NOVA SCOTIA COURT OF APPEAL

Citation: *Howe v. Nova Scotia Barristers' Society*, 2019 NSCA 81

Date: 20191024
Docket: CA 470952
Registry: Halifax

Between:

Lyle Howe

Appellant

v.

Nova Scotia Barristers' Society and
Attorney General of Nova Scotia

Respondents

Restriction on Publication: : pursuant to Confidentiality Order dated March 22, 2018

Judge:	The Honourable Justice David P.S. Farrar
Appeal Heard:	April 3-4, 2019, in Halifax, Nova Scotia
Subject:	**Code of Professional Conduct. Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia. Professional Misconduct. Disciplinary Proceedings.**
Summary:	Mr. Howe was charged with a number of counts of professional misconduct between 2011 and 2016. After a 66-day hearing, a Disciplinary Panel found Mr. Howe guilty of professional misconduct and disbarred him without eligibility to re-apply for a period of five years. It also ordered him to pay costs in the amount of $150,000.00 prior to being able to apply for readmission to the Bar. During the hearing before the Panel, Mr. Howe's primary argument was the disciplinary process and investigation had been tainted by racism. He said he was unfairly targeted

because of his race and cultural background and that his s. 15 *Charter* rights had been violated. He asked that the evidence against him be excluded.

He also argued that the Panel was biased against him.

The Panel found that Mr. Howe's s. 15 *Charter* rights had not been violated by the investigation and disciplinary process.

It also dismissed his allegations of bias.

Mr. Howe appealed.

Issues: The primary issues on the appeal were:

(1) the Panel erred in failing to find a breach of s. 15 of the *Charter*;
(2) the Panel misinterpreted or ignored relevant evidence;
(3) one of the Panel members, Donald Murray, Q.C., erred in failing to recuse himself on the basis of bias;
(4) the penalty imposed was unfit and unjust.

Result: Appeal allowed, in part.

The Panel did not err in finding that there had not been a breach of Mr. Howe's *Charter* rights. It thoroughly reviewed the evidence and found that the Society's investigation was not motivated by racial prejudice. Its findings of fact are not subject to review by this Court.

Mr. Murray did not err in failing to recuse himself based on the allegation of bias. The argument was entirely without merit.

The Panel also considered all of the evidence and it did not fail to consider or ignore relevant evidence.

With the consent of the Society, the ground of appeal relating to sentence was allowed, in part. It is no longer a condition precedent that Mr. Howe pay costs in the amount of $150,000.00 prior to being able to apply for readmission to

the Bar.

The parties sought permission, and were granted, the ability to make submissions on costs subsequent to this decision.

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Judges:	Farrar, Saunders, Oland, Fichaud and Bryson, JJ.A.
Appeal Heard:	April 3-4, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed, in part per reasons for judgment of Farrar, J.A.; Saunders, Oland, Fichaud and Bryson, JJ.A. concurring;
Counsel:	Appellant in person and Laura A. McCarthy, for the appellant Marjorie A. Hickey, Q.C. and Daniel Wallace, for the respondent, Nova Scotia Barristers' Society Edward A. Gores, Q.C., for the respondent, Attorney General of Nova Scotia, not participating

Reasons for judgment:

[1] On May 25, 2015, the Nova Scotia Barristers' Society (the Society) charged the appellant, Lyle Howe, with professional misconduct and professional incompetence for allegedly violating provisions of the *Code of Professional Conduct* (the *Code*) and the *Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia*, 2nd ed. (Halifax: Nova Scotia Barristers' Society, 1998) (the *Handbook*), as well as the Regulations made pursuant to the *Legal Profession Act*[1], S.N.S. 2004, c. 28.

[2] The hearing into Mr. Howe's conduct commenced on December 10, 2015. The hearing lasted for approximately a year and a half, with 66 hearing days, before a panel consisting of Ronald J. MacDonald, Q.C., Donald C. Murray, Q.C. and Dr. Richard W. Norman. They heard final arguments on April 19, 2017. On July 17, 2017, the Panel rendered its decision (Merits decision reported as 2017 NSBS 3).

[3] The Panel found that Mr. Howe had been dishonest with the Court, made misrepresentations to the Court, demonstrated a significant lack of candour, was deliberately dishonest, failed to properly investigate client files, and failed to recognize conflicts of interest. It concluded his behaviour constituted Professional Misconduct and Professional Incompetence (Merits decision, ¶575).

[4] On October 20, 2017, the Panel disbarred Mr. Howe from the practice of law effective October 20, 2017 and ordered that he would not be entitled to apply for re-admission for five years from the date of the decision. It further ordered that if Mr. Howe wished to reapply, he would be required to pay costs to the Society in the amount of $150,000.00 prior to doing so (Sanction decision, reported as 2017 NSBS 4, ¶109).

[5] Mr. Howe appeals from both the decision to disbar him and the sanction imposed.

[6] On the appeal, Mr. Howe was represented by himself and Laura McCarthy; his spouse and former law partner.

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[1] Mr. Howe was alleged to have violated both the *Code* and the *Handbook*, as his behaviours span the time between 2011 and 2016. In 2011, the *Handbook* provided ethical guidance for Nova Scotia counsel. The *Code* has provided that guidance since January 1, 2012.

[7] For the reasons that follow, I would allow the appeal to the extent described in ¶215 and reserve on the question of costs until the parties have had an opportunity to make further written submissions.

Background

[8] Mr. Howe graduated from Dalhousie Law School in May 2009. He articled with Boyne Clarke in Dartmouth, Nova Scotia. He was called to the Bar in June 2010.

[9] Following his admission to the Bar, he worked as an associate with Bailey & Associates until November 2010. He left Bailey & Associates to become an associate at Bacchus & Associates Law Firm where he worked until July 2011.

[10] In August 2011, Mr. Howe opened Howe Law as a sole practitioner focusing mainly on criminal defence matters. In June 2013, Ms. McCarthy joined the firm upon her admission to the Bar.

[11] From June 2010 to October 2011, the Society received five complaints against Mr. Howe. The Society's Complaints Investigation Committee (CIC) was responsible for directing and reviewing the investigation of complaints.

[12] On September 23, 2011, the CIC ordered a Practice Review of Mr. Howe and retained John Rafferty, Q.C. to conduct it.

[13] Mr. Rafferty filed his report on November 21, 2011.

[14] Mr. Rafferty's report discussed his review of random files in Mr. Howe's office as well as the complaints which had been made against him. According to Mr. Rafferty, Mr. Howe acknowledged that he needed to improve the way he conducted his practice and limit the number of files he accepted. He also told Mr. Rafferty that he would no longer double book court dates.

[15] Mr. Rafferty filed a supplemental report on November 23, 2011. Mr. Rafferty planned for the report to be a review of Mr. Howe's conduct at a scheduled trial involving charges of driving under the influence. However, on November 21, 2011, Mr. Howe was charged with sexual assault and administering a noxious substance. As a result, the trial that Mr. Rafferty was to observe did not go ahead on the scheduled date. Mr. Rafferty's supplemental report primarily addressed the impact the criminal charges had on Mr. Howe's practice.

[16] On November 30, 2011, Victoria Rees, the Director of Professional Responsibility for the Society, wrote to Mr. Howe regarding the Practice Review enclosing a copy of Mr. Rafferty's reports which had been reviewed by the CIC. In her correspondence Ms. Rees informed Mr. Howe that the CIC was urging him to reflect seriously on Mr. Rafferty's comments and recommendations with respect to practise management improvement and scheduling issues.

[17] In January 2012, Mr. Howe voluntarily agreed to restrict his practice by not taking on any new files for clients charged with the same or similar criminal charges as those he faced at that time.

[18] The CIC finished its investigation of the outstanding complaints by July 2012. The CIC dismissed all but one of the complaints which resulted in Mr. Howe being counselled for not taking sufficient care to avoid misleading the Court.

[19] On February 26, 2013, Provincial Court Judge Alanna Murphy telephoned Ms. Rees to express concerns about Mr. Howe's conduct before the Court. One of the complaints was that Mr. Howe had been three hours late for a trial.

[20] On September 9, 2013, Ms. Rees wrote to Mr. Howe as follows:

> Over the past year, concerns have again come to the Society's attention with regard to your continuing to practice before the Courts in a manner which is disruptive, contrary to the interests of the proper and effective administration of justice, and contrary to the interests of some of your clients.
>
> On the basis of these concerns, the Executive Director has determined that reasonable grounds for an investigation … have been established.

[21] Ms. Rees went on to inform Mr. Howe that the Society had retained Elizabeth Buckle to assist with the investigation and requested that Mr. Howe attend at an interview with Ms. Rees and Ms. Buckle.

[22] On September 19, 2013, [J.B.] made a complaint to the Society about Mr. Howe arising from Mr. Howe's representation of him on a charge of impaired driving. Mr. [B.]'s complaints included:

- Mr. Howe not calling him when Mr. Howe could not be in court;
- not providing him with any written documentation of any kind;
- making court dates and not informing him; and

- blaming him (Mr. [B.]) for not appearing when Mr. Howe never informed him of the dates.

[23] On October 2, 2013, the Public Prosecution Service filed a complaint against Mr. Howe involving Crown Attorney Michelle James. In that complaint, the Public Prosecution Service alleged that Mr. Howe had made an inappropriate attempt to persuade a Crown witness from proceeding with a prosecution.

[24] On October 3, 2013, the CIC ordered a second Practice Review. The Society retained Stanley MacDonald, Q.C. to conduct this review.

[25] On January 13, 2014, Mr. MacDonald issued his Practice Review Report. In that report, Mr. MacDonald identified several areas of concern with Mr. Howe as gleaned from the outstanding complaints, including:

- misleading the court;
- failing to properly prepare for court;
- failing to keep clients informed;
- misrepresenting client instructions to the court;
- threatening a Crown witness;
- various appearances arising out of "overbooking" himself for various court appearances; and
- misleading a client with respect to a retainer and the costs of legal services.

[26] Mr. MacDonald expressed concerns about the manner in which Mr. Howe was conducting his practice:

> My concerns with respect to Mr. Howe's practice arise from the sheer volume of clients that he and Ms. McCarthy represent. In my experience, 280 to 300 clients is a very large caseload, even if it is split between two lawyers. In this case, one of those lawyers was admitted to the bar in 2013. Mr. Howe was admitted in 2010. Despite Mr. Howe's own views regarding his experience, neither Mr. Howe nor Ms. McCarthy are "seasoned" lawyers. They are just beginning their careers.

[27] Mr. MacDonald then went on to identify what he observed from the files as follows:

- no letters to clients;
- no memos to file;
- no documents reflecting instructions;
- no documents containing any analysis of disclosure materials;
- no opinions to clients with respect to their cases; and
- no written instructions with respect to admissions.

[28] Mr. MacDonald noted that those were just a few examples of what he considered to be deficiencies.

[29] Despite these concerns, Mr. MacDonald was of the view that Mr. Howe was capable of competently conducting trials and other criminal proceedings.

[30] On February 10, 2014, Ms. Buckle and Ms. Rees interviewed Mr. Howe. The interview commenced at approximately 1:30 p.m. and concluded at almost 7:00 p.m. During the course of that interview, Ms. Buckle and Ms. Rees questioned Mr. Howe about a number of the complaints against him, as well as what steps he had taken to implement the recommendations in the initial Rafferty Report.

[31] On February 21, 2014, the CIC met to consider the various outstanding matters involving Mr. Howe. The CIC invited Mr. Howe to attend a subsequent meeting with them to review matters. In advance of that meeting the Society retained Robert Wright, a Registered Social Worker, to conduct an "Impact of Race and Culture Assessment". In the Society's letter to Mr. Wright dated March 5, 2014, it described Mr. Howe as follows:

> … Mr. Howe presents as a very intelligent, knowledgeable, capable, hard working and articulate young lawyer. The Society and the Complaints Investigation Committee (CIC) believe Mr. Howe has the potential to be a very good lawyer. However, the complaints we have been investigating, and for which there is substantial evidence of serious ethical violations, alleged dishonesty and lack of integrity, poor communications and quality of service, failure to prepare for matters before the Courts, numerous significant conflicts of interest (usually by representing co-accused charged with the same or similar offences), and impairing the administration of justice through double and triple booking proceedings before various Courts. … Mr. Howe admitted to having "trust issues", which has impacted his interactions with his peers and others, and a belief that he has been and continues to be the subject of racial discrimination by

> lawyers, police and the Courts, which has also impacted his interactions and judgment.

[32] After setting out the issues with respect to Mr. Howe, the letter continued:

> It is the CIC's hope that with the benefit of your assessment, they will be able to better understand the range of factors contributing to Mr. Howe's conduct and poor judgment, to demonstrate cultural competency and sensitivity as appropriate, and take this into consideration when designing practice requirements, which will likely include the imposition of a practice supervisor. …

[33] On March 28, 2014, Mr. Wright issued his Impact of Race and Culture Assessment. In that report, Mr. Wright suggested that Mr. Howe needed to address the internal forces that were driving his behaviours:

> Addressing the internal forces that drive these behaviours should be the focus of Mr. Howe's attention. When his work and life become manageable this issue will simply cease to exist.
>
> Though I have not set out to diagnose Mr. Howe, my review of this matter and my conversations with him have led me to believe that counselling issues that are substantially based in issues of race, class, and systemic discrimination are at the heart of his difficulties with his practice. Speculating around the diagnosis would have little value in the context of this report. What is important is that Mr. Howe agree and acknowledge that he has some work to do in this area and to commit to a systemic plan and process to address his needs and for the barristers' society to either acknowledge or reject that explanation and then craft practice restrictions that are designed to support Mr. Howe to practice better.

[34] Mr. Howe did not follow-up on the suggestions contained in Mr. Wright's report.

