**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Lienaux v. Nova Scotia Barristers' Society*, 2009 NSCA 11

**Date:** 20090128
**Docket:** CA 293547
**Registry:** Halifax

**Between:**

Charles D. Lienaux,
a Barrister and Solicitor of Halifax, Nova Scotia

Appellant

v.

The Nova Scotia Barristers' Society
(the "Society")

Respondent

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| **Judges:** | MacDonald, C.J.N.S.; Bateman, J.A. and Murphy, J. *(Ex officio)* |
| **Appeal Heard:** | November 18, 2008, in Halifax, Nova Scotia |
| **Held:** | Appeal allowed in part, with costs to the respondent, per reasons for judgment of MacDonald, C.J.N.S.; Bateman, J.A. and Murphy, J. concurring. |
| **Counsel:** | Charles D. Lienaux, appellant in person<br>Clarence A. Beckett, Q.C., for the respondent |

**Reasons for judgment**:

OVERVIEW

[1] Charles D. Lienaux has been a member of the respondent Nova Scotia Barristers' Society for the last 32 years. Continuously since 1993, he and his wife, Karen Turner-Lienaux, have been embroiled in an all-out legal war with their former business partner, Wesley G. Campbell. This dispute originally arose when their joint venture to construct a retirement residence went sour. The battleground for this war has been primarily the Supreme Court of Nova Scotia and the Nova Scotia Court of Appeal, where, unfortunately, the fighting continues.

[2] The initial litigation saw the Lienauxs, as self-represented litigants, sue Mr. Campbell. Their allegations against Mr. Campbell were very serious and included criminal fraud. The Lienauxs lost first at trial; then again before this court. Leave to appeal further to the Supreme Court of Canada was denied.

[3] Since that time there have been many related actions and applications in the Supreme Court. Most have proceeded to appeal. Mr. Lienaux and Karen Turner-Lienaux have had little success. Unwilling or unable to accept the legal outcomes, Mr. Lienaux turned his sights on the Nova Scotia judiciary. Specifically, in the course of advancing an appeal involving yet another related claim **(Lienaux v. 2301072 Nova Scotia Ltd.,** [2005] N.S.J. No. 247 (Q.L.)), Mr. Lienaux attacked the trial judge (**Smith's Field Manor Development Ltd. v. Campbell**, [2001] N.S.J. No. 230 (Q.L.)) and the three Nova Scotia Court of Appeal judges (**Smith's Field Manor Development Ltd. v. Campbell**, [2002] N.S.J. No. 369 (Q.L.)) involved in a prior failed action. He accused all four judges of turning a blind eye to Mr. Campbell's fraudulent activities because, along with Mr. Campbell, they were part of Halifax's "old boy network". Added to this was Mr. Lienaux's scandalous assertion, made during the same appeal hearing, that on a recess in his initial trial, Mr. Campbell's counsel rummaged through his private papers.

[4] All this prompted the Society to commence discipline proceedings against Mr. Lienaux, charging that he had engaged in conduct unbecoming a barrister.

[5] Following a full hearing, a Society discipline hearing panel found that the allegations had been established. The sanction included: (a) a one-month suspension

from practice; (b) a prohibition from representing anyone, including himself, in any matter related to these “Campbell” proceedings, and (c) a $30,000.00 costs order.

[6] Mr. Lienaux now appeals the Panel's order to this court. Essentially, he submits that by not investigating his assertion of an “old boy network” and by not permitting him to call evidence about it, the Panel erred in law and exceeded its jurisdiction.

[7] For reasons that follow, I see this submission as being completely without merit. As a barrister, Mr Lienaux cannot justify hurling baseless attacks on the judiciary simply because he does not accept a particular decision. Of course, this matter would be totally different had Mr. Lienaux offered one shred of evidence linking any of these judges to Mr. Campbell. However, the most he could muster to rationalize his scurrilous attack was that they happen to be Nova Scotia judges who ruled against him.

[8] Aside from adjusting one aspect of the Panel’s prohibition order, I would dismiss this appeal with costs.

BACKGROUND

[9] Victoria Rees, the Society's Director of Professional Responsibility, filed the official complaint after Mr. Lienaux's assertions came to her attention. There she summarized the allegations of “conduct unbecoming”:

> 1. During the course of representing himself, his wife and his companies in a civil proceeding before the Nova Scotia Court of Appeal, Charles Lienaux failed in his duty to encourage respect for justice and not weaken or destroy public confidence in legal institutions or authorities by making broad, irresponsible allegations of corruption and partiality against Justices of the Supreme Court, and failed to treat the Court with candour, courtesy and respect by knowingly asserting something for which there was no reasonable basis in evidence, contrary to Chapters 14 and 21 of the *Handbook*. In particular, he made the following allegations in his Appellant's Factum filed in the matter of *Toronto Dominion Bank v. Lienaux*, 2005 NSCA 97:
>
> (i) "The review below of the findings of fact and legal rulings made by Hood, J. and this Court show on their face that they intentionally

did not enforce the law against Campbell… . This raises an unavoidable appearance that the Court's process has been corrupted." (para.75)

(ii) "The Impugned Decisions make it appear that because of his social standing in the Halifax community Campbell received special consideration from the Courts which is not afforded to members of the general public." (para. 76)

