

IN THE MATTER OF: *The Legal Profession Act and the Regulations
Made Pursuant Thereto*

AND IN THE MATTER OF: **A Complaint By The Nova Scotia Barristers'
Society Against Duane Rhyno**

BETWEEN: **THE NOVA SCOTIA BARRISTERS' SOCIETY**

Complainant

-and-

DUANE RHYNO

Member

DECISION ON AMENDED SANCTION

Dates of Hearing: **December 16th, 2021**

Heard Before: **Discipline Panel: Gavin Giles, Q.C., Chair
Richard W. Norman, M.D., F.R.C.S.C.
McFarlane "Marc" Njoh**

Appearances: **For the Complainant: Bernadine MacAulay**

For the Member: Self-Represented

Date of Decision: **December 29th, 2021**

Gavin Giles, Q.C., Chair; and Dr. Richard Norman and McFarlane “Marc” Njoh, Panel Members – Reasons As To Amended Sanction

(1) In a Nova Scotia Barristers’ Society Disciplinary Hearing Panel Decision entered on January 7th, 2019, the Member was found to have had acted in a manner that had been professionally unacceptable, in that he had committed professional misconduct and conduct which was unbecoming of a member of the legal profession. The specific details of these finding need not be repeated here.

(2) In a companion Hearing Panel Decision on Sanction – and related Resolution (Order) – entered on April 5th, 2019, the Member was disbarred. By way of corollary penalty, the Hearing Panel directed that:

- The Member would remain ineligible to apply for re-admission, as a Member, for a period of five years.
- The Member would pay Costs to the Nova Scotia Barristers’ Society of \$125,000 prior to any application for re-admission, as a Member thereof.
- The Member would not be re-admitted to legal practice privileges without an up-to-date redacted report in support of re-admission (confirming the absence of redacted health issues, including cognitive, emotional and personality ones that could impede his ability to ethically serve the public”).
- The Member would not be re-admitted to legal practice privileges without enrolling in and successfully completing “The Legal Profession and Professional Responsibility” course at the Schulich School of Law.
- Upon any re-admission to legal practice privileges, the Member would “work under the direct supervision of a lawyer acceptable to the Nova Scotia Barristers’ Society for his first” subsequent year of practice.

(3) The Hearing Panel’s Decision on Sanction was not unanimous. The specific details of the Sanction findings and the reasons for its lacking unanimity need not be repeated here.

(4) Since the time of the Decisions and related Resolution referred to above, the Member does not appear to have been engaged in any aspect of legal practice. As expected that

that might well be, it is nevertheless to the Member's credit that the Hearing Panel's Decision on Sanction has been respected. Not only does that approach reflect the Member's respect for the Hearing Panel's Decision on Sanction, but it also reflects an overall respect for the Nova Scotia Barristers' Society and its regulatory and disciplinary processes.

(5) On October 28th, 2021, under the signature of Ms. Bernadine MacAulay, General Counsel to the Nova Scotia Barristers' Society, it, and the Member, applied jointly to vary the Hearing Panel's Decision on Sanction and the related Resolution. The joint application was submitted pursuant to the provisions of Section 45(5)(m) of the *Legal Profession Act* and Section 9.14.6 of the *Regulations* made pursuant thereto.

(6) There was a misstatement in the joint application in that it is actually Section 45(4)(m) of the *Legal Profession Act* which governs the relief which the joint application is seeking.

(7) Section 45(4)(m) of the *Legal Profession Act* provides as follows:

Where a hearing panel finds a member of the Society ... guilty of professional misconduct, professional incompetence or conduct unbecoming a lawyer or articled clerk or makes a finding of incapacity, it shall, following an opportunity for the parties to present evidence and submissions respecting the proposed disposition by the hearing panel, do one or more of the following:

(a) where the member is a lawyer, disbar the member;

(d) for any period the hearing panel considers appropriate,

...

(ii) confirm, vary or impose restrictions on the member's practice;

(e) order the member to pay an amount not to exceed twenty thousand dollars to be paid into the Fund;

(h) order the member to pay all or any part of the costs incurred by the Society in connection with any investigation or proceedings relating to the matter in respect of which the member was found guilty and, in particular, to pay the costs of the proceedings authorized by Sections 36 to 38;

(i) order the member to submit to an assessment or examination, or both, as the hearing panel considers appropriate;

(ia) order the member to submit to a medical assessment;

...