[35] On April 10, 2014, Mr. Howe met with the CIC. At that time, the CIC outlined and discussed with Mr. Howe 20 proposed practice restrictions. Mr. Howe agreed with the proposed practice restrictions and on April 17, 2014, he signed an Agreement for Practice Restrictions.

[36] On May 31, 2014, Mr. Howe was found guilty of sexual assault. On June 2, 2014, he was suspended from the practice of law and Mr. Rafferty was appointed as Receiver for his practice.

[37] Mr. Howe appealed his sexual assault conviction to this Court.

[38] On June 12, 2014, Judge Anne Derrick (as she then was) wrote to the Society about Mr. Howe. In her letter, Judge Derrick expressed concerns about Mr. Howe's representation of three individuals and provided transcripts of the proceedings to show why she was concerned.

[39] On June 30, 2014, [K.S.] made a complaint to the Society about Mr. Howe's representation of her in criminal proceedings. Ms. [S.]'s complaint was very detailed. It took issue with the level of service provided by Mr. Howe, his failure to attend at court when she expected him to do so and the amount of money she had paid for his services.

[40] On July 4, 2014, Peter Mancini, Service Delivery Director with Nova Scotia Legal Aid, wrote to the Society complaining about Mr. Howe on behalf of a former client of Mr. Howe, [B.H.]. The Society laid charges against Mr. Howe arising from his representation of Mr. [H.].

[41] On July 29, 2014, Crown Attorney Bill Gorman, sent an email to the Society to advise of his concern that while Mr. Howe was suspended as a result of the sexual assault conviction he attended at a summary conviction appeal with Ms. McCarthy and provided advice with respect to the conduct of that appeal[2].

[42] On September 11, 2014, Ms. Buckle finalized her Investigation Report arising from her review of court transcripts and her interview with Mr. Howe. After a lengthy review of the matters involving Mr. Howe, Ms. Buckle concluded:

> I believe the evidence suggests breaches of the C*ode of Conduct* relating to Competence, Quality of Service, Conflicts and Candour with the court arising out of the matters brought forward by the Court. …

[43] The Society continued its investigation of Mr. Howe's conduct into 2014 and 2015. In late May, 2015, the CIC met to consider the investigation materials. It directed Ms. Rees to lay charges against Mr. Howe and on May 25, 2015, the Society issued charges and a Notice of Hearing to Mr. Howe. The charges included that Mr. Howe:

1. failed to carry on the practice of law and discharge all his responsibilities to clients, tribunals, the public, the Society and other members of the profession honourably and with integrity, and/or

[2] The charges arising from Mr. Howe's representation of Mr. [H.] and those arising from Mr. Gorman's email were withdrawn by the Society during the disciplinary hearing.

failed to be honest and/or candid with clients and inform them of all information known to him that may affect their interests;

2. failed to have and apply relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of his clients and the nature and terms of the engagements, and/or failed to provide competent, timely, conscientious, diligent and efficient quality of service to clients;

3. engaged in professional misconduct, in particular, by failing to follow the advice and guidance respecting his practice of law and ethical responsibilities provided by the Society's Practice Reviewers;

4. continued to act for clients when there was a clear conflict of interest between his clients;

5. failed to treat the courts with candour, fairness, courtesy and respect by permitting himself to be scheduled for court proceedings for multiple clients in different courtrooms, different cities and towns at the same time;

6. knowingly asserted facts as true when their truth could not be reasonably supported by the evidence;

7. attempted to improperly dissuade and/or wrongfully influence a witness not to testify;

8. approached and/or communicated with a person who was represented by other counsel.

[44] On September 4, 2015, this Court overturned Mr. Howe's criminal conviction (reported as 2015 NSCA 84). Mr. Howe applied for a lifting of his suspension. On September 15, 2015, the CIC lifted Mr. Howe's suspension and permitted him to practice subject to various terms, conditions and restrictions including a requirement for a practice supervisor. The CIC subsequently amended those conditions on October 22, 2015.

[45] Malcolm Jeffcock, Q.C. was appointed as Mr. Howe's practice supervisor.

[46] As noted earlier, the hearing into the complaints against Mr. Howe started on December 10, 2015. However, in June and July 2016, while the hearing was in progress, the Society investigated three other complaints against Mr. Howe.

[47] The CIC approved new charges against Mr. Howe arising from these complaints. The panel hearing the original charges allowed a motion to add the new charges to the ongoing hearing and on August 10, 2016 the Society amended the charges against Mr. Howe.

[48] The amended charges related to Mr. Howe's conduct in June and July 2016. The charges stated that Mr. Howe:

- failed to be honest and/or candid;
- misled and/or made misrepresentations to the court in misrepresentations he made to Judge Derrick and Justice Cacchione about his ability to attend court appearances, in two different courts on June 17, 2016;
- was unprepared to testify at a hearing where a former client was seeking to set aside guilty pleas on the basis of Mr. Howe's ineffective counsel;
- failed to be honest and/or candid, misled the CIC and/or made misrepresentations with respect to a file he was involved in;
- failed to ensure clients were appropriately served;
- failed to follow the CIC's order in relation to practice restriction;
- used disparaging language toward and about lawyers and judges;
- made unsupported or false allegations or representations;
- failed to respond to communications from a representative of the Society; and
- entered incomplete documents as exhibits.

[49] On September 1, 2016, the CIC suspended Mr. Howe as a result of information arising from another investigation. It approved additional, separate charges against Mr. Howe based on that investigation. These charges are being held in abeyance and are not the subject-matter of this appeal.

[50] During the course of the hearing Mr. Howe brought numerous motions, one of which was to have Panel Member, Donald Murray, Q.C. recuse himself from the proceedings. That motion was dismissed (Recusal decision reported as 2016 NSBS 3). Mr. Murray's failure to recuse himself is a ground of appeal in this proceeding.

[51] At the hearing, Mr. Howe argued that the Society's investigation into his conduct was tainted by racism and breached his Section 15 *Charter* rights. He asked that all of the evidence gathered by the Society be excluded. He also argued that he was not guilty of any of the charges laid by the Society.

[52] The Panel concluded in its Merits decision that Mr. Howe had not proven a breach of s. 15 of the *Charter* and denied his request for a s. 24 *Charter* remedy.

[53] It found that the Society had proven some but not all of the charges. The Panel found that Mr. Howe's breaches generally fell into three categories of behaviour: (1) integrity issues; (2) overbooking and failure to appear in Court; and (3) failure to follow practice and other directions from the Society.

[54] The Panel found that, in several distinct factual circumstances over a number of years, Mr. Howe breached his duty to act with integrity in his communication to the Courts, the Society and his clients. In its factum, the Society has provided a helpful summary of the Panel's findings regarding Mr. Howe's lack of integrity. The summary correctly outlines the Panel's findings and I repeat them here with some modifications:

(a) January 16, 2013 – Mr. Howe was not candid with the Court about Mr. [B.]'s absence from Court. The Panel found that Mr. Howe misled Judge Sherar because telling him the truth "would have meant admitting to the court that Mr. Howe had not been diligent enough in ensuring his client knew he was supposed to be in court that day" so "his version given to the court was a massaging of the facts to place blame on [Mr. [B.]]". The Panel found that Mr. Howe "fudged" the facts to avoid responsibility (Decision ¶124-125) ;

(b) March 15, 2013 – in the DF/MS and RM matters, Mr. Howe was inaccurate in his comments to Judge Tax and Judge Hoskins. After providing a thorough analysis of the facts of this case, the Panel found: "the nature of the occasion on which Mr. Howe's comments were made, the importance of the occasion with respect to his client's timely trial interests, and his ineffective effort to deflect responsibility, combine to persuade us to conclude – regretfully – that Mr. Howe's comments to Judge Tax and Judge Hoskins on March 15 were purposely false" (Decision ¶523);

(c) March 26, 2013 – Mr. Howe was dishonest with the Court and Mr. [B.] about the timing of the receipt of the therapist's report. Mr. Howe

negligently provided an unhelpful report to the Court without reviewing it with Mr. [B.]. The Panel found that the "only rational explanation for doing so is that Mr. Howe was scrambling to save face with the court and to gain a further adjournment, and thus he pulled the letter from the file and tendered it to the court" (Decision ¶140);

(d) April 9, 2013 – in the KS & KW and JC conflict matter, Mr. Howe misled the Court by stating that he had "waivers" and insinuating that the Society was in support of his position to stay on the file as counsel. The Panel found that "it was deceptive and misleading on the part of Mr. Howe to tell that he had spoken with the Society and could assure the Court that no issues were going to arise, given that he clearly knew the Society's actual, and contrary, position" (Decision ¶496);

(e) April 16, 2013 – Mr. Howe deliberately lied to Judge Gabriel about what happened in Court that morning before Judge Murphy. After reviewing the facts behind this incident, the Panel found that, in an attempt to minimize his liability for not being prepared before Judge Murphy, Mr. Howe lied and was deliberately untruthful to Judge Gabriel. The Panel then noted: "What happened here is something we saw similar evidence of throughout the proceedings before us" (Decision ¶197);

(f) March 4, 2014 – Mr. Howe failed to act with integrity in his response to the Society regarding his receipt of the therapist's report in the Mr. [B.] matter, and that he reviewed the matter with his client (Decision ¶147);

(g) June 5 – July 21, 2014 – the Panel considered three matters and found that following his suspension, "Mr. Howe deliberately and repeatedly violated the [Society's Guidelines Respecting Lawyers' Voluntary or Involuntary Cessation of Practice]" (Decision ¶374-380);

(h) June 10, 2016 – Mr. Howe was dishonest with Judge Derrick when he indicated that he was available to attend court on June 17, 2016. The Panel found that Mr. Howe made a calculated decision and "intentionally created a conflict to give him a reason to avoid either one or both sentencings the following week. This is significant misconduct" (Decision ¶235);

(i) June 12, 2016 – Mr. Howe inaccurately advised Justice Cacchione in a letter that he was "newly retained" in the Mr. [D.] and Mr. [K.]

matters. Mr. Howe failed to advise Justice Cacchione that he was no longer available to attend the scheduled Court appearance for the afternoon of June 17, 2016. The Panel held that "this material non-disclosure in the correspondence to the Supreme Court on June 12 demonstrates a singular lack of candour." (Decision ¶228);

(j) June 17, 2016 – Mr. Howe failed to attend Mr. [K.]'s sentencing hearing in the afternoon and failed to advise Justice Cacchione that he was unable to attend that afternoon even though he was before him in the morning. The Panel found that Mr. Howe "made a strategic decision not to raise the status of [K.]'s sentencing with either Ms. Driscoll or Justice Cacchione while they were assembled on the morning of June 17." (Decision ¶226);

The Panel found that Mr. Howe was "manipulating the Supreme Court through a lack of candour. He was, frankly, attempting to play the Court." (Decision ¶229);

The Panel held that it was "regrettably plain and evident that Mr. Howe saw nothing wrong on June 17 with abusing the Supreme Court…Mr. Howe engaged in a cost-benefit analysis as to how candid to be with the Court…" (Decision ¶231);

(k) June 17, 2016 – Regarding Mr. Howe's letter to Justice Cacchione, the Panel found that Mr. Howe gave a "deliberate falsehood" when he informed Justice Cacchione in a letter that he was "compelled" to testify by Judge Derrick. The Panel found that: "Even as he pretended an apology, he was endeavouring to escape responsibility for his own calculated behaviour." (Decision ¶234); and

(l) July 8, 2016 – in the *R. v. Domoslai* matter, Mr. Howe told the Court that he was not "…up to speed with exactly why the discharge (of Ms. McCarthy) took place…" while he testified to the Panel that he was aware of the reason. This comment demonstrated that Mr. Howe was not honest and accurate with the court and thus again in breach of clause 17 of the practice conditions to be honest and accurate with the Court. (Decision ¶426).

[55] As noted earlier, the Panel, in its Sanction decision, disbarred Mr. Howe for a period of five years commencing on October 20, 2017. He was also ordered to pay costs to the Society in the amount of $150,000.00.

[56] Mr. Howe's appeals from the Merits and Sanction decisions were heard on April 3 and 4, 2019. During the appeal hearing, Mr. Howe raised the issue of the quantum of costs and the fact that he would be required to pay the costs prior to him being reinstated. At the conclusion of the hearing we asked the parties for submissions on whether we could vary the costs award as the issue was not raised in Mr. Howe's Notice of Appeal nor his factum.

[57] The Society consented to this Court varying the Panel's Sanction decision to the extent it made the repayment of costs a condition precedent to Mr. Howe's reinstatement.

[58] In July 2019, this Court identified another issue relating to the Sanction decision: in particular, whether Mr. Howe's race, colour or ethnic background could be factors in mitigating sentence. We requested further submissions on that issue which were received in August and September 2019.

[59] With this backdrop I will now turn to the issues on the appeal. I will add further factual context as necessary when addressing the individual grounds of appeal.

Issues

[60] Mr. Howe's Notice of Appeal raises seven grounds of appeal with a number of issues identified under each ground of appeal. In his factum he distils the grounds of appeal down to four grounds as follows:

> (a) Has there been a violation of Mr. Howe's s. 15 *Charter* rights;
>
> (b) Is there a reasonable apprehension of bias of the panel, particularly the pecuniary interest of Murray;
>
> (c) Have there been errors of law amounting to a violation of the Appellant's substantive and procedural rights; and
>
> (d) Has the panel ordered and imposed an unfit and unreasonably disproportionate sentence amounting to an error of law.

