Dr. Robert COLISTRO

Discipline Hearing Committee Decision

Date Charge(s) Laid:	December 1, 2018
Date of Discipline Hearing:	May 31, June 1-2 and 17, 2021
Date of Decision:	October 25, 2021
Date of Penalty Hearing:	January 28, 2022

This matter proceeded to hearing before the Discipline Hearing Committee. The decision of that committee is attached.

The matter has proceeded to a penalty hearing before the CPSS Council. The results of the penalty hearing are posted on the College website in Dr. Colistro's physician profile at the link "Council Decision."

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

DR. ROBERT COLISTRO,
Medical Practitioner of Saskatoon, Saskatchewan

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

Saskatoon, Saskatchewan
May 31, June 1, 2 and 17, 2021

DECISION

Before: Alma Wiebe, Q.C. (Chair)
Dr. James Stempien
Dr. Mark Fowler

Appearances: Sheila Torrance, for the College of Physicians and Surgeons
Colin Hirschfeld, Q.C., for Dr. Robert Colistro

I. INTRODUCTION

1. Dr. Robert Colistro was charged by the Council of the College of Physicians and Surgeons of Saskatchewan (the College) as follows:

> 1. You, Dr. Robert Colistro are guilty of unbecoming, improper, unprofessional, or discreditable conduct contrary to the provisions of Section 46(i) and/or 46(j) and/or Section 46(p) of *The Medical Profession Act, 1981*, S.S. 1980-81 c. M-10.1 and/or paragraphs 43 and 44 The Code of Ethics incorporated in bylaw 7.1 of the College of Physicians and Surgeons of Saskatchewan, and/or bylaw 8.1(b)(iii) and/or bylaw 9.1(f) and/or bylaw 9.1(g) of the bylaws of the College of Physicians and Surgeons of Saskatchewan by excessive billing and/or failing to exercise due diligence over billing.
>
> The evidence that will be led in support of this charge will include some or all of the following:
>
> > a) Since sometime in 2012, you acted as the Medical Director of Circle West Ultrasound Diagnostics Inc. ("the Circle West") in Saskatoon, Saskatchewan.
> >
> > b) During the period August 12, 2013 to March 16, 2015 you caused or permitted excessive billing for your services by billing code 20W when the circumstances did not justify the charge;
> >
> > c) During the period August 12, 2013 to March 16, 2015 you caused or permitted excessive billing for your services by billing code 50W when the circumstances did not justify the charge;
> >
> > d) During the period August 12, 2013 to March 16, 2015 you caused or permitted excessive billing for your services by billing for ~~fetal echocardiography and~~ Doppler imaging when it was not indicated nor requested;
> >
> > e) You failed to exercise due diligence to ensure that your billings were submitted accurately and appropriately.
>
> 2. You, Dr. Robert Colistro are guilty of unbecoming, improper, unprofessional, or discreditable conduct contrary to the provisions of Section 46(o) and/or 46(p) of *The Medical Profession Act, 1981*, S.S. 1980-81 c. M-10.1 and/or bylaw 8.1(b)(ix) and or bylaw 25.1 of the bylaws of the College of Physicians and Surgeons of Saskatchewan by failing to meet the obligations of a medical director of a diagnostic imaging facility and failing to exercise appropriate oversight over the facility.
>
> The evidence that will be led in support of this charge will include some or all of the following:
>
> > a) Since sometime in 2012, you acted as the Medical Director of Circle West Ultrasound Diagnostics Inc. ("the Circle West") in Saskatoon, Saskatchewan.
> >
> > b) You failed to provide proper oversight to Circle West, its employees, and its day to day operations;
> >
> > c) You failed to ensure Circle West had written policies in place regarding employment issues ~~and Infection Control~~;
> >
> > d) You failed to meet the requirements of bylaw 25.1(c)(ii)2(l) (later amended to be 25.1(c)(iii)2(l)) to ensure that the facility maintains the standards established in bylaw 25.1;
> >
> > e) You failed to meet the requirements of bylaw 25.1(c)(ii)2(7) (later amended to be 25.1(c)(iii)2(7)) by failing to ensure Circle West had in place a quality assurance procedures manual and complied with all provisions therein;

f) You failed to meet the requirements of bylaw 25.1(c)(iii) (later amended to be 25.1(c)(iv)) in permitting staff of Circle West to perform and bill for tests that were not requested by the referring physician and were not medically indicated;

~~g) You failed to meet the requirements of bylaw 25.1(c)(iii)4 (later amended to be 25.1(c)(iv)4)) by failing to ensure that staff and physicians were qualified to perform and interpret fetal echocardiography;~~

~~h) You failed to meet the requirements of bylaw 25.1(d)(i)3 by failing to ensure that staff were certified to perform and interpret fetal echocardiography;~~

i) You failed to meet the requirements of bylaw 25.1(d)(i)4(2) by failing to ensure there was a policy in place in relation to regular inspection of ultrasound equipment;

j) You failed to meet the requirements of bylaw 25.1(d)5(l) by failing to ensure the existence of a policy and procedure manual at Circle West;

k) You failed to meet the requirements of bylaw 25.1(d)5(2) by failing to ensure appropriate oversight of Circle West and by failing to ensure direct communication between yourself and the technologist at the time of examinations in order to guide the examination.

2. This matter was heard by the Discipline Committee on May 31, June 1, 2 and 17, 2021 with written submissions received June 11, 2021.

3. The June 17, 2021 hearing concerned an evidentiary issue which will be dealt with later in this Decision.

II. LEGISLATION/BYLAWS

4. The relevant legislation and bylaws of the College of Physicians and Surgeons of Saskatchewan read as follows:

***Medical Profession Act, 1981*, SS 1980-81, c M-10.1**

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:

(i) performs for a patient a professional service that is not justifiable on any reasonable grounds;

(j) provides any professional service that, in the opinion of the discipline hearing committee, is in volume or, in relation to other professional services provided by him, not justifiable on any reasonable grounds;

(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;

(p) does or fails to do any act or thing where the council has, by bylaw, defined that act or failure to be unbecoming, improper, unprofessional or discreditable.

CPSS Regulatory Bylaws

7.1 The Code of Ethics
(a) Subscription to and observance of the Code of Ethics is a condition of registration under the Act.

(b) No person who is registered under the Act shall contravene or fail to comply with the Code of Ethics.

(c) Contravention of or failure to comply with the Code of Ethics is unbecoming, improper, unprofessional or discreditable conduct for the purpose of the Act.

(d) Every person who applies for registration under the Act shall subscribe to The Code of Ethics, as adopted by the College of Physicians and Surgeons from time to time, as a condition of registration.

(e) Every person who is registered under the Act shall observe The Code of Ethics, as adopted by the College of Physicians and Surgeons from time to time, as a condition of maintaining his or her registration.

(f) The Code of Ethics as adopted by the College of Physicians and Surgeons is the 2004 Canadian Medical Association Code of Ethics, with a change to paragraph 48 of the CMA Code of Ethics.

(g) The Code of Ethics adopted by the College of Physicians and Surgeons is as follows:

43. Recognize the responsibility of physicians to promote equitable access to health care resources.

44. Use health care resources prudently.

8.1 Bylaws Defining Unbecoming, Improper, Unprofessional or Discreditable Conduct
(a) In this section:

(i) “standard of practice of the profession” means the usually and generally accepted standards of practice expected in the branches of medicine in which the physician is practicing.

(b) The following acts or failures are defined to be unbecoming, improper, unprofessional or discreditable conduct for the purpose of Section 46(p) of the Act. The enumeration of this conduct does not limit the ability of Discipline Hearing Committees to determine that conduct of a physician is unbecoming, improper, unprofessional or discreditable pursuant to Section 46(o):

(iii) Charging a fee that is excessive in relation to the services performed.

(ix) Failing to maintain the standard of practice of the profession.

9.1 Conflict of Interest
(f) It is a conflict of interest for a physician to order diagnostic tests other than medically necessary tests to be performed by a diagnostic facility in which the physician or a member of the physician’s family has any proprietary interest.

(g) It is unbecoming, improper, unprofessional or discreditable conduct for a physician to have a conflict of interest in relation to the physician’s professional practice.

25.1 Operation of Diagnostic Imaging Facilities in the Province of Saskatchewan

(a) Preamble

The following bylaw has been developed to ensure the provision of an acceptable quality patient care in diagnostic imaging. This document indicates conditions that must exist in any diagnostic imaging facility, whether fixed or portable to allow a physician to:

- perform diagnostic imaging procedures in that facility; or

- interpret diagnostic images rendered or obtained in that facility; or

- refer patients to that facility.

Diagnostic imaging facilities themselves are acknowledged to be outside the jurisdiction of the College. The standards must, however, be met by a diagnostic imaging facility for a health care professional to have a professional relationship with the facility.

The medical acts to be covered by these provisions would include all procedures involving diagnostic imaging and all interpretation of images including, but not limited to radiography, CT scanning, nuclear medicine, magnetic resonance imaging, all imaging applications of ultrasound including echocardiography, and other medical imaging procedures which may be developed in the future.

Imaging facilities may perform, as long as there is no other legal exclusion, imaging acts at the request of a physician, dentist, chiropractor, enhanced skill nurse or registered midwife duly licensed to practise in the province of Saskatchewan.

All physicians working in these facilities shall conform to the CMA Code of Ethics and other ethical standards adopted by the College of Physicians & Surgeons of Saskatchewan.

Nothing in this bylaw requires a physician to perform medical imaging services when, in the opinion of that physician, it would be medically inappropriate to do so.

No physician shall perform or report radiological examinations unless the physician is licensed by the College of Physicians and Surgeons of Saskatchewan and restricts their practice to radiology, or a specialty discipline in which they have the appropriate qualifications to perform or report selective diagnostic imaging examinations.

All physicians shall, as a condition of performing diagnostic imaging procedures in an imaging facility or interpreting diagnostic images rendered or obtained in an imaging facility, fulfill the credits for the Maintenance of Certification and Continuing Professional Development programs for specialists of the Royal College of Physicians and Surgeons of Canada as required by the Royal College.

(b) Definitions

(i) “Diagnostic Imaging Facility” – any facility that performs diagnostic imaging of any type; including radiography, fluoroscopy, ultrasound, CT, MRI, mammography, and other imaging modalities that may be developed in the future.

(c) The Director of a Diagnostic Imaging Facility

(i) the owner(s) of a private diagnostic imaging facility or the Regional Health Authority that operates a public facility, or any other imaging facility, shall cause the appointment of a Director who shall be a Radiologist, a physician PRR or a specialist who has completed an approved period of training pertaining to the imaging modality being performed.

(ii) the Director shall be responsible for:

1. the day to day operation of the facility;

2. ensuring that:

(1) the facility maintains the standards in this bylaw of the College of Physicians and Surgeons of Saskatchewan and the standards of any other applicable Provincial and Federal authority;

(2) adequate consideration is given to the design and operation of the facility to protect personnel of the facility, patients and the public from unnecessary radiation. *The Radiation Health and Safety Act, 1985*, requires that all ionizing radiation facilities obtain prior plan approval from the Radiation Safety Unit, Saskatchewan Labour.

(3) all radiation equipment installed in the facility meets the requirements of *Health Canada's Radiation Emitting Devices Act* and Regulations;

(4) all personnel who routinely participate in radiological procedures are issued with personal dosimeters for monitoring their radiation exposure and these are used in accordance with Provincial and Federal guidelines;

(5) all ionizing radiation equipment in the facility is operated by qualified individuals;

(6) all ionizing radiation equipment in the facility is adequately maintained and has the required number of Safety Preventive Maintenance inspections as per section 14 of *The Radiation Health and Safety Regulations*;

(7) all provisions in the on-going quality assurance procedures manual are carried out and proper documentation kept;

(8) all personnel of the facility are familiar with *The Radiation Health and Safety Act, 1985* and Regulations and that adequate resources are provided so that all requirements of the Act and Regulations will be complied with;

(9) the personnel of the facility are familiar with *The Health Information Protection Act* and that the facility will comply with the obligations of a trustee under the Act.

3. informing the College of Physicians & Surgeons of ownership, directorship or technical supervision of the facility, qualifications of technical staff, or any change thereof;

4. providing notification of any major addition, replacement or modification of any equipment at the facility to the College of Physicians and Surgeons of Saskatchewan;

(iii) The Physician Director shall ensure that the imaging facility does not:

1. establish criteria for referral of patients to the facility other than those required by clinical considerations; in accordance with Bylaw 9.1(f);

2. function to increase its profitability at the expense of sound medical practice;

3. perform imaging investigations which contravene the standards;

4. use unqualified personnel;

5. use substandard equipment or obsolete equipment as defined for each modality.

(d) General Requirements
(i) Ultrasound Facilities:

1. Types of Ultrasound Facilities:

(1) Restricted: Perform examinations pertaining to a particular recognized medical specialty.

(2) Comprehensive: Perform general ultrasound within limitations related to the training of the operator.

2. Records of Examination:

(1) Reporting: All ultrasound examinations shall be reported promptly to the referring physician by the Ultrasonologist performing or interpreting the ultrasound examination. Where a physician other than a radiologist performs or interprets ultrasound examinations on his/her own patients, a complete record of the results of this examination must be included in the patient record.

