:

(a) In Clause 3, the phrase “*respond to a family law matter*” was substituted for the words “*respond to a matter that is family law related,*” so that the paragraph read:

I agree that if I change my mind or am otherwise obliged to respond to a family law matter, to place myself under supervision by a registrant appointed by the College for as long as I have conduct of the family law related file,

(b) In Clause 1, the agreement was "I agree to write a letter of regret to the Complainant as attached in Appendix A." Appendix A sets out a draft letter substantially containing the content of paragraph 1 of the March 8, 2017, draft:

Mr. [Complainant]

I am writing about the psychological services I provided in respect of [the Child] in February to April 2016. I based my actions on what I perceived to be the best interests of the child, based on information I had at the time.

My opinion was based on limited information. If I could do things over again I would make it more explicit, in my report, that the opinion was based on limited information. Indeed, if I could do things over I would reach out to you, prior to conducting an assessment, to inquire about consent and to gather information from you. If I did these things, my opinion might have been different. After reflection and with the benefit of hindsight, I regret the experience you had in relation to my assessment of [the Child].

[52] The Registrant on May 3, 2017, independently provided the College with a signed letter of regret addressed to the Complainant.

H. The parties' requests for a status update

[53] On May 29, 2017, the College wrote to the Complainant in response to his inquiry for a status update, advising him that "the College has reached terms of resolution with [the Registrant]. A fully detailed report will be drafted and provided to you once approved by the Inquiry Committee."

[54] On June 1, 2017, the Inquiry Committee referenced the May 10, 2017, Resolution Agreement and directed "That a draft Complaint Investigation Report be prepared for discussion and review by the Inquiry Committee pursuant to section 33(6)(c) of the Act based on receipt and approval of a Resolution Agreement."

[55] On June 8, 2017, the Complainant and Registrant independently followed up with the College asking for a status update. The College separately advised the Complainant and the Registrant that "a decision report is in process." The Registrant was additionally advised that once finalized, it would be placed before the Inquiry Committee for approval and a copy provided to her.

[56] On July 13, 2017, the Registrar updated the Committee on the draft Complaint Investigation Report ("Investigation Report") which was "in progress."

[57] On July 28, 2017, the Registrant followed up on her June 8, 2017, update request.

[58] On August 25, 2017, the Complainant followed up on his June 8, 2017, update request.

[59] On August 28, 2017, the College advised the Complainant that "a decision report is in the final stages and, once approved by the Inquiry Committee, will be promptly forwarded to you."

[60] On September 7, 2017, the Registrar updated the Committee on the draft Investigation Report which was "in progress."

[61] On October 5, 2017, the Registrar again updated the Committee on the draft Investigation Report which was "in progress".

[62] On October 19, 2017, the Complainant, citing the College's previous responses, followed up again seeking the terms of the resolution.

I. The Inquiry Committee Complaint Investigation Report (October 30, 2017)

[63] On October 27, 2017, College staff provided a draft Investigation Report for the Inquiry Committee's review, with the note that the report has some urgency. The Investigation Report was approved.

[64] On October 30, 2017, the College wrote to the parties advising them that the Inquiry Committee had conducted an investigation and "reached a decision as to the legal conclusion" of the complaint.

[65] The Investigation Report states that the Inquiry Committee decided to act under s.33(6)(c) of the Act. Section 33(6) states:

> **33(6)** After considering any information provided by the registrant, the inquiry committee may
>
> (a) take no further action if the inquiry committee is of the view that the matter is trivial, frivolous, vexatious or made in bad faith or that the conduct or competence to which the matter relates is satisfactory,
>
> (b) in the case of an investigation respecting a complaint, take any action it considers appropriate to resolve the matter between the complainant and the registrant,
>
> (c) act under section 36, or
>
> (d) direct the registrar to issue a citation under section 37.

[66] Because s.33(6)(c) refers to s.36 of the Act, the latter section is quoted below for better understanding:

> **36 (1)** In relation to a matter investigated under section 33, the inquiry committee may request in writing that the registrant do one or more of the following:
>
> (a) undertake not to repeat the conduct to which the matter relates;
>
> (b) undertake to take educational courses specified by the inquiry committee;
>
> (c) consent to a reprimand;
>
> (d) undertake or consent to any other action specified by the inquiry committee.

(1.1) If a consent or undertaking given under subsection (1) relates to a complaint made under section 32 (1), the inquiry committee must, within 30 days of the consent or undertaking being given, deliver to the complainant a written summary of the consent or undertaking advising the complainant of the right to apply for a review by the review board under section 50.6.

(2) If a registrant refuses to give an undertaking or consent requested under subsection (1), or if a registrant fails to comply with an undertaking or consent given in response to a request under subsection (1), the inquiry committee may direct the registrar to issue a citation for a hearing by the discipline committee regarding the matter.

[67] After outlining the Committee's mandate and process, and summarizing the complaint, the Investigation Report addressed what it regarded as the key allegations. The allegations and the Committee's key findings are set out below:

Allegation No. 1 That the Respondent did not obtain the Complainant's consent to assess his child in the context of a custody dispute

[After summarizing the positions of the parties]:

The Inquiry Committee reviewed the November 10, 2015 Final Varied Parenting Order which [describes the guardians, which included the Complainant]. In addition it is clear from the Respondent's response to the Committee that she knew her assessment was going to be used in the Complainant's court litigation and that the custody dispute was extremely high conflict. The Committee was of the view that this complaint highlighted areas where more careful consideration should have been given to the issues of parental consent and involvement and that she should refrain from conducting any psychological assessments in the area of family law, except as required by court order or subpoena and in that case would only do so under direct supervision of a registrant approved and appointed by the College. The Respondent signed an Agreement that included this as a term.

Allegation No. 2: That the Respondent did not contact the Complainant to gather sufficient background information and understanding of the circumstances before offering an opinion, and therefore offered an opinion without sufficient basis.

[After summarizing the positions of the parties]:

As above, the Committee was of the view that the Respondent ought to have made attempts to gather information from the Respondent [sic]. Had she gathered additional information from the Complainant, she may have better understood the context of [the Child's] mental health concerns, and the broader context of the parents' ongoing custody dispute. The Committee was of the view that the terms in the Agreement, signed by the Respondent, were appropriate to address the concerns that was [sic] raised.

Allegation No. 3: That the Respondent continues to have a professional role with the Complainant's child and former spouse despite knowing that it was problematic to offer services without contacting the Complainant.

[After summarizing the Registrant's response]:

> The Committee noted that the Complainant lodged his complaint on May 1, 2016, around the same time that the Respondent said she informed [the mother] that she would not have any further contact with her. The issue of ongoing contact and involvement in the Complainant's family law matter appears to have been addressed by the Registrant. As such, no further action is warranted with regard to this allegation.
>
> **Allegation No. 4:** That overall, the Respondent lacked appropriate judgment in conducting an assessment in the context of a custody dispute
>
> [After summarizing the Registrant's information regarding her practice]:
>
> The Committee requested and the Respondent agreed to a term in a Resolution Agreement, whereby the Respondent would refrain from accepting referrals for assessments for the courts for family law related purposes as noted above.

[68] Under the heading "Conclusions and Recommendations," the Report stated that the Committee was satisfied that it had obtained key information to conclude its investigation, and that based on its review, it decided to dispose of the complaint by asking the Respondent to agree to the May 2017 Resolution Agreement under s.33(6)(c) of the Act. It stated:

> Accordingly, the Inquiry Committee requested, and the Respondent executed, a written Resolution Agreement with the College dated May 10, 2017, addressing key matters which include, but are not limited to:
>
> 1. Not accepting any new referrals for the conduct of any assessments for the courts for family law related purposes;
>
> 2. That if the Respondent changes her mind or is otherwise obliged to respond to a family law matter, to place herself under supervision by a registrant appointed by the College for as long as she has conduct of the family law related file;
>
> 3. To write a letter of regret to the Complainant.