[61] I would restate the grounds of appeal and review them in the following order:

1. Did the Panel err in concluding that there was no breach of Mr. Howe's s. 15 *Charter* rights? Under this ground of appeal Mr. Howe identifies a number of sub-issues. I will also address some of those issues in this order:

(i) "Bring the hood into practice";

(ii) There were no effective steps taken by the Society to address the systemic discrimination issue raised by Mr. Howe;

(iii) Hypervigilance;

(iv) *R. v. Le*, 2019 SCC 34;

2. Did the Panel err in law or act in a procedurally unfair manner by allowing Mr. Murray to remain on the Panel;

3. Did the Panel err in law by failing to consider material evidence;

4. Did the Panel misinterpret the provisions of the *Code of Conduct* for Charge #6; and

5. Was the Panel's sentence unfit and unjust?

[62] I have attempted to address the arguments which Mr. Howe emphasized in his oral and written submissions. However, at the outset I would comment that if I have not made reference to an argument it is not because I have not considered it, it is because it was not material to this appeal.

Issue #1 Did the Panel err in concluding that there was no breach of Mr. Howe's s. 15 *Charter* rights

Standard of Review

[63] Mr. Howe, in his factum, takes the position that the standard of review of the *Charter* issue is correctness; the Society says it is reasonableness. With respect, neither of those standards of review apply in these circumstances. As I will set out in more detail later, Mr. Howe takes no issue with the Panel's expression of the law which it must apply when determining the *Charter* issue. His concern is with the Panel's findings that the facts of this case do not give rise to a *Charter* violation.

[64] Mr. Howe has a statutory right of appeal pursuant to the *Legal Profession Act*:

> 49. (2) A party may appeal to the Nova Scotia Court of Appeal on <u>any question of law</u> from the findings of a hearing panel, following the rendering of a decision pursuant to subsections 45(4) or (5) or from a decision of the Complaints Investigation Committee under Section 37 or 38.

[Emphasis added]

[65] In *Nova Scotia Liquor Corporation v. Nova Scotia (Board of Inquiry)*, 2016 NSCA 28, this Court was addressing an appeal from a Human Rights Tribunal decision. Section 36(1) of the *Human Rights Act,* R.S.N.S. 1989, c. 214, as amended, like the *Legal Profession Act*, only allows an appeal "on a question of law". Bourgeois, J.A., writing for the Court, explained the deference afforded to findings of fact on such an appeal. Although that case did not involve *Charter* considerations, it did involve quasi-constitutional provincial human rights legislation. The Court held:

> [23] As will be expanded upon in the analysis to follow, some of the issues raised on this appeal challenge findings of fact made by the Board. Given the scope of s. 36(1), this poses difficulty for those seeking to advance such arguments. In *International Association of Fire Fighters, Local 268 v. Adekayode,* 2016 NSCA 6, Fichaud, J.A. considered s. 36(1) and noted that the door to reviewing the factual findings of a board of inquiry may only be cracked where there is **no evidence** upon which such conclusions could have been reached. He wrote:
>
> > [42] This appeal also challenges the Board's findings of fact. Where, as here, the statutory right of appeal is limited to an issue of law, **the Court may review a finding of fact only if there is *no* supporting evidence from which the finding may be made or the inference reasonably drawn**. That is because a finding based on no evidence is arbitrary, and a tribunal errs in law by acting arbitrarily in any aspect of its process, including fact-finding. The standard of review would be reasonableness (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226, paras. 34, 38-9, 42), though it is difficult to conceive how an arbitrary finding could be reasonable. **Alternatively, if there is *some* evidence, then the tribunal's factual findings and inferences are not appealable under the statute, nor are assessments of credibility, meaning the standard of review is not an issue**. *Fashoranti v. College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 25 (CanLII), paras. 20-21, leave denied Sept. 3, 2015 (S.C.C.); *Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26 (CanLII), paras. 12-17, and authorities there cited. See also *Nova Scotia v. Play it Again Sports Ltd.*, para. 50.

[Emphasis in original]

[66] The Court went on to state:

> [25] This is clearly an appeal of an administrative decision. However, the NSLC and Commission submit that *Housen v. Nikolaisen,* 2002 SCC 33, applies to at least portions of their proposed standard of review analysis, saying that factual findings made by the Board should be reviewed for "palpable and overriding error."
>
> [26] Such submissions miss the mark on two counts. Firstly, factual findings or inferences drawn therefrom will not, absent the narrow circumstances noted above, be the fare of appeals to this Court. Secondly, *Housen* has no place in the review of decisions from a board of inquiry under the *Human Rights Act*, or any other administrative body. One instead looks to *Dunsmuir v. New Brunswick,* 2008 SCC 9, and the decisions which have followed therefrom, for the standard of review—it is correctness or reasonableness.

[67] In conclusion on this point Bourgeois, J.A. held:

> [40] In challenging the Board's conclusion [on discrimination under provincial human rights legislation], the NSLC has not suggested that there was no evidence upon which the factual conclusions could have been made, but rather the evidence was misinterpreted or misapplied. With respect, unless an error of law is apparent elsewhere in the reasons, this Court cannot intervene.

[68] Similar considerations apply in this case. Mr. Howe is arguing that the Panel misinterpreted, misapplied or overlooked evidence in making its factual findings. We can only interfere if there was no evidence upon which the factual conclusions could have been made.

Analysis

[69] Mr. Howe's allegation that s. 15(1) was breached was intertwined with his allegations of bias, discrimination and differential treatment. The Panel summarized his complaints as follows:

> 22. Mr. Howe eventually consolidated his complaints in relation to race, racial bias, differential treatment, and lack of cultural sensitivity or awareness, into a specific position with his *Notice of Charter Motion,* dated February 27, 2017. That *Notice* has since gone through some proposed amendments, upon which we have ruled. Those allegations that remain to be adjudicated are that:
>
> 1. The Society "acted in a conflict of interest in the investigation and in the conduct of the proceeding and acted in a discriminatory manner towards Lyle Howe from September 2011 to the present";
>
> 2. The Society "acted in a conflict of interest, and acted in a discriminatory manner and without transparency in the investigation of the PPS Complaint, interactions with Crown Attorneys providing information to" the Society, "and

> the information provided by Dartmouth Provincial Court Judges", and furthermore,
>
> > (a) relied upon double standards compared to other members of the Bar;
> >
> > (b) used an unfair standard to justify the unprecedented scope of its investigation and perception of Mr. Howe's conduct;
> >
> > (c) failed to apply practice standards and norms present in the Halifax criminal defence context, which amounted to adverse impact discrimination;
>
> 3. The Society failed to disclose the retention of Elizabeth Buckle "and the reasons thereof, in a reasonable time";
>
> 4. The Society "retained and instructed Agents, in particular Malcolm Jeffcock, practice supervisor, for an ulterior purpose";
>
> 5. The Society "failed to investigate Lyle Howe in an [sic] manner that is objective and consistent with the *Legal Profession Act* and Charter Values";
>
> 6. The Society "failed to act in the public interest in the investigation. . . and in the conduct of the proceedings against Lyle Howe".

[70] In effect, Mr. Howe argued that he was subject to differential treatment because of his race resulting in an unfair investigation, unfair allegations and an unfair hearing. He argued that this amounted to a violation of his right to equality under s. 15(1) of the *Charter*, and that the proper remedy was to exclude or discount the evidence upon which the Society relied in the disciplinary hearing.

[71] Mr. Howe repeats these same arguments before this Court.

[72] In *International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6, this Court reviewed the authorities on what constitutes discrimination pursuant to s. 15(1) of the *Charter*. Fichaud J.A., writing for the Court, said:

> [64] In *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, an authority missing from Local 268's factum, Justice Abella, speaking for five justices on the meaning of discrimination in s. 15(1) of the *Charter*, said:
>
> > 324 *Kapp*, and later *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, restated these principles as follows: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (*Kapp*, at para. 17; *Withler*, at para. 30). As the Court said in *Withler*:

> The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. [para. 39]

325 In referencing prejudice and stereotyping in the second step of the *Kapp* reformulation of the *Andrews* test, the Court was not purporting to create a new s. 15 test. *Withler* is clear that **"[a]t the end of the day there is *only one question*: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?"** (para. 2 [italics in *Quebec v. A*]). **Prejudice and stereotyping are two of the indicia that may help answer that question; they are not discrete elements of the test which the claimant is obliged to demonstrate**, as Professor Sophia Moreau explains:

> Such a narrow interpretation will likely have the unfortunate effect of blinding us to other ways in which individuals and groups, that have suffered serious and long-standing disadvantages, can be discriminated against. This would include cases, for instance, that do not involve either overt prejudice or false stereotyping, but do involve oppression or unfair dominance of one group by another, or involve a denial to one group of goods that seem basic or necessary for full participation in Canadian society.
>
> ("*R. v. Kapp*: New Directions for Section 15" (2008-2009), 40 *Ottawa L. Rev*. 283, at p. 292)

326 Prejudice is the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member. Stereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities. Attitudes of prejudice and stereotyping can undoubtedly lead to discriminatory conduct, and discriminatory conduct in turn can reinforce these negative attitudes, since "the very exclusion of the disadvantaged group ... fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces, for example, that women 'just can't do the job'" (*Action Travail* [*Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114], at p. 1139). ...

327 **We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them.** Such an approach improperly focuses attention on whether a discriminatory *attitude* [italics in *Quebec v. A*] exists, not a discriminatory impact, contrary to *Andrews* [*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143], *Kapp* and *Withler*. ...

329 ... **prejudice and stereotyping are neither separate elements of the *Andrews* test, nor categories into which a claim for discrimination**

> **must fit.** A claimant need not prove that a law promotes negative *attitudes*, [italics in *Quebec v. A*] a largely unquantifiable burden.
>
> [Emphasis in original]

[73] The authorities cited by Justice Fichaud established that there is "one question" under s. 15(1) of the *Charter*. To paraphrase it to fit the circumstances of this case: did the actions of the Society violate the norm of substantive equality in s. 15(1) of the *Charter*?

[74] The Panel referred to *Adekayode* in setting out its approach in determining whether Mr. Howe had experienced discriminating impacts:

> [39] Therefore, in approaching our task of determining whether there have in fact been discriminatory impacts to Mr. Howe, we will consider whether race or colour or ethnicity could have been a factor, or could have been an influence, in the behaviour of others towards him. We believe that this approach is consistent with the approach to findings of discrimination pursuant to s. 15 of the *Charter*: … *Adekayode*… At the end of the analysis there is really only one question to be answered: Does the behaviour of the individual or institution violate the norm of substantive equality on a relevant ground?
>
> [Emphasis added]

[75] Nowhere in his factum nor in his oral argument does Mr. Howe challenge the Panel's expression of the legal test under s. 15 of the *Charter*. For good reason – the Panel properly identified the question it had to determine in assessing whether the Society violated Mr. Howe's rights.

[76] The Panel made several factual findings in the course of its deliberations on the *Charter* issue. One key finding was that as of March 5, 2014, the date the Society wrote to Mr. Wright to request the Race and Culture Assessment, Mr. Howe's race, colour and cultural location were factors in every subsequent decision made by the Society about him:

> [68] By early 2014, the Society was considering what to do about various complaints and comments and reports relating to Mr. Howe's behaviour as a lawyer. Mr. Howe was involved with Ms. Rees and the Complaints Investigation Committee on a regular and ongoing basis. The Society decided, with some initial adherence by Mr. Howe, to consider the preparation of a Race and Culture Assessment. **We understand and believe that the assessment was initiated, at least by the Society, to assist in making decisions about how to move forward with Mr. Howe**. While Mr. Howe quibbles with the legitimacy of some of the

> rationales outlined in the letter of March 5, 2014: Ex.2, vol. I, Tab 47, and criticizes its focus on him being the problem to be managed, the relevance of the Race and Culture Assessment to us is different. For us it shows conclusively that from at least March 5, 2014, on, Mr. Howe's race, colour, and cultural location, were factors in every subsequent decision made by the Society about him.
>
> [Emphasis added]

[77] The Panel then asked itself whether the Society's consideration of Mr. Howe's practice issues, in light of his race, had any discriminating impact:

> [69] We believe that it was at this stage, in March 2014, that the Society made a critical choice in relation to how it dealt with Mr. Howe. This was when the Society first explicitly considered that the practice issues being noticed might have something to do with Mr. Howe's adjustment to the ways of the profession, and that this adjustment process might require some consideration, and perhaps accommodation, of his cultural and racial location. **From at least that point in time, race and colour and culture and ethnicity became explicit factors in the Society's interactions with Mr. Howe. To pretend otherwise would be to be blind. The remaining question is whether any discriminatory impact resulted from this decision by the Society to consider Mr. Howe's identified practice issues in light of his race, colour, and cultural location.**
>
> [Emphasis added]

[78] Not only did the Panel find that there was not any failure by the Society to accommodate Mr. Howe's race, color or ethnic background, it found that the Society made a number of attempts to help Mr. Howe with the management of his practice with limited success:

> [72] We do not believe that there was any failure by the Society to accommodate Mr. Howe's racial, colour, or ethnic background. The evidence appears to us to demonstrate that the Society made several attempts to assist Mr. Howe with the management of the kind of practice that he wanted to develop – though these efforts met with limited success. The most obvious demonstration of these efforts from the Society's point of view were the successive "practice agreements" signed between Mr. Howe and the CIC: …

[79] The Panel expressly found that Mr. Howe resisted offers of professional guidance and support with respect to a number of practice areas:

> [78] Mr. Howe has resisted offers of professional guidance and support from senior members of the Bar in terms of his practice location, client load (number), client scope (types of matters), and attitude (professional collegiality). Indeed, the

> palpable antipathy between Mr. Howe and some other members of the racialized Bar were obvious to us during this process – not only in the course of receiving evidence, but also explicitly in some arguments made to us by Mr. Howe.

