SUPREME COURT OF NOVA SCOTIA
Citation: *Howe v. Rees*, 2022 NSSC 230

Date: 20221104
Docket: Hfx No. 500125
Registry: Halifax

Between:

Lyle Howe

Plaintiff

v.

Victoria Rees, Raymond Larkin, Nova Scotia Barristers Society

Defendants

Decision on Plaintiff's Motion to Amend Pleadings and Defendant's Motion (Mr. Larkin) for Summary Judgment on Pleadings

Judge:	The Honourable Justice Peter Rosinski
Heard:	April 1, 2022, in Halifax, Nova Scotia
Counsel:	Laura McCarthy, for the Plaintiff Michael Brooker K.C. and Sydney Hull, for the Defendants Ms. Rees and Mr. Larkin Geoffrey Breen and Erin Mitchell, for the Defendant Nova Scotia Barristers Society

The original text of this decision has been corrected according to the erratum dated December 8, 2022

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By the Court:

A – Introduction

[1] Mr. Howe, a disbarred lawyer, has sued the defendants for their alleged acts and omissions in relation to the administrative processes of the Nova Scotia Barristers Society ["the Society" or "NSBS"] that led to his interim suspension from practice on September 1, 2016, and ultimately contributed to a finding by a Hearing Panel of the Society of numerous instances of misconduct by him in its decision on July 17, 2020, which led to his disbarment by the Society on October 20, 2017.[1]

[2] In a statement of claim filed August 31, 2020, he claims against the defendants for **negligence** in their investigation and actions taken against him, **malicious prosecution**, and **defamation** in both slander and libel.[2]

[3] He has since conceded that he only claims defamation by the Society, not as against Mr. Larkin or Ms. Rees.

[4] Before me are two motions:

1. Mr. Howe's motion seeking leave from the court to amend his pleadings; and
2. Mr. Larkin's motion for summary judgment on pleadings, and alternatively, that Mr. Howe's pleadings constitute an abuse of process pursuant to *Civil Procedure Rule* ["*CPR*"] 88.

[5] Ms. Rees and the Society support Mr. Larkin's position.

[6] I largely agree with the defendants in relation to the two motions.

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[1] To be clear, Mr. Howe is not directly challenging his disbarment and those underlying proceedings, but rather is challenging it indirectly, to the extent that his disbarment flowed from an *ex parte* interim suspension hearing held on September 1, 2016, and the charges arising therefrom, which were withdrawn (without a hearing) by the Society on July 24, 2020. This conclusion is clear from his requested relief in his March 4, 2022, brief at paragraph 72 which includes his statement that he is claiming "monetary damages, as well as an order rescinding Mr. Howe's suspension and subsequent disbarment".

[2] Attached hereto as Appendix "A" is the *proposed amended* statement of claim.

[7] For the reasons that follow, I deny leave to Mr. Howe to amend his pleadings, and grant Mr. Larkin's motions. Consequently, I dismiss Mr. Howe's existing civil suit against each of the defendants.

B - General background chronology[3]

[8] Mr. Howe graduated from Dalhousie Law School in May 2009. He was called to the Nova Scotia Bar in June 2010. From August 2011 onward, he was a sole practitioner focusing mainly on criminal defence matters. In June 2013, Laura McCarthy joined his firm upon her admission to the Bar.

[9] As a result of complaints received between June 2010 and October 2011, the Nova Scotia Barristers Society ["the Society"] conducted a review of Mr. Howe's practice led by John Rafferty, KC. The Society's Complaints Investigation Committee [CIC] is responsible for directing and reviewing the investigation of such complaints. In relation to one complaint only, he was counselled by the Society.

[10] After further complaints, on October 3, 2013, the CIC ordered a second review of Mr. Howe's practice and retained Stanley MacDonald, K.C., to conduct it. Pursuant to the findings of that review, the CIC retained Robert Wright to conduct an "Impact of Race and Cultural Assessment" to assist it in its investigation.[4] The Society proposed practice restrictions, to which Mr. Howe agreed on April 17, 2014.

[11] Further complaints in relation to Mr. Howe's practice were received by the Society in 2014. The Society continued its investigation into 2014 and 2015. It directed Victoria Rees, K.C., who was the Director of Professional Responsibility for the Nova Scotia Barristers Society at all material times, to lay charges against Mr. Howe, and the Society did so on May 25, 2015 ["the 2015-charges"].

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[3] The following chronology of events is taken from the decision rendered by the Court of Appeal herein and is for context only: *Howe v. Nova Scotia Barristers' Society*, 2019 NSCA 81 (leave to appeal denied, [2019] SCCA No. 522). Notably, the factors to be considered in sentencing racialized lawyers for disciplinary findings as set out at paragraph 179 in *Howe*, were adopted by the disciplinary body in *Law Society of British Columbia v. Yen*, [2021] LSDD No. 153, at paragraph 51). Ms. Rees and Mr. Larkin have even more expansively set out the context in their September 27, 2021, and December 20, 2021, briefs.

[4] This assessment is explained in greater detail, albeit in the context of a criminal sentencing, in the unanimous reasons of the five sitting justices in *R v. Anderson*, 2021 NSCA 62, per Derrick, J.A.

[12] In October 2015, Malcolm Jeffcock, K.C., was appointed as Mr. Howe's practice supervisor.

[13] In addition to some pre-existing charges, the CIC approved new charges against Mr. Howe arising from new complaints relating to his conduct in June and July 2016 ["the 2016 charges"].

[14] Raymond Larkin, K.C., was retained by the Society to act as its counsel in relation to an interim hearing pursuant to section 37 of the *Legal Profession Act*. That was his only involvement in relation to Mr. Howe. As a result of that one-day *ex parte* hearing, the CIC rendered a decision on September 1, 2016, to suspend Mr. Howe from practising law pursuant to section 37 of the *Act*. After a 66-day disciplinary hearing, Mr. Howe was found guilty of numerous charges brought against him by the Society, and consequently disbarred on October 20, 2017.[5]

[15] On October 24, 2019, Mr. Howe's appeal thereof was dismissed (2019 NSCA 81, leave to appeal denied, [2019] SCCA No. 522, December 20, 2019).

[16] Mr. Howe filed a Notice of Action on August 31, 2020, in which he alleged that the Society, Victoria Rees, K.C., and Raymond Larkin, K.C., caused him to suffer damages as a result of negligence in the investigation of his conduct as a lawyer, as well as alleging malicious prosecution for alleged breaches of professional conduct, and defamation (libel and slander) of him.

[17] On July 23, 2021, Mr. Larkin filed a motion for summary judgment on pleadings (*CPR* 13.03) and, alternatively, for an order dismissing the proceeding *against him* as an abuse of process (*CPR* 88).

[18] On November 15, 2021, Mr. Howe filed a motion for leave to amend his existing pleadings. The Society, Ms. Rees, and Mr. Larkin oppose the motion.

C - A summary of the motions

i) Mr. Howe's motion to amend his pleadings

[19] His proposed amendments to existing pleadings should generally be granted provided: Mr. Howe is not acting in bad faith in requesting the amendments, and the defendant parties will not consequently suffer serious non-compensable

[5] He was nevertheless permitted to re-apply for admission to the Bar after five years.

prejudice-neither of which the defendants argue here; *and* that the proposed pleadings are tenable and sustainable – which the defendants say is not the case.

[20] Mr. Howe pointed out that it is early in the litigation process, with only the pleadings available at present. There has been no opportunity for disclosure, discovery, and the associated advantages that arise as a result of those processes.[6] Mr. Howe urges this court should take an especially generous view of the tenability/sustainability of his present pleadings in that light.

[21] However, his concerns are overstated because he overlooks the substantial insights he has had into the workings of the administrative procedures (including between 2011-2016) regarding his suspension and disbarment by virtue of him having been present for the proceeding throughout (with the exception of his non-attendance at the *ex parte* interim suspension hearing on September 1, 2016); as well as the Misconduct hearing, Sanction hearing of the Society, and the arguments in the Court of Appeal.

[22] He further argues that the court should be very reluctant to make any determination regarding the discoverability of the harms he claims, and therefore when his various causes of action accrued, thus triggering the limitation period for each. I am satisfied that each of his claims' discoverability can be reliably ascertained based on his own pleadings.

[23] Mr. Howe also urges this court *not to be* entirely deferential to the conclusions of our Court of Appeal in relation to its conclusions regarding "discrimination". My analysis here is limited to the pleadings – therefore findings of fact by the Hearing Panel and commentary from the Court of Appeal are only relevant to Mr. Larkin's abuse of process arguments.[7]

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[6] However, Statements of Defence have been filed by all defendants, such that strictly speaking, the pleadings are "closed" – CPR 38.11. No one argued that this is an impediment to Mr. Howe's motion.

[7] In that respect, Mr. Howe states in his March 4, 2022, brief in relation to the "bring the hood into practice" comment (paras. 35-43): "Before we explain the details of Mr. Larkin's role in discriminating against the Plaintiff, we will address what we believe is a barrier for black, equity seeking people and litigating or otherwise addressing discrimination in Nova Scotia. Respectfully, we do this because we do not want this barrier to impact your Lordship's analysis of the race-based discrimination evidence. Although we find it awkward and uncomfortable to make the following submissions, we find it necessary to address how our Court of Appeal analysed one issue pertaining to racial prejudice… there is overlap between the factually relevant material in the case at bar and the material that was before the Court of Appeal in 2019. We believe that this court's assessment and analysis of the same or similar evidence is not curtailed by any previous findings of any other decision-maker. This Court's role is very different than that of the Hearing Panel or the Court of Appeal and the legal analysis required is very different.… We respectfully submit that while our Court of Appeal is commendable in many respects, their handling

[24] By motion filed November 15, 2021 (pursuant to *CPR* 38.12 and 83.11), Mr. Howe has requested the court's permission to file an amended statement of claim which includes the three original causes of action pleaded, and adds the following causes of action against all three defendants:

- **civil conspiracy;**
- **malfeasance in public office;**

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of race-based discrimination related issues leaves much to be desired. One important aspect of the Plaintiff's case when he was before the Court of Appeal… is the "hood into practice email" by Ms. Rees. The Plaintiff has provided details about this email in paragraph 15 of the Plaintiff's proposed amended notice of action and statement of claim… [leads to the conclusion] that Ms. Rees' view of her own words, based on her cross-examination about what she meant by her words, makes it clear that she held a prejudiced racial stereotype about the Plaintiff… We explained the significance of this evidence in previous litigation, and we wish to address the fallacy that we perceive with how this evidence was addressed so that your Lordship does not fall victim to the same fallacy." He goes on to reference the Court of Appeal decision at paragraphs 82 – 94. Therein, the Court of Appeal concluded that: "[Mr. Howe's] attribution of the comment to Ms. Rees is simply not supported by the evidence. Upon review of this evidence of Mr. Howe's arguments, the Panel concluded that race was not a factor in the Society's oversight of Mr. Howe… I do not consider the Panel's failure to specifically mention this comment to have any impact on its ultimate decision." To this Mr. Howe argues in his brief: "The Court of Appeal's assessment has a fundamental problem, and that it does not matter whether Mr. Wright was the first person to make the comment about hood into practice or not. Ms. Rees drafted the email on February 26, 2014, not Mr. Wright. Ms. Rees explained what she meant when she adopted the language. Her description of what she meant did not pertain to ameliorating a disadvantage based on how Black people are perceived. Her comments were about how she perceived the Plaintiff… We submit that the Court of Appeals' fallacy, that we described above, is a symptom of a larger problem faced by equity seeking people when they make allegations of discrimination against people that are more powerful and respected than they are. There is a dynamic in a culture whereby the perpetuation of systemic discrimination relies on people in positions like that of our Court of Appeal in 2019 and your Lordship currently, feeling compelled to ignore or explain away evidence of racially prejudiced attitudes and actions.… It would be difficult for your Lordship (or the Court of Appeal) to accept, internally, that someone that operates in his (or their) own community could be influenced by racist/discriminatory attitudes and one of the institutions close to his (or their) own profession… It takes an extremely courageous and perhaps radical person in the position of your Lordship to go against the grain and have a different interpretation of the facts than those before him in this regard.… We are hopeful and optimistic that your Lordship reflects on the systemic factors that we described above and does not let them curtail your analysis." I accept that Mr. Howe is making those submissions respectfully. I further recognize that I am at a disadvantage when it comes to fully appreciating the position of persons who are marginalized by virtue of race, and analogous characteristics. However, that disadvantage is not significant in the circumstances of these motions. That is because at present, I am dealing exclusively with issues in relation to the alleged facts and inferences that reasonably can be drawn from those pleaded facts; I am not dealing with matters of evidence, which was the case before the Hearing Panel and before our Court of Appeal. As a result, in relation to Mr. Howe's motion to amend his pleadings, I do not have to show any deference to the facts found by the Hearing Panel and endorsed by the Court of Appeal. As a result of Mr. Larkin's motion for summary judgment on pleadings, I do have to examine the presumed facts in Mr. Howe's pleadings to assess whether the inferences he argues I could draw from those facts can reasonably be drawn; and to assess whether Mr. Howe's pleadings amount to an abuse of process, when examined in relation to the Hearing Panel and Court of Appeal processes. When I say "inferences" to be drawn, I am not speaking of inferences from evidentiary facts but rather from pleaded facts – which is permissible when I examine whether the pleadings are tenable and sustainable. After all, the tenability/sustainability of the pleadings must at least rise to the level of there being a "reasonable cause of action".

- individual and systemic discrimination based on race (Mr. Howe has conceded that he is not relying on a purported common law tort of discrimination pursuant to claimed breaches of Human Rights legislation, but rather on a **breach of section 15 of the *Canadian Charter of Rights and Freedoms*** "*Charter*"); and

- harm by way of the **"unlawful means" tort.**

[25] The defendants argue that the court should refuse permission to file an amended statement of claim because the causes of action are either untenable or unsustainable in law, based on the pleaded facts therein and Mr. Howe's written Answers to Demand for Particulars. They say that assuming that the facts he alleges can be proved to be true, it is plain and obvious that his pleadings do not disclose a reasonable cause of action – there is no chance that Mr. Howe might succeed, because his pleadings contain various "radical defects" that undermine each of his causes of action – *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at paras. 14-16.

[26] They argue that all the causes of action in Mr. Howe's original and proposed amended statements of claim are doomed to failure based on the pleadings, because:[8]

1. in law, or on the pleaded facts, they disclose no reasonable cause of action;
2. even if they disclose a reasonable cause of action, that cause of action is defeated by common law and statutory immunities that protect the defendants;
3. such causes of action are defeated by the limitation period in section 8 of the *Limitation of Actions Act*, c. 35 2014 SNS; and
4. permitting them to proceed would effect an abuse of process (per *CPR* 88, violate the rule against collateral attack; and the doctrine of *res judicata* (issue estoppel)).

[27] Citing *CPR* 4.02(4), the defendants point out that *CPR* 38.03(3) mandates that "a pleading must provide **full particulars of** a claim alleging **unconscionable**

[8] I appreciate that there is an overlap between the analysis required in relation to Mr. Howe's motion to amend his pleadings and that of Mr. Larkin for summary judgment on the pleadings.

conduct, **such as** fraud, fraudulent misrepresentation, misappropriation, or **malice**." [My bolding added]

[28] I have a responsibility to assess whether pleadings that allege "unconscionable conduct" have provided "full particulars" of the underlying material facts. As Justice Arthur LeBlanc stated in *Kasheke v. Canada*, 2017 NSSC 61:

> [27] **The requirement to assume the truth of facts pleaded is not unqualified**. The Supreme Court of Canada noted in *Imperial Tobacco* that "[a] motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that **the facts pleaded are true, unless they are manifestly incapable of being proven"**: para. 22**. Further, it has been held that bald allegations in the nature of bad faith, malice, and abuse of power do not constitute material facts for pleading purposes unless they are particularized**: see, for instance, *Merchant Law Group v. Canada (Revenue Agency)*, 2010 FCA 184, [2010] F.C.J. No. 898, at paras. 34-38; *Adventure Tours Inc. v. St. John's Port Authority*, 2011 FCA 198, [2011] F.C.J. No. 875, at paras. 25-26 and 63. This principle is also recognized in *Civil Procedure Rule* 38.03(3), which provides that "[a] pleading must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice."
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> [28] The plaintiff is not necessarily required to plead the precise legal characterization of a claim; as Stratas J. said, for the majority, in *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, [2015] F.C.J. No. 399, "plaintiffs who choose to use a particular legal label are not struck out just because they chose the wrong label": para. 113.
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> [My bolding added]

[29] I conclude that the following causes of action claim "unconscionable conduct" as referenced in *CPR* 38.03(3): malicious prosecution; malfeasance in public office. Based on the pleadings (racial bias/discrimination) I also conclude that the claim of civil conspiracy and breach of section 15 of the *Charter* involve "unconscionable conduct". The claims of defamation and negligence do not involve "unconscionable conduct".

[30] At the outset, I will summarily dispose of the "unlawful means" tort, as it is doomed to fail - it is simply not available based on the pleadings (see *AI Enterprises Ltd. v. Bram Enterprises Ltd*., 2014 SCC 12, and Justice Beveridge's reasons in *Canada (Attorney General) v. Geophysical Services Incorporated*, 2022 NSCA 41, at paragraphs 57-61). As Justice Farrar stated in *Halifax Regional Municipality v. Annapolis Group Inc.*, 2021 NSCA 3, at paragraph 101: "Where

there is but one outcome based on the law and uncontested facts, summary judgment should follow."

[31] Whether Mr. Howe's pleaded or proposed causes of action are considered as untenable, or unsustainable (including being extinguished by a limitation period), or are an abuse of process - they each fail.[9]

ii) Mr. Larkin's motion for summary judgment on pleadings and claims of abuse of process

[32] I also have before me Mr. Larkin's motion for summary judgment on the proposed amended pleadings[10], should leave to amend the pleadings be granted, seeking dismissal of the proceeding against him, *and alternatively* for an order dismissing the proceeding against him as an abuse of process pursuant to *CPR* 88.[11] Next, let me briefly outline the basic summary of the applicable principles. Civil Procedure Rule 13.03(1) provides the requirements for a judge to grant summary judgment on the pleadings:

> Summary judgment on pleadings
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> 13.03 (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:

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[9] Mr. Howe argued that I should determine his motion to amend his pleadings and produce a separate decision *before* dealing with Mr. Larkin's motion for summary judgment on pleadings and a finding of an abuse of process, so that Mr. Howe can make further, more informed arguments in relation to Mr. Larkin's motion. I do not find in the interests of justice to bifurcate the hearing in the manner suggested by Mr. Howe. I am satisfied that it is in the interests of justice for me to notionally first consider Mr. Howe's motion to amend his pleadings and note the parties themselves agreed with me doing so. The parties had agreed to have me hear both motions together, and I do not see any material prejudice to Mr. Howe's position by me dealing with them in one decision. Fairness considerations require me to notionally proceed with Mr. Howe's leave to amend pleadings motion before hearing the defendant's motion for summary judgment on pleadings, especially where a limitation period is in play – see for example Justice Norton's reasons in *Sears v. Top O' The Mountain Apartments Ltd.,* 2021 NSSC 80.

[10] See for example, Justice Fichaud's reasons in *Innocente v. Canada (Att. General)*), 2012 NSCA 36; and Justice Bryson's reasons in *Walsh Estate v Coady Estate*, 2016 NSCA 60.

[11] Mr. Larkin relies on the doctrines of collateral attack, and *res judicata* (issue estoppel), in support of his *CPR* 88 argument. In simple terms, he argues they operate because during Mr. Howe's suspension and disbarment proceedings and appeal of his disbarment to the Nova Scotia Court of Appeal, a mainstay of his arguments was his reliance on claims of racial discrimination and prejudice as underlying all his complaints, and that he similarly relies on racial discrimination and prejudice as the underlying bases of all his civil claims. Ms. Rees and the Society make many of the same arguments that Mr. Larkin does in support of his motion for summary judgment (and why Mr. Howe's request for leave to amend his pleadings should be denied) but strictly speaking do so under the auspices of challenging Mr. Howe's motion to amend his pleadings on the basis that his pleadings are untenable and unsustainable.

(a) it discloses no cause of action or basis for a defence or contest;
(b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;
(c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

(2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:

(a) judgment for the party making a claim, when the statement of defence is set aside wholly;
(b) dismissal of the proceeding, when the statement of claim is set aside wholly;
(c) allowance of a claim, when all parts of the statement of defence pertaining to the claim are set aside;
(d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.

(3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

(4) A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.

(5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:

(a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;
(b) the outcome of the motion depends entirely on the answer to the question.

[33] In *Mehta v. Wolfville Animal Hospital*, 2021 NSSC 363, Justice Hunt provided a helpful summary of the applicable principles:

> [25] Under Rule 13.03(1)(a) and Rule 13.03(1)(c), summary judgment on the pleadings must be granted if a statement of claim discloses no cause of action or makes a claim which is clearly unsustainable when the pleading is read on its own.
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> [26] The Nova Scotia Court of Appeal and other courts have provided substantial guidance on the question of when summary judgment on the pleadings ought to be granted.
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> [27] The legal principles applicable to summary judgment on the pleadings have been well delineated in caselaw. They can be summarized as follows:

> (1) A reviewing court must strike a claim that is absolutely unsustainable, discloses no cause of action, or is certain to be dismissed. Summary judgment on the pleadings clears the docket of claims or defences that are bound to fail: *Nova Scotia v. Carvery*, 2016 NSCA 21 at para. 23;
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> (2) It must be "plain and obvious" that the claims as pleaded cannot succeed because, for example, "the pleading, on its face, discloses no reasonable cause of action; or ...the claim is absolutely unsustainable; or ...it is certain to fail because of a radical defect": *Hunt v. T&N PLC*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959, at paras 30-34; *Homburg Canada Inc. v. Halifax (Regional Municipality)*, 2013 NSCA 61, at para 7;
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> (3) In assessing the pleading, the facts contained in the challenged document must be taken as proved and true: *Homburg Canada Inc. v. Halifax (Regional Municipality)*, supra. at para 7;
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> (4) Although the pleaded facts are deemed to be true, the pleading party cannot simply stand on the mere possibility that the material facts necessary to sustain a cause of action might eventually turn up. A plaintiff "must plead facts material to the cause of action they assert": *Canada (Attorney General) v. Walsh Estate*, 2016 NSCA 60 at para 18;
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> (5) The power to strike out clams that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42;
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> (6) The power to strike should be used with care. The law evolves. The court should be generous and err on the side of permitting novel, but arguable, claims to proceed: *Canada (Attorney General) v. Walsh Estate, supra, at para. 18.*

[34] I have concluded that, the facts Mr. Howe has pleaded (in his original and proposed amended Statement of Claim and Answers to Demand for Particulars) could not support the drawing of inferences therefrom that are necessary for his causes of action to be found to be tenable, are otherwise not tenable, *and* there are other reasons why they are not sustainable.