The Ultrasonologist shall ensure that Ultrasonographers do not provide interpretations of ultrasound results to physicians or patients.

(2) Records: Written reports and archival image records sufficient to support the report must be retained in accordance with the College bylaw regarding records.

3. Training Standards:

The Director of an ultrasound imaging facility shall ensure that:

(1) an Ultrasonographer shall have completed the required course of study in ultrasonography, have passed the American Registry of Diagnostic Medical Sonographer (ARDMS) examinations or an equivalent Canadian certification;

(2) an Ophthalmic ultrasonography shall have completed a recognized training program and must perform all scans under on-site supervision of an ophthalmologist;

(3) technicians performing ultrasonography must fulfill the requirements of the ARDMS or an equivalent Canadian certification;

(4) a Specialist Ultrasonography shall have completed a recognized course and continue to meet the requirements of that subspeciality;

(5) technicians performing echocardiography must fulfill the requirements of the ARDMS or an equivalent Canadian certification;

(6) the physician performing and/or interpreting ultrasound studies must be:

A. For a restricted facility: an ultrasonologist as defined under the Interpretation section of the bylaws. The required period of training shall be as set for each discipline by the Council of the College of Physicians and Surgeons as:

Obstetrician/Gynecologists – 3 months

Ophthalmologists – ‘A’ mode - no special training

‘B’ mode - 3 months

Cardiologists – 6 months (1 year for directors of a cardiology laboratory)

Vascular Sonologists – 3 months

Neurosonologists (Transcranial) – 3 months

Urologists – 3 months

Any specialist physician wishing to perform a specialized area of ultrasound that is not included under the criteria of these bylaws, must apply to the Advisory Committee on Medical Imaging of the College of Physicians and Surgeons of Saskatchewan for training standards.

B. For a comprehensive facility: a Radiologist or Physician PRR who has completed an approved period of training in ultrasound.

4. Equipment:

The Director of the facility shall ensure that:

(1) The equipment used for ultrasound examinations is appropriate for the specific type of examination performed. This stipulation includes the required use of appropriate high frequency transducers for “small parts” ultrasound examinations;

(2) Every six months all active ultrasound equipment is inspected by a duly qualified service technician trained in the application, performance characteristics and repair of the specific equipment software and the archival imaging systems;

(3) ‘A’ mode ophthalmic ultrasound units are calibrated daily, while ‘B’ mode units are inspected annually by a qualified service technician trained in the application, performance characteristics and repair of the specific equipment software and the archival imaging systems.

5. Procedures:

The Director of the facility shall ensure that:

(1) a policy and procedure manual shall outline the minimum ultrasound examination techniques required, and shall follow section 17 of *The Radiation Health and Safety Regulations*, in accordance with Canadian Association of Radiologists (CAR) or College guidelines, where applicable;

(2) in communities which have a resident ultrasonologist, he or she shall be on-site at the facility for consultation, supervision and interpretation for all of the ultrasound examinations. Real time video linkage is deemed to be the same as having on-site supervision. If the sonologist must be away from the department, scans should not be performed or arrangements should be made for an alternate sonologist;

(3) in communities which do not have a resident ultrasonologist on-site to be fully responsible for the supervision and interpretation of all ultrasound examinations done in the facility, the ultrasonologist shall be immediately available for consultation, supervision and interpretation of at least 50% of examinations where annual volume is less than 1000 and for all examinations where the annual volume exceeds 1000 cases. Real time video linkage is deemed to be the same as having on-site supervision.

(f) Professional Conduct

(i) It is unbecoming, improper, unprofessional or discreditable conduct for a member, except in the case of an emergency, to perform imaging procedures in an imaging facility or interpret

diagnostic images rendered or obtained in an imaging facility, or to refer patients to an imaging facility, unless the diagnostic imaging facility meets the standards of this bylaw.

(ii) Notwithstanding paragraph (i) above, it is not unbecoming, improper, unprofessional or discreditable conduct for a member, other than a director of a diagnostic imaging facility, to do any of the acts enumerated in paragraph (i) above if, at the time of such conduct, the member was unaware of the breach by the medical imaging facility and had exercised reasonable diligence to ensure that the facility met the standards of the bylaw.

III. EVIDENCE

A. Agreed Statement of Facts and Documents

5. The parties filed an Agreed Statement of Facts and Documents which reads as follows:

Agreed Statement of Facts and Documents

1. Dr. Robert Colistro ("Dr. Colistro") and the Registrar's office of the College of Physicians and Surgeons of Saskatchewan (the "College" or "CPSS") agree to the following facts and documents to be presented into evidence at the discipline hearing of Dr. Colistro without further proof.

2. It is admitted that all correspondence and other documents were prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the hearing.

Relevant CPSS Regulatory Bylaws

3. The relevant time period for the purpose of Charge #1 is 2013 to 2015.

4. The relevant time period for the purpose of Charge #2 is 2012 to 2018.

5. As the conduct that forms the basis of the charges spanned several years, the CPSS Regulatory Bylaw 25.1 was amended from time to time.

6. Excerpts of the issues of *The Saskatchewan Gazette* containing the relevant versions of Bylaw 25.1 are attached as follows:

a. Volume 105, No. 34, August 21, 2009 – Tab 1

b. Volume 112, No. 25, June 24, 2016 – Tab 2

7. Bylaws 7.1, 8.1 and 9.1 (as referenced in the charges) were published in *The Saskatchewan Gazette*, Volume 105, No. 34, August 21, 2009 and were not amended during the relevant times – Tab 3

Background and structure of Circle West Ultrasound Diagnostics Inc.

8. Dr. Colistro is a medical doctor specializing in diagnostic radiology. He obtained his medical degree from the University of British Columbia in 2001, and obtained his Royal College certification in diagnostic radiology in 2006.

9. Dr. Colistro completed a 6-month fellowship in echocardiography, and is credentialed to read echocardiograms in British Columbia and Saskatchewan.

10. Since 2006, he has maintained a full-time radiology practice in Kamloops, British Columbia, performing all modalities.

11. In 2012, Dr. Colistro was asked to read reports for Circle West Ultrasound Diagnostics Inc. ("Circle West" or the "Clinic"), an ultrasound clinic in Saskatoon, Saskatchewan that was owed by Ms. Terra Libke, a sonographer. Circle West had been scanning patients but its arrangement

with a radiologist had fallen through. As a result, there was a backlog of scans that required reporting.

12. Circle West provides general outpatient ultrasound services to Saskatoon and the surrounding area and added echocardiography services in 2013. It typically employed 3-4 sonographers.

Communications between Dr. Colistro/Circle West/Ministry of Health/CPSS

13. Dr. Colistro was in communication with CPSS to inquire about his ability to take on a role with Circle West. An email dated July 9 2012 to Dr. Colistro from CPSS addressed the obligations to interpret images from that facility and what was required to be a medical director of that facility. (Tab 4)

14. Dr. Colistro spoke by telephone with CPSS legal counsel, Mr. Bryan Salte, Q.C. who confirmed their discussion via email dated July 19, 2012. Dr. Colistro was granted a temporary telemedicine license on July 19, 2012 in order to read the backlog of scans at Circle West. The email exchange of July 9 to 19, 2012 is attached at Tab 5.

15. Dr. Colistro and Ms. Libke received another email from Mr. Salte on July 19, 2012 confirming that Dr. Colistro had a temporary license which met College requirements. Mr. Salte indicated that they were awaiting confirmation from Medical Services Branch (MSB) as to the appropriateness of the arrangement for billing purposes. (Tab 6).

16. Dr. Colistro, the College and the Ministry were also involved in a number of email chains in an attempt to clarify billing issues. The following email chains are attached:

a. Email chain dated July 19 to 23, 2012 between CPSS, MSB, Dr. Colistro and Ms. Libke (Tab 7);

b. Email chain dated July 19 to August 3, 2012 between CPSS, MSB and Dr Colistro (Tab 8);

c. Email chain dated July 19, 2-012 to July 31, 2014 between CPSS, MSB and Dr. Colistro (Tab 9);

d. Email chain dated July 19 to August 3, 2012 between CPSS, Dr. Colistro and MSB re Payment Schedule requirements for billing (Tab 10);

e. Email chain dated July 19 2012 to September 24, 2012 between CPSS, Dr. Colistro and MSB re Payment Schedule requirements for billing and internal MSB emails dated September 24, 2012 (Tab 11);

f. Email dated July 20, 2012 from Ms. Libke to P. Behl re proposal for Dr. Colistro to bill MSB for his interpretations (Tab 12);

g. Emails dated July 19 to July 24, 2012 between CPSS, Dr. Colistro and MSB re Payment Schedule requirements for billing and internal MSB email of September 21, 2012 (Tab 13);

Some of the emails include highlighting that originated with MSB or the JMPRC.

17. Dr. Colistro ultimately obtained a full license with CPSS in August 2012. He agreed to be the Medical Director of Circle West, and acknowledged review of the responsibilities of a medical director as set out in the CPSS regulatory bylaw 25.1. The intention was that he would interpret and report scans taken at Circle Wet remotely from Kamloops.

18. Dr. Colistro signed a Direct Payment Authorization with Practitioners ("DPA") on August 3, 2012, effective for payment of services provided on or after July 19, 2012. This agreement is included at Tab 14 of the Book of Documents.

19. Dr. Colistro inquired with the College in November 2012 with respect to accreditation of diagnostic imaging facilities. This was addressed by email of November 23, 2012. The email chain of November 20-23, 2012 is attached at Tab 15 of the Book of Documents.

20. This information was again confirmed in an email from Dr. Karen Shaw dated January 9, 2013 (Tab 16) and an email from Ms. Bowkowy dated January 12, 2013 (Tab 17).

21. By letter dated May 1, 2013 Dr. Shaw inquired with Dr. Colistro about how he was meeting the bylaw requirement to be immediately available for consultation, supervision and interpretation of a certain percentage of examinations. This letter is attached at Tab 18.

22. Dr. Colistro responded by email dated May 2, 2013 providing the echocardiography credentials for Ms. Libke and confirming that real-time video linkage had been established. This email is attached at Tab 19.

23. After an inquiry and a number of follow-ups by Dr. Colistro, Dr. Shaw confirmed by letter dated February 12, 2013 that Dr. Colistro was permitted to act as a Medical Director of a facility that performs echocardiography, but that this would be limited to the performance and interpretation of trans-thoracis echocardiography. In that letter, Dr. Shaw also inquired how Dr. Colistro was fulfilling the obligations in Bylaw 25.1 with respect to being available for consultations, arrangements for coverage when he is on call for another facility, on vacation, or otherwise not in a position to carry out his duties; and how often he visits the site. This letter is attached at Tab 20.

24. Dr. Colistro responded by letter dated February 23, 2014 (Tab 21). This response was acknowledged by Dr. Shaw's letter of February 28, 2014 (Tab 22).

25. Dr. Colistro also provided details of his arrangement with Circle West in his questionnaire completed for the Diagnostic Imaging Quality Assurance Program in August 2015 (Tab 23).

<u>Payment Schedules for Insured Services</u>

26. The Ministry of Health publishes twice yearly Payment Schedules for Insured Services Provided by a Physician ("Payment Schedules"). Excerpts of the Payment Schedules that were in force at the relevant times are attached as follows:

a. April 1, 2013 Payment Schedule – Tab 24

b. October 1, 2013 Payment Schedule – Tab 25

c. April 1, 2014 Payment Schedule – Tab 26

d. April 1, 2014 (revised October 1, 2014) Payment Schedule – Tab 27

e. April 1, 2015 Payment Schedule – Tab 28

27. Each version of the Payment Schedule contains a listing of Information Sources, including numbers of the Claims Analysis Unit – both General Inquiries and Physician Claim Inquiries (including diagnostic coding of claims).

28. In October 2017 the Payment Schedule was amended to add detail to the circumstances in which billing code 20W can be used for M-mode and 50W can be used for Doppler flow studies. Excerpts of this version are attached at Tab 29.

29. There were various documents released by the Ministry of Health at or around the time of the release of the October 2017 Payment Schedule:

a. Physicians' Newsletter No. 47 dated October 1, 2017 (Tab 30);

b. Operations Bulletin No. 9 dated October 1, 2017 (Tab 31);

c. Obstetric Ultrasounds – New Payment Criteria & Service Codes with attached Billing Information Sheet – Obstetric Ultrasounds – undated (Tab 32).

30. For the purpose of this matter both parties certify to the authenticity of the excerpts of the relevant Payment Schedules attached. Any highlighted portions are marked as such in the original documents to show physicians which items were changed from the previous version of the Payment Schedule.

MSB audit and JMPRC review

31. In the course of its work, MSB monitors billings submitted by physicians and billing patterns. One of the ways it monitors is to review statistics relating to groups of physicians. Another way is through the Joint Medical Professional Review Committee ("JMPRC").

32. The JMPRC is established pursuant to section 49(1) of *The Saskatchewan Medical Care Insurance Act*. Pursuant to section 49.2 of the same Act, the JMPRC can investigate the appropriateness of billings by a physician, and can direct the recovery of funds paid by the Minister in appropriate circumstances.