[80] The Panel then directly addressed Mr. Howe's arguments that the Society and individuals acting on its behalf were racially biased:

> [83] We also do not see race or colour or cultural location as factors in Elizabeth Buckle, Malcolm Jeffcock, the CIC, or the Society, giving advice to, or in exercising oversight of, or in formulating professional conduct charges against, Mr. Howe. Each of these actors or institutional players from time to time made decisions, or gave advice, or made reports, which disappointed Mr. Howe. Each was performing a legitimate statutory task or service. Disappointment and disagreement by Mr. Howe with the conclusions of those persons or bodies are not the tests for whether something violates the aspirational value of equality in s.15 of the *Charter*.

[81] The Panel concluded that Mr. Howe had not proven a material violation of s. 15 of the *Charter* in relation to the investigation or prosecution of these complaints (¶87). Although the Panel uses the adjective "material" violation of s. 15 of the *Charter*, nothing turns on their use of that word. It is apparent from the Panel's review of the law they cited, and the facts they found, there had been no violation of Mr. Howe's s. 15 *Charter* rights.

Bring the hood into practice

[82] To address this issue some further background is necessary. Mr. Howe, in submissions before the Panel and this Court, repeatedly portrayed Ms. Rees as being the chief architect of what he perceived to be a racially-driven vendetta to drive him from the profession.

[83] Mr. Howe spent a considerable amount of time, in both his factum and his oral argument, addressing the "bring the hood into practice" comment, which he attributed to Ms. Rees. Her use of this term, he argued, was a blatant example of her racial profiling and prejudice toward him.

[84] On February 26, 2014, Ms. Rees sent an email to Stan MacDonald and Elizabeth Buckle. She wrote to inform them of the Society's proposal to have Robert Wright conduct a race-impact assessment on Mr. Howe. In the email, she made what has been referred to as the "bring the hood" into practice comment. To put the comment into context, I will quote the full paragraph in the email:

> I have followed up with Emma Halpern, our Equity Officer, about a resource for the CIC on cultural competency. She has come up with a brilliant idea. Dr. Robert Wright is a public rep on our Race Equity Committee, a psychologist and an excellent facilitator of cultural competency training. He has developed a new Race Impact Assessment which was used in the criminal justice system twice last year. It is not unlike a PSR of sorts. The purpose is to meet with the member, help them identify and understand their background and cultural issues and the potential impact these have on current behavior, and how to better cope with this. It is often enlightening and educational, both for the member, as well as the decision-makers in receipt of the report. <u>As Dr. Wright aptly has said, he's often seen problems when professionals "bring the hood" into practice</u>.
>
> [Emphasis added]

(Although Ms. Rees refers to him as "Dr. Wright", Mr. Wright is not a doctor).

[85] In her evidence at the hearing, Ms. Rees indicated that she had spoken with Mr. Wright to discuss the purpose of the assessment. The email comment in question was her recounting the conversation she had had with Mr. Wright. She testified she was relaying Mr. Wright's words in the quotation marks.

[86] During his testimony, Mr. Wright was asked whether he recalled making that statement and he responded:

> A. I didn't initially but was reminded of it both in conversations I've had with Ms. Rees and with Ms. Hickey, and in conversations I've had with you. I didn't initially remember it but then when I was reminded of it, I guess remembered and accepted that, yes, I probably said something to that effect.

[87] In his report to Ms. Rees dated March 28, 2014, he discussed the great interpersonal struggles for professional blacks as follows:

> One of the great intrapersonal struggles for professional Blacks today is how they construct their racial identity. Will they seek peaceful integration into the largely white professional class and run the risk of being perceived as and feeling like an "Uncle Tom" and race traitor, or will they seek to maintain their identity and solidarity with the still impoverished, marginalized, and criminalized elements of their community and run the risk of being perceived as too radical and unstable to be truly "a professional", particularly by white members of the professional class of which they are a member? …

[88] Mr. Wright was called by Mr. Howe's counsel to give evidence before the Panel. While being questioned about the "bring the hood into practice" comment, Mr. Howe's counsel referred Mr. Wright to the section of his Report which I have

cited above. Mr. Howe's counsel questioned Mr. Wright about the context in which he made the "bring the hood" comment. During the course of his testimony, Mr. Wright said the following:

> Q. … and if I could turn you to page five of the report, page 401 of the exhibit. And if you go to the second substantive paragraph … I'll count down the lines; one, two, three, four, five, six where it begins with "Risk …"
>
> A. Yes.
>
> Q. Does that at all refresh your memory with respect to the context in which that comment was made?
>
> A. Well, I think certainly the report … and I've gone back and forth between being reminded of the statement and this segment of the report. And this struggle of identity and the difference and the distance between life in the community and life in the professions, this kind of describes it fairly well. Risk of being perceived as too radical and unstable to be truly a professional.
>
> That this distance that exists between the way a person lives within their community, life on the street, if you would, and their life in the professions for … you know, that this is the challenge that I'm speaking of here, which I suppose could be described there at that phrase, bringing the hood into practice, bringing … just recognizing the difference in those two locations.
>
> Q. And does recognizing the difference in those two locations, could that imply that it's about a perception of bringing the hood as opposed to an actual bringing the hood into practice?
>
> A. I'd say that the phrase "bringing the hood into practice" is certainly a more colourful phrase. When I talk about the distance and the location from, you know, the … this … when I talk about the struggle of maintaining identity and solidarity with impoverished, marginalized, and criminalized elements in their community, and running the risk of being perceived as too radical and unstable to be truly a professional, that this fear of being perceived is what I'm speaking about here in the report.

[Emphasis added]

[89] In closing argument before the Panel, the Society's counsel spent a considerable amount of time on this issue and asked the Panel to compare the language in Mr. Wright's report, which I have set out above, and Ms. Rees' email, which contained the impugned comment. The Society invited the Panel to conclude that the wording was as Mr. Wright said – his words and not those of Ms. Rees.

[90] Mr. Howe put much emphasis on the fact that the Panel did not address the comment directly in their decision. The Panel was obviously aware of the comment and its conclusion that it did not see race or colour or cultural location as factors in the Society "giving advice to, or in exercising oversight of, or in formulating conduct charges against Mr. Howe" (¶83). The Panel, in coming to this conclusion, obviously disagreed with Mr. Howe that it was Ms. Rees' comment or that it was evidence of racial stereotyping.

[91] Mr. Howe, in his factum to this Court, spent a lot of time (approximately 65 paragraphs), reviewing the evidence pertaining to Ms. Rees, including a continued insistence that the comment "bring the hood" into practice were her words, not Mr. Wright's. His attribution of the comment to Ms. Rees is simply not supported by the evidence.

[92] Upon review of this evidence and Mr. Howe's arguments, the Panel concluded that race was not a factor in the Society's oversight of Mr. Howe.

[93] Although the Panel did not mention the comment in its decision, administrative tribunals do not have to consider and comment upon every issue or evidence raised by the parties in their reasons.

[94] I do not consider the Panel's failure to specifically mention this comment to have any impact on its ultimate conclusion.

There were no effective steps taken by the Society to address the systemic discrimination raised by Mr. Howe

[95] In his factum, Mr. Howe alleges that the Society took no effective steps to address systemic racism (¶50).

[96] As earlier referenced, the Panel found that by early 2014 Mr. Howe's race, color and cultural location were factors in every subsequent decision made by the Society. It retained Mr. Wright at its own expense and on its own initiative. The Panel found this was to allow the Society to consider and perhaps accommodate his cultural and racial location (Merits decision, ¶68-69).

[97] Mr. Wright, who was called by Mr. Howe as an expert witness, was complimentary of the Society's work in promoting racial equity:

> Q. And indeed, is it fair to say from your experience, that the efforts being made by the Nova Scotia Barristers' Society in equity initiatives places it as a leader among a variety of other professions even across the country?
>
> A. Yes, certainly a leader among other legal regulatory boards in Canada. The racial equity work here stands head and shoulders above the work that is happening in other parts of the country in that profession, yeah.

[98] The Panel addressed Mr. Howe's argument on this point, it was satisfied the Society took effective steps to address the issue of the impact of race on Mr. Howe's behavior.

Hypervigilance

[99] The Society's alleged hypervigilance towards Mr. Howe was front and centre before the Panel and before us. The Panel described his argument as follows:

> 64. Mr. Howe argues that complaints about deficiencies in his practice are the result of specific and increased focus on him, and demonstrate that he is being held to a different standard than similarly situated lawyers. We understand that unless someone goes looking, or a client makes a specific complaint, the kind of things spoken about by Mark Bailey are unlikely to be noticed by the Society in anyone's practice. The fact that those kinds of things were noticed in relation to some of Mr. Howe's clients does reflect the heightened level of scrutiny that was given to him.

[100] Again, the Panel recognized Mr. Howe's point regarding the Society's alleged hypervigilance:

> 73. We certainly appreciate that from Mr. Howe's point of view, the practice agreements were restrictive and likely felt paternalistic. They imposed obligations which, he believed, were unique to him. They demonstrated, in his view, an institutional hyper-vigilance towards his practice that was not applied to other lawyers of similar vintage at the Bar. He attributes the hyper-vigilance to his race, colour, and cultural location.

[101] The Panel disagreed with Mr. Howe's attribution of the alleged hypervigilance to his race. It pointed out the flaw in Mr. Howe's perspective and his complaint that the practice agreements he was required to enter into were restrictive and paternalistic:

> 74. The flaw in Mr. Howe's perspective about hyper-vigilance and the practice agreements is that the kind of expectations and obligations that they

> imposed are not substantially different than the obligations that any lawyer of less than 5 years at the Bar would expect if working within a firm under the supervision of more senior members of the Bar. Because Mr. Howe was operating his own firm at most of the relevant times, and was the senior lawyer in his firm at most of the relevant times, he did not have a more senior lawyer "in house" to do the supervising.

[102] Mr. Howe refers to unprecedented scrutiny and over-supervision from the Society. He states: "All of the dishonesty charges were investigated by the NSBS without a formal complaint of dishonesty from an outside source". However, the matters before the Panel were the result of complaints or concerns expressed from a variety of sources: former clients ([J.B.], [K.S.], [B.H.]through his counsel Peter Mancini), the Public Prosecution Service, and two Provincial Court Judges).

[103] The Panel found that by 2014, there were clear problems with how Mr. Howe was managing his practice and they were too pervasive for the Society to ignore:

> 70. Regardless of how the information came to light, and regardless of their scope or volume, by 2014 there clearly were problems with how Mr. Howe was managing his practice. These problems were acknowledged by Mr. Howe, they were obvious on external observation, and they were too pervasive for the Society to ignore. Mr. Howe's choice of how to behave was affecting the orderly functioning of the courts, other counsel, and the public.

[104] The Society's investigation of Mr. Howe's actions in June 2016 during the hearing only arose after the publication of media reports, including reports that Justice Cacchione was "furious" that Mr. Howe did not appear for a sentencing hearing.

[105] There was significant scrutiny of Mr. Howe. However, the Society did not initiate its investigations without reason. The Society was responding to numerous complaints and concerns about Mr. Howe's practice – concerns regarding behaviours that Mr. Howe earlier acknowledged and agreed to change but did not.

R. v. Le, 2019 SCC 34

[106] Mr. Howe requested and was granted permission to make submissions on the recent Supreme Court of Canada decision in *R. v. Le*, 2019 SCC 34. The Society was given an opportunity to respond to those submissions but declined.

[107] I have reviewed Mr. Howe's submissions on *R. v. Le* and, with respect, they are inapplicable to this case. Mr. Howe simply uses *R. v. Le* to reargue points which I have already addressed under this ground of appeal.

[108] *Charter* decisions are not made in a factual vacuum. Mr. Howe conveniently avoids the significant volume of evidence that was before the Panel and that the Panel considered in making its decision. As explained earlier, it made findings of fact which provide no support Mr. Howe's assertion that race was a factor in the Society's investigation.

[109] I am not satisfied that *Le* has any application to the facts before us and it is not necessary to address it further.

Conclusion on this Ground of Appeal

[110] The Panel carefully considered Mr. Howe's allegations of unequal treatment by the Society. It determined that race and background were not factors that led to or permeated the disciplinary proceedings:

> 77. We appreciate that there are ongoing issues of access and support for racialized lawyers in this province. Lawyers from racialized communities can gain admission to the legal profession, but then bump up against barriers in terms of finding mentorship and securing practice opportunities. Based on the evidence, that has not been Mr. Howe's experience. He has had the opportunity to practice in several supervised, private practice settings. He was offered mentorship by a senior lawyer from the numerically limited community of black lawyers. He has had the opportunity in his daily practice to interact with black legal adversaries and colleagues about issues that arise in his chosen field of criminal law. Mr. Howe has largely spurned those opportunities for mentorship and supervision, or paid mere lip service to them.
>
> 78. Mr. Howe has resisted offers of professional guidance and support from senior members of the Bar in terms of his practice location, client load (number), client scope (types of matters), and attitude (professional collegiality). Indeed, the palpable antipathy between Mr. Howe and some other members of the racialized Bar were obvious to us during this process – not only in the course of receiving evidence, but also explicitly in some arguments made to us by Mr. Howe.

[111] The Panel concluded its findings by stating:

> 83. We also do not see race or colour or cultural location as factors in Elizabeth Buckle, Malcolm Jeffcock, the CIC, or the Society, giving advice to, or in exercising oversight of, or in formulating professional conduct charges against, Mr. Howe. Each of these actors or institutional players from time to time made

> decisions, or gave advice, or made reports, which disappointed Mr. Howe. Each was performing a legitimate statutory task or service. Disappointment and disagreement by Mr. Howe with the conclusions of those persons or bodies are not the tests for whether something violates the aspirational value of equality in s.15 of the *Charter*.

[112] The Panel properly set out the test for discrimination, examined and applied the evidence to the test, and determined that the test had not been met.

[113] The above conclusion was premised on the detailed factual findings made by the Panel as outlined in the Merits Decision. Those factual findings are not questions of law subject to statutory appeal.

[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.

Issue #2 Did the Panel err in law or act in a procedurally unfair manner by allowing Mr. Murray to remain on the panel?