[69] On November 7, 2017, the College wrote to the Complainant, enclosing for his record, a copy of the Registrant's May 3, 2017, letter of regret.

J. Complainant requests for clarification

[70] On November 3, 2017, the Complainant wrote to the College asking when exactly it came to terms with the Registrant, and noting that the Investigation Report made no reference to the Complainant's concern, communicated November 23, 2016, about the Registrant's responses to the mother's BC lawyer.

[71] On November 9, 2017, the Registrar responded, advising that:

> (a) The Registrant provided the College with the signed agreement on May 10, 2017, which agreement was put before the Inquiry Committee at its June 2017 meeting "at which point they accepted it as satisfactory to resolve the concerns that were raised and at which point they directed that a decision report be drafted for their review."

(b) The Complainant's November 23, 2016 email was specifically referenced at p. 4 of the Report, and was considered in the context of allegation #3, "that the Registrant continued to have a professional role with the mother and child despite knowing it was problematic to continue to offer services without contacting the complainant."

[72] As will be noted below, the Registrar's response summarized in para. [71](b) makes no reference to the basis for the concern expressed in the November 23, 2016, email about Registrant's willingness to continue to offer her opinion despite the judicial finding made only a few days earlier, and to do so for the first time by using the term "suicide."

[73] On November 13, 2017, the Complainant stated that the Registrar did not answer the question in regard to the mother's lawyer corresponding with the Registrant, and expressed serious concern about the delay:

> For a psychologist who just "retired" from [a university] and is probably already semi-retired from private practice, these consequences are a slap on the wrist. You have failed to protect the public.

[74] The Complainant also advised that he had still not received a letter of regret from the Registrant.

K. Inquiry Committee Ratification

[75] On November 30, 2017, the Inquiry Committee ratified the email Motion passed on October 30, 2017, in relation to the draft Complaint Investigation Report. The motion before it stated:

> MOTION: To dispose of the matter pursuant to section 33(6)(c) of the *Act* based on the approval of the draft Complaint Investigation Report as presented, and on the Inquiry Committee's confirmation that the Report as drafted, is an accurate summarization of the Committee's discussion and decision on the matter.

III THE REVIEW BOARD PROCEEDINGS

A. The Application for Review

[76] On November 23, 2017, the Review Board received the Complainant's Application for Review. The Complainant challenges both the adequacy of the investigation and the reasonableness of the disposition.

[77] Included in his reasons for requesting a review, the Complainant alleges as follows:

(a) That the "actual sanctions" would "have very little effect" on the Registrant's practice in regard to "ethical fairness" as she "broke many rules." He stated that the Registrant "has an exceptional resume, and thus should be held to the highest standard."

(b) The disposition letter failed to address the Registrant's involvement with the BC lawyer after the Alberta Court refused to accept her as an expert, and after the

Alberta Court spoke about having a qualified psychologist perform the assessment.

(c) That the College had not "updated" anything on its website regarding the Registrant's "Limitations or Conditions and Public Notification."

(d) With regard to the adequacy of the investigation, he questioned the time that it took the Inquiry Committee to forward the May 10, 2017, Resolution Agreement and the May 3, 2017, letter of regret which he received on October 30, 2017 and November 7, 2017 respectively.

[78] The Complainant stated that "Their role is to protect the public and they have failed."

B. Production of the Record, Section 42 application and application for postponement

[79] On January 10, 2018, the Review Board received the College Record together with a cover letter:

> (a) Making an application under s.42 of the *Administrative Tribunals Act* (the "ATA") requesting that portions of the Registrant's clinical file be received in confidence by the Review Board to the exclusion of the Complainant; and
>
> (b) Seeking a direction that the Review Board's Stage 1 process be postponed until receipt of a supplementary record from the College after giving "further consideration to the question whether public notification is required in this case under section 39.3(1)(b)…"

[80] On January 11, 2018, the Review Board Chair granted the latter direction:

> … the College has identified the issue of public notification that was not before the Inquiry Committee when it rendered its decision. There is no benefit to the parties nor is it in the public interest for the Review Board to review a matter that is essentially now incomplete. Accordingly prior to directing this matter to a hearing the Review Board authorizes the College to file a Supplementary Record of Investigation in this matter, on the issue of public notification, after the Inquiry Committee determines the issue. The additional Record generated by this process will be incorporated into this review process and will be reviewed by the Review Board. The Supplementary Record is due by March 16, 2018.

[81] On March 21, 2018 I ruled that the portions of the Registrant's clinical file relating to the BASC-3 test would be received in confidence to the exclusion of the Complainant: Decision No. 2017-HPA-157(a) (2018 BCHPRB 12).

C. The Supplementary Record and Disposition

[82] On March 13, 2018, counsel for the College provided the Supplementary Record with respect to its consideration of the issue of public notification.

[83] The Supplementary Record included a January 10, 2018, letter from the College to the Registrant asking her to advise "whether or not you will consent to public notification," and if not, to provide written submissions.

[84] The Registrant did not consent, and through counsel, provided her written submissions to the College on January 25, 2018.

[85] Counsel's letter raised concerns about the process that was underway, stressed that the Registrant did not consent to public notification of the Resolution Agreement, made legal submissions that s.39.3(1)(b) of the Act is not engaged here, and stated that "in signing the Resolution Agreement, [the Registrant's] understanding was that there would not be a public notification" unless and until she chose to do further family law forensic work, at which time she would "advise the College accordingly and would place herself under a registrant appointed by the College to supervise the family law forensic work and, at that point in time, a limitation on [the Registrant's] practice would occur and be entered on the College register." (emphasis in original)

[86] The Supplementary Record also set out the Inquiry Committee's February 13, 2018, disposition which set out its conclusion that "public notification is not required in this case."

[87] The February 13, 2018, Disposition found that s.39.3(1)(b) of the Act would require public notification only if the Respondent's undertakings and consents under s.36(1) were in relation to a "serious matter" as defined in s.26 of the Act. The Committee determined that the complaint was not in relation to a serious matter, as "given the isolated nature of the allegations, the most likely outcome would have been a reprimand, given the isolated nature of the allegations, the circumstances in which they arose, and the low likelihood that concerns identified in this case will ever recur in the Respondent's practice, as well as the Respondents' lack of any disciplinary history with the College." The Committee described the allegations as "an isolated lapse in judgment by the Respondent to embark on an engagement that was outside her core area of professional competence," and found that if the matter had gone to the Discipline Committee, the matter would appropriately be concluded with a reprimand, and a warning to comply with Standards 3.5 and 3.26 of the *Code of Conduct*, but without the need for other formal limits or conditions.

[88] The Inquiry Committee added that undertakings and consents were not "limits or conditions" that would be included on the Register unless she chose to start accepting referrals for family law assessments.

[89] The Committee also made the following statements, which appeared to reach beyond the specific issue of s.39.3 of the Act into a more general statement of its views which were not expressed as such in the Investigation Report:

> It is also important to recognize that the Inquiry Committee has not identified any concerns about the Respondent's clinical practice, and that the concerns identified in the Complaint Investigation Report were only in relation to an isolated engagement to perform an assessment outside the Respondent's actual area of practice. The Committee is satisfied from its review of the investigative file that the Respondent undertook this engagement based on a good faith belief that the family had no other

practicable options for alternate services in [a region of BC] to assist in responding to the child's distress. The Committee is also satisfied that it was the Respondent's good faith belief that she had obtained adequate consent from the child's mother to proceed with the engagement…

In the circumstances, the Inquiry Committee considers that the public interest was most effectively served by confirming the Respondent's voluntary agreement to self-limit her practice, without the need to require any public notification unless and until the Respondent ever ceases to self-limit. If the College had required public notification in this case as a condition of the Respondent's Resolution Agreement, it would have made it less likely that the Respondent would have voluntarily agreed to the terms of the agreement, which would not, in the Inquiry Committee's view, have best served the public interest.

