2024

NOVA SCOTIA BARRISTERS' SOCIETY

IN THE MATTER OF: Application for variation or rescindment of sanction and costs

APPLICANT

LYLE HOWE

AND

RESPONDENT

NOVA SCOTIA BARRISTERS' SOCIETY

Hearing Panel:

Ronald J. MacDonald. K.C., Chair

Donald C. Murray, K.C.

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

Counsel:

Laura McCarthy: Counsel for Lyle Howe

David G. Hutt, Ashley Hamp-Gonsalves: Counsel for the Nova Scotia Barristers' Society

Introduction

1. Lyle Howe has applied pursuant to s.45(4)(m) and (n) of the *Legal Profession Act*, SNS 2004, c.28, to rescind or vary an order made against him by this Panel on October 20, 2017. This application was dated and considered filed on September 16, 2023. We are still constituted as the Panel that heard and decided the initial complaints against Mr. Howe, and thus remain seized with this application.

2. Mr. Howe seeks an order that would rescind or vary the October 2017 Resolution Order so that he "should be permitted to return to practice without the requirement of reapplication and the requirement to pay Costs." The reasons stated in his application and supporting brief as to why this should be done are as follows (Howe Brief, September 16, 2023, at paragraph 73 (a) – (c)):

i. The order for costs be rescinded in its entirety, or in the alternative reduced to an amount in the range of $0.00 to $12,000 (as was ordered for the Disparity Matters);
ii. The order to disbar Mr. Howe be varied to a suspension of 6-12 months (as was ordered for the Disparity Matters);
iii. The order to participate in and produce a psychiatric report be rescinded in its entirety.

3. In addition, in the September 16, 2023, brief accompanying his application Mr. Howe requested (paragraph 73(d)) that we also order that the Panel's decision resulting from this application be forwarded to Douglas Ruck, K.C., for the purpose of addressing any issues of discrimination or systemic discrimination that arose during the proceedings involving Mr. Howe.

4. The Panel is aware that in May 2021, Mr. Ruck, K.C., was commissioned by the Society to conduct "a comprehensive external, independent review of the Society's regulatory policies and processes… expected to provide short-and long-term goals, solutions and changes required to eliminate or mitigate systemic discrimination in the Society and encourage an organizational culture free of bias."

5. The bar on Mr. Howe applying for re-admission to the legal profession in Nova Scotia expired on October 19, 2022. That was 11 months prior to this application by Mr. Howe to vary his "suspension."

6. Since our decision of October 20, 2017, the Nova Scotia Court of Appeal, with the agreement of the Society, has also ordered that:

> . . . the Sanction decision is amended such that there is no requirement for the appellant to pay costs in the amount of $150,000.00 as a condition precedent to applying for re-admission to the Society.

And further stated in its decision at 2019 NSCA 81, at paragraph 214, that:

> The terms and conditions of that repayment will be a matter for Mr. Howe and the Society to agree on if he applies to re-enter the practice law.

Background

7. On May 25, 2015, the Nova Scotia Barristers' Society (the Society) charged Lyle Howe with professional misconduct and professional incompetence.

8. After a 66-day hearing this Panel rendered a unanimous decision on July 17, 2017, finding that some of Mr. Howe's conduct constituted professional misconduct and professional incompetence within the meaning of the *Act*: *The Nova Scotia Barristers' Society v. Lyle Howe*, 2017 NSBS 3.

9. On October 20, 2017, this Panel issued its decision on sanction: *The Nova Scotia Barristers' Society v. Lyle Howe*, 2017 NSBS 4. The Panel found that the most significant misconduct engaged in by Mr. Howe related to a "concerted scheme of dishonesty" which included repeatedly lying to judges and courts (see paragraph 53).

10. In that decision on disposition, the Panel concluded that the appropriate disposition was to disbar Mr. Howe for a period of 5 years, following which he would be eligible to re-apply for admission to the Bar with an up-to-date psychiatric evaluation to ensure that there were no underlying mental health issues that could impede his ability to ethically serve the public. He was also ordered to pay costs of $150,000 before re-application.

11. Mr. Howe appealed both the merits and sanction decisions to the Nova Scotia Court of Appeal on the following grounds:

i. The Panel erred in failing to find a breach of s. 15 of the *Charter*,
ii. The Panel misinterpreted or ignored relevant evidence,
iii. One of the Panel members, Donald Murray, Q.C., erred in his refusal to recuse himself on the basis of bias,
iv. The penalty imposed was unfit and unjust.

