THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

RYAN WILLIAM FAWCETT
(the "Member")

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

Hearing Date:	January 17, 2023
Panel:	Richard Scott (Chair) Dean Scaletta Maureen Morrison (Public Representative)
Counsel:	Rocky Kravetsky for the Law Society of Manitoba D. Greg Bartel for the Member

REASONS FOR DECISION – PRELIMINARY MOTIONS

Introduction

1. Ryan William Fawcett is a member of The Law Society of Manitoba ("the Society"), having been called to the Bar and admitted as a solicitor in 2001.

2. He was charged in a Citation dated May 20, 2022 (File No. 22-009-DIS) ("the Citation") with: (a) one count of harassment or sexual harassment ("Charge 1(a)"), (b) one count of conduct unbecoming a lawyer ("Charge 1(b)"), both contrary to Rule 6.3 of the *Code of Professional Conduct* ("the *Code*"), and (c) one count of a breach of the duty of integrity, contrary to Rule 2-1.1 of the *Code*. The Citation is attached as Appendix "A" to these Reasons.

3. The hearing convened on January 17, 2023, and quorum was declared pursuant to sub-Rule 5-93(7) of the *Rules of the Law Society of Manitoba* ("the *Rules*").

   At the outset of the hearing, counsel for Mr. Fawcett confirmed that:

(a) he was a member of the Society at all relevant times, and that he is not a member of any other law society; and,

(b) he had no objection to any of the Panel members either on the basis of bias or conflict, or otherwise.

4. The hearing was convened to hear submissions on a Notice of Motion, filed on behalf of Mr. Fawcett, dated November 4, 2022. The motion seeks:

(a) an Order dismissing the proceedings on the grounds that the proceedings are an abuse of process;

(b) in the alternative, an Order dismissing the proceedings on the grounds of undue delay; and,

(c) Such further and other relief as the circumstances may require [and] the Committee may permit.

5. The Panel is indebted to counsel for their well-researched, thoughtful, balanced, and compelling submissions.

6. For the reasons which follow, the motions are dismissed.

The Panel is satisfied that there has been neither abuse of process nor undue delay, on the part of the Society, which would warrant the stay of proceedings sought by Mr. Fawcett. The Panel will remain seized of the matter and will reconvene, when the parties are ready to proceed, for a hearing on the merits.

7. There were no submissions by either party on costs. The Panel therefore orders that costs may be spoken to at the hearing on the merits of the allegations set out in the Citation.

Evidence Tendered by the Member

8. The Affidavit of Ryan Fawcett affirmed November 3, 2022 was entered, by agreement, as Exhibit 1 in these proceedings. It consists of thirteen pages of text, and forty-five Exhibits marked "A" through "SS".

9. On October 17, 2017, the complainant in this matter ("AB"), then an articling student at law, filed a formal complaint against Mr. Fawcett with the Society. She alleged that on October 6, 2017, Mr. Fawcett, herself, and two other lawyers had met for a Friday evening of drinks at a local bar. In her complaint, AB wrote: "At approximately 11:45 pm, Mr. Fawcett got out of his chair, walked around the table and stood behind me. He then reached out with his left hand and he offensively grabbed my left breast. He did this in full view of [the other two lawyers]. He then sat back down at the table. [The other two lawyers] and I left within a half hour after he grabbed my breast."

Affidavit of Ryan Fawcett, Para. 6(a), Exhibit "C".

10. On October 25, 2017, Witness A sent a detailed email to the Society, under the subject line "AB/Fawcett Matter – my witness statement", in which they set out their recollections of what occurred on the evening of October 6, 2017. They confirmed the material allegations of fact made by AB, and added that she "looked embarrassed", "was clearly affected", and "seemed stunned".

Affidavit of Ryan Fawcett, Para. 6(c), Exhibit "E".

11. In his letter dated November 23, 2017, sent in response to a letter from the Society asking for "your comments and an explanation of the circumstances that are described [in the complaint]", Mr. Fawcett wrote: "At one point, as they [AB and the other female lawyer who was present] were still seated, I got up and gave [them both] a hug, my hands touching their shoulders or upper arms. This was the only physical contact I had with anyone there."

Mr. Fawcett concluded his letter with these statements: "When I received notice of this accusation I was shocked. I did not touch [AB] in any way that could be considered an offensive assault. I completely deny the accusation."

Affidavit of Ryan Fawcett, Paras. 6(d) & 6(e), Exhibits "F" & "G".

12. On December 11, 2017, the Society wrote to Mr. Fawcett asking him to "please advise whether you consumed any intoxicants on the evening in question (that is, the evening of October 6, 2017)". Mr. Fawcett replied on December 20, 2017, stating: "I, like everyone present, had consumed alcohol that evening. As I recall I had 1 or 2 draft beers with a friend before joining the group [AB and the two other lawyers]. There I believe I had another 3 or 4 draft beers."

Affidavit of Ryan Fawcett, Paras. 6(j) & 6(l), Exhibits "L" & "N".

13. The Complaints Investigation Committee of the Society ("CIC") met on May 18, 2018 to consider the AB complaint against Mr. Fawcett. [Note: The Panel was advised that none of the individuals who were present when the impugned conduct occurred were present at the CIC meeting.]