[35] While bearing in mind Chief Justice Wood's comments in *EllisDon Corporation v. Southwest Construction*, 2021 NSCA 20, at paragraphs 27-8,[12] I am

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[12] "A judge should not permit an amendment to add a claim which discloses no cause of action or where the action is obviously unsustainable. This is the same standard applied on a motion for summary judgment on pleadings

satisfied that the Mr. Larkin's motion for summary judgment in relation to all causes of action pleaded should be granted, insofar as all defendants are concerned.[13]

D - A summary of my conclusions regarding the motions

[36] To allow for a present understanding of the issues, I will elaborate on the pleadings now.

[37] I conclude that the **negligence** pleading cannot be said to be tenable or sustainable, in relation to Ms. Rees, Mr. Larkin, or the Society.

[38] The express pleadings in this respect arise at paragraphs 2, 5, and 11 of the proposed amended statement of claim which read:

> The first defendant is the Nova Scotia Barristers Society. The Plaintiff claims the defendant was negligent in their investigation and actions taken against the Plaintiff… is vicariously liable for the actions of Victoria Rees and Raymond Larkin.;
>
> The Plaintiff pleads that the defendants the Nova Scotia Barristers Society, Victoria Rees and Raymond Larkin were negligent in their investigation of the Plaintiff…;
>
> The Nova Scotia Barristers Society and Victoria Rees owed the Plaintiff a duty of care to not discriminate against the Plaintiff and to conduct an investigation that was not negligent.

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under *Rule* 13.03. In this case, the motion judge described the proposed pleading as "not elegant" and the respondent readily concedes that point. The fact that a proposed pleading sets out allegations which are poorly described or lacking in particulars is not fatal to the amendment motion. The issue is whether the pleading is obviously unsustainable."

[13] Mr. Howe also argued that even if the court denied him leave because his pleadings are presently untenable/unsustainable, it should permit him to re-file further amended pleadings, per para. 28 of his October 5, 2021, brief. In my view this could be a matter for my discretion, had any of his pleadings survived the tenability/sustainability assessment, but his original statement of claim was also time-barred when filed on August 31, 2020, and the bulk of his pleadings amount to an abuse of process; therefore his amendments were also thereby precluded. This is not a situation such as described by Justice Fichaud in *Symington v. Halifax (Reg. Municipality)*, 2007 NSCA 90, at para. 127: "I would allow the appeal in part, to permit Cst. Symington to pursue in court his cause of action for malicious prosecution resulting from alleged abuse of the criminal process. In all other respects I would dismiss the appeal and dismiss the grounds in the notice of contention. *Rather than parsing the pleadings to strike passages and retain only those that relate to the permitted cause of action, I prefer the remedy applied by the Alberta Court of Appeal in Edmonton Police, ¶ 29-30. I would retain the basic pleading of malicious prosecution for abuse of the criminal process to avoid a limitations issue, but would strike the rest of the amended statement of claim, with leave to Cst. Symington to amend to support his claim for malicious prosecution for alleged abuse of the criminal process.*; cited with approval by MacDonald CJNS in *Symington v. Halifax (Reg. Municipality)*, 2013 NSCA 152, at para. 10 - leave to appeal denied 2014 CanLii 24504.

[My underlining added]

[39] And in Mr. Howe's Answers to the defendants (Rees and Larkin) Demand for Particulars, he stated:

1. Particulars of the claim of negligence against Victoria Rees alleged in paragraphs 3 and 5 of the [original] statement of claim.

Answer

Ms. Rees was negligent in that she failed to meet her professional, fiduciary and other duties with respect to her position as Director of Professional Responsibility. The particulars include but are not limited to the following,

a) Ms. Rees negligence was with respect to the investigations, conduct and all of the proceedings against the Plaintiff including but not limited to those referenced in paragraphs 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, and 26 of the [original] statement of claim;

b) Ms. Rees was negligent in the exercise of her duty to ensure that the investigations and actions in relation to the Plaintiff were driven solely by the stated and implied legislative purposes of the [Society] and her position:

i) Ms. Rees was negligent in her duty to ensure that the values, principles and objectives of the [Society] were upheld in investigating and disciplining the Plaintiff in the ways that include the following:

-Ms. Rees investigation was negligent in that her racial bias (as particularized in paragraph 14 of the statement of claim) influenced the nature of her investigation towards the Plaintiff and resulted in the application of racialized double standards and other discriminatory treatment towards the Plaintiff:

-Ms. Rees' personal motives, relationships and interests (as particularized in part in paragraphs 12, 13, 15, 17 and 24 of the [original] statement of claim and the conflict of interests described in the Answer to question 6 (below) influenced the nature of her investigation towards the Plaintiff and resulted in the application of double standards and other discriminatory treatment towards the Plaintiff.

c) Ms. Rees was negligent in her approach to selecting investigators and agents for the [Society]. Ms. Rees was negligent in her choice of investigators and agents. Ms. Rees was negligent in that she failed to ensure that the investigators and agents that she chose and/or have a role in choosing to investigate the Plaintiff, investigated and proceeded in a fair, reasonable manner that applied standards

that were not racially or otherwise bias. Ms. Rees failed in her approach to instructing and/or supervising the nature of the investigations in proceedings that were conducted by investigators and agents that she chose and/or have a role in choosing to investigate and otherwise proceed against the Plaintiff. The investigators and agents referred to in this paragraph include, but were not limited to:

i. Mr. Larkin, this was particularized in part in paragraphs 11, 13, 18, 19, 20, 21, 24 and 26 of the [original] statement of claim

ii. Michelle James

iii. Stan MacDonald

iv. Malcolm Jeffcock

v. Elaine Cumming

vi. John Rafferty

vii. Robert Hagell

viii. Luke Craggs; and

ix Elizabeth Buckle.

d) Ms. Rees was negligent in her professional duties more generally, including but not limited to the following:

i. Ms. Rees was negligent in her duty to ensure that she was accurate and honest with respect to her statements when she alleged that the Plaintiff acted unethically

ii. Ms. Rees was negligent in her duty to ensure that she did not act in a discriminatory and unfair manner and/or act on racial prejudice with respect to the Plaintiff; and

iii. Ms. Rees was negligent in her duty to ensure that her actions did not result in unfair or discriminatory outcomes to the Plaintiff.[14]

[14] In his Answer to the Society, similar statements are made in Answer 4.

[40] References to alleged expressions of "racial bias" by Victoria Rees against the Plaintiff were outlined in Mr. Howe's Answers[15] which I will not cite verbatim, but Mr. Howe has focused in particular on the comments of Ms. Rees in an email regarding the Society's retention of Robert Wright, an acknowledged expert in the preparation of Impact of Race and Culture Assessments [IRCAs] in the criminal context regarding African Nova Scotian offenders (see *R. v. Anderson*, 2021 NSCA 62) in relation to Mr. Howe's ongoing disciplinary proceedings before the Society.

[41] I do not accept that the Society has a common law private "duty of care" to its member,[16] or that even if such a duty existed, there is a properly pleaded breach of such duty to reasonably prudently investigate Mr. Howe.[17]

[42] Moreover, absent a proper pleading of bad faith, mere negligence in the statutorily presumed (per s. 81 of the *LPA*) good faith performance of the Society's duties and functions does not give rise to liability – see for example: *Mohammad v. Sajjad-Hazai*, 2021 ONSC 8490, at paragraphs. 11-14, per Corbett J; *Potis Holdings Ltd. v. The Law Society of Upper Canada*, 2019 ONCA 618; *Robson v. Law Society of Upper Canada*, 2016 ONSC 5579, at paragraphs. 39 - 40, affirmed 2017 ONCA 468; and *Fitzpatrick v. The College of Physical Therapists of Alberta*, 2020 ABCA 164.[18]

[43] The pleadings do not support the drawing of the necessary inferences therefrom that the defendant Ms. Rees acted in bad faith, with malice or for improper purpose as against Mr. Howe per *CPR* 38.03.(3).[19]

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[15] Apart from generalized claims of "discrimination" pleaded in the statements of claim, these are found primarily at Answers 4 and 5 in relation to Ms. Rees and Answer 7 in response to Mr. Larkin and Mr. Howe's Answer 2(b) to the Society. No express reference is made to Mr. Larkin having racial bias, and it is not an inference that could be drawn on the pleaded facts. Consequently, the malicious prosecution; public misfeasance; civil conspiracy; and s. 15 *Charter* breach causes of action, do not constitute a "[reasonable] cause of action" in light of *CPR* 38.03(3).

[16] See for example *Ouellette v. Law Society of Alberta*, 2019 ABQB 492.

[17] The pleadings themselves do not reference with specificity any examples of negligent investigation. They merely cite in conclusory fashion that there was negligence in the investigation. The pleadings are deficient.

[18] I bear in mind that *before* he filed his proposed amended statement of claim in his November 15, 2021, affidavit, Mr. Howe had the benefit of Statements of Defence from all defendants by March 18, 2021, wherein they pleaded these various common law and statutory immunities; *after* they had the benefit of his Answers to Demand for Particulars.

[19] I appreciate that, *inter alia*, Mr. Howe's argument is that Ms. Rees and Mr. Larkin had a racial bias against him which rose to an equivalent level to "malice", and in support of that proposition Mr. Howe relies upon the court's

[44] Mr. Larkin could *also* claim a privilege as an advocate/lawyer (in relation to his appearance at the September 1, 2016, interim suspension hearing) unless it can be defeated by malice or acting outside the scope of his duties – *Hill v. Church of Scientology*, [1995] 2 SCR 1130, at paragraphs. 143 – 156.

[45] I conclude that the pleadings do not negate Ms. Rees' pleaded reliance upon the statutory immunity per s. 81 of the *Legal Profession Act* ["*LPA*"] and common law witness immunity [see paragraph 12 of the statement of claim] which protect her in the absence of "bad faith" per *CPR* 38.03(3).

[46] My examination of the pleadings herein reveals only bald conclusory assertions of bad faith, rather than material facts from which an inference of bad faith could be drawn as against Ms. Rees, Mr. Larkin or the Society - including paragraphs 21-25, of the proposed pleadings in relation to Mr. Larkin**,** and the Society.[20]

[47] Furthermore, I am satisfied that the expiry of the two year limitation period herein occurred on or before September 30, 2018 (based on the September 1, 2016, suspension hearing and notice being provided to Mr. Howe – which proceedings he has pointed out are his primary focus, rather than his disbarment proceedings), but even if it were as late as October 21, 2019 (based on his disbarment on October 20, 2017) - in either case it would mean the filing of his statement of claim on August

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comments regarding when "bad faith" can be presumed in *Horne v. Queen Elizabeth II Health Sciences Centre*, 2018 NSCA 20 - wherein the court stated between paragraphs 103 and 104: "The overall message to the jury was: **(1) at the end of the day, bad faith needs a finding of subjective advertence; and (2) insofar as recklessness is relevant to that issue, the jury would have to decide whether Dr. O'Neill 'acted so recklessly out of anger or out of some other improper motive', and whether Dr. Cowden 'was so reckless or extremely negligent in her investigation that she acted in bad faith or malice or spite toward Dr. Horne'**. The charge channeled recklessness into whether, to the jury's mind, there was subjective advertence. This is the **crux of the *Finney/Hinse* test**, i.e. that **advertent bad faith may be presumed or inferred from an inexplicable or incomprehensible degree of recklessness**." Bad faith and racial discrimination/prejudice are distinct descriptors, but both are captured by the "unconscionable conduct" label in CPR 38.03(3). [My bolding added]

[20] *CPR* 38.03(3) reads: "A pleading must provide *full particulars* of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice." **In my view, the following causes of action inherently or by the specific pleadings herein claim "unconscionable conduct" (including claims of "bad faith", such as racial prejudice/discrimination) per CPR 38.03(3): malicious prosecution; misfeasance in public office; civil conspiracy and breach of section 15 of the *Charter of Rights and Freedoms***, which are also to be included in this category because the primary alleged motivation underlying them is racial discrimination and prejudice. **See Justice LeBlanc's reasons in *Kasheke v Canada (Attorney General)***, *supra*, at paragraph 27: "the requirement to assume the truth of facts pleaded is not unqualified… **it has been held that bald allegations in the nature of bad faith, malice and abuse of power do not constitute material facts for pleading purposes unless they are particularized**…".; and *Symington v. Halifax (Regional Municipality)*, 2011 NSSC 474 affirmed 2013 NSCA 152 (leave denied, 2014 CanLII 24504). Mr. Howe has had a great deal of insight into the Society's proceedings; has provided fresh proposed pleadings in 2021; and given Answers to Demands for particulars, and yet still is unable to particularize the pleadings beyond conclusory assertions.

31, 2020, was after the expiry of the two year limitation period, which extinguishes any causes of action claimed therein - *Aucoin v. Murray*, 2013 NSSC 37, per Wood J., as he then was.

[48] Mr. Howe's negligence claim is therefore also time-barred *in relation to all defendants*.

[49] Considering CPR 38.02 and 38.03(3) and the conclusory nature of the pleadings in relation to **malicious prosecution**, they are not tenable and sustainable in relation to Ms. Rees, Mr. Larkin, or the Society, in spite of paragraphs 21-25 of the proposed amended statement of claim.

[50] Mr. Howe's pleadings could not permit an inference that the following elements of that tort have been sufficiently pleaded:

1. that Mr. Larkin *initiated* the "suspension" proceedings; and
2. relevant to both Ms. Rees and Mr. Larkin, that the proceeding has been terminated *in favour of* Mr. Howe; *and* that there was an absence of probable cause required *to initiate* the (interim suspension) proceeding.[21]

[51] The only significant alleged intentional misconduct/mis-statement Mr. Howe attributes to Mr. Larkin was that on September 1, 2016, Mr. Larkin "intended to have his statements [that Mr. Howe was on the record as the lawyer for the criminal defendant DE and Mr. Howe had a certificate from Nova Scotia Legal Aid to represent him] mislead the CIC into believing that [Mr. Howe] was double booked and missed the court appearance of his client DE [on one occasion only] … to wrongfully convince the CIC that a suspension of the practice license of [Mr. Howe] was warranted in the circumstances".[22]

[52] I reject Mr. Howe's argument that the pleadings are sufficient to establish that the proceeding was "terminated *in his favour*" when the charges arising from the suspension hearing were "withdrawn" by the Society on July 24, 2020

[21] The only express reference to "no probable cause" in the "pleadings" is at paragraph 35 of the proposed amended statement of claim, where Mr. Howe recites that he wrote to the Society after he received the September 1, 2016, suspension notice to draw attention to Mr. Larkin's "misleading malicious statements". This therefore also acknowledges that Mr. Howe was then aware of the harm he complains of in his pleadings.

[22] See for example Justice Keith's reasons in *Keleher v. Nova Scotia (Att. General),* 2019 NSSC 375, at para. 43 and following, affirmed 2021 NSCA 77.

(paragraph 36 proposed pleadings), and that therefore the limitation period only began to run at that time.

[53] There is no pleading of the following:

1. a "decision" about the merits of the allegations/charges that led to his suspension;
2. that the charges were withdrawn because there was no basis for them having been initially made against Mr. Howe; or
3. that there was no basis on their merits for them to be continued.

[54] Regarding the **defamation** pleadings, including Mr. Howe's Answer to Demand for Particulars from the Society,[23] Mr. Howe conceded that he is now only carrying forward this cause of action as against the Society alone. It is, however, nevertheless not tenable and sustainable. The material facts supporting such a claim are missing.[24]

[55] The **civil conspiracy** pleadings, whether viewed as a predominant purpose conspiracy or an unlawful means conspiracy, cannot be said to be tenable or sustainable in relation to any of the defendants. The material facts supporting such a claim are missing – *CPR* 38.03(3).[25]

[56] At paragraphs 30 – 31, the proposed amended pleadings read in part:[26]

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[23] "The defamatory statements include the misleading statements made by Mr. Larkin described above in 2a ('The claim also relates to Mr. Larkin's actions in misleading defamatory statements regarding Aubrey Seymour… alleged that the Plaintiff made misrepresentations to the hearing panel of the NSBS regarding an adjournment request before the Halifax Provincial Court…'); Mr. Larkin's defamatory statements were made on September 1, 2016 in the afternoon. The defamatory statements with respect to the intimidation. Mr. Larkin knew that what he stated was false and he intended to mislead the Complaints [Investigation Committee]. The statements were made to the Complaints Investigation Committee. Mr. Larkin communicated orally during an *ex parte* hearing that he requested. He intended to persuade the Complaints Investigation Committee to suspend the Plaintiff during the hearing and made misleading, false statements to convince them that his suspension was warranted in circumstances that it was not."

[24] See for example Justice McDougall's reasons in *Robertson v. McCormick*, 2012 NSSC 4 at paragraphs. 16-34; and Justice Ouellette's reasons regarding when a plaintiff may be unable to articulate the precise words that are defamatory: *MacDonald v. Fiander*, 2021 NBQB 23; *Sapra v. Cato*, 2020 NSSC 30; *MacLellan v. Canada (Attorney General)*, 2014 NSSC 280 at paragraphs. 106-111.

[25] The "unsustainable" bases of the pleadings are generally canvassed later to avoid repetition.

[26] This claim seems to rely on the same allegations as the negligence claim. There is no material fact sufficiently pleaded to support the bare statement that there was any kind of agreement, much less a conspiracy. Mr. Howe was

> … The defendants unlawfully conspired and/or agreed to allow for or support the systemic discrimination (including stereotypes and marginalization) of the Plaintiff within the practice of law whilst unjustly investigating and prosecuting the Plaintiff…
>
> In furtherance of the conspiracy, the following acts were done by the defendants and their employees/agents/contractors…
>
> applied racialized double standards to the Plaintiff and pursued meritless charges against the Plaintiff…
>
> hired Raymond Larkin to conduct an *ex parte* application before the Complaints Investigation Committee to have the Plaintiff suspended from practising law.
>
> [My underlining added]

[57] In relation to the **malfeasance in public office** pleadings, *CPR* 38.03(3) is also applicable.

[58] That cause of action is not tenable or sustainable against Ms. Rees [e.g. the elements of the tort require that there be a public officer who **engaged in deliberate and unlawful conduct in their capacity** as such, **and** that they must have been **aware (or recklessly indifferent) both that the conduct was unlawful and that it was likely to harm the plaintiff** (*Odhavji Estate v. Woodhouse*, 2003 SCC 69; *Ontario (Attorney General) v. Clark*, 2021 SCC 18; *Geophysical Services Inc. v. Canada (Attorney General)*, 2021 NSSC 77/2022 NSCA 41).

[59] As with malicious prosecution, I conclude the pleadings are not tenable and sustainable in relation to Ms. Rees because they do not sufficiently plead the elements of this tort regarding her conduct, including that no inference of bad faith/improper motive could be drawn.

[60] In summary, Mr. Howe's allegations at paragraphs 21 - 25 of his proposed amended statement of claim focus on his allegation that Mr. Larkin engaged in deliberate and unlawful conduct (misleading statements that Mr. Howe was double-booked and missed a court appearance in relation to his client DE, on one occasion only, and an inference that this was for an improper purpose) in his

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a participant and therefore well informed during all the machinations of the Society's proceedings against him, given the unusually lengthy misconduct and disbarment hearings and arguments, which had concluded with his disbarment on October 20, 2017.

capacity as counsel for the Society at the September 1, 2016, *ex parte* interim suspension hearing regarding Mr. Howe.[27]

[61] In relation to Mr. Larkin, and the Society, the essential elements of this tort have not been sufficiently pleaded. Consequently, Mr. Larkin is not precluded from reliance upon the presumptive good-faith based common law and statutory immunities otherwise available *vis-à-vis* this tort (or malicious prosecution). No reasonable inference of bad faith/improper motive could be drawn against Mr. Larkin based on the presumed truth of the pleadings (*CPR* 38.03(3)).

[62] I conclude that section 32 of the *Charter* likely applies to the Society,[28] however, the **breach of section 15 of the *Charter of Rights*** pleading cannot be said to be tenable and sustainable in relation to any of the defendants.[29]

[63] The pleadings reveal only conclusory statements of "[racial] discrimination", "racial bias", racial "stereotypes", "racialized stigma", "agreed to allow for or support the systemic discrimination (including stereotypes and marginalization) of the Plaintiff".

[64] From the pleaded facts, bearing in mind *CPR* 38.03(3), no reasonable inference of a breach of Mr. Howe's section 15 *Charter* rights could be drawn.

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[27] I observe that Mr. Howe was quickly made aware of the outcome of this interim hearing, and that he had a statutory right to request a reconsideration, as well as an appeal, yet availed himself of neither.

[28] The Society stated in its March 17, 2022, brief: "The Society acknowledges that it may be subject to the *Charter* in fulfilling its statutory mandate and does not challenge a theoretical section 15 claim for purposes of this pleading motion.… remains opposed to the addition of this cause of action to the statement of claim for reasons set out in the Society's Response brief." I am satisfied that, while the jurisprudence is not clear about this issue, it generally supports such a finding: see *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, at paragraph. 41; *Black v. Law Society of Alberta*, [1989] 1 SCR 591; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44; *Re Klein and Law Society of Upper Canada*, [1985] O.J. No. 2321. Mr. Howe relies on Justice Campbell's reasons in the costs decision, *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 100 at paragraph 29: "The [Society] is a governing body of a self-regulating profession. It is a regulator and a government actor as that phrase is used in the constitutional sense." Justice Campbell's reasons for the outcome in the main decision were upheld: 2016 NSCA 59.