12. On October 24, 2019, the Court of Appeal rendered its unanimous decision (*Howe v. Nova Scotia Barristers' Society*, 2019 NSCA 81), dismissing the first three grounds of appeal. As referenced earlier, with the agreement of the Society, the Court of Appeal allowed the fourth ground in part, amending the Order such that Mr. Howe was not required to pay the $150,000 in costs as a precondition to his reapplication to the Bar. Instead, Mr. Howe and the Society were to agree upon alternative terms and conditions for repayment if Mr. Howe applied for re-admission to the Bar.

13. We observe that the Court was explicit in commenting on the time and effort which this Panel had spent on the issues in the hearing before it. The Court stated at paragraph 215:

> Its decisions are well reasoned and properly address the multitude of difficult matters before it.

Those "difficult matters" included the consideration of Mr. Howe's *Charter* argument relating to the impact of race upon the investigation, his ongoing interactions with the Society, as well as the formulation and prosecution of the charges against him. Indeed, the Court of Appeal specifically stated at 2019 NSCA 81, at paragraph 114:

> The Panel heard from approximately 40 witnesses. There were 100 exhibits filed and both sides made extensive oral arguments. After considering all of the evidence the Panel concluded that the Society's investigation was not racially motivated. I cannot identify any error in its conclusion.

14. On April 30, 2020, the Supreme Court of Canada dismissed Mr. Howe's application for leave to appeal from the decision of the Nova Scotia Court of Appeal, with costs to the Society: 2020 CarswellNS 305.

15. More than three years later, on September 16, 2023, Mr. Howe made the current application with a brief in support. The Panel heard from the parties through further written submissions on process (the Society on January 26, 2024; Mr. Howe on February 8, 2024) before hearing from them orally on February 12, 2024. Those submissions related to issues of our jurisdiction, as well as the nature and scope of the hearing to be provided under s.45(4)(m) of the *Act*. Further submissions were sought and received in writing from both the Society (March 22, 2024), and Mr. Howe (April 2, 2024), in relation to jurisdictional questions raised by the Panel during argument on February 12, 2024.

16. We have taken time to consider those submissions. Our decision with respect to Mr. Howe's *Legal Profession Act,* s.45(4)(m) and (n) application follows.

Jurisdiction of the Panel

17. Section 45(4)(m) and (n) of the *Legal Profession Act* provide that:

> 45(4) Where a hearing panel finds a member of the Society, other than a law firm, 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;
>
> . . .
>
> (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;
>
> (n) make any other order or take any other action the hearing panel determines to be appropriate in the circumstances including an order to retain jurisdiction to monitor the enforcement of its order; . . . .

18. Mr. Howe's own September 16, 2023, application proposed that:

> There has been ***a significant material change in circumstances since the issuance of the order*** including:
>
> a) The Society's public acknowledgment of systemic discrimination;
> b) The Society penalizing several white members of the bar to much less harsh sanctions than the applicant for similar if not worse behaviour;
> c) The disproportionate sanction the Applicant received when compared to the range of reasonable sentences imposed on white lawyers resulting in a violation of the Applicant's rights pursuant to section 15 of the Charter of Rights and Freedoms. [Emphasis added]

However, Mr. Howe's February 8, 2024, brief, at paragraphs 30 – 36, repudiated the position that there was any need to show a change of circumstances at all. That submission went on to propose that if we felt that a change of circumstances was

required, we should hold a hearing to decide whether or not he had established a change.

19. We appreciate that in addition to his brief on this issue, Mr. Howe's oral submissions also resisted the idea that there was any need for him to demonstrate a change in his own personal circumstances in order to activate the jurisdiction under s.45(4)(m) of the *Act*. Indeed, he has never presented by affidavit or assertion that there has been any such change in his personal circumstances that would activate the variation jurisdiction of s.45(4)(m) and (n). We will address in the next section of these reasons the arguments that he does identify to justify our re-consideration of our October 20, 2017, decision.

20. The Society's position before us, as stated at page 6 of their January 26, 2024, brief was clear:

> As contemplated by the legislation, a subsection 45(4)(m) application is firmly grounded within a pre-existing (and fully concluded) matter. The Panel has heard evidence in a comprehensive hearing and produced an order, or otherwise taken "action" (as referred to in the subsection). Simply put, the parties have already received an oral hearing with full participatory rights in connection with Order.
>
> The legislation empowers the Panel to retain jurisdiction over their Order, and to consider whether changed circumstances require it to be rescinded or varied. Unlike in other jurisdictions, like Ontario, the *Act* does not give express guidance on the kinds of circumstances in which a party can seek rescission or variation. That said, inherent in this legislative jurisdiction-keeping and power to revisit one's order is the element of *change***.**

We agree with that.

