Law Society of Saskatchewan

ANDREW CLEMENTS
HEARING DATE: October 29, 2021
DECISION DATE: April 25, 2022
***Law Society of Saskatchewan v. Clements*, 2022 SKLSS 1**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF ANDREW CLEMENTS,
A LAWYER OF SASKATOON, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

Committee: **Scott Moffat (Chair), Lynda Kushnir Pekrul and Ronni Nordal Q.C.**
Counsel: **Tim Huber for the Conduct Investigation Committee**
Brian Pfefferle for the Member

Introduction

1. The Amended Formal Complaint dated June 1, 2021 alleges that Andrew Clements (the Member) is guilty of conduct unbecoming a lawyer in that he:

> Did, in relation to the CR matter, fail to discharge his duties as a prosecutor in a fair and dispassionate manner by intentionally maintaining a prosecution against CR, when there was no reasonable likelihood of conviction, in order to prolong the effect of conditions of release.

2. On October 29, 2021, a Hearing Committee (the Committee) appointed by the Law Society of Saskatchewan composed of Scott Moffat, Chair, Lynda Kushnir Pekrul and Ronni Nordal Q.C. convened at Saskatoon, Saskatchewan to hear this matter. Ronni Nordal Q.C. appeared by phone. There were no objections as to the jurisdiction or composition of the Hearing Committee. Tim Huber appeared for the Conduct Investigation Committee and Brian Pfefferle appeared for the Member.

3. The parties tendered an Agreed Statement of Facts (ASOF) and the Member offered a plea of guilty to the count of conduct unbecoming a lawyer. The parties then proceeded to make submissions on penalty.

Particulars of the Conduct

4. The Member is, and was at the material time, a member of the Law Society of Saskatchewan. Further, the Member was, and is, employed as a Crown prosecutor for the Province of Saskatchewan. He was called to the Saskatchewan Bar in 2016.

5. Sometime prior to August 27, 2018, the Member provided a written opinion to the police regarding the CR matter. CR was charged with assault causing bodily harm and uttering threats against EM. The Member opined that as the complainant, EM, was not cooperative, it would be more appropriate to proceed with a peace bond or a stay of proceedings.

6. On August 27, 2018, the CR matter appeared on the Provincial Court docket. At that time, the Member's opinion was not appended to the file. After dealing with the matter at docket, the complainant EM, who was in attendance at court with the accused, CR, approached the Member and asked to speak with him. According to the ASOF:

> ... [t]he Member spoke with EM in a private interview room without CR. The Member believed that CR had brought EM to court and was pressuring her to speak with the Member. EM indicated to the Member that she did not want to proceed with charges and wanted to have the "no-contact" conditions the CR was subject to be dropped. EM advised that she had no intention of testifying in court in relation to the allegations against CR. EM did not provide the Member with more information and would not give a written statement to the police. It was a short conversation, at the conclusion of which EM repeated again that she would not come to court to testify against CR.
>
> Based on the Member's exchange with EM, he formed the belief that there was no likelihood that CR would be convicted of the allegations and without a complainant to testify there was no further evidence of the offence. Further, the accused denied the assault.
>
> [...]
>
> The Member's anger and frustration prompted the Member to make the decision to keep the file alive with the intent of keeping CR on conditions of release longer. The Member decided, on his own, that CR should remain on conditions, creating the possibility that CR would be caught in breach of his conditions. The Member thought that, at minimum, there would be some "justice" in forcing CR to continue to be bound by the conditions of release and no contact.
>
> The next appearance for CR was on September 10, 2018. The Member set the matter down for trial on March 11, 2019. The Member states that he did not remember what occurred two weeks prior with EM. No notes in relation to the August 27, 2018 meeting were on file as the Member did not take any.
>
> Ultimately, a different prosecutor was assigned to handle the trial. The charges were stayed in April of 2019. EM was still unwilling to cooperate.[1]

[1]ASOF, Exhibit P-2, paras. 4, 5, 9 - 11.