(iii) "The evidence set out hereinafter establishes reasonable grounds for any knowledgeable person to conclude that judges of both levels of the Court intentionally did not enforce the law thereby allowing Campbell to evade liability for a number of criminal activities." (para. 77)

(iv) "This Court cannot be the judge of whether or not its process may be seen to have been corrupted." (para. 82)

(v) "Justice Hood intentionally disregarded the law… ." (para. 95)

(vi) "This Court intentionally failed to enforce the law and allowed Campbell to evade liability for fraud. The Court's failure to enforce the law creates the unavoidable appearance that the Court's process was corrupted." (para. 140)

(vii) "This Court should not commit acts indirectly which would constitute criminal offences if they were done directly." (para. 149)

2. Charles Lienaux failed to treat and deal with other lawyers courteously and in good faith, and failed in his duty not to make disparaging remarks to or about another lawyer, contrary to Chapter 13 of the *Handbook*. In particular, he alleged before the Nova Scotia Court of Appeal that during a recess during a Nova Scotia Supreme Court hearing before Justice Suzanne Hood, opposing counsel removed the top off his case box of materials and "went through it", without having or offering any evidence whatsoever to support his allegation.

3. And that in relation to the charges set out above, Charles Lienaux has been guilty of conduct unbecoming.

[10] In finding Mr. Lienaux guilty on all charges, the Panel concluded:

Specifically, the Panel was not offered any evidence that Madame Justice Hood or any other Judge in the Supreme Court of Nova Scotia or the Court of Appeal of Nova Scotia acted in any manner other than what is expected or required pursuant to law.

The allegation in Mr. Lienaux's Factum as delineated in Article 1 about the conduct of Madame Justice Hood and of the judiciary are serious and need to be treated seriously for they impugn the integrity of Justice Hood, the Court and of the administration of justice. Statements such as those delineated in Article 1(i) through and including (vii) made in the absence of compelling and relevant evidence are unacceptable.

. . .

Clearly, lawyers have a right to speak out against injustice and illegal activity. However, a lawyer has a duty to speak out on such matters only when there is reasonable and cogent relevant evidence in support of such allegations. In the matter before us we have been provided with no such evidence to support any of the specific allegations made by Mr. Lienaux as outlined in Articles 1(i) through (vii) inclusive.

. . .

Disagreeing or being unhappy with the decision of the Courts in matters in which a person acts as counsel, or in this case, as a party do not entitle the Member to make unsupported allegations of a nature and kind and of the seriousness of those which are contained in the Appellant's Factum as delineated in Article 1 of the Complaint.

Clearly, the Member is in breach of his duty pursuant to Article 14(g) as "there is no reasonable basis in evidence of the assertions made by the Member".

Likewise, the Member is in breach of his duty pursuant to Article 21.4 "not to weaken or destroy public confidence in legal institutions or authorities by broad, irresponsible allegations of corruption or partiality….".

While a lawyer "should not hesitate to speak out against an injustice" a lawyer does have a duty pursuant to 21.7 "to avoid criticism that is petty, intemperate or unsupported by a *bona fide* belief in real merit…". The allegations as delineated in Article 1 of the Complaint can easily be described as petty and intemperate and in the absence of any evidence in support of the allegations there cannot be a *bona fide* belief in their merit.

> Finally, the Member is in breach of 21.7 for as a lawyer involved in the proceedings, "there is a risk that any criticism may be, or may appear to be, partisan rather than objective."

[11] Regarding his attack on the opposing counsel, the Panel concluded:

> Simply put Mr. Giles unequivocally denies the allegation and Mr. Lienaux admits that he has tendered no evidence at any time in support of his allegation.
>
> Chapter 13 of the *Handbook* states that "a lawyer has a duty to treat and deal with other lawyers courteously and in good faith".
>
> > 13.1 A lawyer has a duty not to allow any ill feeling that may exist or be engendered between clients to influence his or her conduct towards the other lawyer or the other lawyer's client. The presence of a personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. A lawyer has a duty not to make any disparaging remarks to or about another lawyer.
>
> In making his allegations before the Court of Appeal without clear and cogent evidence to support such allegations, the Member is in breach of his duty "not to make any disparaging remarks to or about another lawyer". Contrary to section 13.1 of the *Handbook* he is guilty of conduct unbecoming a Barrister.

[12] Before turning to the issues, I note that, to date, Mr. Lienaux remains convinced that his attacks have merit. For example, in his factum before us, he asserts:

> ¶ 10 In the Factum [in the original appeal] I made the argument to the Court of Appeal that when the court does not enforce the law it creates "the appearance" that the court's process has been corrupted. In the Factum I made the argument to the Court of Appeal that for the foregoing reason it should not apply or follow the rulings made by the courts in the Campbell Case and should consider the Campbell Case decisions to be bad law.
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> ¶ 11 Because of my knowledge that Campbell and the four judges in question are all lawyers and socially prominent members of the Nova Scotia legal community, and because of comments made to me by informed lawyers and accountants in the community, I made the oral argument to the Court of Appeal that by not enforcing the law against Campbell it created the appearance that the

> law is being applied for the benefit of a member of an 'old boy network'. The *prima facie* appearance of an old boy network arises in this case because Campbell - - like the judges who ruled in the Campbell Case - - was a lawyer and socially prominent member of the Nova Scotia legal community - - and the law was not enforced according to the proven facts.
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> ...
>
> ¶ 22 In response to the Complaint I filed the submission set out at pages 268 – 378 of Volume 2A of the appeal book. At pages 304 – 355 of Volume 2A of the appeal book I set out evidence (the "Evidence") from the Campbell Case which in my opinion supports a reasonable belief that *Justice Hood intentionally did not enforce the law against Campbell*. ...
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> ¶ 23 At pages 355 – 366 of Volume 2A of the appeal book I set out further Evidence from the Campbell Case which in my opinion supports a reasonable belief that the *Court of Appeal intentionally did not enforce the law against Campbell*. ...
>
> [Emphasis added.]