[29] For completeness, I note that in *Kennedy v. Hewlett-Packard (Canada) Co.*, 2011 NSSC 502, Justice Murray in considering a motion for summary judgment, concluded that to the extent that a person in Mr. Howe's position is claiming racial discrimination as a basis for his cause of action, such claims are outside the Court's jurisdiction under *CPR* 13.03(1)(b) since the *Human Rights Act* and the Human Rights Commission have jurisdiction for those discrete issues. That argument has not been made to this Court-see also the more recent decision of ACJ Smith (as she then was) in *Garner v. Bank of Nova Scotia*, 2015 NSSC 122. Notably, Mr. Howe conceded that he is no longer asserting a freestanding "tort of discrimination" claim based on a breach of statute – the Nova Scotia *Human Rights Act*.

[65] Mr. Howe has pleaded in support of his claims of discrimination at paragraph 45 of the proposed Amended Statement of Claim, the publicly disseminated "Acknowledgement of systemic discrimination" by the Society on April 14, 2021.

[66] Regarding the nature of the Acknowledgement, I conclude that it:

1. is not a formal admission under *CPR* 20 (because factual admissions are matters of evidence, and if pleaded, such "evidence" of references to the Acknowledgement should be struck - *Coles v. Takata Corporation*, 2016 ONSC 4885, *per* Perell J., at paragraph 26) - as against all defendants; and
2. could be construed as an "apology" as defined in section 2 of the *Apology Act*, SNS 2008, c. 34, made by the Society, and consequently not admissible against it - see also *Symonds v. HRM*, [2021] NSHRBID No. 2.

[67] At paragraph 45 of the proposed amended statement of claim, Mr. Howe pleads:

> On April 14, 2021, the Nova Scotia Barristers Society released an 'Acknowledgement of systemic discrimination' on their website. In this Acknowledgement, the Nova Scotia Barristers Society admitted the existence of systemic discrimination within the justice system and the Society. They stated that by systemic discrimination they mean 'a system of disproportionate opportunities or disadvantages for people with a common set of characteristics such as race, gender, disability, sexual orientation, and/or socioeconomic status.'

[68] Since the Acknowledgement was not pleaded as having been made by the individual defendants Mr. Larkin and Ms. Rees, it is immaterial to Mr. Howe's civil claims against them.

[69] While I appreciate that at paragraph 67 of his Reply brief Mr. Howe maintains that the Acknowledgement "supports the Plaintiff's claims of discrimination, differential treatment and malice", its wording is vague, and, in any event, I conclude one could not infer from it that during Mr. Howe's suspension and disbarment proceedings, the Society or its agents (including Ms. Rees and Mr.

Larkin) discriminated against Mr. Howe as he has baldly alleged in his existing and proposed statement of claim.[30]

[70] The pleaded Acknowledgement is consistent with the publicly accessible full Acknowledgement. What is significant is that both speak in terms of "systemic discrimination", which the Society has defined as "a system of disproportionate opportunities or disadvantages for people with a common set of characteristics such as race, gender, disability, sexual orientation, and/or socio-economic status."

[71] The pleaded Acknowledgement's ambit is limited to "systemic discrimination," and is in any event the pleading of "evidence", therefore an impermissible factual pleading in relation to whether there was individual discrimination against Mr. Howe during his suspension and disbarment proceedings.

[72] The defendants also rely in their Statements of Defence upon the ***Limitation of Actions Act***. Therefore, I must examine this defence, based only on Mr. Howe's pleadings.

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[30] I recognize that I must, and I do, confine myself for the purposes of these motions to only the pleaded facts before me. Nevertheless, I include here the full wording of the Acknowledgement for completeness. The Acknowledgement remains publicly accessible and reads as follows: "We acknowledge and regret the existence of systemic discrimination in our justice system and within the Society. The Society exists to uphold and protect the public interest in the practice of law. We do that through our regulation of the legal profession in Nova Scotia. Acknowledgement that systemic discrimination exists within the Society is a step towards improving how we protect the public interest. It is only in accepting this truth that we can meaningfully begin the journey to improve our organization and the justice system.' When we use the term "systemic discrimination", we mean a system of disproportionate opportunities or disadvantages for people with a common set of characteristics such as race, gender, disability, sexual orientation, and/or socio-economic status. For example, the mistreatment of Indigenous and Black communities throughout the justice system has been chronicled in the Marshall Inquiry, the Truth and Reconciliation Commission of Canada, and the National Inquiry into Missing and Murdered Indigenous Women and Girls. It has been recognized by the Supreme Court of Canada and retold through the voices of the Idle No More and Black Lives Matter movements. Where systemic discrimination manifests in policies and procedures, we need to recognize this, and both modify our policies and procedures and accommodate individual members of equity-seeking communities, including those who are members of the bar. Since the Marshall Inquiry, the Society has made efforts to address issues in the legal profession and the justice system arising from historical, deep-rooted inequities. However, we have heard the voices of those dissatisfied with our efforts to date and we accept that we must do more. We not only acknowledge and regret the existence of systemic discrimination within the justice system and the Society, but also recognize the need for action and education to address it. The Society is committed to reducing barriers created by racism, unconscious bias, and discrimination. We are committed to continuing our efforts to learn, to adapt, to improve our processes and to lead Nova Scotia's legal profession by example. In collaboration with our members, the legal entities we regulate, stakeholders, and justice system partners, we will work diligently towards eliminating all forms of discrimination in the justice system and in the Society."

[73] The limitation period for all the causes of action in Mr. Howe's original Statement of Claim filed August 31, 2020, is discernible from his original pleadings and had expired long before that filing date (see *CPR* 13.03(5)). Therefore, the causes of action in the original statement of claim are dismissed as against all defendants. I wholly set aside his original Statement of Claim per *CPR* 13.03(2).[31]

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[31] I conclude that I can confidently discern the discoverability dates of all causes of action from the pleadings - see *CPR* 13.03(5) which permits me to determine a question of law if I am satisfied that both the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination; and the outcome of the motion depends entirely on the answer to the question. Those preconditions echo Justice Pugsley's comment at paragraph 32 of *Future Inns Canada Inc. v. Nova Scotia (Labor Relations Board*), [1999] N.S.J. No. 258, though under the old Rule 14.25: "With respect, I am of the view that questions of law are appropriate for a determination under Rule 14.25, in cases *where the law is clear, and provided no further extrinsic evidence is required to resolve the issues raised*." The discoverability date is a question of mixed fact and law. In these motions I must *presume* all Mr. Howe's pleaded facts to be true, and only consider those presumed facts. In *TE Gordon Home inspections Inc. v. Smith*, [2022] NSJ No. 92 (CA) per Beveridge JA, the court was not in a position to do so where *CPR* 12 [Question of Law] was implicated - the Court of Appeal concluded the dispute involved "a question for trial". Section 8 of the *Limitation of Actions Act*, SNS 2014, c. 35, as amended, ["*LAA*"] establishes that for the present claims the limitation period is "two years from the day on which the claim is discovered"; and that "**a claim is discovered on the day on which the claimant first knew or ought reasonably to have known (a) that the injury, loss or damage had occurred; (b) that the injury, loss or damage was caused by or contributed to by an act or omission; (c) that the act or omission was that of the defendant; and (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding."** In relation to when a plaintiff knew or ought reasonably to have known of an injury, loss or damage, Chief Justice Wood's comments in *Ellis Don Corp. v Southwest Construction*, supra, bear repeating (paragraph 35):" The motion judge failed to differentiate between "damage" and "damages". **What a party needs to be aware of for limitation purposes is that damage has occurred. It is not necessary that the precise calculation of loss be known.** This distinction was identified by Cromwell, JA in *Union of Icelandic Fish Producers Ltd. v. Smith*, 2005 NSCA 145: [119] There is a distinction, long recognized, although sometimes overlooked, between damage and damages. As A.I. Ogus put it in his treatise *The Law of Damages* (London, Butterworths, 1973) at p. 2: The terms "damage" and "damages" have suffered from loose usage. Some writers and judges have used them as if they were synonymous. But "damages" should connote the *sum of money payable by way of compensation* ..., while **the use of "damage" is best confined to instances where it refers to the *injury inflicted* by the tort or breach of contract ... .[120] Following this description, damage, or detriment, as an element of the cause of action in negligent misrepresentation may be understood to mean an injury rather than a sum money to compensate for its infliction. Consistent with this view, the House of Lords approved the following description of what actual damage means** in *Nykredit Mortgage Bank Plc. v. Edward Erdman Group Ltd. (No. 2)*, [1997] H.L.J. No 52:... **any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by 'actual' damage. ...".** (My bolding added)]. The pleadings make clear that Mr. Howe was well aware shortly after the September 1, 2016, *ex parte* interim suspension hearing, that Mr. Larkin had made the alleged misleading statements, which are components of his claims of malicious prosecution, misfeasance in public office, defamation, civil conspiracy, and breach of section 15 of the Charter of Rights. In his original statement of claim (paragraph 17) Mr. Howe pleaded: that between 2015 and 2017 he "repeatedly highlighted Victoria Rees' conflict of interest and racial bias that influenced the investigation into his practice and his ongoing prosecution"; (paragraph 21) "after the Plaintiff's suspension from practising law on September 1, 2016, he provided written communications to the [Society] highlighting the misleading statements by Raymond Larkin and the allegations of the Plaintiff breaching his practice restrictions being meritless"; Answer to Rees/Larkin: "the dates, times and occasions in which the acts of malicious prosecution were perpetrated are

[74] Mr. Howe initially relied upon three causes of action: negligence, defamation and malicious prosecution. The defendant's position is that Mr. Howe was *at the very latest* fulsomely aware that harm had been caused to him by the defendants and that the claims he made initially and is now making were discoverable by October 20, 2017. It is important to point out that Mr. Howe did *not* expressly disagree with the defendants' position.

[75] I am further satisfied that his original *and* proposed amended pleadings are not sustainable because they were filed at a point after which each cause of action had been extinguished by a limitation period arising from the *LAA - Aucoin v. Venoit*, 2013 NSSC 37, per wood J., as he then was.

[76] Mr. Howe has argued that, even if his filing of his original statement of claim, and his proposed amended statement of claim, is *after* the expiry of the two-year limitation period, he can rely on the wording and intent of *CPR* 83.11(3) and section 22 of the *LAA* to protect him against the effect of the otherwise expired limitation period. I reject that argument.

[77] Once all the causes of action in his original statement of claim are extinguished by the limitation period, they cannot be relied upon as a springboard to permit him to file even later new claims that also relate to the same defendants, arising out of the same conduct, the same factual matrix, and involving the same core allegations.

[78] Consequently, on the pleadings here, each of the new causes of action claimed by Mr. Howe are also extinguished, which contributes to my decision to deny leave to amend his pleadings.

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partially particularized in paragraph 9,15, 16, 17, 18, 19 and 20 of the original statement of claim. The malicious acts were an aggregate of actions and a corresponding discriminatory attitude that manifested over these dates, but there were also specific discrete dates which include but are not limited to the following: [the Fall of 2011; from 2011 - 2016; February 10, 2014; May 2015; September 23, 2013 - February 24, 2014]"; "in and around 2014"; "[December 10, 2015 - July 17, 2017]; and [2016 - July 24, 2020]"; and Mr. Howe confirms that the malicious prosecution allegations in relation to Mr. Larkin are contained in paragraphs 4, 5, 6,18,19,20 and 21 [preceding the September 1, 2016 hearing; on September 1, 2016; and after September 1, 2016]. I observe that many of those dates were *not* included in the proposed amended statement of claim. A review of all the pleadings allows this court to conclude that Mr. Howe must have been aware of the harms he has alleged herein, as early as September 2016 and no later than the date of his disbarment on October 20, 2017. Two years thereafter is October 21, 2019. He filed his initial statement of claim on August 31, 2020. **As noted in my analysis of the tenability of [the elements of] the malicious prosecution claim, I reject his argument that the malicious prosecution claim remained unable to be considered completed, and therefore the limitation period did not begin, until the charges were withdrawn on July 24, 2020, which is when Mr. Howe characterizes them as successfully "terminated <u>in his favour</u>"**.

[79] I am further satisfied that Mr. Larkin's arguments in support of his **abuse of process** claims are persuasive in relation to all the causes of action pleaded as against each of the defendants - except negligence and defamation, which at their core do not involve the alleged racial discrimination and prejudice issues ("unconscionable conduct"), as argued by Mr. Howe regarding each of his other causes of action, which issues were amply addressed by the Society's disbarment proceedings, and by the Nova Scotia Court of Appeal.

[80] All three defendants have pleaded in their statements of defence that they rely on various common law and statutory immunity protections. Generally, these defences are only available to defendants if they have acted in good faith.

[81] All the causes of action (except negligence and defamation) relied upon by Mr. Howe are materially dependent on his claim that his treatment by the defendants during the Society's administrative processes was driven not by proper/lawful motivations, but rather by improper motivations, and specifically racial discrimination and prejudice against him personally. Mr. Howe argues racial bias and prejudice as a basis for the essential elements of each of his causes of action (except negligence and defamation), to support his argument that the existence of the bad faith element of those causes of action necessarily negates the (good-faith required) presumptive common law and statutory immunities that the defendants would otherwise be able to rely upon to defend against his claims.

[82] Next, I will briefly consider the circumstances of Ms. Rees and Mr. Larkin regarding whether the pleadings could permit me to draw inferences in relation to each of them having "a bad faith" motivation in these proceedings.

[83] In relation to **Ms. Rees**, Mr. Howe pleaded that she "was central to the investigation of the Plaintiff, such that she had a gatekeeping role for the complaints process for the Nova Scotia Barristers Society. The charges that the Plaintiff faced originated from investigations that were led by Victoria Rees… instructed, directed, retained and received reports from the investigators hired by the Nova Scotia Barristers Society" (paragraph 10, proposed amended statement of claim).

[84] Mr. Howe itemizes what he references as her "racial bias" at paragraphs 15-17 and 43 among others (including the Answers he gave to Demands for Particulars). His primary specific complaint about Ms. Rees is based on her

reference to a cultural assessment report created for the Society in relation to Mr. Howe and authored by Robert Wright.[32]

[85] Mr. Howe specifically references (see also his Answer to Demand for Particulars dated February 18, 2021 at para. 5 and his proposed pleadings at paras. 15-19) an email she sent to two investigators for the Society (lawyers Elizabeth Buckle and Stanley MacDonald, K.C.) wherein Ms. Rees stated:

> "[Robert Wright] has developed a new race impact assessment which was used in the criminal justice system twice last year… 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 behaviour, and how to better cope with this… *As Dr. Wright aptly has said, he's often seen problems when professionals 'bring the hood' into practice*".
>
> [My italicization added]

[86] Mr. Howe's pleadings (existing or proposed) *could not* permit me to draw inferences therefrom that would be necessary to conclude that Ms. Rees has acted in bad faith (with malice or for improper purpose(s)/racial discrimination or bias) as against him, and therefore she is *not* precluded from relying upon the good-faith based statutory and common law immunities argued by the defendants.

[87] Similarly, in relation to **Mr. Larkin**, Mr. Howe at paragraphs 21 – 25 (among others, and including his Answers to their Demands for Particulars) of his amended statement of claim pleads that on September 1, 2016:

> Raymond Larkin <u>maliciously misled</u> the complaints investigation committee by indicating [Mr. Howe] was on the record for client DE and that [Mr. Howe] had *a certificate from Legal Aid. Raymond Larkin <u>intended to have his statements mislead</u> the complaints investigation committee into believing that [Mr. Howe] was double booked and missed the court appearance of the client DE.…*
>
> *<u>intention was to wrongfully convince the committee that the suspension of the practising license of [Mr. Howe] was warranted in the circumstances.…</u>*
>
> *<u>was aware that his own statements were not true at the time</u> that he made the misleading statements. For example, prior to making the statements, Raymond Larkin was in possession of materials…*

[32] Mr. Wright's Impact of Race and Culture Assessments regarding African Nova Scotians in conflict with the criminal law have been received by the courts of this Province since approximately 2014 and were recently the subject of positive commentary in *R. v. Anderson*, *supra*.

> *that demonstrated that [Mr. Howe] was not retained, that [Mr. Howe] had no intention of becoming retained for client DE, …*
>
> *[Mr. Howe] did* not commit to attending the impugned court appearance. Prior to making the misleading statements, Raymond Larkin was also in possession of materials that demonstrated to him that neither the court, the client DE, the Crown, or anyone else could have reasonably believed that the plaintiff was retained or had any intention to become retained for DE and that the intention of the client was to possibly retain a different lawyer. Raymond Larkin was aware that [Mr. Howe] had no obligation and was not expected to attend the impugned court appearance for DE, and nonetheless… intentionally misled the complaints investigation committee into believing that [Mr. Howe] was unethical for failing to attend the same appearance.
>
> [My underlining added][33]

[88] In relation to the applicable causes of action, I conclude that from Mr. Howe's pleadings one could not draw inferences that would be necessary to conclude that Mr. Larkin's conduct was motivated by racial discrimination and/or racial prejudice towards Mr. Howe.

[89] Even from paragraphs 21-25 of his proposed amended statement of claim (the alleged intentional misleading of the Complaints Investigation Committee about Mr. Howe's suggested retention as counsel by client DE (on one occasion only)), assuming those facts are true, one could not draw an inference that Mr. Larkin was acting in bad faith on and around the time of September 1, 2016 (or that he held or acted upon racially discriminatory beliefs) such that therefore he would be precluded from relying on the good-faith based common law and statutory immunities otherwise available.[34]

[90] I am also satisfied that Mr. Larkin's arguments are persuasive (except as to negligence, and defamation) that to permit Mr. Howe's claims to proceed would be an abuse of process in relation to all causes of action in the original August 31, 2020, statement of claim, as well as the proposed amended statement of claim

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[33] It is remarkable that in relation to Mr. Larkin's conduct, at the same time that Mr. Howe alleges Mr. Larkin intentionally committed torts against him, namely, civil conspiracy, malicious prosecution, malfeasance in public office, and breach of section 15 of the *Charter* (racial discrimination/prejudice) - he also alleges that Mr. Larkin was negligent – though I appreciate that in appropriate circumstances, malicious prosecution can coexist with negligence-based torts such as a negligent investigation – *Hill v. Hamilton-Wentworth Regional Police Services Board,* [2007] 3 SCR 129, at paragraph 35.

[34] Moreover, Mr. Howe must also plead facts upon which one could conclude that the tortious conduct was *the legal cause of his injuries* (that "but for" Mr. Larkin's alleged tortious conduct, he would not have suffered the injuries claimed) and that the injuries are compensable in tort law.

(insofar as they rely upon Mr. Howe's claims of racial bias, discrimination, and differential treatment). Those same claims were vigorously and comprehensively advanced by Mr. Howe before the Society's Hearing Panel (both the Misconduct hearing and the Sanction hearing), and at the Court of Appeal.

[91] Whether by being a collateral attack on earlier decisions, or *res judicata* (issue estoppel) considerations, with possibly the exception of his negligence and defamation claims, at the root of Mr. Howe's civil action are his claims of racial bias, discrimination, and differential treatment. These very issues between the Society and Mr. Howe during substantially the same time interval, have been exhaustively examined in the administrative law context and a subsequent appeal.

[92] I conclude it would be an abuse of process to allow those same issues to be re-litigated by way of Mr. Howe's civil action.

E - The legal framework governing when amendments to pleadings should be permitted

[93] Mr. Howe requires the permission of this Court to amend his August 31, 2020, pleadings. It is his onus to satisfy the court that his proposed new pleading should be permitted.[35]

[94] *CPR* 83.11 states:

> (1) A judge may give permission to amend a court document at any time.
>
> (2) An amendment cannot be made that has the effect of joining a person is a party who cannot be joined under Rule 35 – Parties, including Rule 35.08(5) about the expiry of the limitation period.
>
> (3) *A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period*, applicable to a cause of action:
>
> a) the material facts supporting the cause are pleaded;
>
> b) the amendment merely identifies, or better describes, the cause.
>
> [My italicization added]

[35] See *CPR*s 38.12, 83.02, and 83.11, and related jurisprudence: for example, *EllisDon Corporation v. Southwest Construction, et al*., 2021 NSCA 20.

[95] *CPR* 38.02 states:

> (1) A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.
>
> (2) *The pleading* must be concise, but it *must provide information sufficient to accomplish both of the following*:
>
> (a) the other party *will know the case the party has to meet* when preparing for, and participating in, the trial or hearing;
>
> (b) the other party *will not be surprised* when the party signing the pleading seeks to prove a material fact.
>
> (3) *Material facts must be pleaded*, but the evidence to prove a material fact must not be pleaded.
>
> (4) A party may plead a point of law, if the material facts that make it applicable are also pleaded.
>
> [My italicization added]

[96] *CPR* 38.03(3) states:

> *A pleading must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice*.
>
> [My italicization added]

[97] *CPR* 38.08 [requiring particulars in an action] and 38.09 [providing particulars in an action] are both implicated herein. The defendants demanded Mr. Howe provide particulars in support of his claims. He did so. The Answer(s) became part of the pleadings per *CPR* 38.09(2)(a).

[98] The jurisprudence establishes that, in exercising the discretion to grant leave (or not) to amend pleadings, a motion judge should be guided by the following general considerations:[36]

> A. *The parameters of the general rule regarding leave of the court to make amendments*

[36] From my reasons in *Southwest Construction Management Limited v. EllisDon Corporation*, 2020 NSSC 99, affirmed at 2021 NSCA 20.