Findings Regarding the Conduct

7. "Conduct unbecoming" is defined by *The Legal Profession Act*, *1990*[2] as 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).

8. Section 5.1-3 of the *Code of Professional Conduct*[3] and the supporting commentary are relevant to this matter and provide:

> 5.1-3 When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.
>
> Commentary
>
> [1] When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.
> [emphasis added.]

9. The particulars of the conduct alleged are supported by the ASOF. The Member, a Crown prosecutor, determined he had no reasonable likelihood of conviction. Rather than stay the charges, he intentionally kept the accused on release conditions thinking there would be some measure of "justice" in maintaining those conditions.

10. The count is well founded on the agreed facts and the Member admits the same. The Committee agrees that the actions of the Member are conduct unbecoming.

Decision on Penalty
(Reasons for the majority, R. Nordal Q.C. and L. Kushnir Pekural).

11. As a self-regulated profession, the primary purpose of regulation through the Law Society of Saskatchewan is protection of the public. This objective is met "by cultivating, certifying and maintaining standards of competence and probity for those who wish to engage in the practice of law[4].

12. Protection of the public and ensuring public confidence in the legal profession is

---

[2]S.S. 1990-91, c. L-10.1, as amended.
[3]Adopted by the Benchers of the Law Society of Saskatchewan, effective July1, 2012, as amended.
[4] *Law Society of Saskatchewan v. Evatt Anthony Merchant*, 2020 SKLSS 6 at para 57.

maintained is achieved, in large part, through oversight including professional disciplinary proceedings, when required.

13. Crafting of an appropriate penalty must meet the primary objectives of protection of the public and maintenance of public confidence in the profession. In addition, consideration must be given to the need for deterrence, be it specific deterrence or general deterrence.

14. Consideration of previous penalties imposed for similar conduct must be given.

15. Other Hearing Panels have looked to the following non-exhaustive list of considerations:

(a) Was there a specific rule or duty which was breached?
(b) What conflicting duties was the Member under and how evenly were they balanced?
(c) Was the Member favouring personal interests over his duties to his client?
(d) Were the circumstances and duties such that it is appropriate to conclude that the Member must have known at the time, or be taken to have known, at th time that the course of action chosen was wrong?
(e) Was it an isolated act?
(f) Was it planned?
(g) What opportunity did the Member have to reflect on the act or the course of action?
(h) What opportunity did the Member have to consult with others?
(i) What results flowed from the act or course of action taken?
(j) What subsequent steps could have been taken to correct the error or its consequences and were such steps taken?5

16. Counsel on behalf of the Conduct Investigation Committee submits the appropriate penalty to be imposed is a one to two month suspension along with costs as set out in the Statement of Costs marked as Exhibit P-3.

17. Counsel for the member submits the appropriate penalty is a reprimand and takes no issue with amount of Costs being sought.

18. No cases were put before the Hearing Panel that involved the exact same misconduct – however, both counsel referred to the *Bliss6* matter and this Hearing Panel has reviewed the same carefully along with all other case law referred. Particular note is taken of the following from the *Bliss* decision:

i) Mr. Huber was also Counsel for the Conduct Investigation Committee in that matter;
ii) Mr. Bliss was also a Crown Prosecutor;
iii) The morning of a trial a police witness disclosed new information to Mr. Bliss which was relevant and assisted the Crown. Mr. Bliss knew the new information should be disclosed to defence counsel;
iv) Mr. Bliss got busy and forgot to disclose before the trial started, but remember during the trial yet did not adjourn to speak to defence counsel;
v) During cross-examination the police witness disclosed the new information and a brief adjournment occurred. When asked about the new information by defence counsel, Mr. Bliss stated that he was not aware of the new evidence until the police

---

[5] *Law Society of Alberta v. Ter Hart*, [2004] L.S.D.D. No. 25.
Law Society of Saskatchewan v. Cory Bliss, 2010 LSS 4.

witness had testified. When the trial reconvened the police witness testified that he had told Mr. Bliss the information before the trial started;

vi) Mr. Bliss did not self-report at that point in time, but did self-report when at a later trial (approximately six months later) the same deference counsel challenged the same police witness' credibility based on the earlier experience;

vii) Mr. Bliss' employer imposed a two week suspension without pay;

viii) Mr. Bliss entered a guilty plea to a charge of failing to be candid and misleading opposing counsel in a criminal proceeding;

ix) As Counsel for the Conduct Investigation Committee Mr. Huber argued that a reprimand with an order to pay costs was an appropriate sanction.