On June 5, 2018, the CIC sent Mr. Fawcett a "Reminder Letter" pursuant to Rule 5-74(1)(b) which included the following statements:

(a) upon the conclusion of the investigation by the Society, the matter had been referred to the CIC for "a final determination";

(b) the Committee accepted that the complaint was credible, and that the events had occurred in the manner described by AB and corroborated by Witness A;

(c) the Committee "did not accept your explanation about what happened" and "found your response unsatisfactory";

(d) the Committee "expressed deep concern regarding ... your conduct towards [AB]";

(e) a "lengthy debate" ensued about "whether your misconduct fell within the scope of [the *Code*];

(f) the Committee decided to "issue a formal Reminder to you of your obligations under Rule 2.1-1 of the *Code* ... to conduct yourself honourably and with integrity in all aspects of your life";

[Note: Although the letter says it was being issued pursuant to Law Society Rule 5-66(b), that Rule actually pertains to what the Chief Executive Officer can do after an investigation. As Mr. Bartel correctly pointed out, the CIC would had to have issued the letter pursuant to Rule 5-74(1)(b).]

(g) "While the Committee decided not to authorize charges of professional misconduct, members agreed that a charge of professional misconduct for sexual harassment (pursuant to Rule 6.3[-3] of the *Code*) would have been authorized if the misconduct had taken place more clearly in a professional context rather than a private setting";

(h) "The complaint by [AB] and the fact that you received a written reminder from the [CIC], will form a part of your complaints history"; and,

(I) The CIC was "closing [its] file".

Affidavit of Ryan Fawcett, Para. 6(v), Exhibit "X".

[Note: A "complaints history" differs from a "discipline history" in that the latter is publicized by the Society (on its web site and elsewhere) while the former is not.]

14. On October 6, 2020, exactly three years after the event, Mr. Fawcett was charged with the sexual assault of AB pursuant to Section 271 of the *Criminal Code (Canada)* ("the Criminal Charge"). He was released on an Undertaking which included a condition that he have no contact with AB.

Affidavit of Ryan Fawcett, Para. 6(y), Exhibit "AA".

15. The following day (October 7, 2020), Mr. Fawcett and his counsel appeared in person before the CIC on a different matter. As he was required to do under Rule 2-80, Mr. Fawcett advised the Society of the Criminal Charge and signed an undertaking to provide regular updates to the Society after each court appearance.

Affidavit of Ryan Fawcett, Para. 6(z), Exhibit "BB".

16. On November 3, 2020, the Society sent an email to Mr. Bartel which reads, in part: "The Society has opened a new complaint file regarding the criminal charges that were laid against Mr. Fawcett. This is standard procedure, and occurs whenever the Society receives information that a member has been charged."

On November 12, 2020, the Society sent a letter to Mr. Fawcett which reads, in part: "As is our normal practice pursuant to Law Society Rules 5-61 and 5-64, we have opened a complaint investigation file in order to gather additional information and to consider your conduct in connection with the matter."

Affidavit of Ryan Fawcett, Paras. 6(aa) & (bb), Exhibits "CC" & "DD".

17. In April, 2021, trial dates were set for November 25-26, 2021 in the Provincial Court of Manitoba. On November 26, 2021, Mr. Fawcett entered a plea of "Guilty" to the included charge of "common assault" and was sentenced, pursuant to a joint recommendation put forward by the Crown Attorney and his criminal counsel, to a two-year conditional discharge.

Affidavit of Ryan Fawcett, Paras. 6(ff) & (gg), Exhibits "HH" & "II".

18. In due course, the Society asked for, and received, transcripts of the sentencing submissions and the Reasons for Decision of the Provincial Court judge.

Affidavit of Ryan Fawcett, Paras. 6(ii) & (jj), Exhibits "KK" to "NN".

19. The Society then started to gather additional information on the complaint investigation file it had opened upon receiving notification of the Criminal Charge. On March 9, 2022, the CIC reviewed the results of the investigation and authorized three charges of professional misconduct against Mr. Fawcett. The Citation issued on May 20, 2022.

Affidavit of Ryan Fawcett, Paras. 6(nn) & 6(oo), Exhibits "B", "RR", & "SS".

Evidence of the Society

20. The Society did not tender any evidence in addition to Exhibit 1.

Relevant Statutory Provisions

21. *The Legal Profession Act* ("the *Act*")
Sections 3(1), 3(2), 4(5), 4(6), 43(b), 63, 64(1)(a), 66, 68, & 70

22. *Code of Professional Conduct*
Rule 2.1-1 and Commentary [2] & [3]
Rule 6.3-3 and Commentary [2](a), [3](k), & [3](m)

23. *Law Society Rules*
Rules 2-80(1), 2-80(2), 5-61, 5-64(1), 5-64(2), 5-64(3), 5-64(4), 5-64(5), 5-66(b), 5-66(d), 5-71, 5-74(1)(a), 5-74(1)(b), 5-74(1)(e), 5-74(1)(g), 5-74(2), 5-76, 5-93(1), 5-93(3)(a), & 5-93(10)

Relevant Authorities and Principles

24. Each of the parties provided an extensive Book of Authorities in advance of the hearing. Given that the law is reasonably well-settled and that there are a significant number of relevant, and relatively recent, Supreme Court of Canada and Manitoba Court of Appeal decisions now available, it will only be necessary for our purposes to cite a few of the many authorities which have been brought to our attention.

Abuse of Process / Undue Delay

25. The doctrine of abuse of process is rooted in the inherent and residual discretion of a court to prevent abuse of its process. It is a broad concept that applies in various contexts (civil and criminal), and which is characterized by its flexibility; it is not encumbered by specific requirements, unlike the concepts of *res judicata* and issue estoppel. Such flexibility is important in the administrative law context, given the wide variety of circumstances in which delegated authority is exercised.

Law Society of Saskatchewan* v. *Abrametz, [2022] SCJ 29, 2022 SCC 22, paras. 33-35.