> 42 In considering whether the court should grant leave, there are three aspects to consider:
>
> 1. Is there sufficient evidence of bad faith on the part of the Southwest Group of Companies to preclude granting leave to amend?
>
> 2. Is there serious non-compensable prejudice to EllisDon flowing from granting leave to amend?
>
> 3. Can it be said that any part of the proposed pleadings are unsustainable or untenable in law such that leave to appeal [sic] should not be granted regarding those amendments?

[99] Firstly, the defendants do not argue that there is bad faith on the part of Mr. Howe.

[100] Secondly, neither do they seriously argue that permitting the amendments will cause them serious non-compensable prejudice. I am satisfied that granting Mr. Howe leave to amend his pleadings as presently proposed will not cause any of the defendants to suffer material non-compensable prejudice.[37]

[101] My proper focus therefore should be on the third factor.[38]

[102] As Chief Justice Wood stated in *EllisDon Corp. v. Southwest Construction, supra*:

> 26 A judge should not permit an amendment to add a claim which discloses no cause of action or where the action is obviously unsustainable. This is the same standard applied on a motion for summary judgment on pleadings under Rule 13.03.
>
> 27 In this case, the motion judge described the proposed pleading as "not elegant" and the respondent readily concedes that point. The fact that a proposed pleading sets out allegations which are poorly described or lacking in particulars is not fatal to the amendment motion. The issue is whether the pleading is obviously unsustainable.

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[37] Rees/Larkin concede in writing at paragraph 262 of their December 22, 2021 brief, that they do not expect to be so prejudiced.

[38] I remind myself that I must always also consider Mr. Howe's Answers to Particulars requested by Mr. Larkin and Ms. Rees, given on February 18, 2021, and to the NSBS on March 3, 2021 – see the court's reasons at paragraph 7 in *Robson v. The Law Society of Upper Canada*, 2018 ONCA 944.

[103] Chief Justice Wood's reference to *CPR* 13.03 brings my attention to that Rule.[39] The Rule reads:

> 13.01 Scope of Rule
>
> 13 (1) This Rule is for summary judgment on evidence in an action and summary judgment on pleadings in an action or an application.
>
> (2) This Rule is not for economical disposal of a claim or defence that may have some merit, to be determined through assessment of credibility or otherwise, which purpose may be served by any of the following:
>
> (a) provisions of Rule 4 - Action for early assignment of trial dates;
>
> (b) provisions of Rule 5 - Application for an application in court and Rule 6 - Choosing Between Action and Application;
>
> (c) Part 4 - Alternative Resolution or Determination, except Rule 13 - Summary Judgment;
>
> (d) Part 12 - Actions Under $150,000.
>
> (3) *This Rule is not for disposal of frivolous, vexatious, scandalous, or otherwise abusive pleadings, which purpose is served by Rule 88 - Abuse of Process*.
>
> 13.02 Interpretation
>
> In this Rule 13, "statement of claim" includes all or part of a statement of claim, statement of claim against third or subsequent party, statement of counterclaim, and statement of crossclaim, and the grounds in a notice of application and in a notice of respondent's claim, and "statement of defence" includes all or part of a statement of defence and the grounds in a notice of contest in answer to a statement of claim.
>
> **13.03 Summary judgment on pleadings**
>
> (1) *A judge must set aside a statement of claim,* or a statement of defence, *that is deficient in any of the following ways:*

[39] The defendant Mr. Larkin filed a motion for summary judgment on pleadings *before* Mr. Howe filed his motion to amend his pleadings. The defendant's motion was properly adjourned pending Mr. Howe's motion- see Justice Norton's reasons regarding hearing an amendment to pleadings motion before a summary judgment motion in *Sears v. Top O' the Mountain Apartments Ltd.*, 2021 NSSC 80. Ultimately the parties agreed the motions would be heard together. Consequently, when I engage in an analysis of whether I should grant leave to Mr. Howe to amend his pleadings, I necessarily must consider whether his pleadings describe a reasonable cause of action, that exists in law, and whether the pleadings are sustainable or are doomed to failure- see Justice Bryson's reasons in *Walsh Estate v. Coady Estate*, 2016 NSCA 60 at paragraphs 17-18. These are essentially the same considerations that are applicable to a motion for summary judgment on pleadings.

(a) *it discloses no cause of action* or basis for a defence or contest;

(b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;

(c) *it otherwise makes a claim*, or sets up a defence or ground of contest, that is *clearly unsustainable when the pleading is read on its own*.

(2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:

(a) judgment for the party making a claim, when the statement of defence is set aside wholly;

(b) *dismissal of the proceeding, when the statement of claim is set aside wholly*;

(c) allowance of a claim, when all parts of the statement of defence pertaining to the claim are set aside;

(d) *dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.*

(3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

(4) A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.

(5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:

(a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;

(b) the outcome of the motion depends entirely on the answer to the question.

F - What does it mean when one speaks of pleadings as being “untenable” or “unsustainable”, such that leave to amend should not be granted regarding the amendments?

[104] Pleadings can be unsustainable or untenable in law based on various forms of legal objections.

[105] Let me first briefly address whether there is any significant difference whether one speaks in terms of pleadings being "untenable" and "unsustainable"?

[106] In the Random House *Dictionary of the English Language*, Unabridged Edition (Toronto: Random House, 1966), they are defined as follows:

> Unsustainable – *not sustainable*; not to be supported, maintained, upheld, or corroborated
>
> Untenable – *incapable of being defended*, as an argument, thesis etc.; indefensible.

[107] To my mind, there is value in examining the etymology of each word. I had available to me and have referred to *An Etymological Dictionary of Modern English*, by Ernest Weekley (London: John Murray, 1921). Therein we find, neither term in the negative form, but we do find them in the positive form:

> Sustain[able] – Old French sostenir [from the Latin sustenire] to hold
>
> Tenable – French from tenir,..to hold

[108] The two words seem at their root to be synonyms, although their more recent precise usage in the law implies there is a nuanced difference. I suggest the following:

1. A claim that discloses no cause of action on the face of the pleadings is "untenable"- *CPR* 13.01(a)[40];
2. A claim that is "tenable" (it discloses a cause of action on the face of the pleadings) can become unsustainable when it is more closely examined - *CPR* 13.01(c).[41]

[109] The defendants herein claim that the pleadings are untenable or unsustainable for the following reasons:[42]

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[40] For example, if the claim made does not exist in law; or the claim as drafted exists in law, but the pleadings reflect omissions of material fact such that they are obviously deficient.

[41] For example, if an otherwise valid claim is pleaded, but is doomed to failure by a limitation period, a statutory bar (such as section 81 of the *Legal Profession Act*), or a common law bar (such as witness or lawyer/advocate immunity).

[42] Interestingly, Rule 88, Abuse of Process, and specifically *CPR* 88.03, entitled "Unsustainable Pleading", reads: "(1) It is not an abuse of process to make a claim, or raise a defence or ground of contest, that may on the pleadings alone be unsustainable, and such a claim, defence, or ground may be challenged under Rule 13 – summary

1. The "pleadings" (i.e. pleadings and Answers to the Demand for Particulars together) either do not plead causes of action that exist in law **or** sufficient material facts to establish each of the elements of the causes of action pleaded, and therefore leave to amend should be denied.[43]

2. There are various legal impediments or bars which lead to the pleadings necessarily being doomed to failure:

    a. **a limitation period** precludes the causes of action;

    b. the NSBS, Mr. Larkin and Ms. Rees are protected by **statutory immunity** pursuant to s. 81 of the *Legal Profession Act*, SNS 2004, c. 28, as amended by SNS 2010, c. 56 [provided the "act or failure to act, or any proceeding initiated or taken, or anything done or not done, is *done in good faith* while acting or purporting to act on behalf of the Society in the carrying out of the duties or obligations under the Act; or for any decision, order or resolution *made or enforced in good faith* under this Act"];

    c. the NSBS is protected by **common law immunity** for quasi-judicial exercises of discretion (including alleged associated negligence) provided the Society and those acting on its behalf *acted in good faith - Edwards v. Law Society of Upper Canada*, 2001 SCC 80; (see more recently *Finney v. Barreau du Quebec*, [2004] 2 SCR 17;[44] and *Ouellette v. Law Society of Alberta*, 2019 ABQB 492, per Phillips, J. at para. 4); **and because at common law, there is no private law duty of care** owed to individual members of the legal profession – the Society's role and duty is to protect the public;

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judgment.(2) A party or the prothonotary may make a motion to strike a pleading on the basis that it amounts to an abuse of process." I interpret the intention of the drafters in including *CPR* 88.03, as wishing to clarify that the machinery of "abuse of process" should not be invoked merely because a pleading is deficient.

[43] See *CPR* 13.03 jurisprudence as it is applicable per Chief Justice Wood's statements in *Southwest Construction* at paragraph 26, and the summary by Justice Keith in *Keleher v. Nova Scotia (Attorney General), supra*, at paragraph 44; and most recently, Justice Norton's reasons in *MacGregor's Custom Machining Limited v. Sanikiluaq Development Corporation*, 2021 NSSC 139.

[44] It is an open question as to whether the Society's Complaints Investigation Committee ["CIC"] membership has retained its immunity, since Mr. Howe has not specifically alleged bad faith against it or in the making of its decision. I incline to thinking that the Society and the CIC membership have the benefit of statutory immunity regarding the September 1, 2016, suspension hearing, even if Mr. Larkin does not have that immunity.

d. that Ms. Rees is entitled to rely on **common law witness immunity** when she testified at NSBS proceedings;

e. that Mr. Larkin is entitled to rely on **common law lawyer/advocate privilege immunity** against defamation (and other) claims when acting in that role (provided he *acted in good faith*) per *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, at paras. 143 – 156; although in different circumstances, more recently see *Groia v. Law Society of Upper Canada*, 2018 SCC 27;

f. that the amendments should not be permitted because they would be an **abuse of process** as envisaged by *CPR* 88, including based on arguments that the pleadings are *res judicata* (see *Hoque v. Montreat Trust Co, of Canada*, 1997 NSCA 153, at paras. 20-65, per Cromwell, J.A. (as he then was) - subject to issue estoppel; and contrary to the rule against collateral attacks (see for example, the application of *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, in *Skrypichako v. Law Society of Alberta*, 2020 ABQB 461, at paras. 60-68, per ACJ John Rooke). These arguments arise in part from the following:[45]

   i. Mr. Howe's decision not to avail himself of the opportunity to request a meeting with the Complaints Investigation Committee *regarding his interim suspension*, or to *appeal a question of law* at the time of his interim suspension from practice, to the Court of Appeal, both pursuant to section 37 of the *Legal Profession Act*;

   ii. Mr. Howe's unsuccessful appeal of the Society's decision to disbar him: 2019 NSCA 81 (leave to appeal denied by Supreme Court of Canada). That comprehensive decision dealt with the substance of the

[45] I keep in mind it even where the requisite elements of *res judicata*, the rule against collateral attacks and abuse of process, have been made out, a court must consider whether to exercise its residual discretion to nevertheless allow pleadings to proceed (or to be amended) if the public interest in finality is trumped by the public interest in fairness to a particular litigant, and ensuring that justice is achieved in a specific case – for example see *Klassen v. British Columbia Minister of Public Safety and Solicitor General*, 2021 BCCA 294, at paragraphs 15-19 and 37-39 (leave to appeal denied, 2022 CanLII SCC 1932).

issues raised in his present pleadings filed August 31, 2020, as well as his proposed amended pleadings;

iii. Mr. Howe's unsuccessful motion to have an earlier Consent Dismissal Order of his motion for judicial review set aside before Justice Campbell (*Howe v. Nova Scotia Barristers' Society*, 2020 NSSC 229); and

iv. Mr. Howe's failure to fully engage the processes afforded by the Nova Scotia Human Rights Commission in relation to his claims of discrimination based on race.[46]

G – Does Mr. Howe plead causes of action that exist in law, and does he allege sufficient material facts to establish each of the elements of the causes of action pleaded against each of the three defendants, namely: negligence; defamation (only pleaded as against the Society) malicious prosecution; civil conspiracy; public malfeasance; individual and systemic racial discrimination; "unlawful harm"?[47]

[110] I will state the essential elements of each claimed cause of action and review the pleadings to assess whether material facts in support of those elements are pleaded, and such cause of action exists in law.[48]

[111] The test was described as: whether the pleadings "disclose a reasonable cause of action i.e. **a cause of action 'with some chance of success'** … or …is it 'plain and obvious that the action cannot succeed'?" per Wilson, J. in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at para. 94 (Dickson, J. at para. 8); see also Justice Fichaud's reasons in *Nova Scotia (Attorney General) v. Carvery*, 2016 NSCA 21, at para. 24.

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[46] I bear in mind that *CPR* 88.02 allows for a non-exhaustive listing of possible remedies likely to control an abuse, short of striking pleadings or not granting leave to amend them.

[47] When considering the tenability and sustainability of the pleadings, I must *presume* the facts alleged therein are true - *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at paragraph 15.

[48] In his August 31, 2020, statement of claim, Mr. Howe advanced the following causes of action: negligence, defamation, and malicious prosecution. In his proposed amended statement of claim in addition to the originally pleaded negligence, defamation (against the Society), and malicious prosecution, Mr. Howe is advancing the following new causes of action: civil conspiracy; "unlawful harm" tort; public malfeasance; and individual and systemic discrimination based on race which violated Mr. Howe section 15 *Charter of Rights and Freedoms* protections.

[112] Notably in recent cases, a slightly different wording has emerged regarding when a pleading discloses "no reasonable cause of action" (see *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at paras. 14 (majority) and 90 (minority) reasons): "**Simply stated, if a claim has no reasonable prospect of success it should not be allowed to proceed to trial** (*R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45, at para. 17.)"; and "**Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial".** (see also *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635).

[113] "… This is a high standard that applies to determinations of fact, law, and mixed fact and law." (para. 87 – *Babstock*) - However, although "conclusions of law may be pleaded: see *Famous Players Canadian Corp. v. J.J. Turner and Sons Ltd.*, [1948] O.W.N. 221, per Gale J., at paras. 221-22, they do not form part of the factual allegations which must be taken as proved for purposes of a motion to strike": *Operation Dismantle*, per Wilson J., at p. 492. Notably however, Gale J. added in his reasons at para. 3, [1948] O.J. No. 69: "Provided that [legal] conclusion is adequately supported by a statement of facts which are material to that result."

[114] "Material facts" have been comprehensively commented upon by Justice Bodurtha in his reasons in *Layes v. Bowes*, 2019 NSSC 298, at paragraphs 9-19:[49]

> [9] In Williston and Rolls, *The Law of Civil Procedure* (1970) at p. 647 the authors state:
>
> > **It is an elementary rule in pleading that when a state of fact is relied on, it is enough to allege it simply without setting forth the subordinate facts which are the means of proving it or the evidence to sustain the allegation**. While generally any fact which may be given in evidence may be pleaded, **the pleading of a fact which is only relevant insofar as it tends to prove a material allegation is in the nature of pleading evidence and will be struck out**.
>
> [10] Rule 38(2) and (3) inform us that pleadings must be concise but provide enough information to the other side of the nature of the proceedings, and when the party signing the pleading seeks to prove a material fact, the other side will not be surprised. The inclusion of evidence ignores the distinction between material facts and evidence.

[49] At para. 78 in *Operation Dismantle*, Justice Wilson noted that pleadings may include two kinds of "evidentiary facts": "These may be either real or intangible. Real facts are susceptible of proof by direct evidence. Intangible facts … may be proved by inference from real facts or through the testimony of experts." Inferences may be drawn from (material) facts pleaded by Mr. Howe in the case at Bar – or they not be possible to be drawn.

…

[13] **The pleading of evidence is prohibited**. The rule is meant to restrict the pleading of facts that are subordinate and that merely tend to prove the truth of the substantial facts in issue (see *Rare Charitable Research Reserve v Chaplain* (2009) OJ No 3893 (Ont. S. C.)).

[14] What is patently obvious after hearing the submissions of the parties is **the difference between pleading material facts and pleading evidence is a difference in degree and not in kind** (see *Toronto (City) v MFP Financial Services Ltd* (2005), OJ No 3214 (Ont. Master)).

[15] The Plaintiff relies on the case of *Robertson v. Jacques Whitford Environment Ltd.*, 2004 BCSC 1424, at para. 20, for the distinction between material facts and evidence but also for a more liberal interpretation of pleading evidence. The Court quotes the following passage from MacLachlin and Taylor's *British Columbia Practice*, 2nd ed.:

> The distinction between material facts and evidence is essentially one of degree. **A material fact is a fact that of itself is necessary to establish a legal proposition and without which the cause of action is incomplete. Evidence includes those facts necessary to establish the material facts.** It is a safe practice, if in doubt to plead a matter as the risk of having an order go to strike out a portion of one's pleadings as being evidence is remote, and the consequences of such an order are slight (costs), while the consequences of having omitted to plead a material fact might be to have one's pleadings struck out or claim dismissed for failing to state a cause of action or defence.

[16] A similar point was made in *Toronto (City) v. MFP Financial Services Ltd.*, 2005 CarswellOnt 3324, [2005] O.J. No. 3214, [2005] O.T.C. 672, 141 A.C.W.S. (3d) 254, 17 C.P.C. (6th) 338 but the court also discusses how **the answer to acceptable pleadings can be found by revisiting first principles such as fairness, judicial economy and the exposition of truth** at paras 15-16:

> 15 **The distinction between material facts, particulars and evidence is not a bright line** and there will be situations in which the level of detail required to provide adequate particulars sets out material facts that might also be regarded as evidence. Furthermore, pleadings motions should not be approached in an overly technical manner. **Generally speaking, a party should be at liberty to craft a pleading in the manner it chooses providing the rules of pleading are not violently offended and there is no prejudice to the other side**. (see *Toronto (City) v. British American Oil Co.* (1948), 1948 CanLII 80 (ON CA), [1949] O.R. 143 (Ont. C.A.) and *Abdi Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd.*, [2001] O.J. No. 1068 (Ont. S.C.J.)

> 16 The answer to acceptable pleading may often be found by revisiting first principles. Our rules of pleading are intended to define and limit the issues in order to promote fairness, judicial economy and exposition of the truth. **This must be done so that the court understands the dispute and the parties have fair notice of the case to be met and the remedies to be sought. Pleadings** are important because they are the foundational documents on which the case rests and will **shape the scope of relevance for both discovery and trial**. It must be remembered however that the question for today is not whether similar fact evidence will be admitted at trial but whether or not the allegations appearing above should be added to the statement of claim.

i) Negligence[50]

[115] The essential elements of the tort of negligent [police] investigation were described by the court in *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41. In summary, the court concluded:

> A **prima facie duty of care is owed if the relationship between two persons is sufficiently proximate that it is reasonably foreseeable that the actions of one may directly affect the other.** In the relationship between the police and a particular suspect being investigated, the **requirement of reasonable foreseeability** is clearly made out and poses no barrier **to finding a duty of care**; clearly negligent police investigation of a suspect may cause harm to the suspect.
>
> Other considerations in the proximity analysis include the close and direct relationship between the police and a suspect identified for investigation, and the suspect's critical personal interest in the conduct of an investigation.
>
> The interests at stake support a finding of a proximate relationship giving rise to a prima facie duty of care, and other torts do not provide an adequate remedy for negligent police acts.
>
> The personal interest of the suspect in the conduct of the investigation is enhanced by a public interest.

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[50] At paragraph 2 of his brief filed October 5, 2021, in response to the defendants' summary judgment motion, Mr. Howe acknowledged that he was "**conceding the grounds for summary judgment on the claims of negligence and defamation against the defendant Raymond Larkin**… **No action in negligence or defamation lies against Mr. Larkin under the statutory immunity outlined in the *Legal Profession Act*; there is no private law duty of care owed by law societies to disciplined members**; and the defamation claims are barred by the common law immunity of lawyers as advocates." **However**, in his March 4, 2022, brief (paragraph 59) and oral argument he confirmed that he **maintains that Ms. Rees, Mr. Larkin and the Society can be liable for negligence in relation to his investigation and prosecution under the *Act***.

> Moreover, a duty of care by police officers to suspects under investigation is consistent with the values and spirit underlying the *Charter*. The relationship between a police officer and a particular suspect is close enough to support a *prima facie* duty of care.
>
> **This duty is not negated by any compelling policy reasons**. The quasi-judicial nature of police duties does not require officers to make judgments as to legal guilt or innocence, or to evaluate evidence according to legal standards. The discretion inherent in police work fails to provide a convincing reason to negate the proposed duty of care. Police are not unlike other professionals who exercise discretion in their work, but who are subject to a duty of care in tort. Recognizing such a duty of care does not raise the standard required of the police from reasonable and probable grounds to some higher standard; nor would it have a chilling effect on policy by causing police officers to take an unduly defensive approach to the investigation of criminal activity. The record does not support the conclusion that there would be a flood of litigation against the police if a duty of care were recognized. Finally, there are safeguards against the possibility that investigated persons who were acquitted of a crime, but who were in fact guilty, might recover against an officer for negligent investigation.
>
> **The appropriate standard of care for the tort of negligent investigation is that of the reasonable police officer in like circumstances**. This provides a flexible overarching standard that covers all aspects of investigatory police work and is reinforced by the nature and importance of police investigations. The standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. **The particular conduct required is informed by the stage of the investigation and applicable legal considerations. Police officers may make minor errors or errors in judgment without breaching the standard of care**.
>
> [My bolding added]

[116] Justice Beveridge, on behalf of the court in *R. v. Gardner and Fraser*, 2021 NSCA 52, succinctly described the duty, albeit in the context of a criminal prosecution:

> 6 The common law imposes a duty on everyone to use the care of a reasonably prudent individual where a failure to do so will foreseeably cause harm to another. If that duty is breached and harm results, the person harmed can sue to be put back in the same position, as far as money damages can, as they were before the harm.

[117] While these principles have general application,[51] the defendants in the present motion argue that Mr. Howe's negligence claims are untenable and unsustainable.

[118] Mr. Howe's claims of negligence are in relation to the defendants' "investigation" of him.