(m) rescind or vary any order made or action taken under this subsection;

...

(8) Section 9.14.6 of the *Regulations* provides as follows:

Upon completion of a hearing, the hearing panel must dispose of the charge as provided in Sections 45(4) or (5) of the [*Legal Profession*] Act.

(9) Read together, the legislation and subordinate legislation clothes the Hearing Panel with a wide and basically unfettered jurisdiction to revisit its past Decision (and related Resolution) with respect to the Member, and to sustain that Decision, rescind it, or vary it without limitation.

(10) In the latter regard, the joint application sought three variations:

- That the [prepayment of the] Costs penalty set out in the Sanction Decision will not be a condition of any application by the Member to be reinstated as a member of the Society.
- That if the Member is reinstated as a member of the Society, he shall pay the Costs penalty of \$125,000 over a five-year period in equal monthly installments commencing the day upon which the Society reinstates him to practice. Failure to make a monthly payment on the date due will result in the Member's immediate suspension until such payment is made in full.
- The Member be no longer required to enrol in and complete the professional responsibility course as a condition of his application to be reinstated.

(11) Notwithstanding that wide and basically unfettered jurisdiction, and notwithstanding the fact that the variation being sought is on a joint (or consent) basis, it is still incumbent on the current Hearing Panel to exercise its discretion against the backdrop of both the public interest in the practice of law and the continuing trust, confidence, and prestige which the legal profession must enjoy.

(12) In making that statement, the current Hearing Panel is not ignoring, or even discounting the fact that what has been styled by the Nova Scotia Barristers' Society and the Member as a joint application is, in sum and substance, a new joint recommendation on sanction. It is on that basis that that the current Hearing Panel must, and has, considered carefully the principles

on joint submissions set out by the Nova Scotia Court of Appeal in cases such as *R. v. Fudge*, 2013 NSCA 149.

(13) An added wrinkle which arose with respect to the hearing of the joint application was that the initial Hearing Panel's Chair, Michael T. Pugsley, Q.C., was no longer available to participate in any subsequent Hearing convened to consider the joint application. It was on that basis that Donald C. Murray, Q.C., in his capacity of Chair of the Nova Scotia Barristers' Society's Disciplinary Hearing Committee, was asked to exercise his jurisdiction pursuant to the provisions of Section 9.14.7 of the *Regulations*, to appoint a successor to Mr. Pugsley, Q.C., and to appoint a new Hearing Panel Chair.

(14) Mr. Murray, Q.C. consulted with both the Nova Scotia Barristers' Society and the Member as regards his execution of the jurisdiction referred to in Paragraph 11 above. In addition, Mr. Murray, Q.C. permitted, and in fact encouraged, the Member to seek legal advice with respect to that jurisdiction, and to make such submission(s) as the Member considered were warranted. The Member essentially demurred: the related written directive being then entered by Mr. Murray, Q.C. on November 10th, 2021.

(15) It was by that directive entered by Mr. Murray, Q.C. that McFarlane "Marc" Njoh was appointed as a Member of the Hearing Panel, and Gavin Giles, Q.C. was elevated to the role of Hearing Panel Chair.

(16) In support of the joint application, only the Nova Scotia Barristers' Society filed. Its inchoate pre-hearing submissions dated December 15th, 2021 provided only as follows:

On April 5, 2019, the Hearing Panel released its sanction decision. The sanction decision included costs payable to the Society of \$125,000 payable in installments of \$20,000 per year and the final \$25,000 to be paid off prior to application for re-admission. The sanction also included a requirement to enrol in the professional responsibility course at Dalhousie University. A full copy of the Sanction Decision is attached.

Mr. Rhyno has filed an appeal of the Panel's decision. The appeal has not been perfected due to functional restraints caused by Mr. Rhyno's medical condition and treatment.

Mr. Rhyno is willing to consent to have his appeal dismissed on certain terms which require a variation of the Sanction Decision and Resolution.