26. There is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction, or because there has been a change in circumstances. It can only do so if authorized by statute, or if there has been a slip or error.

The principle of *functus officio* is applicable to the decisions of administrative tribunals, but the application must be more flexible and less formalistic. The principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened to enable the tribunal to discharge the function committed to it by enabling legislation.

Chandler v. Alberta Association of Architects, [1989] 2 SCR 848, 1989 SCC 41, paras. 20-22.

Holder v. College of Physicians and Surgeons of Manitoba, (2002) 166 Man R (2d) 310, 2002 MBCA 135, paras. 20 & 25.

27. In administrative proceedings, abuse of process is a question of procedural fairness. There are two ways in which delay may constitute an abuse of process.

The first concerns hearing fairness. The fairness of a hearing can be compromised where delay impairs the ability of a party to answer the complaint against them, such as when memories have faded, essential witnesses are unavailable, or evidence has been lost. The second category is concerned with abuse of process. Even when there is no prejudice to hearing fairness, an abuse of process may occur if significant prejudice has come about due to inordinate delay.

Abrametz, paras. 38, 40-42.

28. The decision in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 2000 44, set out a three-step test to determine whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process. First, the delay must be inordinate. Second, the delay must have directly caused significant prejudice. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute.

Abrametz, para. 43.

29. In determining whether delay is inordinate, the court or tribunal should consider the following non-exhaustive contextual factors: (a) the nature and purpose of the proceedings, (b) the length and causes of the delay, and, (c) the complexity of the facts and issues in the case.

The purposes of professional disciplinary proceedings are to protect the public, to regulate the profession, and to preserve public confidence in the profession. Inordinate delay in these types of proceedings can be harmful to the members being disciplined, to the complainants, and to the public in general.

When assessing the actual time period of delay, the starting point should be when the obligations of the administrative decision maker, and the interests of the public and the parties in a timely process, are engaged. It should end when the proceeding is completed, including the time taken to render a decision.

A lengthy delay is not *per se* inordinate; it may be justifiable when considered in context such as, for example, when a case involves parallel criminal and administrative proceedings. Some disciplinary proceedings involve allegations of conduct that may be criminal, such as sexual misconduct. In some such cases, suspension of the disciplinary proceedings to await the conclusion of criminal proceedings can be justified.

A consideration of the causes of the delay necessarily includes consideration of whether the party complaining of the delay contributed to, acquiesced in, or waived (explicitly or implicitly) all or part of the delay. If the delay was caused by

the party who complains of that delay, it *cannot* amount to an abuse of process. Nor will there be unfairness if the delay is an inherent part of a fair process.

The requirements of procedural fairness sometimes slow the pace at which proceedings progress. Whether the resulting delays are justified will depend on the circumstances of each case.

The complexity of the facts and issues in a case will affect the time required to decide the matter. Assessing inordinate delay must account for the wide range of contexts in the administrative system.

Abrametz, paras. 51-66.

30. Prejudice is a question of fact. The requirement for significant prejudice is grounded in the foundations of the doctrine of abuse of process in administrative law. It is only where there is *detriment* to an individual that a court or a tribunal will conclude that there has been an abuse of process.

The reality is that an investigation or proceeding against an individual tends to disrupt his or her life. It is only the prejudice caused by inordinate delay that is relevant to the abuse of process analysis. That said, prejudice caused by the investigation of or proceedings against an individual can be exacerbated by inordinate delay. That is to be taken into account.

Abrametz, paras. 67-69.

Statutory Interpretation – Implied Exclusion Rule

31. Where a statute specifically empowers an administrative entity such as the Society to take specific actions (for example, the imposition of a suspension on a lawyer) in some specifically enumerated circumstances but not in others, the legislature must have intended to exclude a suspension as a consequence in any situation other than those in which it is mentioned.

Green* v. *Law Society of Manitoba, [2017] 1 SCR 360, 2017 SCC 20, paras. 35-37.

Remedy – Stay of Proceedings

32. A stay of proceedings is the ultimate remedy for abuse of process. It is "ultimate" because it is "final"; the process would be permanently stayed. In disciplinary matters, that means that charges will not be dealt with, any complaint will go unheard, and the public will not be protected. Given these consequences, a stay should only be granted in the "clearest of cases", when the abuse falls at the high end of the spectrum of seriousness.

The decision whether to grant a stay involves a balancing of public interests. On the one hand, the public has an interest in ensuring that a tribunal established for its protection follows fair procedures, untainted by an abuse of process. On

the other hand, the public has an interest in the resolution of administrative cases on their merits. A balance must be struck between those two interests.

When faced with a proceeding that has resulted in abuse, the court or tribunal must ask itself: would going ahead with the proceeding result in more harm to the public interest than if the proceedings were permanently halted? If the answer is yes, then a stay of proceeding should be ordered. Otherwise, the application for a stay should be dismissed.

A stay will be more difficult to obtain where the charges are more serious. Even if rare, however, stays of proceedings are sometimes warranted.

Abrametz, paras. 83-87.

Submissions on Behalf of the Member
Abuse of Process / Undue Delay

33. The Member argues that: (a) the CIC made a "final determination" (its words) with respect to the AB complaint when it issued the Reminder Letter dated June 5, 2018, (b) it "dealt with" or "disposed of" the complaint at that time, and (c) the Society is now precluded by its own Rules from revisiting the same matter all these years later.

34. This is not a situation where new and relevant facts were discovered years later. The particulars of the impugned conduct were known to the Society in 2018, yet it now wants to revisit the earlier CIC decision. This is an abuse of process and is not permitted by its enabling legislation or by its own Rules.