33. The JMPRC reviewed billings submitted on behalf of Dr. Colistro between August 12, 2013 and March 16, 2015. An excerpt of its statistics package showing the total ultrasound services billed by a radiologist (3152 – Dr. Colistro) is attached at Tab 33.

34. By letter dated November 23, 2015, the JMPRC advised Dr. Colistro that it was reviewing billings for the period between August 12, 2013 and March 16, 2015, and requested copies of selected patient records for a sample of patients seen over that time frame. This letter is attached at Tab 34.

35. By letter dated September 19, 2016, the JMPRC requested that Dr. Colistro attend at an interview before the JMPRC on January 26, 2017. This letter is attached at Tab 35.

36. By letter dated November 2, 2016, and separate and apart from the JMPRC process, Ms. Carie Dobrescu advised Dr. Colistro that Medical Services Branch was undertaking a routine audit of services. This letter is attached at Tab 36.

37. This letter was followed up by a letter from Ms. Dobrescu dated November 8, 2016, attached at Tab 37, and an email of December 30, 2016 (Tab 38). The JMPRC interviewed Dr. Colistro in the presence of his legal counsel on January 27, 2017. A court reporter was present and transcribed the evidence. Ms. Libke was also present. For the purpose of this matter, both parties certify the authenticity and accuracy of the transcript that was prepared. This does not preclude either party from challenging the admission of the transcript (or portions thereof) as evidence in this matter.

38. One of the billing codes that was first raised by the JMPRC at the interview was 20W, "M-mode". Dr. Colistro typically billed the 20W code in conjunction with obstetrical ultrasound, as the sonographers used M-mode on fetal hearts to detect and measure the heart rate.

39. Another of the codes that was first raised by the JMPRC at the interview was 50W which applies to the use of Doppler. Doppler is the ability in ultrasound to detect a moving object; it is used to detect whether there is blood flow, and if so, the direction of the blood flow.

40. Colour Doppler is used in many cases to evaluate almost any mass that is identified, in order to determine vascularity.

41. Pulse Doppler or spectral Doppler identifies the presence or absence of blood flow, directionality, quantity of blood flow, and identifies the velocity.

42. The JMPRC did not review all services provided for the period under review but rather only reviewed selected patients. Following its review and interview of Dr. Colistro, the JMPRC

a. Reassessed recovery of all 20W services billed;
b. Reassessed recovery of some but not all of the 50W services billed;
c. Reassessed recovery of some but not all of the soft tissue codes (120W-136W) billed in conjunction with the primary requested ultrasound.

Medical records that may be referenced in evidence

43. The following records were excerpted from the records obtained by the JMPRC. Notations in red font were applied during the JMPRC process:

a. Patient M9 – xxx xxx 398 – pages 1000 to 1007
b. Patient M11 – xxx xxx 535 – pages 2000 to 2008
c. Patient M12 – xxx xxx 271 – pages 2009 to 2018
d. Patient M13 – xxx xxx 827 – pages 1008 to 1014
e. Patient M15 – xxx xxx 306 – pages 1015 to 1024
f. Patient M22 – xxx xxx 623 – pages 2023 to 2034
g. Patient M22A – xxx xxx 514 – pages 1029 to 1036
h. Patient M38 – xxx xxx 377 – pages 1070 to 1075
i. Patient M44 – xxx xxx 981 – pages 1092 to 1095
j. Patient xxx xxx 427 – pages 3007 to 3009
k. Patient xxx xxx 041 – pages 3014 to 3015
l. Patient xxx xxx 389 – pages 3016 to 3017
m. Patient xxx xxx 275 – pages 3020 to 3021
n. Patient xxx xxx 059 – pages 3026 to 3027
o. Patient xxx xxx 298 – pages 3048 to 3049
p. Patient xxx xxx 305 – pages 5002 to 5003
q. Patient xxx xxx 000 – pages 5046 to 5048

The above records are included at Tab 39. The charts are separated and organized at Tabs A through Q. The red notations on the records were added as part of the JMPRC process. The figures in the red box were the billing codes that had been billed with respect to each series of ultrasounds.

44. For the purposes of the discipline hearing, the parties admit that the patient records at Tab 39 are authentic and accurate records.

Dr. Colistro's oversight of Circle West

45. In August 2012, Dr. Colistro agreed to become the Medical Director of Circle West. He acknowledged having read Bylaw 25.1 and the obligations of a medical director of a diagnostic imaging facility.

46. From the time of Dr. Colistro's involvement in 2012, Circle West was owned by Ms. Libke and she was the employer of the other sonographers. Ms. Libke functioned as the clinic manager and supervisor of the employees. She managed the business, human resources and billing.

47. While Dr. Colistro read the Circle West images from Kamloops, the Circle West sonographers were able to communicate with him by text or phone.

48. While Circle West initially had the functionality to provide live scanning through the use of a Slingbox and later through a Skype function, reporting has primarily been done from still images,

"cine-clips" (rapid capture of a series of photos, simulating real time recording) and sonographer comments.

49. Circle West had in place a document entitled "Circle West Ultrasound Diagnostics INC. Employee Manual". We understand that various forms of the manual existed since Dr. Colistro's involvement with the Clinic.

50. During the time relevant to the charges, this manual included a number of policies and procedures as set out at the following tabs under Tab 40:

a. Employee Manual (since June 2014)
b. General guidelines for Sonographers
c. Canadian Society of Diagnostic Medical Sonography "Professional Practice Guidelines and Policy Statements for Canadian Sonography"
d. Sonography Canada "Professional Practice Guidelines and Member Policies" (since 2014).

51. The Clinic did not maintain a separate policy relating to equipment maintenance, but equipment was maintained on a reminder system through GE and was serviced approximately once annually. In addition, service calls would be arranged if a sonographer noted something that required repair. Service logs for each piece of equipment were maintained in a binder by Ms. Libke.

52. From 2012 until 2018, Dr. Colistro made one trip annually to Circle West and spent one day at Circle West. He walked room to room, looked at the infection prevention and control (IPAC) process for transvaginal transducers, met with the sonographers, etc.

53. Dr. Colistro was the only radiologist to read for Circle West, and did so even when he was on vacation or away at a conference.

54. Throughout the relevant times, Ms. Libke primarily communicated with Dr. Colistro via text, and he was generally accessible.

55. Dr. Colistro had delegated all major tasks to Ms. Libke including general management of the clinic, human resources, billing, etc.

56. An arrangement has always been in place with an IT company to periodically review functionality of equipment including technology.

57. During the relevant times, Dr. Colistro had no involvement with any follow-up on requisitions, nor did he typically review images prior to the patient departing Circle West (unless specifically requested to review images urgently).

58. Communications with sonographers was unencrypted and there was no record kept of those communications including any advice or directions provided by Dr. Colistro. Communications by text used the patient's initial only.

<u>Billing process at Circle West</u>

59. Ms. Libke was responsible for submitting billings on behalf of Dr. Colistro and Circle West. The billing process was delegated to Ms. Libke, the clinic owner. He did receive from Ms. Libke a monthly summary of the billings after those had been submitted.

60. At the relevant times, all payments by the Ministry were submitted to Circle West, and Ms. Libke then issued payments to Dr. Colistro. Ms. Libke maintained signing authority for the Circle West.

B. College Witnesses

6. The College called three witnesses to testify at the hearing: Ms. Carie Dobrescu, an employee of the Ministry of Health, Ms. Tanya Govier, an expert in sonography and Dr. Carolyn Flegg, an expert in diagnostic radiology.

7. Ms. Dobrescu is a Senior Insured Services Consultant with the Medical Services Branch (MSB), Saskatchewan Ministry of Health (MoH) through which physicians are compensated for medical services. Among her duties, Ms. Dobrescu serves as the Manager of the Joint Medical Professional Review Committee (JMPRC).

8. Dr. Colistro signed a Direct Payment Agreement with the Ministry of Health on August 3, 2012 (C-3 – Tab 14).

9. Ms. Dobrescu reviewed the 2014-2015 Payment Schedule for Insured Services Provided by a Physician (C-3 – Tab 26). Under the General Information – Services Supervised by a Physician section the Payment Schedule provides for payments to physicians for services they supervised by:

> (c) a person employed by a physician in the physician's office and for whose work the physician assumes overall responsibility and provides intermittent daily personal supervision, and the service is:
> …
> (iii) a diagnostic procedure involving a tracing.

10. The Payment Schedule also includes a section devoted to the resources available for billing inquiries including the provision of Physician Billing Profiles. The Schedule, in Section W, sets out the diagnostic ultrasound codes, the service(s) to which they apply and the amount payable for the technical component as well as the interpretation component of each code. Code 40W is used for an Obstetrical Scan–Complete (incudes pregnancy diagnosis, fetal age determination and placenta localization). Code 45W refers to "transvaginal ultrasound study **in addition** to 40W, 41W, 43W, 47W or 48W. Code 50W under the heading Doppler Studies is used for "flow studies including arterial or venus or fetal monitoring or shunt assessment, etc."
[emphasis added]

11. Ms. Dobrescu testified that all codes are applicable only to medically necessary procedures.

12. She stated physicians' questions regarding the billing codes are directed to Claims Analysts at MSB and may escalate to a medical consultation.

13. Ms. Dobrescu testified that a physician may come to the attention of the MSB for an audit where they are an outlier in terms of their billing profile. Payment is withheld until the physician produces documentation satisfactorily supporting their billings.

14. Ms. Dobrescu forwarded correspondence to Dr. Colistro on November 2, 2016 comparing his 2015-16 billings to the 72 other radiologists in the province:

Category	**Rank**	**You**	**Mean (Avg)**	**Times Higher**
Total Cost of Services	2nd	$1,765,922	$490,169	3.6
Standardized cost per patient	1st	$289	$118	2.4
Total services per discrete patient	1st	3.09	1.55	2
Total volume of ultrasounds billed	1st	308.9	73.9	4
Total services provided by doctor	4th	18,095	6,555	2.7
Total patient contacts	4th	1,124	239	4.7

15. In her testimony, Ms. Dobrescu also referred to JMPRC data for 2014 to 2015 comparing Dr. Colistro's ultrasound services billings to his peers (C-3, Tab 33). Notably Dr. Colistro was the only radiologist billing under the 20W code which he billed 1,974 times during that year.

16. Ms. Dobrescu testified that high volume by itself does not necessarily mean inappropriate billing. A high volume of patients may account for this but, in Dr. Colistro's case, the amount billed and his use of the 20W code were not standard. Likewise his use of the 50W code for the years 2013-14, 2014-15 and 2015-16 was unusual. The average use of the 50W code for all radiologists in Saskatchewan in the year 2013-14 was 128 while Dr. Colistro's use was 2,319. In 2014-15 the average was 117 and Dr. Colistro was at 4,569. In 2015-16 the average was 123 while Dr. Colistro's number was 5,522. In 2015-16 Dr. Colistro billed 20W 1,329 times compared to 0 for all other radiologists in the province (C-4).

17. On November 8, 2016, post-audit, Ms. Dobrescu sent a follow-up letter to Dr. Colistro outlining in detail the Ministry's areas of concern, specifically with respect to 50W, 40W and 20W billings (C-3, Tab 38). The pattern identified was that Dr. Colistro was billing 20W and 50W in conjunction with every obstetrical case (no matter the trimester) where there was:

> … no documented clinical indication to do so, and no documentation to support that this procedure was ordered or performed. … An echocardiogram or Doppler would never be indicated in the 1st trimester of pregnancy due to the limited fetal anatomy present.

> For a routine pregnancy, the Ministry would expect to see the following codes billed (when performed, ordered and clinically indicated):
>
> - 1st trimester – 40W
> - 2nd trimester – 40W, 50W
> - 3rd trimester – 40W, 50W and 46W
>
> There were also many times when a limited scan (41W) was recommended for follow-up, but a complete ultrasound (40W) was billed when there was no clinical indication to do so. …
>
> **Conclusion**
> … Ministry Officials identified numerous concerns with your billing patterns pertaining to ultrasound services. Many ultrasounds billed to Medical Services for payment were not ordered, performed, clinically indicated or documented in the medical record. It is inappropriate to bill in these circumstances. The Ministry is requesting that you discontinue billing in this manner immediately.

18. On December 30, 2016 Ms. Dobrescu emailed Dr. Colistro indicating ongoing concerns and stating:

> … There appears to be a complete disregard for the direction we provided in our letter dated November 7, 2016. …
> [referring to correspondence of November 8, 2016 rather than November 7, 2016]

Dr. Colistro responded the same day saying changes had been made to the billings by Circle West personnel in accordance with Ms. Dobrescu's suggestions. He added that:

> It would seem to me that Clinic staff's billing of exams needs some major oversight, despite the fact that my involvement in both Clinics came after they were already established, and this has obviously caused some serious concern for both MSB and myself.