Standard of Review

[115] In *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24, Saunders, J.A. succinctly set out the standard of review when there is an allegation of a reasonable apprehension of bias:

> [20] A reasonable apprehension of bias is an issue of procedural fairness and, where found, results in a loss of jurisdiction. Therefore, the complaint that such an appearance of partiality exists, is seen to raise a question of law. Accordingly, our review for bias (whether apparent or actual) is carried out on a correctness standard. No deference is paid to the decision-maker's ruling.

[116] We must decide whether the Panel was correct when it held that a reasonable apprehension of bias did not arise in the circumstances and dismissed Mr. Howe's motion to recuse Mr. Murray.

Analysis

[117] In his motion before the Panel, Mr. Howe raised four grounds upon which Mr. Murray could be seen to have a reasonable apprehension of bias. On this

appeal, he limits the reasonable apprehension of bias to the pecuniary interests of Mr. Murray. In his factum Mr. Howe says the following:

> [238] **We ask the court to review the fresh evidence placed before the court wherein there is evidence of Murray's criminal practice after the disbarment of the Appellant**. This further supports the position that there was a pecuniary interest in this case that […] a reasonable member of the public would not view this situation as [bringing] the administration of justice into disrepute.
>
> [Emphasis added]

[118] Although Mr. Howe contemplated bringing a fresh evidence application, he did not submit any fresh evidence and there was nothing for this Court to consider with respect to Mr. Murray's criminal practice after the disbarment of Mr. Howe. Therefore, I cannot comment on what the fresh evidence was or was intended to have shown.

[119] I will focus on Mr. Howe's argument that Mr. Murray's bias was his pecuniary interest.

[120] *MacLean*, *supra*, described the legal principles engaged when there is a reasonable apprehension of bias. They are as follows:

> [39] First, as a matter of law, there is a strong presumption of judicial impartiality, which is not easily displaced. Second, there is a heavy burden of proof upon the person making the allegation to present cogent evidence establishing "serious grounds" sufficient to justify a finding that the decision-maker should be disqualified on account of bias. Third, whether a reasonable apprehension of bias exists is "highly fact-specific". Such an inquiry is one where the context, and the particular circumstances, are of supreme importance. The allegation can only be addressed carefully in light of the entire context. There are no shortcuts. See *Wewaykum Indian Band v. Canada*, 2003 SCC 45.
>
> [40] The "test" regarding what constitutes a reasonable apprehension of bias appears in the oft-quoted dissenting judgment of de Grandpré, J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at ¶40:
>
> > ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, that test is "what would an informed person, viewing the matter realistically and practically—
> > ...conclude? Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

> [41] In relation to what constitutes the "reasonable person", the qualifications are not limited to just being "reasonable". The law requires a fully *informed* "reasonable person". That is:
>
> > ...a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality.
>
> [*R. v. S.(R.D.)(R.D.S.)*, [1997] 3 S.C.R. 484]
>
> [Emphasis in original]

[121] In the Recusal decision, the Panel addressed Mr. Howe's argument about Mr. Murray's pecuniary interests at pp. 5-6:

> **3. Mr. Murray has a pecuniary interest because if Mr. Howe is not able to practice that will increase Mr. Murray's potential clientele.**
>
> Mr. Howe is suggesting that Mr. Murray, who has accepted this position of sitting in judgement of a fellow lawyer, would use that to his advantage to effectively rid himself of that lawyer to increase his chances of gaining more clients.
>
> One answer to this argument would be that if that were a reason for recusal it would effectively bar any lawyer from ever being involved in any case, as decreasing the pool of lawyers will always help other lawyers by that logic.
>
> Another answer to that argument is that the impact of reducing the pool of criminal lawyers by one would have such a minimal impact on the number of clients for Mr. Murray as to be insignificant. This cannot form the basis of a reasonable apprehension of bias by a reasonable person. [It] cannot form the basis to rebut the presumption of impartiality.
>
> But most importantly is that the suggestion completely ignores any possibility of good faith by a lawyer hearing such a case. The suggestion such a lawyer would take action to rid himself of another lawyer for the minimal chance of personal gain is anathema to everything that this profession stands for. A reasonable and well informed person does [not] automatically think the worst of people, but thinks the best of a profession that deserves to be thought of in that way. Lawyers are honourable people, and are able to act honourably when asked to judge their fellow lawyer.
>
> We find this suggestion by Mr. Howe to be untenable as a reason to rule that Mr. Murray should be recused from this hearing.

[122] I agree with the analysis and reasons of the Panel. Mr. Murray's status as a practicing member of the criminal Bar in Nova Scotia does not come close to rebutting the presumption of impartiality. Further, Mr. Howe presented no evidence, other than mere speculation, that would establish "serious grounds"

sufficient to justify a finding that Mr. Murray should be disqualified on account of bias.

[123] In *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, the Supreme Court considered an argument of bias related to the Law Society's potential pecuniary interests arising from its authority to collect costs in disciplinary proceedings. It was alleged that the provisions of the *Law Society Act*, R.S.M. 1987, c. L100 authorizing a judicial committee to award costs against a member created a reasonable apprehension of bias because the costs went to the Law Society. The Court rejected that argument and, in doing so, commented on the very argument Mr. Howe raises in this case at pp. 891-892:

> Secondly, any pecuniary interest that the members of the Judicial Committee might be alleged to have is far too attenuated and remote to give rise to a reasonable apprehension of bias. Costs recouped pursuant to s. 52(4) become the property of the Law Society as a whole, and in no way do they accrue to the individual members of the committee who determined that the charge of misconduct was in fact well-founded. As such, there is no personal and distinct interest on the part of the Judicial Committee members. Just as it is speculation to suggest that a disciplinary committee deciding that a lawyer should be disbarred is tainted because it is thereby marginally reducing the competition for the committee's members, it is also speculation to suggest that the Law Society would apply these recouped costs in such a manner as to reduce the practising or non-practising fees of Law Society members by some small amount. These recouped costs, which are after all just reimbursements for expenses already incurred, might equally well be allocated by the Executive and Finance Committee to any other of the numerous educational or promotional endeavours of the Law Society.
>
> [Emphasis added]

[124] The Panel committed no error when it rejected Mr. Howe's argument that Mr. Murray should recuse himself on the basis of his pecuniary interests.

[125] I would dismiss this ground of appeal.

Issue #3 Did the Panel err in law by failing to consider material evidence?

[126] Although this is not listed as a ground of appeal in Mr. Howe's factum, it is addressed in some detail within it. His position is two-fold: (1) the Panel misinterpreted evidence; and (2) the Panel failed to consider evidence.

Standard of Review

[127] I have already set out the standard of review for the Panel's factual findings underpinning its *Charter* decision. Similar considerations apply to this ground of appeal.

[128] The *Legal Profession Act* limits the right of appeal to this Court from a panel's decision to questions of law. Section 49 states:

> **Appeal of order or decision**
>
> 49(1) Subject to this Section, every order or decision of a Complaints Investigation Committee or a hearing panel is final and shall not be questioned or reviewed in any court.
>
> (2) A party may appeal to the Nova Scotia Court of Appeal on any question of law from the findings of a hearing panel, following the rendering of a decision pursuant to subsections 45(4) or (5) or from a decision of the Complaints Investigation Committee under Section 37 or 38.

[129] In *Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26, Fichaud, J.A. reviewed the limited role of this Court where the governing statute restricts the scope of appellate review to errors of law:

> [12] Before superimposing the administrative standard of review, the Court isolates the threshold grounds of appeal that are permitted by the statute: *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, para 36; *Royal Environmental Inc. v. Halifax (Regional Municipality)*, 2012 NSCA 62, para 39. Section 58(1) of the *Pharmacy Act* permits an appeal to the Court of Appeal on "any point of law". There is no appeal on issues of fact.
>
> [13] **Ms. Fadelle's grounds allege errors in assessing credibility, apprehending and weighing evidence, drawing inferences and making findings of fact**.
>
> [14] In *Young v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2009 NSCA 35, paras 17-25, this Court reviewed the authorities respecting when an error in an administrative tribunal's fact finding process may constitute an appealable error of law.
>
> [15] **Put simply, a finding based on no evidence is arbitrary**. Tribunals are not supposed to act arbitrarily in any aspect of their process, including fact finding: *Toronto (City) Board of Education v. O.S.S.T.F.*, [1997] 1 S.C.R. 487, para 44, per Cory, J. for the majority, referring to *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, at 277. So an arbitrary finding, based on no evidence, is an error of law. I add that a fact finding tribunal is entitled to draw inferences, meaning the evidential foundation need not be direct evidence.

> Further, I am not commenting on judicial notice, which has no application to this appeal.
>
> [16] **If there is evidence, then a submission that the tribunal gave the evidence either too much weight and wrongly preferred it over other evidence, or too little weight and wrongly discounted it compared to other evidence, raises an issue of fac**t: *Toronto (City) Board of Education*, paras 44-45, 48; *Young*, para 22. Whether the tribunal should draw an inference from the evidence is a question of fact: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras 19-25. Similarly, "[a]ssessments of credibility are quintessentially questions of fact": *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, para 38.
>
> [17] In short, Ms. Fadelle's factual grounds are beyond this Court's appellate jurisdiction, that is confined to errors of law under s. 58(1) of the *Pharmacy Act*, except insofar as they suggest that the Hearing Committee made an arbitrary finding based on no evidence.
>
> [Emphasis added]

[130] This Court does not have the ability to consider the Panel's assessment of credibility, factual findings or inferences drawn from the facts – unless they are arbitrary and based on no evidence (see also, *Fashoranti v. College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 25 at ¶26).

[131] Mr. Howe, commencing at page 60 of his factum through to page 73, reviews the evidence in some detail in re-arguing what was argued before the Panel below. In ¶156 of his factum he says:

> [156] … We will explain that the several interactions that the Appellant was involved in that the NSBS characterized as "dishonesty, candor and integrity" violations were unfair categorizations considering the context of the investigation, a plain language reading of the statements, the circumstances of the Appellant and the norms for inaccuracy that were simply noted during the hearing.

[132] Mr. Howe then goes through a number of factual findings made by the Panel. He refers to these as:

- Interaction #1, relating to misleading the court with respect to [J.B.];
- Interaction #2, misleading the court regarding the advice he received from the Society;
- Interaction #3, that he was dishonest with the court when he said that he did not confirm a court appearance that was confirmed;

- Interaction #4, misleading the court by stating to Judge Gabriel that he believed Judge Murphy was aware of his other court commitments; and
- Interaction #5, addressing the charges that were added during the hearing which dealt with the appearances before Judge Derrick and Justice Cacchione.

[133] He then takes each of these interactions, reviews the evidence (including his own evidence) and suggests that the Panel's finding that he was dishonest, lacked integrity or misled the Court is not borne out by the evidence. With respect, this is simply Mr. Howe asking us to review the record and come to a different conclusion than that of the Panel. Subject to the standard of review which I have set out above, that is not our role.

[134] It is not necessary to review each of the interactions in detail. An examination of the record reveals there was ample evidence to support the Panel's findings. Mr. Howe's submissions raise issues of fact which are beyond our reach. However, when addressing the next ground of appeal I will review some of the evidence the Panel had before it in finding Mr. Howe guilty of Charge #6 which includes what Mr. Howe refers to as interaction #5. As will be seen, the evidence clearly supports the Panel's findings.

[135] I would dismiss this ground of appeal.

Issue #4 Did the Panel misinterpret the provisions of the *Code of Conduct* for Charge #6

Standard of Review

[136] Mr. Howe argues that the Panel erred in interpreting its home legislation — the *Code of Conduct*. The Panel's interpretation will be reviewed on a standard of reasonableness (see *Adekayode, supra,* ¶31).

Analysis

[137] Charge #6 reads as follows:

> 6. Contrary to Rule 5.1-2(g) Lyle Howe knowingly asserted facts as true when their truth could not be reasonably supported by the evidence in relation to the complaint of the Public Prosecution Service, and in the

> client matters of K.S./K.W. and J.C., D.F./M.S. and R.M. and S.O. and C.S.D. and J.K.

[138] Mr. Howe argues that the Panel misinterpreted section 5.1-2 of the *Code* in its analysis of Charge #6.

[139] He says this section of the *Code* only applies when a lawyer is asserting facts on an evidentiary record as an advocate. He says that the subject-matter of his conduct in charge #6 did not arise in his role as an advocate; but rather, his comments to the court pertained only to personal matters regarding his time commitments.

[140] Section 5.1-2(g) provides as follows:

> 5.1-2 When acting as an advocate, a lawyer must not: […]
>
> > (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal; […]
>
> [Emphasis added]

[141] The Society had alleged six violations of section 5.1-2(g). The Panel addressed all six in its reasons. To address Mr. Howe's argument, I will provide some background context to the Panel's findings.

C.S.D. and J.K.

[142] The C.S.D. and J.K. charges are in reference to the appearances before Justice Cacchione and Judge Derrick. The Panel noted that it had already addressed the comments and behaviour under two previous charges:

> 484. We have already dealt with Mr. Howe's comments and behaviours toward the Court in relation to C.S.D. and J.K. in Charges 1 and 2. We pointed out how Mr. Howe pretended to be "recently retained" when his retainer had not been "recent" within any reasonable understanding of that word. We also pointed out how Mr. Howe effectively played the Court to secure an objective that would serve his personal purposes, and did so by other than open persuasion as an advocate. That behaviour on its own was a violation of Chapter 5.1-2, and Charge [5] in this proceeding. We do not need [sic] see a purpose in re-analyzing the same evidence in relation to Charge 6. That behaviour constitutes a violation of Charge 6 as well in the matters of C.S.D. and J.K.