## ISSUES

[13] In his factum, Mr. Lienaux lists the following issues:

> 1. That the Hearing Panel erred in law and exceeded its jurisdiction when the Hearing Panel proceeded with the hearing of the Complaint after the Society's witness testified that the Society had not carried out any investigation of the matters giving rise to the charges made against the appellant in the Complaint.
>
> 2. That the Hearing Panel erred in law and exceeded its jurisdiction when the Hearing Panel found the appellant guilty of the charges made in the Complaint after the Society's witness testified that as a member of the Society the appellant owed a duty to complain to the court about the matters which gave rise to the charges made against the appellant in the Complaint.
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> 3. That the Hearing Panel erred in law and exceeded its jurisdiction when it refused the appellant the opportunity to call witnesses and adduce evidence for the purpose of defending the charges made against the appellant in the Complaint contrary to s. 43(3)(b) of the **Legal Profession Act**, SNS 2004, c. 28.

> 4. That the Hearing Panel erred in law when it determined that the Society had jurisdiction to lay a charge against the appellant and prosecute the appellant for conduct unbecoming for making submissions to the court in a proceeding in which the appellant was a party and representing himself, solely, in person, and not practising law on behalf of any other person or corporation within the meaning of s. 16(1) of the **Legal Profession Act**, SNS 2004, c. 28.
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> 5. That the hearing panel erred in law when it determined that the Society had jurisdiction to lay a charge against the appellant and prosecute the appellant for conduct unbecoming for the appellant's personal conduct which conduct does not constitute personal conduct unbecoming within the meaning of regulation 9.1.3 published pursuant to the **Legal Profession Act**.
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> 6. That the hearing panel erred in law when it determined that the Society had submitted any or sufficient evidence to prove the charges made against the appellant in the Complaint on the balance of probabilities or according to any other sufficient burden of proof.

## ANALYSIS

### Standard of Review

[14] Before addressing each issue in order, I would first like to make some general comments about the standard upon which we should review the Panel's conclusions. In other words, on each of these issues I must ask what will it take for this court to interfere with the Panel's conclusions?

[15] The Supreme Court of Canada in **Dunsmuir v. New Brunswick**, [2008] S.C.J. No. 9, recently revisited our role in reviewing decisions of administrative tribunals. In essence, we are to place each issue in context by addressing certain factors before deciding whether a particular decision is entitled to deference.

[16] The factors to consider are: (a) whether the tribunal's enabling legislation directs deference by way of a privative clause; (b) the tribunal's purpose according to its enabling legislation; (c) the nature of the issue under review, and (d) any institutional expertise the tribunal may possess. In some cases, one factor alone may represent a command for deference. (**Dunsmuir**, ¶ 64.)

[17] Once the impugned decision is placed in its appropriate context, we are to choose from one of two potential standards of review. The first standard is

*correctness* which calls for no deference. In other words, the reviewing court will conduct its own analysis and, as the label suggests, the decision must be correct to be sustained. (**Dunsmuir**, ¶ 50.) The alternative standard is *reasonableness*, which commands deference. As such, the decision will be sustained unless it is viewed as *unreasonable*. Here is how the Court in **Dunsmuir** described the test for *reasonableness*:

> ¶ 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. *In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*
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> [Emphasis added.]

[18] The approach in **Dunsmuir** represents a change in terminology by the Supreme Court. For example, if deference is appropriate, we now have just one as opposed to two standards to choose from. In other words, the new *reasonableness* standard subsumes what used to be, (a) the *reasonableness simpliciter* standard that commanded some deference, and (b) the *patent unreasonableness* standard that commanded greater deference.

[19] However while **Dunsmui**r triggers a change in terminology, it does not necessarily signal a substantive change in approach. The Supreme Court explains:

> ¶ 48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be

> content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" *(Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).
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> ¶ 49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[20] Furthermore, and relevant to this case, the melding of the two previous *reasonableness* standards does not trigger a reinventing of the jurisprudential "wheel". The Court in **Dunsmuir** recognized that earlier case law should still be relied upon:

> ¶ 57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard *(Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

[21] In fact, if directly on point, existing jurisprudence should render any further analysis unnecessary:

> ¶ 62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[22] In this appeal, a review of pre-**Dunsmuir** existing case law does indeed bear fruit. In fact, the Supreme Court of Canada in **Law Society of New Brunswick v. Ryan**, [2003] 1 S.C.R. 247, 2003 SCC 20, considered in some detail the standard upon which bar societies' decisions should be reviewed. Generally speaking, they command deference:

> ¶ 42 Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the self-regulating Law Society should be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting appropriate sanctions. In looking at all the factors as discussed in the foregoing analysis, I conclude that the appropriate standard is reasonableness *simpliciter*. Thus, on the question of the appropriate sanction for professional misconduct, the Court of Appeal should not substitute its own view of the "correct" answer but may intervene only if the decision is shown to be unreasonable.