D. Panel's request for Stage 2 submissions

[90] On June 21, 2018, I directed that this application proceed to Stage 2, issued procedural directions, and without limiting the scope of the parties' submissions, requested that the Registrant and the College respond to the following:

(a) Kindly address how the public is protected by the Registrant's undertaking in this complaint, which undertaking:

i. is not listed as a limitation or condition of the Registrant's practice on the College's website;

ii. does not appear on the College's website under "Public Notifications"; and

iii. allows the Registrant to choose at a future time to take action that would only then result in public notification of limitations on the Registrant's practice under s. 39.3(1) of the Act.

(b) In the Supplementary Record, the College references the further disposition of the Inquiry Committee in this matter specifically addressing the issue of public notice. The Inquiry Committee determined that it was not necessary to notify the public under s.39.3 of the Act stating rather that the College's register would be amended at the time the Respondent changes her mind about her area of practice. Section 39.3(1)(b) of the Act provides that the public must be notified in relation to a "serious matter" as defined by s.26 of the Act. Kindly comment on how there can be authority to give public notice in the future but not at present?

(c) Although this complaint includes questions about the appropriateness of the Registrant administering the BASC-3 test to the Child by allowing the BASC-3 test to be completed by the Child in the home of one of the Child's parents without the presence of the Registrant and the Inquiry Committee's disposition acknowledged this concern, the Inquiry Committee did not address the validity of the opinion reached by the Registrant utilizing the Child's BASC-3 test results obtained in this manner. Kindly comment on the reasonableness of the Inquiry Committee's disposition given this omission.

(d) The Registrant entered into the Undertaking that fulfilled the Inquiry Committee's requirements as set out in the disposition on May 10, 2017. However the Minutes of the Inquiry Committee indicate that the Inquiry Committee did not

finally address this matter until November 30, 2017, when it ratified the email motion passed on October 30, 2017. The Complainant was provided with the Undertaking on October 30, 2017. Please comment on how this process meets the requirements of section 36 (1.1) of the Act.

E. Supplementary submission by the College

[91] On November 20, 2018, while this matter was on reserve, and after receiving written submissions from all parties, the College wrote to the Review Board drawing the panel's attention to the British Columbia Supreme Court decision in *College of Physicians and Surgeons v. Health Professions Review Board*, 2018 BCSC 2021. The College submitted that that decision confirms that the Review Board must defer to the Inquiry Committee's interpretation and application of the term "serious matter" as defined in s.26 of the Act, that it is not open to the Review Board to substitute its own "correct" interpretation, and that the definition of "serious matter" does not turn on the seriousness of the outcome for a complaint, but rather turns on the regulatory consequence under s.39 of the Act that would ordinarily result from the conduct complained of if it was admitted or proven. College counsel states that while the court decision focused on "serious matter" as it defines the Registrar's jurisdiction under s.32(3)(c) of the Act, the court's reasoning is equally applicable to the use of the term "serious matter" in 39.3(1)(b) of the Act concerning publication.

[92] After giving the other parties an opportunity to respond to the College's submission, the Registrant advised that she supported the College's submission. The Complainant did not provide a submission.

IV REVIEW BOARD STATUTORY MANDATE

[93] The Review Board exists in part to provide, upon an application for review by a Complainant, impartial and objective reviews of complaint dispositions of Inquiry Committees of the health profession colleges of British Columbia. These are reviews of dispositions and not fresh examinations of complaints. In completing a review, I examine the entire Record provided by the College and consider the Statement of Points with attachments provided by the College, the Registrant and the Complainant. My role is limited to reviewing the adequacy of the investigation and the reasonableness of the disposition by the Inquiry Committee. This is set out at s.50.6(5) of the Act:

> **50.6(5)** On receipt of an application under subsection (1), the review board must conduct a review of the disposition and must consider one or both of the following:
>
> (a) the adequacy of the investigation conducted respecting the complaint;
>
> (b) the reasonableness of the disposition.

[94] The powers of the Review Board for the conduct of reviews are set out in s.50.6(8) of the Act which states:

> **50.6(8)** On completion of its review under this section the review board may make an order:
>
> (a) confirming the disposition of the inquiry committee;
>
> (b) directing the inquiry committee to make a disposition that could have been made by the inquiry committee in the matter; or

(a) sending the matter back to the inquiry committee for reconsideration with directions.

V ADEQUACY OF THE INVESTIGATION

[95] The test governing the adequacy of an investigation has been considered in numerous Review Board decisions. The most oft-cited statement is from Review Board Decision No. 2009-HPA-0001(a)-0004(a) (2010 BCHPRB 6), at paras. [97] and [98]:

> [97] A complainant is not entitled to a perfect investigation, but he or she is entitled to adequate investigation. Whether an investigation is adequate will depend on the facts. An investigation does not need to have been exhaustive in order to be adequate, provided that reasonable steps were taken to obtain the key information that would have affected the Inquiry Committee's assessment of the complaint.
>
> [98] The degree of diligence expected of the college – what degree of investigation was adequate in the circumstances – may well vary from complaint to complaint. Factors such as the nature of the complaint, the seriousness of the harm alleged, the complexity of the investigation, the availability of evidence and the resources available to the college will all be relevant facts in determining whether an investigation was adequate in the circumstances.

[96] My role in assessing the adequacy of an investigation is to determine whether the Inquiry Committee's investigation provided it with sufficient information to assess the particular complaints made against the Registrant. It is not my role to reinvestigate the complaint.

[97] In this case, the investigation was adequate. Not only did the Inquiry Committee obtain complaint material from the Complainant (including the Provincial Court transcripts), it obtained the Registrant's file notes as they relate to this matter, and it allowed the Complainant and the Registrant to review and respond to each other's submissions. All this was done before resolution discussions commenced, which meant that the discussions took place with benefit of an adequate investigative record.

[98] It is also clear that the Inquiry Committee was kept updated regularly by College staff, and that it asked its own questions of the Registrant in its August 2016 letter requesting her response. When the Application for Review alleged that there was no public record of the Resolution Agreement, the Inquiry Committee took the additional step of seeking further submissions from the Registrant and issuing a Supplementary Disposition.

[99] There is no record of the resolution discussions that followed the College's February 7, 2017, letter to the Registrant to discuss potential resolution, though counsel for the College did advise in his submission that the Registrant "did not accept the Inquiry Committee's initial proposal. Instead, she and her legal counsel…engaged the College in further negotiation. This led ultimately to [the Registrant] signing a modified version of the Resolution Agreement on May 10, 2017, providing undertakings and consent to action under s.36(1) of the Act, subject to the Inquiry Committee's final approval."

[100] While the details of the negotiations have not been shared, it has been held that settlement discussions are privileged: Decision No. 2016-HPA-199(b) (2018 BCHPRB

10). This privilege does not prevent the Review Board from reviewing the reasonableness of the final Resolution Agreement, as follows in the next part of these reasons.

[101] The Complainant questioned the adequacy of the investigation with reference to the delay between the May 2017 Resolution Agreement (and the advice he received at that time that the College had "reached terms" with the Registrant) and the notice he received in October and November 2017 of the actual agreement and the letter of regret, together with the Investigation Report.

[102] The Complainant has raised a legitimate concern as to whether the College's process complied with the statutory duty set out in s.36(1.1) of the Act[3]. On the facts here, however, it is my view that any failure to comply with the duty in s.36(1.1.) did not render the investigation inadequate. The delays were regrettable and warrant a serious review by this College as to how best to comply with s.36(1.1.)[4]. However, nothing in the Record suggests that the delays impaired the completeness or integrity of the investigation from an evidentiary or informational perspective. While it is always possible for an investigation to be more thorough, it is my view that the investigation in this case was adequate, in the sense that reasonable steps were taken to obtain the key information necessary to be capable of rendering a reasonable disposition.