[143] At ¶199 through 239 of its decision, in addressing the conduct under Charge #1, the Panel reviewed the evidence in detail relating to the appearances before Justice Cacchione and Judge Derrick. Both matters involved sentencings on June 17, 2016. The Panel found that Mr. Howe was "attempting to play the Court" when he deliberately chose not to appear before Justice Cacchione and sent Mr. McKillop in his stead to avoid a scheduling conflict he had created with Judge Derrick. It then set out in some detail the evidence it relied on in coming to this conclusion:

> 229. Mr Howe's behaviour leading up to Friday afternoon, June 17, was consistent with a person who intended to achieve his objectives with respect to K.'s sentencing by manipulating the Supreme Court through a lack of candour. He was, frankly, attempting to play the Court. If that inference seems harsh, it was validated by Mr. Howe's own presentation of evidence at the hearing before us. First, when cross-examining his practise adviser, Mr. Jeffcock (Transcript pp.5838 – 5841) Mr. Howe said:
>
> > MR. HOWE: Okay. And another thing that I mentioned, if you'll recall, is that I wouldn't have been prepared to proceed with K. if the matter did go ahead and I was concerned that it may have actually been more dangerous, and you said that I was wrong on this, but *I said it might be more dangerous if I attend, because then they can actually force me to proceed with a sentencing that I'm not prepared for*.
> >
> > A. I recall that K. is the matter that was before Justice Cacchione. I remember you telling me that that was scheduled for the Friday and you had only received from Nova Scotia Legal Aid the full file on the Wednesday and that it was a significant size, so you had not had an opportunity to go through it.
> >
> > Q. Right.
> >
> > A. You did tell me that.
> >
> > MR. MURRAY: What's your answer to his question?
> >
> > THE WITNESS: About whether or not it would be more dangerous?
> >
> > MR. MURRAY: Yes.
> >
> > THE WITNESS: I don't know that it would be more dangerous, because I don't ... I can't, I can't really agree with it being more dangerous. I would say that if you're not present, then you're really forcing there to be little discretion on the judge's part about what's in the judge's hands, how, whether or not to grant the adjournment.
> >
> > MR. HOWE: *Which my point is, I attempted to put to you that that's bad, but it might be the lesser of two evils, because if I did attend and I wasn't ready and I knew I wasn't ready to proceed, that Justice Cacchione may*

have said, "I understand you're not ready, but start with your submissions, please," or, "I understand that you're saying you're not ready ..." I expressed that concern to you, and I guess what I'm trying to get at is, is that one of the ...

A. You expressed that concern, but I don't view that as a legitimate concern.

Q. Because you felt like it wouldn't have went ahead if I said I wasn't ready?

A. No, because I know Justice Cacchione to be a fair [Justice].

Q. So he ...

A. I can't imagine Justice Cacchione taking such a steamroller approach to the rights of the accused...

Q. Right.

A. ... to be fully represented and competently represented. He wouldn't do that.

Q. And do you remember that part of my justification, and this is the part of what you dismissed, but I just want it on the record, was that if I knew it wasn't going to go ahead either way, I couldn't say much more than what Mr. MacKillop would have said if he would have attended.

A. I believe you had said to me that that morning you had another person who was before Justice Cacchione for a similar type of matter that you had not been prepared for and that was adjourned, so you knew that the afternoon matter would be adjourned. And I pointed out to you that you wouldn't, at the time you decided to accept the appearance before Judge Derrick, have known what was going to happen in the morning. So you couldn't really say that I knew it was going to be adjourned because of what happened in the morning, because when you made that decision, it had not yet happened. I remember that.

Q. Okay. But on the point that I just raised, did I mention to you that - and I think this might have been what you dismissed, but you can ... one of the things that you dismissed, but you can tell me - that I couldn't really say much more than what Mr. McKillop said on the 17th, anyway, in the afternoon.

A. My recollection of the justifications that I rejected were primarily in relation to you were justifying why you accepted the time that Judge Derrick set.

Q. Right. Okay. [Emphasis added]

230. And then, during his own evidence (Transcript, pp.8607 - 8611), Mr. Howe said:

MR. HOWE: . . . It [K.] was a huge file. When it came in on Tuesday, considering that K. was in jail and I can't really review it with him, and considering that the hearing was on the Friday, I knew there was just no way I was going to be able to run that hearing. In fact, at the point that I wrote the letter on Monday I already knew that it would not be ethical for me to run a sentencing hearing on the Friday and that's why I was trying to adjourn it. And part of what factored in ...

THE CHAIR: Sorry, you said the letter you wrote on the Monday?

MR. HOWE: On the Monday. So I wrote the letter on the Monday ...

MS. SUMBU: Perhaps you can grab that tab, it's 162.

MR. MURRAY: That's the one that's dated Sunday?

MR. HOWE: That's right.

THE CHAIR: Oh, okay, yeah.

MR. HOWE: 162. So when I wrote that letter on Monday, or, sorry, on Sunday - I sent it on Monday - I knew that, you know, I was crunched for time. I needed to get the disclosure, I needed to go and review things with K. and there wasn't a lot of time to do that. So I knew that, you know, this was going to have to get adjourned. And I talked to K. about that and he was fine with an adjournment. K. had other charges in other jurisdictions and, frankly, he wasn't going anywhere anytime in the immediate future. So he was fine with an adjournment. And I also knew that if I told the judge that I'm not ready to proceed and I didn't start with this matter ... So it's different if I was counsel from the start and I'm familiar with everything and I heard all the evidence and then, you know, after eight weeks or so after a conviction, I say I want more time, the judge may give me grief. But in a situation like this, I expected the judge to say, No, you know, if you just received the disclosure, we can't go ahead. I just didn't think that the judge would actually make me go ahead. It was ... I thought it would be a mistake to make me go ahead in a situation like that. And that's part of what factored into my decision to send Mr. MacKillop. *If I do just strictly a cost-benefit analysis in terms of the interests of the client, if I go, I guess there's a potential that the judge can say, No, we're going ahead today, and I know I'm not prepared to do it, whereas if I send an agent and the matter is adjourned, it's more likely to get adjourned, even though it's already pretty likely*. But, but, certainly, you know, I expected that, because the matter wasn't brought forward on the docket and adjourned in advance, I certainly expected or should have expected, if I didn't, that the judge might say, No, we, you know, we want to move this ahead, so you tell Lyle that, next time, you tell Mr. Howe that, next time, we need to be prepared and need to move this along. Now that he's got the disclosure, the next date's the last date, you know, maybe something like that. But I didn't, in a million years, think that he would actually make me

> go ahead or that he would ... I didn't expect him to be quite as frustrated as he was that, you know, that I sent an agent looking for an adjournment.
>
> MR. MURRAY: And it kind of puts Mr. MacKillop is [sic] a very bad position, though, doesn't it?
>
> MR. HOWE: It, it does. And I ... I didn't know that Justice Cacchione was going to be that angry, and when Mr. MacKillop explained to me what happened, I did feel bad about that. So Mr. MacKillop said that as soon as he walked in, he said he didn't even have his gown on and he just looked angry and said ... And then he just ... he knew he was going to rip into him. And I apologized to him, I said, Look, I'm really sorry that I put you in that position. And I explained to him that when I set the date on June 10th for ... when I set the date on June 10th in front of Judge Derrick, you know, there was another matter that she really wanted to have done, as well, and I had matters that were, that I may have had to deal with on the 17th in that court. *So I explained to him what I've already explained to you, that if I would have said to Judge Derrick, No, you know, I can't do the 17th. I have this matter where I, you know, where I docketed it in front of Justice Cacchione, you know, she may have drilled down ... She probably would have and asked some questions*, like, Well, when did you get retained on that matter? Are you aware that you have this other matter where you or Ms. McCarthy is expected on the 17th? Can you send somebody else to that? Are you prepared to go ahead? Is that a sentencing that's going to go ahead? And obviously, the answers to that would have been ... And by the way, this isn't to suggest that I turned my mind to all these things, *but I'm just saying that, in hindsight, I mean, I was kind of stuck in a situation that it was, either way, a judge could have been ticked off at me, if I would have said no to Judge Derrick or if I would have said ... you know, either way, it could have, somebody could have been upset. [Emphasis added by the Panel]*

[144] After setting out this evidence the Panel concluded:

> 231. It is regrettably plain and evident that Mr. Howe saw nothing wrong on June 17 with abusing the Supreme Court by forcing it to grant an adjournment which would provide Mr. Howe with an escape from the consequences of his own lack of diligence in not being ready for K.'s scheduled sentencing, or at least not having been active in addressing the difficulty with June 17 for sentencing. As we noted earlier, all of those Supreme Court difficulties could easily have been dealt with in advance of the appearance before Judge Derrick on June 10. Mr. Howe did not do that. While Mr. Howe had good arguments to make as to why he felt unable to proceed with K.'s sentencing on the afternoon of June 17, the evidence shows that he felt it was preferable to pre-empt any chance of those arguments being rejected by simply not appearing in court to make them. By his own admission, Mr. Howe engaged in a "cost-benefit" analysis as to how candid to be with the Court. He arranged his schedule to put the Court in a position where it

> would have to grant the adjournment regardless of the merits of Mr. Howe's legal position.
>
> [Emphasis added]

[145] Mr. Howe was ensuring that the sentencings would not proceed on that date because of his own failings. However misplaced his logic may have been, Mr. Howe recognized it was not in his client's best interests to proceed with the sentencings on those dates when he was unprepared. As a result, he manipulated the Court to force an adjournment.

S.O., K.S., K.W. and J.C.

[146] The Panel did not find any violation of the *Code* with respect to S.O.

[147] With respect to K.S., K.W. and J.C., a conflict arose between those individuals in 2013. On April 9, 2013, Mr. Howe claimed possession of "signed waivers " and certificates of "independent legal advice" from the clients. Mr. Howe also told the Provincial Court that he had spoken with the Society about the potential conflicts leaving the impression that the Society had no issues with the potential conflict. The Panel cited what Mr. Howe said to the Provincial Court in its decision:

> 488. …
>
> I'm indicating that I've done all that I could to explore the situation. I've got two conflict waivers in, independent legal advice in place. *I have also spoken with the Bar Society*. I can assure you that I'm confident that no issues are going to arise in reality, Your Honour. I'm very confident of that.
>
> [Emphasis in original]

[148] The Panel expressed some concerns about the validities of the waivers and identified one critical problem: K.W.'s waiver was dated April 15, 2015, after Mr. Howe made his representations to the court (¶490).

[149] The Panel also found that Mr. Howe misled the court about the advice the Bar Society gave him. The Society had recommended that Mr. Howe either withdraw or not act for the client who would create the conflict (¶492).

[150] Finally, the Panel concluded that Mr. Howe had both overstated and under disclosed the reality of his actual situation to the court.

[151] The Panel recognized that some of Mr. Howe's conduct did not fit squarely into Rule 5.1-2(g). It said:

> 498. Mr Howe's comments about his contact with the Society, which even he acknowledged in retrospect were "misleading", or "could be" misleading, are not covered by Rule 5.1-2(g). They are, instead, a violation of the overarching Rule 5.1-1, and specifically Rule 5.1-2(e):
>
> > 5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.
> >
> > 5.1-2 When acting as an advocate, a lawyer must not:
> >
> > . . .
>
> knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

[152] The Panel then asked itself whether it could find an ethical violation on Mr. Howe's part on a breach of a rule not particularized by the Society (¶499).

[153] It concluded that it could consider the whole of the evidence and determine that Mr. Howe's conduct demonstrated a breach of the *Code*'s Rule 5.1-1 and 5.1.2(e) rather than Rule 5.1-2(g) as alleged by the Society.

D.F., M.S. and R.M.

[154] With respect to the D.F., M.S. and R.M. matters, the alleged misconduct played out in two Dartmouth Provincial Court courtrooms. The Panel concluded that Mr. Howe had been purposely false in his comments to Judge Tax and Judge Hoskins:

> 523. If these inaccurate comments had arisen in the ordinary Provincial Court flow of scheduling dates, we recognize that they could be the result of mistake, or casual inattention. However, these inaccurate comments were made by Mr. Howe when the Courts before whom he was appearing were focused directly – indeed acutely – on the issue of his personal availability. The nature of the occasion on which Mr. Howe's comments were made, the importance of the occasion with respect to his client's timely trial interests, and his ineffective effort to deflect responsibility, combine to persuade us to conclude – regretfully – that Mr. Howe's comments to Judge Tax and Judge Hoskins on March 15 were purposely false.

[155] The Society urged the Panel to find a breach of Rule 5.1-2(g) of the *Code of Professional Conduct.*

[156] Again, the Panel recognized that Mr. Howe's conduct did not fit squarely within Rule 5.1-2(g) but found a violation of Rule 5.1-2(e) concluding:

> 525. Not telling the truth to the Court is hardly treating the Court with candour, fairness, courtesy and respect. We again see Mr. Howe's comments as a violation of Rule 5.1-2(e), by supressing what ought to have been disclosed. We are not sure that his egregious behaviour is actually a violation of Rule 5.1-2(g). But for the reasons stated earlier, that does not prevent us from making a finding that Mr. Howe committed professional misconduct in failing to be honest with the Court. We do so with respect to both Mr. R.M.'s matter, and M.S.'s matter.

[157] Mr. Howe's position is that on all of these occasions he was not appearing as an "advocate" because he was not advocating on behalf of his clients.

[158] With respect, this is parsing of the wording of the Rule beyond any reasonable interpretation.

[159] Mr. Howe was in court as a result of the representation of his clients. To suggest that a lawyer can, at any time, attend before a court and make misleading or inaccurate statements knowingly because he or she is only setting dates or otherwise addressing matters not related to the evidence in the actual trial or hearing defies any logical interpretation of the Rule.

[160] The setting of dates for a hearing or sentencing are integral to the court process and the administration of justice. It demands that counsel be forthright about their availability to serve the interests of their client and the objectives of the court process.