[119] In Mr. Howe's original statement of claim, his pleadings allege negligence against all three defendants; and negligence against Ms. Rees and Mr. Larkin in his Answer to their Demand for particulars. He reiterates those claims against Ms. Rees, Mr. Larkin, and the Society "as an entity", in his Answer to the Society's Demand for particulars.

[120] In Mr. Howe's proposed amended statement of claim, he claims negligence only against Ms. Rees and the Society (at paragraphs 2 and 3). He has struck the negligence claim in paragraph 3 against Mr. Larkin, but it reappears in paragraph 5. He notes in his March 4, 2022, brief at para. 59: "it is our position that Mr. Larkin (as well as Ms. Rees and the Society) were negligent in their 'operational' decisions in addition to the fact that their actions were not done in good faith. As such the immunity clause would not prevent the defendants from being liable for their negligent actions".

[121] As I understand his position, Mr. Howe claims against all three defendants in negligence. His pleadings disclose multiple paragraphs containing generalized allegations and conclusions (for example, see also Mr. Howe's Answer to Demand for particulars filed February 18, 2021, paragraph 1). He states that "Ms. Rees was negligent in that she failed to meet her professional, fiduciary and other duties with respect to her position as Director of Professional Responsibility. The particulars include but are not limited to the following…".

[122] Section 81 of the *Legal Profession Act* reads:

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[51] Except insofar as there is likely no private law duty owed to Mr. Howe by the Society – including as a result of statutory and common law immunity: see *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, at paragraph 14; *Ouellette v. Law Society of Alberta*, 2019 ABQB 492; *Broda v. Alberta*, 2020 ABQB 221; and *Robson v. Law Society of Upper Canada*, 2016 ONSC 5579 [affirmed 2017 ONCA 468 at paragraphs 10-12] where Justice Firestone references "no tenable cause of action" at paragraph 37 and adds at paragraph 41: "it is settled law that, while the wording of section 9 of the *Law Society Act* does not apply to the Law Society itself, disciplinary proceedings of the Law Society are judicial or quasi-judicial in nature. As a result, absent bad faith, the Law Society is immune from suit." In contrast, in Nova Scotia the Society is expressly given statutory immunity by section 81 of the *Legal Profession Act*. [My underlining added]

(1) No action for damages lies against the Society, the Council, members of the Council, committees of the Society, persons serving as members of committees of the Society, the Executive Director or officers, agents or employees of the Society

(a) for any act or failure to act, or any proceeding initiated or taken, or anything done or not done, *in good faith* while acting or purporting to act on behalf of the Society in carrying out the duties or obligations under this Act; or
(b) for any decision, order or resolution made or enforced *in good faith* under this Act;

(2) No action lies against any person for the disclosure of any information or any document or anything therein pursuant to this Act unless such disclosure was made in *bad faith*.

(2A) No action for damages lies against any person for making a complaint to the Society *in good faith* about a member of the Society.

[123] The upshot is that, absent a pleaded allegation of bad faith, the Nova Scotia Barristers Society, and those acting on its behalf, are protected by common law judicial or quasi-judicial decision-maker immunity, and by the statutory immunity in section 81 of the *Legal Profession Act*.

[124] I conclude that the negligence pleadings are not tenable, in the sense that a generous reading thereof could not establish the essential elements of the tort of negligent investigation, especially in relation to the alleged breach of the duty to reasonably prudently investigate.[52]

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[52] As noted, I do not accept that the Society has a private law duty of care to its members. Moreover, each of the defendants have statutory immunity against claims of negligence absent bad faith. Mr. Howe's reliance on factors such as the alleged racial bias and malice could in some cases be characterized as "bad faith" and therefore negate the immunity provided to the defendants *regarding the negligence claims*, however, in the present circumstances this seems incompatible in nature with an alleged intentional manifestation of racial bias/malice. Recall also that pleadings of "unconscionable conduct" per *CPR* 38.03(3) must provide "full particulars". In relation to the claim of malicious prosecution, I have concluded that the alleged "malice" aspect is *not* sufficiently pleaded against any of the defendants. While I did not consider the following in coming to that conclusion, I have also had drawn to my attention: the 576 paragraphs long written Misconduct Decision of the hearing panel dated July 17, 2017, which shows Mr. Howe as having been represented by counsel; as well as the 110-paragraphs-long October 20, 2017, Sanction Decision, which shows Mr. Howe as having been represented by counsel. Moreover, Justice Farrar, for the five-member panel of our Court of Appeal, noted that "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… heard final arguments on April 19, 2017. On July 17, 2017, the panel rendered its decision…." - at paragraph 2 of 2019 NSCA 81. Mr. Howe has certainly had the opportunity to investigate and press his arguments regarding these issues. I am satisfied that at the latest by October 31, 2017, he was fulsomely informed about the core issues he raises in his pleadings and the nature of the evidence available in support thereof.

[125] Later, I will more fully deal with the bars to this cause of action, which undermine its sustainability.

ii) Malicious Prosecution

[126] The essential elements of this tort are:[53]

1. the proceeding must have been initiated by the defendant;
2. the proceeding must have been terminated in favour of the plaintiff;
3. there is an absence of reasonable and probable cause which is required to initiate the proceeding;[54]
4. there is malice, or a primary purpose other than that of carrying the law into effect.[55]

[127] I will next review the original and proposed amended statement of claim/Answer to Demand for *Particulars on malicious prosecution, regarding each of the defendants*[56] *Raymond Larkin, K.C. and Victoria Rees, K.C.*[57]

[128] The significant parts of the pleadings state:

> (para. 6) "The Plaintiff pleads that the defendants… maliciously prosecuted the Plaintiff by their motives and conduct in making an *ex parte* application to have the Plaintiff's ability to practice law suspended and in the dishonest manner in which they conducted the hearing…

---

[53] See *Nelles v. Ontario*, [1989] 2 SCR 170.

[54] In *Nelles* at paragraph 43, "reasonable and probable cause" has been defined as [*Hicks v. Faulkner* (1878), 8 Q.B.D. 167, at p. 171, per Hawkins J.] ":. . . an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed." This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. [My underlining added]

[55] "Malice" was further defined in *Miazga v. Kvello Estate*, 2009 SCC 51, at paras. 78-80. **It is not "malice" where conduct is inexplicable** (such as Mr. Larkin's statements about DE on September 1, 2016). Merely because in a conclusory fashion Mr. Howe pleads malice/malicious conduct, does not mean that it rises to the level of constituting "an absence of good faith" – see *Robson v. Law Society of Upper Canada*, 2016 ONSC 5579, affirmed 2017 ONCA 468.

[56] Mr. Howe's pleadings allege the Society is vicariously liable for the impugned actions of Ms. Rees and Mr. Larkin.

[57] I will not expressly address all the pleadings in the original and proposed amended statements of claim, however, I have considered all the pleadings of each statement of claim. The proposed amended pleading shows the language of both.

(para. 10) Victoria Rees was the Director of Professional Responsibility for all of the time period spanning the investigations of the Plaintiff's legal practice and prosecution regarding the same.…

(para. 14) Victoria Rees expressed racial bias toward the Plaintiff during the investigations into his practice.

(paras. 17-19) Victoria Rees acted in a conflict of interest and influenced the Nova Scotia Barristers Society investigations and malicious prosecution of the Plaintiff's legal practice based on her conflict of interest as well as racial bias expressed toward the Plaintiff. The Plaintiff was charged by the Nova Scotia Barristers Society in 2015 for allegations of breaching the Code of Conduct which proceeded to hearing. The Hearing for the 2015 charges was held from 2015 to 2017 over which time the Plaintiff repeatedly highlighted Victoria Rees conflict of interest and racial bias that maliciously influenced the investigation into his practice and his ongoing prosecution, and breaching their duty of care two the Plaintiff.

(para. 20) The Nova Scotia Barristers Society hired Raymond Larkin in 2016 to make an application to have the Plaintiff suspended at an *ex parte* hearing with the allegation that the Plaintiff was breaching his practice restrictions imposed by the Complaints Investigation Committee of the Nova Scotia Barristers Society.

(para. 21) On September 1, 2016, during an *ex parte* hearing, Raymond Larkin maliciously misled the Complaints Investigation Committee by indicating the Plaintiff was on the record for client DE and that the Plaintiff had a certificate from Legal Aid. …

(para. 34) On September 1, 2016, the Plaintiff was suspended from practising law as a result of the Complaints Investigation Committee of the Nova Scotia Barristers Society making a finding that the Plaintiff should be suspended after hearing submissions by Raymond Larkin on behalf of the Nova Scotia Barristers Society.

(para. 35) After the Plaintiff's suspension from practising law on September 1, 2016, he provided written communications to the Nova Scotia Barristers Society highlighting the malicious misleading statements by Raymond Larkin and that the allegations of the Plaintiff breaching his practice restrictions being meritless and warranted no probable cause to justify the actions of Mr. Larkin, Ms. Rees or the Nova Scotia Barristers Society.

…

(para. 40) Victoria Rees acted maliciously toward the Plaintiff in her role as Director of Professional Responsibility of the Nova Scotia Barristers Society.

(para. 41)… Raymond Larkin's investigation was motivated and otherwise influenced by his desire to further the interests of Victoria Rees. Raymond Larkin was influenced by the bias held and expressed by Ms. Rees against the Plaintiff to act maliciously against the Plaintiff…

> (para. 51) The charges relating to the allegations resulting in the Plaintiff's suspension from practicing law as of September 1, 2016, were withdrawn by the Complaints Investigation Committee on July 24, 2020, without a hearing."

[129] The significant parts of Ms. Rees' Demand for Particulars were answered by Mr. Howe on February 18, 2021, at pages 4-6, and particulars of the alleged racial bias and conflict of interest follow from pages 6-8.

[130] The significant parts of Mr. Larkin's Demand for Particulars were answered by Mr. Howe on February 18, 2021, at pages 9-10 (confirming that Mr. Howe's allegations of malicious prosecution are related to specifically paragraphs 18-21 of the original statement of claim filed August 31, 2020 – although, as noted, those allegations have been expanded in the proposed amended statement of claim).

[131] **On the malicious prosecution claim, bearing in mind CPR 38.03(3), I conclude that the pleadings:**

1. do not claim that Mr. Larkin initiated any proceedings against Mr. Howe;[58]
2. do not claim that the proceedings were "terminated in favour of" Mr. Howe (not for the overall disciplinary process, or for the interim suspension resulting after Mr. Larkin's involvement on September 1, 2016) – paragraphs 22/36 and 26/51 of the original and proposed amended statement of claim read almost identically:[59]

> The Plaintiff is not aware of any action taken by the Nova Scotia Barristers Society to address the misleading statements by Raymond Larkin or addressing the meritless charges until July 24, 2020, when the charges were withdrawn.
>
> The charges relating to the allegations resulting in the Plaintiff's suspension from practicing law as of September 1, 2016, were

[58] Or that he had the authority to discontinue the proceedings per the reasons in *Miazga v. Kvello Estate*, 2009 SCC 51, at paragraph 6. I recognize that a majority of a three-member panel in *Khanna v. Royal College of Dental Surgeons of Ontario*, [2000] O.J. No. 946, read broadly the requirement for the defendant to have been involved in the "initiation" of proceedings in those circumstances, however in Mr. Howe's case I find it is not appropriate to come to the same conclusion since the pleadings here are distinguishable.

[59] Reviewed contextually and purposively interpreted, it cannot be said that the pleadings could allow one conclude that "the proceedings" were "terminated in favour of the plaintiff". By July 2020, the Misconduct Decision and Sanction Decision had both been long ago determined, as had the appeal thereof (October 24, 2019).

> withdrawn by the Complaints Investigation Committee on July 24, 2020, without a hearing.

3. do not claim that "there is an absence of reasonable and probable cause which is required to initiate the proceeding";[60]
4. do not properly claim that there is malice, or a primary purpose other than carrying the law into effect.

[132] *CPR* 38 ("Pleadings") contains several noteworthy sub-Rules. In addition to the "General Principles of Pleading", Rule 38.02, Rule 38.03(2) and (3) read:

> 38.02 General principles of pleading
>
> (1) A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.
>
> (2) **The pleading must be concise, but it must provide information sufficient to accomplish both of the following**:
>
> (a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;
>
> (b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.
>
> (3) **Material facts must be pleaded**, but the evidence to prove a material fact must not be pleaded.
>
> (4) A party may plead a point of law, if the material facts that make it applicable are also pleaded.
>
> …

[60] Moreover, as a matter of law, I doubt that "withdrawing charges" in these circumstances is tantamount to being "terminated in favour" of Mr. Howe. See para. 35 of the amended statement of claim. Moreover, the "proceeding" is not limited to the September 1, 2016 hearing. I bear in mind that Mr. Howe alleges in his Answer that Ms. Rees' actions that "constituted malicious prosecution include Ms. Rees acting as the operating mind of the NSBS, overseeing and investigating proceedings while being driven by racial stereotypes and prejudice as well as improper motives and/or while acting in a conflict of interest… The proceedings against the Plaintiff were malicious in totality and discrete actions of Ms. Rees were also malicious in and of themselves. This includes her actions in relation to the following charges: i) charges that were investigated… that were withdrawn…; ii) charges that were investigated… proceeded to hearing… for which the Plaintiff received an acquittal; iii) charges that were investigated [and prompted the *ex parte* hearing of September 1, 2016, yet were withdrawn without a hearing on July 24, 2020]." However, when all is tolled, the pleadings do not reference material facts that support a claim of an "absence of reasonable and probable cause to initiate the proceedings". [My underlining added]

38.03 Pleading a claim or defence in an action

(1) A claim or defence in an action, and a claim or defence in a counterclaim, crossclaim, or third party claim, must be made by a statement of claim that conforms with Rules 4.02(4) and 4.03(5), of Rule 4 - Action, or a statement of defence that conforms with Rule 4.05(4) of Rule 4.

(2) **The following additional rules of pleading apply to all pleadings in an action**:

(a) a description of a person in pleadings must not contain more personal information than is necessary to identify the person and show the person's relationship to a claim or defence;

(b) claims or defences may be pleaded in the alternative, but **the facts supporting an alternative claim or defence must be pleaded distinctly**;

(c) a pleading that refers to a material document, such as a contract, written communication, or deed must identify the document and concisely describe its effect without quoting the text, unless the exact words of the text are themselves material;

(d) a pleading that alleges notice is given must state when the notice was given, identify the person notified, and concisely describe its content without quoting the text, unless the exact words of the text are themselves material.

(3) **A pleading must provide full particulars of a claim alleging unconscionable conduct**, **such as** fraud, fraudulent misrepresentation, misappropriation, or **malice.**

[My bolding added]

[133] The pleadings in relation to Mr. Larkin rely on allegations of him "misleading" the Committee on September 1, 2016, including: "he knew that what he stated was false and he intended to mislead the Complaints Investigation Committee to suspend me during the *ex parte* hearing" (Answer to Demand for particulars, page 9), which were confirmed as being "alleged in paragraphs 4, 5 and 6 of the [original] statement of claim [and relate solely to the matters] alleged in paragraphs 18, 19, 20 and 21."

[134] In the proposed amended statement of claim, Mr. Howe claims that Mr. Larkin and Victoria Rees:

Maliciously prosecuted the Plaintiff by their motives and conduct in making an *ex parte* application to have the Plaintiff's ability to practice law suspended and in the dishonest manner in which they conducted the hearing… Raymond Larkin maliciously misled the

> Complaints Investigation Committee by indicating the Plaintiff was on record for client DE and that the Plaintiff had a certificate from Legal Aid. Raymond Larkin intended to have his statements mislead the Complaints Investigation Committee into believing that the Plaintiff was double booked and missed the court appearance of the client DE… to wrongfully convince the Committee that the suspension of the practicing license of the Plaintiff was warranted in the circumstances. Raymond Larkin was aware that his own statements were not true at the time that he made the misleading statements. For example, prior to making the statements, Raymond Larkin was in possession of materials… that demonstrated that the Plaintiff was not retained, that the Plaintiff had no intention of becoming retained for the client DE and that the Plaintiff did not commit to attending the impugned court appearance… also in possession of materials that demonstrated to him that neither the court, the client DE, the Crown, or anyone else could have reasonably believed that the Plaintiff was retained or had any intention to become retained for DE and that the intention of the client was to possibly retain a different lawyer.… was aware that the Plaintiff had no obligation and was not expected to attend the impugned court appearance for DE… was within their roles that Victoria Rees and Raymond Larkin engaged in deliberate conduct that was not within their lawful roles as public officers and in particular misleading the Complaints Investigation Committee to have the Plaintiff suspended from practicing law… were aware that their deliberate conduct was unlawful … Raymond Larkin's investigation was motivated and otherwise influenced by his desire to further the interests of Victoria Rees. Raymond Larkin was influenced by the bias held and expressed by Victoria Rees and possibly other members of the Nova Scotia Barristers Society, including Darrell Pink, to act maliciously against the Plaintiff.
>
> [My underlining added]

[135] Overall, the pleadings of "malice" are improperly conclusory, even after two Demands for Particulars were requested, and Answers received.

[136] Regarding the claim of malicious prosecution against Raymond Larkin, arising exclusively from the September 1, 2016 *ex parte* interim suspension hearing, the two bases upon which Mr. Howe relies are that: Mr. Larkin was under the influence of Victoria Rees' alleged bias and/or racial prejudice; and that he knowingly misled the Committee about whether Mr. Howe was retained as counsel for one appearance on behalf of one client (DE) in Provincial Court on one occasion. No other particulars are provided. Mr. Howe simply suggests Mr. Larkin was somehow influenced by Ms. Rees, by what Mr. Howe says is her malice against him. There are simply insufficient material facts pleaded to support a conclusion that Mr. Larkin was acting with malice against Mr. Howe.

[137] Similarly in relation to Ms. Rees, Mr. Howe claims that she was in a conflict of interest because her husband, Martin Herschorn, K.C., was the Director of Public Prosecutions (Nova Scotia), and

a. Mr. Howe had filed "a lawsuit naming the Public Prosecution Service on February 4, 2013";

b. "the Plaintiff had incidents involving employees of the Public Prosecution Service which were investigated by Victoria Rees in her role as Director of Professional Responsibility for the Nova Scotia Barristers Society";

c. that Ms. Rees "expressed racial bias toward the Plaintiff during the investigations into his practice…" (original statement of claim); and

d. *per* Mr. Howe's Answer to the Demand for particulars:

> Ms. Rees… driven by racial stereotypes and prejudice as well as improper motives and/or while acting in a conflict of interest**… the malicious acts were an aggregate of actions and a corresponding discriminatory attitude that manifested over these dates…** Ms. Rees' **negative racial stereotypes that she expressed in an email of February 26, 2014… by unreasonably suggesting that [Mr. Howe] was threatening a former client when providing legal advice… In May 2015, Ms. Rees supported the allegations of Ms. [Michelle] James wherein she made criminalizing comments about the Plaintiff** in circumstances that were not appropriate and were driven by racial stereotypes and prejudice… **September 23, 2013, and February 24, 2014, Ms. Rees ignored the Plaintiff's complaints of mistreatment by Crown attorneys and his experience of racial discrimination within the legal profession**. Ms. Rees **discouraged the Plaintiff from pursuing complaints against Ms. James at the same time she encouraged Ms. James to forward complaints against him;…** In and **around 2014, Ms. Rees reviewed and commenced a complaint regarding the Plaintiff's criminal trial wherein it was alleged that he misled the court**, when in fact the transcript of the testimony demonstrates of the Crown Attorney had misled the court regarding the Plaintiff's evidence… **Ms. Rees sent an email that stated… [Robert Wright] has developed a new race impact assessment which was used in the criminal justice system twice last year. It is not unlike a PSR [presentence report] 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 behaviour, and how to better cope with this… As Dr. Wright aptly has said, he's often seen problems when professionals "bring the hood" into practice [emphasis added by Mr. Howe].**

[My bolding added throughout]

[138] Regarding the claim of malicious prosecution against Victoria Rees, the two primary bases upon which Mr. Howe relies are that: firstly, she was in a continual conflict of interest because her husband was the Director of Public Prosecutions of Nova Scotia; and secondly, because she was "driven by racial stereotypes and prejudice…"; and that her "malicious acts were an aggregate of actions and a corresponding discriminatory attitude that manifested over these dates."

[139] The mere fact that Ms. Rees is married to the Director of Public Prosecutions, given the circumstances Mr. Howe references in his pleadings, is immaterial.

[140] Regarding Ms. Rees, Mr. Howe has not pleaded sufficient material facts upon which to conclude that there is anything close to *CPR* 38.03(3) "full particulars" of the malice he alleges.[61]

[141] I conclude that **the "malice" alleged is not sufficiently pleaded as against Ms. Rees, Mr. Larkin and the Society**.[62]

[142] In light of the deficiencies in the pleadings, **the alleged malicious prosecution cause of action is not tenable as against Ms. Rees, Mr. Larkin and the Society.**

iii) Defamation

[143] Justice McDougall outlined the law in relation to defamation in *Robertson v. McCormick*, 2012 NSSC 4:[63]

> 14 Defamation may take the form of libel (where the communication is in a written or otherwise permanent form) or slander (where the statement takes an oral or otherwise transitory form). The requirements for a defamation claim were set out in *Grant v. Torstar Corp.*, 2009 SCC 61 (S.C.C.), where McLachlin, C.J.C. said, for the majority, at paras. 28-29:

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[61] While some of these references are from the original statement of claim, I have reviewed the proposed amended statement of claim, (both of which alleged malicious prosecution) and the Answers to Demands for particulars, and whilst more expansive, the core concerns that I have in relation to the need for full particulars being provided, are not reduced by the wording of the pleadings in the proposed amended statement of claim.

[62] In doing so I bear in mind the obligation under *CPR* 38.03(3) to provide "full particulars" and the reasons in *Miazga v. Kvello Estate*, 2009 SCC 51.

[63] See also the *Defamation Act*, RSNS 1989, c. 122, as amended, s. 4 – "Pleadings".

