

**In the Matter of *The Medical Professional Act, 1981*,
R.S.S. 1980-81, c. M-10.1**

**DR. JESSE LEONTOWICZ,
of Regina, Saskatchewan**

**HEARING OF THE DISCIPLINARY HEARING COMMITTEE
OF THE COLLEGE OF PHYSICIANS AND SURGEONS
OF SASKATCHEWAN**

**Saskatoon, Saskatchewan
May 5, 6 and 7, 2020**

DECISION

Before: Alma Wiebe, Q.C. (Chair)
Dr. Chris Ekong
Dr. Lorne Rabuka

Appearances: Rochelle Wempe, for the College of Physicians and Surgeons
Darren Kraushaar, for Dr. J. Leontowicz

I. INTRODUCTION

1. The Council of the College of Physicians and Surgeons of Saskatchewan (CPSS or the College) laid the following charge against Dr. Jesse Leontowicz:

You Jesse Leontowicz are guilty of unbecoming, improper, unprofessional, or discreditable conduct contrary to the provisions of section 46(o) of *The Medical Profession Act, 1981*.

The evidence that will be led in support of this charge will include some or all of the following:

- 1) You engaged in sexual intercourse with J.T. without her consent;
- 2) You applied physical force to J.T. without her consent;
- 3) You met J.T. on Tinder and went on a date on the evening of January 22, 2018.
- 4) You and J.T. went back to your apartment after the date. You and J.T. took your clothes off, kissed, you put a condom on, and engaged in consensual vaginal intercourse with J.T.
- 5) After some time you took the condom off. J.T. told you to put a condom back on and that she was not consenting to vaginal sex without a condom. You forced her to have vaginal sex without a condom.
- 6) Although J.T. consented to rough sex, after you took the condom off you held her down, hit her repeatedly causing significant bruising to her body, forced your penis into her mouth, and spit on her.

2. A Discipline Hearing Committee composed of Dr. Lorne Rabuka, Dr. Chris Ekong and Alma Wiebe (Chair) conducted a hearing into this charge on May 5, 6 and 7, 2020. Due to Covid19 physical distancing requirements, all witnesses were heard via videoconference. Counsel for both parties presented oral argument at the hearing and filed written submissions on May 13 and 15, 2020.

3. The Hearing Panel was advised that, because of Dr. Leontowicz' pending residency program, this matter required timely resolution. As a consequence, following deliberations, the Discipline Hearing Committee rendered its findings on May 22, 2020 with written reasons to follow. The Committee came to the following decisions:

1. The College of Physicians and Surgeons of Saskatchewan has met its onus of proving the allegations against Dr. Leontowicz on a balance of probabilities.

2. The proven conduct falls within Section 46(o) of *The Medical Profession Act, 1981* as being conduct unbecoming, improper, unprofessional or discreditable.

II. LEGISLATION/BYLAWS

4. Section 46(o) of the *Medical Profession Act, 1981*, SS 1980-81, c M-10.1 provides as follows:

Charges

46 Without restricting the generality of “unbecoming, improper, unprofessional or discreditable conduct”, a person whose name is entered on a register is guilty of unbecoming, improper, unprofessional or discreditable conduct, if he or she:

...

- (o) does or fails to do any act or thing where the discipline hearing committee considers that action or failure to be unbecoming, improper, unprofessional or discreditable;

III. EVIDENCE

5. The parties filed an Agreed Statement of Facts and Documents. All documents tendered at the hearing were consented to along with agreement as to the authenticity and accuracy of certain of the documents namely photographs and text messages. In addition two factual matters were agreed to:

(i) On or about January 22, 2018, Dr. Jesse Leontowicz went on a date with J.T. .

(ii) J.T. was a patient of Dr. Huse Kamencic, Gynecology and Pediatric Associates. Dr. Kamencic treated J.T. for endometriosis.

A. CPSS Evidence

6. The CPSS called five witnesses:

(i) **Dr. Lori Haskell**

7. Dr. Haskell, a clinical psychologist from Ontario, was qualified to provide opinion evidence on the neurobiology of trauma. Her report was included in the Agreed Statement of Facts and Documents filed by the parties.

8. Dr. Haskell testified she had not had any personal contact with either the Complainant or Dr. Leontowicz. While she had received a copy of the charge against Dr. Leontowicz, she had not reviewed any of the evidence in advance of giving her testimony. Like her report, her oral evidence was general in nature, providing an overview of the neurobiology of trauma with a focus on trauma resulting from sexual violence.

9. Dr. Haskell explained a traumatic event automatically activates the fear/defence circuitry in the brain triggering automatic reflexive reactions such as fight, flight or freeze which register both on a cognitive (conscious) level and an unconscious (physiological) level. The automatic physiologic response to danger/threat is the release of a flood of hormones: adrenalin and cortisol which allow the brain and body to focus all resources on the threat at hand. The executive functions of the brain (prefrontal cortex) are, concomitantly, temporarily lost. This impairs planning and decision-making as well as the brain's capacity to organize the experience into logical sequences. This inability/incapacity to plan or logically sequence an event explains why sexual assault victims may be unable to account for the decisions they made or did not make during and after the assault. Also, it helps explain why sexual assault victims often cannot give a chronological account of the assault.

10. Dr. Haskell testified that once the prefrontal cortex is turned off, a victim is left to respond only with reflex or habit. For women, as a result of their socialization, this may manifest as conduct designed to placate, appease and/or defer to a man's wishes in order to keep the peace and maintain a relationship. These coping responses and habits take the form of avoidance; making the other person's feelings and needs a priority; and/or difficulty identifying or naming what is happening or has happened to them as "sexual assault". She stated the flight or fight reflex reactions are the least likely responses by women to sexual assault because the perpetrators are most often men known to the victim, for whom they may care, or whom they may admire or even idolize – persons who are supposed to be trusted. The assault experience is therefore profoundly confusing and destabilizing.

11. Dr. Haskell also testified to the effect on memory of a highly stressful event. Some aspects of it may be "burned into our brains for the rest of our lives" as a result of the release

of “stress chemicals” which amend the encoding and consolidation (storage) of episodic memories. At the same time other aspects of the encoding and consolidation may be impaired, such as those requiring greater processing e.g. temporal order of events. Memory retrieval of a traumatic event occurs only afterwards when the victim is less stressed, rested and feeling safe.

12. Dr. Haskell, in the context of the neurobiological science of trauma response, discussed the commonly known “rape myths” e.g. that a woman who is promiscuous is untrustworthy; a promiscuous woman is more likely to have consented to the sexual acts in question; women who do not promptly disclose or report sexual assaults are lying; women who do not want to engage in sex will physically fight back and/or attempt to escape; women who use drugs or alcohol are responsible for sexual assaults perpetrated against them; and consent is continuous in intimate relationships.

13. Dr. Haskell explained that victims of sexual assault often do not report their experience immediately because they need time to acknowledge and integrate what has happened to them. This process is often delayed because of avoidance (deferring exposure to high levels of negative emotions such as anger, guilt, shame and sadness). She said some sexual assault victims may continue contact with the assaulter to neutralize the trauma, regain some control of the relationship and/or invite an acknowledgement of what took place and/or an apology. Dr. Haskell discussed the phenomena of cognitive dissonance, denial and dissociation in victims of sexual assault.

14. In cross-examination Dr. Haskell reiterated that stress hormones may remain in the body for hours after a traumatic event, as many as 96 hours at the outside, but rarely only a few hours. Disorganized thinking and inability to plan lasts for as long as the hormone flood continues. Cognitive dissonance (the disconnect between how one perceives someone and how you actually experience them) impairs the brain’s ability to integrate new information because it simply does not fit. This is not necessarily contingent on how long the victim and perpetrator have known each other.

15. Dr. Haskell testified that false reports represent 2 to 10 percent of all reported sexual assaults. False reports are those where the account of the assault is recanted or proven to be false.

16. Dr. Haskell acknowledged that many factors and variables, including childhood trauma, affect individual responses to sexual assaults.

(ii) J.T.

17. Ms. J.T. , age 26, and a resident of Regina, is the Complainant.

18. She testified she met Dr. Leontowicz in January 2018 on a dating site – Tinder. They chatted on Tinder for a few days and then arranged to meet in person on January 22, 2018 at Bodega Tapas Bar in Regina. At the time they met, Ms. J.T. knew Dr. Leontowicz was a 27 year old 4th year medical student.

19. Ms. J.T. testified she and Dr. Leontowicz spent approximately two hours at Bodega drinking beer (two each), eating and chatting about their respective families, histories and education. At her suggestion they retired to his apartment in his vehicle. She left her car near Bodega. She described Dr. Leontowicz as nice, trustworthy, a medical student who seemed to have it together. She said she enjoyed their time together at Bodega.