VI REASONABLENESS OF THE DISPOSITION

[103] The next issue is whether the disposition was reasonable.

A. Standard of review

[104] The first issue is the standard of review. On the surface, addressing this issue is simple. By statute, the standard of review is the "reasonableness of the disposition": s.50.6(5)(b) of the Act.

[105] The more difficult question is how the reasonableness standard should be applied, particularly in this context, where the complaint has been disposed of by way of a resolution agreement between the College and the Registrant.

---

[3] Section 36(1.1) states: "If a consent or undertaking given under subsection (1) relates to a complaint made under section 32 (1), the inquiry committee must, within 30 days of the consent or undertaking being given, deliver to the complainant a written summary of the consent or undertaking advising the complainant of the right to apply for a review by the review board under section 50.6." (emphasis added)

[4] Counsel for the College submitted that even after the Registrant signed the Agreement, the College "still considered the resolution to remain subject to final approval by the Inquiry Committee, in accordance with the College's usual investigative procedures, along with the Complaint Investigation Report to be prepared for the Committee's review and approval." While it makes sense for the Committee not to approve a resolution agreement before it has read and approved the Complaint Investigation Report, the College would do well to make it clear to complainants and registrants that a consent or undertaking is not really "given" until the Committee has decided to accept the terms on which it is proposed to be given. This would ensure compliance with s.36(1.1) and prevent the accusation or appearance that the Committee, in "approving" an agreement, has engaged in after-the-fact "bootstrapping" of an agreement its staff entered into without prior approval by the Inquiry Committee, or that the only matter really under consideration was the wording of the Investigation Report and not the approval of the agreement itself.

[106] Citing *College of Dental Surgeons of British Columbia v. Health Professions Review Board*, 2014 BCSC 1841, the College submits that the Review Board must apply "the same common law reasonableness standard as that applied by the courts on judicial review, as articulated in *Dunsmuir v. New Brunswick,* 2008 SCC 9." It says that the Review Board has no ability to determine the "degree of deference" that it considers appropriate to afford an Inquiry Committee disposition.

[107] I do not find it productive to engage in abstract discussions about "degrees of deference," to approach reasonableness as if was some sort of self-applying formula, or to pretend that the Review Board is simply a mini-judicial review court. Talking about degrees of deference can be confusing. If reasonableness was self-applying, one would expect to see far less disagreement within our judiciary in describing and applying the test. If the legislature intended the reasonableness test to be applied by a court, one would think it would have conferred the function on a court, as it has done in other parts of the Act. The legislature, in creating the Review Board and giving it exclusive jurisdiction to apply the reasonableness test, must have expected the Review Board to apply the reasonableness test from its specialized perspective and expertise given our knowledge of how college complaint processes operate. As has been said, reasonableness takes its colour from the context. This includes our responsibility to assess, from our unique vantage point, whether remedial steps taken by the Inquiry Committee, given its role, reasonably achieve the paramount duty to serve and protect the public and the public interest (Act, s. 16).

[108] As noted in *Dental Surgeons*, the Review Board cannot interpret reasonableness to mean "correctness," except where there is only one reasonable answer. Reasonableness requires that the Review Board afford deference to the judgments of the Inquiry Committee and not to merely substitute its judgments for those of the College. But deference does not mean abject submission, even to a consent agreement.

[109] In Decision No. 2009-HPA-0027(a) (2009 BCHPRB 5), the Review Board discussed the significance of the legislature's decision to make consensual resolutions subject to review by the Review Board:

> [32] These points lead naturally to a consideration of the second key policy issue the Legislature was required to address in the reform package – namely, the types of dispositions that ought to be amenable to review by a complainant. On that issue, the Legislature has significantly expanded the classes of dispositions complainants are now allowed to challenge. Of particular interest to the arguments under consideration on this application, the Legislature has, for the first time, given complainants the statutory right to challenge consensual resolutions made between a college and registrant at the internal college level.
>
> [33] This aspect of the reforms recognizes that professional health colleges have in recent years begun to promote and encourage consensual and negotiated resolutions to professional conduct issues. There are many benefits to these processes. Difficulties arise however when such processes exclude the participation of the complainant. Transparency, accountability and legitimacy are not enhanced when a private arrangement is arrived at behind closed doors between a college and registrant, to the exclusion of the complainant who initiated the complaint and who is advised only of the end result.

> [36] A close reading of ss. 36 and 37.1 makes clear that many of the dispositions the Legislature has decided to open up to challenge by a complainant are dispositions arrived at after discussion and negotiation between the college and the registrant. The remedies open to the Review Board on a review of any of these dispositions include directing the inquiry committee to make any order that could have been made by the inquiry committee in the matter, which includes the issuance of a citation. The legislative interests at play here are clearly transparency and accountability.

[110] Consensual dispositions are entitled to deference. The reasonableness test recognizes that there is rarely "one right answer" when it comes to exercising the discretion in ss.33(6) and 36(1) of the Act in the public interest. The Inquiry Committee is also rightly granted reasonable latitude in arriving at resolutions in the interests of finality and cost, and avoiding unnecessary discipline proceedings. I accept the College's submission that a resolution will not always reflect an Inquiry Committee's "first choice of outcomes."

[111] At the same time, consensual dispositions are subject to review, and the Review Board has been given the mandate to intervene where the disposition falls outside the realm of reasonableness. Reasonableness requires deference, but it cannot mean immunity from review. In this regard, I refer to and adopt my discussion of reasonableness review in Review Board Decision No. 2017-HPA-045(a) (2018 BCHPRB 6) at paras. [72-76]. I also find it helpful to apply the approach to reasonableness set out in Decision 2015-HPA-G21 (2016-BCHPRB 71). In that case, after making reference to both s.33(6) and s.36 of the Act, quoted earlier in these reasons, the Review Board stated:

> [210] These provisions give the Inquiry Committee room to consider a wide range of informal options where it finds that substandard practice warrants regulatory criticism. The Inquiry Committee may decide that regulatory criticism is enough. Or it may take informal steps beyond that. It may remind the registrant of its expectations. It may seek an in-person meeting with the registrant to express the Inquiry Committee's concerns and follow up on whether those concerns have been met. It may ask the registrant to consent to its request not to repeat the conduct, to take educational courses or even consent to a reprimand. It might, as in Ontario, request a "written report" addressing the proper circumstances and method by which to perform the procedure: A.H. v. M.H.L., 14-CRV-0021. In choosing between any of these steps, the Inquiry Committee is obviously well advised to consider any relevant past conduct history in its files: Act, s.39.2.
>
> [211] The key point is that since only a small number of formal citations are issued each year, the Inquiry Committee's decisions about what informal actions to take or recommend are obviously critical to protecting the public.
>
> [212] The Review Board's role is to determine whether the disposition was reasonable. While the Review Board rarely intervenes with such dispositions, if the disposition was unreasonable - for example because it cries out for an explanation, or shows a failure to consider key factors, or shows a clear lack of proportion in its statutory duty to protect the public - the Review Board can return the matter to the Inquiry Committee or issue its own disposition. (emphasis added)

[112] In my view, this approach is appropriately applied to the disposition here. This approach is deferential and is focused on identifying any fundamental errors that would cause the disposition to fall below the minimum reasonable standard.

B. Was the disposition reasonable?

(i) What was the agreement?