> [28] **A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed,** though this rule has been subject to strong criticism.... (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se*: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.
>
> [29] If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

15 The categories of slander that are actionable *per se* include "oral imputations calculated to disparage the plaintiff in the way of his or her work, business, office, trade, calling or profession": *Waterbury Newton v. Saunders*, 2007 NSSC 230 (N.S. S.C.) at para. 18, citing *Bell v. Intertan Canada Ltd.*, 2002 SKQB 446 (Sask. Q.B.), at para. 22.

16 The *Judicature Act*, R.S.N.S. 1989, c. 240, requires that proceedings for libel and slander be tried by a jury unless the parties agree otherwise (s. 34(a)(i)), but the determination of whether words are capable of bearing a defamatory meaning so as to be put to the jury is a question of law for the trial judge: Raymond E. Brown, *The Law of Defamation in Canada*, 2d ed, vol. 1 (Toronto: Carswell looseleaf) at §5.12(1). **The defendant submits that if the alleged communications are not capable of bearing a defamatory meaning the claim must be dismissed**.

17 **The rules of pleading have been said to be particularly strict when applied to defamation claims**. **The allegedly defamatory words constitute material facts and generally should be set out verbatim:** Roger D. McConchie and David A. Potts, *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 535. Brown writes, in *The Law of Defamation in Canada*, vol. 5, at §19.1:

> Because of the technical nature of the tort, pleadings are of critical importance in an action for defamation. They must adequately define the nature of the action or defences and the issues being tried. **The defamatory words must be set out with reasonable certainty, clarity and precision and if the words are innocent on their face, or have some special meaning, the facts or circumstances which give them a defamatory sting must be pleaded and proved**. The plaintiff must also plead and prove that the words were published of and concerning the plaintiff and were communicated to persons other than the plaintiff, identifying the time when, the place where and the persons to whom they were published. Where the action is one

> for slander not actionable per se or where special damages are otherwise sought to be recovered, the plaintiff must allege and prove such damages in order to succeed.

18 **In *C. (D.) v. Children's Aid Society of Cape Breton Victoria*, 2008 NSSC 196 (N.S. S.C.), Coughlan, J. struck a claim in defamation under the former Rule 14.25** commenting that "a plaintiff must set out fully and precisely the defamatory words the defendant is alleged to have published and specify how, when, where and to whom they were published. **In this proceeding, the statement of claim does not specify any defamatory statements, whether the statements were written or oral, or anything about to whom, when or where any defamatory statement was made**." (para. 15) **There is, however, authority to the effect that where the plaintiff does not know the exact words of an alleged slander, there is some flexibility.** In *Wallace v. Lawrence*, 2002 NSCA 36 (N.S. C.A.), Cromwell, J.A. (as he then was) said that "in cases of slander in which the plaintiff is not aware of the specific words or precise occasions on which the allegedly defamatory words were published, the usual requirements of very precise pleading of the claim may be somewhat relaxed." (para. 6) **The plaintiff says he has pleaded the necessary words, as far as they are within his knowledge, sufficiently for the defendant to know the case she has to meet.**

19 Where the plaintiff is not able to particularize the defamatory words directly, and relies on third-party documents, the plaintiff must establish that there has, in fact, been defamation. In *Abrams v. Johnson*, 2009 ABQB 575 (Alta. Master), where a teacher alleged defamation against a principal, a teacher and two school administrators in connection with allegations of improper conduct, Master Hanebury said:

> [48] The Amended Statement of Claim refers to members of the CBE [Calgary Board of Education] and the public. The Reply to Demand for Particulars names "CBE; Doe and to other unnamed parties as may apply; principals and staff members of the CBE; the Alberta Teachers' Association; parent councils; and others as will be presented as become available." The Supplemental Demand for Particulars refers to "Doe", being parties of whom he is not aware. It names certain members of the CBE who apparently are colleagues, other colleagues who he cannot name, the Social Studies 33 students who are not named, unnamed parents and the unnamed parents' councils. Mr. Abrams argues that he is trying to ascertain the names of these people and has been stymied in his attempts to get information through the defendants and under the provincial freedom of information legislation.
>
> [49] **For policy reasons the courts have taken a different approach to defamation actions and have required such actions to be properly particularized. They have refused to allow defamation actions to proceed when they are "fishing" expeditions.** In this case the memo and notes were prepared by CBE employees for the purposes of reporting to their supervisors. Mr. Abrams has taken the information found in those documents and alleged that the words or similar words were repeated to a number of named parties who are apparently colleagues, administration, supervisors and investigators and various unnamed colleagues,

> students, parents and the student council. The time frame described covers a period of a year and a half.

[50] This third component of Mr. Abrams' claim against the named defendants lacks the particularity needed to proceed. **In the absence of that particularity Mr. Abrams must at least establish a *prima facie* case that the alleged defamation has occurred**. The passing reference in the Neilsen note to "parental ... negative reaction" is insufficient to do so. The case law holds that in such an instance the claim is an abuse of the process of this court.

> 20 Where a plaintiff claims that words which are not defamatory on their face nevertheless give rise to a defamatory meaning, the plaintiff is said to be relying on "true" or "false" innuendo.

[My bolding added]

[144] Mr. Howe is only alleging defamation against the Society and has particularized the defamatory statements as Mr. Larkin's alleged intentional misleading statements to the Committee on September 1, 2016.[64]

[145] He is alleging that Mr. Larkin incorrectly stated that, on one occasion only, Mr. Howe missed a court appearance with an individual DE – who Mr. Howe did not have had an obligation to represent, nor was there a reasonable expectation by DE that Mr. Howe would represent him at that court appearance. Neither on its face, nor could any reasonable inference lead one to conclude that the constituent material facts necessary for defamation have been pleaded here.[65]

[146] In *Sapra v. Cato*, 2020 NSSC 30, Justice Denise Boudreau discussed defamation as follows:

> [16] Having said that, this is an action in defamation. It is clear that <u>such an action has specific and particular requirements. A pleading in respect of a defamation claim needs to be carefully and specifically particularized</u>.

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[64] See his affidavit of October 15, 2021, paragraph 12, referencing his October 5, 2021, brief at paragraph 2: "Upon reviewing the grounds for the motion received on September 24, 2021 the Plaintiff is conceding the grounds for summary judgment on the claims of … and defamation against the defendant Raymond Larkin". See also his February 18, 2021, Answer to Demand for particulars at p. 3: "…the Plaintiff is not proceeding with the claim of defamation against Victoria Rees". **Therefore, what remains is only the defamation claim against the Society**.

[65] See Mr. Howe's Answer to Demand for particulars by Ms. Rees and Mr. Larkin, February 18, 2021, at page 9, and Answer to Demand for particulars by the Society, March 3, 2021, at pages 5-6.

> The purpose of the statement of claim and the particulars that form a part of it is to define the issues of the claim, inform the court what the case is all about, and alert the defendant to the case against him or her, thereby precluding any surprise. Therefore, the plaintiff must at a minimum, plead a *prima facie* case and set out with some particularity all those material facts necessary to support a cause of action for defamation. This includes the defamatory words, their publication, the fact that they were spoken "of and concerning the plaintiff", and any additional material facts necessary to support an action, including damages, where appropriate. The time, place, content, publisher and recipient of the publication should be included in the pleading…There must be clarity in the pleadings; they must be sufficiently particularized to enable the defendant to plead to them. The "claim must be pled with a heightened level of precision and particularity". (*Brown on Defamation*, Vol 6, 19.3(1))
>
> …
>
> Ordinarily it is not sufficient to give the tenor, substance or purport of the libel or slander, or an approximation of the words, or words to a certain "effect", or any other words of a similar import. Merely to refer to "demeaning and slanderous remarks" or to plead that the plaintiff was defamed is not sufficient…
>
> The exact words had to be set out with reasonable certainty, clarity, particularity and precision…(*Brown*, supra, Vol 6, 19.3(2)(a))

[17] Professor Brown's text makes it clear that a claim in defamation requires that the exact words complained of must be pled:

> The general rule is that the defamatory words about which the plaintiff complains must be set out fully and precisely in the statement of claim. The particular words that are claimed to be defamatory must be included in the claim. The impugned words must be pleaded. They should be set forth verbatim, or at least with sufficient particularity to enable the defendant to plead to the allegation…
>
> [My underling added]

[147] The essential elements of defamation are:[66]

a) the impugned words must be defamatory[67]

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[66] See pp. 746-750 of *Canadian Tort Law,* 11th edn (Toronto: Lexis-Nexis, 2018), where the authors rely on the reasons in *Grant v. Torstar Corp.* [2009] 3 SCR 640 (SCC)

[67] From *Canadian Tort Law*: "At common law there are two separate actions in relation what we call defamation: libel and slander. The former tends to relate to communications and permanent form, such as the written word and pictures. Slander tends to relate to communications whose form is not permanent, such as the spoken (and unrecorded) word. Because of the permanence of libel, and therefore the greater potential reputational harm, it is actionable *per se* whereas his slander is only actionable *per se* in limited circumstances. Otherwise, it requires proof

b) they must refer to the plaintiff; and

c) they must be published.

[148] The authors of *Canadian Tort Law*, at p. 747:

> Falsity of the words and damages are presumed where these elements are established on a balance of probabilities. The elements are often straightforwardly made out and cases then turn on defences. The most common defences are justification (truth), qualified and absolute privilege, responsible communication on matters of public interest and fair comment.

[149] In his original statement of claim, Mr. Howe alleged no more than the following generalized statements:

> The first defendant is the Nova Scotia Barristers Society… [which] is vicariously liable for the actions of Victoria Rees and Raymond Larkin… The second defendant is Victoria Rees. The Plaintiff claims negligence, defamation in both slander and libel… The third defendant is Raymond Larkin. The Plaintiff claims negligence, defamation in both slander and libel… The Plaintiff pleads that defendants the Nova Scotia Barristers Society, Victoria Rees and Raymond Larkin were negligent in their investigation of the plaintiff, malicious in their prosecution of the plaintiff and through the course of their investigation and prosecution, defamed the plaintiff in both slander and libel…
>
> [My underlining added]

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of injury. These circumstances are where the words impute: a) the commission of a crime; b) that the plaintiff has the loathsome disease; c) unchastity to a woman; and d) unfitness to practice one's trade or profession. These circumstances were singled out because they were thought to be 'either so obviously damaging to the financial position of the victim that pecuniary loss is almost certain, or so intrinsically outrageous that they ought to be actionable even if no pecuniary loss results. From a modern perspective, these categories are impossible to justify. Nevertheless, they persist.… Most Canadian jurisdictions have abolished the distinction between libel and slander by statute, such that both are actionable *per se*, and an Alberta Court noted that the distinction serves no useful purpose. However, the two provinces in which the most defamation litigation occurs (Ontario and British Columbia) retained the distinction, as does Saskatchewan… Defamatory meaning has been explained in a range of ways… is that which 'tends to lower a person in the estimation of right-thinking members of society generally'… what 'ordinary decent folk in the community, taken in general', would feel… There are few limits to what can be considered defamatory… The language of 'right-thinking members of society generally'… Note the reference to a *respectable* minority". The authors also cite Justice Abella's reasons in *Colour Your World Corp. v. Canadian Broadcasting Corporation*, [1998] O.J. No. 510 (CA) at paragraph 14 - 15, leave to appeal dismissed [1998] SCCA No. 170, where she stated: "A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society…" [My underlining added]

[150] In his proposed amended statement of claim Mr. Howe does not specify the particular words he alleges were defamatory (either slanderous or libelous) and that were published or broadcast. While I infer that he argues the findings of misconduct against him, leading to his suspension and disbarment, and the reasons therefor, which were published, are collectively defamatory - this omission would be fatal, in spite of his Answer to Demand for particulars given to Ms. Rees and Mr. Larkin at paragraph 8.

[151] Since Mr. Howe no longer claims defamation against Mr. Larkin or Ms. Rees, presumably by his leaving that cause of action in his proposed amended statement of claim, he claims only against the Society.[68]

[152] That pleading is not tenable.[69]

iv) Civil Conspiracy

[153] The essential elements of this tort were referenced by Justice Rothstein for the Court in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57:

> *(b) Tort*
>
> 72 Pro-Sys alleges that Microsoft combined with various parties to commit the economic torts of conspiracy (both predominant purpose conspiracy and unlawful means conspiracy) and unlawful interference with economic interests. **A conspiracy arises when two or more parties agree "to do an unlawful act, or to do a lawful act by unlawful means"** (*Mulcahy v. R.* (1868), L.R. 3 H.L. 306 (U.K. H.L.), at p. 317). Despite the fact that the tort of conspiracy traces its origins "to the Middle Ages, [it] is not now a well-settled tort in terms of its current utility or the scope of the remedy it affords" (*Golden Capital Securities Ltd. v. Holmes*, 2004 BCCA 565, 205 B.C.A.C. 54 (B.C. C.A.), at para. 42).
>
> 73 Nonetheless, in Canada, **two types of actionable conspiracy remain available under tort law: predominant purpose conspiracy and unlawful means conspiracy.** I first address the arguments related to predominant purpose conspiracy. I then turn to unlawful means conspiracy and unlawful interference with economic interests and deal with them together, as the arguments against these causes of action relate to the "unlawful means" requirement common to both torts.

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[68] For a discussion of the *Limitation of Actions Act* period interaction with the special limitation period in the *Defamation Act*, see Justice Beveridge's reasons in *Yarmouth (District) v. Nickerson*, 2017 NSCA 21.

[69] See also Mr. Howe's Answer to Demand for particulars, February 18, 2021 (Rees/Larkin) at para. 2 and March 3, 2021 (NSBS) at para. 3.

(i) Predominant Purpose Conspiracy

74 **Predominant purpose conspiracy is made out where the predominant purpose of the defendant's conduct is to cause injury to the plaintiff using either lawful or unlawful means, and the plaintiff does in fact suffer loss caused by the defendant's conduct. Where lawful means are used, if their object is to injure the plaintiff, the lawful acts become unlawful** (*Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), at pp. 471-72).

75 It is worth noting that **in *Cement LaFarge*, Estey J. wrote that predominant purpose conspiracy is a "commercial anachronism" and that the approach to this tort should be to restrict its application:**

> The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *Lonrho*, *supra*, at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise. [p. 473]

Notwithstanding these observations, whether predominant purpose conspiracy should be restricted so as not to apply to the facts of this case is not a matter that should be determined on an application to strike pleadings.

76 At para. 91 of its Third Further Amended Statement of Claim, in a section discussing both predominant purpose and unlawful means conspiracy, **Pro-Sys states that "[t]he defendants were motivated to conspire" and then lists the defendants' three "predominant purposes and predominant concerns": (1) to harm the plaintiffs by requiring them to purchase Microsoft products rather than competitors' products; (2) to harm the plaintiffs by requiring them to pay artificially high prices; and (3) to unlawfully increase their profits** (A.R., vol. II, at p. 43).

77 **Microsoft argues that the tort of predominant purpose conspiracy is not made out because Pro-Sys's statement of claim fails to identify one true predominant purpose and instead lists several "overlapping purpose**[s]" (R.F., at para. 93). Microsoft submits that by pleading that it was "motivated solely by economic considerations" (R.F., at para. 94), **Pro-Sys in effect concedes that the predominant purpose of Microsoft's alleged conduct could not have been to cause injury to the plaintiff as required under the law.**

78 **There is disagreement between the parties as to what the pleadings mean.** Microsoft says that Pro-Sys failed to identify injury to the plaintiffs as the one true

predominant purpose. Pro-Sys argues that its pleadings state that Microsoft acted with the predominant purpose of injuring the class members which resulted in, among other things, increased profits. **While the pleadings could have been drafted with a more precise focus, I would hesitate on a pleadings application to rule definitively that the predominant purpose conspiracy pleading is so flawed that no cause of action is disclosed**. At this stage, **I cannot rule out Pro-Sys's explanation that Microsoft's primary intent was to injure the plaintiffs and that unlawfully increasing its profits was a result of that intention. For this reason, I cannot say it is plain and obvious that Pro-Sys's claim in predominant purpose conspiracy cannot succeed.**

79 **Microsoft also argues that this claim should be struck to the extent it applies as between corporate affiliates because "[p]arent and wholly-owned subsidiary corporations always act in combination"** (R.F., at para. 95). Pro-Sys says that "[t]his is not true as a matter of law" (appellants response factum, at para. 55). Both parties cite, among other cases, para. 19 of *Smith v. National Money Mart Co.* (2006), 80 O.R. (3d) 81 (Ont. C.A.), leave to appeal refused, [2006] 1 S.C.R. xii (note) (S.C.C.), which says that "there can be a conspiracy between a parent and a subsidiary corporation". In my view, this statement appears to leave open a cause of action in predominant purpose conspiracy even when the conspiracy is between affiliated corporations. **Again, it would not be appropriate on a pleadings application to make a definitive ruling on this issue. In the circumstances, I cannot say it is plain and obvious that the predominant purpose conspiracy claim as it applies to an alleged conspiracy between a parent corporation and its subsidiaries should be struck at this phase of the proceedings.**

(ii) Unlawful Means Conspiracy and Intentional Interference With Economic Interests

80 **The second type of conspiracy, called "unlawful means conspiracy", requires no predominant purpose but requires that the unlawful conduct in question be directed toward the plaintiff, that the defendant should know that injury to the plaintiff is likely to result, and that the injury to the plaintiff does in fact occur** (*Cement LaFarge*, at pp. 471-72).

81 **The tort of intentional interference with economic interests** aims to provide a remedy to victims of intentional commercial wrongdoing (*Correia v. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353 (Ont. C.A.), at para. 98; *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1 (U.K. H.L.)). **The three essential elements of this tort are (1) the defendant intended to injure the plaintiff's economic interests; (2) the interference was by illegal or unlawful means; and (3) the plaintiff suffered economic loss or harm as a result** (see P. H. Osborne, *The Law of Torts* (4th ed. 2011), at p. 336).

82 Microsoft argues that the claims for unlawful means conspiracy and intentional interference with economic interests should be struck because their common element requiring the use of "unlawful means" cannot be established.

> 83 **These alleged causes of action must be dealt with summarily as the proper approach to the unlawful means requirement common to both torts is presently under reserve in this Court in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd*.**, 2012 NBCA 33, 387 N.B.R. (2d) 215 (N.B. C.A.), leave to appeal granted, [2012] 3 S.C.R. v (note) (S.C.C.). Suffice it to say that **at this point it is not plain and obvious that there is no cause of action in unlawful means conspiracy or in intentional interference with economic interests.** I would therefore not strike these claims. Depending on the decision of this Court in *Bram*, it will be open to Microsoft to raise the matter in the BCSC should it consider it advisable to do so.

[154] As recently summarized by Justice Warner in *Trimar Promotional Products Ltd. v. Milner*, 2021 NSSC 98, the essential elements of these torts are:

> 188 The seminal decision on the tort of conspiracy in Canada is **Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 SCR 452 (BCCA) ("Canada Cement")**. An excellent outline of unlawful conduct conspiracy, and the danger of defining "unlawful conduct" too broadly, is found in *Agribrands Purina Canada Inc. v. Kasamekas et al* 2011 ONCA 460 ("*Agribrands Purina*"), beginning at paragraph 24.
>
> 189 The law is thoroughly canvassed by *Lewis N. Klar* in *Remedies in Tort*, Chapter 3 — Conspiracy (Thomson Reuters Proview, 2021). The following excerpts from Klar summarize the relevant law:
>
> > §1 **A conspiracy is an agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. In Canada, the tort of conspiracy is committed if: i) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or ii) where the conduct of the defendant is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.** In situation ii) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff. ...
> >
> > §4 There is authority to the effect that an action for conspiracy cannot be maintained in respect of a combination to commit an act which is itself actionable in tort, on the basis that the agreement merges in the tort. ... The theory behind merger is that once the planned tort is actually committed, the harm flows from the tort and the pleading of conspiracy is therefore redundant. ... the Supreme Court of Canada decision in *Hunt v. T & N plc*, concluded that the doctrine of merger should not be applied at the pleading stage. The court held that the law supports applying the doctrine of merger only at the end of the trial when it is known if the plaintiff has been fully

> successful on the nominate torts and whether anything is added by the conspiracy claim. ...
>
> §14 ... The plaintiff must show an agreement on the part of the defendants to pursue the course of action which has resulted in damages to the plaintiff. ... **The requisite agreement is not an agreement in the contractual sense, but rather a joint plan or common intention to do the action which is the object of the alleged conspiracy.**
>
> §15 It is necessary that the facts of the alleged agreement be known and that the defendant intend to be a party to the combination. Mere knowledge or approval of or acquiescence in the act is not sufficient to establish the existence of a common plan or design. The defendants must have intentionally participated in the act with a view of furtherance of the common design and purpose.
>
> §16 The agreement may be proved by direct evidence or may be inferred from the facts where the facts cannot fairly admit of any other inference being drawn. ...
>
> §18 ... what is required to meet the "unlawful conduct" element of conspiracy is that the defendants engage, in concert, in acts that are wrong in law, whether actionable at private law or not. ...
>
> [My bolding added][70]

[155] In *Normart Management Limited v. West Hill Redevelopment Company Limited*, [1998] O.J. No. 391, Justice Finlayson for the court stated:[71]

> In *H.A. Imports of Canada Ltd. v. General Mills Inc.* (1983), 1983 CanLII 1722 (ON SC), 42 O.R. (2d) 645, 150 D.L.R. (3d) 574 (H.C.J.), O'Brien J., dealing with the civil action of conspiracy as pleaded, quoted from *Bullen, Leake and Jacob's Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975), as follows at pp. 646-47:
>
> > **The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each**

[70] Justice Denise Boudreau also recently had occasion to consider these torts in *Geophysical Services Inc. v. Canada (Attorney General)*, 2021 NSSC 77. Her decision however was rendered in relation to a motion for summary judgment *on evidence,* as refined by the reasons of Justice Beveridge: 2022 NSCA 41.