[161] Whenever a lawyer is appearing in front of a court on behalf of a client, they are an advocate within the meaning of the Rule.

[162] In the end, this issue is of little significance. Mr. Howe was found guilty of charges relating to C.S.D. and J.K. under Charge #1. In its Sanction decision the Panel recognized that there were duplicate findings of guilt stemming from this particular set of facts and ruled that it would "consider those factual and legal situations concurrently in our discussions on sanction" (Sanction decision, ¶17). As a result, the Panel did not sentence Mr. Howe separately for violating different sections of the *Code* arising from the same facts.

[163] I would dismiss this ground of appeal.

Issue #5 Was the Panel's sentence unfit and unjust?

[164] Following the hearing, this Court requested and received submissions on the following aspects of the Sanction decision:

1. whether we could vary the sanction, in particular:
   a) the conditions of repayment;
   b) whether the time served by Mr. Howe on suspension should reduce the period of disbarment;
2. what impact, if any, should the finding of systemic racism have on the ultimate sanction.

[165] With respect to the conditions of repayment, the Society agreed that the Court had the ability to vary the costs award with respect to the repayment condition. On April 24, 2019, it wrote the following:

> … the Society notes this condition had not been requested by the Society in either its written or oral submissions to the Hearing Panel. Indeed, in its oral submissions to the Hearing Panel on September 12, 2017, it specifically noted that it would not treat any cost award as a barrier to Mr. Howe's readmission to practice.
>
> Based on this, the Society is prepared to agree to the Court varying the Hearing Panel's decision to the extent it made the repayment of costs a condition of Mr. Howe's reinstatement, in the event he chooses to re-apply for such reinstatement. The Society does not object to an amendment to the Notice of Appeal, limited to this issue.

[166] As a result, I will vary the costs to the extent that the payment of that amount is a condition precedent to reinstatement.

[167] Next, I will address systemic racism when considering the fitness of the sanction imposed.

[168] Finally, I will consider the question of whether the Panel should have reduced the period of disbarment by the time served on suspension as a separate issue.

Standard of Review

[169] Mr. Howe argues that the Panel erred by imposing a demonstrably unfit sentence that was not justified in these circumstances.

[170] The proper standard of review to be applied when assessing the sanctions imposed by the Panel is reasonableness and one that affords a high degree of deference to the sanctions imposed against Mr. Howe.

[171] The Ontario Divisional Court's decision in *Mundulai v Law Society of Upper Canada*, 2014 ONSC 7208, reinforces the need for an appellate court to pay great deference to the decision at first instance. It stated:

> [2] In answering this question we have had to remind ourselves what our function is today. We are not the panel of first instance who had the opportunity to hear the evidence, including hearing the appellant testify. It is not our task to make credibility findings or reweigh evidence. Further, the decision being appealed is a decision on penalty arrived at by a committee in a self-governing profession. This is a discretionary decision to which a reviewing court must show great deference.
>
> [3] The Supreme Court of Canada has consistently held that the court should not interfere with the disciplinary penalty imposed by self-governing professions. *(Pearlman v. Manitoba Law Society*, [1991] 2 S.C.R. 869 at p. 888).
>
> [Emphasis added]

[172] Decisions on sanctions are subject to a high degree of deference on appeal.

Analysis

[173] Mr. Howe's statement that the Panel erred in principle in imposing a demonstrably unfit sentence is just that – a statement. He does not identify any error in principle.

[174] In its Sanction decision, the Panel identified the following principles from its review of the authorities:

> 5. Having [reviewed the authorities], the Panel finds the following principles are applicable:
>
> 1) The nature and gravity of the proven allegations play an important role. This includes the impact the impugned behaviour had on clients, the public, and the courts.

2) Punishment and denunciation are principles best left to the criminal courts when dealing with criminal offences, not disciplinary sanctions.

3) Specific deterrence and general deterrence should be emphasized where appropriate.

4) The sanction must recognize the strong need to protect the public.

5) The sanction must act to uphold and maintain the public's trust and confidence in and the reputation of the profession.

6) Rehabilitation of the offender can play a role in the sanction imposed.

7) The sanction must be proportionate to the gravity of the offence and to sanctions imposed in other cases.

8) The level of risk to the public caused by allowing the lawyer to continue to practice must be considered.

9) A breach of integrity or dishonesty is a consideration, but neither automatically leads to disbarment. However, substantial breaches of integrity will significantly impact the public's confidence in the profession.

10) Disbarment is not reserved for only the worst offenders.

11) Mitigation factors play a role, although in a case of serious misconduct may not override other factors, including the need to maintain the public's confidence in the profession.

Mitigating factors can include:

a. the age and experience of the lawyer;
b. previous character;
c. mental and physical health;
d. acknowledgment of wrongdoing;
e. community support; and
f. Impact of systemic, actual, and historical racism.

[175] Mr. Howe does not take issue with the principles nor the mitigating factors identified by the Panel.

[176] The Panel then reviewed each of the incidents with respect to which Mr. Howe was found guilty and categorized them into three types of behaviour: integrity issues; overlooking and failing to appear in Court; and failure to follow directions from the Society. The Panel stated:

56. These various incidents fall into the following three categories of behaviour:

1) Integrity issues: this grouping includes incidents of dishonesty and lack of candour, as well as continuing to act in situations of clear conflict. These

> are by far the most serious of Mr. Howe's behaviours and cause the Panel the most concern. While precedents suggest that findings of a lack of integrity do not necessarily result in disbarment, where that lack of integrity is significant and/or repetitive, the ultimate sanction becomes more inevitable.
>
> 2) Overbooking and failing to appear in court: The continual overbooking and the resulting associated difficulties are also significant. They demonstrate Mr. Howe's disregard for the court and indeed, his clients. However, other than the June 2016, matters, after September of 2015 it did appear that Mr. Howe began to make great improvements in this behaviour.
>
> 3) Failing to follow practice and other directions from the Society: These behaviours are the least significant. However, they are quite relevant when considering issues of specific deterrence and protection of the public. Simply put, if Mr. Howe has a poor track record of following directions and practice restriction, the Panel must be concerned about whether the public can be protected by a sanction that may involve similar conditions designed to reform his conduct.

[177] The Panel then discussed the mitigating factors urged upon it by Mr. Howe. The Panel found because of the repetitive nature of Mr. Howe's behaviour and the significant attempts of intervention by the Society, the mitigating factors did not offer significant benefit to Mr. Howe:

> 57. **Mitigating factors**: We have discussed above the mitigating factors that Mr. Howe has urged us to consider. We have considered them all very carefully. For example, Mr. Howe asks us to consider his youth and inexperience, his previous character, and the support of his community. Those positive factors certainly have caused the Panel to carefully consider giving Mr. Howe the benefit of the doubt where possible. The Panel is well aware of the importance to effectively forgive early errors and consider character as an assurance that future behaviour offers more promise.
>
> 58. Unfortunately, these factors lose impact because of the repetitive nature of Mr. Howe's behaviour, and the significant attempts at intervention by the Society. In the end, these factors do not offer a significant benefit to Mr. Howe.

[178] The Panel then turned its mind to the impact of systemic, actual and historic racism. As noted earlier, the Court asked for further submissions from the parties on this issue and in particular the impact, if any, of a series of cases involving disciplinary proceedings from the Law Society of Upper Canada.

[179] The L.S.U.C. proceedings outline factors that should be considered when sanctioning a racialized lawyer. I would summarize them as follows:

1. a decision maker can give mitigating effect to systemic discrimination when it impacts on misconduct and influences the lawyer's actions (*Law Society of Upper Canada v. McSween*, 2012 ONLSAP 3);
2. there must be a causal connection between systemic or individual racism and the lawyer's actions giving rise to findings of misconduct (*McSween*; *Law Society of Upper Canada v. Hamalengwa*, 2015 ONLSTH 57*)*;
3. when addressing the sanctioning of a racialized lawyer, it is appropriate to consider the community's need to have access to lawyers from their community in the justice system (*Law Society of Upper Canada v. Robinson*, 2013 ONLSAP 0018; *LSUC v. An*, 2017 ONLSTH 181; *Law Society of Upper Canada v. Batstone*, 2015 ONLSTH 214; *Law Society of Ontario v. Bahimanga*, 2018 ONLSTH 60);
4. The overarching considerations are the requirements for a self-governing profession to govern itself in the public interest, and to maintain public confidence in the integrity and trustworthiness of members of the legal profession (*Robinson, An, Law Society of Upper Canada v. Adams*, 2018 ONLSTH 20, *Law Society of Upper Canada v. Dadepo*, 2018 ONLSTH 48).

[180] The Panel recognized the impact of systemic, actual and historical racism was a mitigating factor to be considered by it when sentencing Mr. Howe (Sanction decision, ¶5(11)(f)).

[181] The Panel devoted an entire section of its decision titled “Impact of Systemic, Actual and Historical Racism” to this issue. In doing so it recognized Mr. Howe’s circumstances:

> 66. There can be no question that Mr. Howe grew up in circumstances that place him squarely in line to feel the impacts of systemic and historical racism. He talked eloquently about this during the sanction hearing, and about how it led him to distrust the system which he viewed as designed to prevent his success. That led to him reacting aggressively to challenge.

[182] The Panel went on to find a connection between Mr. Howe’s perception and his reaction to what he faced:

> 67. We accept this explanation to a great extent because his reactions were so consistent: when challenged, he often relied on conjecture and falsehood to get

> out from under that pressure. And that is the problem: while the injustice seems to have been real in Mr. Howe's mind, there is little evidence of actual discriminatory attack. This is why the Society says there is no connection. But the Panel says there is a connection. Historical and systemic racism explain Mr. Howe's perception and reaction to what he faced.

[183] The Panel, correctly, noted that this conclusion did not end the discussion. It needed to consider whether there was a causal connection between Mr. Howe's conduct and systemic or actual racial discrimination. I will set out the Panel's findings on this issue in their entirety:

> 69. 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.
>
> 70. For example, when Mr. Howe was dishonest with the court about JB's absence, that was to cover up his own lack of diligence.
>
> 71. When Mr. Howe was dishonest with Judge Tax and Judge Hoskins on March 15, 2013, that was to cover up his decisions that led him to be double booked.
>
> 72. When Mr. Howe lied to the court about the timing of the therapist's report on March 26, 2013, that was to cover up his own lack of proper preparation.
>
> 73. When Mr. Howe deceived the court about the advice he received from the Society regarding conflict on April 9, 2013, and lied about having signed waivers from clients, that was to assist him in keeping both clients.
>
> 74. When Mr. Howe, on April 16, 2013, lied to Judge Gabriel about what happened in Judge Murphy's court, that was to cover up his own actions to delay a matter he was not adequately prepared for.
>
> 75. When Mr. Howe, in June of 2016, falsely told Judge Derrick he could be available when he was already booked, and then engaged in a series of dishonest and devious behaviours in relation to Judge Cacchione, this was all in an effort to allow him to avoid two sentence hearings he was either not prepared for or that he wished to adjourn for other reasons.
>
> 76. None of these situations arose out of discriminatory actions toward Mr. Howe. Nor were they situations where he was under attack because of historical or systemic racism. Rather, they were created by his own actions. In every case, even if he was in a bind, he had an option: tell the truth. Instead, he chose the option of being untruthful and self-serving.
>
> 77. <u>The even more unfortunate reality is if Mr. Howe showed contrition to the courts, not only would he have been forgiven, he may well have earned respect,</u>

> and also would have been less likely to make the mistake again. One can only learn from their mistakes if they admit them, particularly to themselves.
>
> 78. Therefore, while we acknowledge the role Mr. Howe's background must play in this case, in the end it [cannot] play a role to mitigate or reduce the ongoing and serious lack of integrity shown by Mr. Howe.
>
> [Bold in Original]
> [Emphasis added]

[184] The Panel properly considered systemic and actual racism as mitigating factors. It examined whether there was a connection between the systemic or individual racism and the findings of misconduct. It found there was not:

> 83. Regardless of Mr. Howe's racial and cultural background, regardless of his core views as to the functioning of the criminal justice system, and regardless of his aspirations to have an effect on the criminal justice system for the benefit of the system and his community and his clients, as a professional he is not permitted to pursue those objectives by employing dishonesty when he decides it would be convenient or effective. Nor can the profession as a whole allow a member of the Nova Scotia Barristers' Society to offer services to the public where it is known that the member may choose to be dishonest when representing clients. That would not only serve to encourage public distrust of the legal profession as a whole, but could also encourage suspicion about the ability of our Courts to function properly. Convenient dishonesty by lawyers would directly undermine the value of our justice system. Our justice system can produce independent, rational judgments that are based on evidence, and which result from open, persuasive, and entirely candid advocacy. Mr. Howe's choices to attempt to tip the scales of justice in his favour, or in favour of his clients, through the tool of occasional dishonesty is the antithesis of how a legal professional must act. Effective counsel can be disruptive without being dishonest.

[185] In terms of aggravating factors, the Panel considered the repetitive nature of Mr. Howe's conduct, the high level of dishonesty, his demonstrated inability or unwillingness to follow direction, and the fact that the misconduct continued in spite of significant interventions by the Society:

> 85. **Aggravating factors**: The most relevant aggravating factors the Panel has considered are the repetitive nature of Mr. Howe's misconduct, the high level of dishonesty, a demonstrated inability to follow direction, and the fact the misconduct continued in spite of significant interventions by the Society and, indeed, even during this hearing.