20. Ms. J.T. testified that at Dr. Leontowicz's apartment she, his roommate and Dr. Leontowicz chatted for a while, the roommate got her a beer and about 15 minute later she and Dr. Leontowicz went to his bedroom. She described the headboard of his bed as containing a colour-changing light which she remarked on. She started getting undressed. He said "Whoa, ok" and also began undressing. They kissed and moved onto his bed where she performed oral sex on him while on her knees in bed and with him standing beside the bed or kneeling on the bed. She testified she initiated the oral sex. He then put a condom on and penetrated her vagina with him on top and her lying on her back. She said, up to this point, all of these activities were consensual.

21. During intercourse he asked if she was okay with rough sex. She replied “sure” whereupon he immediately slapped her face lightly. She said she had not anticipated this and was shocked but not scared. He used his open right hand to slap her across her left cheek. He then “manhandled” her a bit, manipulating her arms and legs. She described this as rough but not uncomfortable.

22. The vaginal intercourse lasted five to ten minutes with him on top of her. He then turned her so that she was on her hands and knees, removed his penis from her vagina, got out of bed and took the condom off. She asked him what he was doing and said he needed to put it on. He informed her that he was “clean”. She said “I don’t care. Put the condom on”. He said “It’s ok” or “It’s fine”. She said “No” emphatically. During this conversation she said she was on her back, up on her elbows, looking at him. He crawled onto the bed to mount her again. She said “No. No.”. He then put his hand on her sternum so she could not move and penetrated her vagina. She said she was on her back trying to shimmy toward the headboard. He was on top of her with one hand on her sternum. He then began hitting her again, not playfully. She described him striking her hard approximately 50 times with one hand on her throat and the other drawn back and swinging with full force. All the while his penis, unshielded, remained in her vagina. She said he switched his hitting hand a few times, slapping her with both his palm and backhand in the face, jaw, cheeks and ears. She described herself as afraid, shocked, alarmed and not knowing what was happening. She said he was not squeezing her throat but his body weight was on her throat. She said she focused on breathing and bracing for the next blow, thinking “Please just finish. I want this over”. She said nothing and did not think to scream for help. She said this assault lasted five to ten minutes. She shimmied her body to the headboard. He pulled out, put his knees on her shoulders and pinned her down. He told her to put his testicles in her mouth which she did. He then grabbed her hair and torqued her neck back so hard she could not close her mouth. He forced his penis into her mouth and kept pulling her hair for approximately 30 seconds and then masturbated, ejaculating onto her face, mouth and eye. He also spat into her open mouth.

23. Ms. J.T. testified she consented to vaginal sex with a condom and rough sex meaning manhandling, harder thrusting, gentle slapping, spanking and hair pulling. She did

not consent to the infliction of pain and bruises. She said she did not consent to intercourse without a condom and to being “beaten to the point of seeing stars”.

24. Ms. J.T. denied having multiple “rounds” of intercourse. She said she has endometriosis so intercourse for her is always somewhat painful and very painful after the first time. She has experienced symptoms of endometriosis since the age of approximately 14 and was diagnosed with endometriosis in 2015. As a result, she always experiences discomfort with penile penetration. She can gauge by where she is in her cycle how much pain she will experience with intercourse. She said she had tried having multiple courses of intercourse per night and was unable to endure a second round of intercourse. She experienced pelvic floor spasms, had to take medications and lie on a heat pad and rest for a few hours. Even on good days she aches after penile penetration and has to use a heat pad.

25. Ms. J.T. testified to a vivid image in her head of Dr. Leontowicz with his arm outstretched “way back” behind him prior to hitting her. She described him having a “frenzied, manic” look on his face.

26. Ms. J.T. said, immediately after Dr. Leontowicz ejaculated in her face, he stood up, threw a towel on her face and rubbed her face with it. She said she lay there, then got up and went into his ensuite washroom. She said her face was stinging, red and blotchy. She commented “Oh my god, my face is so red” to which Dr. Leontowicz laughed. She said she splashed cold water on her face to rinse the semen out of her eyes and mouth. When she reentered the bedroom Dr. Leontowicz said “I hope I didn’t scare you. I’ve scared girls before”. He was smiling as he said this. Ms. J.T. said she did not respond. She lay down on the bed and they talked about sexual orientation in general and specifically about her bisexuality. He fell asleep about 20 or 30 minutes later. She remained in bed awake all night.

27. Ms. J.T. described herself as “very confused”, “afraid” and trying to reconcile the violence she had just experienced with the “really nice guy” and the good time she had earlier in the evening. She said she was “disoriented”. She wanted to go home but did not have her car. Also, she said she did not want to get up because she was afraid she

would wake Dr. Leontowicz and he would become angry because she was leaving. She described her thoughts as “jumbled”.

28. Ms. J.T. said she had set her alarm for an extra early hour which she thought was approximately 6:30. They dressed and Dr. Leontowicz offered her coffee. She declined saying she was in a rush. He drove her to her car. As they approached it she noted a traffic officer writing a ticket. She intervened and then went back to Dr. Leontowicz’s vehicle, gave him a peck on the cheek and went home. During the drive to her car they had “light” conversation, possibly about her work and his classes. She said at that time she had no plans to see him again.

29. Ms. J.T. testified that when she got home she showered and noticed bruises on her arms, legs and left jaw. She took photographs of the bruises and then went to work.

30. At the time Ms. J.T. was employed as a passport officer for the Government of Canada. She said she struggled to concentrate at work and was trembling, cold and “foggy”. She remained at work for approximately an hour during which she spoke to two of her coworkers/friends. Both knew she was going on a date the night before and asked how it had gone. She told them it was “weird” – she had a good time at Bodega but that he went crazy at his place. She showed them the bruises on her face. She told her friend, J.M., she was uncomfortable with how the date had gone and embarrassed to come to work with “sex bruises”. She was not ready to tell the whole story to her colleagues at that time. She also spoke to her manager, B.M. , telling her she was not feeling well. She then went home to bed.

31. Ms. J.T. said emotionally she felt “shocked and confused” about a nice date that had become a horrible experience. She was exhausted, numb, very conflicted, uneasy and did not know what to do. She said she called her sister to tell her about it.

32. Ms. J.T. testified that on January 24, 2018 she spoke to her manager, Ms. M., telling her she had been raped, felt conflicted and did not know what to do. Her

manager encouraged her to go to the hospital and the police station in order, at least, to document the bruising.

33. Ms. J.T. attended at the Pasqua Hospital Emergency Department in Regina during the evening of January 24, 2018 and reported the incident to the Regina Police Service on January 25 or 26, 2018. By that time she was “getting a better grasp of what had happened”. She recalled Dr. Leontowicz saying he had “scared girls before” and she thought perhaps she could prevent a similar experience for another woman. Ultimately, she was advised by the Regina Police Service lead investigator that no charges would be laid.

34. The photographs taken by Ms. J.T. and the Regina Police Service disclose bruising to her left jaw, under her right eye, on her upper left thigh/buttock (a cluster with the appearance of a hand print) and small bruises on the right shin, upper right arm and left ear.

35. On January 23, 24 and 25, 2018 an exchange of text messages occurred between Ms. J.T. and Dr. Leontowicz. This communication string is set out in full below:

Today 10:55 AM
Ms. J.T.

My jaw has an enormous bruise

Today 11:18 AM
Dr. Leontowicz
That's Wow

I'm so sorry ... But that's kind of hilarious

Today 11:36 AM
Also you should Text me 306 _____

Today 7:07 PM
Ms. J.T.

I don't think that's super hilarious [sad smiley face]

Dr. Leontowicz
Awe. I'm really sorry. I do kind of want to see the damage I've caused.

I hope it was still worth it [wink smiley face]

Tuesday January 23, 2018 – 7:32 PM
[photograph of Ms. J.T.'s left jaw]

Dr. Leontowicz:
Jesus. I'm sorry... [concerned smiley face]

[7:38 PM] How'd work go?

Ms. J.T.

[7:48 PM] It was rough! So exhausted haha

[7:49 PM] How was your day?

Dr. Leontowicz

[7:58 PM] Yea I can't imagine... I slept til noon. Just about to finish work, it was a great day actually

[8:09 PM] I feel bad. Can I bring you a coffee and naproxen?

Ms. J.T.

[8:20 PM] No, thank you. I took an Advil.

Dr. Leontowicz

[8:29 PM] Gotcha. Catch any terrorists today?

Ms. J.T.

No he didn't come back in, he was supposed to provide a statement today.

[9:57 PM] Sketchbag

Dr. Leontowicz

[10:40 PM] That's pretty alarming.

Wednesday, January 24, 2018

Ms. J.T.

[12:06 AM] When are you back from BC?