[23] Furthermore, it is noteworthy that Nova Scotia's regime for Society discipline is virtually identical to that of New Brunswick. For example, the practice of law in both provinces is self-regulated. Statutory rights of appeal exist in both provinces. Their respective discipline Panels possess institutional expertise as a result of their experience in this area and their members bring individual expertise to the process. Under the category of individual expertise, both regimes draw on a blend of seasoned lawyers and lay representatives. The Court in **Ryan** explains the consequent advantages:

> ¶ 31 First, the Discipline Committee has greater expertise than courts in the choice of sanction for breaches of professional standards. By s. 55(1)(a) of the Act, the Discipline Committee is composed of a majority of members of the Law Society who are subject to the same standards of professional practice as the lawyers who come before them. Current members of the Law Society may be more intimately acquainted with the ways that these standards play out in the everyday

> practice of law than judges who no longer take part in the solicitor-client relationship. Practising lawyers are uniquely positioned to identify professional misconduct and to appreciate its severity (see *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 890; *Re Law Society of Manitoba and Savino* (1983), 1 D.L.R. (4th) 285 (Man. C.A.), at pp. 292-93); on the matter of expertise, see also *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 43-53.
>
> ¶ 32 Second, members of the public are appointed to the Discipline Committee pursuant to s. 55(1)(b) of the *Act*. There will always be one lay person on a panel of the Committee by operation of s. 55(4). Although they will presumably have less knowledge of legal practice than judges or the members of the Law Society, lay persons may be in a better position to understand how particular forms of conduct and choice of sanctions would affect the general public's perception of the profession and confidence in the administration of justice. Since these are central concerns in the *Act*, the lay member of a Discipline Committee provides an important perspective for the tribunal in carrying out its duties.
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> ¶ 33 Third, the Discipline Committee has relative expertise generated by repeated application of the objectives of professional regulation set out in the Act to specific cases in which misconduct is alleged. In each case, the Committee will be called on to interpret those objectives in the factual context. This, we can assume, will tend to generate a relatively superior capacity to draw inferences from facts related to professional practice and also to assess the frequency and level of threat to the public and to the legal profession posed by certain forms of behaviour.

[24] Finally, under both statutory regimes, membership discipline represents a core mandate. For all these reasons, the guidance offered in **Ryan** should apply with equal force in Nova Scotia.

[25] Furthermore, several post-**Dunsmuir** decisions in Ontario and Quebec (also with similar regimes) have confirmed that **Ryan** remains the leading authority in this area. See: **Law Society of Upper Canada v. Evans**, [2008] O.J. No. 2729 at ¶10-13; **Igbinosun v. Law Society of Upper Canada**, [2008] O.J. No. 2848 at ¶9; and **Goldman c. Comité des requêtes du Barreau du Québec**, 2008 QCCS 3019 at ¶ 24-25.

[26] With this basic backdrop, let me now address the issues raised by Mr. Lienaux. Guided by **Ryan**, I will initially identify the appropriate standard of review for each. You will note that universally the result is *reasonableness*.

Issue #1

*That the Hearing Panel erred in law and exceeded its jurisdiction when the Hearing Panel proceeded with the hearing of the Complaint after the Society's witness testified that the Society had not carried out any investigation of the matters giving rise to the charges made against the appellant in the Complaint.*

[27] By this ground of appeal, Mr. Lienaux asserts that the Society should have taken his allegations of an "old boy network" seriously and investigated them before passing judgement. Without such an investigation, he says the Panel, (a) had no jurisdiction to proceed, and (b) erred in law by doing so. He submits therefore that such questions of law and jurisdiction ought to be reviewed on a *correctness* standard. I disagree.

[28] Granted, pure questions of jurisdiction and questions of law unrelated to the enabling legislation should be reviewed on the *correctness* standard. (**Dunsmuir**, ¶ 59-60). However this issue, properly framed, involves neither a legal nor a true jurisdictional question. I say this because nobody would seriously question the Society's fundamental jurisdiction to discipline its members and, to this end, conduct whatever investigation it deems warranted. Thus issues that may tangentially touch on jurisdiction do not necessarily command a *correctness* standard. The Supreme Court in **Dunsmuir**, *supra*, explains:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of vires to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a

> municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[29] In reality, this issue involves the Panel's statutory right to control its own process under the enabling legislation. When deciding the extent of its investigation, the Panel was therefore exercising its discretion and interpreting its enabling statute. This calls for deference. (**Dunsmuir**, ¶ 53-54; **Ryan**, ¶ 42.) Considering the overall guidance offered by **Ryan** and the true nature of this question, the standard of review arrows point conclusively to *reasonableness*.

[30] Turning to consideration of this issue on its merits, was the Panel's refusal to investigate Mr. Lienaux's assertions of apparent judicial corruption reasonable? For the following reasons, I say it was.

