Law Society of Saskatchewan

NATHAN XIAO-PHILLIPS
HEARING DATES: March 9, 10, 2021 and April 7, 2021
DECISION DATE: October 18, 2021
PENALTY HEARING DATES: February 15, 2022 and June 17, 2022.
PENALTY DECISION DATE: June 17, 2022

***Law Society of Saskatchewan v. Xiao-Phillips*, 2022 SKLSS 3**
IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF NATHAN XIAO-PHILLIPS,
A LAWYER OF REGINA, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

Members of the Hearing Committee:	Ian D. Wagner, Chair Murray K. Walter, Q.C. Judy McCuskee
Counsel:	Sean Sinclair for the Conduct Investigation Committee
	Alan G. McIntyre, Q.C. for Nathan Phillips

INTRODUCTION:

1. Nathan Phillips (the Member) is the subject of an Amended Formal Complaint dated October 25, 2018. The Amended Formal Complaint charges that the Member is guilty of conduct unbecoming a lawyer and set out within the complaint the following specific charges that he:

> 1. did, advance frivolous and/or vexatious arguments and positions as demonstrated by the following matters:
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> a) 2015 CIRB 801;
> b) 2017 CIRC LD 3801;
> c) 2015 SKQB 412;
> d) 2016 SKCA 35;
> e) 2016 SKPC 94;
> f) 2016 SKPC 93;
> g) 2017-05-09 QBG 1366 of 2015;

h)CIRB 30493-C and 30715-C (Cowessess First Nation #73); and
i) 2016-11-14 QBG 2355 of 2016.

2. did, fail to provide a quality of service generally expected of a competent lawyer in a like situation as demonstrated by the following matters:

a)Cowessess First Nation #73 (CIRB 31414-C) (Missed Filing Deadlines);
b)Cowessess First Nation #73 (CIRB 30493-C and 30715-C) (Missed Filing Deadlines and Failure to Follow Tribunal Requirements and Orders);
c)2016 SKPC 94 (Failure to Identify Relief Sought or Grounds for Relief); and
d)2017 05 09 QBG 1366 of 2015 (Poorly Drafted Pleadings).

3. did, in the context of Small Claims Court Litigation involving his firm and Fond Du Lac First Nation et al. (#356/15), provide an undertaking to that he did not, and/or could not, fulfill.

2. At the outset of the hearing the parties were asked if there were any preliminary motions or applications prior to the hearing proceeding: none were made. The Parties were further asked if there were any objections to the jurisdiction of the Hearing Panel or its constitution: there were none.

3. Prior to the hearing, at a number of case management conferences, the parties agreed through counsel that the case for the CIC in chief would consist of a number of written decisions from which the charges of conduct unbecoming arise and that these documents would be provided to the Hearing Committee before the hearing date. It was further agreed that the Member would file an affidavit in response with exhibits. The agreed upon process was that the Counsel for CIC would cross-examine the member on his Affidavit and the documents before the Hearing Committee, the Member's Counsel would then be given the opportunity to "re-examine" his client. From the outset the Member and his counsel expressed that he was the only witness.

4. Following the hearing, the parties were given time to file written briefs, which were both filed on time. Oral arguments were heard on April 7, 2021.

5. All of the hearings were heard virtually. Each member of the Hearing Committee was in a separate office and location. Mr. Sinclair attended from his office. The Member, his father (also a Member of the same firm), and Mr. McIntyre attended from his office. Two counsel for the Cowessess First Nation attended as members of the public but did not attended any portions of the hearing that did not pertain to their client in order to protect solicitor-client privilege of other clients of the Member.

6. As stated prior, the case for the CIC was achieved by filing the written decisions from which the charges arise, a response affidavit with exhibits (166 paragraphs and 39 exhibits), and the cross-examination and re-examination of the Member.

Conclusion

7. The Hearing Panel has concluded that the CIC through its counsel has proven all the complaints but for two: numbers 1(i) and 3 as itemized in the Amended Formal Complaint. The analysis and reasons follow below.

Factual Background

9. Nathan Phillips was called to the Saskatchewan Bar in 2014 and has been employed by the same firm since his articles, Phillips & Company in Regina, Saskatchewan. The member had an unique articling experience as he was not employed by the lawyer responsible for overseeing his articles. Moreover, he did not work in the same physical location as his Principal lawyer, but rather at Phillips & Company. Mr. Philips testified that during his articles that his father was the predominate mentor. Mr. Phillips was unaware of whether the Law Society of Saskatchewan had approved of this unusual arrangement.

10. From the very outset of his practice Mr. Phillips has had a very busy civil litigation practice in a number of different forums on wide ranging areas of law. As his firm represented a number of First Nations, he acted on a wide range of matters and as General Counsel for First Nations Chief and Councils. However, his main area of practice was civil litigation.

11. All of the complaints concern a span of time between 2015 and 2017. The complaints are the written decisions of Federal tribunals, and from all three levels of court in Saskatchewan. The facts of each will be reviewed below.

Preliminary Issues

(a) Weighing of the evidence before us?

12. The case in chief for the CIC involved no *viva voce* evidence or documents other than the cases and decisions it filed. The question is how should the Hearing Panel approach and weigh this evidence? Fortunately, the Panel is guided by the Saskatchewan Court of Appeal in Phillips v Law Society of Saskatchewan, 2021 SKCA 16. The salient components of the decision indicate:

> [79] Based on the foregoing authorities, I conclude that findings of fact made in a previous civil proceeding to which the lawyer was a party or has actively participated, such as the Small Claims Decision, may be admitted as *prima facie* evidence in support of disciplinary charges and not proof thereof.
>
> [80] Once a previous decision is admitted as evidence, it must be accorded the evidentiary weight that is appropriate in the circumstances. That weight is for the trier of fact to assess, taking into account a number of factors including, among others, those identified in British Columbia (Attorney General) v Malik, 2011 SCC 18, [2011] 1 SCR 657 [Malik]:
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> > [42] Of course the weight of the prior judgment will depend on such factors as the similarity of the issues to be decided, the identity of the parties, and (because of the differing burdens of proof) whether the prior proceedings were criminal or civil. As the Sopinka text points out: "The fact that it is a civil judgment only would be significant in terms of weight. The party against whom the judgment was rendered would have a greater opportunity to explain it or suggest mitigating circumstances" (Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, Sopinka, Lederman & Bryant: The Law of Evidence in Canada (3rd ed. 2009), at §19.177).
> >
> > …
> >
> > [48] Once admitted, the weight to be given to the earlier decision in subsequent interlocutory proceedings will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on all "the varying circumstances of particular cases" (Del Core, at p. 22 [para 61]).

13. A difference does exist between Malik and the allegations at hand. In the matters before us we are not being asked to accept a judgment, order, or determination of a matter as prima facie evidence, but rather we are being asked to accept the findings of the tribunals and courts regarding the behaviour of the Member as prima facie evidence. An important distinction but not one that overrides the fundamental principle of Malik which is that once admitted the previous decisions of the panels must be "accorded appropriate weight in the circumstances."

14. Applying the principles from *Phillips v Law Society of Saskatchewan* to this case, the cases filed by the CIC may, if we so find, be properly admitted as *prima facie* evidence in support of the disciplinary charges, if we so find, but they are not proof of the disciplinary charges. The weight to be accorded to the judicial decisions is for the discipline committee to assess together with the evidence tendered by the member. The burden of proof ultimately lies with the CIC and the Member has no obligation to proffer evidence.

15. Naturally, if a trier of fact is left only with *prima facie* evidence with nothing to weigh against that evidence, the charges in most instances (but not all) will be made out. In this hearing we had to take into account the evidence of the Member - given in chief by affidavit, cross-examination, and questions from the panel to the Member.

16. The Member in his defence did not have the opportunity to cross-examine the authors of the decisions that the CIC filed with the hearing panel. However, the member did have ample opportunity through his affidavit and his viva voce evidence to proffer evidence that would override the conclusions of the panels or put them in a light that explained his actions as appropriate. It is interesting to note that when often asked to explain a conclusion of a trier of fact that the Member often answered with the statement that "the document speaks for itself."

17. The lack of ability to cross examine the triers of fact did not impact the Member's ability to provide a full defence. Where the reasons did not clearly disclose a prima facie case we did not find against the Member and where we did find a prima facie case there was ample evidence in the decisions to understand fully the complaints detailed therein. We further had the Member's evidence.

18. At this point we want to make it clear that we, as a panel, relied upon the decisions and cases from which the charges arise and did also rely upon interlocutory decisions within the same matter that shed light on the matter and were filed by the CIC. All of these cases were at the Member's disposal and he had the opportunity to address them in his evidence.

19. The Panel agrees that *prima facie* evidence existed for each and every charge in the Amended Formal Complaint but for charges 1(i) (frivolous and vexatious) and 3 (failing to fulfill an undertaking). Accordingly, we assessed and weighed the evidence of the Member in relation to the conclusions reached by the various tribunals and courts upon which the charges in the Formal Complaint were derived. Careful consideration was given to the explanations of the Member and the supporting evidence he filed.

(b) Conduct Unbecoming

20. Lawyers in Saskatchewan are governed by *The Legal Profession Act, 1990* (the Act) which defines conduct unbecoming as follows:

> 2(d) “conduct unbecoming” means any act or conduct, whether or not disgraceful or dishonourable, that:

> (i) is inimical to the best interests of the public or the members; or
> (ii) tends to harm the standing of the legal profession generally;
> and includes the practice of law in an incompetent manner where it is within the scope of subclause (i) or (ii);

21. As you can see from the Act conduct unbecoming does not require a specific intent but can be determined by the affect the conduct has on the public's interest or upon the legal profession. The Act imposes upon lawyers a duty to not harm the public interest or the standing of their profession.

22. The CIC need not prove intent or mens rea, but rather must prove that an act occurred and that such act was conduct unbecoming. As shown above the Act does not require intent and if intent was required it would run counter to the fundamental duty of the Law Society as stated in the Act:

> 3 .2 In any exercise of the society's powers or discharge of its responsibilities or in any proceeding pursuant to this Act, the protection of the public and ethical and competent practice take priority over the interests of the member. (emphasis added)

23. A lawyer either acted competently or they did not, it is not an issue of whether they tried to be competent. Similarly, whether an act or course of conduct is vexatious/frivolous is not dependent upon the intent of the member, but rather is dependent upon the facts of the case. The public is protected by lawyers acting competently and ethically; the public would not be protected if incompetent and unethical practice was sanitized by the good intentions of the lawyer.

24. Members of the Law Society are not set adrift to determine on their own what is or is not conduct unbecoming as they are specifically provided with a *Code of Professional Conduct* (the Code) with commentaries to guide them. Also the Law Society provides training during articles on the Code and what conduct is or is not ethical and appropriate. The Law Society requires every member to meet minimum hours of continuing legal education some of which must cover ethics annually (during the time period involved the appropriate time was to be averaged over three years).

25. Whether the actions of a member constitute conduct unbecoming is ultimately a question of fact for us as a panel to decide based upon all the evidence before us.

(c) Frivolous and/or Vexatious

26. Frivolous and vexatious are hardly common terms used in everyday conversation or discourse. The two terms have similar meanings but are not synonymous.

27. Black's Law Dictionary provides the following helpful definitions:

> **Vexatious**: Without reasonable or probable grounds or excuse.
> **Vexatious proceeding**: Proceeding instituted maliciously and without probable cause.
>
> **Frivolous**: Of little weight or importance. A pleading is "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to

> embarrass the opponent. A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense.

28. An excellent definition of vexatious within a legal context was adopted by the Office of the Information and Privacy Commissioner (IPC) in the case of *Re Saskatchewan (Advanced Education)*, 2010 CanLII 28547 (SK IPC) finding that a vexatious argument is "lacking a sufficient ground and serving only to annoy or harass when viewed objectively." In the same case the IPC defined frivolous as "lacking a legal basis or legal merit; not serious; not reasonably purposeful."

29. It is important to note that neither definition provided by the Privacy Commissioner creates a level of intent. It is not necessary to show that the Member intended to be vexatious and/or frivolous in his arguments or positions, but rather the determination in the case of vexatious is when "viewed objectively" and for frivolous "reasonably purposeful." Both definitions show that the trier of fact is looking at the behaviour from an objective or reasonable standard and it is not needed to determine the intent of a member charged with frivolous and/or vexatious arguments.

30. Prior law society cases have found that bringing frivolous, vexatious, and abusive litigation amounts to sanctionable conduct*: Law Society of Upper Canada v Mary Martha Coady*, 2012 ONLSAP 0012 and *Law Society of British Columbia v Edwards*, 2020 LSBC 21.

31. Some of the relevant passages of the Code, with commentary, we reviewed in this matter, state:

> 5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, **while treating the tribunal with candour, fairness, courtesy, and respect.**
>
> Commentary
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> [8] **In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections**, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.
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> 5.1-2 When acting as an advocate, a lawyer must not:
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> (a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;
>
> (b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;
>
> 5.1-5 **A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.**
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> Commentary
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> [1] Legal contempt of court and the professional obligation outlined here are not identical, and **a consistent pattern of rude, provocative or disruptive conduct by a lawyer, even though unpunished as contempt, may constitute professional misconduct.**
>
> 7.2-1 A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.
>
> Commentary
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> [3] **A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be**

> **prepared, when requested, to advise and represent a client in a complaint involving another lawyer.**
>
> 5.6-1 A lawyer must encourage public respect for and try to improve the administration of justice.
>
> Commentary
>
> [1] The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.