Dr. Leontowicz

[12:07 AM] Sunday

Ms. J.T.

[12:10 AM] Do you wanna hang out again with less physical violence lol

Dr. Leontowicz

[12:11 AM] Absolutely

[12:13 AM] I don't get in til super late Sunday, so how about we hang out/go on a date that week? Maybe we won't get drunk on a Monday again though ...

Ms. J.T.

[12:24 AM] Yeah that is beyond fair

Dr. Leontowicz

[12:29 AM] Good, I look forward to it [wink smiley face]

[1:10 AM] I have your bracelets fyi

Ms. J.T.

[10:04 AM] Oh shoot my chakras are gonna go way out of whack

Thursday, January 25, 2018

Ms. J.T.

[11:12 AM] Okay so the more I remember of Monday night the more I realize what a nut case you are. I definitely told you not to remove the condom. I definitely didn't say it was okay to ejaculate on my face and in my mouth and eye. I agreed to rough sex but that does not involve beating me about the face so hard that I am covered in bruises and I can't conceal them with all the makeup I own. I have bruises on my legs, face, arms, ass, and chest. My chest aches so badly from you holding me down. I went to the hospital and got a rape test kit so they have all of this documented. Don't ever fucking do that to anyone ever again. I still have the option to press charges and I'm still thinking about it. Infectious disease is going to contact you if I test positive for anything.

36. In her testimony, Ms. J.T. explained her suggestion that they “hang out again with less physical violence” was her clinging to the idea that they had had a nice time at Bodega and maybe that could happen again. She said she was also hoping she might get an apology from Dr. Leontowicz by sending him the photograph of her facial bruises. With time she came to realize the gravity of what had happened and never spoke to Dr. Leontowicz again after January 25, 2018.

37. Records of Mr. J.T.'s attendance at the Pasqua Hospital on January 24, 2018 describe the bruises noted above and a brief description of the incident with Dr. Leontowicz including Ms. J.T.'s objection to removal of the condom. The record states “When asked what her normal method of birth control is, the patient states she uses condoms and that she is consistent with their use”.

38. Ms. J.T. testified she contacted CPSS in July 2018. She was disappointed the Crown was not pressing charges and she wanted CPSS to know about Dr. Leontowicz's conduct towards her.

39. Ms. J.T. described the impact the January 22, 2018 incident had on her life as “huge”. She described tics, panic attacks, hypervigilance, tremors, nightmares, loss of self-confidence and fear of young, white men.

40. In cross-examination Ms. J.T. allowed it was possible, while in Dr. Leontowicz's bedroom, that she used her mother's Crave account and possibly suggested they watch Letterkenny on Crave.

41. Ms. J.T. acknowledged in her statement to the Regina Police Service that she did not reference oral sex but did in her CPSS interview, stating she was still confused when she gave her statement to the Regina Police Service and that it was difficult to relay something so traumatic.

42. Ms. J.T. allowed it was possible Dr. Leontowicz, after the first slap to her face, asked “That okay?” and that she said “Yes. Keep going”. She acknowledged that her statement to the Regina Police Service may have been slightly out of order i.e. she reported the first slap as a hard one.

43. Ms. J.T. acknowledged that neither before nor after Dr. Leontowicz removed the condom did he threaten her, apologize to her or ask her not to tell anyone. Likewise, she did not ask him to “dial it back” or say “don’t slap me”. She said she tried to move back to get him out of her (“shimmying away”) but did not protect her face during the 5 to 10 minutes of him hitting her.

44. Ms. J.T. denied giving Dr. Leontowicz oral sex more than once, having vaginal intercourse more than once and did not recall him performing oral sex on her or her scratching his back or choking him.

45. Ms. J.T. allowed it was possible she spoke to him after sex about her having endometriosis and being on medication. She denied getting on top of him when he was not wearing a condom. She also denied taking a Snapchat video while in his bed with the caption “sleeping with the hot doctor”. She said she may have taken a Snapchat at some point but not of the two of them in bed.

46. Ms. J.T. described herself as “notorious” for getting tickets and knew her vehicle would be ticketed at 7:00 a.m. She denied having this in mind the morning of January 23 until she saw her vehicle being ticketed.

47. Ms. J.T. acknowledged that the bruises on her thigh/buttock, shin and arm could have occurred during the consensual sexual activity between her and Dr. Leontowicz.

48. Ms. J.T. testified that she tried, the following morning, to cover her facial bruises with makeup and was unable to do so. She showed them to her colleagues at work but could not recall the details of what she told them, specifically whether she spoke about removal of the condom. She did not tell J.M. that Dr. Leontowicz punched her with a closed fist to the jaw. She said her grasp of what happened the night of January 22, 2018 evolved over time as her head cleared from the shock. It was easier to grasp the violence that had occurred than the violation of removal of the condom.

49. Ms. J.T. agreed she had no conversations with Dr. Leontowicz on January 22, 2018 about sexual intercourse being painful for her due to endometriosis. She said she agreed to rough sex, including hard thrusts. Intercourse is more painful for her with deeper maneuvers and some positions are better than others. Likewise some days are better than others but the pain increases with the length of the intercourse. Ms. J.T. testified she was concerned about STDs and pregnancy as a result of unprotected sex.

50. Ms. J.Y. stated, through counselling and reading, she learned her confusion post-trauma as well as her concerns about not being believed were normal. She learned that staying the night at Dr. Leontowicz's apartment and texting him later was classic post-rape behavior. A few months prior to testifying she was told CPSS was calling an expert in the neurobiology of trauma at the hearing.

51. Ms. J.T. denied seeking revenge as a motive for her complaint to the CPSS. She said she hoped to prevent Dr. Leontowicz from hurting other women, particularly vulnerable ones he may be treating as a physician.

(iii) J.M.

52. Ms. M, Ms. Thorarinson's coworker at the Passport Office, testified that on January 23, 2018 Ms. J.T. appeared at work tired, dazed and not herself. Ms. J. M. noted bruising on her jaw and a smaller bruise on her neck. When asked, Ms.

J.T.said she had been assaulted the night before by a guy she met online and had had nonconsensual (unprotected) sex with him. Ms. J.M. encouraged her to report to the Regina Police Service and the hospital. Ms. J.T.remained at work for part of that morning. She was “very shaken up” and had difficulty dealing with the public. She went home before noon.

53. Ms. J.M. described Ms. J.T. as normally cheerful, bubbly and friendly. On January 23, 2018 she was dazed, tired, kind of zoned out and not talkative. After January 23 she became anti-social.

54. In cross-examination Ms. J.M. stated she was told by Ms. J.T. that Dr. Leontowicz punched her in the face with a closed fist. She was told this on more than one occasion, most recently, several months ago. Ms. J.T. told Ms. J.M. the sexual incident with Dr. Leontowicz began with a condom being used and ended without him using a condom against her will. She specifically told Ms. J.M. that the condom was removed.

(iv) B.M.

55. Ms. B.M., Ms. J.T.'s supervisor at the Passport Office, described Ms. J.T. as distraught, missing a morning of work without notice, coming in in the afternoon and looking “frazzled” on January 23, 2018. Ms. B.M. chided her, telling her to provide notice if she was not coming in.

56. The following day, January 24, 2018, Ms. J.T. asked to speak to Ms. Molson. During their meeting that day Ms. J.T. told Ms. B.M. she had been raped on a date. She described being held down by the neck and showed bruises to Ms. B.M. Ms. B.M. described the bruising as being on her upper neck, ear, leg (handprint shape) and other locations. Ms. B.M. said she was shocked and saddened. She recommended Ms. J.T. contact the Employee Assistance Program, Sexual Assault Centre, police and hospital and told her she could take time off for this. They talked for approximately half an hour. Ms. B.M. described Ms. J.T. as scared, not knowing what to do. She was physically shaking (vibrating) and seemed terrified.

57. Ms. B.M. described Ms. J.T. as a “really good passport officer” – a high performer, friendly, good with people, high capacity, great at investigations, sociable, happy, bright and someone who got along with everyone really well. On January 23 she was frazzled, unfocused, seemed out of it and kind of frantic. After January 23 she was frequently late for work, took sick days and eventually required accommodation (reduced hours). Ms. B.M. also noted that post-January 23 Ms. J.T. was easily frustrated. None of this was normal behavior for her.

58. In cross-examination Ms. B.M. said Ms. J.T. reported leaving some of her favourite jewelry behind at Dr. Leontowicz’s and that she “wanted to get out of there”. She did not report contacting Dr. Leontowicz post-incident.

(v) Dr. Huse Kamencic

59. Dr. Kamencic, an obstetrician/gynecologist, testified he has treated Ms. J.T. for endometriosis since May 2015 with various medication as well as two surgical interventions. The first surgery, on September 4, 2015, confirmed the diagnosis. He described endometriosis as a chronic condition which usually recurs even after surgery. One of the effects of endometriosis is pain on vaginal intercourse both during initial penetration and also on deep penetration.