19. In *Bliss*, the Hearing Panel specifically noted Mr. Bliss's clear remorse and the consequences he had already received; that there was no need for specific deterrence and that "[T]he notoriety of this incident among his colleagues and a formal reprimand should provide adequate general deterrence to the profession.7"

20. While Counsel for the Conduct Investigation Committee ably argued that the Member's conduct in this case was more serious and that *Bliss* was more about misleading and less about misconduct of a Crown Prosecutor, the Committee does not agree. Mr. Bliss, like the Member in this case, was acting in the role of a Crown Prosecutor. The circumstances are sufficiently similar that consideration of *Bliss* is appropriate.

21. In the present case, the Member has entered a guilty plea and acknowledged that his actions kept the accused on conditions pending trial despite the Member having previously provided an option that the charge should not proceed to trial as there was no likelihood conviction. When the Member recalled having reached the opinion that there was no likelihood of conviction, he immediately self-reported to his employer and the Law Society of Saskatchewan. The Member's employer imposed a ten day unpaid suspension.

22. During oral submissions Counsel for the Conduct Investigation Committee acknowledged there was no need for specific deterrence and that the member had a great deal of remorse. Counsel argued that general deterrence needed to be addressed and a serious penalty was needed to maintain public confidence in the Law Society and proposed a one to two month suspension.

23. Counsel for the Conduct Investigation Committee also pointed to the *Kirkham8* decision as providing guidance to the Committee. The conduct by Mr. Kirkham was far more egregious than that of Mr. Bliss or the Member in the present case and the Hearing Panel distinguishes the decision on that basis.

24. In the present case, the Member self-reported immediately on realizing the wrong doing. Therefore, the aggravating factor of not coming clean that existed in *Bliss* does not exist in the present case. The Committee does not see justification to impose a harsher decision than in *Bliss*.

25. With respect to mitigating factors, the Member in the present case self-reported to his employer and to the Law Society of Saskatchewan; he has acknowledged his wrong doing and entered a guilty plea at an early opportunity. Like Mr. Bliss, the Member has no prior record and

---

Ibid, at para 25.

Law Society of Saskatchewan v. Randolph Gene Kirkham, 1999 SKLS 8

has exhibited great remorse. The final similarities are of an isolated incident and the same two week (10 working day) unpaid suspension having been imposed by the employer.

26. In addition, the Hearing Panel has considered submissions of Counsel on behalf of the Member as well as the submissions made directly by the Member during the penalty hearing.

27. The Committee is of the view that, in light of the circumstances set out above and the mitigating circumstances, the objectives of protection of the public and maintenance of confidence in the Law Society of Saskatchewan are met with a formal reprimand and order of costs in the amount of $4,713.00 to be paid within four months of the date of this decision.

Per: "Lynda Kushnir Pekrul" April 25th, 2022

Per: "Ronni Nordal Q.C." April 25th, 2022

S. Moffat (Dissenting as to penalty).

Particulars of Conduct Relevant to Penalty

28. As reviewed above in greater detail, the Member admits that he maintained a prosecution when he had formed the belief he had no reasonable likelihood of conviction.

29. In April, 2019, the Member reported his conduct to his employer and on July 12, 2019, self-reported to the Law Society. His employer conducted an investigation and ultimately the Member was suspended for 10 days without pay and suffered 'other financial repercussions.'

30. The Member's self-report to the Law Society detailed his personal struggles and high stress levels associated with his job. The Member was experiencing financial and martial pressures. Further, the Member's office was understaffed, particularly in relation to senior Crowns. The Member both began to take on more files and was acting as a senior Crown to other junior Crowns in the office.