[113] The disposition in this case was the approved May 11, 2017, Resolution Agreement between the College and the Registrant, as ratified by the Inquiry Committee's on November 30, 2017, when it approved the Investigation Report. The Agreement had these key elements:

(a) A letter of regret, which contained no actual apology or acknowledgement of substandard practice. Instead, the letter explained that all of the Registrant's actions were based on what she "perceived to be in the best interests of the child", stated "if [she] could do things over" she would make the report's limitations clearer and "reach out to you", and stated: "If I did these things my opinion might have been different". The expression of "regret" was not the registrant's own statement of regret at her poor practice. It was: "…I regret the experience you had in relation to my assessment." The College, not the Registrant, sent the letter to the Complainant.

(b) An agreement carefully designed to avoid any publicity through an agreement structure whereby limitations on her practice, included on the College Register, would only exist at the "point" where the Registrant "changed her mind" or was otherwise "obliged to respond" to "a matter that is family law related." Until that point, the agreement provided that the Registrant would "voluntarily self-limit" her practice and no conditions would apply.

(c) Should the Registrant change her mind or be obliged to respond to a matter that is family law related, the Registrant would "place myself" under supervision by a College approved registrant who would be given a copy of the complaint file, follow the supervisor's directions "related to the completion of any additional information and training" and be responsible for supervision costs at the rate of $160/hour.

(d) The Registrant agreed to waive any right to take legal action in relation to any of the limitations, conditions or restrictions contained in this Agreement and agreed that a failure to comply with the Agreement constitutes professional misconduct.

(e) An agreement that the terms of the agreement could not be varied without (or, could be varied with) "the express written consent of the Registrar on behalf of the Inquiry Committee … and me."

(ii) The disposition was unreasonable

[114] As noted above, the Review Board has held that "a disposition will be unreasonable where cries out for an explanation, or shows a failure to consider key factors, or shows a clear lack of proportion in its statutory duty to protect the public."

[115] In applying this test, the Resolution Agreement cannot be considered in isolation. It must be considered in light of the Record and in light of the reasons that were given by the Inquiry Committee. The reasons in this case are reflected in the ratified Investigation Report and its February 13, 2018, Supplementary Disposition.

[116] Taking all this information into account, I find that the disposition was unreasonable on several grounds.

(iii) "Isolated Lapse in Judgment"

[117] It was unreasonable for the Inquiry Committee to describe the complaint as referring to an "isolated lapse in judgment by the Respondent to embark on an engagement that was outside her core area of competence."

[118] As a professional psychologist whose practice contained no limitations, the Registrant was subject to all relevant College standards, regardless of her location in the province. To describe as "an isolated lapse in judgment" a *series* of actions involving several College standards (including standards relating to objectivity, sufficiency of information and informed consent) because this was what College counsel described as a "one off" retainer, or what the Inquiry Committee said was "outside her core area of competence," is plainly unreasonable. Such an approach unreasonably fails to give primacy to the protection of the public, because it glosses over multiple breaches of standards and suggests that the public is entitled to less protection when a registrant is practicing outside her core area of competence or is located in a part of the province where services are not as widely available.

[119] From a public protection perspective, it would be absurd to suggest that a lawyer whose core area of competence is family law, and who ventured into a single corporate transaction where she committed numerous breaches of Law Society standards committed only an "isolated lapse in judgment" because she was doing a "one off" file practicing outside her "core area of competence." It would be unreasonable there, and it is unreasonable here, because it fails to focus on the nature of the standards in issue, thereby failing to give primacy to the protection of the public. The fundamental public expectation is that professionals are qualified to a minimum level of competence and conduct. This is the very nature of professional standards, which are articulated separately because they involve distinct professional obligations: the Act, s.16(2)(g). Such standards are carefully created by College boards, and they reflect that the work of professionals can profoundly affect the public, as the facts of this case vividly demonstrate. If a professional does not feel qualified to perform particular work, then that is the time for the professional to "voluntarily self-limit." From a public protection standpoint, which is still part of the Inquiry Committee's screening role, it is not reasonable to use the broad label "isolated" to justify a regulatory posture that emphasizes the "one off" nature of professional misconduct as an "isolated lapse in judgment."

[120] The term "isolated engagement" also unreasonably obscures the following key facts, which were common ground in the Record but which did not feature in the Inquiry Committee's reasons:

(a) The Registrant continued to provide an opinion for the Alberta court dated April 2, 2016, even after she had been recommended on February 27, 2016, by a colleague in Alberta to contact the Complainant. The Child's mother provided the Complainant's contact details immediately but the Registrant neither obtained the Complainant's consent to her involvement nor did she obtain information from the Complainant.

(b) The Alberta Court refused to accept the Registrant's evidence given substandard methodology, suspended the Complainant's contact with the Child on April 4, 2016, and ordered a child assessment report. Despite this, the Registrant continued to correspond with the mother's BC lawyer.

(c) The Registrant admitted that she changed the language of the danger to the Child were he to be in contact with the Complainant by referencing the risk of suicide in the April 8, 2016, correspondence to BC counsel for the mother when this had not been her opinion only days before.

(iv) Failure to reasonably consider the allegation about the "suicide" reference

[121] Even if the Registrant's actions in relation to the Alberta court hearing could reasonably be compartmentalized and characterized as "isolated", the Inquiry Committee could not have reasonably held that that was the end of the matter. When, in the face of the Court's judgment rejecting her evidence and with the court itself raising obvious ethical concerns, the Registrant persisted in providing opinions, and elevated the risk to speak of "suicide" without performing any additional assessment (after which she wrote "Hallelujah!" on learning of the BC Court's judgment), the conduct could not reasonably be characterized as an "isolated lapse in judgment".

[122] The Registrant's conduct in remaining involved and using the "suicide" language despite performing no additional assessment of the Child was a key part of the professional misconduct alleged on the complaint. The Complainant made specific reference to the Registrant's "*new assertions*" (not just involvement) in his May 1, 2016, complaint to the College, and made this key allegation clear beyond doubt in the details of his November 23, 2016, submission to the College.

[123] The Investigation Report did not specifically address this allegation, which allegation was about much more than what the Investigation Report described as "obtaining consent," "contacting the complainant," "continuing to have a professional role despite knowing it was problematic to offer services without contacting the Complainant" or lacking "appropriate judgment in conducting an assessment in the context of a custody dispute."

[124] Not surprisingly, on November 3, 2017, almost immediately after receiving the Investigation Report, the Complainant wrote to the College noting that the Investigation Report made no reference to this aspect of the Complaint. On November 9, 2017, the Registrar responded stating that this allegation was considered as part of Allegation #3:

> …that the Registrant continued to have a professional role with the mother and child despite knowing it was problematic to continue to offer services without contacting the complainant.

[125] That response failed to address that the complaint was not only that the Registrant continued to be involved. The complaint was about what she did when she continued to be involved. The latter was clearly not addressed in the Investigation Report:

> The Respondent replied that her last contact with [the Child] was on March 8, 2016, and her last contact with [the mother] was May 12, 2016. She said that during this last contact with [the mother], she advised her that she would not have any further contact with her.
>
> The Committee noted that the Complainant lodged his complaint on May 1, 2016, around the same time that the Respondent said she informed [the mother] that she would not have any further contact with her. <u>The issue of ongoing contact and involvement in the Complainant's family law matter appears to have been addressed by the Respondent. As such, no further action is warranted with regard to this allegation.</u> (emphasis added)

[126] In my opinion, this is not just a situation where the reasons are opaque. It is clear from the reasons that the Committee focused merely on the Registrant's continued involvement per se, and was silent as the core allegation that her conduct in "changing the words" to refer to suicide was a separate and serious concern. Perhaps this occurred because the Committee's report was drafted using the template set out in its July 28, 2016 questions to the Registrant, and without properly integrating the information the Complainant provided to the Committee on November 23, 2016. Be that as it may, it was a significant omission from the Committee's deliberations. It resulted in a failure to address a key allegation.