B. Dr. Jesse Leontowicz’s Evidence

60. Counsel for Dr. Leontowicz called his client to testify.

61. Dr. Leontowicz, age 29, graduated from the College of Medicine at the University of Saskatchewan in June 2019. He was offered a residency in family medicine in British Columbia commencing July 1, 2019. A precondition of the residency is licensing which cannot occur until the allegations which are the subject of this hearing are resolved. His residency offer has been extended to June 30, 2020.

62. Dr. Leontowicz described meeting Ms. J.T. and communicating with her on Tinder for a few days before January 22, 2018. On January 22 they met at Bodega at approximately 8:00 p.m., had a few drinks, some food and talked about travel, education,

work and past relationships. He had four glasses of wine and she had three pints of beer during the course of approximately two hours. He said the date went well – they had good chemistry, got along and flirted. She suggested they go to his place. He agreed and they drove in his vehicle to the condo, arriving at approximately 10:00 p.m. or later.

63. They kissed in the elevator going up, chatted with his roommate for approximately 15 minutes over beers and then went to his bedroom to watch TV. When he turned around from his computer Ms. J.T. was naked except for her panties. He said something like “Whoa! That’s exciting” and took his clothes off. She performed oral sex on him and then asked him to put on a condom. He agreed but said he had been tested for STDs. She said she didn’t care, he had to use a condom. He grabbed one and put it on. They had vaginal intercourse for a few minutes. He then told her he likes rough sex and she said she did too. He asked if it was okay to slap her and he did. He said he checked in with her and she said it was okay.

64. They had sex in different positions for approximately 15 minutes during which he slapped her two to three times. He was watching her to see if she was enjoying it but not verbally checking in. He manhandled her and then, as he got close to an orgasm, pulled out, took the condom off and asked her for oral sex. She agreed and he ejaculated in her mouth. He got her a towel to wipe up the semen and asked her how it was. She said she enjoyed it. He then got each of them a beer.

65. Dr. Leontowicz testified that Ms. J.T. had a Crave account which she logged into and they watched Letterkenny. They cuddled, made out, had oral sex, he put on a condom and they had vaginal intercourse again. This occurred at approximately 11:30 p.m. He again slapped her two or three times across her left cheek and slapped her butt while she was on her hands and knees. He described slapping her with his open right hand to the left side of her face. During this second sexual encounter he did not ejaculate.

66. Dr. Leontowicz said after this they again watched Letterkenny on Crave, drank beer and talked. He said they were both quite satisfied. He was excited and thought she was too. While in bed Ms. J.T. took a Snapchat video of the two of them, showing off the

lights in his bedroom. She captioned it “sleeping with the hot doctor lol”, showed it to him and they laughed about it. She sent it to a friend who responded “you guys are crazy lol”. They began cuddling, kissing and touching each other. He put on a condom and they had vaginal sex for 20 to 30 minutes, at the conclusion of which he ejaculated.

67. Dr. Leontowicz said he then got another beer for himself (she declined one). They continued watching Letterkenny in bed. He said they talked about having good chemistry and liking each other. At approximately 3:00 a.m. they began kissing again, this time more passionately and she mounted him (“cow girl” position) and had sex. He was not wearing a condom. This encounter lasted approximately half an hour in different positions. He described himself as having a hard time reaching orgasm and she said she was getting sore. He asked her to suck on his testicles which she did and he then masturbated. He asked if it was okay to call her dirty words. She agreed, he did and ejaculated into her mouth.

68. Dr. Leontowicz described “rough sex” as Ms. J.T. choking him with both hands at one point, squeezing lightly. He said he enjoyed this. She did not slap him but did scratch his back. He said they laughed about the scratch marks. She also dug her nails into his thighs. He described slapping her five to seven times in total. On one of these occasions she looked dazed and said it was too much. She added that he could keep going but less roughly.

69. Dr. Leontowicz testified that after the fourth sexual encounter Ms. J.T. looked different than she had previously. She said she wished they had used a condom. He apologized and she agreed to get tested with him. She told him she was on birth control because of her endometriosis and he said his ex-girlfriend had endometriosis as well. He said this last encounter kind of just happened without a condom. It was more passionate, cow girl position, without any discussion of use of a condom. It was completely consensual.

70. Dr. Leontowicz denied making a comment about “scaring other girls”. He said he did ask Ms. J.T. “Are you okay? Not every girl is into rough sex”.

71. Dr. Leontowicz said at approximately 4:00 a.m. he offered to call a cab for Ms. J.T. who declined the offer and asked him to drive her in the morning. He set his alarm for 6:30 a.m. He said he had had too much to drink (five or six drinks over a ten hour period). Both set their alarms for approximately 6:45 and he fell asleep. He woke up to the alarm, got dressed and offered Ms. J.T. coffee. She said she would get a ticket for parking in the bus lane. When they arrived at her car she ran out to intercept the ticketing person, then kissed him and got into her car. That was the last time he saw her.

72. Dr. Leontowicz described Ms. J.T. as an exciting date. They had a “fun night” and he was looking forward to seeing her again. He said “I liked her”.

73. After dropping her off at her car he went home, slept and got up again at approximately 11:00 a.m. He interpreted Ms. J.T.'s first text message that day as her teasing him. He responded in kind. He said both of them liked rough sex and he had not noticed a bruise on her face in the morning. His thinking, in responding as he did, was in accordance with the “vibe” of the night before. He acknowledged she had been upset after their last sexual encounter about the absence of a condom. When she sent him a picture of her face the following morning he could see minor bruising. He recognized she was upset and so he “kind of apologized”. He said he felt bad that she had to go to work with no sleep and a bruised jaw. He was trying to be nice to her in his texts. She was clearly upset by the “condom thing” even though she had consented to it.

74. Dr. Leontowicz testified that after he received Ms. J.T.'s message asking him to “hang out again with less physical violence” he understood she was not too comfortable with rough sex. He did want to see her again and would have seen her again without rough sex. When he received her January 25 text he thought it was a joke. It came “completely out of left field”. It represented a total departure from her previous attitude. He said he panicked and got a referral to a lawyer.

75. Dr. Leontowicz concluded his examination-in-chief by saying he did not have sex with Ms. J.Y. without her consent and would not have enjoyed it in the absence of consent.

76. In cross-examination Dr. Leontowicz acknowledged he has not been threatened with a lawsuit by Ms. J.Y. nor has she made any attempt to obtain compensation from him.

77. Dr. Leontowicz testified, that when he got up to get a condom during their first sexual encounter, he told Ms. J.Y. he had been tested and the paperwork confirming he was clean was on his desk. She said “I don’t care”. She was “pretty adamant” about the need for a condom.

78. Dr. Leontowicz said he asked Ms. J.T. not only whether she was okay with rough sex but whether slapping was okay. After slapping her he asked if she liked it and she replied in the affirmative. Throughout the night he asked if she was okay with slapping, spitting, dirty names and inserting his finger into her anus. She said no to the latter. He called her a “dirty slut” during the fourth sexual encounter that night when she was giving him oral sex. He said it was important during rough sex to check in with her. He did not recall telling the Preliminary Inquiry Committee (PIC) during his interview that he checked in with Ms. J.T. during the rough sex. Neither did he recall mentioning to the PIC that Letterkenny was playing on the screen the entire night.

79. Dr. Leontowicz, in cross-examination, said he could not recall the various positions he and Ms. J.T. were in during their various sexual encounters that night, neither could he recall his positions during ejaculation. He said he recalled five to seven slaps simply because slaps are more taboo than the other activity they engaged in that night. Only once did she react to a slap saying that it was too much. This occurred early on – during the first or second sexual encounter that night.

80. Dr. Leontowicz described the fourth “round” of sex as being longer, approximately 40 minutes, and more passionate because of the conversation they had had in between. It was more “love-dovey”. Also, they were tired and slower paced.

81. With respect to Ms. J.T. choking him, Dr. Leontowicz said this occurred in the second, third or fourth round while he was on top of her. He recalled it because it was unique. He acknowledged he did not relay this to the PIC nor did he tell them about her scratching him (which occurred throughout the night). He said he could not recall telling the PIC that he asked to put his testicles in Ms. J.T.'s mouth during the fourth round of sex. He recalled during his testimony that he asked her near the end of the fourth “round” (when he put his testicles in her mouth) whether he could call her dirty names.

82. Dr. Leontowicz acknowledged, in cross-examination, that since telling his story to the PIC he had added some details e.g. Ms. J.T. choking and scratching him, the fact she was on top of him in the fourth round when he was not wearing a condom and that he told her not every girl likes rough sex. He agreed these additions make his story more believable.