32. It is within the context of the *Act* and the Code that we will assess the evidence to determine if frivolous and/or vexatious arguments were put forward.

(d) Failure to Fulfill and Undertaking

33. This is the most straightforward matter in the Amended Formal Complaint. The applicable sections from the Code states:

> 5.1-6 A lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation.
>
> 7.2-11 A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted.

34. The first question we must answer is did the Member give an undertaking; if he did make such a commitment, did he fail to honour it. This is a completely fact driven analysis in this instance.

Analysis of Each Charge

Charge 1(a) – 2015 CIRB 801

35. The first charge of the formal complaint relates to a decision of the Canada Industrial Relations Board (CIRB). The CIRB was addressing an application made by the Member's client, Cowessess First Nation #73 (Cowessess), for an unfair labour practice. Specifically, Cowessess alleged that Saskatchewan Government and General Employees' Union (SGEU) had violated Section 95(i) of the Canada Labour Code by intimidating and coercing one of Cowessess' witnesses in advance of her intended testimony. A very serious charge if found to be true.

36. The specifics of the "intimidation and coercion" are set out in the affidavit of a witness, a former employee of Cowessess (attached to the Affidavit of Nathan Philips). The affidavit of the witness was not lengthy, consisting of two pages and eight paragraphs. They indicated that they received a telephone call from a member organizer of SGEU who had advised that the CIRB hearing was taking too long, was costing Cowessess money and that the lawyer for Cowessess (Phillips) was a liar and incompetent. The member organizer also indicated that he was "for the employees, the union". The witness indicated, without any personal analysis or justification, that they felt that it would be "wrong" for her to testify. This was the sole affidavit filed by Cowessess in support of the allegation that SGEU had "intimidated or coerced" a witness. There was no viva voce evidence. When the panel reviewed the affidavit of the witness we all immediately concluded

that nothing from that evidence could be construed as intimidating or coercing a witness, a conclusion that was reached by the CIRB that initially received the affidavit.

37. The comments of the CIRB include:

> [23] Even if the Board assumes Cowessess' allegations are true for the sake of argument, there are several reasons why Cowessess did not convince the Board that the SGEU or MR violated the Code.
> [24] First of all, the evident reality is that MA testified on October 27, 2015 in the main proceedings. There was no indication during MA's evidence that they could not testify fully before the Board. It was this reason which led the Board to inquire during the main proceedings whether Cowessess still intended to pursue this complaint.
> [25] Secondly, the Board agrees with the SGEU that neither it, nor MR, held any position of authority which would allow them to retaliate against MA in several of the ways described in section 95(i). MA was not a Cowessess employee in August 2015, since they had left her employment in 2014. Accordingly, they was not an employee in the SGEU's bargaining unit at the time of the conversation with MR.
> [26] Given those facts, it is difficult to see how the SGEU, or MR, could discriminate in areas involving: i) MA's employment; ii) a term or condition of her employment; or iii) SGEU membership.
> [28] While MA wrote in her affidavit that they "felt that it would be wrong for me to testify", they provided no basis for that conclusion. They evidently changed their mind sometime afterward and testified in the main proceedings.
> [29] Thirdly, the Board in various decisions has commented on the meaning of Code terms like "intimidation" or "coercion". The Code does not use these terms lightly; they suggest serious misconduct on the part of another person.
> …
> [31] There is simply nothing in Cowessess' allegations even remotely approaching the concepts of "intimidation" or "coercion". Moreover, unless a witness is also a represented party, nothing prohibits any party in a proceeding from attempting to contact that person for evidence about the case. There is no property in a witness…
> [32] On Cowessess' own facts, the Board could not find that MR's call would cause a reasonable person to consider that they had been intimidated or coerced from testifying in a Code proceeding. Neither did those facts, as pleaded, convince the Board there was any intimidation or coercion by the SGEU or MR directed towards MA.

38. The Member's evidence with respect to this matter is largely found at paragraphs 18 to 21 of his affidavit. He indicated that:

(a) Notwithstanding that the application was unsuccessful; the complaint was valuable to his client;
(b) The relief sought had two purposes;
    (i) The first purpose was to impugn the credibility of one of SGEU's primary witnesses;
    (ii) The second purpose was because he had a professional and ethical obligation to inform the CIRB of what he believed to be the improper influence of a witness or witness tampering;
(c) The purposes of the complaint had been accomplished.

39. In cross-examination, the Member could not explain to the satisfaction of the Hearing Panel:

(a) Why the credibility of the witness was an important consideration for any future hearings before the CIRB;
(b) How the witness's credibility was, in fact, impugned by any of the material filed or by the application itself;
(c) Why it was proper to bring this as an unfair labour practice complaint instead of simply cross-examining the witness on the matter (to the extent that the witness's credibility was put at issue in any future hearing);
(d) How the evidence would lead to the conclusion that there was "improper influence of a witness or witness tampering" (as set out in paragraph 20 of the Member's affidavit);
(e) What ethical or professional guidelines that he was referring to when he indicated that he had an obligation to inform the CIRB of the witness's conduct;
(f) Why these ethical or professional guidelines necessitated an unfair labour practice complaint; or
(g) How the purpose for the complaint had actually been accomplished, as he asserted, particularly in relation to impugning the credibility of the witness.

40. The Member brought forward an application that had no legitimate factual basis or remotely achievable goal (winning the application was not necessary; merely impugning SGEU's witness was sufficient in the Member's view), and for which he had no understanding of the "ethical" considerations that he claimed to be a principal motivating factor. Moreover, his conclusion that he successfully accomplished the goals of the application shows a complete disconnect from the stated and supportable conclusions of the CIRB. The only credibility damaged was that of the Member and his client. The CIC has made out that the member advanced frivolous and vexatious arguments and positions in relation to this charge.

Charge 1(b) – 2017 CIRB LD 3801

41. The second charge in the formal complaint relates to a decision of the CIRB from 2017. SGEU alleged an unfair labour practice complaint against Cowessess, represented (at the time of making the complaint) by the Member. SGEU alleged that Cowessess failed and/or refused to, inter alia:

(a) Engage in negotiation of a collective agreement;
(b) Agree to set bargaining dates;
(c) Provide accurate information as to the status of meetings with Health Canada and/or its full band membership; and/or
(d) Provide explanation as to why it was refusing to engage in collective bargaining until such meetings (with Health Canada and band membership) were held.

42. The positions advanced by Cowessess, still represented by the Member at the time of advancing these positions, were accurately described by the CIRB:

(a) Cowessess needed to balance competing governance interests, which occupied the Chief and Council's time;
(b) Cowessess needed to meet with Health Canada for further bargaining to occur, as Health Canada is the sole decision-maker as to whether funding requirements have been met;

(c) Cowessess needed to meet with Band membership after meeting with Health Canada to discuss collective bargaining.

43. The CIRB's comments in relation to this matter include the following:

- Mr. Phillips requested, noting that since Cowessess had no experience with a union, that the SGEU prepare a draft collective agreement. Due to Mr. Phillips' request for a comprehensive draft, MH made attempts to obtain information from Cowessess such as salary and benefit information and job descriptions. Despite not providing the SGEU with important information to help them draft a collective agreement, Cowessess served the SGEU with a Notice of Dispute on May 13, 2015. (page 9)
- The Board finds that Mr. Phillips continued to raise the prospect of discussing collective bargaining with Health Canada even after repeatedly being told that Health Canada would not engage in such discussions and would only discuss health programs and service delivery.

The Board finds that Mr. Phillips was being told one thing by Health Canada (that they would not meet if the SGEU is present and would not discuss collective bargaining) and relaying entirely different information to his client in both December 2015 and January 2016 (the first meeting will be without the SGEU, this is [sic] first good step, etc.). He also continued to reference a "first meeting" without the SGEU and then a second meeting that would include the SGEU when he wrote to the SGEU's MR on January 11, 2016, knowing full well that Health Canada had repeatedly told him that they would not be able to speak to the collective agreement or union activities.

This is not a situation of a message that has been misunderstood: Mr. Phillips was conveying completely contradictory and inaccurate information to both his client and to the SGEU than what he had been told by Health Canada.

Cowessess had refused to meet with the SGEU based on their position that bargaining would serve no useful purpose until it had met with Health Canada. Had it contacted Health Canada sooner, it would have realized that Health Canada was never going to participate in the very meeting that Cowessess was asserting to the SGEU was a necessary pre-cursor to bargaining. (page 18)

- Cowessess' counsel also stated that the Board should see the serious efforts that his client had made to move the process along in December 2015 and January 2016 and to schedule a meeting with Health Canada for March 3, 2016. Based on this, he suggested that Cowessess has taken all reasonable steps possible to schedule the meeting with Health Canada. The challenge for the Board in hearing that kind of statement is that Health Canada made it clear to both Mr. Phillips and to the Board that they will not be discussing collective bargaining with Cowessess and that the HCFA is considered static regardless of the fact that the HSDD is now unionized. The meeting on March 3, 2016, has nothing to do with collective bargaining or the relationship between collective bargaining and the HCFA. The Board rejects the narrative from Cowessess' counsel that a meeting with Health Canada has a relationship to collective bargaining, based on documents and testimony stating otherwise. Cowessess' position in this regard is simply not credible. (page 19)
- Contrary to the position put forward in Cowessess' opening statement ET testified that the Chief and Council make decisions on behalf of Cowessess First Nation, and there is no requirement to meet with Band membership. MH testified

that they asked Chief Lavalee if he had authority to enter into a collective agreement or if authority derived from the Band, that Chief Lavalee confirmed that he had that authority and that meeting with the community would not affect anything in the collective agreement. (page 20)

- The Board finds that Cowessess' view that it was too busy with all of its other responsibilities to find time for bargaining or to engage in constructive conversation or even provide counter-proposals to the SGEU is problematic and cannot be used as an excuse not to meet or participate, no matter how important their governance issues, litigation dates or other responsibilities are.

While Cowessess took the position that their weight their governance responsibilities must factor into the Board's assessment of this file, they were not able to provide any case law indicating that the duty to bargain in good faith can be balanced with other matters that compete for the time of one of the parties. (page 22)

44. Mr. Phillips addressed this case at length in is Affidavit at paragraphs 22 to 66 of his affidavit. The material filed is lengthy, but can be summarized as:

(a) Mr. Phillips attempted to mediate the complaint, but was rebuffed by SGEU;
(b) Mr. Phillips approach to mediation and settlement was appropriate;
(c) The CIRB was incorrect in determining that insufficient efforts were made to provide information to SGEU;
(d) Cowessess properly brought an application to set dates for bargaining;
(e) Meetings with Health Canada and the membership of the First Nation were necessary. Such decision was the unanimous determination of the band council, for which Mr. Phillips agreed with. Specifically, Cowessess was concerned because Health Canada was almost the exclusive source of funding for health and social development for Cowessess (under the Health Funding Consolidated Contribution Agreement). The funding under the agreement, contrary to the finding of the CIRB, was not static given that there had been several amendments to the funding agreement. The CIRB failed to consider the fact that such amendments had been made (and thus the agreement was not static).
(f) Significant efforts were made by Cowessess to schedule a meeting with Health Canada. The fact that Health Canada clearly articulated that collective bargaining was not an issue that Health Canada would discuss in any meeting was a "difference of opinion" and Health Canada was required to show deference to Band Council on that issue;
(g) There were significant competing governance priorities that took precedence over the 10 politically motivated employees;
(h) The CIRB's determination that Phillips deliberately communicated incorrect information as to what the Health Canada meeting related to (or more particularly did not relate to – collective bargaining) is subject to solicitor and client privilege and had no relevance to the proceedings before the CIRB;
(i) The CIRB was incorrect in determining that a meeting with band membership was not necessary to engage in collective bargaining.

45. In his materials and cross-examination, the Member failed to fully explain certain conclusions of the CIRB. Of particular concern is the question of whether the Band Council needed to meet with Health Canada prior to meeting with SGEU, the CIRB found it did not. Clear evidence from his own witnesses from Health Canada was that any such meeting between Health Canada and Cowessess would not address collective bargaining and that Health Canada refused

to discuss collective bargaining – the need for such a meeting was his main excuse to the CIRB for the delay. The Member's position that the CIRB was wrong is unsustainable. Moreover, the evidence clearly shows that the Member continued to advise SGEU on the status of booking meetings with Health Canada when he had been told by Health Canada that the meetings would not address unionization or collective bargaining.

46. The second major concern is that the Member advanced the argument that a meeting with Band membership was required prior to conducting collective bargaining with SGEU, but that was not the evidence before the CIRB and the Member did not provide evidence that could remotely dislodge the conclusion that the CIRB made from the evidence before it. The necessity for a meeting with band membership appears to be made from whole cloth.

47. The Member did advance evidence that the Chief and Council had significant matters that they were dealing with besides the collective bargaining issue with SGEU, but he could not and did not advance any evidence of why or how the priorities were determined and why that impacted the Band Council and its commitments to the collective bargaining process. We must remember that his two main excuses for delay – Health Canada meeting and Band membership meeting – were clearly creations of the Member and not based in reality, how then do we give this excuse which also lacks probative evidence any sway?

48. The Hearing Panel concludes that although not every complaint of the CIRB is necessarily made out or that every complaint suggests the advancement of frivolous and/or vexatious arguments, the evidence clearly shows that significant and serious arguments, as discussed above, were advanced without any factual or legitimate basis. The charge is made out.