35. A careful examination of the two charges in the Citation makes it clear that both elements of Charge 1 (dealing with the actual misconduct alleged by AB) were before the CIC in 2018. The elements of "untruthfulness" on the part of Mr. Fawcett which underpin the allegations of "misleading" behaviour on his part were also known at that time; in fact, the CIC specifically stated that it did not accept his explanation. The CIC *could* have charged him in connection with both of those "misconducts", but it did not.

36. Self-regulation involves being governed by one's peers, who the Supreme Court of Canada has said (in *Pearlman*) are best-equipped to perform that important function. That is what the CIC did in 2018 when it "disposed of" the AB complaint by issuing the Reminder Letter.

37. Although the CIC does not decide "guilt or innocence", it can and does make other, equally important, decisions. Those decisions are "judicial" in nature, in the sense that they involve the weighing of evidence, the consideration and application of legal principles, and the making of decisions which impact members of the Society. While it does not operate in as formal a manner as a court or even the Discipline Committee, the CIC must still (and does in practice) observe some of the more basic tenets of procedural fairness.

38. Rules 5-74(2) and 5-76, when read together, make it clear that the CIC cannot "reconsider" a decision made under Rule 5-74(b); that is, a decision to issue a Reminder Letter. Only when it has decided to "take no further action" under Rule 5-74(1)(a) is a "reconsideration", and the taking of one or more of the other actions enumerated in Rule 5-74(1), expressly permitted.

39. There is a clear distinction between a "reconsideration" under Rule 5-74(2) and a "resumption" of a matter held in abeyance pursuant to Rule 5-74(1)(e), but that is *not* what the CIC did in 2018.

40. The Society received the AB complaint on October 17, 2017. The CIC did not authorize charges against Mr. Fawcett until March 9, 2022 – 52 months and two weeks (more than four years) later. This meets the three-step test for undue delay established by the Supreme Court of Canada in *Blencoe* (2000) and affirmed by it in *Abrametz* (2022).

41. The criteria for assessing whether the delay is "inordinate" are all met in this case: (a) the interests of the member, the complainant, and the public call for the timely resolution of professional disciplinary proceedings (the nature and purpose of the proceedings), (b) the CIC had all the information it needed to authorize a charge pursuant to Rule 5-74(1)(g) when it met in 2018; the Member had no part in causing the subsequent delay of more than 52 months (the length and causes of the delay), and (c) the case itself is not complex, either factually or legally, and the initial investigation was completed in just over seven months (the complexity of the facts and issues).

42. The requirement for prejudice to the Member is met in this case. Mr. Fawcett received a letter in June 2018 advising him that the matter was closed, and that there was no ongoing investigation looming. The prejudice that he now faces is that his ability to properly defend himself has been compromised by the passage of time and by the inability of at least one of the witnesses to accurately recall what occurred on the evening of October 6, 2017. This creates an inherent unfairness in the hearing process.

43. With respect to the "final assessment" step, it is manifestly unfair to require that Mr. Fawcett once again answer the allegations made against him in 2017. Proceeding with the Charges at this time would be tantamount to disregarding the 2018 decision of the CIC and would render its "lengthy" deliberations meaningless.

Remedy – Stay of Proceedings

44. The appropriate remedy in this case is for the Panel to stay Charge 1 and the parts of Charge 2 which reference facts and conduct known to the Society at the time of the 2018 CIC disposition. While those charges may arise from the same subject-matter, they are not the "same matter" as was dealt with in 2018, and they are therefore outside of what is permitted by Rule 5-74(2).

45. Permitting the Society to operate outside of its own Rules undermines the earlier decision of the CIC, undermines the integrity of its discipline process, and brings the administration of justice into disrepute.

Submissions of the Society
Abuse of Process / Undue Delay

46. The Society argues that the roles of the CIC and the Discipline Committee in the discipline processes of the Society are fundamentally different.

The CIC performs a "screening" function and is the "charging authority" which determines *whether* a member will be charged (although it is Discipline Counsel who formulates the actual charges and drafts the Citation). It may even make decisions about other steps to be taken in response to a complaint. But the CIC cannot impose disciplinary measures, and it can only impose conditions on the practice of a member after it has decided to authorize one or more charges.

The Discipline Committee has exclusive jurisdiction to hold hearings, hear evidence and submissions, make findings of guilt or innocence, and impose one or more sanctions.

Law Society Rules 5-74(1)(g), 5-93(3)(a), & 5-93(10)(a).

Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 SCR 869, 1991 SCC 26, Page 889.

Jhanji v. Law Society of Manitoba, [2019] MJ 176, 2019 MBQB 90, para. 35 (last sentence); affirmed [2020] MJ 116, 2020 MBCA 48, para. 54.

47. In determining whether to charge a member, the CIC will assess whether there is a "reasonable prospect of conviction".

In adjudicating a matter, the Discipline Committee will determine whether, on a balance of probabilities, the elements of the alleged offence(s) have been established.

48. The 2022 CIC decision to authorize the Charges was eminently reasonable, and was entirely in keeping with the statutory obligations of the Society to regulate lawyers in the public interest and to preserve public confidence in its ability to do so.

49. The situation was markedly different in 2018. When the CIC met at that time, it was faced with a flat denial from Mr. Fawcett that he had done *anything* wrong. While some (and perhaps all) of the members of the Committee may have harboured doubts about the veracity of that denial, it was a factor they had to consider in deciding whether the threshold for charging had been met.

Had there been an admission of misconduct by Mr. Fawcett at that time, the CIC could have, with confidence, authorized a charge. He did not admit to *any* untoward touching of AB until November 26, 2021; when that happened, it became incumbent on the CIC to make a fresh decision in light of that new, and very pertinent, information.