The variation we are requesting are as follows:

- a) The Cost Order penalty set out in the Sanction Decision will not be a condition of Mr. Rhyno's application to be reinstated as a member of the Society.
- b) If Mr. Rhyno is reinstated as a member of the Society, Mr. Rhyno shall pay the Cost Order penalty of \$125,000 over a five-year period in equal monthly installments commencing the day upon which the Society reinstates him to practice. Failure to make a monthly payment on the date due will result in immediate suspension until such payment is made in full.
- c) Mr. Rhyno is not required to enrol in and complete the professional responsibility course as a condition of his application to be reinstated.

We will provide further information tomorrow during the public hearing and answer any questions that the Panel may have.

(17) Apart from the reference to the Member's appeal, there was no submission by the Nova Scotia Barristers' Society as to its reasoning underpinning its support for the joint application. This factor is considered by the current Hearing Panel to be significant, in that there appeared to be nothing within the Member's appeal which put the Nova Scotia Barrister's Society at any risk. Not only had the Member's appeal not be "perfected", as required pursuant to the *Nova Scotia Civil Procedure Rules*, there were no tangible *indicia* led into evidence to suggest that the Member's appeal would ever be perfected, or if it was, that it would be, or even could be, successfully argued.

(18) Against that backdrop, the current Hearing Panel would have benefited from some indications as to the basis for the Nova Scotia Barristers' Society's thinking as regards the joint application.

(19) It may be that the Nova Scotia Barristers' Society wishes only to be accommodating to the Member. That much would be fine, depending, of course, on context. It may be that the Nova Scotia Barristers' Society has concluded that all things considered, the Member's application for re-admission to practice status is only a remote possibility, such that sanction, in whatever form, does not really apply. Either way, the current Hearing Panel did in fact expect a great explanation from the Nova Scotia Barristers' Society on its basis underpinning its support for the joint recommendation.

(20) Also helpful to the current Hearing Panel would have been some indications, from either the Member himself, or from the Nova Scotia Barristers' Society, as to the Member's insights

into the professional behaviours and relationships which resulted in his disbarment, as well as some indications as to his present intentions with respect to a possible future return to legal practice.

(21) That void having been created, largely by the Nova Scotia Barristers' Society, it was left to the current Hearing Panel to in effect "figure it out". Though not a task for which the current hearing Panel was incapable or unsuited, the preferred approach may have been for a greater attention to the evidence to be led in support of the joint application.

(22) The current Hearing Panel makes those comments for what they are worth vis-à-vis any such future similar circumstances. Ultimately, however, the current Hearing Panel has concluded that it has sufficient information in relationship to the joint application to enable it to enter its Decision herein.

(23) The Hearing of the joint application proceeded virtually on December 16th. Both the Nova Scotia Barristers' Society and the Member were present. Ms. Bernadine MacAulay attended on behalf of the former. The Member attended by himself. The public had access to the Hearing's virtual forum. Only Ms. Gillian Cormier from allnovascotia.com attended.

(24) The presentation in support of the joint application was made solely by Ms. MacAulay. The Member spoke only to endorse Ms. MacAulay's presentation, and later to respond to some questions posed to him, largely by Dr. Norman.

(25) The Hearing Panel was not particularly concerned with the joint application as it related to the Costs sanction which had been initially imposed on the Member. Instead, the current Hearing Panel was intrigued only by two points.

(26) The first relates to the Nova Scotia Barristers' Society's decision to release the Member from his obligation to successfully complete the law school's professional responsibility and ethics course. In that regard, the current Hearing Panel confesses its concern with the Nova Scotia Barristers' Society's representation that the Member had taken the course at least twice in the past and does not appear to have learned or benefited from it; and collaterally, with the Nova Scotia Barristers' Society's representation that would be classmates of the Member should he attempt to fulfil his obligation to successfully complete the law school's professional responsibility and ethics course may recoil at his presence amongst them.

(27) As regards the former point, the benefit to be taken from a successful completion of the law school's professional responsibility and ethics course, the current Hearing Panel is very

concerned that any Member who cannot grasp and apply the principles to be gleaned from such a course may in fact be inherently incapable of acceding to safe legal practice. And as regards the latter point, the Member's would be classmates being discomfited by his presence, there was no evidence led at all. In fact, there could be added mutual benefit to such multigenerational exposure to legal ethical issues.