Charge 1(c) and 1(d) – 2015 SKQB 412 and 2016 SKCA 35

49. The third and fourth charges in the formal complaint relate to an application for leave under Section 67 of *The Legal Profession Act, 1990* for an assessment of all accounts rendered by Brabant and Company Law Office (Brabant), the former legal counsel to Cowessess, for a period covering over six years. The application was unsuccessful at Court of Queen's Bench (Count 1(c)) and an appeal that was not granted in the Court of Appeal (Count 1(d)).

50. Overall, the conclusions of Justice D.J. Brown in the Queen's Bench fiat are that the application was poorly brought as it lacked an evidentiary basis. Some of the comments made by Justice Brown in dismissing Cowessess' application were that the application was brought without sufficiency of evidence and in some instances a clear misunderstanding on whom the burden lay to provide evidence. Brown J. stated:

> 23 There is nothing in the evidence that indicates there was a prima facie overvaluing or undervaluing of the services provided prior to January 2013. The general complaint from Cowessess centers around **their belief** in an overall amount of billings over a lengthy period, this application covering 2009 – 2015, with specific attention being given to 2011 – 2013.
>
> 24 ET sought to provide some detail regarding a few particular matters which indicated they were suspect of either the timing or amount of work remaining. **However, the affidavit is not based on personal knowledge. Responding affidavits from former Chiefs and Council members with personal knowledge establish the facts in this regard.**
>
> ..
>
> 27 I agree that the information put forward here on which to direct an assessment of six years of legal services covering a multitude of issues on a substantial number of files

should be much more specific. While different considerations might well apply if a single file were the subject of a request for an assessment, that is not the case here. Nor is this either an unsophisticated client or one with communication challenges such as a language barrier, factors that have been of some consequence in other applications for assessments outside of the 30 days. **It is not sufficient to make a general complaint that the services seem to represent a large sum and expect six years of a complex ongoing relationship to thereafter be scrutinized in detail.**

28 This conclusion is supported by the affidavit evidence by the Chiefs and Council members from the time when services were provided. They indicate that they were pleased with the services Brabant provided and take no issue with the amounts charged for such services. **To prefer general statements of concern related to a time period many years earlier over the evidence of those who were actually receiving the advice and who indicated they were both pleased with it and had no issue regarding the cost is not a fair approach.**

29 While the affidavit of ET was filed late, in contravention of Justice Kovach's time-table, even if it is considered it adds little value. They were not a Council member at the relevant time **and relies on hearsay from current legal counsel** and others. The information they present is not from their own direct observations and conflicts with the evidence provided from sources who had the opportunity to directly observe. It is therefore not sufficient to require Brabant to retrace and justify six years of billings on the plethora of legal matters he was involved in with Cowessess.

…

33 This length of time is highly unusual and, if there is to be a requirement that Brabant attend for an assessment, should be accompanied by clearly outlined reasons justifying going back six years. **Evidence must establish the appropriateness of doing so.** …

34 The requisite evidence and accompanying reasons which must exist to require the rather far reaching relief sought in this matter, event when measured on the less stringent, fairness-based standard recognized by Justice Ryan-Froslie in Machula, have not been provided. There are general observations and concerns expressed, however these do not provide the type of information required so as to create the obligation for Brabant to unearth the extensive information with respect to legal services covering such a broad range of matters dating back six years. …

…

54 Here Cowessess' request is not fair to Brabant. The negative impact would be out of all proportion to the evidence provided on which the request is made. While a request on one file or a single lawsuit might well be approached differently, here Cowessess seeks to assess six years of general counsel advice on a wide spectrum of issues involving many different matters. To justify that kind of intrusion to a sole practitioner in a lengthy, extensive and ongoing relationship with a sophisticated client, specific, clearly defined and reliable evidence is required. …

(emphasis added)

51. As can be seen Brown J. did not find the argument compelling primarily because the application lacked the appropriate level of evidence to even be considered.

52. Rather than recognizing the deficiencies in the evidence and the argument that he had placed before the Court of Queen's Bench, the Member appeared before the Court of Appeal making exactly the same arguments. The Court of Appeal was even more direct with respect to matters in commenting:

> 6 As Brown J. observed in his fiat, the appellant made a number of unsubstantiated accusations of overcharging that are tantamount to fraud or other unethical behaviour on the part of the respondent. …
> 7 Moreover, in the context of this case, we conclude Brown J.'s factual finding that there was a lack of evidence to support the appellant's allegations of misrepresentation, fraud or other dereliction of duty is wholly supported by the evidence—**or, correctly, the absence of it**. **These were bare allegations that were repeated on appeal without an application to adduce fresh evidence to support them** …(emphasis added)

53. The Court of Appeal specifically admonished the Member for advancing the allegations that he put forward.

> 8 Pointedly, we remark that parties and **counsel would be well-advised to avoid making allegations of this nature before a Court without establishing the full particulars thereof on the record.** No member of the Law Society of Saskatchewan should be put to answering allegations of misrepresentation or fraud made in open court without a proper evidentiary foundation having first been established therefor. (emphasis added)

54. The Member's reply to these decisions found at paragraphs 67 to 71 of his affidavit. He advises:

(a) The factum was reviewed and approved by another lawyer at his firm with revisions incorporated therein;
(b) While he accepts the decisions from the Court of Appeal and Justice Brown, he argued the matter in good faith with client instructions. He believed there to be a meritorious factual and legal foundation to take the steps and advance the arguments that he did.

55. In cross-examination and in his materials, it was established:

(a) The application, in the first instance, was brought with a factual foundation of a nine paragraph, three-page long affidavit sworn by Chief Terrence Lavalee. The affidavit clearly does not specify any misrepresentation or specific issues with any invoices rendered by Brabant.
(b) The Member in an attempt to buttress the case against the Respondent filed several other affidavits, many of which are virtually identical, and contain opinion and hearsay, but still do not identify specific concerns with invoices rendered by Brabant or the quality of his services. Brabant's billings are referred to as "excessive" in the affidavits but without any foundation for such assertion.
(c) Some of the affidavit material Phillips filed had hearsay with the apparent intent to establish the perjury of affiants tendered by Brabant.
(d) The information filed on the appeal includes suggestions that Brabant's bills were "grossly excessive, unfair and unreasonable", again with no specificity as to why such conclusion was reached.

56. The argument of the Member that he brought the argument in good faith is beyond comprehension. How can it be that an application made without an evidentiary basis alleging deplorable conduct by another person be in good faith? Another way to characterize the member's defence is that he did not know better and put his arguments forward blindly – the

panel suggests that a proper characterization would be that the arguments were put forward with wilful blindness, which is certainly not good faith. The frivolous attack against another member of the Law Society is clearly conduct unbecoming as such an attack harms the other member's standing and the standing of the profession. No matter how it is characterized the application was vexatious and/or frivolous as there was no evidentiary basis for advancing the application or the appeal. The fact that another lawyer reviewed the factum for the Court of Appeal does not absolve the member of his duties. The charges 1(c) and 1(d) are made out.

Charges 1(e) and 2(c) – 2016 SKPC 94

57. These two charges will be discussed together as they involve the same case and there exists significant interrelation between the allegations of vexatious and/or frivolous arguments together with allegation involving quality of legal services. The case was between *Phillips Legal Professional Corporation and Fond Du Lac First Nation et al.* to recover unpaid legal fees. This decision relates to various letters sent by Phillips to the Provincial Court in the context of an application by certain defendants to set aside a default judgment.

58. The presiding Provincial Court Judge P. Demong made the following comments:

> [8] On June 29th, one day before both of the parties were required to file their materials, Mr. Phillips again requested an adjournment suggesting that if his enforcement efforts against the remaining default judgment debtors (which had only been commenced on June 15th provided successful), there would be no need to proceed with the application. **Once again, there was nothing in his letter to indicate that Mr. Phillips had contacted opposing counsel to discuss this suggestion prior to his request for an adjournment other than the fact that he had copied this letter to opposing counsel**. …
>
> [9] **Within 40 minutes of the Court's response, Mr. Phillips, sent another letter to the Court,** but this time suggesting that the application should be adjourned, but for a different reason, he inclined to the view that the remaining defendants (those persons against which he had already obtained judgment), and against whom he is adverse in interest with, and whom he does not represent, might not have been served with the application to set aside and on that basis inclined to the view that the matter could not proceed. **He offered no case law in support of the proposition that these judgment debtors have the right to attend subsequent hearings in this matter. He provided nothing to suggest that he himself, had altered [sic] these judgment debtors of his own application to cross-examine on affidavits.**
>
> [10] **Mr. Phillips then asked the Court for further reasons as to why his original request for an adjournment was not granted, and opined that because it appeared that Mr. Slusar's clients would not be prejudiced, there would be no reason why this Court would decline his request for an adjournment.** (This request had not been declined, he had been instructed to obtain consent of the other party). In his words, 'There appears to be no prejudice whatsoever to Mr. Slusar's clients, in the absence of which I have yet to encounter any Court refusing such request'. Mr. Phillips would invite this Court to conclude that it alone does not automatically allow adjournment requests which have not been agreed to by both parties. Is it allowed in the Court of Queen's Bench, in apparent contradiction to its Practice Directive #7 which directs that an appropriate request to adjourn means 'a written request to adjourn by all parties involved in the application'. Is it regularly allowed in our Court of Appeal?

…

[12] **On July 4, 2016 Mr. Phillips' sent the Court three letters**. Had my two day trial not fallen through, I would not have been made aware of them until July 6, 2016.

[13] **The first letter badly [sic] asserted that the defendants had failed to serve a dispute note. This bald assertion was made notwithstanding that Mr. Slusar had filed a letter with the Court on that date confirming that the dispute note had been served on July 4, 2016.** This letter included proof of service. On the strength of this assert Mr. Phillips requested that the Court dismiss the application. But what of Mr. Phillips? He did not file his materials until July 4, 2016 either. Does he presume that he can avoid the consequences of late compliance but that all other should be sanctioned?

[14] Mr. Phillips went on to say that in the absence of the defendant's dispute note he was effectively unable to provide his own affidavit materials to the Court. (In another letter of same date he speaks to the fact that he is 'severely prejudice') Severely prejudiced? The defence that was filed is what the Court fully expected to see and which any reasonable lawyer would expect to See [sic]. It was a blanket denial that the defendants had contracted for legal services. I use the words 'expected' and 'reasonable' because this defence clearly articulated in the affidavits that were filed by the defendants on April 6, 2016. Moreover, Mr. Phillips did in fact file his affidavit on July 4, 2016.

[15] Mr. Phillips then invited the Court to exercise on the basis of this prejudice, its jurisdiction to direct payment into Court of the entirety of the amount claimed, and he sought his costs for having to file his affidavit. Why? Mr. Phillips was required to file his affidavit materials no later than June 30, 2016. Had Mr. Slusar's clients taken full advantage of the order I made, they could have filed and served their materials at 3:59 p.m. on that date. Mr. Phillips would still have not had the advantage of reading the pro forma defence would have been filed before being required to file his affidavit. He would still have been required to incur the costs of preparing those materials.

[16] Mr. Phillips posits that had Mr. Slusar provided his immediate consent to the adjournment sought by Mr. Phillips then he would not have had to file his materials. Why does he think this? Mr. Slusar's consent to an adjournment would not have negated Mr. Phillip's requirement to comply with my order. My order didn't say that the materials would not have to be filed if the parties consented to an adjournment.

[17] Strangely Mr. Phillips third letter to the Court on July 4, 2016 included the following concluding passage:

> **If the Court does not dismiss this application, does not require the defendants' to provide a dispute note, continues to refuse to grant the requested adjournment, and does not require opposing counsel to provide proof of service of the March 7, 2016, summons and supporting affidavits upon any of the other parties to this action, then as a result of paragraph's 7-11 of the Court's April 20, 2016 Fiat, ie the refusal of the Court to permit the cross-examination on the merits of the defence, the Plaintiff will no longer cross-examine on any of the affidavits filed thus far …** In addition, the plaintiff would also consent to the judgment being set aside against GM, however it will not consent to the judgment being set aside with respect to Fond Du Lac Denesuline First Nation or any other defendant. Finally, upon receipt of the Defendant's dispute note, the Plaintiff will provide a supplemental affidavit.

> What am I to make of this? Is it an admonition to the Court that it has not immediately directed to be done each and everything that Mr. Phillips thinks ought to be done and on an ex parte basis? Is it a passing comment at my earlier decision that on a Section 37 Application Mr. Phillips will not be allowed to cross-examine on the merits of the defence that is being advanced? Is it a formal withdrawal of his application to cross-examine some defendants but not others? Is it a formal withdrawal of his opposition to setting aside the default judgment against GM? Is he inviting me to step into the fray; to take off my Judge's robes and try to convince Mr. Slusar of the utility of the bargain that Mr. Phillips appears to be offering?
>
> [18] After having had almost ten weeks since my order for the provision of materials was made, Mr. Phillips has, with only one day remaining to comply, attempted to foist his self-imposed last minute request for an adjournment on a busy Court and presumably on a busy Mr. Slusar. In so doing, he has inundated this Court with four letters in two days. He has lacked the courtesy, or at least he lacks the experience, to recognize that requests to the Court and to opposing counsel for adjournments should be brought early. Professional courtesy and good practice directs counsel to seek the consent of the other side of the dispute if an adjournment is needed. If an early request cannot be made, the reason for the delay should be provided to the Court. Requests for direction and/or relief from the Court should not be drafted in a demanding fashion, nor, as I read letters, come across as petulant and recriminatory. In addition, it is simply inappropriate to castigate, in writing, opposing counsel, for a technical breach of an order when one is also in breach.
>
> [19] In future, I will expect Mr. Phillips to conduct himself with the courtesy and respect that this Court has come to expect, and invariably receives from every other lawyers that comes before it.
>
> [20] In the future, I will expect that if Mr. Phillips seeks relief from this Court, that he will, from now on, and with necessary modification timely comply with those procedures which are set out in R. 6-4 of the Queens' Bench Rules for Saskatchewan and identify the specific relief sought, the grounds upon which that relief is based, and cite those enactments or case authorities upon which he intends to rely. Upon receipt of those materials the matter will brought to the attention of an available Judge to consider whether or not the relief can be granted on an ex parte basis, or whether or not the matter will be set down for hearing.