In a responding email of the same date, Ms. Dobrescu explained:

> The comment regarding "complete disregard" pertains to the Circle West Ultrasound facility only. I can send you a listing of what was submitted this run, basically, almost everything that was outlined in our letter dated November 7, 2016, has continued to be billed. ie: 50W billed with almost every ultrasound – soft tissue, joints, renal, prostate, etc. There are multiple scenarios where 4 to 5 ultrasounds are being billed per patient contact. We advised that 50W would never be billed with a first trimester ultrasound, yet they are continued to be billed in this manner. The only code that has no longer been submitted is the 20W. With regard to your comments: "It would seem to me that Clinic Staff's billing of exams needs some major oversight, despite the fact that my involvement in both Clinics came after they were already established, and this has obviously cased some serious concerns for both MSB and myself". The Physician Payment Schedule under "Services Supervised by a Physician" specifies that the physician must employ the staff and provides daily personal supervision.

19. Ms. Dobrescu explained that, partially as a consequence of Dr. Colistro's egregious billing patterns, the Payment Schedule was amended on October 1, 2017 (C-29). The Schedule added a reminder that only medically required services are reimbursable by MSB. The diagnostic ultrasound section (W) clarified that services billed for 50W and 20W codes in the first trimester are not payable and that 50W Doppler Flow Studies are only payable in specific medically required circumstances.

Ms. Dobrescu said there had been no need for this clarification in the past ten years because no one ever billed the 20W and 50W the way Dr. Colistro did. A Physician's Newsletter on October 1, 2017 highlighted these changes. The newsletter was mailed directly to all physicians (C-3, Tab 30). An Operations Bulletin on October 1, 2017 again outlined the changes to the Payment Schedule (C-3, Tab 31). As well, in advance of the October 1, 2017 Payment Schedule changes, physicians received notification of the proposed changes for billing obstetric ultrasound services, detailing the proposed amendments.

20. In cross-examination Ms. Dobrescu testified that physicians' billings are routinely audited however the codes used by radiologists are straightforward and there has been no history of abuse. She said she had not previously seen a JMPRC referral of a radiologist. She speculated that, had they looked at Dr. Colistro's profile earlier, he would have received correspondence from MSB before November 2016. The Ministry may opt not to audit where a referral has been made to the JMPRC. Ms. Dobrescu acknowledged she knew 20W and 50W codes were an issue for Dr. Colistro in 2015 but the JMPRC and MSB are two separate bodies. She did not draft the JMPRC letters of November 23, 2015 and September 19, 2016 (C-3, Tabs 34 and 35) and was not directly involved in MSB audits in November 2015.

21. Ms. Dobrescu acknowledged she may have had telephone conversations with Dr. Colistro in November or December 2016 and possibly spoke to him about the JMPRC matter as well.

22. The second witness, Dr. Carolyn Flegg, a radiologist, was qualified to provide opinion evidence on:

1. The usual expectations/protocols when conducting ultrasound assessments;
2. The determination of the scope of an ultrasound examination;
3. The standard protocol for obstetric ultrasound depending on the trimester;
4. The use of M-mode;
5. The use of colour and spectral Doppler ultrasound;
6. Billing for ultrasound services in general and specifically relating to 20W and 50W.

Her reports were filed as Exhibits C-7, 8 and 9.

23. She testified that ultrasounds are done by sonographers in accordance with physician's orders. Radiologists are responsible for ensuring the right test is done. The radiologist is available to the sonographer at all times in person, by text or telephone. If imaging, beyond what was requested

by the referring physician, is performed, the reason for that additional imaging should be clearly documented in the radiologist's report. For example if a mass is found, the exam may be expanded. As a radiologist, Dr. Flegg, compares the requisition to the images and reads the sonographer's notes, if any. The radiologist's role is to interpret the images, answer clinical questions and report all relevant information from the images. The radiologist's report contains the images, the requisition, the work flow sheet and any prior relevant images with changes noted.

24. The standard protocol for obstetric ultrasounds varies depending upon the trimester of pregnancy and the reason for the ultrasound. Fetal heartrate is required for all obstetric ultrasound examinations. This is not considered an additional examination, nor does it constitute fetal echocardiography. The use of M-mode to calculate fetal heartrate is a routine component of obstetric ultrasounds in all trimesters. It takes approximately 15 seconds to conduct and is not billed under a separate billing code.

25. Doppler ultrasound is used to assess the blood flow through the vessels. Colour Doppler shows the direction and velocity of blood flow. Spectral Doppler quantitatively measures the flow of blood at defined anatomic locations. Spectral Doppler is not part of routine obstetric ultrasound in any trimester and is usually avoided when assessing an embryo in the first trimester. Doppler flow studies are used during pregnancy in the second and third trimester, typically performed only at the request of the referring physician or at the direction of the radiologist. Colour Doppler takes about 10 seconds to perform.

26. With respect to billing obstetric ultrasound, Code 20W is used only for echocardiography i.e. a detailed fetal cardiac examination that goes far beyond the M-mode documentation of the fetal heartrate. The use of M-mode to measure the fetal heartrate is part of a routine obstetric ultrasound in any trimester. It is covered by the existing billing code for an obstetric ultrasound and does not constitute fetal echocardiography or require an added-on fee code.

27. Dr. Flegg reviewed 29 of Dr. Colistro's ultrasound examination reports from 17 separate patients, 14 of which were for obstetric ultrasounds. She opined that Code 20W was not applicable to any of the examinations she reviewed. It was however applied to 13 of 14 obstetric ultrasounds none of which were requested by the referring physician. Furthermore none of the reports included a fetal echocardiography report. In short, the use of Code 20W was not justified in any of these cases.

28. Dr. Flegg also reviewed Dr. Colistro's use of Code 50W which was applied to all but one of the reviewed cases. Her opinion was that it was not applicable to any of the non-obstetric ultrasounds that were performed. Regarding the obstetric ultrasounds, none of the corresponding requisitions requested or suggested histories requiring a 50W examination. The reports by Dr. Colistro, with two exceptions, did not indicate that a core Doppler examination was done. The two exceptions were for fetal core Doppler which was reported but were not clinically indicated and should not have been performed.

29. Dr. Flegg stated it is inappropriate to add a Code to a billing unless extra work was done. The goal is to apply the Code matching most closely to the work performed.

30. In cross-examination Dr. Flegg acknowledged her staff submit her billings to MSB. In her practice she has never applied the 20W Code. Fetal echocardiography is conducted by pediatric cardiologists at the Children's Hospital. Where 50W (Doppler) is added to an examination, that should be noted in the radiologist's report. The operations bulletin dated April 1, 2017 (P-1) clearly states what the 50W Code is and is not intended to be used for.

31. The final witness for the College was Ms. Tanya Govier who was qualified to provide opinion evidence on:

1. Sonography credentials.
2. The usual expectations/protocols when conducting ultrasound imaging.
3. The circumstances in which additional scanning (beyond the requisition) is appropriate.
4. The use of M-mode and Doppler studies, and when those are appropriately independent examinations.

Ms. Govier's report was tendered as Exhibit C-11.

32. Ms. Govier, a sonographer, testified there are generally accepted protocols/standards for scanning different body parts. In obstetrics, the protocols vary by trimester. M-mode is used to measure fetal heartrate in all three trimesters. M-mode is not referred to as echocardiography. Fetal echograms are conducted by sonographers trained in fetal echocardiography, pediatric cardiologists and obstetricians specializing in high risk pregnancies on referral to the Maternal Fetal Unit at the Children's Hospital. The use of M-mode to assess fetal heartrate does not constitute echocardiography (the 20W code).

33. Colour Doppler to assess blood flow does not constitute a separate procedure/billing code. In obstetrical ultrasounds a request for colour Doppler would normally be made by the referring physician or the radiologist. Fetal Doppler studies in Saskatoon are typically done only at the Children's Hospital, Maternal Fetal Unit.

34. Colour Doppler is an expected part of soft tissue imaging and is not a separate procedure/billing code.

35. As a sonographer, Ms. Govier said she would only expand the scope of a requisition if, for instance, she saw a mass and would then record her observations and add-ons for the radiologist. A Doppler flow study typically takes less than five minutes to conduct.

36. In cross-examination Ms. Govier acknowledged she does not work in private practice. She is an employee of the Saskatchewan Health Authority (SHA).

C. Dr. Colistro's Witnesses

37. Counsel for Dr. Colistro called two witnesses at the hearing, Terra Libke, the owner/manager of Circle West Ultrasound Diagnostics Inc. and the Member, Dr. Robert Colistro.

38. Ms. Libke attended with her counsel, Nicholas Stooshinoff. She is a registered Diagnostic Medical and Cardiac Sonographer.

39. Ms. Libke testified that in 2012, after she opened Circle West, she was in need of a radiologist/medical director. Dr. Colistro agreed to fill this role.

40. Ms. Libke referred to a document (C-3, Tab 40C) entitled "Canadian Society of Diagnostic Medical Sonography Professional Practice Guidelines and Policy Statement for Canadian Sonography" as the original Circle West policy guidelines. These practice guidelines have been updated (C-3, Tab 40D).

41. Libke also referred to a Circle West Ultrasound Diagnostics Inc. Employee Manual (revised: October 3, 2019) and an undated General Guidelines for Sonographers Circle West Ultrasound (C-3, Tab 40B). Libke said Dr. Colistro was involved in adding to and revising the Employee Manual. She described good communication with Dr. Colistro by emails and texts as well as feedback from

him to technicians in a timely manner. Dr. Colistro visited Circle West once or twice a year for a day. She described him as "very hands-on" and approachable. Staff meetings were held monthly and the minutes of each provided to Dr. Colistro. She described him as "100 percent available" to the sonographers, giving instructions within 10 to 15 minutes of request. She said he was "never not available". Live images were available to Dr. Colistro with real time possibility.

42. Libke testified that the equipment at Circle West was maintained.

43. As for examination protocols, this is part of a sonographer's training. If a referring physician's request is not clear, the technician contacts the physician. Technicians do not conduct a full scan unless it is requested.

44. With respect to billings, Libke said she forwarded billing summaries to Dr. Colistro by email for his review and correction. Questions concerning billing codes were, at the outset, directed to MSB but she gained confidence in her billings with time.

45. Libke said M-mode was used in obstetric ultrasound for every trimester and it "made sense" to bill it as a code 20W. Likewise with the use of the 50W code, it "made sense" to bill it separately.

46. On July 26, 2013 Libke sent a fax to MSB Claims Analysis (P-2) asking whether she could resubmit some claims previously billed to add a 50W code to thyroid and scrotal ultrasounds for the use of colour Doppler. The response from the MSB Manager, Claims Analysis dated August 15, 2013 (P-2) addressed the timing of the proposed additional 50W claims i.e. claims must be submitted within six months of the service being provided, and denied the request. Libke testified that because MSB did not forbid the additional 50W billing and, in fact, did not address this issue in the response, she assumed the 50W code could be added and did so thenceforth.

47. With respect to the correspondence from the Ministry of Health (Dobrescu) dated November 2, 2016 (C-3, Tab 36) and the November 8, 2016 correspondence from the Ministry (C-3, Tab 37), Libke acknowledged receiving this correspondence and was confident she spoke to Dr. Colistro about it. She described being a bit "shocked" by the correspondence and stopped adding 20W and 50W codes to the billings.

48. In cross-examination Ms. Libke stated she is the sole owner of Circle West. She hires, pays and manages all employees and is responsible for the finances and other management duties associated with the Clinic. Decisions regarding how the Clinic operates are made jointly with Dr. Colistro.

49. Staff meetings, which Dr. Colistro does not attend, are held monthly. When sonographers have questions they are directed to Libke first.

50. With respect to the Circle West General Guidelines for Sonographers (C-3, Tab 40B) Libke said this document was in place early on. It contains protocols with minimum standards for each examination including a warning that "pulsed Doppler should be avoided in any obstetric exam". M-mode is expected to be part of all obstetric ultrasounds, Doppler is an expected part of abdominal exams. Libke testified that in addition to this document she believed the Clinic also had Quality Assurance Policies in place and that informal processes were used to ensure quality control. Sonographers learn this in school. She acknowledged the Clinic did not have an audit procedure as recommended by the Canadian Society of Diagnostic Medical Sonography (C-3, Tab 40C, page 11).

51. Libke acknowledged Dr. Colistro may have visited the Clinic only once per year in the first few years. The visits were informal and included building rapport with staff. Dr. Colistro also answered sonographers' questions. She acknowledged these meetings did not follow an agenda.

52. Libke testified Dr. Colistro asked her to manage all of the billings. There was no management group at the Clinic. She was solely responsible. Dr. Colistro's role in billing was to let Libke know if two exams were to be done. Sonographers conducted the exams requested and if they had questions, called the referring physician. Libke said Dr. Colistro did not tell her or the sonographers what examinations to conduct.

53. The letter from MSB of August 15, 2013 was not clear. However, no further inquiries were made of MSB regarding the code 50W billings.

54. Dr. Colistro testified on his own behalf. He has been a practicing radiologist in Kamloops, British Columbia since 2006 when he completed his residency. In British Columbia the College of Physicians and Surgeons has a Diagnostic Accreditation Program (DAP) to ensure diagnostic facilities comply with standards. College staff conduct site visits to assess quality, staff

qualifications, equipment, etc. In the event of noncompliance with the standards the facility is given time to make changes before full accreditation is granted. No such program exists in Saskatchewan. Dr. Colistro said he was surprised there was no facility accreditation process in place in Saskatchewan.