[31] Here is part of what Mr. Lienaux alleges in his factum (after citing testimony from the discipline hearing that the Society had not considered public criticisms about Nova Scotia's justice system):

> ¶ 47 By the Society making the Complaint against me and making the rulings it has against me without:
>
> > (a) carrying out the investigation required by the **Act** to ensure that the matters which I alleged against the judges of the courts were wrong in fact and in law; and
> >
> > (b) making the Complaint and the rulings it has against me - - without considering any of the evidence which was before the Panel at pages 304 – 366 of Volume 2A of the appeal book - - the Society has *de facto* ruled that members of the Society must never make submissions to the courts which - - rightly or wrongly - - in any way impugn the conduct of the judges of the courts.
>
> ¶ 48 The actions of the Society fly in the face of both the requirements of the **Act** *supra* and para. 21.4 of the *Handbook* which provides as follows:
>
> > The lawyer has a duty not to weaken or destroy public confidence in legal institutions or authorities by broad, irresponsible allegations of corruption or partiality. The lawyer in public life must be particularly careful in this regard because the mere fact of being a lawyer lends weight and credibility

> to any public statements. **For the same reason the lawyer should not hesitate to speak out against injustice**. (Bold and emphasis added.)
>
> ¶ 49 According to the provisions of the Act the Society can only invoke its jurisdiction to sanction a member of the Society "during or after an investigation". Since - - by the admission of the Society's own witness - - no such investigation was ever conducted by the Society or the CIC to determine the validity of the issues alleged in the Complaint the Hearing Panel erred in law and exceeded its jurisdiction when the Hearing Panel proceeded with the hearing of the Complaint and enforced the penalties it did against me without a proper investigation having been previously made to determine whether the submissions I made to the Court of Appeal were permitted to be made pursuant to para. 21.4 of the *Handbook*.

[32] It appears, by his submission, that Mr. Lienaux would have the Nova Scotia Barristers' Society launch a full inquiry into Nova Scotia's justice system simply because, (a) our justice system has been openly criticized in the past, and (b) four Nova Scotia judges have recently ruled against him. Again, aside from baseless assertions, he offers absolutely nothing to connect the four named judges to Mr. Campbell. The fact that he misguidedly believes there is a link is not evidence of a connection. It was more than reasonable for the Panel to proceed as it did. I would dismiss this ground of appeal.

Issue #2

*That the Hearing Panel erred in law and exceeded its jurisdiction when the Hearing Panel found the appellant guilty of the charges made in the Complaint after the Society's witness testified that as a member of the Society the appellant owed a duty to complain to the court about the matters which gave rise to the charges made against the appellant in the Complaint.*

[33] This issue is related to the first issue. Mr. Lienaux asserts that not only was he within his rights to make his accusations of perceived judicial corruption, he, as a lawyer and officer of the court, was under a duty to speak out.

[34] In considering the appropriate standard of review, by this issue Mr. Lienaux essentially challenges the Panel's conclusions based on the evidence presented. This involves findings of mixed fact and law which call for deference. Therefore, as with the first issue, no question of law or jurisdiction is triggered. Again, *reasonableness* is the proper standard of review.

[35] On its merits, this issue again hinges on the credibility of Mr. Lienaux's assertions of judicial misconduct. Of course, had they been at all credible, he would indeed have been under a duty to courageously speak out. However, there can be no duty triggered when the assertions are baseless. The Panel acted reasonably in finding Mr. Lienaux guilty on the evidence presented. I would dismiss this ground of appeal.

Issue #3

*That the Hearing Panel erred in law and exceeded its jurisdiction when it refused the appellant an opportunity to call witnesses and adduce evidence for the purpose of defending the charges made against the appellant in the Complaint contrary to s. 43(3)(b) of the* ***Legal Profession Act****, SNS 2004, c. 28.*

[36] This issue is even more closely related to the first issue. Mr. Lienaux argues that the Panel erred in law and jurisdiction by not allowing him to call witnesses to prove, (a) that the Society failed to conduct an investigation into his assertions of apparent judicial corruption, and (b) that Nova Scotia's justice system has been publicly criticized in the past. As with the first issue, this question fundamentally involves the Panel's discretionary decision in the course of controlling its own process. For the same reasons, therefore, this issue will be reviewed on a standard of *reasonableness*.

[37] In considering the merits of this issue, let me first note that the Panel did not issue a blanket prohibition against calling witnesses to support the fact that Nova Scotia's justice system has been publicly criticized in the past. In pre-hearing correspondence, the Chair questioned its relevance but added:

> Should it become apparent at any time that the testimony of any one or all of the justices may be relevant to our consideration of the specific allegations contained in the Complaint, the Panel can revisit this issue.

[38] Furthermore, and in any event, the Panel reasonably concluded, in the end, that any such evidence was irrelevant to their inquiry. The reason is simple. There was no issue about whether or not the Society investigated the merits of his assertions - it did not. Nor was there an issue about Nova Scotia's justice system being publicly criticized in the past. It has been. Again, the real issue was whether

Mr. Lienaux could offer any evidence linking the four named judges to Mr. Campbell and on this he offered nothing. The Panel exercised its discretion reasonably in this regard. I would dismiss this ground of appeal.