50. There is a distinction between behaviour which constitutes "professional misconduct" and behaviour which constitutes the sort of "conduct unbecoming a lawyer" which underpins the charges particularized in the Citation. The former relates to "conduct while actually engaged as a barrister and solicitor", while the latter relates to "conduct not in the course of the practice of law".

The duty of integrity established by the *Code* applies equally in both spheres, and the conduct over which the Society has jurisdiction is very broad, encompassing conduct which may be unrelated to the actual legal practice of the member.

Code of Professional Conduct, Rule 2.1-1 & Commentary [3].

Nova Scotia Barristers' Society v. Morgan, 2010 NSBS 1, Pages 8 & 10.

Krieger v. Law Society of Alberta, [2002] 2 SCR 372, 2002 SCC 65, Page 398.

51. Section 11 of the *Canadian Charter of Rights and Freedoms* is does not apply to proceedings before professional disciplinary tribunals unless there are "true penal consequences". There is, in particular, no protection against "double jeopardy" and no constitutional right to not be "tried" and "punished" twice for the same conduct.

R. v. Wigglesworth, [1987] 2 SCR 541, 1987 SCC 41, Pages 552-553, & 560.

Smith v. Law Society of Manitoba, 2011 MBCA 81, Page 6, second para.

Implied Exclusion Rule

52. The Supreme Court of Canada expressly rejected the applicability of this rule in the *Green* case, at paragraphs 36-37:

> [36] This argument is flawed for two reasons. First, it disregards the proper approach to assessing the legality of the impugned rules. What the Court must do is to determine not whether [the *Act*] specifically refers to this power, but whether the impugned rules are reasonable in light of the Law Society's statutory mandate.
>
> [37] Second, Mr. Green's argument is inconsistent with this Court's purposive approach to statutory interpretation. An argument based on implied exclusion is purely textual in nature and cannot be the sole basis for interpreting a statute: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 256-57. The words of the statute must be considered in conjunction with its purpose and its scheme. In my view, the purpose of the *Act* supplements the open-ended

wording of the relevant provisions to indicate that the implied exclusion rule should not be applied in this case.

53. Rule 5-74(1) has 13 subsections, enumerated (a) through (m). Subsections (b) through (m) all empower the CIC, "after considering a complaint", to take some form of action; subsection (a) – "decide to take no further action" – is the only "do nothing" option available to the Committee.

54. Since Rule 5-74(2) specifically empowers the CIC to take "any of the steps in subsection (1)" notwithstanding that "it has previously taken another of those steps in the same matter" (that is, after having done something *other than* "do nothing"). It was perhaps out of an abundance of caution that Rule 5-76 was included to make it absolutely clear that the CIC *could* "reconsider" a matter that it had previously determined to "take no further action on".

55. Such an interpretation of Rule 5-76 renders it "reasonable in light of the Law Society's statutory mandate", and is in harmony with the "purpose and scheme" of the *Act* and its Rules.

56. In this case, the CIC did both (a) and (b) in 2018 – it issued a Reminder Letter, then resolved to take no further action. In 2020, after the Criminal Charge was laid, the CIC invoked (e) – which had no application in 2018 – and held the matter in abeyance pending the conclusion of the criminal proceedings. There is no question that the CIC was dealing with the "same matter" in both 2018 and 2022, and that its actions on both occasions were entirely consistent with the Rules.

57. In early 2022, the Society received troubling new information; it learned for the first time that Mr. Fawcett had pled guilty to having done "*something* untoward". It simply could not ignore that new information; to do so would have been an abdication of its duties under the *Act* and the Rules to act in the public interest.

Remedy – Stay of Proceedings

58. There is no "hearing prejudice" (that is, prejudice affecting hearing fairness) in this case. Evidence is not "unavailable" – witnesses are available to testify; documents created soon after the event have been preserved; the proceedings in the Provincial Court have been transcribed, and those transcripts are available.

    Mr. Fawcett has retained sufficient memory of the events to have dealt with the Criminal Charges within the past 14 months, and he too has access to the records which were created a short time after the event.

59. There is also no prejudice "outside the hearing". The alleged "abuse of process" is taking into account information now known by the Society which was not previously known.

Mr. Fawcett has not had the Charges "hanging over him" for many years; they have only been pending since May, 2022. He himself delayed in telling the truth about what happened in 2017 until the Provincial Court hearing, more than four years later.

There was no publication of the AB complaint by the Society until the Citation issued, and prior to that only AB and the employer of Mr. Fawcett were advised of the CIC action.

There has been no suggestion that the Society has been acting for some "improper purpose"; in fact, it has acted in accordance with its legislated mandate since it first received the AB complaint.

60. This is a not a "clear case" for a stay which would satisfy the *Abrametz* test, nor has Mr. Fawcett met his onus of establishing that going ahead with a hearing on the merits would harm the public interest. If anything, a full hearing, with all of the attendant procedural safeguards which serve to ensure that it is fair one, can only benefit the public interest.

Reply on Behalf of the Member

61. The *Abrametz* decision dealt with allegations of prejudice to the member arising from undue delay on the part of the regulator. It was not (as in this case) about "re-litigating" an issue previously decided by the CIC.

62. The CIC was not "misled" by Mr. Fawcett in 2018. It expressly stated that it did not believe him, and it proceeded on the basis that what AB *said* happened is what *did* happen.

63. The Society cannot operate outside of its own Rules. The impugned conduct *was* "dealt with" by the CIC in 2018, and Rule 5-76 clearly precludes any further "reconsideration" of the same matter.