55. Dr. Colistro testified he was contacted by Terra Libke in 2012. At that point she had several months worth of unreported cases because of the absence of a radiologist to interpret the images. Dr. Colistro agreed to help, was granted a temporary license by the College of Physicians and Surgeons and eventually became fully licensed. He was referred by CPSS Legal Counsel to Bylaw 25.1 of the CPSS Bylaws regarding the role of a medical director and he did his best to comply. In an email dated November 23, 2012 Mr. Salte pointed out that Bylaw 25.1 requires an ultrasound facility to have a medical director who takes responsibility for the facility meeting the standards of Bylaw 25.1 (C-3, Tab 15). To comply with Bylaw 25.1 Circle West established real time video linkage (C-3, Tab 19).

56. In response to questions from the CPSS Dr. Colistro advised that he is available for consultations or to support the sonographers at Circle West at all times including during vacation and makes annual visits to Circle West (C-3, Tab 21). He testified he always has a laptop and cell phone with him. When he is not available no scans are conducted. Because Circle West is an out patient Clinic the acuity of patients is lower than in hospital. He interacts with Circle West one to three times per day except where an immediate response is required as, for example, with an out of town patient. The real time video link referred to in his correspondence is no longer being used because it is not compatible with the equipment at Circle West, and no alternative device was available. Dr. Colistro said he asked Libke to check with other facilities to determine how they comply with this aspect of Bylaw 25.1 and was told one facility does not use real time video. Dr. Colistro described this noncompliance as a “head scratcher”. However, shortly after this problem arose, CPSS approved an alternate method.

57. Dr. Colistro testified the CPSS has no standard as to frequency of medical director visits at a facility. CPSS accepted his proposal to visit annually as is required in British Columbia. In 2018 CPSS determined that four visits per year were required.

58. Dr. Colistro, during his visits, meets with staff to review processes and suggests changes, provides feedback to sonographers and, if time permits, observes them. He and Libke meet to discuss operations.

59. Protocols for various scans are defined. If a sonographer, based on clinical observations, finds it necessary to expand the scope of the examination, that is permissible.

60. Dr. Colistro said he and Libke when they began working together reviewed and defined all billings in accordance with the Payment Schedule and revised them as the Schedule changed. Libke bills for all services after validating the requisition and scan. Libke manually submits the billings and sends a print-out every three months to Dr. Colistro. He takes ten sample cases and reviews all of the information to determine whether the billing was appropriate. Occasionally MSB rejected a billing submission from Circle West.

61. Regarding the 20W code, Dr. Colistro and Libke thought it applied to M-mode. They had not been billing M-mode as a 20W code and decided to add it as a separate code for billing purposes. Circle West never did fetal echocardiography. Dr. Colistro described it as a highly specialized service for which he was not credentialed.

62. Regarding the 50W code, Dr. Colistro and Libke interpreted it as applying to colour Doppler and core Doppler. Because Circle West was doing lots of colour Doppler they thought it could be separately billed. Dr. Colistro recommended Libke get advice from MSB on this.

63. Correspondence from the JMPRC dated November 23, 2015 (C-3, Tab 34) to Dr. Colistro advised him the JMPRC was reviewing his billing patterns for the period August 12, 2013 to March 16, 2015 and requested additional information specifically with respect to diagnostic ultrasounds. The JMPRC requested copies of the records for all the dates of services indicated in the billing histories for the patients listed on an enclosed sheet and all referral requisitions and/or referral letters for these patients. In addition, it sought patient records for four specific dates in February, April and July 2014 and February 2015. Dr. Colistro was advised to contact the Canadian Medical Protective Association (CMPA) if he wished to engage legal counsel.

64. In his testimony Dr. Colistro described this correspondence as non-descriptive, vague and a general notice of the JMPRC's intent to review his billings. The information requested was promptly compiled and forwarded.

65. Approximately ten months later, on September 19, 2016 Dr. Colistro received further correspondence from the JMPRC (C-3, Tab 35):

> The Joint Medical Professional Review Committee (JMPRC) reviewed your submission of December 22, 2015, at their May 20, 2016, meeting; however, the Committee was unable to conclude their review of your pattern of billing.
>
> As identified in our letter, the initial issues were:
>
> - **Frequency of diagnostic ultrasounds**.

66. The Committee requested a hearing with Dr. Colistro on January 26, 2017 in Regina and again referred him to the CMPA as well as the Saskatchewan Medical Association, the College of Physicians and Surgeons and the Ministry of Health Medical Services Branch. Dr. Colistro attended as requested but said he had no idea why he was being asked to meet with the JMPRC.

67. The November 2, 2016 correspondence from MSB (C-3, Tab 36) came as a surprise to Dr. Colistro. He said he had no indication there was a problem or that his billing profile was an outlier.

68. The November 8, 2015 correspondence from MSB (C-3, Tab 37) was the first indication he had of the particular billing items at issue. He called Libke immediately and reviewed the codes 20W and 50W with her. They had added the code 50W to all colour Doppler services approximately a year earlier thinking colour Doppler justified a 50W billing. He told Libke to stop billing the code 20W. Libke and Colistro reviewed all the billings again to ensure they matched the Payment Schedule. Colistro called Dobrescu at MSB, a call that felt to him like he had been invited to the "principal's office". He said he wished he had known there was a problem.

69. Regarding CPSS Bylaw 25.1, Dr. Colistro said he asked Libke in 2012 to work on preparing a Circle West Manual. He had input into it and reviewed it, however said he had to mobilize quickly in 2012 because time was of the essence. The Manual has been built on since then.

70. Circle West equipment is calibrated and maintained by GE (the Vendor) on an ongoing basis and a log book kept by Libke.

71. As for quality control required by the Canadian Society of Diagnostic Medical Sonography (C-3, Tab 40C), all sonographer candidates are screened by Libke at Circle West and reviewed by Colistro before hiring. Dr. Colistro said he believed there was a system in place at Circle West to ensure sonographers were registered. A Policy and Protocols Manual is in place. Quality patient care begins when a patient walks into Circle West. Dr. Colistro stated the staff are capable, thorough, and interpretation of examinations is high level and reported in a timely fashion. His reports are detailed. Sometimes unexpected findings require immediate attention. The patient is asked to wait until Dr. Colistro reviews the images. Sometimes he contacts the referring physician by telephone regarding findings. Referring physicians appreciate this and are surprised by it because not everyone provides this kind of feedback.

72. Dr. Colistro said he expects high quality images. The process of maintaining quality imaging is an ongoing matter.

73. During his annual visits to Circle West Dr. Colistro meets with each member of staff to review processes/communication. He reviews turnaround time for reports in accordance with British Columbia standards because Saskatchewan does not have any. In British Columbia turnaround time for reports are set according to whether the matter is urgent or elective.

74. In cross-examination Dr. Colistro acknowledged he is responsible for all billings submitted in his name and that billings must reflect medically necessary clinically indicated services. The April 1, 2012 Payment Schedule (C-13) provides that supervised services are billable if provided by:

> (c) A person employed by a physician in the physician's office and for whose work the physician assumes overall responsibility and provides intermittent daily personal supervision, and the service is:
> …
>
> iii. a diagnostic procedure involving a tracing (including, but not limited to, W section codes, ECGs, spirometries, echocardiograms, etc);

75. Dr. Colistro said the sonographers at Circle West are under his supervision and that he bears ultimate responsibility. Hiring is a joint process conducted by Libke and him.

76. Dr. Colistro acknowledged that the code billed should be the one most closely matching a medically necessary service and must be reported.

77. Because M-mode was being used at Circle West the 20W code was added to the billings for each obstetric ultrasound. He agreed that M-mode is used routinely in all trimesters to measure fetal heartrate and that the 40W code covers a complete obstetrical scan. Fetal heartrate is an expected part of every obstetrical ultrasound. Because M-mode is shown as a separate billing code in the Fee Schedule, he deduced that it was applicable to obstetric ultrasound. He and Libke thought they had been underbilling by not using the 20W code for years. Obstetrics is the only application for M-mode and M-mode was not included as a listed service in a complete obstetric exam (40W).

78. As for use of the 50W code Dr. Colistro said it had come to their attention that others were using it. He asked Libke to get input from MSB. He understood from her that billing the 50W (Doppler) was permissible and they then billed it retroactively. He did not report specifically on it because he thought Circle West was doing something they should have been billing for but had not. Colour Doppler is used routinely in ultrasounds and is part of the protocol at Circle West. Doppler is a useful diagnostic tool.

79. Dr. Colistro testified it is not necessary to report additions or subtractions to the examination request although, ideally, reports should reference additions.

80. Dr. Colistro testified he read CPSS Bylaw 25.1 when he took the medical director position at Circle West. He acknowledged Circle West may not have had an employee policy in place until 2014.

81. Inspection of equipment was conducted by the vendor in accordance with its recommendations at least once a year.

82. His proposal to the CPSS of annual visits to Circle West was acknowledged by the Registrar, Dr. Shaw with no contradictory direction given by her.

83. While Circle West did have real time video capacity, it was never needed because the patients of Circle West are low acuity.

84. Dr. Colistro testified daily operations and matching services to billings were delegated to Libke. In addition to his ten case audit, Dr. Colistro occasionally noticed an unjustified scan and contacted Libke to advise her not to bill it.

85. Regarding the MSB correspondence of November 2, 2016 (C-3, Tab 36) Dr. Colistro testified he received it sometime later, probably the end of November or early December 2016 because it was mailed to Circle West. However the November 8, 2016 correspondence from MSB (C-3, Tab 37) refers to his "prompt response".

IV. ARGUMENT

86. Both parties presented oral and written submissions.

A. College of Physicians and Surgeons

87. The College argued the charges are strict liability offences not requiring proof of *mens rea*.

88. Charge #1, excessive billing of the 20W and 50W codes, was acknowledged by Dr. Colistro in his appearance before the JMPRC. The decision to bill these codes were made jointly by Dr. Colistro and Libke but ultimately he is responsible for billings in his name.

89. The defence of due diligence, specifically belief in a mistaken set of facts, is not applicable. The decision to add code 20W to all obstetric exams was deliberate. No additional service beyond what is covered under the 40W code was required or conducted. Likewise with the addition of the 50W code which was added inappropriately to standard procedures. The billing decisions taken by Dr. Colistro/Libke were aggressive and, because no one told them they could not do it, they did. This was not a mistake or a one-off.

90. Regarding the second branch of the due diligence test, Circle West's billings were submitted by its owner who had a direct interest in profitability. Dr. Colistro suggested MSB should have audited/told him Circle West was billing inappropriately, however, the aggressive billing decisions were made more than two years after Circle West opened. MSB receives millions of claims and, as the evidence disclosed, historically has had no issues with radiologists' billings and therefore has paid less attention to them than to some others. It was Dr. Colistro's obligation to ensure appropriate billing, not MSB's. Dr. Colistro did not request a billing profile, did not take an offered course on billings because it was not required and did not contact MSB to question the appropriateness of adding the 20W and 50W codes. He has failed to meet the burden of proving due diligence

91. Regarding Charge #2 it is not necessary for the College to prove every particular. Dr. Colistro had an obligation to oversee Circle West under Bylaw 25.1. According to Libke there was no manual in place as required by Bylaw 25.1(c)(ii)(2)(l). The requirement for inspections every six months was not complied with. Likewise with respect to the other particulars in Charge #2. Specifically with respect to Charge #2(f) – billing for tests that were not requested by the referring physician and were not medically indicated – Dr. Flegg's uncontradicted evidence from her review of a sample of Dr. Colistro's cases was that Dr. Colistro's reports did not always record examinations done and billed for. Dr. Flegg disagreed with Dr. Colistro that if no pathology is found the radiologist's report does not need to reference it.

92. The College submitted it would be helpful for the Committee, should we determine the charges to be proven, to provide an assessment as to the seriousness of the conduct found.

93. In support of its submissions the College cited the following authorities: *Green v. College of Physicians and Surgeons (Sask.)*, 1986 CanLII 3238 (SK CA); *Hesje v Law Society of Saskatchewan*, 2015 SKCA 2 (CanLII), at para. 57-60, 63-65, 70-72; *Huerto v. College of Physicians and Surgeons (Sask.)*, 1994 CanLII 4900 (SK. Q.B.) at pages 13-14; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.) at para. 40-49; *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33 (SKCA) at para. 50-53; leave to appeal refused [2009] S.C.C.A. No. 192 (S.C.C.); *Merchant v. Law Society of Saskatchewan*, 2014 SKCA 56 (CanLII) at para. 64, 73; *Faryna v. Chorney*, 1951 CanLII 252, [1952] 2 D.L.R. 354 (BCCA) at pages 356-357; *Brar and others v. B.C. Veterinary Medical Association and Osborne*, (No. 22), 2015 BCHRT 151 (CanLII) at para. 78-84; *R. v. Sreedhar*, 1986 CanLII 2919 (SKCA); *CPSS v Dr. Ernst (2019)*, (decision available under "Completed Cases" at the Saskatchewan College of Physicians and Surgeons website); *CPSS v Dr. Cardoso-Medinilla (2019)*, (decision available under "Completed Cases" at the Saskatchewan College of Physicians and Surgeons website).