83. Dr. Leontowicz recalled spitting on Ms. J.T. more than once, aiming at her chest and inside her mouth. He recalled this because it is a “risqué” thing to do. He said he did not recall what position he was in when he spit on Ms. J.T.

84. Dr. Leontowicz was challenged by counsel for the College concerning omissions in his PIC interview. He acknowledged not mentioning to the PIC that he and Ms. J.T. watched the show Letterkenny throughout the night. He said he was not asked about this and the entire interview was confusing because the PIC was under the impression that he and Ms. J.T. had one round of sex only. He did not mention the finger in the anus request or the fact that she was on top of him at the beginning of the fourth round to the PIC. He told the PIC they assumed a variety of positions during the night. He agreed he did not tell the PIC that he “checked in” with Ms. J.T. throughout, only that he asked her if it was okay to slap and spit.

IV. ARGUMENT

A. CPSS Submission

85. Counsel for the College submitted the burden of proof in this case is on the College. The standard of proof is the civil standard – proof on a balance of probabilities. The task for

the Discipline Hearing Committee is to determine the facts and whether those facts establish, on a balance of probabilities, the charge alleged. If the answer to this question is in the affirmative, the Committee must then determine whether the conduct, as found, was unbecoming, improper, unprofessional or discreditable in accordance with Section 46(o) of *The Medical Profession Act*.

86. Counsel argued, that in the circumstances of this case, assessing the evidence requires determining the credibility and reliability of witnesses, specifically the Complainant and the Respondent. Counsel addressed the factors relevant to credibility/reliability assessments and cautioned, that in assessing credibility, the Committee avoid reliance on myths and stereotypes about sexual assault complainants.

87. With respect to credibility, counsel submitted Ms. J.T. had nothing to gain by this process and no motivation to lie. Her evidence was presented in a clear, straight-forward and logical manner. Further, it was both internally consistent and consistent with the evidence of the other witnesses called by the College as well as with the physical evidence. Furthermore, multiple instances of intercourse, as described by Dr. J.T., would have been impossible for someone suffering from endometriosis.

88. Counsel pointed to internal inconsistencies in Dr. Leontowicz's testimony, inconsistencies between his testimony and the physical evidence, instances of selective memory, inconsistencies in and additions to his evidence at the hearing as compared to what he told the PIC.

89. Counsel contended that the evidence of Dr. Haskell is important to the assessment of credibility in that it may assist the Committee in understanding behavior which might otherwise seem counter-intuitive to a lay person without expertise in the neurobiology of trauma.

90. Counsel argued, that regarding the second step of the Committee's deliberations i.e. whether the charge, if founded in fact, is conduct unbecoming, improper, unprofessional or discreditable, requires consideration of the following factors:

1. Whether the “off duty” conduct damages the member’s reputation with the public.
 2. Whether the “off duty” conduct damages the profession’s reputation with the public.
 3. Whether the conduct has a negative effect on the member’s ability to practice his or her profession.
 4. Whether the conduct is more unacceptable for a person in the member’s profession than for members of the public.
91. In her Brief, counsel provided numerous case authorities for the proposition that “off duty” conduct is disciplinable. The Discipline Hearing Committee is entitled to use its own knowledge of the profession to determine if proved conduct is unprofessional. At paragraph 83 she summarized the argument as follows:
83. Dr. Leontowicz seeks to enter a profession in which physicians must be trusted implicitly by their patients in order to provide effective patient care. Physicians treat vulnerable patients. They examine patients when those patients are undressed. Committing a sexual assault is antithetical to those values.
92. In support of her argument counsel for the College referenced the following authorities: *Ali v. The College of Physicians and Surgeons of Saskatchewan*, 2016 SKQB 42 (CanLII); *Brand v. College of Physicians and Surgeons of Saskatchewan*, 1990 CanLII 7711 SK CA); *Brar and others v. B.C. Veterinary Medical Association and Osborne*, (No. 22), 2015 BCHRT 151 (CanLII) at para. 78; *CPSS v Pillay*, Discipline Hearing Committee of CPSS, 2016; *Davies v. Ontario College of Pharmacists*, [2003] O.J. No. 91, 2003 CanLII 19529 (ON SCDC); *Erdmann v. Institute of Chartered Accountants of Alberta*, 2013 ABCA 147 (CanLII); *Faryna v. Chorney*, 1951 CanLII 252 (BCCA); *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41; *Green v. The College of Physicians and Surgeons of Saskatchewan*, 1986 CanLII 3238 (S.K. C.A.); *Huerto v. College of Physicians and Surgeons (Sask.)*, 1994 CanLII 4900 (SK QB); *Khan v. College of Physicians and Surgeons of Ontario*, 1992 CanLII 2784 (ON CA), [1992] O.J. No. 1725 (Ont. C.A.); *Kempling v. British Columbia College of Teachers*, 2005 BCCA 327 (CanLII); *Ontario (College of Physicians and Surgeons of Ontario) v. Marshall*, 2016 ONCPSD 31; *Pillay v CPSS*, 2018 SKQB 54 (CanLII); *Rathe v. College of Physicians and Surgeons of Ontario*, 2013 ONSC 821 (CanLII); *R. v. ADG*, 2015 ABCA 149 at para. 33; *R. v. A.R.D.*, 2017 ABCA 237; *R. v. D.D.* [2000] 2 S.C.R. 275 at paras. 64 – 67; *R. v. Hutchinson*, 2014 SCC 19 (CanLII), [2014] 1

SCR 346; *R. v. Marquard*, 1993 CanLII 37 (SCC), [1993] 4 S.C.R. 223; *R. v. Lupi*, 2019 ONSC 3713 (CanLII); *R. v. R. (D.)*, 1996 CanLII 207 (SCC), [1996] 2 S.C.R. 291; *Whatcott v. Saskatchewan Assn. of Licensed Practical Nurses*, 2008 SKCA 6 (CanLII).

B. Dr. Leontowicz' Submissions

93. Counsel for Dr. Leontowicz, while agreeing with the College that the onus of proving the charge against Dr. Leontowicz is on the College, submitted the standard of proof is clear and convincing evidence or clear, strong and cogent evidence, a higher standard than a simple balance of probabilities given the serious consequences of an adverse conclusion to Dr. Leontowicz's future career.

94. Counsel urged the Committee to give little weight to the expert evidence of Dr. Haskell, citing the danger of her evidence disproportionately affecting the Committee's assessment of the Complainant's credibility. Dr. Haskell's evidence goes to the heart of what the Committee must decide – credibility. Further, because Dr. Haskell had not interviewed the Complainant or familiarized herself with the details of this particular case, her opinion was speculative. Specifically, as it pertains to this case, counsel contended Dr. Haskell's evidence was based on the assumption that the Complainant experienced a trauma. Further, Dr. Haskell was unfamiliar with the specific history of this Complainant which might have affected her reaction to a trauma. Finally, Dr. Haskell's report did not reference false reporting.

95. Counsel agreed with the College that this case turns largely on an assessment of the credibility and reliability of witnesses, particularly that of the Complainant and Respondent.

96. With respect to the Complainant, Ms. J.Y.'s evidence evolved over time from her statement to the police to her initial and second interviews with the PIC to her evidence at the hearing. Also her evidence was not consistent with the physical evidence. She sustained minor injuries from what she described as a prolonged brutal attack. This is not consistent with the photographic evidence or the medical records. Furthermore, neither the evidence of her gynecologist nor her medical records support the Complainant's claim of the pain accompanying multiple sessions of intercourse.

97. Counsel for Dr. Leontowicz took the position, that contrary to Dr. Haskell's evidence about the inability of victims, during a trauma, to plan and strategize, the Complainant, after the alleged assault, set her alarm to coincide with her being able to avoid a parking ticket.

98. The Complainant had access to her phone throughout the night and was not, by her own evidence, confined.

99. The fact that both Ms. J.T. and Dr. Leontowicz were tired the next day is more consistent with Dr. Leontowicz's testimony about their sexual activities the night before than with the description offered by the Complainant.

100. Counsel also argued the Complainant, having familiarized with the language of trauma over time, attempted to explain her own behaviors rather than simply telling her story.

101. Counsel posited that the Complainant, embarrassed by the sex marks on her face the morning after her date with Dr. Leontowicz, could not admit to them being the result of consensual rough sex. She did not tell her colleagues that she requested another date with Dr. Leontowicz after January 22 and did not admit to consenting to and enjoying being slapped and manhandled. Her description of the events of January 22 evolved over time, including initially telling her friend Ms. M. that she was punched in the jaw with a closed fist by Dr. Leontowicz, an allegation she did not repeat at the hearing.