[127] Review Board Decision No. 2016-HPA-146(a) (2017 BCHPRB 106) recognizes that Inquiry Committees are not required to make explicit findings on each detail of a complaint allegation. It is a question of judgment in each case to determine whether the Committee has reasonably addressed the key complaint allegations:

> [63] It is recognized that inquiry committees are "screening" bodies, that their panels include medical professionals, that their time is limited, that they issue numerous decisions every year (sometimes numerous decisions per day), and that it would be too much to require them to deliver lengthy and detailed reasons as if they were the discipline committee. At the same time, these committees, which are supported by College staff, exercise an important part of the College's public interest mandate. The legislature's decision to make their dispositions subject to reasonableness review means that these panels are not to be seen as infallible or entitled to blind deference. While reasonableness review does not allow the Review Board to simply second guess inquiry committee medical judgments, reasonableness review would be meaningless if it did not at least require Inquiry Committees to reasonably explain themselves in a fashion commensurate with the realities of the complaint they are dealing with....
>
> [64] What is a reasonable explanation will obviously depend on the circumstances. As was stated in another Review Board decision, some dispositions "cry out for explanation": Review Board Decision Group File No. 2015-HPA-G21 (2016-BCHPRB 71) at para. [212].

[128] In this case, I find that the Committee failed to address a key issue, which it was unreasonable to gloss over under the general heading that she remained involved. The

Inquiry Committee should reasonably have understood that the new reference to "suicide" in all the circumstances was itself a significant new allegation. I cannot characterize this failure as simply falling within the Committee's latitude to determine what issues should be addressed in the disposition. I do not consider that it would have been an unreasonable added burden for the Committee to have specifically addressed this key issue in its reasons.

(v) *Failure to articulate a provisional assessment of the failure to comply with College standards*

[129] College counsel submits that the Inquiry Committee found that "there was merit" in the Complaint and was concerned about the Registrant's "apparent failure to comply with professional standards governing the conduct of such an assessment." I note the College's reference to "standards" in the plural.

[130] What the College submission does not clarify, and the Investigation Report fails to identify, is what standards the Inquiry Committee provisionally determined had been breached. While the College asked the Registrant on August 18, 2018, to respond to complaint headings with reference to specific College standards, its Investigation Report is more than ambiguous with regard to its provisional findings on those matters.

[131] The first allegation addressed in the Investigation Report was "That you did not obtain the Complainant's consent to assess his child in the context of a custody dispute." In its letter to the Registrant, the College cited Standards 4.1 - 4.5:

> 4.1 **No services without informed consent**
>
> A registrant must obtain adequate informed consent prior to providing psychological services unless otherwise provided by law, including this Code…
>
> 4.2 **Elements of informed consent**
>
> Although the required elements for informed consent may vary depending upon the particular circumstances, and additional elements may be necessary in certain circumstances, a registrant must ensure that the following general elements are satisfied when seeking informed consent:
>
> a) the client has the capacity to consent;
> b) the client has been informed of all appropriate significant information concerning the psychological service(s);
> c) the client has freely and without undue influence expressed consent;
> d) the client has been informed of the fees for the intended service(s);
> e) the client has been informed of the limits of confidentiality, including but not limited to those aspects of confidentiality limits expressed ins Standard 6.7;
> f) the consent has been obtained in writing where possible; and
> g) the consent of the client, or of other appropriate persons where the client is not legally capable of giving informed consent, has been appropriately documented in the registrant's practice record.

4.3 **Lack of capacity to give informed consent**

If an individual is not legally capable of giving an informed consent to a registrant, the registrant must:

a) obtain any necessary documentation to determine the identity of all parties with legal entitlement to provide or withhold consent for services;
b) obtain informed written consent from all of the parties specified in part (a) above;
c) provide an appropriate and understandable explanation of the services to the individual;
d) where possible obtain the individual's assent to the procedure or intervention; and
e) document the explanation and any consents and assents in the registrant's practice record.

4.4 **Informed consent and family law proceedings**

Subject to any court order or court direction, a registrant providing psychological services to parents or to children for the purposes of a family law proceeding, including such services as custody and access assessments, must, prior to providing the services:

a) determine any issues of custody and parental rights or status prior to or as part of obtaining informed consent from all appropriate persons; and

b) obtain and document all necessary consents prior to proceeding with the service.

4.5 **Informed consent continuing throughout psychological services**

A registrant must obtain informed consent from the recipient of his or her services before altering the treatment plan or changing any psychological services that he or she has agreed to provide to him or her.

[132] In its Report, the Committee stated as follows:

> The Inquiry Committee reviewed the November 10, 2015 Final Varied Parenting Order which [describes the guardians, which included the Complainant]. In addition it is clear from the Respondent's response to the Committee that she knew her assessment was going to be used in the Complainant's court litigation and that the custody dispute was extremely high conflict. <u>The Committee was of the view that this complaint highlighted areas where more careful consideration should have been given to the issues of parental consent and involvement and that she should refrain from conducting any psychological assessments in the area of family law, except as required by court order or subpoena and in that case would only do so under direct supervision of a registrant approved and appointed by the College. The Respondent signed an Agreement that included this as a term.</u> (emphasis added)

[133] It is difficult to interpret the statement: "this complaint highlighted areas where more careful consideration should have been given to the issues," as being a

provisional finding of an “apparent failure to comply with professional standards.” What were those areas? Was this just a matter of more careful consideration being required, or was it a provisional finding of an apparent breach of specific standards created by the College’s Board?

[134] The Committee’s finding on Allegation 2 (did not contact the Complainant…before offering an opinion) expressed the view that the Respondent “ought to have made attempts to gather information” from the Complainant. Again, there is no assessment as to whether what the Registrant “ought to” have done fell below one or more of the minimum standards it specifically referenced in the August 18, 2016, letter:

> 3.12 **Objectivity of opinions and interventions**
>
> A registrant must provide professional opinions and interventions in an objective and unbiased manner.
>
> 3.13 **Accuracy**
>
> A registrant must ensure that his or her reports and public statements accurately reflect the information provided or available to him or her, including providing any statements of limitations necessary to an accurate understanding of the information being provided.
>
> 3.14 **Opinion based on proper information**
>
> A registrant must base his or her professional opinions on:
>
> a) accurately represented information provided or made available to him or her; and
> b) adequate and appropriate information.
>
> **3.16 Basis for opinion**
>
> A registrant giving a formal professional opinion or recommendation about a client must do so only after direct and sufficient professional contact with, or a formal assessment of, that client.
>
> 3.18 **Limitations on opinions**
>
> A registrant must disclose any limitations regarding the certainty of his or her opinions, including any limitations respecting diagnoses, judgments, predictions, or formal recommendations that can be made about groups or individuals, or that relate in any way to the nature of the service(s) provided.

[135] While the Committee’s discussion identified the “further concern” that the Respondent relied in part on the results from the BASC-3 which she gave [the mother and child] to complete on their own, the Committee’s actual assessment was silent on this further concern. It was instead limited to expressing the view that the Respondent ought to have made attempts to gather information from the Complainant. Obviously, a complaint about the administration of a psychological test is a very different question from the question whether the Registrant ought to have made attempts to gather

information from the Complainant. The insufficiency of the reasons on this issue was not a mere technicality. It reflected a larger concern that the Committee unreasonably glossed over essential investigative issues in view of the Resolution Agreement that had been signed several months earlier.

[136] As noted, the Committee's discussion on the third allegation was deficient because it failed to address the key allegation that the Registrant engaged in misconduct when she elevated her risk assessment language and provided an opinion to the BC Court using the word "suicide" only days after having her evidence rejected for unethical procedures by the Alberta Court.