B. Dr. Colistro

94. Counsel for Dr. Colistro submitted that Charge #1(b) to (d) using the words "caused or permitted" implies a requirement to prove intent and could therefore be considered a *mens rea* offence rather than one of strict liability. Furthermore, Sections 46(i) and (j) of the *Act* speak to performing professional services that are not justifiable. That is not the case here and, accordingly, the College has failed to prove this allegation.

95. Section 46(o) of the *Act* requires that, in order to constitute unprofessional conduct, the alleged conduct must be sufficiently serious. In this case misinterpretation of the 20W and 50W codes in the Payment Schedule occurred once – when the decision to bill these codes was made. This misinterpretation could be viewed as a singular error in judgment.

96. The College led no evidence with respect to Section 46(p) of the *Act* which imports the bylaws and, thereby, the Code of Ethics requiring physicians to use healthcare resources prudently.

97. Bylaw 8.1(b)(iii) deems "Charging a fee that is excessive in relation to the services performed" to be unprofessional conduct under Section 46(p) of the *Act*. If proven, the onus shifts to Dr. Colistro to prove due diligence on a balance of probabilities. However, arguably, Dr. Colistro's interpretation of the Payment Schedule was reasonable given that the services provided (M-mode and colour Doppler) fit within the descriptors of the 20W and 50W codes. In any case, Dr. Colistro's conduct was in the nature of a technical breach of a bylaw, not sufficiently serious to amount to unprofessional conduct. And again, the decision to bill these codes were isolated ones.

98. Bylaws 9.1(f) and (g) address conflicts of interest for physicians with proprietary interests in a facility. The evidence was that Ms. Libke is the owner of Circle West.

99. Regarding the defence of due diligence (to a strict liability charge), Dr. Colistro's interpretation of the Payment Schedule with respect to the 20W and 50W codes was reasonable given the wording in the Payment Schedule "echocardiography, M-mode" which, essentially, refers to an ultrasound of the heart using M-mode which was the service Dr. Colistro provided. With respect to the 50W code Libke inquired of MSB about retroactively billing this code and was told by MSB that the time limit for retroactive billings had expired. Because MSB did not explain the proper use of code 50W in its response to Libke, she assumed her use of it was appropriate. Adding the 50W code for the use of colour Doppler was a reasonable approach.

100. Both the Ministry and the JMPRC failed Dr. Colistro by not auditing him and by failing to clarify billing problems with Dr. Colistro, respectively. Both bodies knew Dr. Colistro was an outlier. Dr. Colistro ceased 20W billings upon notification to do so from MSB. Prior to this Dr. Colistro reasonably believed his billings under the 20W and 50W codes were appropriate. The reasonableness of his belief is bolstered by the changes made to the Payment Schedule in 2017 clarifying the use for which code 20W and 50W are intended.

101. Dr. Colistro took reasonable steps to mitigate his billing errors by conducting his own ten-case billing audits and did not protest repayment of overbillings when he was advised of MSB's interpretation of the 20W and 50W codes. He reasonably believed in a mistaken set of facts which, if true, would render his act or omission innocent and took all reasonable steps to avoid further billing concerns.

102. With respect to Charge #2, Bylaw 25.1 setting out the obligations of a medical director of a diagnostic imaging facility requires evidence of the standard to be met. Dr. Flegg, as the Medical Director of a facility operated by the Health Authority, could not provide such evidence. Bylaw 25.1 does not make failure to meet its requirements an offence of unprofessional conduct. Therefore Bylaw 8.1(b)(ix) – failure to maintain the standard of practice of the profession – applies. Without evidence establishing what that standard is, the Discipline Committee has no method of assessing whether the steps taken by Dr. Colistro met the standard.

103. Even if Bylaw 25.1 establishes the applicable standard, the College has failed to prove any of the particulars in Charge #2.

104. In support of its submissions counsel for Dr. Colistro cited the following authorities: *College of Physicians and Surgeons of Saskatchewan v. Huerto*, 1996 CanLII 4920 (SK CA); *Dr Ali v College of Physicians and Surgeons*, 2013 SKQB 38 (CanLII); *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41; *Fitzpatrick v. Alberta College of Physical Therapists*, 2012 ABCA 207 (CanLII); *Howe v. Institute of Chartered Accountants of Ontario*, 1994 CanLII 3360 (ON CA); *Huerto v. College of Physicians and Surgeons*, 1994 CanLII 4900 (SK QB); *Huerto v. College of Physicians and Surgeons*, 2004 SKQB 360 (CanLII); *Hussain v. Joint Medical Professional Review Committee*, 2001 SKQB 229 (CanLII); *Kapoor v. Law Society of Saskatchewan*, 1986 CanLII 3237 (SK CA); *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, 2013 SCC 63 (CanLII), [2013] 3 SCR 756; *Law Society of British Columbia v. Lawyer 10 (Re)*, 2009 LSBC 6 (CanLII); *Litchfield v. College of Physicians and Surgeons of Alberta*, 2008 ABCA 164 (CanLII); *Merchant v. Law Society of Saskatchewan*, 2002 SKCA 60 (CanLII); *Anthony Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33 (CanLII); *Merchant v Law Society of Saskatchewan*, 2014 SKCA 56 (CanLII); *Moll v. College of Alberta Psychologists*, 2011 ABCA 110 (CanLII); Oakville (Town) v. Clublink Corporation ULC, 2019 ONCA 826 (CanLII); *R. v. Sault Ste. Marie*,

1978 CanLII 11 (SCC), [1978] 2 SCR 1299; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27.

V. ANALYSIS

A. Post-Hearing Application

105. On June 17, 2021 Dr. Colistro applied to submit as evidence an additional two pages to the Payment Schedule dated April 1, 2012 (C-13) and revised Payment Schedule of October 1, 2017 (C-3, Tab 29) regarding Code 150C – Pediatric – Fetal Echocardiography.

106. Counsel for Dr. Colistro argued that the Payment Schedule is a statutory document [*Hussain v. Joint Medical Professional Review Committee*, 2001 SKQB 229 (CanLII)] and a public document. Code 150C begs the question, not addressed by Dr. Flegg in her testimony, as to the function/use of code 20W. It goes to the reasonableness of Dr. Colistro's belief in a set of facts which, if true, would exonerate him – one branch of the due diligence defence.

107. Counsel for Dr. Colistro said he had not previously noticed code 150C. Introduction of it at this point would not prejudice either party and is relevant to the due diligence/reasonable belief defence.

108. In support of his submissions counsel for Dr. Colistro cited the following authorities: *Ontario (College of Physicians and Surgeons of Ontario) v. Michael*, 2020 ONCPSD 43 (CanLII); *Attallah v. College of Physicians and Surgeons of Ontario*, 2021 ONSC 3722 (CanLII)

109. The College submitted, in response, that because the hearing of this matter is closed, Dr. Colistro's application is an application to reopen his case.

110. The law with respect to reopening is found in *Scott et al. v. Cook et al.*, 1970 CanLII 331 (ON SC) approved by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 SCR 983. The two-part test is:

1. Would the evidence, if presented at trial, probably have changed the result?
2. Could the evidence have been obtained before trial by the exercise of reasonable diligence?

111. Applying that test to this case, regarding step one, the College argued the Discipline Committee is not being asked to determine what code 20W is used for. The important issue is the steps taken by Dr. Colistro in exercising due diligence. Dr. Colistro did not rely on and was not even aware of code 150C at the time he made the decision to bill code 20W for each obstetrical ultrasound.

112. Regarding the second prong of the test, Dr. Colistro had a copy of the 2012 Payment Schedule prior to the hearing and, with diligence, could have located code 150C.

113. In support of his its submissions the College cited the following authorities: *Smith Building And Development Ltd. v Western Financial Group (Network) Inc.*, 2021 SKQB 25 (CanLII); *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 SCR 983; *Scott et al. v. Cook et al.*, 1970 CanLII 331 (ON SC); *College of Physicians and Surgeons of Ontario v. Tan*, 2021 ONCPSD 26 (CanLII).

Decision on the Motion to Reopen

114. Counsel for Dr. Colistro properly acknowledged that Dr. Colistro did not refer to code 150C of the Payment Schedule in coming to his conclusion that billing the 20W code for all obstetric ultrasounds was appropriate. That being the case, code 150C was not and could not be a factor in his due diligence defence. Given that, its admission into evidence would not affect the result.

115. With respect to the second branch of the *Scott* test, as counsel for Dr. Colistro pointed out, the Payment Schedule, including code 150C is a public document and was available to Dr. Colistro prior to the hearing.

116. On both branches of the *Scott* test, this application must fail.

B. Analysis and Decision on the Merits

117. The issues in this case are:

1. Do the charges create strict liability offences or offences requiring proof of *mens rea*?
2. In either case, has the CPSS proved its case on a balance of probabilities?
3. If strict liability applies, has Dr. Colistro met his burden of proving due diligence on a balance of probabilities?

4. In the event of a finding of unprofessional conduct on either or both charges, for the purposes of Council's assessment of penalty, how serious are these matters?

Strict Liability or *mens rea*

118. There is a presumption that professional regulatory offences are strict liability offences [*La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, [2013] 3 SCR 756, 2013 SCC 63 (CanLII)]. Where a strict liability offence is charged it is not necessary for the charging body, in this case the CPSS, to prove the member charged intended to engage in unprofessional conduct. Once the acts of professional conduct are proven on a balance of probabilities, the onus shifts to the member to establish a due diligence defense by proving:

1. Belief in a mistaken set of facts that if true would have rendered the act innocent or
2. The member took all reasonable steps to avoid this particular event.

119. In *La Souveraine, supra*, the Supreme Court of Canada at para, 31 stated:

> [31] A court inquiring into the nature of an offence must interpret the relevant statutory provision. In doing so, it must take account of the presumption established by this Court that regulatory offences are generally strict liability offences. In *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420, at para. 16, LeBel J. explained this as follows, citing the presumption of statutory interpretation articulated by this Court in Sault Ste. Marie:
>
> > Classifying the offence in one of the three categories now recognized in the case law thus becomes a question of statutory interpretation. Dickson J. noted that regulatory or public welfare offences usually fall into the category of strict liability offences rather than that of mens rea offences. As a general rule, in accordance with the common law rule that criminal liability ordinarily presupposes the existence of fault, they are presumed to belong to the intermediate category:
> >
> > Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. [p. 1326]

120. The Saskatchewan Court of Appeal in *Merchant v. Law Society of Saskatchewan*, 2014 SKCA 56 (CanLII) restated that professional regulatory offenses are strict liability offenses **unless** the wording of the charge incorporates a *mens rea* or intentional component.

> [63] In *Merchant (2009)*, this Court also explained the nature of a strict liability offence:
>
> > 50 Regulatory offences that affect matters of public interest or concern fall into the intermediate category. These frequently involve controlled, restricted, or regulated spheres of activity rather than conduct prohibited on pain of criminal sanction. In strict liability offences, the onus is on the accused to establish on a balance of probabilities that he took all reasonable steps to avoid committing the offence. Or, as more recently articulated by Goudge J.A., speaking for the Ontario Court of Appeal, what must be established is that the "accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure

> the effective operation of the system." [*R. v. Petro-Canada* (2003), 222 D.L.R. (4th) 601 at para. 15 (O.C.A.)]
>
> 51 The rationale behind the creation of a third category of offences is that in regulatory situations, it is the defendant who has the relevant knowledge regarding the measures taken to avoid the particular breach in question. It was deemed proper to expect that the defendant would come forward with the evidence of due diligence. Thus, while the prosecution was required to prove beyond a reasonable doubt that the prohibited act has been committed, the defendant had to establish, on a balance of probabilities, that he or she had been duly diligent, taking all reasonable care to avoid offending. Alternatively, the defendant had only to establish the requisite reasonable belief in a state of facts that, if true, would render the act an innocent one.
>
> 52 Therefore, a strict liability offence requires, at minimum, a fault element amounting to negligence before misconduct will be found. Negligence consists in an unreasonable failure to know the facts which constitute the offence, or the failure to be duly diligent in taking steps which a reasonable person would take. [As articulated by Gonthier J. in *R. v. Pontes*, [1995] 3 S.C.R. 44 (in dissent) at para. 79]
>
> …
>
> [69] In this case, the Law Society did not insert any words that would indicate the conduct unbecoming charge hinged on a finding of intention. Examples of such words are "intentionally" or "knowingly." The charges in this case merely say "did" (breach) and "did" (counsel and/or assist). "Did" merely refers to the action of doing something and does not, in itself, impart any type of mental element. One of the definitions that the *Oxford English Dictionary* provides for the word is "perform, effect, engage in." The word "did" alone does not impart any *mens rea* into the charge.

121. Without use of the words "knowingly", "wilfully" or "intentionally" in the charge, there is no requirement for the CPSS to prove an intentional component to Dr. Colistro's conduct.