102. Dr. Leontowicz's testimony, by contrast, was clear and straight-forward. Minor omissions during his PIC interview are explained by the fact that he did not have control of the flow of the interview and responded to specific questions posed by the PIC. Furthermore his evidence is consistent with the physical evidence, the Complainant's actions throughout that night and the following day, the timeline and his joking, light-hearted text responses the following day. The fact he did not attempt to conceal his identity or hide from the incident are not consistent with a plan to commit an extremely violent rape. Counsel questioned, if Dr. Leontowicz had rape in mind, why would he seek consent to rough sex first?

103. Counsel pointed out that consent may be communicated verbally or nonverbally. Affirmative consent to each sexual act is not required. By the Complainant engaging in oral sex without a condom, she was nonverbally consenting to that act without protection. Likewise with respect to the unprotected intercourse which, according to Dr. Leontowicz, was initiated by her during their fourth sexual encounter and evolved naturally.

104. Counsel addressed the question of what conduct constitutes unbecoming, unprofessional behavior, particularly where such conduct is not directly related to professional duties i.e. private conduct. Factors to be considered are whether the conduct directly impairs the ability of the professional to function in a professional capacity or has been linked to the profession. Here there was no evidence of a public controversy surrounding this private event and little or no connection between Dr. Leontowicz's off duty conduct to his profession as a medical doctor. Furthermore, at the time of the alleged incident, Dr. Leontowicz was a medical student and his private conduct is therefore difficult to connect to his profession. There was no pattern of concerning conduct, professionally or privately. The Complainant was not a patient of his and Dr. Leontowicz was not criminally charged. Had he been, his conduct would have been made public thereby affecting the view of the public both of him and the College.

105. Counsel referred the Committee to the following authorities in support of his submissions: *Huerto v. College of Physicians and Surgeons of Saskatchewan*, 2005 SKQB 94 (CanLII); *Young v. College of Physicians and Surgeons (Saskatchewan)*, 2005 SKCA 118 (CanLII); *College of Physicians and Surgeons of Saskatchewan v. Shamsuzzaman*, 2011 SKCA 41 (CanLII); *Jacobs v. Ottawa (Police Service)*, 2016 ONCA 345 (CanLII); *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193 (CanLII); *R. v. Dantas-Ismail*, 2018 ONCJ 677 (CanLII); *R v. Ennis-Taylor*, 2017 ONSC 5797 (CanLII); *R v Mehari*, 2020 SKCA 37 (CanLII); *R. v. Howe*, 2005 CanLII 253 (ON CA); *R. v. Barton*, 2019 SCC 33 (CanLII); *R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 SCR 330; *R. v. Park*, 1995 CanLII 104 (SCC), [1995] 2 SCR 836; *College of Physicians & Surgeons Alberta v Ali*, 2017 ABCA 442 (CanLII); *Erdmann v Complaints Inquiry Committee*, 2013 ABCA 147 (CanLII);

Fountain v. British Columbia College of Teachers, 2007 BCSC 830 (CanLII); *Fountain v. British Columbia College of Teachers*, 2013 BCSC 773 (CanLII).

V. ANALYSIS

A. Standard of Proof

106. The burden of proof in professional discipline matters rests with the College. The standard of proof the College must meet is that adhered to in civil case law where the question to be answered is: Can it reasonably be concluded on a balance of probabilities that the allegations are founded?

107. The Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41 clarified there is only one civil standard, a balance of probabilities. Case law prior to this definitive decision articulated a sliding scale of proof required depending on factors such as the severity of the consequences to the subject of the hearing. The language used to describe the evidence required to meet this higher bar was “cogent” and “clear and convincing”. In *McDougall*, the Supreme Court of Canada addressed this squarely, holding that one standard, and one only, applies to proceedings such as this one.

108. Counsel for Dr. Leontowicz referred to one post-*McDougall* decision, *Jacobs v. Ottawa (Police Service)*, 2016 ONCA 345 (CanLII), where the Ontario Court of Appeal, applying the language of the applicable statute (*Police Services Act*) defined “clear and convincing evidence” as a standard “somewhere between a balance of probabilities and proof beyond a reasonable doubt”. This case was decided on the basis of specific legislative wording. No such language appears in the *Medical Profession Act, 1981*. Accordingly, we are bound by the decision in *McDougall* to adhere to the standard of proof on a balance of probabilities and must review the evidence presented using that standard.

B. Findings of Fact - Credibility

109. We have set out the evidence of the witnesses, particularly that of Ms. J.T. and Dr. Leontowicz, in some detail because, as both counsel submitted, the credibility and reliability of witnesses are in issue in this case.

110. Credibility assessments have two constituent elements. One relates to the honesty of the witness, that is, the witnesses' willingness to speak the truth as she/he believes it to be. The other relates to the reliability of the witness, that is the witnesses' ability to observe, recall and recount the events she/he gives evidence on. [*Karkanis v. College of Physicians and Surgeons*, 2014 ONSC 7018 (Div. Crt), para. 52]

111. In *R. v. H.C.*, 2009 ONCA 56 (CanLII), Watt, J.A. explained the difference between credibility and reliability, at paragraph 41:

[41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

- i. observe;
- ii. recall; and
- iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514, at 526 (C.A.).

112. A number of guidelines have been established by case law to assist in assessing the reliability and credibility of witnesses. The guidelines include not only such factors as demeanor, power of observation, judgment, memory and ability to describe clearly what was seen and heard, but also whether the evidence of the witness is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" [See *Faryna v. Chorney*, [1952] D.L.R. 354 (B.C.C.A.)]. This is sometimes referred to as "the ring of truth", that is, whether the account is reasonable in the context of all of the circumstances.

113. Other factors relevant to the assessment of credibility include the witnesses' motives, their relationship to the parties, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses' evidence [See *Hadzic v. Pizza Hut Canada* (1999), 37 C.H.R.R.D./252 (B.C.H.R.T.)].

114. A concise description of what is involved in assessing credibility was set out by the British Columbia Human Rights Tribunal in *Gichuru v. Purewal*, 2017 BCHRT 19; [2017] B.C.H.R.T.D. No. 17:

[8] In assessing credibility, I have adopted and applied the test set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, para. 186:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanor of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

115. In *Brar and others v. B.C. Veterinary Medical Association and Osborne*, 2015 BCHRT 151 (CanLII) at para. 80 the British Columbia Human Rights Tribunal in discussing credibility, made the following statement:

[80] Generally, I found the witnesses to be credible in some areas but not others. For example, some witnesses had a clear recollection of the events while giving their direct evidence, but that recollection became more vague, evasive or self-serving in cross-examination. However, I note that the failure of a witness to be consistent in his or her evidence does not necessarily indicate untruthfulness. Some witnesses became argumentative while giving their evidence or unnecessarily embellished and exaggerated their evidence to support their theory of the case. In some cases, when the documents differed from the witness' recollection or his or her theory of the case, the witness strained their evidence in order to make the written document reflect their view of the events. ...

116. Counsel for Dr. Leontowicz cautioned the Committee about assessing the credibility of the Complainant without first reviewing Dr. Leontowicz's testimony. He also urged us to allow for the possibility that neither parties' version of events is found credible. In that case, the College has not met its burden of proving the charge against Dr. Leontowicz on a balance of probabilities.

117. Counsel for the College urged the Committee to avoid reliance on "rape myths" in assessing the credibility of Ms. J.T. Specifically her failure to distance herself from Dr. Leontowicz after their sexual encounter.

118. With those cautions in mind, together with the factors to be taken into account in assessing credibility, we carefully reviewed all of the evidence, both oral and physical.

119. Ms. J.T. and Dr. Leontowicz, as is clear from the detailed recitation of their oral evidence, gave virtually the same account of what took place on January 22, 2018 up to the point of their sexual encounter in Dr. Leontowicz's bedroom. Neither claimed anything untoward up to that point. Neither claimed intoxication on theirs or the other's part.

120. Their stories diverge significantly after that point. Dr. Leontowicz testified they had intercourse four times during the night, three times with a condom and once without, all with Ms. J.T.'s consent. Also, that he slapped Ms. J.T. five to seven times during these sexual encounters, spit on her, ejaculated on her face and called her a "dirty slut". Again, all with her consent, both explicit and implicit.

121. Ms. J.T. , on the other hand, said she and Dr. Leontowicz had only one sexual encounter that night. It began with oral sex followed by protected vaginal intercourse. Over her objections, Dr. Leontowicz removed the condom and continued vaginal penetration. She said she consented to rough sex but not to him striking her so forcefully as to cause bruising.

122. The parties' accounts of what happened that night again converge in the retelling of what occurred after their sexual activities.

123. The three primary differences between the parties' accounts of their sexual encounter are:

1. The number of times they had sex;
2. The force used during rough sex; and
3. What was and was not consented to by Ms. J.T.