64. A member *can* suffer demonstrable prejudice if a Reminder Letter is actually referred to by the CIC when it is deciding, at some subsequent time (perhaps even years later), whether to charge that member with an offence.

65. The profession as a whole would suffer significant reputational harm if the Society were permitted to proceed "outside of the law".

Analysis

66. This case appears to be one of first instance. In no other case that was brought to the attention of the Panel has the member been charged with misleading, or attempting to mislead, the Society, a court, or both. For this reason alone, the Panel finds that it would be in the public interest to conduct a full hearing, with fulsome arguments on both sides of the issue. This would enable the Panel to render a decision with precedential value should a similar situation arise in the future.

67. It would serve little purpose to spend much time speculating on why the first CIC did what it did in 2018, but certain of the comments of both the Crown Attorney and counsel for Mr. Fawcett, and of AB herself in the Victim Impact Statement which she delivered to the Provincial Court Judge during the sentencing hearing on November 26, 2021, offer some telling insights.

Both counsel allude to the potential difficulties AB might have experienced had she been compelled to testify at a trial of the Criminal Charges. Further, the Victim Impact Statement paints a vivid portrait of a vulnerable, frightened, and confused young woman; an articling student, who wanted to practise criminal law from an early age, who had been assaulted – in an overtly sexual manner – by a relatively senior member of the local criminal Bar; someone for whom having to testify, whether at a contested Discipline Committee hearing or at a criminal trial, would have been tantamount to an unnecessary re-victimization.

Affidavit of Ryan Fawcett, Para. 6(jj), Exhibit "MM", Page T11, Lines 1.

Affidavit of Ryan Fawcett, Para. 6(jj), Exhibit "MM", Page T11, Lines 19-21.

Affidavit of Ryan Fawcett, Para. 6(jj), Exhibit "MM", Page T8, Lines 4-10 and Page T9, Lines 4-13.

68. There is also a distinct possibility that the CIC felt constrained by the actual wording of Rule 6.3-3 of the *Code*, which reads: "A lawyer must not, *in a professional context*, sexually harass any person." (Emphasis added.)

69. One can well imagine the proverbial "alarm bells" that must have gone off when the Society, upon its review of the transcripts of the Provincial Court proceedings, learned that the *exact* allegations which had been made by AB in her initial complaint, and then unequivocally denied by Mr. Fawcett, had: (a) been read into the record by the Crown Attorney, (b) been specifically referenced by AB in her Victim Impact Statement, (c) not been contradicted in any way by Mr. Fawcett or his counsel, and (d) been expressly adopted by the Judge as part of his reasons for accepting the joint submission on sentence.

Had he misled the Society in 2017? Had he misled the court in 2021, or both?

Affidavit of Ryan Fawcett, Para. 6(a), Exhibit "C".

Affidavit of Ryan Fawcett, Para. 6(e), Exhibit "G".

Affidavit of Ryan Fawcett, Para. 6(jj), Exhibit "MM", Page T6, Lines 7-16.

Affidavit of Ryan Fawcett, Para. 6(jj), Exhibit "MM", Page T8, Lines 4-10.

Affidavit of Ryan Fawcett, Para. 6(jj), Exhibit "NN", Page T1, Line 31 to Page T2, Line 2.

Undue Delay

70. The Panel is satisfied that the initial investigation by the Society, culminating in the issuance of the Reminder Letter to Mr. Fawcett, was conducted with reasonable dispatch. Indeed, Mr. Fawcett himself does not allege any "undue delay" in that regard. Had there been no Criminal Charge laid and no subsequent disposition in the Provincial Court of Manitoba, the matter may well have ended there.

    The Panel notes, parenthetically, that if it takes at face value what AB *said* she had hoped to achieve by submitting a complaint – that is, "An acknowledgment of the assault and an apology" – the matter might never have gotten as far as the CIC in the first place. It was, after all, Mr. Fawcett who waited until the Provincial Court hearing on November 26, 2021 (more than four years after the event) to offer both an acknowledgment and an apology.

71. As noted, the Criminal Charge was laid exactly three years after the event. None of that delay can be laid at the doorstep of the Society.

72. Upon being notified of the charge, the Society immediately opened a new complaint investigation file and advised both Mr. Fawcett and his counsel that the matter would be held in abeyance until the criminal proceedings had concluded. No objections were raised at the time and, again, the Society cannot be held responsible for any "delays" attributable to those proceedings.

73. The Society received the transcripts of the Provincial Court proceedings on January 20, 2022, completed its investigation by early March, 2022, and issued the Citation on May 20, 2022. Again, the Panel finds that the Society conducted these necessary activities with reasonable dispatch.

74. The Panel has concluded that there was no undue delay on the part of the Society at any point since it first received the AB complaint and, in particular, no undue delay amounting to an abuse of process.

Stay of Proceedings

75. The Panel finds no evidence of an improper motive on the part of the Society in its formulation of the present charges, or in its decision to pursue those charges through to an adjudication on the merits.

76. The Panel does not accept that this is the "clearest of cases" where the extraordinary remedy of a stay of proceedings for abuse of process is called for. It is satisfied that no direct prejudice to the Member, "significant" or otherwise, has been demonstrated which would justify such relief.

Conclusion

77. With respect to the submission that a partial stay of proceedings should be granted, the Society points out that Charge 2 depends ultimately on what facts are established in connection with the events of October 6,2017; and

the relevant facts in that regard have already been fully addressed and judicially-determined in the Provincial Court decision of November 26 2021 (which, as previously noted, was as a result of what both counsel described as "a true plea bargain"). To require that the Law Society now re-litigate the factual foundation for Charge 1 in such circumstances would be not be in the public interest, and would do nothing to preserve the confidence of the public in the ability of the Law Society to effectively govern the profession.