Grounds offered in Mr. Howe's Application

21. In his application and initial brief, Mr. Howe noted the Society's acknowledgement of the existence of systemic discrimination in our justice system and within the Society. He also pointed to the Society's recognition of the need for action and education to address these underlying problems. He referenced a variety of initiatives that have become steps in the prolonged process that will address this problem at the Society, as well as those discriminatory practices that have embedded themselves in the historical culture of the legal profession in Nova Scotia.

22. Mr. Howe then asserts that the Society disciplines white members of the bar less severely than black lawyers. He endeavours to show, by specific case references, that his disposition was disproportionate when compared with dispositions imposed on white lawyers for similar, if not worse, behaviour. Mr. Howe puts forward three examples: *The Nova Scotia Barristers' Society v. Rodgers*, 2021 NSBS 1; *The Nova Scotia Barristers' Society v. Nash Brogan*, 2022 NSBS 2; and *The Nova Scotia Barristers' Society v. TJ McKeough*, 2022 NSBS 1. None of these cases are, in our view, similar to that of Mr. Howe in terms of the nature and scale of the misconduct, or the process by which a resolution of the complaints were reached.

23. Adam Rodgers was found guilty of professional misconduct and professional incompetence based on being reckless regarding his professional responsibilities regarding trust funds. Mr. Rodgers cooperated with the Society throughout the investigation of Jason Boudrot and throughout the subsequent investigation of

himself. Mr. Rodgers acknowledged that "I could have and should have done more." The Panel which heard the Rodgers case suspended him from the practice of law for a period of twelve months and required him to complete the Schulich School of Law Professional Responsibility course, at his own expense, before being re-instated. Costs were ordered against him in the amount of $12,000.00: *The Nova Scotia Barristers' Society v. Rodgers*, 2021 NSBS 2, at paragraphs 2, 35, and 36.

24. The differences between Mr. Rogers' situation and that of Mr. Howe are glaring. Mr. Rodgers acknowledged doing wrong. He acknowledged being willfully blind to the actions of Mr. Boudrot who was the primary actor in the professional misconduct. In contrast, Mr. Howe initiated, and was at all times directly responsible for, his own misconduct. Furthermore, as we said at the time of our initial disposition hearing:

> Mr. Howe did little if anything to cooperate with the investigations or to facilitate proof by admissions, other than accepting the accuracy of transcripts. He could certainly have done more.

The Nova Scotia Barristers' Society v. Lyle Howe, 2017 NSBS 4, para. 105.

25. Mr. Brogan was a senior member of the Bar who admitted to charges of professional misconduct and professional incompetence, none of which involved a concerted scheme of dishonesty involving the courts (see *The Nova Scotia Barristers' Society v. Nash Brogan*, 2022 NSBS 2, at paragraph 36). He admitted that his conduct did not meet the professional standards expected of a lawyer and the requirements of the Nova Scotia Barristers' Society *Code of Professional Conduct*. His penalties were negotiated and resolved as part of a settlement agreement between him and the Society, and eventually approved by his Hearing Panel. Mr. Brogan's disposition involved a six month-suspension from practice with additional penalties and restrictions. The Society agreed to seek no costs.

26. With respect to Mr. McKeough, that case involved an "abdication of professional responsibilities." Mr. McKeough admitted to multiple integrity offences, demonstrated insight as to his own responsibility for these, acknowledged the impact of his failings on others, and the changes that he would need to be able to implement before safely resuming practice. He negotiated a joint resolution with the Society, which included a ten-month suspension, completing the professional responsibility course from Osgoode Hall, completing 80 hours of continuing professional development training, and then engaging and funding a practice supervisor for a minimum of one year following his return to practice. He was also to pay costs of $1,000 within three months of his return to practice post-suspension.

27. Most notable, in its absence from Mr. Howe's cited examples, is the case of Mr. Duane Rhyno, a white Nova Scotian lawyer with a prior record of discipline having been found guilty of professional misconduct, primarily for deceptive practices involving mortgage financing, and failing to deal with the Society with candour (see *The Nova Scotia Barristers' Society. v. Rhyno*, 2019 NSBS 2). Many of these instances of misconduct were, like Mr. Howe's, permeated with dishonesty. Mr. Rhyno's Decision on Sanction emphasized the similarity between his aggravating factors and those of Mr. Howe (paragraphs 40-43), and the elements of the dispositions in both cases demonstrate substantive parity:

i) Disbarment for 5 years;
ii) Costs payable to the Society on a schedule which could be negotiated with the Society;
iii) Provision of a medical report relating to ethical capacity at the time of applying for re-admission as a lawyer.