[71] Cited with approval by Saunders JA in *R. Baker Fisheries Ltd. v. Atlantic Clam Harvesters Ltd.*, 2002 NSCA 82, paragraph 17.

> **of the alleged conspirators in pursuance and in furtherance of the conspiracy**; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.
>
> The above is still good law. …
>
> [My bolding added]

[156] Regarding **predominant purpose conspiracy**, I conclude that the pleadings are untenable because they:

1. **do not allege** that Ms. Rees and Mr. Larkin or others agreed to do an unlawful act or to do a lawful act by unlawful means (on the pleadings Mr. Larkin's involvement was only on September 1, 2016 – moreover there is no pleading that Ms. Rees and Mr. Larkin agreed to do anything specifically, much less unlawful, to Mr. Howe).[72]

2. **do not allege** that the predominant purpose of Ms. Rees' and Mr. Larkin's conduct was to cause injury to Mr. Howe (the pleadings suggest that Complaints Investigation Committee on its own initiative held an interim *ex parte* suspension hearing in relation to Mr. Howe, and that *they* concluded he should be suspended; the Committee is not alleged to be part of an agreement, yet it made the decision that Mr. Howe complains of - not Ms. Rees or Mr. Larkin).

[157] Therefore, the alleged "civil conspiracy" cause of action is not tenable against any of the defendants.[73]

v) Public malfeasance/malfeasance in Public Office[74]

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[72] Although in a summary judgment *on evidence* motion, the court's adoption of Canada's position at paragraph 121 in *Geophysical Services Incorporated*, 2022 NSCA 41, has similarities with the pleaded facts I must presume here.

[73] At paragraph 26 of the proposed amended statement of claim Mr. Howe alleged: "The defendants agreed to use lawful means to cause the Plaintiff harm and further or in the alternative, the defendants agreed to use unlawful means to cause the Plaintiff harm particulars of which include any or all of the following…" Immediately thereafter Mr. Howe uses language purporting to buttress his claim, but his pleading does not do so: "…using the Nova Scotia Barristers Society complaint process investigation and disciplinary process to force the suspension and disbarment of the Plaintiff… for inappropriate or ulterior means… to create racialized stigma against the Plaintiff" – in light of the requirement for "full particulars" per *CPR* 38.03(3).

[74] While in Mr. Howe's proposed pleadings he uses the term "public malfeasance", and in the jurisprudence the term "misfeasance" is generally used (though not in *Weinstein v. HMQ*, 2020 ONSC 485), I will use "malfeasance" herein.

[158] Regarding the "public malfeasance" cause of action, the essential elements thereof were described by the court in *Odhavji Estate v. Woodhouse*, 2003 SCC 69:[75]

> 22 What, then, are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? **In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class or persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. This understanding of the tort has been endorsed by a number of Canadian courts**: see, for example, Powder Mountain Resorts Ltd., supra, *Alberta (Minister of Public Works, Supply & Services)* (C.A.), *supra*, and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (Ont. S.C.J.). **It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.**
>
> 23 **In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort,** owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.
>
> 24 Insofar as the nature of the misconduct is concerned, **the essential question to be determined is not whether the officer has unlawfully exercised a power actually possessed, but whether the alleged misconduct is deliberate and unlawful**. As Lord Hobhouse wrote in *Three Rivers*, *supra*, at p. 1269:

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[75] Justice Denise Boudreau referenced this tort in *Geophysical Services Inc. v. Canada (Atty. Gen.)*, 2021 NSSC 77 – but in 2022 NSCA 41, at paragraph 100, Justice Beveridge for the Court held that she "erred in law when she found there were material questions of fact that she was not permitted to resolve on a summary judgment [on evidence] motion".

> **The relevant act (or omission, in the sense described) must be unlawful**. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose.

Lord Millett reached a similar conclusion, namely, that a failure to act can amount to misfeasance in a public office, but only in those circumstances in which the public officer is under a legal obligation to act. Lord Hobhouse stated the principle in the following terms, at p. 1269: "If there is a legal duty to act and the decision not to act amounts to an unlawful breach of that legal duty, the omission can amount to misfeasance [in a public office]." See also *R. v. Dytham*, [1979] Q.B. 722(Eng. C.A.). So, in the United Kingdom, a failure to act can constitute misfeasance in a public office, but only if the failure to act constitutes a deliberate breach of official duty.

25 Canadian courts also have made a deliberate unlawful act a focal point of the inquiry. In *Alberta (Minister of Public Works, Supply & Services) v. Nilsson* 70 Alta. L.R. (3d) 267 1999 ABQB 440 (Alta. Q.B.), at para. 108, the Court of Queen's Bench stated that the essential question to be determined is whether there has been deliberate misconduct on the part of a public official. **Deliberate misconduct, on this view, consists of (i) an intentional illegal act and (ii) an intent to harm an individual or class of individuals**. See also *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)*, 156 Man. R. (2d) 14, 2001 MBCA 40 (Man. C.A.), in which Kroft J.A. adopted the same test. In *Powder Mountain Resorts Ltd.*, *supra*, Newbury J.A. described the tort in similar terms, at para. 7:

> . . . **it may, I think, now be accepted that the tort of abuse of public office will be made out in Canada where a public official is shown either to have exercised power for the specific purpose of injuring the plaintiff (i.e., to have acted in "bad faith in the sense of the exercise of public power for an improper or ulterior motive") or to have acted "unlawfully with a mind of reckless indifference to the illegality of his act" and to the probability of injury to the plaintiff.** (See Lord Steyn in *Three Rivers*, at [1231]. ***Thus there remains what in theory at least is a clear line between this tort on the one hand, and what on the other hand may be called negligent excess of power - i.e., an act committed without knowledge of (or subjective recklessness as to) its unlawfulness and the probable consequences for the plaintiff.***

Under this view, the ambit of the tort is limited not by the requirement that the defendant must have been engaged in a particular type of unlawful conduct, but by the requirement that the unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff.

26 As is often the case, there are a number of phrases that might be used to describe the essence of the tort. In *Garrett*, *supra*, Blanchard J. stated, at p. 350, that "[t]he purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty." In *Three Rivers*, *supra*, Lord Steyn stated, at p. 1230, that "[t]he rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public

good' and not for ulterior and improper purposes." **As each passage makes clear, *misfeasance in a public office is not directed at a public officer who inadvertently or negligently fails adequately to discharge the obligations of his or her office*:** see *Three Rivers*, at p. 1273, *per* Lord Millett. **Nor is the tort directed at a public officer who fails adequately to discharge the obligations of the office as a consequence of budgetary constraints or other factors beyond his or her control.** A public officer who cannot adequately discharge his or her duties because of budgetary constraints has not deliberately disregarded his or her official duties. **The tort is not directed at a public officer who is *unable* to discharge his or her obligations because of factors beyond his or her control but, rather, at a public officer who *could* have discharged his or her public obligations, yet wilfully chose to do otherwise.**

27 Another factor that may remove an official's conduct from the scope of the tort of misfeasance in a public office is a conflict with the officer's statutory obligations and his or her constitutionally protected rights, such as the right against self-incrimination. Should such circumstances arise, a public officer's decision not to comply with his or her statutory obligation may not amount to misfeasance in a public office. I need not decide that question here except that it could be argued. A public officer who properly insists on asserting his or her constitutional rights cannot accurately be said to have deliberately disregarded the legal obligations of his or her office. Under this argument, an obligation inconsistent with the officer's constitutional rights is not itself lawful.

28 As a matter of policy, I do not believe that it is necessary to place any further restrictions on the ambit of the tort. **The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that *misfeasance in a public office requires an element of "bad faith" or "dishonesty*." In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens.** Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order **for the conduct to fall within the scope of the tort, *the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office*.**

29 The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. ***Liability does not attach to each officer who blatantly disregards his or her official duty, but only*** to a public officer ***who, in addition, demonstrates a conscious disregard for the interests of those who will be affected*** by the misconduct in question. This requirement establishes the required nexus between the parties**. Unlawful conduct in the exercise of public functions is a public wrong, but, absent some awareness of harm, there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, *as an individual*. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort.**

30 In sum, I believe that **the underlying purpose of the tort is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions**. Once these requirements have been satisfied, it is unclear why the tort would be restricted to a public officer who engaged in the unlawful exercise of a statutory power that she or he actually possesses. If the tort were restricted in this manner, the tort would not extend to a public officer, such as Mr. Duplessis, who intentionally *exceeded* his powers for the express purpose of interfering with a citizen's economic interests. Nor would it extend to a public officer who breached a statutory obligation for the same purpose. But there is no principled reason, in my view, why a public officer who wilfully injures a member of the public through intentional *abuse* of a statutory power would be liable, but not a public officer who wilfully injures a member of the public through an intentional *excess* of power or a deliberate failure to discharge a statutory duty. In each instance, the alleged misconduct is equally inconsistent with the obligation of a public officer not to intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions.

31 I wish to stress that this conclusion is not inconsistent with *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205(S.C.C.), in which the Court established that the nominate tort of statutory breach does not exist. *Saskatchewan Wheat Pool* states only that it is *insufficient* that the defendant has breached the statute. It does not, however, establish that the breach of a statute cannot give rise to liability if the constituent elements of tortious responsibility have been satisfied. Put a different way, the mere fact that the alleged misconduct also constitutes a breach of statute is insufficient to exempt the officer from civil liability. Just as a public officer who breaches a statute might be liable for negligence, so too might a public officer who breaches a statute be liable for misfeasance in a public office. *Saskatchewan Wheat Pool* would only be relevant to this motion if the appellants had pleaded no more than a failure to discharge a statutory obligation. This, however, is not the case. The principle established in *Saskatchewan Wheat Pool* has no bearing on the outcome of the motion on this appeal.

32 **To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, *the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries and that the injuries suffered are compensable in tort law.***

[My bolding and italicization added]

[159] As the court aptly concluded in *Conway v. The Law Society of Upper Canada*, 2016 ONCA 72, at paragraph 20:

> The tort of misfeasance in public office has been variously described in the case law as the tort of abuse of public office or abuse of statutory power: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at paragraphs 25 and 30. "Whatever the nomenclature, the essence of the tort is the deliberate and dishonest wrongful abuse of the powers given to a public officer, coupled with the knowledge that the misconduct is likely to injure the plaintiff… **Bad faith or dishonesty is an essential ingredient of the tort …**"
>
> [My bolding added]

[160] The essential elements of the tort of public malfeasance for present purposes are:

1. unlawful conduct in one's capacity as a public officer (the deliberate and dishonest [bad faith] abuse of the powers given to a public officer);
2. coupled with the knowledge that the misconduct is likely to harm the plaintiff's interests; **or**
3. that the public officer's unlawful conduct acting in that capacity was for the express purpose of harming the plaintiff's interests;
4. that the tortious conduct was the legal cause of his injuries.

[161] Taking a view of the pleadings as a whole, one sees that Mr. Howe has pleaded in his original statement of claim at paragraph 27:[76]

> The Plaintiff is *seeking compensation for any loss, injury or damage suffered to the Plaintiff naturally arising from the Defendant's tortious actions*.
>
> [My italicization added]

[162] In his proposed amended statement of claim pleadings at paragraphs 28-29, Mr. Howe claims:

> *It was within their roles that Victoria Rees and Raymond Larkin engaged in deliberate conduct that was not within their lawful roles as public officers* and in particular, *misleading* the Complaints Investigation Committee to have the Plaintiff suspended from practising law, *discriminating* against the Plaintiff, *acting in a conflict of interest* when dealing with the Plaintiff, and other actions not known to the Plaintiff.

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[76] There is no mention of civil conspiracy nor of any illicit connection or agreements between Mr. Larkin and Ms. Rees.

> Victoria Rees and Raymond Larkin were aware that their deliberate conduct was unlawful and that harm to the Plaintiff would flow from their actions.[77]

[163] And at paragraphs 32-33:

> The actions of the Defendants … were committed *knowing in the circumstances that their actions would likely cause injury to the Plaintiff and the Plaintiff suffered injury as a result… has caused pecuniary and nonpecuniary loss* to the Plaintiff.

[164] I note that *CPR* 38.03 (3) mandates that Mr. Howe's pleading "must provide full particulars of" his claim alleging "deliberate conduct that was not within their lawful roles as public officers".[78]

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[77] In the Defendants (Rees and Larkin) December 22, 2021 brief, they state at paragraphs 141-2: "Ms. Rees and Mr. Larkin concede that law societies and their agents can theoretically be subject to a claim of misfeasance in public office by an aggrieved member or former member of the Bar." They cite *Robson v. The Law Society of Upper Canada*, 2018 ONCA 944, …" (where the court stated at paragraphs 23-4: 'the respondents **challenged the appellant's pleadings on the basis that the appellant did not plead, with sufficient particularity, facts from which the 'improper purpose' element of malicious prosecution can be inferred.** We understand the respondents to **similarly argue that**, with respect to the **tort of misfeasance in public office, the facts from which 'the deliberate and dishonest wrongful abuse of the powers given to a public officer' might be inferred** have also not been pleaded with sufficient particularity. In our view, the elements of both torts have been sufficiently pleaded. **The improper purpose is to harass and harm the appellant**. The facts pled, **if true, support the inference of an improper purpose. If true, they may also point to a deliberate and dishonest wrongful abuse of the powers given to a public officer**." [My bolding added]

[78] I have earlier concluded, when discussing the "malicious prosecution" cause of action in relation to Mr. Larkin and Ms. Rees, that there are not sufficient pleadings of "malice". I should nevertheless add that it is important to distinguish between these two causes of action to the extent that their essential elements are different. The former for example, attaches significance to Mr. Larkin's role by requiring him to have been involved in the initiation (or continuation, per *Miazga v. Kvello Estate*, 2009 SCC 51, at paragraph 6) of the charges in question. These differences make my earlier conclusion of insufficient pleading of "malice" not necessarily determinative in relation to the sufficiency of the pleading claiming public malfeasance. Having said this, I appreciate that generally speaking, during an *ex parte* hearing counsel is expected to be particularly candid with the hearing body since the subject of the hearing is not present. On the other hand, Mr. Howe has answered to the Demand for particulars at page 8 that Mr. Larkin was *negligent* in that he did not "ensure that he did not act in a discriminatory and unfair manner with respect to the Plaintiff… misused the legislative objectives of his position and applied double standards to the Plaintiff with respect to ethical standards of the practice of law…" Honest carelessness does not constitute "malice" in such circumstances – *Robson v. Law Society of Upper Canada*, 2016 ONSC 5579, affirmed 2017 ONCA 468. Moreover, the CIC made the decision to suspend Mr. Howe – the pleadings do not assert that Mr. Larkin's misstatement had a material effect on the interim suspension decision of the CIC.

[165] Regarding the cause of action "public malfeasance", I conclude that the pleadings:[79]

1. do not sufficiently allege that Ms. Rees or Mr. Larkin had a direct/material decision-making authority that they could exercise in relation to Mr. Howe's interests (i.e. the power to effect harm to the Plaintiff's interests) and in particular regarding the September 1, 2016, *ex parte* interim suspension hearing;[80]
2. do not sufficiently allege an unlawful purpose, as against Ms. Rees, Mr. Larkin and the Society, (as with the malicious prosecution claim) and therefore do not support a claim of relevant unlawful conduct by Ms. Rees or Mr. Larkin, in a capacity as a public officer;[81]
3. do not sufficiently allege that Ms. Rees or Mr. Larkin abused their "powers" or engaged in "unlawful conduct".[82]

[166] Therefore, the alleged public malfeasance cause of action is not tenable against any of the defendants.

vi) Breaches of section 15 of the *Charter of Rights and Freedoms* based on individual and systemic racial discrimination

[79] Which bears similarities to my conclusions regarding malicious prosecution, and that the pleadings did not satisfy me that the "predominant purpose" of the alleged civil conspiracy had been sufficiently pleaded; given the requirement that "full particulars" of such "unconscionable conduct" be pleaded per *CPR* 38.03(3).

[80] I have serious doubt that Ms. Rees especially, and Mr. Larkin, are "public officers" in this specific context. Moreover, it cannot reasonably be inferred from the pleadings that one or more of the defendants were the legal cause of Mr. Howe's alleged harm (which he has argued is his interim suspension from practice).

[81] As against Mr. Larkin regarding malicious prosecution, a court could not draw an inference of unlawful purpose (bad faith) based on the presumed facts, which are limited to the allegation that he made a mis-statement to the Committee in relation to Mr. Howe's having a retainer for one person (DE) and consequently missing the court appearance of DE, on only one occasion.

[82] The decision to suspend Mr. Howe was pleaded to have been taken by the Complaints Investigation Committee, of which neither Ms. Rees nor Mr. Larkin were members. The pleadings do not allege that Ms. Rees was a witness on September 1, 2016, nor is it pleaded that she was present during the Committee's process that day. Mr. Larkin appeared as counsel for the Society before the Committee; that is the extent of his involvement with Mr. Howe. I also bear in mind that Ms. Rees and Mr. Larkin had a statutory mandate to fulfil, which was focused on protection of the public, and would naturally bring them into conflict with members of the Society; and they were acting in the capacity of representatives of the Society, working with numerous other representatives of the Society, who have not been so impugned by Mr. Howe.

[167] In his original statement of claim, although Mr. Howe made references to "racial bias toward the Plaintiff during the investigations into his practice" and "racial bias that influenced the investigation into his practice and his ongoing prosecution", he did not plead "discrimination" as a cause of action, although he did state at paragraph 47:

> Victoria Rees, the Nova Scotia Barristers Society and Raymond Larkin also perpetuated discrimination and systemic discrimination by proceeding against the Plaintiff in the fashion that they did.

[168] Similarly, his only reference to the *Canadian Charter of Rights and Freedoms* appears at paragraph 48:

> The actions of Victoria Rees, Raymond Larkin and the Nova Scotia Barristers Society violated the *Charter of Rights and Freedoms* including section 15.

[169] In his proposed amended statement of claim, Mr. Howe alleges:

> 28 - It was within their roles that Victoria Rees and Raymond Larkin engaged in deliberate conduct that was not within their lawful roles as public officers and in particular, misleading the Complaints Investigation Committee to have the Plaintiff suspended from practising law, discriminating against the Plaintiff, acting in a conflict of interest when dealing with the Plaintiff and other actions not known to the Plaintiff…
>
> 30 - … The defendants unlawfully conspired and/or agreed to allow for or support the systemic discrimination (including stereotypes and marginalization) of the Plaintiff within the practice of law whilst unjustly investigating and prosecuting the Plaintiff.
>
> …
>
> 31 - In furtherance of the conspiracy, the following acts were done by the defendants and their employees/agents/contractors: …
>
> > applied racialized double standards to the Plaintiff and pursued meritless charges against the Plaintiff… hired Raymond Larkin to conduct an *ex parte* application before the Complaints Investigation Committee to have the Plaintiff suspended from practising law…
>
> …
>
> 41 - Raymond Larkin's investigation was motivated and otherwise influenced by his desire to further the interests of Victoria Rees. Raymond Larkin was influenced by the bias held

and expressed by Victoria Rees and possibly other members of the Nova Scotia Barristers Society…

…

43 - Victoria Rees, the Nova Scotia Barristers Society and Raymond Larkin acted in a racially discriminatory fashion against the Plaintiff by furthering meritless charges, racialized double standards and held the Plaintiff to an unreasonable standard that lawyers in this region are not held to.

44 - Prior to, during and after the Nova Scotia Barristers Society investigated and prosecuted the plaintiff, the Nova Scotia Barristers Society failed to explore whether the [Plaintiff] was perceived and/or treated by themselves or others in a manner that reflected racial stereotypes…

45 - On April 14, 2021, the Nova Scotia Barristers Society released an 'Acknowledgement of Systemic Racism' on their website. In this acknowledgement the Nova Scotia Barristers Society admitted the existence of systemic discrimination within the justice system and the Society. They stated that by systemic discrimination they mean 'a system of disproportionate opportunities or disadvantages for people with a common set of characteristics such as race, gender, disability, sexual orientation, and/or socio-economic status.'

…

47 - Victoria Rees, the Nova Scotia Barristers Society and Raymond Larkin also perpetuated discrimination and systemic discrimination by proceeding against the Plaintiff in the fashion that they did.

48 - The actions of Victoria Rees, Raymond Larkin and the Nova Scotia Barristers Society violated the *Charter of Rights and Freedoms*, including section 15.

[170] Firstly, I note that, in law, there exists no independent "tort of discrimination."

[171] In *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 SCR 181, the court relied on the existence of a comprehensive *Human Rights Code* containing administrative and adjudicative features, including a wide right of appeal to the courts on both fact and law. It must be borne in mind that the *Charter of Rights and Freedoms* has only been in effect since April 17, 1982, and that section 15 thereof has only been operative since April 17, 1985. More recently, the Supreme Court of Canada reiterated the core reasoning in

Bhadauria: *Honda Canada Inc. v. Keays*, 2008 SCC 39, per Bastarache J., at paragraphs 63-64.

[172] I agree with ACJ Smith (as she then was), speaking in relation to a claim of discrimination based on age, when she stated in *Garner v. Bank of Nova Scotia*, 2015 NSSC 122, at para. 26:

> Despite these comments, **jurisprudence has developed which allows allegations of discrimination to be dealt with as a part of a recognized, independent, actionable wrong**. The leading case in Nova Scotia on this issue is *Kaiser v. Dural*, *supra*. In that case, the court was satisfied that where the plaintiff had a common law right of action for breach of contract which gave the court jurisdiction to adjudicate the plaintiff's wrongful dismissal action, the trial judge also had jurisdiction to adjudicate the allegation that discrimination played an integral part in any injury that was suffered (see ¶26).
>
> [My bolding added]

[173] In Nova Scotia, the *Human Rights Act*, RSNS 1989, c. 214, deals with jurisdiction over complaints of "discrimination". It does not have a privative clause. Thus, *depending on the circumstances*, I am inclined to think that our Court and the *Human Rights Act* decision-making framework could have concurrent jurisdiction regarding matters of alleged "discrimination".[83]

[174] I will later canvass the effect on Mr. Howe's claim of the following conclusion of the Court of Appeal (2019 NSCA 81) at paragraphs 110-114:

> **The [Disciplinary] 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 … 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 formulating professional conduct charges against Mr. Howe**. Disappointment or disagreement by Mr. Howe … are not the tests for whether something violates the aspirational value of equality in s. 15 of the Charter. **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. 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. The Panel heard from approximately 40 witnesses. There were 100 exhibits filed and both sides made extensive oral arguments. After considering all of the

[83] This latter observation may seem at odds with Justice Murray's comments in *Kennedy v. Hewlett-Packard (Canada) Co*., 2011 NSSC 502, which ACJ Smith did address in *Garner v. Bank of Nova Scotia*, 2015 NSSC 122. I do not need to come to a definitive conclusion regarding this for present purposes.