[186] The Panel also considered the need for African Nova Scotians to have access to a lawyer from their community. It agreed with Mr. Howe's submissions on that point:

> 87. In addition to the principles reviewed above, the Panel has carefully considered the submissions made by Mr. Howe regarding the need for the African Nova Scotian community to have access to a person from their community in the criminal justice system. We fully agree with the importance of those submissions. This is especially the case given the over-representation of that community in the criminal justice system in the Halifax area which was often discussed during the hearing. As a result, the Panel has determined that in this particular case, with these particular facts, that we should only consider the removal of Mr. Howe from practice if that was the only option available to us to address all the appropriate principles of sanctioning. Simply put, we decided that if we could address those principles in any way short of disbarment, we should do so.
>
> [Emphasis added]

[187] I am satisfied the Panel properly considered and properly applied the principles I have identified in determining whether actual and systemic racism played a part in Mr. Howe's conduct before the courts. However, these principles did not assist Mr. Howe due to: the absence of a causal connection between his misconduct and the racism; and, the role of the relevant aggravating factors.

[188] Having discussed and weighed the aggravating and mitigating factors, the Panel turned its mind to whether any sanction short of disbarment was available and appropriate in Mr. Howe's case. In doing so, it set out the principles it would apply:

> 86. We consider the following to be the most appropriate principles to be applied when determining sanction:
>
> 1) The nature and gravity of the proven charges: As discussed, Mr. Howe's proven lack of integrity and dishonesty is very serious. It was deliberate, repeated, and often done in the face of the court. Our system of justice, and the criminal justice system in particular, must place significant weight on the word of lawyers. They make adjournment requests, warrant requests, and sentencing submissions based on their word as evidence. One lawyer's proven dishonesty challenges not only that lawyer's trustworthiness, but threatens the system of trust for everyone.
>
> On this point, the Panel highlights Mr. Howe's actions in June of 2016. We found that his decision on June 10 to accept the date of June 17 for the hearing before Judge Derrick was part of a calculated decision to intentionally create a conflict to give him a reason to avoid the two sentencings he had scheduled before Justice Cacchione on that same date. The entire scenario involved a deliberate use of

> dishonesty to both avoid having to proceed on two sentencings, and then to attempt to avoid criticism for his decisions. This type of intentional deception must be viewed as close to the most serious possible.
>
> While an argument for leniency for several of Mr. Howe's earlier integrity issues may have carried the day, considering the nature and timing of this behaviour it makes leniency almost impossible.
>
> 2) Specific Deterrence: In spite of interventions in the form of two practice reviews, and various investigations and interviews with the Complaints Investigation Committee, Mr. Howe's behaviours were repeated. Indeed, they continued during the hearing.
>
> In addition, Mr. Howe's testimony during the hearing demonstrated a lack of awareness of how some of his actions were inappropriate.
>
> There is a strong need for specific deterrence in this matter.
>
> 3) General Deterrence: Given the impact Mr. Howe's behaviours have on the functioning of the courts and the reputation of the profession, there is a strong need for general deterrence. Lawyers have to know if they are dishonest with the courts, the Society, and their clients, the consequences will be significant. In addition, a strong message must be sent that lawyers must treat the courts with respect, and if they are given direction from the Society, they must follow it.
>
> 4) The sanction must recognize the strong need to protect the public, and maintain the public's trust and confidence in the profession.
>
> Lawyers are given the privilege of self regulation. That continued privilege will be jeopardized if the public or government perceive that lawyers do not treat significant misconduct with significant sanction. That reduction of trust and confidence has lead to the loss of self-regulation in other jurisdictions. Thus, in cases of significant misconduct, the public must see a sanction which appropriately responds to that misconduct.
>
> 5) The Panel recognizes that not every breach of integrity or dishonesty must lead to disbarment. We must carefully consider whether the level of the misconduct has risen to the level where that is the most appropriate remedy.
>
> [Emphasis added]

[189] The authorities support the Panel's enumeration of the principles to be applied when determining discipline in a law society setting.

[190] In *Lawyers & Ethics: Professional Responsibility and Discipline*, loose-leaf (Toronto: Thomson Reuters Canada Limited, 2017) at p. 26-1, Gavin MacKenzie explains the purpose of law society discipline:

> The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.
>
> In cases in which professional misconduct is either admitted or proven, the penalty should be determined in reference to these purposes. If a lawyer has committed a criminal offence it is for the criminal courts, not the legal profession, to inflict punishment. All sanctions necessarily have punitive effects, which are tolerable results of the protective and deterrent functions of the discipline process. The goals of the process are, nevertheless, non-punitive.
>
> The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practise will be terminated regardless of extenuating circumstances and the probability of recurrence. If a lawyer misappropriates a substantial sum of clients' money, that lawyer's right to practise will almost certainly be determined, for the profession must protect the public against the possibility of a recurrence of the misconduct, even if that possibility is remote. Any other result would undermine public trust in the profession.
>
> [Emphasis added]

[191] There is also a distinction between the imposition of sanctions for unprofessional conduct and sentencing for criminal law offences. In *The Regulation of Professions in Canada*, loose-leaf (Toronto: Thomson Reuters Canada Limited, 2017) at p. 14-7, James T. Casey explains:

> A number of factors are taken into account in determining how the public might be best protected, including specific deterrence of the member from engaging in further misconduct, general deterrence of other members of the profession, rehabilitation of the offender, punishment of the offender, isolation of the offender, the denunciation by society of the conduct, the need to maintain the public confidence in the integrity of a profession's ability to properly supervise the conduct of its members, and ensuring that the penalty imposed is not disparate with penalties imposed in other cases. However, it may be argued that the factors of punishment and denunciation should not be given undue emphasis since these factors may more properly be considered to be part of the domain of criminal law.
>
> While parallels are often drawn between the imposition of sanctions for unprofessional conduct and sentencing for criminal law offences, there is a critical distinction. A criminal court judge is free to focus almost exclusively on the individuals involved whereas a discipline tribunal must also consider the impact of the unprofessional conduct on the reputation of the profession.
>
> [Emphasis added]

[192] In *McKee v. College of Psychologists of British Columbia*, [1994] 9 W.W.R. 374 (B.C.C.A.) at 376, the Court of Appeal reviewed the principles in professional discipline sanctioning as follows:

> [7] In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in a criminal case. However, where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree of risk, if any, in permitting a practitioner to hold himself out as legally authorized to practice his profession. The steps necessary to protect the public, and the risk that an individual may represent if permitted to practice, are matters that the professional's peers are better able to assess than a person untrained in the particular professional art or science. …
>
> [Emphasis added]

[193] *Bolton v. The Law Society*, 1993 EWCA Civ. 32, [1994] 2 All E.R. 486 is frequently referenced regarding the purpose of sanctioning in a professional disciplinary matter. In that case, the Solicitors' Disciplinary Tribunal in England was considering the case of a solicitor charged with a single count of mortgage fraud. Sir Thomas Bingham M.R. stated the following:

> [14] Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the Tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. …
>
> [15] It is important that there should be full understanding of the reasons why the Tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the Tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension;

> plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires.
>
> [16] Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the Tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely to be, so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.

[Emphasis added]

[194] In *Smith v. Law Society of Manitoba*, 2011 MBLS 3 (aff'd 2011 MBCA 81, leave to appeal to SCC refused, 2011 S.C.C.A. 540), the Manitoba Court of Appeal upheld a disciplinary committee's finding of disbarment due to a pattern of dishonest conduct. In that case the Hearing Panel found a pattern of a lack of integrity by the lawyer and it was concerned that he would re-offend based on his

continued assertions that he did nothing wrong. The Panel found disbarment to be the appropriate sanction to protect the public and the profession's reputation:

> [8] The issue, therefore, is what the appropriate penalty is given the panel's conclusion that there is a pattern of dishonest actions. Our obligation is to impose a penalty that protects the public and maintains the reputation of the profession. This includes ensuring that only people who understand and adhere to the duty to act with the upmost of integrity practice law. Unfortunately Mr. Smith is not such a person. When the opportunity presented itself to be dishonest, he took it. Further, he continues to maintain that he has done nothing wrong which causes us concern that if another opportunity was to present itself he would once again favour his personal circumstances over that of the public. As such we have concluded that the appropriate penalty in this case is disbarment. This is the only penalty that will protect the public and maintain the reputation of the profession as one where only honest people practice law.

[Emphasis added]

[195] In *Smith*, the Court of Appeal upheld the Hearing Panel's finding of disbarment:

> [50] As to the harshness of the penalty, critical to the Panel's decision to disbar was the appellant's testimony, and his belief, that he had done nothing wrong in connection with the matters before it. The Panel was concerned that given another opportunity, "he would once again favour his personal circumstances over that of the public" (at para. 8). The Panel decided that on five counts, the appellant's conduct demonstrated a lack of integrity. The Panel concluded that disbarment was required to protect the public and maintain the reputation of the profession.

[196] Although the Panel did not reference any of these authorities in coming to its sanction decision, the authorities were before it in the oral and written submissions of the parties. It is apparent by their recitation of the principles to be applied that it was aware of the authorities and the importance of the public confidence in the integrity of the legal profession. They found Mr. Howe's dishonesty and lack of integrity left them no option but to disbar him:

> 88. … Mr. Howe's dishonesty and lack of integrity, as continuous and repetitive as it was, leaves us with no option but to rule that disbarment is necessary. His other proven behaviours only strengthen that conclusion.

[197] The Panel was obviously troubled by Mr. Howe's lack of insight into his actions, and it is apparent from a reading of the Panel's decision it had no confidence that Mr. Howe would not reoffend.

[198] The Panel considered that the nature and gravity of the proven charges were very serious – it was deliberate, repeated, and often done in the face of the Court (¶86). It was particularly concerned with Mr. Howe's actions in June of 2016 when dealing with Judge Derrick and Justice Cacchione, viewing it as conduct "as close to the most serious possible" (¶86).

[199] They were concerned about Mr. Howe's lack of awareness of why his actions were inappropriate; not only was the conduct repeated, in fact, it continued during the disciplinary hearing (¶86).

[200] The Panel recognized and cited the need to protect the public and maintain the public trust and confidence in the profession. It had no confidence that Mr. Howe, in light of his past and continued conduct, would not re-offend (¶86).

[201] Not only was the Panel's decision to disbar Mr. Howe reasonable, in light of the authorities and the facts of this case, it was the only remedy that would be appropriate in these circumstances.

[202] I see no error in principle in the Panel's identification of the legal principles and their application to the facts of this case. Its decision is unassailable.

[203] I would dismiss this ground of appeal.

Did the Panel err in failing to take into account the time served on suspension by Mr. Howe to reduce the period of disbarment?

[204] There was no basis on which the Panel could have taken Mr. Howe's time served on suspension as a factor in reducing the period of disbarment.

[205] To explain, the suspensions preceding Mr. Howe's disbarment need to be put in context.

[206] Mr. Howe commenced the practice of law in June 2010.

[207] On November 21, 2011, Mr. Howe was charged with sexual assault and administering a noxious substance. He was convicted of sexual assault on May 31, 2014, which resulted in him being suspended on June 2, 2014.

[208] On September 4, 2015, this Court overturned Mr. Howe's criminal conviction.

[209] On September 15, 2015, Mr. Howe's suspension was lifted and he was permitted to practice on certain conditions. Mr. Howe continued to practice while the hearing against him was ongoing. The hearing commenced on December 10, 2015, and continued to April 19, 2017.

[210] On September 1, 2016, the Society suspended Mr. Howe as a result of information arising from another investigation. His suspension at that time did not occur as a result of the matter presently before this Court.

[211] The Panel subsequently disbarred him on October 17, 2017, in its Sanction decision.

[212] Mr. Howe has never been suspended as a result of the charges that are in issue in this appeal.

[213] As a result, the Panel did not err in failing to take into account the time served on suspension. Mr. Howe's suspensions arose as a result of his criminal conviction and other charges which are not the subject-matter of this proceeding.

Conclusion

[214] By consent of the Society, the costs ground of appeal is allowed, in part and the remainder of the appeal is dismissed. The Sanction decision is amended such that there is no requirement for Mr. Howe to pay costs in the amount of $150,000.00 as a condition precedent to apply for re-admission to the Society. 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 of law.

[215] Before concluding, I would commend the Panel for the time and effort it spent on the issues in the hearing before it. Its decisions are well reasoned and properly address the multitude of difficult matters before it.

Costs

[216] The parties asked for permission to make submissions on costs following the decision of this Court on the merits.

[217] The Society will file its submissions on costs by November 15, 2019. Mr. Howe will have until December 2, 2019 to respond.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.

Fichaud, J.A.

Bryson, J.A

2017 CA No. 470952

NOVA SCOTIA COURT OF APPEAL

Between:

LYLE D. HOWE

Appellant

- and -

NOVA SCOTIA BARRISTERS' SOCIETY

Respondent

ORDER

BEFORE THE HONOURABLE CHIEF JUSTICE MICHAEL MACDONALD:

UPON MOTION of the Respondent, Nova Scotia Barristers' Society, for a partial publication ban;

AND UPON REVIEWING the submissions of counsel for the Respondent, Nova Scotia Barristers' Society;

AND HAVING HEARD ~~counsel on behalf of~~ the Appellant, Lyle D. Howe, and counsel for the Respondent, Nova Scotia Barristers' Society;

IT IS HEREBY ORDERED THAT:

1. No person shall publish or broadcast any information that identifies or may tend to identify any of the following persons who are identified during this proceeding:

    i. Any clients of Mr. Lyle Howe;
    ii. Any co-accused clients of Mr. Lyle Howe;
    iii. Any clients of Mr. Robert Hagell.

2. The parties to this proceeding are permitted to identify the following persons by pseudonyms or initials alone:

    i. Any clients of Mr. Lyle Howe;

ii. Any co-accused of clients of Mr. Lyle Howe;
iii. Any clients of Mr. Robert Hagell.

DATED AT Halifax, Nova Scotia this 22nd day of March, 2018.

Deputy Registrar Cherri R. Brown

Cherri Brown
Deputy Registrar
Nova Scotia Court of Appeal

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