124. We begin our analysis of Ms. J.T.'s evidence by considering her testimony in relation to the testimony of other witnesses and the documentary evidence. As noted, a significant difference between Ms. J.T.'s evidence and that of Dr. Leontowicz was

the number of sexual encounters they described. Ms. J.T. was clear in stating that, as a person suffering from endometriosis, penile penetration a second, third or fourth time would have been extremely painful for her, not something she would have been able to endure.

125. Ms. J.T.'s gynecologist, Dr. Kamencic, confirmed the diagnosis and that Ms. J.T. experienced pain with intercourse (dyspareunia), a common symptom of endometriosis. According to her medical records Ms. J.T. presented with dyspareunia in 2015 and, as recently as February 2020 when she underwent her second surgery for endometriosis. We found this evidence persuasively corroborative of Ms. J.T.'s claim of only one instance of vaginal intercourse with Dr. Leontowicz and so find.

126. With respect to Ms. J.T.'s allegation of assault, she testified Dr. Leontowicz held her down with one hand while striking her forcefully about the face multiple times over a period of five to ten minutes. The image stuck in her mind was of him with his hand raised far back ready to strike and a frenzied, manic look on his face. She said she focused on breathing and bracing for the next blow thinking "Please just finish. I want this over".

127. Photographs taken the following morning by Ms. J.T. and on January 26, 2018 by the Regina City Police show distinct bruises on her left jaw. Ms. J. M. testified she noticed the bruising on Ms. J.T.'s jaw and neck the following morning. Ms. J.M. also testified to seeing bruises on Ms. J.T.'s upper neck, ear and other locations on her body on January 24. Both Ms. J.M. and Ms. B.M. noted significant changes in Ms. Thorarinson's demeanor after January 22. She was described as dazed, shaken, frazzled and unfocused. This represented a notable change from her normal cheerful, friendly, happy, bright, sociable personality.

128. Dr. Leontowicz said he slapped Ms. J.T. five to seven times during sex. She scratched him, dug her nails into his thighs and lightly squeezed his neck. He said he checked in with her to see if she was okay. One time after he slapped her she looked dazed and said it was too much adding that he could keep going but less roughly.

129. In the absence of evidence on this point, we are unable to determine what level of force would have been required to cause the bruising to Ms. J.T.'s jaw evidenced in the photographs. What we can say is that the bruising we saw in the photographs all along Ms. J.T.'s left jaw, could not be the result of a few light slaps. The photographic evidence and the observation of the witnesses is inconsistent with Dr. Leontowicz's testimony and more consistent with that of Ms. J.T.

130. Regarding evidence of unprotected sexual intercourse, while both parties agree it occurred, Ms. J.T.'s testimony was that she verbally and emphatically opposed it. She said when Dr. Leontowicz removed the condom she asked him what he was doing and said he needed to put it on. He told her he was "clean". She replied she didn't care, he was to replace the condom. When he got back onto the bed to mount her again she said "No. No". He then held her down and penetrated her.

131. Dr. Leontowicz's testimony regarding unprotected sex was that it happened organically during passionate lovemaking and was initiated by Ms. J.T. during their fourth and final sexual encounter. He acknowledged Ms. J.T. asked him during their first sexual encounter to put on a condom, that he told her that he had been tested for STDs and she replied she didn't care, he had to use one. He used a condom during successive instances of vaginal intercourse until the last one. It was after this last encounter that Ms. J.T. "looked different" than she had previously and said she wished they had used a condom. He apologized and she agreed to get tested with him. Dr. Leontowicz, in examination-in-chief, acknowledged Ms. J.T. was upset about the absence of a condom during their last sexual encounter. In cross-examination he described her as "pretty adamant" about the need for a condom at the very beginning of their sexual activity.

132. Did Ms. J.T. consent to unprotected vaginal intercourse? Consent, in the criminal context in Canada, means voluntary agreement of the complainant to engage in the sexual activity in question. A recent case from the British Columbia Court of Appeal, *R. v. Kirkpatrick*, 2020 BCCA 136 (CanLII), held that sexual intercourse with a condom is not the

same physical activity as sexual intercourse without a condom. A person may validly limit their consent to sexual intercourse with a condition that their partner wear a condom.

133. Here, as in the *Kirkpatrick* case, Dr. Leontowicz was aware from the outset of their sexual activity that Ms. J.T. was “adamant” about the need for a condom. He acknowledged as much in his testimony. Ms. J.T.'s insistence on the use of a condom was explicit, clear and unmistakable. She consented only to the act of sexual intercourse if his penis was sheathed.

134. There is no credible evidence to suggest Ms. J.T. changed her mind. In fact Ms. J.T. testified she strongly objected to his removal of the condom and there would seem to be no reason for a change of heart for her in the middle of the sex act. She insisted on the condom whether or not he was “clean” because she feared contracting a disease and/or becoming pregnant. Given her insistence of sexual intercourse with a condom, and the reason for it, it is inconsistent with the evidence to suggest she suddenly became careless or reckless as to the potential consequences of unprotected sex and nonverbally consented to it. In the result, we find Ms. J.T. did not consent to unprotected vaginal/penile intercourse.

135. We have already concluded that Ms. J.T.'s claim of only one “round” of sex is corroborated by external evidence and is credible. Dr. Leontowicz testified unprotected sex occurred organically during “round” four of sexual activity and was initiated by Ms. J.T. We do not accept that there was a “round” four for the reasons already given.

136. The evidence of both parties is clear that Ms. J.T. consented to “rough sex”. Neither party defined what this meant at the time. At the hearing Ms. J.T. said she understood it to mean manhandling, harder thrusting, gentle slapping, spanking and hair pulling. Dr. Leontowicz, in his testimony, did not offer a definition of “rough sex” but described light choking, scratching, slapping, spitting and her digging her nails into his thighs. Neither party said Ms. J.T. consented to multiple strikes delivered with such force as to cause facial bruising.

137. There is, in our view, a significant difference between the “rough sex” described by the parties and to which Ms. J.T. consented and full on hard hits. We have already concluded, based on all the evidence, that Ms. J.T.'s description of the rough sex that occurred is more credible than that offered by Dr. Leontowicz. We are also satisfied that Ms. J.T. did not consent to the forceful strikes inflicted on her either explicitly or implicitly. We accept her evidence in this regard.

138. In assessing the credibility of the parties, we also carefully reviewed their testimony for internal consistency or otherwise. Counsel for the College pointed to numerous additions to Dr. Leontowicz’s evidence at the hearing from the responses he gave to the PIC. These were that:

- The paperwork for his STI test was sitting on his desk at the time;
- He attempted to insert a finger in Ms. J.T.'s anus, and she said not on the first date;
- He asked her if he could call her dirty names and that he called her a dirty slut;
- They were watching Letterkenny throughout the entire night;
- Ms. J.T. choked him;
- Ms. J.T. scratched him on the back and thighs, and they were laughing about it;
- He asked her to suck on his testicles in either the 3rd or 4th round of sex;
- He never said he had scared other girls before as opposed to, he didn’t recall;
- Throughout the night Dr. Leontowicz consistently checked in with Ms. J.T. to make sure she was okay and that he not only did he do this verbally but he watched her body language to make sure she was okay; and
- On the 4th round of sex when no condom was used, Ms. J.Y. mounted him.

139. Counsel for Dr. Leontowicz suggested the Complainant’s evidence evolved over time from initially telling the police that immediately upon her consenting to rough sex Dr. Leontowicz began striking her hard. At the hearing she testified he initially slapped her face lightly once. Further, she told the police he hit her hard and often before he removed the condom. At the hearing she said he slapped her once, manhandled her, took the condom off and then began striking her forcefully.

140. Counsel also noted that in her initial interview with the PIC Ms. J.T. defined rough sex as “hard thrusting” or maybe “spanking”. In her second interview she added “very gentle slapping” and at the hearing said the initial slapping was enjoyable.

141. We place little meaning on the inconsistencies between and additions to previous statements made by the parties and their testimony at the hearing. They are, in our view, insignificant to the big picture of the stories each party told and to our overall assessment of their credibility. We recognize, as stated by the British Columbia Human Rights Tribunal in *Brar, supra* “that the failure of a witness to be consistent in his or her evidence does not necessarily indicate untruthfulness”.

142. In assessing credibility we also considered motive. The Complainant expressed a desire to protect other women from experiencing what she had at the hands of Dr. Leontowicz. When criminal charges were not preferred against him she turned to the College for this purpose.