Disposition

78. The Panel orders that:

(a) the motion for an Order dismissing the proceedings on the grounds that the proceedings are an abuse of process be dismissed;

(b) the motion for an Order dismissing the proceedings on the grounds of undue delay be dismissed;

(c) Costs in connection with these motions may be spoken to at the hearing on the merits; and,

(d) the matter be adjourned the next set-down hearing to fix a date for the hearing on the merits.

DATED this 7th day of February, 2023.

Richard Scott

Dean Scaletta

Maureen Morrison

APPENDIX "A"

THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

RYAN WILLIAM FAWCETT

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

CITATION

TO: **RYAN WILLIAM FAWCETT** of the City of Winnipeg, in the Province of Manitoba, lawyer, and a member of The Law Society of Manitoba.

TAKE NOTICE that a hearing will be held by a panel of the members of the Discipline Committee of The Law Society of Manitoba to consider charges of professional misconduct and conduct unbecoming a lawyer laid against you by the Complaints Investigation Committee of The Law Society of Manitoba. If you are found guilty of professional misconduct or conduct unbecoming a lawyer, you may be disbarred and your name struck off the Rolls of The Law Society of Manitoba or you may be suspended from practising law or you may otherwise be dealt with by the Discipline Committee panel under

the provisions of *The Legal Profession Act* and the *Rules of The Law Society of Manitoba*. A statement of the charges is as follows:

1. On October 6, 2017 you assaulted Ms. AB, who was then an articling student, by grabbing her breast, for which assault, on November 6, 2021, you entered a plea of guilty in Provincial Court and by that conduct, you:

    a. acted contrary to Rule 6.3 of the *Code of Professional Conduct* in that you harassed or sexually harassed Ms. AB, as defined by Commentaries under that Rule;

    b. engaged in such dishonourable conduct as to be unbecoming a lawyer by committing a disgraceful and morally reprehensible offence.

2. You acted contrary to Rule 2.1-1 of the *Code of Professional Conduct* in that you either misled The Law Society of Manitoba or caused or suffered the Provincial Court of Manitoba to be misled.

Particulars

a. in response to a complaint made to The Law Society of Manitoba in October 2017 by Ms. AB concerning an incident that occurred on October 6, 2017, you said "I did not touch Ms. [AB] in any way that could be considered an offensive attack;"

b. contrary to your said assertion to the Society, on November 26, 2021 you appeared before in Provincial Court before Judge Bayly and entered a plea of guilty to assaulting Ms. AB in the same incident of October 6, 2017;

c. immediately following entry of your guilty plea, in your presence, Crown Counsel read out the facts of the assault including that you were standing directly behind Ms. AB when you reached out with your left hand and grabbed her left breast;

d. in her submissions made in your presence, in support of a joint submission as to sentence, Crown Counsel represented to the Court that you had, through counsel, provided information that at the time of the admitted assault you were dealing with two issues that precipitated it, being alcohol consumption and lack of appreciation of sexual harassment and personal

and professional boundaries;

e. in passing sentence Judge Bayly recited and relied upon the stated facts that you reached out and grabbed Ms. AB's left breast over top of her clothing and, in mitigation, that you had completed a Professional Boundaries Program and that you expressed genuine remorse for the admitted assault; and

f. in subsequent correspondence to the Society on February 28, 2022 when asked to explain the inconsistency of the guilty plea and representations made to the Court with your prior statements, you maintained, contrary to what you suffered the Court to rely upon, that you did not touch Ms. AB's breast.

YOU OR YOUR COUNSEL are required to appear before the Chairperson of the Discipline Committee or his designate on **Tuesday, June 7. 2022 at 12:00 noon,** at the offices of The Law Society of Manitoba, 200 - 260 St. Mary Avenue, Winnipeg, Manitoba, to set a date for the hearing of the charges against you. If you or your counsel do not attend at the said time and place, the Chairperson of the Discipline Committee or his designate, in accordance with the *Rules of The Law Society of Manitoba*, may proceed to set a date for the hearing in your absence.

DATED at the City of Winnipeg, in the Province of Manitoba, this 20th day of May, 2022.

LEAH KOSOKOWSKY
Chief Executive Officer
The Law Society of Manitoba

APPENDIX "B"

Relevant Statutory Provisions

The Legal Profession Act

Purpose

3(1) The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.

Duties

3(2) In pursuing its purpose, the society must

(a) establish standards for the education, professional responsibility and competence of persons practising or seeking the right to practise law in Manitoba; and

(b) regulate the practice of law in Manitoba.

General power to make rules

4(5) In addition to any specific power or requirement to make rules under this Act, the benchers may make rules to manage the society's affairs, pursue its purpose and carry out its duties.

Rules are binding

4(6) The rules are binding on the society, the benchers, the members and everyone who practises or seeks the right to practise law under the authority of this Act, other than Part 5 (representation in highway traffic matters)

Practice standards

43 The benchers may

(b) establish or adopt a code of conduct for lawyers, law firms and students;

Definitions

63 The following definitions apply in this Division and Divisions 8, 9 and 11.

"**charge**" means a charge of incompetence, professional misconduct, or conduct unbecoming a lawyer or student, as the case may be. («accusation»)

"**conduct**"includes an act or omission. («conduite»)

Disciplinary jurisdiction

64(1) The society has disciplinary jurisdiction over

(a) members in respect of their conduct in Manitoba or in any other jurisdiction;

Complaints investigations

66 The benchers must establish a complaints investigation committee and processes for

(a) receiving and responding to complaints or other information concerning the conduct or competence of members; and

(b) investigating a member's conduct, competence or practice.