59. The member's reply to this decision is found at paragraphs 72 to 86 of his affidavit. Some of the information provided by Phillips includes:

(a) There was good reason for Phillips' delay in initially seeking an adjournment of the application to lift the default judgment – he was engaged in settlement discussions;
(b) He sought a case management conference as that might assist the parties in achieving settlement;
(c) He sought to adjourn the application because he started enforcement measures:
(d) Opposing counsel did not file the dispute note with the Court as required:
(e) The determinations of the Provincial Court were based upon incomplete knowledge;
(f) The dispute note filed by opposing counsel on July 4, 2016 was not filed or served at the time the Member sent his letter to the Court on July 4, 2016.

60. In cross-examination and through the utilization of materials filed by the Member, it was established:

(a) The Member sent two letters on June 29, 2016 seeking an adjournment. The reply by the Court to the first letter indicating that an adjournment would only be granted by consent is in the Member's materials. The second letter of the Member is included new reasons for the adjournment along with a request for reasons as to the refusal to grant the adjournment;
(b) The Member sent three letters on July 4, 2016 to the Court (latter is a letter to opposing counsel but carbon-copied to the Court);
(c) The request for adjournment of June 29, 2016 was initially sought because enforcement measures had been commenced against the judgment debtors not represented by opposing counsel. Those enforcement efforts were started on June 15, 2016 (despite judgment having been obtained in December, 2015);
(d) There is nothing in the materials or elicited in cross-examination to establish why the Member felt it appropriate to:

    (i) Demand better or fuller reasons from the Court as to why his request for an adjournment should have been granted. The Member indicated that the tone of the letter is not "demanding", but the Member asked for additional reasons on something that, in our opinion, was straightforward and obvious – the Court would not grant an adjournment without consent and the matter would have to be spoken to;
    (ii) Further follow up with the Court on July 4, 2016, again presumably asking for reasons why the adjournment had not been granted after his letter of June 29, 2016;
    (iii) Why the Member felt the need to reference the non-dismissal of the application, dispute note, in the second letter if they was not castigating the prior decisions of the Court. It is also unclear as to the nature of the relief sought in this letter;
    (iv) Why the Member asserted the severe prejudice caused by failure to file the dispute note by June 30 (and having it filed on July 4, 2016 instead);
    (v) How it was appropriate to carbon-copy the Court on a letter to Mr. Slusar and demanding the date of execution of the Statement of Defence.

61. The letters that the Member sent to the Court are extremely unusual: they do not follow normal practice (which is to either accept the Court's decision or judicial review at the end of the case if prejudice or a miscarriage of justice actually occurred); they are very aggressive in tone to the Court; and, the arguments put forward are nonsensical. The appropriate strategy should have been obvious – when the adjournment was not granted by the Court the Member should have worked with opposing counsel to either gain consent for an adjournment or prepare for the forthcoming court appearance. The tone of the letters alone supports a charge of conduct unbecoming as they are disrespectful to the Court. The lack of respect to the court combined with arguments that had no properly discernible or achievable goal is proof that the charge found in 1(e) is made out.

62. The question to be answered regarding the charge of 2(c) was the provision of legal services competent? The answer is no. The letters are obviously not proper and the failure to request appropriate remedies of the Court makes them nothing more than an odd haranguing of Judge by a lawyer appearing before the Court. This is not the type of legal service that should be condoned and is clearly not competent in approach or manner. This charge too is made out.

Charge 1(f) – 2016 SKPC 93

63. This was an action by the plaintiff for recovery of goods and services provided to the defendant in the course of a basement excavation. The defendant is the Member's brother. The trial had been concluded and a decision had been rendered; however, the Trial Judge determined that the parties:

> …had been mistaken as to the manner in which damages should have been proven and concluded that I would hear additional evidence on the issue of damages and I provided the parties guidance on the manner in which that evidence could or should be presented.

64. Essentially, the court was asking for information on a particular area of the decision being damages. The Court had determined liability and wanted information to properly assess damages. Rather than organizing his case and concentrating on the information that the Trial Judge required, the Member wrote to the Court objecting to the process proposed. The Court describes the events as the unfold from there:

> [2] On April 18th, 2016 the Court received correspondence from counsel for the defendant SP disagreeing with my decision to seek further evidence on damages and suggested that they 'sought the opportunity to present argument and affidavit evidence respecting' prejudice and other matters relevant to such determination'. They also sought an extension of time within which to file his materials for the damages assessment. I refused The Member' request to have me reconsider my decision to call for further evidence on damages but reluctantly extended the time line for the defendant's filing of documentation and a witness list in light of his assertion that in doing so the defendant may be able to resolve the matter without further participation of the Court. The matter was not resolved and the trial must now resume. The timeline for filing of the defendant's documentation and witness list had been extended to June 29th, 2016.
>
> …
>
> [5] The Court received yet another letter from Mr. Phillips' lawyer. In that correspondence the defendant now requests a retraction of the amendment that they had made to his statement of defence during the course of the trial. The amendment that the defendant refers to was in fact a withdrawal of certain counterclaims advanced by way of set-off. That withdrawal in turn was made shortly after the Court advised the defendant that they would need evidence to support the set offs that were claimed. Mr. Phillips has also sought to call expert testimony in support of the resurrected defences, and also to address certain issues that were dealt with at the original trial. The request is brought because 'it directly relates to the request made by the plaintiff on April 18th, 2016 to provide affidavit evidence and argument to the Court with respect to reopening the trial which request was rejected by the Court on April 19th, 2016.
>
> [6] In that letter, counsel expresses his opinion of the truthfulness of the plaintiff at trial; **his suspicions** relating to other pieces of evidence, and the plaintiff's credibility on certain aspects of his testimony.
>
> [7] On June 30th, 2016 the Court received yet another letter from defence counsel enclosing an affidavit sworn by his client, which is on information and belief. **In essence, they avers to the fact that they were told by his lawyer that his lawyer was advised by a third party that the third party's review of certain company records do not disclose a purchase of steel by the plaintiff**

at or about the time that steel was incorporated into the defendant's basement.

[8] I would note in passing that while the documents purport to be sent to the plaintiff by e-mail, there is, contrary to my order, **no proof of service appended to any of these letters or the affidavit.**

[9] The defendant seeks relief on a number of grounds. The only evidence the Court has in relation thereto is a four paragraph affidavit wherein the defendant says that they believe that his lawyer believes that someone who they had a conversation with checked certain accounting records. **That is the totality of the evidence before me for all of the relief that the defendant seeks. No brief of law was submitted in support for any of the rather extraordinary relief sought, again, notwithstanding that the defendant was directed to file any brief of law they might rely on in support of the relief sought.**

[10] I do not have to cite case law for the now accepted proposition that the central objectives of *The Small Claims Act, 1997* is to create a Court which will provide a timely, cost effective, and efficient means to resolve relatively simple and relatively nominal monetary claims. Implicit in this purpose is the concept of proportionality. In the vast, and I do mean vast, number of cases, matters in this Court are resolved without the need for serial interlocutory applications. In the vast, and again, I do mean vast, number of matters, a request to the Court for direction or interim relief is handled in a simple and straight forward fashion. A request for a direction or the assistance of the Court is sought by correspondence and the reasons for that request are set forth therein. The Court will, either on an ex parte basis or upon directing a hearing, resolve the matter to the satisfaction of the parties. In that regard, the Court has the freedom to direct the practice and procedure of the Court to suit the needs of individual litigants.

[11] For reasons that I cannot fathom, this relatively simple process does not work in the instant circumstances. I can no longer sanction, either in this matter, or on other matters into the future, counsel providing multiple letters to the Court seeking multiple orders, presumably on an ex parte basis, with little if any evidence in support other than counsel's 'suspicions' and 'concerns' based on vague allegations as to what the law might be but with no legal authority cited for the proposition put before the Court, which are often sought on short notice with a corresponding request for an adjournment also sought on short notice. (emphasis added)

65. The Member's reply is found at paragraphs 87 to 100 of his affidavit. In part, the Member argues:

(a) The judge unexpectedly reopened the trial on his own initiative to allow the plaintiff to establish some of his damages by way of *quantum meriut*. During the trial, the Member's client had abandoned some defences of set-off because his expert witness could be used by the Plaintiff to shore up deficiencies in the Plaintiff's case;

(b) In relation to the hearsay affidavit of SP, the Member indicates that they talked with a witness who provided information that could impact on the plaintiff's credibility. They sought to tender that information through hearsay in his client's affidavit in support of his question to compel the witness to testify.

66. From cross-examination and the Member's materials, it is unclear why he believed that his letter of April 18, 2016 was the appropriate means to challenge the decision of the Court to hold a further hearing on the issue of damages (as opposed to, for instance, an application for judicial review). The decision having already been determined against his client, a letter to the Court advising that his client disagreed with the decision is neither normal nor accepted practice. The Member continued sending correspondence to the Court asking for other relief (apparently without considering the necessity of speaking to the matter in court) in a continued bid to challenge the judge's prior decisions. This correspondence includes reference to telephone calls between Phillips and witnesses not called during the trial. Included in this package is an entirely hearsay affidavit sworn by the Member's client.

67. Similar to the case above, a decision having been rendered against his client, the Member sent a number of letters to the Court to challenge its determinations. The arguments are not convincing or relevant to the central issue that the Court raised – how to determine the level of damages. The Member, neither during cross-examination nor in his own materials, posited a cogent explanation of his goals or how his arguments would further the goals of his client. The arguments were vexatious and certainly frivolous and the charge is made out.

Charge 1(g) and 2(d) – 2017 05 09

68. Again these two charges stem from the same decision; the first charge regarding frivolous and/or vexatious arguments and the second competency of counsel. The decision is that of Justice J.D. Kalmakoff of the Court of Queen's Bench (as he then was). The Member was representing the Defendant, JM. This decision relates to JM's application to:

(a) Designate a proper office for the plaintiff for the purposes of questioning; and,
(b) Permit JM to amend his Statement of Defence and Counterclaim.

69. Although not sought in his notice of application, the Member also sought orally in chambers:

(a) Solicitor-client costs for an adjournment that had been sought by the plaintiff (and granted); and,
(b) Striking the plaintiff's application for summary judgment.

70. The latter two requests for relief were sought because the Member asserted that the adjournment requested on March 14, 2017, by the plaintiff was an "abuse of process." The Member argued that the Court should disregard the reasons given by opposing counsel for the adjournment and infer that the true reason for the adjournment was to avoid having an executive of the plaintiff named a proper corporate officer. This inference was to be drawn from the fact that the plaintiff gave the executive a severance package as part of a massive provincial wide reorganization and consolidation of health regions. To draw such inference without further evidence of intention would be asinine and the Court found accordingly.

71. On the latter two grounds of relief set out above, the Court's comments in this case include the following:

> [4] JM's counsel argues that I should find SC's request for adjournment of the March 14, 2017 hearing of JM's application to be an abuse of process, which should be remedied by striking SC's application for summary judgment. Counsel for JM raises the fact that MC, who was the CEO for SC, had been offered a severance package as part of the Provincial Government's restructuring of the

administration of health regions, shortly before the application was to be heard. From this fact, he argues that I should conclude that MC instructed SC's lawyers to seek an adjournment – upon whatever basis they could conjure up – in order to avoid the prospect of being named the proper officer for questioning in this matter.

[5] **This argument is completely without merit and completely unsupported by evidence.** It is true that the Provincial Government announced the restructuring of health region administration, and offered a severance package to MC (and many others in similar positions) a short time before the application was to be heard, but there is not one iota of evidence to suggest anything improper or abusive of the court's process in SC's request for an adjournment on March 14. Quite the opposite in fact. The record clearly demonstrates that SC's counsel had advised Mr. Phillips that they would be seeking the appointment of a case management judge, as well as an adjournment of the application. The order appointing a case management judge was made on March 10, Ms. Gaudin, who had been counsel for SC, was not available on March 14; the file was being transferred to another lawyer in the same firm. In the circumstances, both the request for the appointment of a case management judge and the request for adjournment of the March 14th application were reasonable, and **there is not a shred of evidence to suggest anything to the contrary.**

…

[58] To being, with respect to the adjournment of the application on March 14, 2017, I would not order costs against SC. On that date, SC had a valid reason for seeking and [sic] adjournment, and counsel for SC had communicated their intention to do so to counsel for JM well in advance. When the present application was heard on April 24, **Mr. Phillips chose to advance the argument that SC's counsel had participated in an abuse of process by asking for the adjournment. Mr. Phillips invited the court to infer, on the basis of no more than wild speculation, that MC had instructed counsel for SC to ask for an adjournment so that they could avoid the prospect of being questioned. He also implied that counsel for SC did so, and thereby misled the court on March 14.**

[59] **As I have commented previously in this decision, there was no basis in evidence for the argument advanced by Mr. Phillips on JM's behalf in that respect. That type of conduct before the court must be discouraged, and costs are thus appropriate.** (emphasis added)

72. On the issue of the request to amend the defence and counterclaim, the Court stated:

[34] In the application before me, JM's proposed "Third Amended Statement of Defence" [Third Amendment] **seeks to make many of the same amendments to the Statement of Defence that were not permitted by Justice Keene.** For instance, paras. 4, 5, 6, 7, 18 and 20 in the proposed Third Statement are the same as paras. 4, 6, 8, 10, 15 and 21, respectively, of the proposed "Amended Amended Statement of Defence" [Second Amendment]. Except for the fact that these paragraphs no longer plead the defences in the alternative, the wording is identical, but the paragraphs are simply arranged in a different order in this application than they were in the application before Justice Keene. Paragraph 3 in the Third Amendment is identical to the first sentence of para. 2 in the Second Amendment. **These are all amendments that were not permitted by Justice Keene, and the Court of Appeal upheld his decision in that respect. The**

matter is clearly res judicata with respect to those amendments, and they will not be permitted.