[137] As also noted above, the Inquiry Committee considered the Investigation Report several months after the Registrant signed the Resolution Agreement following a negotiation process with College staff. However, that did not excuse the Inquiry Committee from making the key investigative findings, within its screening role, that were necessary *before* deciding whether to approve it. It is only by making such assessments that the Committee can, in a meaningful, systematic and reasonable fashion, determine whether the resolution it has been presented with should be accepted.

[138] I do not wish to be taken as suggesting that Inquiry Committees are required to couch all of their findings with reference to the specific term of a Code of Conduct as if the Code was some sort of charging document. However, when the Investigation Report in this case is reviewed in its totality, it is plain that it glossed over the key assessments it was required to make when it determined that the Agreement was "appropriate to address the concerns [sic] that was raised." Where, as here, the Inquiry Committee identified relevant Code provisions and requested that the Registrant respond, and made provisional findings that warrant criticism, the Complainant (and, for that matter, the Registrant) were reasonably entitled to expect that the Inquiry Committee would sufficiently explain what it has found to be on-side or off-side with reference to those standards, so that the reader could understand its findings on the key complaint issues with reference to its standards and so that the Committee itself could ensure that the Resolution Agreement reflected its ultimate assessment of the complaint.

[139] In my opinion, the disposition was unreasonable because it was not based on an investigative report that set out the Inquiry Committee's key findings on the complaint issues. In my view, that fundamental defect compromised the Inquiry Committee's assessment of whether the Resolution Agreement should have been accepted.

(vi) *Dissonance between the Complaint Investigation Report and the Resolution Agreement*

[140] I also find that the disposition was unreasonable because it failed to explain why the Inquiry Committee accepted an agreement that gave the Registrant a choice whether to re-engage in family practice, when the Investigation Report specifically stated as follows:

> The Committee was of the view that this complaint highlighted areas where more careful consideration should have been given to the issues of parental consent and involvement and that she should refrain from conducting any psychological assessments in the area

> of family law, except as required by court order or subpoena and in that case would only do so under direct supervision of a registrant approved and appointed by the College. The Respondent signed an Agreement that included this as a term…
>
> The Committee requested and the Respondent agreed to a term in the Resolution Agreement, whereby the Respondent would refrain from accepting referrals for assessments for the courts for family law related purposes as noted above. (emphasis added)

[141] Nowhere in the Report is it contemplated that the Registrant should have the right to "change her mind." In my view, it was unreasonable for the Inquiry Committee to accept, or at least to fail to explain why it accepted, a Resolution Agreement that differed materially from its regulatory view that she refrain from conducting psychological assessments except as required by court order. While I accept that the "change of mind" provision is subject to the same supervision conditions, that does not change the fact that the Inquiry Committee's reasons do not contemplate the Registrant having the choice whether to undertake further family law assessments. In the face of that stated desire by a registrant, a reasonable regulator might well propose that the person take courses suitable to the Committee before it is prepared to endorse an agreement reflecting that choice. I am left with no guidance as to the Committee's thinking here, and I am not prepared to speculate based merely on the fact that it endorsed the Agreement given what it said.

(vii) The letter of regret

[142] As noted above, the Inquiry Committee approved the "letter of regret," which contained no actual apology, insight or acknowledgement of substandard practice. Instead, the letter explained that the Registrant's actions were based on what she "perceived to be in the best interests of the child," stated "if [she] could do things over" she would make the report's limitations clearer and "reach out to you," and stated: "If I did these things my opinion might have been different." The expression of "regret" was not the registrant's own statement of regret at her poor practice. It was: "…I regret the experience you had in relation to my assessment." The College, not the Registrant, sent the letter to the Complainant.

[143] Given the absence of any clear assessment by the Inquiry Committee in connection with the College standards on which it asked her to comment, it is not surprising that the Registrant, who maintained throughout the College investigation that she acted in accordance with standards, did not acknowledge regret arising from substandard practice. In my opinion, the Inquiry Committee's acceptance of a letter of regret that failed to acknowledge any substandard practice only reinforced the unreasonableness of the disposition in the context of the other serious flaws I have identified. Such a letter, detached from any clear statement of insight or acknowledgement by the Registrant and detached from any clear finding on which the Committee itself was critical, unreasonably failed to satisfy the paramount duty to protect the public and the public interest.

(viii) The decision to keep the Resolution "private" unless the Registrant chose to or was required to practice

[144] The College concedes that a resolution agreement can have the effect of imposing a limit or condition on a registrant's practice under s.21(2)(c) of the Act. The College submits and the Registrant agrees that this is exactly what would happen in this case under the Resolution Agreement if the Registrant chose or was required to conduct another family law assessment. However, they also submit that the voluntary self-limitation clause is not itself a limitation imposed under the Act.

[145] I am prepared to accept that the Inquiry Committee reasonably concluded that the voluntary "self-limit" in the agreement was not, under s.21(2)(c), a "limit or condition imposed under the Act*"* and thus did not have to go on the register. That was clearly the parties' intent.

[146] However, given the Committee's clearly expressed view that the Registrant "should refrain from conducting any psychological assessments in the area of family law, except as required by court order or subpoena," it was in my view unreasonable to approve a Resolution Agreement that was structured so as to avoid articulating on the register limits on the Registrant's practice as a precondition to future practice.

[147] I agree that there needs to be room for "give and take" in resolution discussions, and that a public record is significant from the perspective of a registrant. However, reasonable resolution agreements take into account, first and foremost, the interests of the public. The regulatory assessment that a registrant should not practice in a particular area is very significant. While creative drafting designed to avoid a notation on the register protects the registrant and simplifies the making of an agreement, a regulatory assessment that a registrant should not practice in a particular area should reasonably be regarded as being paramount to a registrant's privacy interest.

[148] The College has emphasized that the Inquiry Committee cannot *impose* limits and that if it did not agree to this condition, there might have been no Resolution Agreement. The Committee stated that "if the College had required public notification … it would have made it less likely that the Respondent would have voluntarily agreed," and that this was not in the public interest.

[149] It is true that the Inquiry Committee can only propose, not impose. However, it is not the case that the public interest can only reasonably be protected by a resolution agreement. Indeed, s.36(2) of the Act makes clear to both the Registrant and the College what can happen if a Registrant refuses a college's proposal to give an undertaking or consent that a limit be imposed on her practice:

> **36(2)** If a registrant refuses to give an undertaking or consent requested under subsection (1), or if a registrant fails to comply with an undertaking or consent given in response to a request under subsection (1), the inquiry committee may direct the registrar to issue a citation for a hearing by the discipline committee regarding the matter.

[150] In my view, it was not merely wrong, but unreasonable, for the Inquiry Committee to accept a resolution agreement that was structured so as to keep the agreement private by triggering "limits" only if the Registrant chose to or was required to practice in

that area in the future. It was unreasonable because it showed a clear lack of proportion in its statutory duty to protect the public.[5]

C. The Section 39.3(1)(b) issue

[151] In response to the separate question whether the College was obliged to notify the public under s.39.3(1)(b) of the Act, the College submitted that this question turns on whether the complaint is a "serious matter." The Inquiry Committee's February 13, 2018, disposition determined that if these allegations had been referred to the Discipline Committee, the most likely outcome would have been a reprimand rather than an order imposing any limits on the Registrant's practice. The reference to "the most likely outcome" refers to the definition of "serious matter" in s.26 of the Act:

> "serious matter" means a matter which, if admitted or proven following an investigation under [Part 3 of the *Act*], would ordinarily result in an order being made under section 39(2)(b) to (e)…

[152] As noted above, the College relies on *College of Physicians and Surgeons v. Health Professions Review Board*, 2018 BCSC 2021 to argue that the Review Board is required to defer to the College's assessment of what is a "serious matter" for the purposes of s.26 of the Act.