143. Counsel for Dr. Leontowicz posited that the Complainant was embarrassed by the “sex marks” on her face on January 23, 2018, could not admit to her co-workers to having had consensual rough sex and, essentially from that point on, her story evolved into an assault and rape – a story she could not then retract. This theory was based on scant, if any, evidence and does not explain the Complainant’s choice to undergo a hospital examination and a report to the police. Neither does it explain her significantly altered demeanor after January 22, 2018. We note also that in her message to Dr. Leontowicz on January 25, 2018 at 11:12 a.m. she warned him “Don’t ever fucking do that to anyone ever again”. We found nothing in the evidence to contradict Ms. J.T.’s stated motive for her complaint.

144. Two questions concerning the Complainant’s testimony were raised in the context of credibility:

1. Why, after being assaulted by Dr. Leontowicz, she did not flee; and
2. Why, the day after the assault, she suggested to Dr. Leontowicz that they “hang out again with less physical violence”.

145. Dr. Haskell's evidence concerning the neurobiology of trauma is helpful in addressing these questions. In particular her evidence concerning the effects of an adrenalin dump on the brain and the ensuing automatic responses. She testified that reflex or habit take over. For women, as a result of their socialization, this may manifest as conduct designed to placate or appease. Patriarchal values have accustomed women to being dominated and devalued. She testified that these coping responses and habits take the form of avoidance (deferring exposure to high levels of negative emotions), making the other person's feelings and needs a priority, and/or difficulty identifying or naming what is happening or has happened to them as "sexual assault". Fight or flight reflex reactions are the least likely responses by women because the perpetrators are most often men known to the victim or whom they may admire or even idolize. She also testified that the flood of stress hormones make planning and strategizing difficult if not impossible.

146. Ms. J.T.'s testimony about her response to being assaulted was entirely consistent with Dr. Haskell's description of the neurobiological responses to trauma. Ms. J.T. said she lay awake beside Dr. Leontowicz throughout the night, not wanting to rise for fear she would wake him and arouse his anger. She believed from what he had said about "scaring other girls" that this was not the first time he had assaulted a woman. She described precisely what Dr. Haskell referred to as "cognitive dissonance". Her experience did not fit the medical student image and the nice man she met and had a good time with at Bodega. She described being confused and destabilized. This description was confirmed by the evidence of her co-workers during the following days.

147. Dr. Haskell also testified that the process of identifying what has happened, acknowledging and integrating it is often delayed. Sexual assault victims, in the meantime, may continue contact with the assaulter to neutralize the trauma, regain some control of the relationship and/or invite an acknowledgement of what took place and/or an apology.

148. Again, this evidence was helpful to our understanding of the text exchange between Ms. J.T. and Dr. Leontowicz during 24 hours following their date. Ms. J.T. reached out to Dr. Leontowicz, showing him her bruised jaw, seeking acknowledgment and

verification of her experience and, as she described it, wanting to reconcile her positive experience with Dr. Leontowicz at Bodega with what happened later.

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

150. Having come to this conclusion, we are satisfied that the College of Physicians and Surgeons has met its onus of proving the charge against Dr. Leontowicz on a balance of probabilities.

C. Conduct Unbecoming – Section 46(o) of *The Medical Profession Act, 1981*

151. Counsel for the parties agree that “off duty” conduct may constitute conduct unbecoming, improper, unprofessional or discreditable. Further, that the factors to be considered in determining whether this is the case are summarized in *The Law of Professional Regulation*, Bryan Salte, LexisNexis Canada Inc. 2015, at page 126, as follows:

1. Whether the conduct damages the member’s reputation with the public;
2. Whether the conduct damages the profession’s reputation with the public;
3. Whether the conduct has a negative effect on the member’s ability to practice his or her profession;
4. Whether the conduct is more unacceptable for a person in the member’s profession than for members of the public.

152. As a Discipline Hearing Committee, we are entitled to use our own knowledge of the profession to determine if proved conduct is unprofessional [*Huerto v. College of Physicians and Surgeons*, 1994 CanLII 4900 (SK QB)].

153. The conduct under consideration here is that Dr. Leontowicz (then a fourth year medical student, now an M.D.), on a date with the Complainant, without her consent had

unprotected sex with her and hit her multiple times with such force as to cause injury to her face. Ms. J.T. was not a patient and the assault did not occur in the context of Dr. Leontowicz's medical practice.

154. Dr. Leontowicz was not criminally charged although the matter was reported to the police. While Dr. Leontowicz was not criminally charged, his conduct in the context of this proceeding, meets the definition of sexual assault.

155. Except insofar as the hearing of this matter was public, the complaint has not, to our knowledge, been publicized.

156. With these facts in mind we reviewed the case law and brought our own judgment to bear on the question of whether this conduct is unbecoming, improper, unprofessional or discreditable.

157. In *Erdmann v Complaints Inquiry Committee of the Institute of Chartered Accountants of Alberta*, 2013 ABCA 147 (CanLII) (leave to appeal to the SCC refused), a chartered accountant, in a series of emails, threatened the builder of her residential condominium, including a threat to report the builder to the CRA. She argued that the emails were not sent in her professional capacity and could not be the basis for a finding of unprofessional conduct. The Alberta Court of Appeal, in upholding a finding of professional misconduct, stated the following:

... A chartered accountant's status in the community at large means that his/her conduct will from time to time be the subject of scrutiny and comment. While acknowledging the legitimate demands of one's personal life, and the rights and privileges that we all enjoy, private behaviour that derogates from the high standards of conduct essential to the reputation of one's profession cannot be condoned. It follows that a chartered accountant must ensure that her conduct is above reproach in the view of reasonable, fair-minded and informed persons.

158. The Court quoted Taylor, J. in *Ratsoy v. Architectural Institute of British Columbia*, 1980 CanLII 662 (BC SC) at para. 11:

... reprehensible conduct outside actual practice of the profession may render a professional person liable to disciplinary action if it can be said to be significantly more reprehensible in someone of his particular profession than in the case of others.

159. In *Fountain v. British Columbia College of Teachers*, 2007 BCSC 830 (CanLII), a case where a teacher fired a shot into the air after a domestic dispute with his sons during which he was assaulted, the Court stated at para. 65:

[65] In summary, the framework for the analysis of off-duty conduct that arises from the case law is:

(a) some, but not all, off-duty conduct can give rise to discipline for professional misconduct or conduct unbecoming;

(b) in considering whether the particular conduct at issue is such as to give rise to discipline, the Panel should consider whether the conduct evidences direct impairment of the ability to function in the professional capacity or impairment in the wider sense as described in the case law; and

(c) direct evidence of impairment is not always required. In an appropriate case, impairment can be inferred. In the absence of direct evidence of impairment, the Panel will need to consider whether it is appropriate to draw on inference of impairment in the circumstances.

160. In *Rissi v. Ontario College of Pharmacists*, 2003 CanLII 19529 (ON SCDC), a pharmacist was found guilty of professional misconduct after his closely held corporation was convicted of tax evasion. The Court upheld this decision stating it was open to the Discipline Committee to conclude that a tax evasion scheme was conduct that reflected adversely on the profession as well as on the pharmacist and could therefore be characterized as conduct “relevant to the practice of pharmacy” that “would reasonably be regarded by the members of the profession as disgraceful, dishonourable and/or unprofessional” in accordance with the wording of the relevant legislation.

161. A core value of the medical profession is to do no harm. Further, the essence of the work of the profession is to help and heal other human beings. Sexual assault is the antithesis of this creed and unacceptable to the profession. Though the conduct here did not take place in the course of duty, it discredits both Dr. Leontowicz and the profession. Dr. Leontowicz, in practice, will undoubtedly deal with female patients, disrobed and vulnerable. He has shown himself, by his conduct towards Ms. J.T., as unworthy of the trust which is placed in physicians by their female patients and the public generally. His conduct, as found in this case, is not only damaging to his own reputation but to that of the profession at large. By his conduct Dr. Leontowicz not only did physical harm to the Complainant but demonstrated disregard for the very notion of consent – a foundation of the physician/patient relationship.

162. The medical profession holds its members to high standards both in their personal lives and their professional lives. Maintaining those standards of personal and professional conduct engenders and ensures public trust. Physicians hold positions of elevated status in society for their technical and intellectual abilities but also because they are trusted always to heal not harm. Dr. Leontowicz's conduct was such as to erode the confidence the public now has that they can feel safe with their physician.

163. For these reasons, based on the evidence in this case, we find Dr. Leontowicz guilty of unbecoming, improper, unprofessional or discreditable conduct.

DATED at Saskatoon, Saskatchewan, this 11th day of June, 2020.

A handwritten signature in black ink, appearing to read 'Alma Wiebe', written in a cursive style.

Alma Wiebe, Q.C.,
Chair of the Disciplinary Hearing Committee

Concurred to by Dr. Chris Ekong and
Dr. Lorne Rabuka, Members of the
Disciplinary Hearing Committee