…

[44] JM also seeks an order permitting him to amend the Counterclaim. The proposed Amended Counterclaim, again, does not comply with the requirements of Rule 3-73. **It is poorly drafted, and, to say the least, confusing to follow.** For instance, paras. 23 to 33 of the proposed Amended Counterclaim are all crossed out, as if to indicate that they were in the original Counterclaim, but are being struck from the Amended Counterclaim. However, apart from para. 23, none of those paragraphs actually appear in the original Counterclaim. Paragraphs 24 to 33, inclusive, all appear to have been cut and pasted from a Statement of Defence.

…

[47] Paragraph 44, although double-underlined in the proposed Amended Counterclaim is actually identical to para. 24 in the original Counterclaim. …

[48] Paragraph 46, again double-underlined, is identical to para. 26 in the original Counterclaim.

…

[61] Costs against JM are also appropriate, in my view, in relation to the portion of the application regarding amendments to the Statement of Defence and Counterclaim. Even though JM was partially successful in that respect, there are a number of reasons why I find that costs should be awarded to SC.

[62] **First of all, the proposed amendments to both the Statement of Defence and Counterclaim were extremely poorly drafted. They were inaccurate, convoluted and confusing. This crated great difficulty for me in attempting to understand and analyze them, and I infer that it created similar difficulty for counsel for SC in responding to the application.**

[63] **Second, counsel for JM made extensive attempts to re-argue matters, with respect to the proposed amendments, that had already been decided by Justice Keene, and confirmed by the Court of Appeal. This is also conduct which must be discouraged.**

…

[65] The type of conduct referred to in the preceding paragraphs, and the lack of attention to proper drafting, service, and filing of documents must be discouraged. … (emphasis added)

73. The Member's' reply to these grounds of the formal complaint can be found at paragraphs 101 to 112 and 146 to 154 of his affidavit. In that reply, Phillips indicates:

(a) When initially requesting an adjournment of the March 14, 2017 court date, the only reason given by counsel for the plaintiff was the request for a case management judge to be appointed. On March 14, 2017, another lawyer from the plaintiff's lawyers' office gave further reasons for the adjournment (unavailability of Ms. Gaudin and a transfer of the file within the office);

(b) He advised the Court that he was not suggesting improper conduct by opposing counsel when the matter was argued on April 24, 2017;

(c) He genuinely believed that an inference could be made that MC had inappropriately instructed the adjournment to avoid being appointed as proper officer. He acted in good faith with the thought that his submissions were meritorious;

(d) Although he led no evidence in support of his position, it was not possible to do so as he only learned about the circumstances of MC the day prior;
(e) He acted with client instructions;
(f) The Member had initially sought to replace his client's existing defence with a new defence and counterclaim, which request was denied;
(g) Amending the existing defence was difficult given that the Court had not allowed a replacement of the defence;
(h) There were disagreements between counsel as to what had been permitted by virtue of the Court's fiat of October 20, 2016.

74. In questions posed to the Member and in the materials filed, it was determined that:

(a) The Member could not cogently explain what facts could potentially lead to the inference that MC had given instructions to mislead the Court as to the reasons for the adjournment;
(b) The Member was unable to identify any evidentiary support for the proposition that he was advancing that the "true" reason for the adjournment on March 14, 2017 was other than those reasons given by counsel for the plaintiff;
(c) The Member confirmed that he was seeking (rather extraordinary) relief to strike a summary judgment application and solicitor-client costs on the strength of this "inference" without an application;
(d) The defence and counterclaim being addressed by Justice Kalmakoff had components in the defence which were almost identical to the amendments to the defence that were not permitted by Justice Keene;
(e) Paragraphs 24 to 33 and 43 of the Amended Counterclaim before Justice Kalmakoff which are crossed out were not found in the Counterclaim that existed before the request for amendment. Those paragraphs though were found in the Amended Amended Statement of Defence which was not permitted to be filed by Justice Keene;
(f) Paragraphs 44 to 46 are double-underlined for an unclear purpose both in Exhibit 36 and 37. Those paragraphs appear to have always been part of the counterclaim and were not amended (other than the paragraph number);
(g) The counterclaim is confusing, likely in part because it was not drafted initially as the counterclaim. It was lifted from the prior Amended Statement of Defence (which amendments were not permitted by Justice Keene).

75. The Member's explanations are wholly inadequate on several fronts. The most glaring is the allegations he made against the SC executive member without any evidentiary basis – it should go without saying that if you are to allege a sinister motive that one should have some evidence. The Member admitted it was an inference but could not articulate any evidence from which the inference was drawn other than the provincial reorganization. The Member's assertion that he was not impugning the character of opposing counsel is an example of willful blindness: he argued that they accepted instructions that were, in essence, intended to subvert justice and mislead the Court. The Member's argument that he was following instructions throughout offers no cover to him – a lawyer has a duty to act in accordance with the code and it cannot be that the excuse of "my client so instructed me" absolves counsel of all responsibility. Moreover, the Member did not attempt to explain how the client reached the conclusion that they both shared. These arguments were frivolous and, again, most certainly vexatious – and were certainly not competently made.

76. We have some sympathy for the Member regarding the poor drafting of pleading and the poor quality of the product put before the Court as the matter was becoming factually complex and voluminous, but the Member had already been to the Court of Appeal and his arguments for much of the pleadings had been rejected and as noted by Mr. Justice Kalmakoff the proposed amendments were already rejected by the Court and were therefore *res judicata.* The Member either could not keep clear what was occurring on the file or he attempted to revive certain aspects of his case which were already resolved – either way it falls below the standard of reasonable competency. Both charges arising from this case are made out.

Charge 1(h), 2(a) and 2(b) – 2015 CIRB 762, CIRB Doc. No. 540330 and 2016 CIRB 812

77. 2015 CIRB 762 relates to an application by SGEU complaining that the witness summaries filed by Phillips were non-compliant with the CIRB's policies. In agreeing with the position advanced by SGEU, the CIRB stated:

> [5] On February 24, 2015, Cowessess responded and argued its Summaries, when considered together with the response it filed in each case, were compliant.
> [6] Cowessess' Summaries stated that its witnesses would "refute the allegations contained in the complaint", as well as refute the information set out in the SGEU's detailed Summaries. The Board finds Cowessess' Summaries were essentially useless.
> …
> [30] However, in contrast to the Summaries provided by the SGEU, all Cowessess' Summaries stated unhelpfully: "Will refute the allegations contained in the complaints and in the witness statement of (names of various SGEU witnesses)". The Board was already aware that Cowessess did not accept the SGEU's factual allegations. Cowessess' suggestion that the response it filed for each complaint somehow brought its Summaries into compliance ignores the text of the Regulations, as well as the forms the Board sent it with its September 26, 2014 hearing notice.
> [31] The Board's hearing notice requested explicitly "the witness' name, job title and a summary of the evidence he/she will be providing for each witness called by a party (forms attached)".

78. The Member's reply is found at paragraphs 125 to 132 of his affidavit. Those paragraphs provide:

> (a) The motion by SGEU was only a letter;
> (b) The witness identification forms filed by Cowessess when read in conjunction with his client's written representations and the specific witness statements of SGEU provided an appropriate basis upon which SGEU could anticipate the evidence to be adduced;
> (c) Later, the Member filed revised witness identification forms: paragraph 130.

79. In cross-examination and the materials filed by the Member, it was established:

> (a) The witness identification forms provided no detail as to the proposed testimony of the witnesses to be called by Cowessess;
> (b) In relation to the Member's position that the evidence to be tendered could be surmised from the written representations of the Member and the

> materials filed by SGEU, the witness identification form for Alvin Delorme Jr. was reviewed. It was determined that the Member's written representations do not refer to Alvin Delorme Jr. at all. The SGEU witness identification forms have only passing reference to Alvin Delorme Jr. The properly completed witness identification form for Alvin Delorme Jr. contains much more extensive information, including information not addressed in the written representations or SGEU witness identification forms;
>
> (c) The Member did not directly address why he did not comply with the clear directions from the CIRB as detailed in paragraph 31 of the decision as to what the witness identification forms should contain.

80. 2016 CIRB 812 addresses the repeated failures by Cowessess to comply with its obligations before the CIRB, as well as specific board orders. Included in the comments of the Board in relation to 2016 CIRB 812 are the comments from the CIRB in relation to charge 2(a), CIRB Doc. No. 540330. Some of the comments that are salient to this particular case (and are not otherwise addressed above) include:

> 7 This has been a novel case for the Board. Never before in this panel's experience has the Board had to spend so much time actively pushing a matter along.
>
> 8 These actions have been necessitated mostly, but not exclusively, by Cowessess' continuing failures to abide by its obligations, whether for those arising under the Regulations or from specific Board orders.
>
> …
>
> 15 On March 19, 2015, following initial hearing days in Regina, the Board fixed further hearing dates and advised the parties in writing that it would hold another CMC on July 13, 2015. A CMC is invaluable for the Board, given that it must travel across Canada in order to carry out its mandate.
>
> 16 Usually, however, CMCs are not required for most parties once the oral hearing has already started.
>
> 17 Despite the Board's written notice, Cowessess failed to appear on the CMC conference call. The Board was obliged to proceed in its absence, as described in its July 14, 2015 decision in Cowessess First Nation #73, 2015 CIRB LD 3459:
>
> By letter dated March 19, 2015, the Board fixed continuation dates for these matters for July 29 to 31, 2015, and August 18 to 20, 2015. The Board also set the time for the next Case Management Conference (CMC) for July 13, 2015, at 11:00 a.m. CST (1 p.m. EDT).
>
> While MF phoned into the CMC on July 13, 2015, no one from Phillips & Co called in.
>
> After a brief wait, the Board continued with its CMC, as contemplated by the Canada Industrial Relations Board Regulations, 2012 (the Regulations). As per section 47(2) of the Regulations, where a person who is notified of a pre-hearing proceeding does not appear, the Board may proceed and dispose of the matter in the absence of that person.
>
> 23 In a different Board matter (file no. 31414-C) involving these same parties, by letter dated January 28, 2016, a differently constituted Board panel was obliged to remind Cowessess that other client matters did not provide an acceptable excuse for not being prepared for the Board's hearing:

Despite the extension to the filing deadline, the Board has yet to receive a copy of Cowessess' documents from Mr. Phillips. The Board therefore orders Mr. Phillips to:

- serve MF with his documents today and provide proof of delivery to the Board by close of business in Ottawa today (5:00 p.m. EST);
- send a copy of fulsome witness statements to the Board by close of business in Ottawa today (5:00 p.m. EST);
- bring five copies of his documents to the hearing beginning on Tuesday, February 2, 2016. The hearing begins at 9:30 a.m. (CST) on February 2, 2016. Cowessess' documents must arrive to the hearing room by 8:30 a.m. so that materials can be properly processed prior to the commencement of the hearing.

In accordance with section 27(4) of the Canada Industrial Relations Board Regulations, 2012, failure to adhere to the above orders may result in the Board refusing to accept any documents and refuse to hear any witnesses tendered at the hearing.

Mr. Phillips, we kindly ask that you act with courtesy and respect for the Board, its process and opposing counsel. We note that your commitments on other files are not a reasonable excuse to fail to meet filing deadlines, particularly when an extension for filing had already been granted at your request.

(emphasis in original)

24 In that same file, by letter dated February 8, 2016, the Board later had to deal with similar situations. The Board was obliged to remind Cowessess that it had to be familiar with its documentation:

> In advance of the continuation hearing dates of February 11 and 12, 2016, the Board advises the parties of the following:
>
> 1. The Board was obligated to provide extra time during cross-examination for Mr. Phillips to review his documents at the hearing on February 2 and 3, 2016. The Board advises that this was a one-time courtesy and will not be tolerated going forward. Counsel are expected to be familiar with their documents prior to questioning witnesses.
>
> 2. Appropriate witness statements from Mr. Phillips are to be received at the Board's office by 4:00 p.m. (Central Standard Time) (5:00 p.m. Eastern Standard Time) on Tuesday, February 9, 2016.
>
> 3. At the outset of the hearing on February 2, 2016, Mr. Phillips requested that he be able to provide closing submissions in writing. The Board denies this request. Counsel should therefore be ready to present oral closing arguments during the February 11 and 12, 2016 continuation dates.
>
> 4. Mr. Phillips is reminded to file an additional Respondent's Book of Documents with the Board. The Board will accept this copy in-person on February 11, 2016.
>
> 5. The Board confirms that it received copies of the SGEU's Book of Authorities on February 2, 2016. No authorities were received from Cowessess. Cowessess is therefore expected to provide its Book of Authorities on Thursday, February 11, at the commencement of the proceedings.
>
> 6. Further to the in-person discussion held with the parties on Thursday, February 4, 2016, the Board does not require any clarifications regarding SGEU's draft collective agreement.
>
> (emphasis in original)

25 On November 18, 2015, in Cowessess First Nation #73, 2015 CIRB LD 3526 (LD 3526), the Board ordered Cowessess to comply with the following orders relating to its reply evidence well in advance of the next scheduled hearing dates in May 2016:

> Long before those dates, however, Mr. Phillips will comply with the following Board orders:
> i) Mr. Phillips will provide the SGEU with the names of all of his reply witnesses;
> ii) Mr. Phillips will subpoena those named witnesses, if he has not already done so;
> iii) Mr. Phillips will provide to SGEU a detailed witness statement of those witnesses' proposed reply evidence; and
> iv) Mr. Phillips will provide to SGEU any other documents he intends to enter during those witnesses' reply evidence.
> Mr. Phillips will complete all these matters by no later than February 15, 2016. (page 2; emphasis in original)

26 The due date for Cowessess' compliance was February 15, 2016. The Board's CMC would take place 10 days later on February 25, 2016, a date designed to give the parties time to resolve any issues arising from Cowessess' production of materials.