31. Further, the Member details a significant number of steps he has taken to prevent a re-occurrence of the incident. He has entered into professional counselling and started what appears to be a support group for other junior Crown counsel, wherein those counsel can discuss their work related issues and frustrations. His employer has also been supportive, transferring him to another office and providing a senior Crown to act as a mentor.

32. Also filed on behalf of the Member were a number of letters of support from members of the Saskatoon bar and his former spouse. Mr. Carl Swenson, defence counsel, also appeared and spoke on the Member's behalf. While some of the letter writers were not aware of the particulars of the conduct unbecoming, others were. The overarching theme of the letters and Mr. Swenson's testimony was that this action was out of character for this Member and that there is a good prospect of re-habilitation.

33. The Member also chose to address the Committee. He apologized for his behaviour. Throughout this process and very much to his credit, the Member acknowledged the improper

nature of his conduct. His self-reporting letter begins:

> I've tried to write multiple drafts of this letter, I'm not entirely sure how to put the words onto paper of what I need to say. The embarrassment and amount of shame I feel for my actions cannot be described.[9]

34. His remarks to the Committee expressed a great deal of remorse for his actions. His self-reporting letter also demonstrated insight into the impropriety of his actions:

> I took my own action and my own form of justice out on an accused person, knowing it was wrong and made an irreversible error.

Positions of the Parties on Penalty

35. Mr. Huber, on behalf of the Conduct Investigation Committee, suggested that a one (1) to two (2) month suspension would highlight the seriousness of this matter. Any penalty crafted in this matter should favour protection of the public and deterrence. Counsel acknowledged he could not locate any similar cases and primarily relied on the decisions in *LSS v Bliss* and *LSS v Kirkham*.

36. Mr. Pfefferle, on behalf of the Member, suggested a reprimand would recognize the mitigating factors present in this case. Any penalty crafted in this case should consider both the Member's personal circumstances, including his efforts to address his personal problems and the systemic problems with domestic violence in northern Saskatchewan. Much like Mr. Huber, Mr. Pfefferle acknowledged there was little jurisprudence in this area and argued the Bliss decision was most relevant.

Analysis on Penalty

37. With the greatest of respect to my colleagues, I am unable to agree with them as to penalty. In my opinion, the intentional conduct by a member who was in a particular position of power over a vulnerable accused individual warrants a suspension. Having weighed the aggravating and significant mitigating factors present in this case, I would impose a one (1) month suspension.

38. The overarching principle in assessing penalty must be protection of the public. Sections 3.1 and 3.2 of *The Legal Profession Act, 1990* emphasize this point:

> 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.
>
> 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.]

[9]ASOF, Exhibit P-2, Tab 4, p. 1.

39. In *Merchant v LSS* , the Court 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.]

40. The materials provided to the Committee included a "Comparative Law Society Sentencing Principle Grid." A similar grid was referenced by the Benchers in *LSS v Abrametz* in support of a two (2) month suspension. That suspension was not disturbed by the Court of Appeal. Many of the factors set forth on the grid are at play in this case:

> a) the need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members. Does the conduct raise concerns about:
> i) protection of the public;
> ii) maintaining confidence in the legal profession;
> iii) the ability of the legal system to function properly;
> b) specific deterrence of the member;
> c) general deterrence of other members;
> d) denunciation of the conduct;
> e) rehabilitation of the member, including interim steps taken
> f) avoiding undue disparity with sanctions imposed in other cases (parity);
> g) level of intent: did the member act intentionally, knowingly, recklessly or negligently?
> h) the nature of the conduct, the impact or injury caused by the conduct and any potential impact or injury;
> i) the number of times the conduct occurred;
> j) the length of time involved;
> k) whether there was a breach of trust;
> l) whether the conduct involved taking advantage of a vulnerable person;
> m) the member's reaction to the process, including whether the Member tendered a Guilty Plea;

n) Full and free disclosure of the offending conduct;
o) Age, experience, character and prior disciplinary record;
p) Remorse;
q) A dishonest or selfish motive.