Mr. Rhyno's obligations for re-admission initially also included completion of an ethics course, and post-readmission practice under supervision.

28. Even if a comparison of different Panel rulings could constitute grounds for an application under s.45(4)(m) of the *Legal Profession Act,* a view we do not support, Mr. Howe's application has not provided persuasive comparative evidence to demonstrate that the Society – let alone other Hearing Panels - have in fact treated white lawyers more leniently than black lawyers for similar misconduct. Mr. Howe's suggestion of disparate or disproportionate treatment is, for us, a non-starter.

Evidence of Change to Ground Jurisdiction

29. Fairly understood, Mr. Howe's real argument in support of a variation appears to be instead that things have happened at or in relation to "the Society" since 2017, and that these changes constitute the sufficient "change" to give us jurisdiction to

vary the disposition that was crafted in October 2017. He also suggested that we, on our own motion, might want to identify and declare some change that would move us to change our minds about the disposition that we had determined was appropriate in October 2017.

30. At several points in his written and oral submissions, Mr. Howe conflated, and used interchangeably, "the Panel" and "the Society." It should be plain that as a Panel, we are not the Society. Our mandate in relation to Mr. Howe and the complaints which he faced in 2015 comes from specific appointment by the then Chair of the Hearing Committee under s.2(u) of the *Legal Profession Act*, and Regulation 9.9.4 of the Regulations made pursuant the *Legal Profession Act*, S.N.S.2004, c.28. We have no lawful jurisdiction separate from that appointment.

31. We have no authority under statute to pass judgment on the appropriateness of the decisions made by other appointed Panels under the *Act*, whether those Panels have been constituted before or since the date of our own initial appointment. We have no authority under s.45(4)(m) of the *Act*, or otherwise, to direct the Society to do anything in relation to Mr. Ruck, K.C. Those are things that Mr. Howe is requesting us to do under cover of this application under s.45(4)(m) of the *Act*, but which we cannot do.

32. While s.45(4)(m) of the *Act* does provide for a potentially wide scope for variations and/or for rescission of orders in professional responsibility matters, we are of the view that the applicant (or in some circumstances both parties) must begin by demonstrating that there has been a change in the burden, or effect, of the previous

disposition from what had been contemplated at the time of the initial disposition ruling. That was the acknowledged case in *Rhyno*, *supra*. That kind of change has not been hinted at here.

33. What we can do as a Panel is re-evaluate the application of our own initial sanction decision based on Mr. Howe demonstrating a change in his personal circumstances. In *The Nova Scotia Barristers' Society. v. Rhyno*, 2021 NSBS 4, referenced earlier, the initial Panel decision included:

i) Disbarment for 5 years;
ii) Costs payable to the Society on a schedule which could be negotiated with the Society;
iii) Provision of a medical report relating to ethical capacity at the time of applying for re-admission as a lawyer.

Mr. Rhyno's obligations for re-admission initially also included completion of an ethics course, and post-readmission practice under supervision.

34. That Panel was presented with a joint submission by the suspended member and the Society, *supported by evidence of current mental health issues affecting the member*, *which would have contributed an impact on his participation in the ethics education portion of the disposition* (paragraphs 26 - 27). There was also context of a procedural *quid pro quo* on the part of the suspended member, which might have been taken as a change in the suspended member's acceptance of responsibility (paragraph 16). Each of those things, individually or cumulatively, provided foundation for the variation jurisdiction under s.45(4)(m) of the *Act*.

35. The kind of change which provided a foundation for the changes in *Rhyno* was a change related to the reasonable assumptions or expectations of the burden of the

disposition at the time when the disposition was originally made. That is what Mr. Howe's application requires to provide us with jurisdiction under s.45(4)(m) and (n) of the *Act.* It does not need to be "significant" as the wording of Mr. Howe's September 16, 2023, application initially proposed. So long as the identified change is material or sufficient to persuade the Panel that the penalty ought to be varied in a commensurate or responsive way, that would provide a jurisdictional basis for us to proceed. It would provide the Society with specific facts about Mr. Howe's situation to consider, and to which the Society could reasonably respond. However Mr. Howe has not identified any such a change in the burden which the disposition that our October 20, 2017 decision imposed upon him.