27 At the CMC on February 25, 2016, the Board learned that Cowessess had failed to comply with all of the orders. It had requested subpoenas from the Board's regional office that very day, but otherwise, despite having had over three months, Cowessess had simply ignored the Board's orders.

28 At the SGEU's request during the CMC, the Board did oblige Cowessess to advise of the witnesses it intended to call. Even the naming of those witnesses raised relevancy issues between the parties, which was one of the reasons the Board had insisted that these matters be dealt with far in advance of the Board's next trip to Regina in May, 2016.

…

30 This case, however, is stunning. Rarely, if ever, does the Board have to take such an active role in attempting to complete a matter properly. Cowessess' continuing failures to be prepared for the Board's oral hearings, to comply with the Regulations and to respect Board orders has come close to prejudicing the SGEU's legitimate expectation for a fair and expeditious hearing.

31 Cowessess has failed, despite Board orders and without any reasonable excuse, to provide the SGEU with the names of its reply witnesses, including proper witness summaries. Cowessess was further obliged, pursuant to LD 3526, to provide any further documents to SGEU.

81. The Member' reply found at paragraphs 121 to 124 and 134 to 144 of his affidavit indicated in part:

(a) Some of the complaints of the CIRB pre-dated his involvement with the file;
(b) The Member acknowledges missing the case management conference. He indicated that there was a calendaring system error;
(c) The CIRB's assertion that the Member had not been properly prepared was not correct. He noted that, while preparing a witness (ET) for the hearing, he became concerned that they may not provide valuable evidence for his client. Thus, he decided not to call ET as a witness. He attempted to replace ET with MA as a

witness, but (at the last moment) MA indicated that they was unable to testify when needed. Thus, the loss of the CIRB's time was not intentional, but was mostly as a result of the late discovered problems with ET's evidence;

(d) The Member acknowledged that he was late in filing the materials referenced in paragraphs 25-28 of the CIRB's decision. He indicates that the same occurred because the fax sent by the CIRB as sent upside down and was recorded incorrectly into his scheduling system. He, thus, missed the prompt to complete the work on time;

(e) The Member acknowledged that he was late in filing his book of documents on time (he notes that he served witnesses statements on the date directed) as referenced in paragraphs 23 and 24 of the CIRB decision. He indicates that he attempted to comply with the deadlines provided by the CIRB, but that he had conflicting engagements (including a trial). The trial went longer than anticipated.

82. The long history of delay before the CIRB was clearly frustrating to the board and they detailed their long litany of complaints against the Member which in our opinion he failed to rebut or explain away. The issue of frivolous and or vexatious arguments is made out in this context as he was placing witness statements that were clearly improper before the Board and his explanation to this hearing panel for his actions had no factual connection to the evidence. The charge is made out regarding frivolous arguments. However, this is primarily an example of incompetent representation. Although rare it is not uncommon for lawyers to miss filing deadlines or even an appearance simply because mistakes happen, but the repetitive nature and the continuous disregard of clear direction from the CIRB cannot be forgiven in the absence of an acceptable explanation. This level of repeated error and disregard is not competent and not only harmed the Member's reputation but that of the standing of the profession the charges are made out.

Charge 1(i) – QBG 2355 of 2016

83. This matter relates to a short fiat written by Chief Justice Popescul. The respondent, Regina Qu'Appelle Regional Health Authority, sought to direct this action commenced by originating application (relating to an appeal to court from a decision of a trustee under Section 50 of *The Health Information and Protection Act*) to case management.

84. The principal parties in QBG 2355 of 2016, BG and Regina Qu'Appelle Regional Health Authority, were already in case management in relation to another action (QBG 847 of 2011).

85. The Chief Justice commented:

> It is evident from a review of both matters that the within action involves one of the plaintiffs and one of the defendants in QBG 847, the same counsel as those involved in QBG 847, and, generally speaking, deals with the same subject matter.
>
> Nathan Phillips, counsel for the plaintiff, opposes the appointment of a case management judge. In correspondence filed with the Local Registrar, he states that he intends to file an application wherein he proposes to contest the appointment of the case management judge.
>
> It is beyond comprehension why Mr. Phillips would take such a position. The appointment of a case management judge is not a punitive sanction; rather, the appointment of such a judge should be regarded as a benefit to both parties to assist them to manage litigation.

> It is obvious, after reviewing both actions, that they are related and would benefit from the appointment of a case management judge who would be responsible to hear all of the various interim applications that might arise. **The fact that Mr. Phillips wishes to contest a rational and reasonable request for the orderly hearing of motions by a single judge is proof positive of the need for such an order.** (emphasis added)

86. The Member's reply to this fiat is found at paragraphs 115 to 120 of his affidavit. In those paragraphs, The Member indicates:

(a) The local registrar had advised The Member that he needed to bring an application, rather than a letter, to oppose the appointment of a case management judge. This is why The Member indicated that he would be bringing an application;
(b) The Member filed a letter setting out the reasons why he opposed case management;
(c) The Member opposed the appointment of a case management judge to avoid delay and cost to the parties;
(d) Ultimately, case management caused delay and cost to the parties: paragraph 120.

87. When reading the Fiat it is patently clear that given the facts before him that the Chief Justice would conclude as he did. A simple review of the *Rules of Court*, referenced in the Fiat, or a basic understanding of the principles of joinder would inform counsel that their position was untenable, but the Member persisted with his argument. The Member's strongest defence was that in retrospect he was correct and the matter is still ongoing. However, is the lack of a resolution rooted in the fact that it is case managed or how the parties are behaving within the case management framework – we had no evidence one way or the other. The unsuccessful and ill-advised argument, which lacked cogency, is clearly an example of a lawyer taking a poor path, but the panel is not convinced that the argument was frivolous or vexatious as it can be argued that although the two matters did involve the same parties, the two types of actions were dissimilar in nature and the member had an objectively reasonable goal. The charge is not made out.

Charge 3 – 2017 SKPC 30

88. In this matter during a discussion that involved the Judge, the Member and opposing counsel it became clear that an exhibit to a significant document had not been filed by the Member with the Court or served on opposing counsel. The question before this panel is did the Member undertake to serve and file the appropriate document. From the court materials and the transcript it was unclear to the panel that the Member actually made such an undertaking. Certainly, the Member did not expressly give an undertaking and we are unable to infer from the evidence before us that he implicitly gave an undertaking. The charge has not been made out.

Conclusion

89. In summary the Member faced fourteen charges of conduct unbecoming and all but one are proven by the CIC. This matter will be referred to the Chair of the Discipline Committee to arrange for a date and time for sentencing submissions.

"Ian D. Wagner" "October 21, 2021"

"Murray K. Walter, Q.C."

"Judy McCuskee"

PENALTY HEARING DECISION

Members of the Hearing Committee: Ian D. Wagner, Chair
Murray K. Walter, Q.C.
Judy McCuskee

Counsel: Sean Sinclair
For the Conduct Investigation Committee

Alan G. McIntyre, Q.C.
For Nathan Xiao-Phillips

1. INTRODUCTION:

90. Following a discipline hearing the Hearing Committee found Nathan Xiao-Phillips (the Member) guilty of conduct unbecoming of 12 of 14 counts laid out in an Amended Formal Complaint dated October 25, 2018. The sentencing hearing was held on February 15, 2022 and June 17, 2022.

91. On June 17, 2022, following oral submissions, the Hearing panel sentenced the Member with written reasons to follow. These are the written reasons.

2. CONCLUSION

92. The Member was sentenced to the following:

a. Written Reprimand;
b. A 71 day suspension previously served; and,
c. Costs of $15,000.00 payable by June 17, 2023.

3. FACTUAL BACKGROUND RELATED TO THE SENTENCING

93. The Hearing Panel found the Member guilty of the following counts as stated in the Amended Formal Complaint:

1. did, advance frivolous and/or vexatious arguments and positions as demonstrated by the following matters:
   a) 2015 CIRB 801;
   b) 2017 CIRC LD 3801;
   c) 2015 SKQB 412;
   d) 2016 SKCA 35;
   e) 2016 SKPC 94;
   f) 2016 SKPC 93;
   g) 2017-05-09 QBG 1366 of 2015;
   h) CIRB 30493-C and 30715-C (Cowessess First Nation #73); and

2. did, fail to provide a quality of service generally expected of a competent lawyer in a like situation as demonstrated by the following matters:
   a) Cowessess First Nation #73 (CIRB 31414-C) (Missed Filing Deadlines);

b) Cowessess First Nation #73 (CIRB 30493-C and 30715-C) (Missed Filing Deadlines and Failure to Follow Tribunal Requirements and Orders);
c) 2016 SKPC 94 (Failure to Identify Relief Sought or Grounds for Relief); and
d) 2017 05 09 QBG 1366 of 2015 (Poorly Drafted Pleadings).

94. In April of 2019, the Member was suspended from practice on an *ex parte* basis by the Executive Director of the Law Society of Saskatchewan (LSS) arising from a new complaint against the member. The member served 71 days of suspension prior to being reinstated on practice conditions which included employing an approved Practice Supervisor at his expense (and other conditions not germane to this matter).

95. Sentencing was scheduled for February 15, 2022. Prior to the commencement of the sentencing proceedings Counsel for the Conduct Investigation Committee (CIC) and Counsel for the member provided the Hearing Committee with an agreed Statement of Facts, a Joint Sentencing Submission, and appropriate briefs. The Hearing Committee informed Counsel at the outset of the Hearing that they were not prepared to accept the Joint Submission without further information.

96. The Joint submission requested the following sanction against the member:

a. Written Reprimand; and,
b. Costs of $15,000.00.

97. In the written submissions, and confirmed orally, in support of the proposed joint sentence both Counsel advised the Hearing Committee that the 71 day suspension was not only the result of the still undetermined complaint (now scheduled for a hearing) but also included the matter before us. However the Joint Submission proposed that the 71 days of suspension would only be used if the member was found guilty of conduct unbecoming by the future Disciple Hearing Committee seized with the second complaint. The Joint submission did not offer this Hearing Committee any leeway to use or appropriate any of that suspension towards a disposition in this matter. The Joint Submission proposed that the principle of totality in sentencing should only take place after the second Formal Complaint was dealt with and **only if** the member was found guilty of conduct unbecoming in that matter.

98. The Hearing Committee outlined to both Counsel a number of concerns and information that they required prior to accepting (or not accepting the Joint Submission). Counsel for the CIC in his oral submission aptly summarized – with some paraphrasing - the Hearing Committee's concerns as follows:

a. What were the actual costs that the Law Society bore in prosecuting the complaints?
b. What costs did the member bear in paying for supervision by a Practice Supervisor (Paul Korpan Q.C.) for approximately 2.5 years?
c. How was the decision made regarding removal of the Practice Supervisor made?
d. To clarify that the 71 day suspension and the imposition of the practice supervision also related to this matter and not just the second Formal Complaint?
e. What is the status of the new Formal Complaint or where is it in the process?
f. The Hearing Committee asked counsel for CIC for input from the victims.
g. How does the proposed sentence meet the sentencing goals of general and specific deterrence?

h. What weight should a hearing panel place upon a joint sentencing submission when it is not part of a negotiation that results in the necessity of a hearing to determine guilt or not?
i. What does the public as represented by the Law Society gain from this? Was there meaningful negotiation that benefitted the protection of the public?
j. What if anything should the Hearing panel surmise from the fact that a suspension and practice restrictions were imposed as a result of this Complaint and the second Formal Complaint?
k. Why should the Hearing Committee consider the costs of a practice supervisor a mitigating circumstance?

99. Much of what was submitted jointly by Counsel answered many of those questions and concerns, at least in part. Near the outset and prior to oral submissions of the second penalty hearing Counsel for the member pointedly asked if the Hearing Committee was prepared to accept the Joint Submission. The answer was that we were not yet prepared to do so and asked the Counsel in their submissions to address the following points (paraphrased):

a. The Committee was not satisfied that the member had learned from past mistakes. In that when obvious mistakes were made on the matters before us the member continued on a course of conduct that lead to additional charges. That during the Hearing to determine guilt or not the Member showed little or no insight into his behaviour and conduct.
b. The impact upon the victims is significant.
c. That the committee did not see the gravity of the offences nor the number of offences properly reflected in the proposed joint submission.
d. That the proposed joint submission does not adequately protect the public, other lawyers and the courts in relation to general and specific deterrence.
e. The Hearing Committee did not accept that the use of the 71 days for a possible suspension should be left up to the vagaries of potential results from a future Discipline Hearing Committee.
f. The Hearing Committee was of the view, arising from the materials before us, that a suspension was warranted on these facts.