41. The Member, a Crown prosecutor, was in a position of power over CR, an accused. It is somewhat trite, but prosecutors have a great deal of independence and discretion within the confines of a prosecution and the justice system. This is an important, essential feature of the justice system and the courts show great deference to prosecutorial discretion (See: *Krieger v Law Society of Alberta* ; Martin Report). It is fundamentally important to public confidence in the administration of justice and the proper functioning of the court system that prosecutors act within the confines of the rules.

42. Once the Member determined there was no reasonable likelihood of conviction, he should have, and was required to, bring the proceeding to an end. The provincial Crown policy appended to the ASOF states:

> If at any stage of the proceedings a prosecutor reviewing the charge concludes that the "reasonable likelihood of conviction standard is not met, and there is or proves to be little prospect that standard will be met before either the preliminary hearing or trial, the prosecutor should withdraw or stay the charge.

43. This policy is very much in keeping with the Martin Report.

44. The Member acknowledges that he did not believe there was a "reasonable likelihood of conviction". However, instead of staying or withdrawing the matter, the Member kept CR on release conditions. According to the ASOF, the Member acknowledges:

> In effecting his [the Member's] own idea of "justice" on the CR matter the Member exercised his personal discretion in place of prosecutorial discretion.

45. The Member made an intentional, deliberate choice to keep CR on release conditions and this impacted CR's liberty. While CR's conditions were not before the panel, any release or bail condition impacts the liberty interest of an accused person. Based on the ASOF, CR's release conditions included what is commonly called a 'non-contact' order with the complainant, CR's spouse. CR was prevented by the release conditions from doing something the was otherwise legal, contacting (and presumably cohabitating with) his spouse. This restriction lasted for approximately seven (7) months, until the charge was ultimately stayed.

46. More importantly, during this seven (7) month period, CR was at risk of being arrested and very possibly jailed for breaching his release conditions. According to the ASOF:

> The Member decided, on his own, that CR should remain on conditions, creating the possibility that CR would be caught in breach of his conditions.

47. CR, like all accused, was entitled to the presumption of innocence; it matters not whether CR is a sinner or saint. Once the prosecution should have come to an end, so too should the impact on CR's liberty and the additional risk he faced. CR, a marginalised

person, was vulnerable to the Member's improper exercise of prosecutorial discretion.

48. It was this improper exercise of prosecutorial discretion, the substituting of personal discretion and effecting the member's own idea of justice, that must be addressed through denunication and deterrence. These factors must be emphasized in order for the public to have confidence in the administration of justice and for the legal system to function properly.

49. Many of the factors leading to the conclusion that specific deterrence is not required in this case flow from the members personal circumstances. Accordingly, these have been dealt with as one. First and foremost, the Member spoke before the Committee and expressed a great deal of remorse and shame for his actions. The Member also self reported his actions to his superior in the prosecutions unit, the Assistant Attorney General and wrote a lengthy self-reporting letter to the Law Society. There was an early plea to the charge of conduct unbecoming whereby the Member gave up any potential defences and relieved the Law Society of the necessity of formally proving the charge. In light of these actions and having the opportunity to hear and observe the member while he spoke, the Member appears genuinely remorseful.

50. Further, the Member was struggling with personal issues and stress. The ASOF reveals:

> In the Member's self-report to the Law Society (and his superiors) [Tab 4] he detailed personal struggles and high stress associated with this job. He noted a particular frustration with the high frequency of domestic violence case and with an imperfect justice system to deal with them. The Member's personal and work stress culminated in poor decision making and in the Member being overwhelmed by the work. The Member's self-report details a variety of changes that he has made and strategies that he has implemented since September of 2018 to deal with both personal and work stress.

51. These steps reflect positively on the Member's prospects for rehabilitation.

52. Counsel for the Member expanded upon the personal and professional stressors troubling the Member at the relevant time. The member was a junior lawyer with approximately two (2) years of call. He found himself struggling with complex cases, a high workload and no senior person in the office for support. At the same time, he was dealing with a failing marriage and had a person close to him become a victim of an assault.