36. On its face, any burdens imposed by our Order in October 2017 have become lighter. There is no longer a bar against an application for re-admission. There is no obligation to pay the costs order before applying for re-admission. The only remaining obligations upon Mr. Howe are to:

> a) negotiate with the Society as to a payment schedule for the costs order; and
>
> b) provide an up to date psychiatric report "to ensure there are no underlying mental health issues that could impede his ability to ethically serve the public."

Racism

37. We appreciate that Mr. Howe is not seeking a *Rhyno* kind of variation through this process. Mr. Howe is effectively seeking the recission of the whole disposition reached on October 17, 2024, based on arguments of racism. Mr. Howe argued unsuccessfully before us in 2017 that racism justified his professional misconduct. Mr. Howe argued that claim unsuccessfully before the Nova Scotia Court of Appeal

as well. His current argument appears to be that an acknowledgment of systemic racism by the Society (not this Panel) should retroactively make those unsuccessful arguments successful, and thus insulate him from consequence for his professional misconduct. We disagree. Whatever the Society may have acknowledged, that does not change our rulings, nor the Nova Scotia Court of Appeal's rulings, with respect whether racism was the cause of either Mr. Howe's professional misconduct, or infected our identification and sanctioning of his professional misconduct.

38. The Panel addressed many of the complex issues regarding prejudice and discrimination throughout the original hearing on the merits, and the hearing on disposition. The Panel understands and continues to have sympathy for Mr. Howe's deep-seated beliefs and experiences regarding the unfairness of racial discrimination in our cultures. However we repeat that those beliefs and experiences cannot and do not legitimize repeated occurrences of professional misconduct and incompetence. As we said then:

> In addition, and very importantly, the situations where Mr. Howe's lack of integrity and dishonesty came to the fore did not arise out of circumstances of discrimination. Rather, they arose out of rather routine situations that can face any lawyer, and that did face Mr. Howe.

The Nova Scotia Barristers' Society v. Lyle Howe, 2017 NSBS 4, paragraph 69. Mr. Howe's continuing beliefs and experiences of racism do not create jurisdiction under s.45(4)(m) now.

39. We would add this. The idea that the Society's acknowledgment of systemic racism subsequent to our hearings somehow would constitute a persuasive reason for us to effectively rescind any consequence for Mr. Howe for his professional conduct is misconceived. Mr. Howe's current arguments repudiate his own acknowledgments ***and our findings*** of serious professional misconduct in 2017 (see 2017 NSBS 4, at paragraphs 59 – 61, 66 – 69, and 83 - 84).

40. Similarly, an assertion that the Society has acknowledged systemic racism cannot now create any jurisdiction for this Panel under s.45(4)(m) of the *Act*. Instead, the most compelling reason in our view for requiring an applicant under s.45(4)(m) of the *Act* to show:

a) some kind of change in his personal circumstances, or

b) an unanticipated change in the impact of the disposition,

is that otherwise the legislation would permit repetitive (if not constant) requests to a Panel by a dissatisfied member or disbarred member to re-hear arguments - that have already been rejected – in hopes that the Panel would consider making a different disposition. That is what Mr. Howe appears to be doing here with his race-based arguments.

41. The idea that a Panel's "unfettered" discretion to re-assess its dispositions includes the authority to re-hear a repetition of the same arguments, or re-formulated arguments that were made at the time of the initial disposition, is also incorrect. In our view a Panel's "unfettered" discretion under s.45(4)(m) and (n) of the *Act* relates to a Panel's ability to do whatever is appropriate to adjust a disposition, or the

peculiar burdens of a disposition, ***based on*** a factual change in the circumstances of the member or former member. This subsection of the *Act* is not an open invitation for a member or former member to re-argue his case at any time.

Conclusion

42. The current application provides no reference to altered personal circumstances on the part of Mr. Howe which would be relevant to the disposition imposed upon him in October 2017. In that respect, we are inclined to dismiss and do dismiss the current application without prejudice to Mr. Howe's entitlement, still under s.45(4)(m) of the *Act,* to re-apply for a variation or recission of our previous disposition on appropriate grounds.