100. Counsel for the Member rightly raised that if the Joint Submission was to be rejected that he wanted the opportunity to call more evidence. Counsel for the CIC proposed that the oral submissions should proceed and if the Joint Submission was not then accepted that the request of the Counsel for the Member to call more evidence should be considered. The approach offered by Counsel for CIC was followed by the Hearing Committee. Following oral submissions and hearing what the Hearing Committee considered a proper disposition, Counsel for the Member informed the Hearing Committee that no more evidence would be called; the Hearing Committee then delivered its decision.

4. WHAT PRINCIPLES APPLY TO THE ACCEPTANCE OF A JOINT SUBMISSION ON PENALTY

101. Joint submissions on penalty or sentence should not be lightly taken or discarded, but rather the sentencing body should apply a stringent test to determine if the sentence is fit. The test to be applied must be stringent and carefully followed before a joint submission is not accepted. Sufficient reasons must be proffered by the sentencing body to ensure that the test has been properly applied.[1]

[1] *The Law Society of Saskatchewan v. Rault,* [2009] SJ No 436, 2009 SKCA 81

102. Joint submissions are extremely common in the criminal context and are essential to the proper administration of the justice system as they "contribute to a fair and efficient criminal justice system."[2]

103. The Supreme Court of Canada (SCC) in *R. v. Anthony-Cook*, stated that joint submissions are not sacrosanct and may be departed from if the proposed joint sentence would either "bring the administration of justice into disrepute, or would otherwise be contrary to the public interest."[3] This is called the public interest test.

104. Writing for the SCC in *Anthony-Cook* Moldaver J. referred to two cases that shed light on how the test should be applied:

> [32] Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.
>
> [33] In *Druken*, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system". And, as stated by the same court in *R. v. B.O.2*, 2010 NLCA 19, at para. 56 (CanLII), when assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".
>
> [34] In my view, these powerful statements capture the essence of the public interest test developed by the Martin Committee. They emphasize that a joint submission should not be rejected lightly, a conclusion with which I agree. Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold — and for good reason…[4]

105. The test articulated above for the criminal justice system can be appropriately adapted and applied to the regulatory system of the Law Society of Saskatchewan. The joint submission regarding the penalty of the member should not be departed from unless it brings the administration of lawyer regulation into disrepute and is contrary to the public interest. The public interest aspect is of vital importance when sentencing members that have been found guilty of conduct unbecoming. *The Legal Profession Act, 1990,*[5] specifically mandates the LSS to act in

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[2] *R. v. Anthony-Cook*, 2016 SCC 43 (CanLII), [2016] 2 SCR 204, <https://canlii.ca/t/gv7bk>, at paragraph 2.

[3] Ibid at paragraphs 3 and 5.

4. Anthony-Cook, ibid.

[5] SS 1990-91, c L-10.1

the public interest and places the protection of the public above the interests of the Law Society's members:

> **Duty of society**
> 3.1 In the exercise of its powers and the discharge of its responsibilities, it is the duty of the society, at all times:
> (a) **to act in the public interest**;
> (b) to regulate the profession and to govern the members in accordance with this Act and the rules; and
> (c) to protect the public by assuring the integrity, knowledge, skill, proficiency and competence of members. 2010, c.17, s.4.
>
> **Protection of the public**
> 3.2 In any exercise of the society's powers or discharge of its responsibilities or in any proceeding pursuant to this Act, **the protection of the public and ethical and competent practice take priority over the interests of the member**. 2014, c.15, s.4. (emphasis added)

106. The principles adopted by the Supreme Court in *Anthony-Cook* arose from a case where a plea agreement had been reached and the defendant had entered a guilty plea forgoing his right to a trial. Such plea agreements are a necessary part of the efficient and effective operation of the criminal justice system. This case is not a plea agreement scenario. The Hearing Committee specifically asked Counsel (as noted above) whether the same weight should be given to a joint submission in a matter where no plea agreement has been reached. Counsel for the Member kindly referred us to *Baptiste c. R.* where the Quebec Court of Appeal applied the test in *Anthony-Cook* to a joint submission following trial.[6] The test does not vary regardless of whether a trial or hearing preceded the joint submission on penalty.

107. Although it was decided prior to *Anthony-Cook,* the leading Saskatchewan decision of the effect of a joint submission on penalty in the context of discipline proceedings is *Rault v Law Society of Saskatchewan.*[7] In this decision, the Court underlined the importance of a joint submission, as the adoption of a joint submission encourages professionals to make admissions which they might otherwise dispute at a discipline hearing. Thus, joint submissions are cost effective and encourage certainty.

108. The Court in *Rault* states:

> [28] In summary, the Discipline Committee had a duty to consider the joint submission. The reasons for decision do not reflect that the Discipline Committee understood it was constrained to consider the joint submission, and **give reasons as to why it was inappropriate; not within the range of sentences; unfit or unreasonable; and/or contrary to the public interest**. If the Discipline Committee was of the view the joint submission penalty was not an appropriate disposition in the case before them, then it was required to give good or cogent reasons as to why it is inappropriate. Failure to do so leads to the inevitable conclusion that the decision of the Discipline Committee is unreasonable. [Emphasis added]

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[6] *Baptiste c. R.*, 2021 QCCA 1064 (CanLII), https://canlii.ca/t/jgnrx, at paragraph 67, 71 and 74.
[7] [2009] SJ No 436, 2009 SKCA 81

109. The test in *Rault* may not be as stringent as that laid down by the SCC in *Anthony-Cook* given the stringent test articulated therein; however, the aspect of the public interest and grounds within *Rault* are of upmost importance given the statutory framework under which the LSS operates.

110. Counsel for the CIC provided the panel with the case of *Faminoff v The Law Society of British Columbia*.[8] In that case the British Columbia Court of Appeal adopted the following factors to be considered when considering an appropriate penalty:

(a) the nature and gravity of the conduct proven;
(b) the age and experience of the respondent;
(c) the previous character of the respondent, including details of prior discipline;
(d) the impact upon the victim;
(e) the advantage gained, or to be gained by the respondent;
(f) the number of times the offending conduct occurred;
(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or an absence of other mitigating factors;
(h) the possibility of remediating or rehabilitating the respondent;
(i) the impact on the respondent of criminal or other sanctions or penalties;
(j) the impact of the proposed penalty on the respondent;
(k) the need for specific and general deterrence;
(l) the need to ensure the public's confidence in the integrity of the profession; and
(m) the range of penalties imposed in similar cases.

111. Our analysis will follow and discuss each of the factors in *Faminoff* in light of the evidence and submissions put before us.

5. APPLICATION OF THE PRINCIPLES

112. In this section we will review the factors in *Faminoff* and the principle of totality of sentencing referred to and used by the parties to support the Joint Submission as to penalty.

5.1 THE NATURE AND GRAVITY OF THE CONDUCT PROVEN

113. Counsel for the CIC suggested that the nature and the gravity of the offences falls within the middle range of severity – not as serious as defalcation or misuse of trust funds but not as minor as an inadvertent failure to fulfill an undertaking given by a lawyer. The panel agrees with the CIC that each of the acts falls within the middle range. However, what the CIC and the Joint Submission fail to do is place sufficient emphasis upon the number of counts and the interplay between those counts. Moreover, in the view of the Hearing Committee some of the acts alone fall at the highest portion of the “middle” range.

114. The sheer number of counts suggests a pattern of behaviour that elevates the severity. As does the Member’s conduct on individual files elevate the severity of the infraction. For example, when the Member sent an inappropriate letter, in form and tenor, to a Provincial Court Judge, his response to the Judge’s restrained umbrage was to send another letter just as inappropriate. The Member’s response to an administrative tribunal’s attempts to move the matter along was to raise arguments justifying the delay which were without factual basis compounding the delay and the aggravation of the tribunal before which he was representing a client. These compounding factors not only show a pattern of behaviour, but a lack of insight and integrity. One

[8] 2017 BCCA 373

or two acts of conduct unbecoming can be minimized or forgiven but a continued pattern must be viewed with a highly critical eye.

115. Another example is the matter in which the member advanced vexatious and frivolous arguments regarding a taxation of a fellow member's accounts in the Court of Queen's Bench. The Member instead of heeding the clear and reasoned decisions from that court continued on to the Court of Appeal where he made even more spurious allegations. Those allegations were based upon no facts and to quote Caldwell J.A:

> 8 Pointedly, we remark that parties and **counsel would be well-advised to avoid making allegations of this nature before a Court without establishing the full particulars thereof on the record. No member of the Law Society of Saskatchewan should be put to answering allegations of misrepresentation or fraud made in open court without a proper evidentiary foundation having first been established therefor.** (emphasis added)

116. The member also impugned the integrity of another opposing counsel on a different file without a factual basis, and his justification to the Hearing Committee was that he had made an inference of improper conduct from the information before him. However it was an inference without any factual basis from which it could be derived.

117. An attack on a LSS member alleging fraud and misrepresentation without any factual basis must be at the highest end of the "middle" range of severity, if not at the low end of the "high" range. Civility between lawyers in our adversarial system is essential for a fair and efficient justice system. As well, if the public sees a lawyer advancing claims without evidence, let alone those that attack the integrity of others, it is likely that they may conclude that this how all lawyers act – it is not. Lawyers have a duty to advance arguments that are only supportable by the evidence which they put before the body hearing the matter and they have duty to act professionally and politely to other lawyers.

118. The Hearing Committee states that the gravity and the repetitiveness of the Member's conduct raises the severity and thus must be viewed as an aggravating factor when arriving at an appropriate sentence.

5.2 THE AGE AND EXPERIENCE OF THE RESPONDENT

119. When these offences occurred the Member was in a situation that could only result in negative consequences. The member was only in his fourth year of call when the Amended Formal Complaint was laid covering conduct beginning in his first year of call. The member was a very junior lawyer. Compounding the inexperience he was saddled with a very heavy work load handling files that would normally be led by much more senior counsel with the Member playing a secondary role or a supportive role on the file – handling such complex and important files is certainly possible by junior counsel but the work load made such assignments unreasonable and untenable without appropriate guidance. The member did not have appropriate guidance. At the Discipline Hearing one of his arguments was that the factum (in the taxation matter) was reviewed by senior counsel. Clearly it was not reviewed well and since no significant problems were identified in the factum or the file suggests ineffective guidance.

120. As noted in the Discipline decision the Member had an unusual articling experience. As his Principal was not in the same firm as him and was in a separate location. He may have received appropriate guidance from his principal but the Member's description of his articles makes it difficult to conclude that.

121. The member's lack of experience, work load and lack of guidance are all ameliorative and suggest that a proper disposition should be more rehabilitative rather than punitive. In fact much of the rehabilitation occurred through 2.5 years of supervision by a Practice Supervisor. Placing the Member under practice conditions, including paying for the Practice Supervisor, are sanctions by the LSS. However, the Member's experience level at the time of the offences combined with a rehabilitative sanction calls for leniency only and not absolution.

5.3 THE PREVIOUS CHARACTER OF THE RESPONDENT, INCLUDING DETAILS OF PRIOR DISCIPLINE.

122. The member has no previous discipline matters. That he has upcoming discipline matters is irrelevant to this proceeding and did not form part of our deliberations or influence the outcome – those charges have yet to be proven and it would be an injustice to consider them. We would not have even thought of the other charge if not raised by the parties in relation to the "totality of sentencing" argument used to support the Joint Submission.

5.4 THE IMPACT UPON THE VICTIMS.

123. The Hearing Committee received letters from two victims: Chief Cadmus Delorme for Cowessess First Nation; and, Allan Brabant on his own behalf. Both letters were received as full exhibits but both letters touched upon facts and matters beyond the complaints with which we were charged to deal. We neither considered matters beyond the complaints nor any hearsay contained within the letters.

124. The biggest impact on Cowessess was delay on their files and paying for ineffectual legal services – not a minor impact given that the First Nation's resources are limited. The impact upon Mr. Brabant is understandably devastating; being accused of inappropriate conduct caused him stress, anxiety, and expense. Mr. Brabant was dragged into two courts without a factual basis for the initial application or the latter appeal thereby expending significant resources in resisting actions that did not meet the basic threshold required by law.

125. Those two parties are not the only victims. The Member's action's squandered limited court resources and caused excessive delay to an administrative tribunal including the cancelling of a hearing. Useless time consuming matters before courts and tribunals negatively impacts access to and the administration of justice.

126. The impact upon the individual and institutional victims is significant and warrants a sanction that shows a proper level of censure balanced against the completed sanctions of a Practice Supervisor and a suspension already served.

5.5 THE ADVANTAGE GAINED, OR TO BE GAINED BY THE RESPONDENT

127. The evidence placed before us by the Member of damage to his reputation by being charged and found guilty is not surprising. There was evidence before us is that this discipline process has impacted his relationship with some counsel and has severely impacted his job prospects. His reputation has been seriously impaired, but we would suggest not irreparably so, if the Member conducts himself appropriately in the future.

128. Counsel for the CIC suggested that on the evidence before us that the Member gained little or nothing personally by his conduct on these files. However the Member and his firm billed his clients and were paid for the ineffectual service that he delivered.