53. The Member voluntarily took a number of steps to address these issues, he entered into counselling and joined a support group. He also transferred to another office where, with the support of his employer, has an assigned mentor.

54. Further, the Member is young and has no disciplinary history. As previously noted, number of letters of support authored by both prosecution and defence counsel were tendered to the panel. One defence counsel attended the hearing and provided some brief comments on behalf of the Member. All spoke of this act as out of character for the Member.

55. The Member's employer also disciplined him, meting out a 10 day suspension and giving him a poor performance report that resulted in further financial consequences. That

employer, however, has also remained supportive of the Member.

56. While all of these factors support the assertion by the Member that, in the heat of the moment he made a mistake, his action had a significant, lasting impact on CR. Further, the Member had the subsequent opportunity to fix his mistake by staying the charge. Rather, CR remained on release conditions. It would be an error to overemphasise the Member's personal factors in crafting a fit penalty.

55. Turning to the issue of parity or how similar members have been treated in similar circumstance, both counsel for the Law Society and the Member, candidly acknowledged they knew of no case on point. Both counsel drew the panel's attention to *LSS v Kirkham* and *LSS v Bliss* .

56. The member in Kirkham, was a Crown Prosecutor. During the course of preparing for a high-profile jury trial, Mr. Kirkham sought information from local RCMP detachments regarding prospective jurors. The RCMP contacted twelve (12) of the two hundred (200) prospective jurors. Mr. Kirkham became aware that three (3) of the prospective jurors had been contacted but he did not advise the court or defence counsel. Ultimately, two (2) of the contacted individuals ended up on the jury and the accused was convicted. Approximately a year after the trial, Mr. Kirkham learned of the contact. Eventually a new trial was ordered. The accused was convicted after the second trial. Mr. Kirkham was suspended by the Law Society for six (6) months.

57. In Bliss, the member was also a Crown Prosecutor. Prior to trial, a witness disclosed to Mr. Bliss information that was damaging to the accused. The Prosecutor did not disclose this information to opposing counsel. During the course of the witnesses' testimony, the damaging information came out and opposing counsel requested an adjournment to speak with Mr. Bliss. During that conversation, Mr. Bliss was not candid and misled opposing counsel about when he knew about the damaging testimony.

58. *Bliss* is distinguishable for a number of reasons. The particulars of the charge in *Bliss* was "did fail to be candid and did misled opposing counsel, RP, in the context of a criminal prosecution" not "did in relation to the CR matter, fail to discharge his duties as a prosecutor in a fair and dispassionate manner by intentionally maintaining a prosecution against CR, when there was no reasonable likelihood of conviction in order to prolong the effect of release conditions." Admittedly both charges allege an intentional act. The impact of those acts on the accused, however, was quite distinct. In *Bliss*, the prosecutor stayed the prosecution, ending that Accused's criminal jeopardy; the Member in this case did not.

59. Further, the position taken by the Conduct Investigation Committee in *Bliss* was for a reprimand and costs, the very penalty imposed by that Hearing Committee. While not impossible, it would have been highly unlikely for that Hearing Committee to impose a sentence greater than sought by the Conduct Investigation Committee.

60. Finally, it is of some note that *Bliss* was decided in 2010. Penalty ranges evolve over time, particularly where at the time of its imposition, there were few precedents. Further, amendments in 2010 and 2014 to *The Legal Profession Act, 1990*, added sections 3.1 and more importantly 3.2, which both emphasize the importance of protection of the public. It does not appear the 2010 amendments, which received royal assent shortly before that hearing, were drawn to the Hearing Committee's attention. The passage of time, changes to the governing legislation and the evolution of other sentencing decisions

of other Hearing Committee emphasizing the protection of the public, in my opinion, diminish *Bliss*'s value as a sentencing precedent.