122. Neither of the charges against Dr. Colistro alleged that he knowingly, willfully or intentionally acted or failed to act in the manner complained of. Counsel for Dr. Colistro suggested the words "caused or permitted" in Charge #1 import an element of intent beyond mere negligence. The definitions of "cause" and "permit" cited are not of assistance in making this case. They are action words not, on their face, words requiring proof of intent. As was the case in *Merchant (2014)* where Merchant was charged with breaching a court order and counselling or assisting his client to act in defiance of a court order the Court said at paragraph 70:

> [70] … One can conceive of the charge being established by evidence showing the action required by the court order was not performed and evidence the cause was negligence or inadvertence.

Likewise, excessive billing can be proven by data and evidence of negligence. The only person who has knowledge of what steps were taken to prevent this act, once proven, is Dr. Colistro. This is the hallmark of a strict liability offence particularly where, as here, the Bylaw allegedly breached [8.1(b)(iii)] contains no words implying intent. Proof of the act of excessive billing is sufficient to satisfy the College's burden of proof.

123. Having found that both charges against Dr. Colistro create strict liability offences, the next issue is whether the College has proved the charges on a balance of probabilities so as to shift the onus of proving due diligence to Dr. Colistro.

Proof on a Balance of Probabilities

Charge #1

124. With respect to Charge #1, Dr. Colistro is charged alternatively under the provisions of Section 46(1), Section 46(j) and/or Section 46(p) of the *Act*, the Code of Ethics, paragraphs 43 and 44, Bylaw 8.1(b)(iii), Bylaw 9.1(f) and/or Bylaw 9.1(g) of the College Bylaws with excessive billing and/or failing to exercise due diligence over billing.

125. In reviewing the evidence with respect to Charge #1, the Discipline Committee focused on Section 46(p) of the *Act*, Bylaw 8.1(b)(iii):

> **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:
> …
> (p) does or fails to do any act or thing where the council has, by bylaw, defined that act or failure to be unbecoming, improper, unprofessional or discreditable.
>
> **8.1 Bylaws Defining Unbecoming, Improper, Unprofessional or Discreditable Conduct**
> …
> (b) The following acts or failures are defined to be unbecoming, improper, unprofessional or discreditable conduct for the purpose of Section 46(p) of the Act. The enumeration of this conduct does not limit the ability of Discipline Hearing Committees to determine that conduct of a physician is unbecoming, improper, unprofessional or discreditable pursuant to Section 46(o):
> …
> (iii) Charging a fee that is excessive in relation to the services performed.

126. Under its legislated authority to enact bylaws, the Council of the CPSS has articulated clearly its approbation of excessive, unwarranted billings by deeming such acts unbecoming, improper, unprofessional or discreditable conduct.

127. The JMPRC first alerted Dr. Colistro to the fact that his billings were under review in November 2015 (C-3, Tab 34). The JMPRC's review of all radiologists' billings in the province showed Dr. Colistro billing code 50W 4,569 times in the year 2014-15 compared to the average radiologist billing of code 50W for that period of 138. With respect to code 20W, Dr. Colistro was

the only radiologist in the province billing this code. He used it 1,974 times during the period reviewed (C-3, Tab 33).

128. In its initial letter to Dr. Colistro on November 23, 2015, the JMPRC identified diagnostic ultrasounds as the billing subject requiring further information from Dr. Colistro. It requested dozens of patient records as well as providing contact information for the CMPA, the SMA Member Advisory Committee, the CPSS and MoH.

129. The JMPRC followed up with correspondence dated September 19, 2016 (C-3, Tab 35) requesting his attendance at a hearing on January 26, 2017 regarding his billing patterns and again referring him to the CMPA, SMA, CPSS, and MoH for assistance. Excerpts of the transcript of this hearing were filed as C-12. At this hearing Dr. Colistro acknowledged, in retrospect and given the concerns raised, that the 50W code probably was intended for the use of pulse or spectral Doppler rather than the more common colour Doppler; that he suspected it had been incorrectly used for colour Doppler by Circle West. Likewise, he acknowledged, in retrospect, that M-mode to detect fetal heartrate is included in the code 40W services, not as a separate additional 20W billing.

130. In the meantime, MSB contacted Dr. Colistro by correspondence dated November 2, 2016 (C-3, Tab 36). The heart of this correspondence is detailed in paragraph 14 above. MSB also requested dozens of patient records (referral requisitions and ultrasound reports) for audit purposes. MSB's findings were recorded in Ms. Dobrescu's correspondence of November 8, 2016 outlined in paragraph 17 above. MSB identified a pattern of billing 20W and 50W codes in conjunction with every obstetrical case in all three trimesters. The clinical documentation did not justify it nor did the referring physicians' requests.

131. Dr. Flegg made the same observations based on her review of a sample of Dr. Colistro's patient records. The code 20W was not justified in any of the cases she reviewed. She testified the only application the 20W code would have to obstetric ultrasound is if fetal echocardiography were required. The use of M-mode to calculate fetal heartrate is not fetal echocardiography and does not require an add-on fee code. The use of the 50W code is justified only for spectral Doppler flow studies and is not part of a routine obstetric ultrasound in any trimester. None of Dr. Colistro's obstetric ultrasounds she reviewed justified the use of a code 50W. Likewise with respect to the non-obstetric ultrasounds that were performed. Furthermore, if the study performed varied from what was requested, the reason for that variance should be clearly documented in the radiologist's report.

132. Dr. Colistro's evidence was that he and Libke decided the 20W code applied to the use of M-mode and thereafter added the 20W fee to obstetric ultrasounds. Libke said she stopped billing 20W codes when MSB told her to stop in November 2016.

133. Regarding 50W billings Dr. Colistro said he and Libke interpreted the 50W code as applying to colour Doppler. On Dr. Colistro's recommendation, Libke contacted MSB in July 2013 with a specific question: could she add a colour Doppler (50W) to claims submitted more than six months previously for thyroid (13W) and scrotal ultrasounds (62W) and resubmit those claims with the 50W code added to each claim. The response she received (P-2) stated:

> **RE: Request for time limit extension**
>
> Our office received a request on July 25, 2013 **requesting consideration to extend the six month timeline for exceptional circumstances** for Doppler study (50W) services provided between May 29, 2012 to June 20, 2013.
>
> According to the information provided, your delay in not submitting these claims was due to an oversight.
>
> The Saskatchewan Medical Care Insurance Regulations 1994, Section 11(1) states that accounts for payment must be received in the period of six consecutive months immediately following the provision of the insured service. Section 11(1) clearly describe that extension to the six month time limit is by exception and for reasons beyond the control of the practitioner.
>
> …
>
> I sympathize with any inconvenience your situation has caused you; however I am unable to approve your request to make payment on these claims as **claims with dates greater than six months cannot be paid**.
> [emphasis added]

134. Libke testified that, because MSB in its response did not prohibit applying the 50W code to thyroid and scrotal ultrasounds and, in fact, did not address this issue at all, she assumed the 50W code could be added whenever colour Doppler was used and made no further inquiries.

135. Dr. Colistro's explanation for use of the 20W code was that M-mode is applied only to obstetric ultrasounds and, because it was not included as a specifically listed service in a complete obstetric exam (40W), he and Libke decided it must apply to obstetric ultrasounds. Regarding the 50W code fee additions he understood from Libke that it was permissible to use it for colour Doppler.

136. In our view the evidence is abundantly clear that the 20W and 50W codes, as acknowledged by Dr. Colistro to the JMPRC, were inappropriately added to Circle West billing submissions. It is equally clear these additions constituted excessive billing within the meaning of CPSS Bylaw 8.1(b)(iii).

137. This being a strict liability offence, the facts of which have been proven on a balance of probabilities, it falls to Dr. Colistro to establish, on a balance of probabilities, that

1. He reasonably believed in a mistaken set of facts that, if true, would have rendered his act innocent; or that
2. He took all reasonable steps to avoid excessive billing.

138. Dr. Colistro submitted his interpretation of the Payment Schedule was reasonable because the M-mode and colour Doppler services provided fit within the descriptors of the 20W and 50W codes. The Payment Schedule refers to 20W as "echocardiography, M-mode". M-mode is used in obstetric ultrasounds to calculate fetal heartrate. Furthermore, code 40W did not specifically include M-mode in its descriptor so 20W must apply.

139. Regarding 50W, Dr. Colistro accepted Libke's interpretation of the correspondence from MSB (P-2). Because MSB did not address the proper use of 50W in its response to Libke's question about time limits, it seemed reasonable to assume Libke and his interpretation of code 50W was acceptable. Dr. Colistro also submitted, that by periodically conducting a 10 file audit of Circle West billings, he had taken reasonable steps to avoid excessive billing.

140. We are not satisfied that Dr. Colistro has met his burden of proof of due diligence. His belief that the 20W and 50W codes could be added for routine services was not reasonable. We do not consider the correspondence between Libke and the MSB in 2013 to be confirmation by MSB of the appropriateness of Dr. Colistro's 50W billings. That was not the question asked and answered in this correspondence.

141. The decisions to bill 20W and 50W as additional fees were made jointly by Libke and Dr. Colistro (both of whom stood to profit) without ever questioning their validity or soundness. One call to another radiologist, a diagnostic imaging facility and/or MSB would likely have forestalled the trouble that lay ahead, including the charges which are the subject of this disciplinary proceeding. That was not done and no other steps were taken by Dr. Colistro or, at his direction by Libke, to test

or confirm their interpretation of codes 20W and 50W before or during the period in which these excessive billings occurred.

142. Dr. Colistro suggested MSB or the JMPRC should have caught this earlier and alerted him to the inappropriate 20W and 50W billings. We are satisfied it is not the function of either body to patrol all physicians' billings at all times. As stated in *R. v. Sreedhar, supra* the physician billing system relies on professionals being trustworthy, honest and vigilant in their use of public monies. In this case, we agree with the CPSS that Dr. Colistro and Libke, without exercising due diligence, agreed on an aggressive billing strategy which worked to their advantage until the regular audit processes unfolded and Dr. Colistro's outlier billing profile was exposed.

143. We have concluded on all the evidence that pursuant to Section 46(p) of the *Act* and Bylaw 8.1(b)(iii) Charge #1 has been proven on a balance of probabilities on all counts including failure to exercise due diligence to ensure billings were submitted accurately and appropriately.

Charge #2

144. Dr. Colistro is charged alternatively under Section 46(o), 46(p) of the *Act*, Bylaw 8.1(b)(ix) and/or Bylaw 25.1 for failing to meet the obligations of a Medical Director of a diagnostic imaging facility and failing to exercise appropriate oversight over the facility.

145. Section 46(p) of the *Act* (does or fails to do any act or thing where the Council has, by bylaw, defined that act or failure to be unbecoming, improper, unprofessional or discreditable) takes us to the Bylaws in the charge – Bylaw 8.1(b)(ix) (failing to maintain the standard of practice of the profession) and Bylaw 25.1 which, in subsection (c), describes the responsibilities of the director of a diagnostic imaging facility. Specifically, with respect to Bylaw 25.1, the College alleged Dr. Colistro:

1. Failed to provide appropriate oversight over Circle West.
2. Failed to ensure that Circle West maintained the standards established in Bylaw 25.1.
3. Failed to ensure Circle West had a Quality Assurance Procedures Manual in place and complied with all the provisions of it.
4. Failed in his responsibilities by permitting Circle West staff to perform and bill for tests that were not requested or medically indicated.
5. Failed to ensure there was a policy in place at Circle West regarding regular inspection of ultrasound equipment.
6. Failed to ensure the existence of a Policy and Procedure Manual at Circle West.

7. Failed to ensure direct communication between Dr. Colistro and the technologists at the time of examinations in order to guide the examination.

146. The broad strokes of this charge are that Dr. Colistro failed in his obligation under Bylaw 25.1 to provide appropriate oversight of Circle West.

147. The period covered by Charge #2 is the years 2012 to 2018.

148. With respect to the requirements in Bylaw 25.1 regarding Policy and Procedure Manuals, the Bylaw requires the Director to ensure an "ongoing Quality Assurance Procedures Manual" is in place and adhered to [25.1(c)(ii)(2)(7)], and that a Policy and Procedure Manual outlining the minimum ultrasound examination techniques required in accordance with Canadian Association of Radiologists (CAR) or College guidelines exist [25.1(d)5(1)]. Bylaw 25.1 does not specify what these manuals should contain. Nor does it require facilities to have employee manuals.

149. The Agreed Statement of Facts establishes that Libke was tasked by Dr. Colistro with the operation of Circle West [paragraphs 46 and 55]. Libke, in her testimony, pointed to the Canadian Society of Diagnostic Medical Sonography Practice Guidelines and Policies as the original Circle West policy guidelines. These guidelines [C-3, Tab 40C and D] deal with technical requirements, liability insurance, consent, supervision and quality control among other topics. The Practice Guidelines recommend regular audits regarding personnel, procedures and protocols, quality of patient care, safety, bioeffects and image quality. The Guidelines provide that all institutions "must develop and maintain policy, procedure and protocol manuals" which must be regularly reviewed and updated.