129. When balancing the gain with the detriments to his reputation and the costs of employing a Practice Supervisor we conclude that the gain supersedes the negative implications.

5.6 THE NUMBER OF TIMES THE OFFENDING CONDUCT OCCURRED.

130. This factor was clearly considered within the section 5.1 analysis above and it would be unfair to consider it doubly as an aggravating factor.

5.7 WHETHER THE RESPONDENT HAS ACKNOWLEDGED THE MISCONDUCT AND TAKEN STEPS TO DISCLOSE AND REDRESS THE WRONG AND THE PRESENCE OR AN ABSENCE OF OTHER MITIGATING FACTORS.

131. This was not a matter where the Member self-reported; the investigation was initiated by the LSS. The Member throughout the Discipline Hearing showed no remorse or insight into his offending behaviour. The steps taken to redress the wrong or to undertake rehabilitative action were imposed upon him as practice conditions in exchange for lifting the *ex parte* suspension. At sentencing the Member acknowledged that he had made mistakes, but that was after the Discipline Hearing Committee had found 12 acts of conduct unbecoming. In balancing the above facts we conclude that overall this is an aggravating factor towards penalty.

5.8 THE POSSIBILITY OF REMEDIATING OR REHABILITATING THE RESPONDENT.

132. Without the Practice Supervisor's Affidavit we would have little hope given the lack of insight mentioned in 5.7 above; however, the Member, as shown in the Affidavit, is a lawyer with considerable skill and if he avails himself of proper education and the advice of senior counsel, outside of his firm, for guidance the Member should be able to practice effectively and ethically in the future. But it is up to the Member to seek out that education and mentoring relationships. The member clearly showed insight into the status of his practice and his personal life and how it impacted his behaviour at the time of the offences. Clearly, he is in a better state professionally and personally than at the time of the offending behaviour. This is a mitigating factor.

5.9 THE IMPACT ON THE RESPONDENT OF CRIMINAL OR OTHER SANCTIONS OR PENALTIES

133. The member has done nothing criminal in repeatedly acting unprofessionally and thus faces no sanctions beyond what we impose. This Hearing Committee has considered the previously completed sanctions of the 71 day suspension and the imposition of a Practice Supervisor – sanctions that both parties acknowledge relate directly to this matter.

5.10 THE IMPACT OF THE PROPOSED PENALTY ON THE RESPONDENT.

134. A reprimand is a serious consequence within our legal community – it is a condemnation by one's peers and is a stain on your professional reputation. However, while we believe that a reprimand would be taken seriously by the legal community, which understands the effect of such a penalty, the general public may potentially view it as a rather light-handed approach. The proposed order of costs is only a partial amount of the actual costs to the LSS, but we need to balance that with the financial impact on the member of paying for a Practice Supervisor. However, ultimately the Hearing Committee believes that the impact of these two proposed penalties was too minor to deliver an appropriate message to the Member or the legal community as will be discussed in the factor below. Furthermore, the LSS has to show the public that it seriously condemns such behaviour.

5.1 THE NEED FOR SPECIFIC AND GENERAL DETERRENCE.

135. Specific deterrence in relation to penalty is a simple concept; will the penalty imposed be sufficient to deter the Member from similar conduct in the future? General deterrence is whether the sentence proposed deters other members of the LSS from similar conduct in the future.

136. Regarding both concepts the Hearing Committee believes that the penalty requested by the Joint Submission would not adequately deter this kind of behaviour in the future. We are of the view that a suspension was merited on a number of factors but firmly believed that the Member has to understand that a suspension on these facts for these confirmed charges merited suspension; and that if in the future he again commits such acts that his history will be fully reflected in the record.

137. Counsel for the CIC specifically suggested that an order for reprimand/costs would provide general deterrence because he had also served a 71 day suspension and a Practice Supervisor was imposed. But that position fails to recognize that the Joint Submission specifically asked this Hearing Committee to not consider the 71 day suspension but to leave that up to a future Penalty Hearing Committee to consider. The problem with that is a future Hearing Committee may never be empanelled to consider penalty if he is found not guilty of conduct unbecoming. We firmly believe that the concept of general deterrence, within these facts, requires a clear, not obfuscated, message to the Member and the Legal Community that such behaviour will result in a suspension.

5.12 THE NEED TO ENSURE THE PUBLIC'S CONFIDENCE IN THE INTEGRITY OF THE PROFESSION.

138. As mentioned above in section 5.1 it is imperative that the general public understands that such conduct is not countenanced and is deserving of a significant sanction. Imposing a sentence of a reprimand and partial costs without clearly recognizing that the conduct in these matters also warrants a suspension would undermine the general public's confidence in the LSS to appropriately regulate its members.

139. The public aspect also includes the reputation of the bar in the public's eyes. In *Merchant v LSS*[9], the Court of Appeal highlighted the key difference between criminal sanctions and sanctions imposed by a regulatory body; the regulatory body must take into account the collective reputation of the peer group. This may cause a discipline committee to attach less weight to mitigating factors:

> [98] However, the sentencing approach in disciplinary proceedings is different than in criminal courts. In *Law Society of Upper Canada v. Kazman*, the Law Society Appeal Panel considered the philosophy of sentencing in disciplinary matters and its unique considerations. The panel quoted extensively from *Bolton v. Law Society*. The critical distinction between sentencing in criminal matters and sentencing in disciplinary matters is highlighted in this paragraph:
>
> [74] A criminal court judge is rarely concerned with the collective reputation of an accused's peer group but is free to focus instead on the individual accused to the exclusion of most other considerations. On the other hand, law society discipline panelists must always take into account the collective reputation of the accused licensee's peer group – the legal profession. According to Bolton, it is the most fundamental purpose of a panel's order. This is a major difference between the criminal court process and a law society's discipline process. **It is largely this difference that causes many principles of criminal law, such as mitigation, to have less effect on the deliberations of law society discipline panels. It is a difference easy to lose sight of, but one that should be ever in mind**. [emphasis added]

140. The Hearing Committee takes the view that this factor is of utmost importance given the guidance of the Court of Appeal in *Merchant.*

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[9] *Anthony Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33 (CanLII), <https://canlii.ca/t/22rv4>

5.13 THE RANGE OF PENALTIES IMPOSED IN SIMILAR CASES.

141. Both Counsel for the parties had difficulty in finding similar cases upon which we could make a comparison. Counsel for the CIC referred to two matters concerning two lawyers with lengthy histories of dilatory practice and failure to respond to the LSS. We are in agreement with the implied argument of the Member's Counsel that neither of those cases are of much use for comparison. However, Counsel for CIC also referred us to *Visconti v. The College of Physicians and Surgeons* a case in which a member of the College was sanctioned with a similar sentence of 2 years of practice supervision and a one month suspension in relation to 31 charges of failing to properly chart, billing irregularities, and the failure to refer to a specialist – that case is open to comparison.

142. One case that is a useful example is *LSS v Combe*, 2019 SKLSS 5, as it is decision made with no analogous cases to make a comparison with. In that case the member was involved in a consensual relationship with a subordinate and used intemperate and inappropriate language directed towards employees and clients. Some of the individuals to which the comments were directed suffered injury to their self-esteem and unnecessary stress. The Agreed Statement of Facts recognized that the member's clients received "adequate and effective representation." That penalty hearing committee noted that they were not presented with analogous cases and accepted a joint submission of a one (1) month suspension, $22,000.00 in costs, and an undertaking to take personal counselling. It is true that the member in *Combe* was a senior lawyer in a management position, with a power imbalance between him and his staff. But it is also true that none of the allegations related to that member's conduct regarding the management of his files or the making of repeated frivolous/vexatious arguments to courts or tribunals nor impugned the honesty and integrity of other members in open court. *Combe* provides some guidance that a suspension is warranted in this case, as we view the facts here as slightly more serious, but is not determinative.

5.14 TOTALITY OF SENTENCING PRINCIPLE.

143. The totality of sentencing principle is applied to ensure that the sentences imposed on an offender conforms to the concept of proportionality – that the sentence is proportional to the offences committed and to the circumstances of the offender. The principle is commonly applied in criminal law where the principle is codified within section 718.2(c) of the *Criminal Code of Canada*. Within the criminal context the principle is applied in a number of circumstances, for example:

a. When an offender is convicted of multiple offences arising from one incident for which the totality of usual sentences (not concurrent) for each offence would create a global sentence that would be too severe and is not proportional given the personal circumstances of the offender and the facts of the case before the sentencing judge.
b. When an offender is convicted of multiple offences from two or more incidents for which the totality of usual sentences (not concurrent) for each offence would create a global sentence that would be too severe and is not proportional given the personal circumstances of the offender and the facts of the cases before the sentencing judge.
c. When an offender is convicted of an offence(s) and is sentenced by a judge and later appears to be sentenced for other offences before a different judge for acts that occurred prior to the conviction and sentencing on the first offence. In this instance the second sentencing judge (it may be the same judge) **must** ensure that the sentence they impose creates a global sentence from both convictions

that is not too severe and is proportional given the facts of each case and the circumstances of the offender.

144. As one can see from the above criminal examples the one most similar to the facts before us is the third example. In this case the Joint Submission asks us to not impose a suspension or use the served 71 days, but rather leave the question of a potential suspension to a future Penalty Hearing Panel. What they asked us to do is an extremely unusual method to utilize the totality of sentencing principle and in our opinion an improper application of the principle.

145. If totality of sentencing is to be applied it should be applied by the second Penalty Hearing Panel taking into account our disposition of the matters before us to ensure that the global penalty between the two matters is proportional and follows the penalty principles that we have reviewed in this decision. Frankly, the CIC has asked us to put the cart before the horse in a situation in which there is no guarantee that the member will ever reach a Penalty Hearing regarding the subsequent Formal Complaint. The CIC has asked us to abrogate our penalty imposition duties in favour of a different body that may never be constituted – in our view this would be an error in law. Our task as mandated by the *Act* and the Rules of the Law Society is to impose a fit penalty following the principles of sentencing to the facts of the matter before us. Our duty is to craft a penalty that is proportional on the facts and the circumstances of the member before us; it is not to craft a penalty also considering proportionality between this matter and a further potential matter of which we have no knowledge or understanding.

6. SYNTHESIS OF THE PENALTY PRINCIPLES AND FACTS.

146. Based on the evidence before the Discipline Hearing the Hearing Committee was of the view that the facts of the case could support a suspension of between 3-6 months given the gravity of the offences, the lack of the member's insight regarding his actions, the need for specific and general deterrence, protection of the public, public confidence in the LSS to regulate its members, and impact on the victims. It must be noted that we had no knowledge of the interim suspension and practice conditions also related to the matter – we did not know that sanctions had already been imposed. We are still of the view, despite the Joint Submission, the supporting materials, and the oral submissions of counsel, that a 3 month suspension should be the range for the type and number of offences of which we found the member guilty. However, taking into account the inexperience of the Member, expense/benefits of the Practice Supervisor, and the served 71 days of suspension combined with the growth of the member as a professional (as evidenced by the Affidavit of the Practice Supervisor) and the insight he has gained according to his counsel, we determined that in this instance a 3 month suspension is not warranted. Furthermore, we took note that the member also reports being in a more stable situation regarding his personal life. We have accepted his submissions that he has learned since the Amended Formal Complaint was laid and the imposition of the *ex parte* suspension by the LSS Executive Director.

147. If the Member had not had a Practice Supervisor for 2.5 years we would have certainly imposed such a penalty upon him. If the member had not served the 71 day suspension and been under practice supervision we would have certainly considered imposing at least a 3 month suspension.

148. The Hearing Committee holds that a suspension is warranted to reflect the severity or gravity of the offences, to give a proper message of general and specific deterrence, to reflect the impact on the victims, protection of the public and to ensure that public retains confidence in the LSS to regulate its members. The inexperience of the member at the time of the offences, the lack of previous discipline, the remediation of his approach to practice, and the damage to his reputation arising from a reprimand and conviction has convinced us that any suspension beyond

the 71 days served would be overly harsh and would serve little to protect the public further – the public has been protected by the suspension and the lengthy practice supervision already completed.

149. We concluded that accepting the joint submission would bring the Law Society's regulatory process into disrepute and is against the public interest as stated in *Anthony-Cook* and *Merchant* referenced above. In particular we believe the Joint submission must not be followed, as per the reasoning of the Supreme Court of Canada in *Anthony-Cook* as applied in this regulatory context:

> [33] In *Druken*, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest **if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system**". And, as stated by the same court in *R. v. B.O.2*, 2010 NLCA 19, at para. 56 (CanLII), **when assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts**". [emphasis added]

150. Accordingly for the reasons outlined above we did not follow the Joint Submission, but rather imposed the following sentence upon the member on June 17, 2022:

a. Written Reprimand;
b. A 71 day suspension previously served; and,
c. Costs of $15,000.00 payable by June 17, 2023.

151. It is important to note that the Hearing Committee did not impose any new sanctions (beyond those recommended by the Joint Submission), but rather utilized a previously served sanction to ensure that the public interest was met and to ensure public confidence in members of the Law Society as a self-regulating profession.

7. ANCILLIARY ORDERS

152. We make the following ancillary orders to protect solicitor client privilege in this matter:

a. The transcripts of the discipline hearing are sealed;
b. The Affidavit of Paul Korpan, Q.C. is sealed;
c. The letters from Chief Cadmus Delorme and Allan Brabant are sealed; and,
d. The Agreed Statement of Facts is sealed.

"Ian D. Wagner" "July 4, 2022"

"Murray K. Walter, Q.C."

"Judy McCuskee"