61. In assessing penalty, the following cases, where members intentionally misused their positions of authority resulting in various types of harm, offer some guidance:

> In *LSS v Stinson* , the member, who had no prior disciplinary record, gave an undertaking when he knew he was not in a position to fulfil that undertaking. The failure to fulfil the undertaking resulted in a financial loss. That hearing panel imposed a two (2) month suspension. It appears the underlying factors warranting the suspension were the intentional conduct and that effect of that conduct caused financial harm.
>
> In *LSS v Tollefson* , again that member had no prior record, but acted for a family law client in the presence of a conflict of interest arising out of his intimate relationship with her. That hearing panel accepted a joint submission for a six (6) week suspension commenting that it was clearly at the low end of the range for that type of intentional conduct.

In reviewing this jurisprudence, I have been particularly mindful of the particulars of the conduct. Further where the matter was a joint submission, I have also been mindful of that Hearing Committee's role in assessing a joint submission verses assessing penalty.

> In *LSS v Abrametz* , the member entered into a business arrangement with his clients, used information obtained during the solicitor-client relationship and obtained the clients' property without ensuring the clients fully understood the transaction. It was of note the members initial motivation may not have been personal gain and the clients did not feel they had been victimized. That member received a two (2) month suspension
>
> In *LSS v Combe* , 2019 SKLSS 5, the member was involved in a consensual relationship with a subordinate and used intemperate and inappropriate language directed towards employees, clients and victims. Some of the individuals to which the comments were directed suffered injury to their self esteem and unnecessary stress. That committee noted they were presented with no analogous cases and accepted a joint submission of a one (1) month suspension.

62. In light of the foregoing, I accept the submissions by counsel for the Conduct Investigation Committee that this type of intentional conduct by a Crown prosecutor merits a suspension in the one (1) to two (2) month range. Given the Member's exemplary mitigating conduct, I would assess the penalty at the bottom of that range and impose a 1 month suspension. For clarity, this suspension would be in addition to any suspension imposed by the employer.

63. During the course of the proceedings, counsel presented an itemized bill of costs (Exhibit P2) totalling $4,731. Counsel for the Member accepted the amount and asked for time to pay to December, 2022. I would impose costs in the amount of $4,713 and grant time to pay.

64. I would order the Member, Andrew Clements:

a) be reprimanded;
b) shall be suspended for the period of 1 month. The suspension shall commence no later than 90 days after the date of these reasons;
c) shall pay costs to the Law Society of Saskatchewan in the amount of $4,713. The Member shall have until 4 pm on Friday, January 6, 2023 to comply, failing which a suspension shall be imposed until such time as the costs have been paid in full.

Per: "Scott Moffat (Chair)" April 25th, 2022
(Dissenting as to Penalty).

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Formal Complaint dated February 21, 2020 alleging that Andrew Clements, of the City of Saskatoon in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:

> **Did, in relation to the C.R. matter, fail to discharge his duties as a prosecutor in a fair and dispassionate manner by intentionally maintaining a prosecution against C.R., when there was no reasonable likelihood of conviction, in order to prolong the effect of conditions of release.**

Jurisdiction

65. Andrew Clements (hereinafter "the Member") is, and was at all times material to this proceeding, a practicing member of the Law Society of Saskatchewan (hereinafter the "Law Society"), and accordingly is subject to the provisions of *The Legal Profession Act, 1990* (hereinafter the "Act") as well as the Rules of the Law Society of Saskatchewan (the "Rules"). Attached at Tab 1 is a Certificate of the Executive Director confirming the Member's status.

66. The Member is currently the subject of a Formal Complaint initiated by the Law Society dated February 21, 2020. The Formal Complaint contains the single allegation noted above. Attached at Tab 2 is a copy of the Formal Complaint along with proof of service. The Member intends to plead guilty to the allegation set out in the Formal Complaint.

Background of Complaint

67. The Law Society began an investigation into the Member after receiving a report from the Member's employer on July 5, 2019, indicating that the Member had disclosed that he had engaged in inappropriate prosecutorial conduct in relation to a defendant named C.R. Shortly after that report, the Law Society received a formal self-report from the Member.