Issue #4

*That the Hearing Panel erred in law when it determined that the Society had jurisdiction to lay a charge against the appellant and prosecute the appellant for conduct unbecoming for making submissions to the court in a proceeding in which the appellant was a party and representing himself, solely, in person, and not practising law on behalf of any other person or corporation within the meaning of s. 16(1) of the* ***Legal Profession Act****, SNS 2004, c. 28.*

[39] By this ground it appears, on its face at least, that Mr. Lienaux is suggesting that he cannot be disciplined because when he made his impugned assertions, he was not acting as a lawyer but solely on his own behalf.

[40] For standard of review purposes, this issue fundamentally involves the Panel's interpretation of its enabling legislation. Considering the breadth of its mandate to discipline members, combined with the other indicia of deference identified in **Ryan**, I am led to a *reasonableness* standard of review.

[41] Turning to its merits, this submission also fails. Simply put, lawyers acting on their own behalf do not check their Society membership at the courtroom door. Under its enabling legislation, the Society has a broad mandate to sanction misconduct, even if it involves a member’s private life. Let me explain.

[42] Section 28 of the **Legal Profession Act**, SNS 2004, c. 28, confers a broad jurisdiction over "members of the Society in respect of their conduct and professional competence ...":

> 28 (1) The Society has jurisdiction over
>
> (a) members of the Society in respect of their conduct and professional competence in the Province or in a foreign jurisdiction;
>
> (b) persons who were members of the Society at the time when a matter regarding their conduct or professional competence occurred;

> (c) lawyers from foreign jurisdictions in respect of their practice of law in the Province;
>
> (d) members of the Society, who have been subject to a disciplinary proceeding in a foreign jurisdiction, in respect of the members' behaviour in a foreign jurisdiction and regardless of disciplinary proceedings taken in that jurisdiction.

[43] It can also make regulations establishing ethical standards:

> 28 (2) The Council may make regulations
>
> (a) establishing or adopting ethical standards for lawyers and articled clerks;
>
> (b) establishing or adopting professional standards for the practice of an area of law;

[44] Specifically, regulation 9.1.3 covers conduct in a member’s personal or private capacity:

> 9.1.3 When considering complaints or charges, the Complaints Investigation Committee and a hearing panel may determine that conduct constitutes
>
> > (a) conduct unbecoming, if it involves conduct in a member's personal or private capacity that tends to bring discredit upon the legal profession ...

[45] Furthermore, regulation 8.1 elevates the Society's *Legal Ethics Handbook - Legal Ethics and Professional Conduct* - to the status of rules for all members.

> 8.1 The ethical standards contained in the rules, guiding principles and commentaries of *Legal Ethics and Professional Conduct* (1990) as amended, are adopted as ethical standards for all members of the Society and lawyers who are subject to the rules governing members.

[46] The *Handbook* in turn has a chapter dedicated to respect for legal institutions including the judiciary. Here are the relevant provisions that capture Mr. Lienaux's obligations whether representing himself, or otherwise:

> Guiding Principles

> The admission to and continuance in the practice of law imply a basic commitment by the lawyer to the concept of equal justice for all within an open, ordered and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public. Because of changes in human affairs and the imperfection of human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.[2]
>
> The lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. The lawyer, therefore, has a duty to provide leadership in seeking improvements to the legal system. Any criticisms and proposals the lawyer makes in doing so should be *bona fide* and reasoned. In discharging this duty, the lawyer should not be involved in violence or injury to the person.
>
> . . .
>
> 21.2 The lawyer's responsibilities are greater than those of a private citizen.
>
> . . .
>
> 21.4 The lawyer has a duty not to weaken or destroy public confidence in legal institutions or authorities by broad, irresponsible allegations of corruption or partiality. The lawyer in public life must be particularly careful in this regard because the mere fact of being a lawyer lends weight and credibility to any public statements.[3] For the same reason the lawyer should not hesitate to speak out against an injustice.

[47] The following provisions deal specifically with lawyers who criticize the court:

> Criticism of the Court
>
> 21.5 Although proceedings and decisions of courts are properly subject to scrutiny and criticism by all members of the public including lawyers, members of courts are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers.
>
> 21.6 Firstly, *the lawyer has a duty to avoid criticism that is* petty, intemperate or *unsupported by a bona fide belief in its real merit*, bearing in mind that, in the eyes of the public, professional knowledge lends weight to the lawyer's judgements or criticism.

> 21.7 Secondly, if the lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective.
>
> [Emphasis added.]

[48] Provision 21.6 seems to excuse criticism that is based on a lawyer's "*bona fide* belief in its real merit." In this regard, I accept that Mr. Lienaux subjectively believes his criticism of the judiciary to have real merit.

[49] However, without some objective basis, his beliefs cannot be reasonably viewed as *bona fide* in these circumstances. In other words, the expression "*bona fide*" at least within this context, calls for some measure of objectivity. For example, the Supreme Court of Canada has held that in the context of the Human Rights policy, the concept of "*bona fide*" calls for an element of objectivity. See **New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.**, 2008 SCC 45, at ¶ 32. With no reasonable basis for Mr. Lienaux's assertion, this ground of appeal fails.