43. We thank the parties for their submissions in relation to how the concepts of *functus officio, res judicata* (or *issue estoppel*), and *mootness,* might impact the appropriate interpretation of s.45(4)(m) of the *Act.* We also alerted the parties to our concern about whether we have any continuing jurisdiction in relation to the costs order since the Nova Scotia Court of Appeal specifically directed that any adjustment of that obligation be negotiated between Mr. Howe and the Society – not with the Panel. Given our decision with respect to our lack of jurisdiction under s.45(4)(m) of the *Act* to move forward with Mr. Howe's application at all, we do not feel it appropriate or necessary to draw conclusions about these other issues now.

Disposition

44. Mr. Howe's application for rescindment of sanction and costs is denied.

Signed:

(signed) _____

Donald C. Murray, K.C.

(signed) _____

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

Minority Decision

Introduction:

1. I have had the opportunity to read the reasons for decision from the majority of the Panel. For the reasons below I take a different view of this matter, and would permit Mr. Howe to argue that subsequent actions and decisions of the Nova Scotia Barristers' Society (NSBS) can constitute the type of circumstances that would permit a Panel to vary or rescind the orders made by the Panel in this matter on October 20, 2017.

Initial Comments:

2. At the outset, I wish to confirm that I remain firmly of the view that the decisions made by this Panel to find Mr. Howe guilty of professional misconduct and professional incompetence as set out within our decision of July 17, 2017 - *The Nova Scotia Barristers' Society v. Lyle Howe*, 2017 NSBS 3 were the proper ones.

3. Similarly, I remain firmly of the view that our decisions made with respect to the disbarment of Mr. Howe, and the conditions imposed, were appropriate. See *The Nova Scotia Barristers' Society v. Lyle Howe*, 2017 NSBS 4

4. Our decisions in that regard have, as noted by the Majority, been upheld and commended by the Nova Scotia Court of Appeal, but for the cost issue.

5. Simply put, Mr. Howe's behaviours justified the decisions and sanctions imposed, and were not mitigated by the real impacts of systemic and/or actual discrimination for the reasons discussed in detail in the Panel's decisions.

The Current Application:

6. Mr. Howe's current application is brought under sub-sections 45(4)(m) and (n) of the *Legal Profession Act:*

> "45(4) Where a hearing panel finds a member of the Society, other than a law firm, 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:
>
> (m) rescind or vary any order made or action taken under this subsection;
>
> (n) make any other order or take any other action the hearing panel determines to be appropriate in the circumstances including an order to retain jurisdiction to monitor the enforcement of its order; . . . ."

7. There is nothing in the *Act* which requires the applicant to show a change of circumstances before such an application can be made.

8. I have reviewed the comments of the majority on this point at paragraph 41:

> "41. The idea that a Panel's "unfettered" discretion to re-assess its dispositions includes the authority to re-hear a repetition of the same arguments, or re-formulated arguments that were made at the time of the initial disposition, is also incorrect. In our view a Panel's "unfettered" discretion under s.45(4)(m) and (n) of the *Act* relates to a Panel's ability to do whatever is appropriate to adjust a disposition, or the peculiar burdens of a disposition, ***based on*** a factual change in the circumstances of the member or former member. This subsection of the *Act* is not an open invitation for a member or former member to re-argue his case at any time."

9. I agree that implicit in the statutory provisions must be the requirement for some change of circumstances. Otherwise, a Panel could be tied up in infinite applications.

10. However, it is not possible to outline what would be sufficient to meet the test of some change in circumstances. It could be related to a cause of the discipline, such as a course of action to address addiction of mental health issue, or it may be related to the nature of the person's intended practice, such as an agreement to move away from an area of law the lawyer ought not continue. It is impossible to outline every circumstance.

11. This is a strength of the legislation, as it gives broad power to revisit a sanction for any justifiable reason and leaves it to the broad discretion of the Panel, who have the best understanding of the relevant facts.

The Current Case for Change of Circumstances:

12. In summary form, Mr. Howe is not arguing that the Panel should reconsider its decisions due to a change relevant to his personal circumstances or the circumstances relevant to the Panel's findings. Rather, he is saying that due to systemic or real discrimination, since the date of the Panel's sanction, there is evidence that the Society takes a different approach when dealing with White lawyers than it did with him as a Black lawyer.

13. Simply put, Mr. Howe believes we should change the sanction because the Society took a harsher position with him because he is Black, or a more lenient position with other lawyers because they are White, or a combination of the two.

14. The majority does not consider this to be a valid basis to constitute a change of circumstances. (See paragraph 28 of the majority reasons.)