Particulars of Conduct

68. On or about August 27th, 2018, in, the Member appeared for the Crown on a domestic assault file in Meadow Lake Docket Court. The accused, C. R., was charged with assault causing bodily harm and uttering threats against E.M. After dealing with the appearance that morning, the Member was approached by E.M. The Member met with E.M. who was in attendance with the accused, C.R. The Member spoke with E.M. in a private interview room without C.R. The Member believed that C.R. had brought E.M. to court and was pressuring her to speak with the Member. E.M. indicated to the Member that she did not want to proceed with charges and wanted

to have the “no-contact” conditions that C.R. was subject to be dropped. E.M. advised that she had no intention of testifying in court in relation to the allegations against C.R. E.M. did not provide the Member with more information and would not give a written statement to the police. It was a short conversation, at the conclusion of which E.M. repeated again that she would not come to court to testify against C.R.

69. Based on the Member’s exchange with E.M., he formed the belief that there was no likelihood that C.R. would be convicted of the allegations as there was no corroborating evidence in relation to the allegations and without a complainant to testify there was no further evidence of the offence. Further, the accused denied the assault.

70. The Member did not immediately realized that he had previously provided an opinion on the C.R. matter to police and had, in that opinion, determined that it would be more appropriate to proceed with a peace bond or a stay of proceedings as the complainant was not cooperative.

71. The opinion prepared by the Member was not yet appended to the file when the matter came up on August 27, 2018.

72. The Member was angry and frustrated with what he viewed as a pattern of individuals committing domestic violence offenses and then evading consequences for their actions by pressuring the victim to be uncooperative.

73. The Member’s anger and frustration prompted the Member to make the decision to keep the file alive with the intent of keeping C.R. on conditions of release longer. The Member decided, on his own, that C.R. should remain on conditions, creating the possibility that C.R. would be caught in breach of his conditions. The Member thought that, at a minimum, there would be some “justice” in forcing C.R. to continue to be bound by the conditions of release and no-contact.

74. The next appearance for C.R. was on September 10, 2018. The Member set the matter down for trial on March 11, 2019. The Member states that he did not remember what occurred two weeks prior with E.M. No notes in relation to the August 27, 2018 meeting were on file as the Member did not take any.

75. Ultimately, a different prosecutor was assigned to handle the trial. The charges were stayed in April of 2019. E.M. was still unwilling to co-operate.

76. The Member states that, it was at this time that he remembered what had occurred in the file on August 27, 2018 and his decision to maintain the prosecution despite his belief that there was no likelihood of conviction. C.R. remained on conditions through to the date of the trial, more than six months longer than he should have been.

77. The Member immediately reported himself and what he had done to his immediate supervisor and then to the Assistant Deputy Attorney General.

78. The Member reports having never acted to artificially maintain a prosecution or conditions of release on any other file.

79. After the Member’s report to his superiors, other prosecutors reviewed the file and confirmed the Member’s initial determinations. The whole of the investigation did not support proceeding with the charges and the subsequent conversations with E.M. only served to weaken the case further. The well-established policies of the Ministry of Justice relating to determining

whether or not to proceed with charges in a particular case, of which the Member was fully aware, are attached at Tab 3.

80. In effecting his own idea of “justice” on the C.R. matter the Member exercised personal discretion in place of prosecutorial discretion. The Member himself described his conduct as abhorrent and inappropriate.

81. In the Member’s self-report to the Law Society (and to his superiors) [Tab 4] he detailed personal struggles and high stress associated with his job. He noted a particular frustration with the high frequency of domestic violence cases and with an imperfect justice system to deal with them. The Member’s personal and work stress culminated in poor decision making and in the Member being overwhelmed by the work. The Member’s self-report details a variety of changes that he has made and strategies that he has implemented since September of 2018 to deal with both personal and work stress.

82. The consequences faced by the Member with his employer included a 10-day suspension without pay and other financial repercussions.

Prior History

83. The Member has no prior findings of conduct unbecoming.