[50] This conclusion deals with the issue as presented in Mr. Lienaux's notice of appeal and factum. However, in his oral presentation, Mr. Lienaux proceeded to cast his submission in a completely different direction, appearing to transform this issue into one involving the penalty imposed by the Panel. Specifically, he challenges the prohibition from representing himself in any ongoing or future "Campbell" matters. The impugned provision directs:

> 5. The Panel, after considering the written and oral submissions on behalf of the Society and on behalf of Charles D. Lienaux, has unanimously RESOLVED THAT: ...
>
> > (b) *Charles Lienaux be prohibited from acting* either as a lawyer on behalf of his spouse, family members, any company, or *on behalf of himself* in any capacity including any action, hearing, appearance or other form of representation *in any matter related to the proceedings which gave rise to this Complaint;*
>
> [Emphasis added.]

[51] By this issue, Mr. Lienaux submits that the Panel has no jurisdiction to remove his fundamental right to represent himself. For reasons I will now develop, I agree with him on this point.

[52] Considering first the appropriate standard of review, this is not a true jurisdictional issue as Mr. Lienaux suggests. Again, nobody questions the Society's broad mandate to sanction guilty members. The **Legal Profession Act** provides:

> 45 (4) Where a hearing panel finds a member of the Society, other than a law firm, guilty of professional misconduct, professional incompetence or conduct unbecoming a lawyer or articled clerk, it shall, following an opportunity for the parties to present evidence and submissions respecting the proposed disposition by the hearing panel, do one or more of the following:
>
> . . .
>
> (n) make any other order or take any other action the hearing panel determines to be appropriate in the circumstances including an order to retain jurisdiction to monitor the enforcement of its order.

[53] As well, this function triggers the Panel's expertise and involves an interpretation of its enabling legislation. In fact, this is the exact issue addressed by the Supreme Court in **Ryan**, when it held that a Bar Society's mandate to issue appropriate sanctions should be reviewed on a *reasonableness* standard. For all these reasons, it is clear that I should do the same.

[54] Turning to the merits, let me explain my concerns. Prohibiting Mr. Lienaux from representing himself on any ongoing or future **"**Campbell" matters produces this troublesome corollary. In order for Mr. Lienaux's side of the case to be presented in court, by this order he must retain counsel. From a purely pragmatic perspective, this may not even be possible, depending on his financial circumstances and other contingencies such as the availability of counsel. Furthermore, despite the Society's broad mandate, it cannot be seen to oust what (subject to certain statutory exceptions not relevant here) the common law views as fundamental any citizen's right to be self-represented. For example, in *Children's Aid of Halifax v. C.V.*, 2005 NSCA 87, this court observed:

> ¶ 33 In **Mian v. R.**, [1998] N.S.J. No. 398 this court confirmed that an individual who has not been declared unfit to stand trial has a right to self-representation. He

> or she cannot be forced to be represented by counsel. As noted in **Mian**, the case law on this point was conveniently summarized by Hill J., of the Ontario Court of Justice, General Division, in **R. v. Romanowicz**, [1998] O.J. No. 12, (Q.L.), 14 C.R. (5th) 100, (affirmed on appeal at [1999] O.J. No. 3191 (C.A.)) beginning at paragraph 30:
>
> > The accused has a right to self-representation: **The Queen v. Vescio** (1949), 92 C.C.C. 161 (S.C.C.) at 164 per Taschereau J.; **The Queen v. McGibbon** (1988), 45 C.C.C. (3d) 334 (Ont. C.A.) at 346-7 per Griffiths J.A.; **Regina v. Fabrikant** (1995), 97 C.C.C. (3d) 544 (Que. C.A.) at 555 per Proulx J.A. (leave to appeal to S.C.C. refused [1995] 3 S.C.R. vi). The court cannot, from a paternalistic perspective, force counsel upon an unwilling accused. In **Swain v. The Queen** (1991), 63 C.C.C. (3d) 481 (S.C.C.) at 505-6, Lamer C.J.C. stated "an accused person has control over the decision of whether to have counsel". Likewise, in **R. v. Taylor** (1993), 77 C.C.C. (3d) 551 (Ont. C.A.) at 567 Lacourcière J.A. stated:
> >
> > > An accused who has not been found unfit to stand trial must be permitted to conduct his own defence, even if this means that the accused may act to his own detriment in doing so. The autonomy of the accused in the adversarial system requires that the accused should be able to make such fundamental decisions and assume the risks involved.
> >
> > It seems then that the respect for individual autonomy within the adversarial system forecloses the court from forcing counsel upon an accused even where it may clearly be in the interests of the accused: **Regina v. Taylor,** *supra* at 567; **Regina v. Littlejohn and Tirabasso** (1978), 41 C.C.C. (2d) 161 (Ont. C.A.) at 173 per Martin J.A. In other words, although an accused may be disadvantaged in defending without assistance, no person, otherwise fit to stand trial, can be forced to have counsel. The accused assumes the risks and disadvantages of appearing without counsel.
>
> ¶ 34 *These principles apply equally to a person's right to conduct his or her own case in civil matters.* The appellants here were intent upon self-representation, however misguided that plan. The judge had no option but to permit them to proceed and did not err on that account.
>
> [Emphasis added.]

[55] In articulating my concerns, I appreciate the Panel's motivation. By representing himself in these matters, Mr. Lienaux has clearly lost his way.

However, that, respectfully, does not displace his fundamental right to be self-represented. Harkening back to **Dunsmuir** (¶ 47), this aspect of the Panel's order therefore does not "fall within the range of possible, acceptable outcomes". I would allow this narrow aspect of the appeal.