15. I do. For these reasons:

16. Systemic discrimination is insidious, as I stated orally during one of the oral hearings in this application. A useful definition can be borrowed from the website of the Ontario Human Rights Commission:

> "Racial discrimination can result from individual behaviour as well as because of the unintended and often unconscious consequences of a discriminatory system. This is known as systemic discrimination.
>
> Systemic discrimination can be described as patterns of behaviour, policies or practices that are part of the structures of an organization, and which create or perpetuate disadvantage for racialized persons."

17. Not only does such discriminatory behaviour creep into many aspects of a decision-making process, those making the decisions do not even realize it is happening, as they suffer from an unconscious bias. Hence the insidiousness of its nature.

18. The impact this has on racialized persons is dramatic: they can continue to suffer injustice, from people who may be well intentioned, and who believe strongly they are not acting in a discriminatory way. While overt acts of discrimination can sometimes be identified and pointed out, systemic discrimination can hide behind the acts of these well-meaning people. This makes a remedy for those suffering the discrimination doubly difficult: not only must they prove they suffer from unfair treatment, but they face a difficult task identifying who is responsible for that treatment.

19. Any organization that is designed to promote and protect the public interest, such as the NSBS, and its various arms, including a discipline panel, must always be aware of the impact systemic discrimination may have on decision making and therefore the lives of lawyers.

20. This can include the fact a lawyer's race may well play a role in how they are treated by those in authority. For example, in *Nassiah v. Peel (Regional Municipality) Services Board* 2007 HRTO 14, the Ontario Human Rights Tribunal considered the impact racial profiling can have on the enforcement of the criminal law. At paras. 134 to 136 they state:

> "[134] I find the racial profiling social science evidence is relevant because it speaks to, not just the initial decision to stop, detain, pursue

> an investigation, but also supports the general phenomenon that the *scrutiny applied to the subsequent investigation* is different, more heightened, more suspicious, if the suspect is Black. The stereotyping phenomenon is the same, whether it manifests itself in the discretion to stop/arrest/detain a person in part because they are Black, or whether it manifests itself in the form of greater suspicion, scrutiny, investigation in whole or part because a suspect is Black.
>
> [135] In *Johnson v. Halifax* [2003] N.S.H.R.B.I.D. No. 2, the Nova Scotia Human Rights Board considered whether the decision by a Nova Scotia constable to pursue a vehicle driven by two black men was a form of racial profiling. The Board also went on to consider whether the subsequent investigation process, including the failure to assess properly the documentation proferred by the men, the decision to tow the vehicle, the level of the police response and the general treatment of the men as potential criminals, was the result of stereotyping based on race.
>
> [136] In *Peart v. Peel (Regional Municipality) Police Services Board* [2003] O.J. No. 2669 (Ont. Sup. Ct), although the allegations of racial profiling were not accepted on the evidence, the trial judge assessed whether the phenomenon of acting upon racial stereotypes was present not just at the time of the initial stop, but continued to operate during the chase, the high risk takedown, the further investigation at Petro Canada, the journey to the station and the investigation/treatment at the station."

21. I recognize the above cases refer to interactions with police. However, I think it is appropriate to conclude that given the nature of systemic racism, a person's race can impact how they are treated by any persons in authority, no matter who that authority is. At the very least, it will be a question in the mind of the racialized person impacted by the authority's decisions. I therefore find that it is appropriate to ensure that a person in Mr. Howe's position be given reasonable opportunity to argue that racism has played a role in how the Society dealt with his case when compared to those of White lawyers.

22. Effectively I am suggesting that organizations need to take extra steps to remedy discriminatory situations and to eliminate the appearance of same.

23. As stated in the Report and Recommendations of the New York State Bar Association Task Force on Racism, Social Equity, and the Law (Jan., 2023):

> "Clearly, then, equality cannot be our starting point. There must be equitable solutions. Where the legacies of institutionalized racism continue to circumscribe opportunities and the very lives of individuals and groups of people of color, we must recognize that equity is prerequisite to equality, not the other way around."

24. Simply put, treating everyone the same may not remedy discrimination, it may perpetuate it.

25. Similar authority is found within the decision of Justice Derrick writing on behalf of a five person panel in the case of *The Queen v. Anderson,* 2021 NSCA 62. That case considered the use of Impact of Race and Culture Assessments (IRCAs) in sentencing African Nova Scotian offenders.