[153] I agree with the College's interpretation of the court's judgment. The College's interpretation of "serious matter" is subject to deference by the Review Board. In other words, it can only be set aside if it is unreasonable.

[154] This conclusion begs the question as to how reasonableness review is to be undertaken in respect of a test that is itself highly problematic. Though important questions turn on it (for example, the Registrar's power to dispose of complaints under s.32(3) and the duty to notify in s.39.3 of the Act), the test requires the College applying it to effectively make a prediction – to determine what remedy would "ordinarily result" in a Discipline Committee proceeding if the allegations were admitted or proven.

[155] As the Review Board is often reminded, the Inquiry Committee is not the Discipline Committee. How is the Inquiry Committee to apply such a test? One might expect that the Inquiry Committee would do so at least in part based on some objective measure such as the actual experience of the Discipline Committee of this or other colleges dealing with like matters. Yet because discipline hearings are so infrequently held by colleges, such information is difficult to come by. Indeed, I am not aware of any case where such data or principles has been presented to the Review Board in a "serious matter" case. Nor am I aware of any colleges having established a set of principles on which they base such assessments. All this raises the obvious concerns about college decision-making in this area taking place based on idiosyncratic assessments, or based on legally illegitimate factors such as administrative convenience or the college's assessment of the strength of a complaint whose merits

[5] The overarching duty of each College is expressed in s.16(1) of the Act: It is the duty of a college at all times (a) to serve and protect the public; and (b) to exercise its powers and discharge its responsibilities under all enactments in the public interest.

are supposed to be taken as "admitted or proven." This is precisely why the legislature provided for reasonableness review by the Review Board. Yet, when these concerns are combined with the suggestion that reasons are not required for "serious matter" assessments, the word "deference" can lead to the extreme result of colleges receiving practical immunity from reasonableness review, unless the Review Board can require reasons or intervene where it is obvious on its face that the college's assessment is unsupportable.

[156] In this case, I have not been given any comparator cases, but I have at least been given the Inquiry Committee's reasoned opinion as to "the most likely outcome" based on what the Committee considered to be the isolated nature of the allegations, the circumstances in which they arose, the low likelihood that they would recur, and the Registrant's lack of disciplinary history. This of course implicitly recognizes that other outcomes, such as a suspension or practice limitations, might be possible if the matter proceeded to Discipline Committee.

[157] For the reasons set out above, I question the reasonableness of at least one of the factors on which it relied - "the isolated nature of the allegations." However, based on the Registrant's lack of disciplinary history and the low likelihood that these problems would recur, I cannot say it is obvious that the Committee's assessment of the test in s.26 of the Act is unreasonable. Whether the Inquiry Committee itself wishes to revisit that outcome as being the most *appropriate* outcome after reconsidering its decision in accordance with these reasons will be for the Inquiry Committee to determine if it considers it appropriate to do so and if this matter is not eventually referred to the Discipline Committee.[6]

VII REMEDY

[158] Section 50.6(8) of the Act states:

> **50.6(8)** On completion of its review under this section, the review board may make an order
>
> (a) confirming the disposition of the inquiry committee;
>
> (b) directing the inquiry committee to make a disposition that could have been made by the inquiry committee in the matter; or
>
> (b) sending the matter back to the inquiry committee for reconsideration with directions.

[159] Based on my finding of unreasonableness, I find that it would be inappropriate to confirm the disposition, as I cannot conclude that the outcome would have inevitably been the same but for the reviewable errors I identified. My remedial options are therefore to send the matter back to the Inquiry Committee with directions, or to direct the Inquiry Committee to make a disposition that that it could have made. These choices are to be understood in light of the Inquiry Committee's powers in ss.33(6) and 36 of the Act:

---

[6] I note that under s.39.3 of the Act, a Consent Order under s.37.1 must be the subject of public notification. So must a determination by the Discipline Committee under s.39(1), and any order made by the Discipline Committee under s.39(2), including a reprimand.

33(6) After considering any information provided by the registrant, the inquiry committee may

(a) take no further action if the Inquiry Committee is of the view that the matter is trivial, frivolous, vexatious or made in bad faith or that the conduct or competence to which the matter relates is satisfactory,

(b) in the case of an investigation respecting a complaint, take any action it considers appropriate to resolve the matter between the complainant and the registrant,

(c) act under section 36, or

(d) direct the registrar to issue a citation under section 37.

36(1) In relation to a matter investigated under section 33, the inquiry committee may request in writing that the registrant do one or more of the following:

(a) undertake not to repeat the conduct to which the matter relates;

(b) undertake to take educational courses specified by the inquiry committee;

(c) consent to a reprimand;

(d) undertake or consent to any other action specified by the inquiry committee.

[160] I have seriously considered whether this would be an appropriate case to direct the Discipline Committee to act under s.33(6)(d) – to direct the registrar to issue a citation under s.37 of the Act. The issue of sub-standard professional conduct in relation to family court assessments is very significant for this College. The impact of a failure to comply with professional standards in this area is significant for all persons impacted by a report, and for the justice system generally. Whether or not the Inquiry Committee is correct in predicting that a "reprimand" would be the ordinary remedial outcome if the allegations were proven or admitted before the Discipline Committee, a reasonable person might well conclude that the issues are, from an objective perspective, sufficiently serious as a matter of public interest as to at least warrant a formal discipline hearing to have that issue determined. I note as well that this case would not be especially complex from an evidentiary perspective as the key evidence is not really in dispute.

[161] In the end, however, I have decided not to issue that direction as I do not believe a discipline hearing is the only reasonable outcome in this case. I have instead decided to craft a remedy that gives the Inquiry Committee the opportunity to address the reviewable errors I have identified in a manner that reasonably protects the public interest, but that keeps the Discipline Committee option open as a last resort.

[162] I have decided to send the matter back to the Inquiry Committee for reconsideration with the direction that this decision, in full, be placed before the members of the Inquiry Committee, and with these additional directions:

1. That the Inquiry Committee issue a new Investigation Report that addresses the deficiencies identified in Part VI, B, (iii) – (viii) of these reasons.

2. That unless the Inquiry Committee concludes following step 1 that it should direct the Registrar to issue a citation for a discipline hearing under s.37 of

the Act, the Inquiry Committee is directed to request in writing under s.36 that the Registrant provide at least the following consents and undertakings:

(a) That the Registrant will sign a new letter of regret, to be attached as a new Appendix "A," that acknowledges that the Registrant breached the standards the Committee identifies in its reconsidered Investigation Report,

(b) That the Registrant consents to the following limitations on her practice, to be registered under s.21(2)(c) of the Act:

- That the Registrant may not accept any new referrals for the conduct of any assessments for family law purposes except if obliged to respond to a matter that is family law related, and then only subject to the terms set out in paras. 3(b), 3(c) and 3(d) of the May 11, 2017, Resolution Agreement.

- That if the Registrant wishes at a future date to accept a referral to conduct an assessment for family law related purposes, she must first notify the College, undertake and pass those educational courses required by the College, and agree to whatever conditions the College thereafter requires as a condition of practice in the area.

3. That if the Registrant refuses to give the requested consents or undertakings referenced in para. 2, the Inquiry Committee must direct the Registrar to issue a citation under s.33(6)(d) of the Act on any finding that the Inquiry Committee assesses as having merit based on its reconsidered Investigation Report.

[163] I wish to make it clear that while para. [162] above sets out what the Inquiry Committee must "at least" request, the Committee is not limited in making additional requests or requests that are not in conflict with paragraph [162]. This would include requesting that the Registrant consent to a reprimand if the Committee considers that to be appropriate.

[164] In reaching this decision, I have considered the submissions of the parties and the relevant portions of the Record, whether referenced herein or not.

"Deborah Lynn Zutter"

Deborah Lynn Zutter, Panel Chair
Health Professions Review Board