Committee may suspend or impose conditions

68 The complaints investigation committee may do one or more of the following:

(a) issue a formal caution to the member;

(b) direct that a charge be laid against the member and referred to the discipline committee;

(c) if the committee considers it necessary for the protection of the public, and after directing that a charge be laid,

(i) impose restrictions on the member's practice of law or suspend him or her from practising law pending completion of the investigation and any disciplinary proceeding that may follow, and

(ii) direct the publication of the name of the member, the nature of the matter being investigated and the suspension or practice restrictions imposed on the member;

(d) take any other action permitted by the rules.

Discipline committee

70 The benchers must establish a discipline committee and make rules about its duties and powers that are consistent with this Act. The rules

(a) must require disciplinary hearings to be conducted by a panel of committee members;

(b) may permit preliminary disciplinary proceedings to be conducted by a panel or a single committee member; and

(c) may permit any other duties and powers given to the discipline committee under the Act or the rules to be carried out by a panel or a single committee member.

Code of Professional Conduct

Chapter 2 – Standards of the Legal Profession

2.1 Integrity

2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Commentary

[2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

[3] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice, for example, committing any personally disgraceful or morally reprehensible offence including an act of fraud or dishonesty, will reflect upon the integrity of the lawyer, the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that the knowledge of it would be likely to impair the client's trust in the lawyer, the Society may be justified in taking disciplinary action.

Chapter 6 – Relationship to Students, Employees and Others

6.3 Harassment and Discrimination

6.3-3 A lawyer must not, in a professional context, sexually harass any person.

Commentary

[2] Sexual harassment means one or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature:
(a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person or group;

[3] Conduct that may constitute sexual harassment under this rule includes:
(k) unwanted touching;
(m) sexual assault

Law Society Rules
Part 2 – The Law Society
Division 8 – Members
Notice of Charges

2-80(1) A member, articling student, applicant for admission, resumption or reinstatement, law corporation or visiting lawyer charged with an offence under a federal statute must, as soon as practicable, give written notice to the chief executive officer of:
(a) the particulars of the charge; and
(b) the disposition of the charge and any agreement arising out of the charge.

Appearance before committee

2-80(2) Following receipt of the notification under subsection (1), the chief executive officer may refer the matter to the appropriate law society committee and the committee may request the member, articling student, applicant for admission, resumption or reinstatement, visiting lawyer, or the voting shareholder of the law corporation to appear before it to discuss the charge or its disposition and such other matters as the committee considers appropriate. Failure to appear in answer to the request of the committee, without reasonable excuse, may constitute professional misconduct.

Part 5 – Protection of the Public
Division 6 – Complaints Investigation
Consideration by the CEO

5-61 The chief executive officer:
(a) must consider every complaint received under rule 5-60 [Complaint must be in writing]; and
(b) may treat as a complaint information that comes to the attention of the society about the conduct or competence of a member.

Investigation of complaints

5-64(1) Subject to rule 5-62 [Complaint not meriting investigation], the chief executive officer must investigate a complaint to determine its validity.

Member to receive copy of complaint

5-64(2) The chief executive officer must send a letter to the member complained of enclosing a copy of the complaint or the relevant information.

Written Response

5-64(3) Subject to rule 5-65(2) [Written response not required], a member who has been sent a letter under subsection (2), must respond in writing to the substance of the complaint and to further inquiries from the chief executive officer.

Response within 14 days

5-64(4) The member's response must be signed by the member personally or by his or her counsel and delivered to the chief executive officer with 14 days after the letter is received by the member or by such other date as may be set by the chief executive officer.

Failure to respond

5-64(5) A member's failure to respond in writing to the substance of a complaint or to further inquiries by the chief executive officer by the date set by the chief executive officer, without reasonable excuse, may constitute professional misconduct.

Action after investigation
5-66 After investigating a complaint, the chief executive officer may:
(b) send a letter to the member reminding the member of his or her obligations under the Act, rules or code;
(d) refer the complaint to the complaints investigation committee for its consideration;

Division 7 – Complaints Investigation Committee

Consideration of complaint
5-71 The committee must consider any complaint referred to it by the chief executive officer, the complaints review commissioner or a committee of the society and while considering a complaint under this rule, the committee may also consider any other matters arising out of the member's practice of law.

Action on complaints
5-74(1) After considering a complaint under rule 5-71, the committee may:
(a) decide to take no further action;
(b) send a letter to the member reminding the member of his or her obligations under the Act, rules or code;
(e) decide to hold consideration of the complaint in abeyance until any related proceedings are concluded or until such time as the committee decides to resume consideration of the complaint;
(g) direct that a charge be laid against the member under rule 5-78(1) [Charge];

Additional action
5-74(2) Subject to rule 5-77 [Formal caution], the committee is not precluded from taking any of the steps in subsection (1) because it has previously taken another of those steps in the same matter.

Reconsideration
5-76 A complaint that has been dealt with under rule 5-74(1)(a) may be reconsidered by the committee at a later date and be the subject of further action.

Division 8 – Discipline Proceedings

Definitions
5-93(1) In this division,
"committee" means the discipline committee.

Duties of the committee
5-93(3) The duties of the committee are to:
(a) hold hearings into charges against members;

Panel required to hear and determine certain matters
5-93(10) Only a panel of the committee may hear and determine the substance of:
(a) the charges against a member;
(b) an application for reinstatement; or
(c) a pardon application;
and such panel need not be the same panel as a panel appointed for the purposes set out in rule 5-93(9) [Administration of hearings].