26. In finding that the use of IRCAs can be a valuable resource for sentencing judges, Justice Derrick discusses at paras. 124 and 125 the reality that to properly address the impacts of historical discrimination on persons from the Black community it may require differential treatment to achieve equality:

> "[124] The role of IRCAs in the sentencing of African Nova Scotian offenders will serve to enhance the credibility of the criminal justice system in the eyes of a broad and diverse public by increasing the likelihood of the sentences imposed being seen as just and appropriate. Respect for the law and the maintenance of a just, peaceful and safe society is not achieved by putting disproportionate numbers of Black and Indigenous offenders behind bars having left unaddressed, in the context of sentencing, the deeply entrenched historical disadvantage and systemic racism that more than likely had a hand in bringing them before the courts.

> [125] The historic discrimination and racism to which African Nova Scotians have been subjected is antithetical to societal values of equality and inclusion. The Supreme Court of Canada in *R. v Nasogaluak*, addressing, in the context of sentencing, the impact of a *Charter* breach, recognized the role of the *Charter* in the sentencing regime: "A sentence cannot be "fit" if it does not respect the fundamental values enshrined in the *Charter*".[65] This principle is to be applied purposively. The sentencing process as a whole must accord with *Charter* values, including the right to equality before and under the law. **Differential treatment may be needed in order to serve the goals of substantive equality[66] otherwise how are historic inequalities confronted and addressed, ongoing systemic discrimination ameliorated, and continued disadvantage avoided?**" (Emphasis added).

27. It is my view that given the potential that systemic discrimination may have played a role in the positions taken by the Society in how White lawyers were disciplined, that it is appropriate to take additional steps to explore those issues in order to ensure substantive equality.

28. This is all Mr. Howe is asking for: the ability to make his case that White lawyers have been treated differently than he as a Black lawyer. If that means this panel needs to treat his case differently than "normal", that is because we should do so to ensure that Mr. Howe is given differential treatment to account for the historical disadvantages he has faced throughout his life. In my view, it is the least we can do.

29. Or put another way, a White lawyer would not be asking for this differential treatment, because a White lawyer does not have to worry that they have been treated differently because of the colour of their skin.

30. I appreciate the points made by the majority that they have reviewed the cases put forward by Mr. Howe where he argues that White lawyers have been treated more leniently by the Society. In so doing the majority have concluded that those cases are readily distinguishable from Mr. Howe's situation, and thus do not demonstrate any potential for racial discrimination.

31. However, to date the Panel has only heard from the Parties on matters of process, regarding how Mr. Howe's application should be heard. The Panel has not addressed the substantive issues, and importantly we have not had the opportunity to hear from Mr. Howe as to why he says those cases demonstrate what he says they do. We have also not given Mr. Howe an opportunity to bring forward any other evidence to support these propositions, which he says he wishes to do. We can not know whether there may be evidence beyond the decisions in the other cases that may be quite relevant. For example, perhaps these other cases may have involved other potential charges against a particular lawyer that were not pursued by the Society, or perhaps a case could be made that Mr. Howe's investigation was pursued more diligently that a White lawyer's. That evidence would be very relevant to a consideration of Mr. Howe's position. As of yet, the Panel has not given Mr. Howe the opportunity to call such potential evidence.

32. In my view, procedural and substantive fairness requires us to give Mr. Howe that opportunity, in particular given the nature of his allegations. Indeed, it would be somewhat ironic were we, a Panel of three white men, to conclude that there is no potential for Mr. Howe to demonstrate systemic racism, which is insidious in nature, without giving him the opportunity to be heard completely on those points.

Conclusion:

33. In conclusion, it is my view that sub-sections 45(4)(m) and (n) are available to fashion a remedy should Mr. Howe be able to demonstrate that in fact White lawyers were treated differently by the Society than he was as a Black lawyer. This would constitute sufficient evidence of a changed circumstance to require redress. I view those subsections as permitting a remedial approach, to address a possible situation of systemic racism.

34. Support for this I believe to be inherent in the reality that would exist otherwise: theoretically a Black lawyer might conclusively demonstrate in similar cases that the Society sought a more significant discipline outcome for them than was done for a White lawyer because of race. The Black lawyer would be left without

any potential for remedy. Clearly this can and should not be the case. Sub-sections 45(4)(m) and (n) give us the remedy.

35. Therefore, the appropriate process for this application to vary or rescind the Panel's previous rulings is to allow Mr. Howe to bring forward whatever evidence he has to demonstrate that the Society has taken a differential approach to him because of his race. This would include not only reference to other cases but any other evidence, deemed relevant by the Panel on those points, that Mr. Howe would have available.

Signed and Dated May 30, 2024

(signed)_____

Ronald J. MacDonald, KC

Chair