150. Libke also referenced an undated document titled "General Guidelines for Sonographers Circle West Ultrasound" and another document titled "Circle West Ultrasound Diagnostics Inc. Employee Manual" [C-3, Tab 40(A) and (B)]. The former contains guidelines for the conduct of specific tests. The latter deals exclusively with matters pertaining to the employee/employer relationship including working conditions, wages and benefits, expected conduct, etc. While this document is undated (it was revised October 3, 2019), the Agreed Statement of Facts (paragraph 49) states "We understand that various forms of the [employee] manual existed since Dr. Colistro's involvement with the Clinic". Libke testified that Dr. Colistro was involved in adding to and revising the manual. No contradictory evidence was led. It cannot therefore be said that Circle West

did not have written policies in place regarding "employment issues" (even if this was a Bylaw 25.1 expectation) or that Dr. Colistro failed to ensure same. In the result, we find this aspect of Charge #2 has not been proven on a balance of probabilities.

151. Regarding quality assurance, Libke testified the General Guidelines for Sonographers [C-3, Tab 40B] contains protocols for each examination. She believed Circle West also has a Quality Assurance Policy document in place and added that sonographers learn processes used to ensure quality control in school. The audits for quality control recommended by the professions' Practice Guidelines were not conducted at Circle West.

152. Dr. Colistro testified that a Policy and Protocols manual is in place at Circle West and that all sonographer candidates are screened by Libke and reviewed by Dr. Colistro before hiring.

153. While the evidence we heard with respect to an "ongoing Quality Assurance Procedures Manual" and the carrying out and documentation of its provisions was somewhat haphazard, we are satisfied on a balance of probabilities that the General Guidelines for Sonographers and the CSDMS Practice Guidelines in place at Circle West suffice to meet the requirements of Bylaw 25.1(c)(ii)2(7).

154. Regarding equipment inspection, Bylaw 25.1(d)(i)4(2) requires the director of a diagnostic imaging facility to ensure all active ultrasound equipment is inspected by a duly qualified service technician every six months. The Agreed Statement of Facts (paragraph 51) states, that while Circle West did not maintain a separate policy relating to equipment maintenance, the equipment was maintained on a reminder system through GE and was serviced approximately once annually as required. Service logs were maintained by Libke (paragraph 51). As well an arrangement was in place with an IT company to periodically review functionality of equipment including technology (paragraph 56).

155. Dr. Colistro testified Circle West equipment is calibrated and maintained by the vendor on an ongoing basis. No other evidence was presented with respect to this allegation.

156. The charge against Dr. Colistro [Charge #2(i)] is that he failed to ensure there was a policy in place in relation to regular inspection of ultrasound equipment pursuant to Bylaw 25.1(d)(i)4(2). The

Bylaw states:

> The Director of the facility shall ensure that:
> …
> (2) Every six months all active ultrasound equipment is inspected by a duly qualified service technician trained in the application, performance characteristics and repair of the specific equipment software and the archival imaging systems;

157. While the Bylaw does not require a "policy in place" as the wording of the charge suggests, it does require that the Director ensure semi-annual inspections of ultrasound equipment. We have neither evidence of a policy nor of semi-annual inspections. The equipment inspection logs maintained by Libke were not before us and neither Libke nor Dr. Colistro testified about the timing of the vendors' inspections. On this evidence, we must conclude Dr. Colistro failed in his obligation under Bylaw 25.1(d)(i)4(2) to ensure all active ultrasound equipment was inspected every six months.

158. Charge #2(k) alleges Dr. Colistro failed to ensure direct communication between himself and the technologist at the time of examination in order to guide the examination contrary to Bylaw 25.1(d)5(2). This Bylaw, in part, states:

> The Director of the facility shall ensure that:
> …
>
> (2) In communities which have a resident ultrasonologist, he or she shall be on-site at the facility for consultation, supervision and interpretation for all of the ultrasound examinations. **Real time video linkage is deemed to be the same as having on-site supervision**. …
> [emphasis added]

159. The Agreed Statement of Facts at paragraph 48 states:

> 48. While Circle West initially had the functionality to provide live scanning through the use of a Slingbox and later through a Skype function, reporting has primarily been done from still images, "cine-clips" (rapid capture of a series of photos, simulating real time recording) and sonographer comments.

160. Libke testified that live images were available to Dr. Colistro with real time possibility. Dr. Colistro confirmed this in his testimony. An email from Dr. Colistro dated May 2, 2013 to the Office of the Registrar, CPSS, (C-3, Tab 19) in response to the Registrar's question in this regard stated:

> In compliance with the bylaw, we previously established real time video linkage for supervision last summer.

161. Dr. Colistro testified that the real time video link referred to in this correspondence is no longer being used because it is not compatible with the equipment at Circle West and no alternative advice was available for a short period of time until CPSS approved an alternate. Dr. Colistro testified he had not had occasion, to date, to use this technology.

162. We are not satisfied that this aspect of Charge #2(k) has been proven on a balance of probabilities. Dr. Colistro did, in fact, arrange for real time video linkage between himself and Circle West sonographers. The fact that he has not had occasion to use this technology does not obviate its existence which is all the Bylaw requires.

163. The overarching concern in Charge #2 is expressed in 2(b) and (k) – Dr. Colistro's failure to provide proper oversight to Circle West, its employees and its day-to-day operations including allowing staff to perform and bill for tests that were not requested by the referring physician and were not medically indicated [Charge #2(f)].

164. As noted earlier, the Agreed Statement of Facts makes clear that Dr. Colistro delegated management of Circle West to Libke including supervision of employees, human resources, billing and operating the business on a day-to-day basis. Dr. Colistro made himself available to the sonographers and Libke in a timely manner via text and email even while on vacation or at a conference. Dr. Colistro visited the Clinic in person once a year for a day. The visits were informal according to Libke, often ending with a dinner before Dr. Colistro's flight home.

165. Paragraph 52 of the Agreed Statement of Facts states that during these visits Dr. Colistro "walked room to room", looked at the Infection and Prevention Control (IPAC) process for transvaginal transducers, met with the sonographers, etc. Libke described Dr. Colistro as "very hands on" and approachable. When he was not present in person he was available in 10 to 15 minutes to the sonographers.

166. In correspondence to the Registrar of the CPSS dated February 23, 2014 (C-3, Tab 21) Dr. Colistro described his daily communication with the sonographers at Circle West in addition to "annual visits to the Clinic to conduct formal meetings with staff, observe scanning, review policies and procedures, and for staff education". Dr. Colistro testified that when he is not available for some reason, Circle West does not conduct any scans. As for the annual in-person visits, the Registrar's response to his February 23, 2014 correspondence was to thank him for providing details about how he manages to oversee the operations of Circle West and discharge his responsibilities as a medical director from a distance (C-3, Tab 22). He was not told that the frequency of his visits was to be increased until 2018 when CPSS determined that four visits per year were required.

167. Libke testified that when a referring physician's request was not clear, it was the technician who contacted the referring physician for clarification, not Dr. Colistro. Dr. Colistro said he fulfilled this role from time to time.

168. Libke testified, that although she is responsible for hiring, paying and managing the employees at Circle West as well as being responsible for the finances and other management duties associated with Circle West, decisions as to how the Clinic "operates" are made jointly with Dr. Colistro. No clarification was offered as to what, in addition to the management tasks for which Libke was responsible, "operating" functions remained.

169. Contrary to Libke's testimony and the Agreed Statement of Facts (paragraph 46), Dr. Colistro averred that the sonographers at Circle West are under his supervision; that he bears ultimate responsibility.

170. As described earlier in relation to Charge #1, Dr. Colistro asked Libke to manage all of the billings and took a hand's off approach to which examinations were conducted. However, one operating function conducted by Libke and Dr. Colistro collectively was matching services to billing codes. They jointly decided to add 20W and 50W codes to other billings.

171. Dr. Colistro argued that "proper oversight" is not required by or defined in Bylaw 25.1. Neither does Bylaw 25.1 define unprofessional conduct in the context of oversight. The default bylaw is Bylaw 8.1(b)(ix) which defines a failure to maintain the standard of practice of the profession as unprofessional conduct. Bylaw 8.1(a)(i) defines "standard of practice of the profession" as "the usually and generally accepted standards of practice expected in the branches of medicine in which the physician is practicing". Bylaw 8.1(b) enumerates those acts deemed to be unbecoming, improper, unprofessional or discreditable conduct but goes on to state:

> The enumeration of this conduct does not limit the ability of Discipline Hearing Committees to determine that conduct of a physician is unbecoming, improper, unprofessional or discreditable pursuant to Section 46(o): …

172. Section 46(o) of the *Act* deems a member guilty of unbecoming, improper, unprofessional or discreditable conduct if he or she:

> 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. …

173. The *Act* and Bylaws provide the Discipline Committee with considerable latitude in determining what constitutes unbecoming, improper, unprofessional or discreditable conduct. The conduct at issue in Charge #2 is not related to the practice of medicine *per se*. The evidence related to this charge did not challenge Dr. Colistro's competence as a radiologist. The charge relates to his administrative role as the medical director of Circle West. More specifically, his role as an absentee medical director. Bylaw 25.1(c)(ii)(1) places responsibility for "the day to day operation of the facility" on the director. While the Bylaw does not employ the phrase "proper oversight", responsibility for the day-to-day operation of the facility implies oversight, at the least.

174. The question then is what does oversight of day-to-day operations mean? On its own, the fact that Dr. Colistro maintains a full time practice in Kamloops, British Columbia while serving as the Medical Director for Circle West, is not sufficient to prove a failure on his part to fulfill his responsibility for the day-to-day operations of Circle West. The CPSS condoned the arrangement sought by Dr. Colistro and Circle West allowing Dr. Colistro, as the Medical Director, to maintain a long distance relationship with Circle West.

175. Bylaw 25.1 acknowledges that the CPSS has no jurisdiction over diagnostic imaging facilities. Physicians working in these facilities are, however, subject to the ethics, standards and licensing requirements of their profession. Bylaw 25.1, apart from the specific direction given to medical directors regarding practice and procedure, some of which are dealt with above, does not guide the determination of what constitutes the director's day-to-day responsibilities. In her correspondence of February 12, 2014 the Registrar, on behalf of the Advisory Committee on Medical Imaging, requested information from Dr. Colistro as to how he was fulfilling his obligations of Bylaw 25.1 with respect to being available for consultations. Dr. Colistro responded on February 23, 2014 (C-3, Tab 21) and his response was accepted and acknowledged by the Registrar on February 28, 2014.

176. With respect to the billing aspect of Circle West's operations, the excessive billing which Dr. Colistro has been found guilty of in Charge #1 did not occur as a result of lack of oversight on Dr. Colistro's part of Libke and Circle West. He and Libke deliberated and came to a joint conclusion to bill additional codes. This was not a consequence of lack of oversight on Dr. Colistro's part. He was a full participant in this decision to his ultimate detriment.

77. In the result, while Dr. Colistro was clearly offside in relation to inspection of ultrasound equipment [Bylaw 25.1(d)(i)4(2); Charge #2(i)] representing a failure of oversight in this regard, in the absence of standards set out in Bylaw 25.1 and/or evidence of the CPSS's expectations of a Medical Director of an ultrasound facility in terms of "day-to-day operations", we cannot conclude on a balance of probabilities that the overarching charge of failure to oversee Circle West has been proven against Dr. Colistro and we so find.

VI. DECISION

178. With respect to Charge #1, we find Dr. Colistro guilty of unbecoming, improper, unprofessional or discreditable conduct pursuant to Section 46(p) of the *Act* and Bylaw 8.1(b)(iii) – charging fees that are excessive in relation to the services performed. We are of the view that on the continuum of the seriousness, Dr. Colistro's aggressive and inappropriate billing is beyond the midpoint of the continuum toward the more serious end. On a scale of 0 to 10, with 10 being the most serious, we would judge his behavior at a level 8.

179. With respect to Charge #2, we find Dr. Colistro guilty of professional misconduct pursuant to Bylaw 25.1(d)(i)4(2) in his failure to comply with the Bylaws' express requirements regarding ultrasound equipment inspection [Charge #2(i)]. The balance of Charge #2 has not been proven on a balance of probabilities.

180. Pursuant to the provisions of Section 52(2) of the *Medical Profession Act, 1981*, SS 1980-81, c M-10.1, we recommend that Council or its designate review the provisions of Bylaw 25.1 of the CPSS Regulatory Bylaws with a view to establishing standards of practice for directors of diagnostic imaging facilities.

DATED at Saskatoon, Saskatchewan, this 1 day of October, 2021.

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

Dr. James Stempien,
Member of the Disciplinary Hearing Committee

Dr. Mark Fowler,
Member of the Disciplinary Hearing Committee

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DATED at Saskatoon, Saskatchewan, this 25th day of October, 2021.

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

Dr. James Stempien,
Member of the Disciplinary Hearing Committee

Dr. Mark Fowler M.D.
Dr. Mark Fowler,
Member of the Disciplinary Hearing Committee

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DATED at Saskatoon, Saskatchewan, this _____ day of October, 2021.

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

James Stempien _____

Dr. James Stempien,
Member of the Disciplinary Hearing Committee

_____
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