(28) Next, the Hearing Panel was intrigued, and concerned, by the lack of presentation, by either the Nova Scotia Barristers' Society, or the Member, with respect to the latter's redacted suitability, either at present or in the predictable future, to resume the safe public practice of law.

(29) Though that aspect of sanction imposed on the Member was not subject to the joint variation application, the current Hearing Panel was nevertheless interested in a practical demonstration of how the Member would be assessed from the "safe to practice" perspective if and when the time actually came that he was seeking readmission to practice status.

(30) In response to Dr. Norman's direct questions, the Member spoke with apparent candour but only very briefly. He indicated that his current difficulties were with redacted redacted and that he was seeking treatment for both. He submitted that his treatment was on-going and an end date, if in fact there would be an end date, had not been predicted and was not specifically in sight.

(31) The Member expanded that in his current "condition" he would not be capable of taking a course on professional responsibility and ethics. He indicated that his redacted redacted to permit him that type of exposure.

(32) Finally, the Member's physical appearance at the Hearing and his apparent lack of preparation for it left the current Hearing Panel to wonder if the Member was taking the proceedings at all seriously – in the sense that his return to legal practice was really within his mind's eye.

(33) The current Hearing Panel finds all of that concerning; in the sense that if the Member redacted to the extent that he regards himself incapable of successfully completing a law school course he has taken at least twice previously, how can he be deemed to be able to cope with pressures of legal practice if and when that time comes? The current Hearing Panel only poses that question rhetorically.

(34) As regards the Nova Scotia Barristers' Society's position on the course in professional responsibility and ethics, the current Hearing Panel is prepared to comply. In that regard, and having noted its concerns, it refers again to *Fudge (supra)*. The Hearing Panel is also not concerned with the joint submission as regards the payment of Costs. The fact that they will ultimately be paid if and when the Members is permitted to resume legal practice responsibilities, still reflects an attention to responsibility which the initial Sanction and related Resolution imposed.

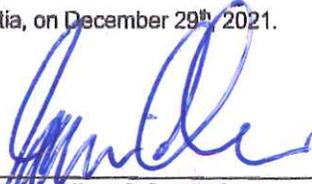
(35) Admittedly, the current Hearing Panel finds itself much less sanguine with respect to how the Member will be vetted for a return to legal practice from the standpoint of the overarching obligation to protect the members of the public in the practice of law. In that regard, and considering the joint nature of the application, the current Hearing Panel is prepared to accept the relief the joint application seeks, albeit only against two additional backgrounds:

- The administrative responsibility devolving to the Nova Scotia Barristers' Society to ensure that the Sanction and related Resolution as previously imposed with respect to an up-to-date redacted report in support of the Member's re-admission (confirming the absence of redacted health issues, including cognitive, emotional and personality ones that could impede his ability to ethically serve the public"), as above, is maintained and exercised at the appropriate time with utmost care.
- The Nova Scotia Barristers' Society takes at the appropriate time a broad and pragmatic approach to the assessment of the Member prior to him being permitted to resume any practice responsibilities.

(36) To be clear, the current Hearing Panel has no wish to place unnecessary impediments in the Member's way. That being said, the limited information having been made available to the current Hearing Panel as underpinning the joint application, along with the Member's own affect in the course of the Hearing, his limited responses and explanations in response to Dr. Norman's questions, in particular, leaves the current Hearing Panel with both unanswered questions and concerns surrounding both the Member's own appreciation for his current condition, and the position, if any, being taken by the Nova Scotia Barristers Society in that regard.

(37) In conclusion, and subject always to the comments above, the current Hearing Panel allows the joint application. The Nova Scotia Barristers' Society will prepare the appropriate Resolution.

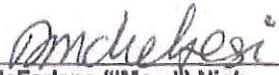
ENTERED at Halifax, Nova Scotia, on December 29th, 2021.



Gavin Giles, Q.C., Chair



Richard Norman, M.D., F.R.C.S.C.



McFarlane ("Marc") Njoh