Issue #5

*That the hearing panel erred in law when it determined that the Society had jurisdiction to lay a charge against the appellant and prosecute the appellant for conduct unbecoming for the appellant's personal conduct which conduct does not constitute personal conduct unbecoming within the meaning of regulation 9.1.3 published pursuant to the* ***Legal Profession Act****.*

[56] By this ground, Mr. Lienaux suggests that the Panel misinterpreted regulation 9.1.3 of the **LPA**. Regarding the standard of review, the fact that the Panel was interpreting its enabling legislation calls for deference (**Dunsmuir**,¶ 54; **Ryan**, ¶42). Because of this and all the other factors highlighted in **Ryan**, the Panel is entitled to have this decision reviewed on a *reasonableness* standard.

[57] Turning on the merits, here is the noted provision:

> 9.1.3 When considering complaints or charges, the Complaints Investigation Committee and a hearing panel may determine that conduct constitutes
>
> > (a) conduct unbecoming, if it involves conduct in a member's personal or private capacity that tends to bring discredit upon the legal profession *including*:
> >
> > > i) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or competence as a member of the Society;
> > >
> > > ii) taking improper advantage of the youth, inexperience, lack of education, lack of sophistication, or ill health of any person;
> > >
> > > iii) engaging in conduct involving dishonesty [LSUC definition];
>
> [Emphasis added.]

[58] Essentially Mr. Lienaux submits that in order to be found guilty of conduct unbecoming, his actions must fall within one of the three enumerated categories involving criminal acts, exploitation, or dishonesty, and the Society makes no such charge.

[59] This submission has no merit for one simple reason. It ignores the word "including" placed immediately before the three enumerated categories. In other words, by its plain and simple meaning, and consistent with the **Act**'s obvious purpose, the enumerated categories are not exclusive. They are but mere examples of a broad category of “conduct unbecoming”. The Panel’s broad interpretation was therefore reasonable. I would dismiss this ground of appeal.

Issue # 6

*That the hearing panel erred in law when it determined that the Society had submitted any or sufficient evidence to prove the charges made against the appellant in the Complaint on the balance of probabilities or according to any other sufficient burden of proof.*

[60] By this ground, Mr. Lienaux essentially challenges the Panel's findings of guilt on the evidence tendered. As with issue #2, this involves the Panel's weighing of the evidence and applying it to the applicable legislative provisions. Such findings of mixed law and fact command deference. This combined with the Panel's expertise triggers a corresponding *reasonableness* standard of review.

[61] On the merits, I have already noted that Mr. Lienaux's assertions against the four named judges are baseless. Furthermore, to this day, he is yet to resile from his strident position. On this basis, again, it was reasonable for the Panel to find him guilty on all related charges.

[62] Regarding the false assertion against opposing counsel, the Panel noted the impugned lawyer's vehement denial of such a suggestion. Furthermore, Mr. Lienaux admits making this accusation and it is clear that he had no direct evidence (other than his own accusation) to support it. The Panel properly considered these facts and applied them to the relevant portion of the *Handbook.* It reasonably concluded:

> Simply put Mr. Giles unequivocally denies the allegation and Mr. Lienaux admits that he has tendered no evidence at any time in support of his allegation.

> Chapter 13 of the *Handbook* states that "a lawyer has a duty to treat and deal with other lawyers courteously and in good faith".
>
> > 13.1 A lawyer has a duty not to allow any ill feeling that may exist or be engendered between clients to influence his or her conduct towards the other lawyer or the other lawyer's client. The presence of a personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. A lawyer has a duty not to make any disparaging remarks to or about another lawyer.
>
> In making his allegations before the Court of Appeal without clear and cogent evidence to support such allegations, the Member is in breach of his duty "not to make any disparaging remarks to or about another lawyer". Contrary to section 13.1 of the *Handbook* he is guilty of conduct unbecoming a Barrister.

[63] I would dismiss this ground of appeal.

Costs

[64] Aside from adjusting a portion of the penalty imposed by the Panel, Mr. Lienaux was substantially unsuccessful in his appeal. For this reason, the Society should be entitled to its costs.

DISPOSITION

[65] I would allow the appeal to the extent that Mr. Lienaux shall not be prohibited from acting on his own behalf. As such, I would therefore order that Clause 5(b) of the Panel's resolution be amended to read:

> (b) Charles Lienaux be prohibited from acting as a lawyer on behalf of his spouse, family members, or any company, in any capacity including in any action, hearing, appearance or providing other form of representation in any matter related to the proceedings which gave rise to this Complaint;

[66] Otherwise, I would dismiss the appeal. For clarity, consistent with the order of Bateman, J.A., in Chambers, (reported as 2008 NSCA 40; [2008] N.S.J. No. 163 (Q.L.)), paragraph 5(a)) of the Panel's Resolution which suspends Mr. Lienaux

from the practice of law for a period of one month shall take effect March 1, 2009. I would further order Mr. Lienaux to pay the Society's costs of this appeal of $2,000.00, together with reasonable disbursements to be agreed upon or otherwise taxed.

MacDonald, C.J.N.S.

Concurred in:

Bateman, J.A.

Murphy, J.