> evidence, **the Panel concluded that the Society's investigation was not racially motivated. I cannot identify any error in its conclusion**.]
>
> [My bolding added]

[175] Secondly, in law there exists no independent tort of "breach of legislation."

[176] I agree with Justice J. Mills's statement in *Khan v. Law Society of Ontario*, 2021 ONSC 6019, that:

> 17 The plaintiff claims the LSO Defendants have failed to comply with legislation, policies and procedures, specifically the *Ontario Human Rights Code*, the *Ontarians with Disabilities Act, 2001*, the *Accessibility for Ontarians with Disabilities Act*, and the *Freedom of Information and Protection of Privacy Act ("FIPPA").* He has also claimed the LSO Defendants have violated the provisions of the *Law Society Act,* the *Rules of Professional Conduct*, and the LSO Mental Health Strategy paper. As **there is no nominate tort of statutory breach, the breach of a statutory obligation can only give rise to a right of recovery through civil action if it is expressly provided for in the statute** (Hodge v. Neinstein, 2017 ONCA 494, at para. 59). None of these statutes or policies provide for a right of recovery through civil action.
>
> [My bolding added][84]

[177] While a "tort of breach of the protections afforded by the *Canadian Charter of Rights and Freedoms*" has been found to exist in some civil cases,[85]

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[84] See also *Khanna v. Royal College of Dental Surgeons of Ontario*, [1999] O.J. No. 2311 (SC), where Justice Cumming noted that the civil consequences of a breach of statute are subsumed in the law of negligence, or other independent causes of action. I say this in spite of a majority of the Court of Appeal overturning Justice Cumming's decision on other grounds: [2000] OJ. No 946 - leave denied September 14, 2000: "1 This is an appeal by the plaintiff from the order of the Honourable Mr. Justice Cumming striking out the statement of claim as against the respondent Alan Bromstein pursuant to rule 21.01(1)(b) of the *Rules of Civil Procedure*. 2 The court is divided. Abella J.A., dissenting, would dismiss the appeal for the reasons given by the motions judge which she adopts. The majority would allow the appeal and dismiss the motion before Cumming J. for the reasons that follow. 3 The case against the defendant Bromstein is framed in malicious prosecution. The case is novel in that it is brought against a solicitor who did not institute the disciplinary proceedings against the plaintiff but took over the prosecution and conducted it thereafter on behalf of the Royal College of Dental Surgeons until its unsuccessful termination. However, novelty is not a bar to an action at the pleading stage. In the majority's view, the pleadings, if they can be proven, could constitute a case of malicious prosecution. 4 Another claim asserted is that all the defendants, including Bromstein, conspired together to injure the plaintiff by unlawful means. Particulars are provided. This pleading should be allowed to stand."

[85] For example, in cases where the police have violated a person's *Charter* rights and the remedy follows from section 24(1) of the *Charter*: *Bevis v. Burns*, 2006 NSCA 56 (an illegal arrest); *Vancouver (City) v. Ward*, 2010 SCC 27 (an illegal strip search); and in relation to disciplinary matters brought by professional associations against their members - See for example*: Khan v. Law Society of Ontario*, 2021 ONSC 6019, where Justice Mills stated: "[20]…

generally, the Charter does *not* apply to disputes between "private" litigants, because subsection 32(1) restricts its application:

> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[178] This requires me to consider whether section 15 of the *Charter* applies to the investigative and disciplinary processes of the Nova Scotia Barristers' Society, and if so, whether its application creates an independent cause of action available to Mr. Howe? That determination will turn on whether Mr. Howe's civil suit impugning the workings of the Nova Scotia Barristers' Society, being the product of legislation,[86] is simply a dispute between private litigants, and therefore his section 15 *Charter of Rights* cause of action cannot exist in law: see *Re Klein and LSUC*, [1985] O.J. No.2321; *Dolphin Delivery Ltd. v. RWDSU, Local 580* [1990] 3 SCR 451; *McKinney v. University of Guelph*, [1990] 3 SCR 229; *Blencowe v. British Columbia (Human Rights Commission)*, 2000 SCC 44.

[179] As I set out in my summary earlier, I will presume that the workings of the Nova Scotia Barristers' Society at issue here are included in a proper interpretation of section 32 of the *Charter*, and thus are subject to section 15.

[180] If the *Charter* applies, the Society's decision-makers then must exercise their discretion regarding *operational decision-making powers* in accordance

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The plaintiff alleges violations of sections 8 and 24 of the *Charter* against all defendants… The plaintiff simply alleges a claim for damages at large pursuant to s. 24(1) and (2) of the *Charter* for the infringement of his rights… In his materials for this motion and in his oral submissions, the plaintiff alleges he was discriminated against by the [Law Society of Ontario] defendants, thereby violating his *Charter* rights… **To obtain constitutional or public law damages for breach of the Charter, one must prove: i) there has been a breach of the Charter; ii) damages are a just and appropriate remedy that would compensate, vindicate or deter future breaches, and iii) that there are no countervailing factors(such as alternate available remedies) to defeat the considerations supporting an award of damages** - (*Vancouver (City) v. Ward*, 2010 SCC 27)." [My bolding and underlining added] As to the implications of the *Ward* decision see Kent Roach's article: "A Promising Late Spring for Charter Damages: *Ward v. Vancouver"*, (2011) 29 National Journal of Constitutional Law 135.

[86] In *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, the court determined that section 15 of the Charter applies to the *provincial legislation* regulating the legal profession in British Columbia.

with its provisions – *Doré v. Barreau du Québec*, 2012 SCC 12, and *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12.[87]

[181] Breaches thereof may result in a "court of competent jurisdiction" issuing orders in response that it "considers appropriate and just in the circumstances" *per* section 24(1). This Court is a court of competent jurisdiction. As to the potential remedies the court can grant, see *Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 SCR 62.

[182] A summary of the elements of this claim can be found in *Khan v. LSUC*, 2021 ONSC 6019:

> 22 To obtain constitutional or public law damages for breaches of the Charter, one must prove i) there has been a breach of the Charter, ii) damages are a just and appropriate remedy that would compensate, vindicate or deter future breaches, and iii) that there are no countervailing factors (such as alternate available remedies) to defeat the considerations supporting an award of damages *(Vancouver (City) v. Ward*, 2010 SCC 27).

[183] One must bear in mind that *Charter* duties are directly imposed only onto the Society, not Ms. Rees or Mr. Larkin. Any claim of a breach of section 15 of the *Charter* must therefore be directed only against the Society.

[184] Furthermore, the pleadings herein reference the language of "systemic" racism/breach of section 15 of the *Charter*.

[185] There is no tenable claim under s. 15 of the *Charter* against Ms. Rees or Mr. Larkin.

[186] I also ask myself whether the pleadings allege sufficient material facts to establish a breach of section 15 of the *Charter* against the Society?

[187] As I concluded in my summary earlier: from the pleaded facts, no inference of a breach of Mr. Howe's section 15 *Charter* rights could be drawn against any of the defendants.

[188] Apart from bald conclusory statements, Mr. Howe's pleadings are bereft of material facts in support of this cause of action as required by *CPR* 38.03(3).

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[87] At paragraph 59 of Mr. Howe's March 4, 2022, brief he states: "*It is our position that Mr. Larkin (as well as Ms. Rees and the Society) were negligent in their* ***'operational decisions'*** *in addition to the fact that their actions were not done in good faith*. As such, the immunity clauses would not prevent the defendants from being liable for their negligent actions." [My bolding and italicization added]

[189] Not even in relation to the September 1, 2016, *ex parte* interim suspension hearing, does Mr. Howe expressly plead material facts in support of his allegation that Mr. Larkin breached his rights under section 15 of the *Charter*. At their highest, Mr. Howe says Mr. Larkin intentionally misled the Committee about whether he was retained by and had a Legal Aid certificate for client DE, after Mr. Howe missed a court appearance associated with DE. One could not reasonably infer from the pleadings that Ms. Rees or Mr. Larkin breached section 15 of the *Charter* on that date, or at any other time. Moreover, *vis à vis* the Society, to the extent that its operational decisions can even be said to be implicated, there is similarly no basis to conclude it was in breach of s. 15 of the *Charter*. This cause of action is untenable. [88]

H - Why the limitation period has expired in relation to all causes of action

i) Why the pleadings are unsustainable on an examination of the Limitation of Actions Act, SNS 2014, c. 35 ("LAA")[89]

[190] On these motions, I must assume that the facts pleaded are true.

[191] Generally, I am permitted to decide questions of law, based on those facts and reasonable inferences that can be drawn therefrom.

[192] I am also specifically permitted to decide whether pleadings are sustainable in light of an argued limitation period, in a manner that parallels that of *CPR* 13.03 - summary judgment on pleadings.[90] I therefore find it appropriate to

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[88] As I will address under "Abuse of process", from their disciplinary decision, 2017 NSBS 4, under the heading "Impact of systemic, actual, and historical racism", the Bar Society Hearing Panel (comprised of Ronald J. MacDonald, K.C., Donald C. Murray, K.C., and Dr. Richard Norman) concluded that: (para. 61) "**These issues permeated the entire proceeding**"; and (para. 64): "**We have also considered the evidence regarding specific instances of racism against Howe. In the Charter application, we did not find evidence of discrimination that would cause us to offer a Charter remedy to Howe**." [My bolding added]

[89] In the December 22, 2021, filed brief by Mr. Larkin and Ms. Rees, at paras. 30-37 and 53-73, they summarize their positions in relation to this issue.

[90] *CPR* 35.08 permits the judge to join a party (which is not the case before me). However, such a decision is also constrained by subsection (5) which reads: "Despite Rule 35.08 (1), a judge may not join a party if a limitation period, or extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it." As Justice Bourgeois noted in relation to limitation periods and the adding of parties, albeit in relation to *CPR* 83.04, in *Barry v. Halifax (Regional Municipality)*, 2018 NSCA 79, at paragraphs 35-48; and in the latter of which she stated: "Litigation has become lengthy, complex and expensive. If there is a valid limitation defence, it makes sense to have it addressed early. *In adopting the 2009 Rules, the Supreme Court of Nova Scotia signalled a desire and expectation*

allow the language of *CPR* 13.03(5) to guide my analysis in relation to the determination of mixed questions of fact and law in the motion before me, such as when the limitation period here expired. That subsection reads:

> (5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:
>
> (a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;
>
> (c) the outcome of the motion depends entirely on the answer to the question.[91]

[193] CPR 83.11(3) reads:

> A judge who is satisfied on both of the following, may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:
>
> (a) the material facts supporting the cause are pleaded;
>
> (b) the amendment merely identifies, or better describes, the cause.

[194] The defendants argue that, read as favourably as possible for the Plaintiff, the triggering of the running of the limitation period in relation to all the causes of action precludes Mr. Howe from pursuing any of his claimed causes of action.

[195] The Society put it as follows in its brief: "As the original notice was filed August 31, 2020, the basic limitation period would preclude claims arising prior to August 31, 2018."

[196] I am satisfied that the material facts necessary for my determination are entirely contained within Mr. Howe's pleadings, and that "the outcome of the motion depends entirely on the answer to the [limitation period] question".

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that matters be dealt with more efficiently and expeditiously than in the past. Rule 35.08(5) is entirely consistent with that goal and serves to enhance the effective administration of justice." [My italicization added]

[91] I adopt from my reasons in *Southwest Construction Management Limited v. EllisDon Corporation*, 2020 NSSC 99, as applicable hereto, paragraphs 90 – 95.

a) the causes of action pleaded in original statement of claim

[197] The limitation period for causes of action against the defendants began to run "on the day on which [Mr. Howe] first knew or ought reasonably to have known" of the existence of all four prerequisites in section 8(2) of the *LAA*. I also keep in mind the respective burdens on the plaintiff and defendants under section 9 of the *LAA*.

[198] Mr. Larkin's alleged direct involvement related to his appearance before the Complaints Investigation Committee, which Mr. Howe has pleaded made its finding that he was suspended on September 1, 2016. Shortly thereafter, Mr. Larkin's involvement for present purposes ended. Ms. Rees's involvement is alleged by Mr. Howe's pleadings to have begun in 2011, but he focuses on the period 2013 – 2020 in his original statement of claim, and in his proposed amended statement of claim.

[199] Chief Justice Wood commented on the element of "damage" for limitations purposes in *EllisDon Corporation v. Southwest Construction, supra*:

> 35 The motion judge failed to differentiate between "damage" and "damages". **What a party needs to be aware of for limitation purposes is that damage has occurred. It is not necessary that the precise calculation of loss be known.** This distinction was identified by Cromwell, JA in *Union of Icelandic Fish Producers Ltd. v. Smith,* 2005 NSCA 145:
>
> > [119] **There is a distinction, long recognized, although sometimes overlooked, between damage and damages**. As A.I. Ogus put it in his treatise *The Law of Damages* (London, Butterworths, 1973) at p. 2:
> >
> > > The terms "damage" and "damages" have suffered from loose usage. Some writers and judges have used them as if they were synonymous. But **"damages" should connote the *sum of money payable by way of compensation* ..., while the use of "damage" is best confined to instances where it refers to the *injury inflicted* by the tort or breach of contract** ... .
> >
> > [120] Following this description, damage, or detriment, as an element of the cause of action in negligent misrepresentation may be understood to mean an injury rather than a sum money to compensate for its infliction. Consistent with this view, the House of Lords approved the following description of what actual damage means in *Nykredit Mortgage Bank Plc. v. Edward Erdman Group Ltd. (No. 2)*, [1997] H.L.J. No 52:

> ... any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by 'actual' damage. ...
>
> [Italics in original]

[My bolding added]

[200] When did Mr. Howe discover, in relation to each of the causes of action he has pleaded, the existence of each of the matters referenced in section 8(2) of the *LAA*? Regarding all the causes of action pleaded by Mr. Howe (whether from the original or the proposed amended statement of claim), I am satisfied that this was on or before October 21, 2017.[92]

[201] Regarding Mr. Howe's original claims (negligence, defamation, and malicious prosecution), I conclude that they are each barred by the limitation period.[93]

[202] Mr. Howe filed his original statement of claim on August 31, 2020.

[203] Based on acceptance of the pleaded facts as true, the limitation period in relation Mr. Howe's malicious prosecution claim, would have expired before September 30, 2018 (if based only on the interim suspension hearing – September 1, 2016), and surely so before October 21, 2019. In relation to the

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[92] Recall that Mr. Larkin dealt with Mr. Howe's *interim* suspension hearing on September 1, 2016. Mr. Howe has pleaded that shortly thereafter he wrote to the Committee about Mr. Larkin's alleged intentional mis-statements regarding "DE". The Hearing Panel decided on July 17, 2017, that the charges of misconduct against Mr. Howe were proven; and he was consequently disbarred on October 20, 2017. Certainly, by October 21, 2017, Mr. Howe was aware of the "damage" he allegedly suffered, namely the causes of action he now pleads. Therefore, by October 21, 2019, the two- year limitation period had expired. In identifying what conduct constituted malicious prosecution, Mr. Howe's original pleading stated (para.7): "The Plaintiff pleads that the defendants, the Nova Scotia Barristers Society, Victoria Rees and Raymond Larkin, maliciously prosecuted the Plaintiff by making an *ex parte* application to have the Plaintiff's ability to practice law suspended." I have earlier concluded that his malicious prosecution claim is not tenable because that proceeding was not "terminated in his favour". Moreover, the harm the September 1, 2016, hearing effected was realized no later than his disbarment on October 21, 2017. [My underling added]

[93] His original pleadings claimed three causes of action against the defendants: negligence, malicious prosecution, and defamation. Mr. Howe has confirmed that he is pursuing only the Society for defamation. I also observe that the special limitation period in section 19 of the *Defamation Act*, c. 122 RSNS 1989 as amended is not available to the defendants; see Justice Beveridge's associated reasons in *Yarmouth (District) v. Nickerson*, 2017 NSCA 21, regarding the tort of defamation generally.

claims of negligence, and defamation against Ms. Rees, Mr. Larkin, and the Society, Mr. Howe was out of time when he filed his claims on August 31, 2020.[94]

[204] Mr. Howe proposed amendments to his pleadings in November 2021. Those newly added "claims" or causes of action as against each of the defendants are: civil conspiracy, public malfeasance, and racial discrimination-based breaches of section 15 of the *Charter of Rights and Freedoms*.

[205] Absent bad faith or serious non-compensable prejudice, leave by the court for such amendments should be granted *provided* it is not successfully argued that they are untenable or unsustainable – see my reasons in *Southwest Construction*, 2020 NSSC 99, at paragraph 42 - affirmed 2021 NSCA 20; and *CPR* 83.11(3), regarding amendment requests after the expiry of a limitation period.[95]

[206] CPR 83.11 reads:

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[94] It must be remembered that Mr. Howe has repeatedly stated that he is not directly challenging his disbarment, but rather says his civil suit directly challenges his interim and ongoing suspension from practice, which preceded his disbarment. Furthermore, to be clear, I am satisfied that any suggested continuing effects of the decisions reached by the Society and its Committee/Panel on September 1, 2016, and July 17 and October 20, 2017, do not extend the limitation period for any of the causes of actions based on section 8(3) of the *LAA* and a claim that they represent "a continuous act or omission" or "a series of acts or omissions concerning the same obligation". Contextually significant in this regard are the decisions of the Society's decision-making bodies found at 2017 NSBS 3 and 2017 NSBS 4 - see also the reasons in *Corbett v. Ainsley*, 2007 MBCA 140, in relation to an alleged continuation of a conspiracy; and *Gillis v. Law Society of New Brunswick*, 2017 NBQB 212, where Mr. Gillis was found on summary judgment to have no case as a result of statutory immunity pursuant to a provision bearing great similarity to section 81 of the *LPA*. Therein at paragraphs 45-47, Justice Clendening stated: "Mr. Gillis filed his Notice of Action/ Statement of Claim on 19 September 2016. It should be remembered that his suspension by the Complaints Committee was ordered on 28 March 2013, and the decision of the Court of Appeal was issued on 9 September 2014. Counsel for the defendants argues that regardless of which of those dates give rise to the cause of action, it is prescribed as having been filed outside the two-year limit is set out in section 5 of the *Limitation of Actions Act* and that because of that timeframe the action should be summarily dismissed. Defence counsel argued that it can be no question that there was nothing to be discovered by Mr. Gillis which he did not already know once the Complaints Committee ordered his suspension on March 28, 2013… the argument continued with the suggestion that Mr. Gillis knew everything that he needed to know on the date of his suspension on 28 March 2013. It was at that point that he could have, or should have, taken some action. I agree with counsel for the defendants that this action is clearly barred under section 5 of the *Limitation of Actions Act*." Regarding the circumstances of Mr. Howe's suspension, in contrast to Mr. Gillis, I bear in mind that Mr. Howe did not appeal his suspension from practice; although he had the right to request a reconsideration of that decision, *and* the right to appeal that decision per section 37 of the *LPA*.

[95] *CPR* 83.02 permits amendments to be made as of right if within 10 days of defences being filed. Ms. Rees/Mr. Larkin filed their defence on February 25, 2021, while the Society did so on March 18, 2021. As noted, the defendants raised numerous defences including common law and statutory immunities, as well as a limitation period. Mr. Howe's motion to amend his pleadings was filed November 15, 2021. Consequently Mr. Howe requires leave to amend his pleadings.

(1) A judge may give permission to amend a court document at any time.

(2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 – Parties, including Rule 35.08(5) about the expiry of a limitation period.

(3) A judge who is satisfied on both of the following may permit an amendment *after the expiry of a limitation period*, or extended limitation period, applicable to a cause of action:

(a) The material facts supporting the cause are pleaded;

(b) the amendment merely identifies, or better describes, the cause.

[207] *CPR* 83.11(3) is a procedural rule and appears to be intended to address problems of poor drafting/ misdescriptions of causes of action, where deficiencies can be remedied by new pleadings, which, in the circumstances, will not operate unfairly against the opposing party. Thus, if after the expiration of the relevant limitation period, Mr. Howe wishes to amend his pleadings, he can rely on this Rule to make a motion for leave to amend his pleadings to add causes of action that would at that time otherwise be precluded as being outside the limitation period. However, the Rule does not override the substantive effect of the limitation period where *the originally drafted cause of action itself* was *not brought before the limitation period expired*. In those circumstances, an expired relevant limitation period is still a bar to later proposed associated causes of action, even if "the amendment merely identifies, or better describes the cause".

[208] On consideration of Rule 83.11, I have concluded that I cannot grant leave to Mr. Howe to make his proposed amendments.

[209] Firstly, he cannot breathe life into his original claims against the defendants (negligence, defamation, and malicious prosecution), which I have found are all time-barred, and reinvigorate them merely by proposing to add late new claims in 2021: see e.g. *Stout Estate v. Golinowski Estate*, 2002 ABCA 49; *Condominium Plan No. 012-5764 v. Amber Equities Inc*., 2015 ABQB 235; *Poff v. Great Northern Data Supplies (AB) Ltd.*, 2015 ABQB 173; *WR v. Alberta (Atty. Gen.)* 2006 ABCA 219 (and references to Alberta legislation as similar to Nova Scotia in *Dyack v. Lincoln*, 2017 NSSC 187, at paragraph 49 per Chipman J.).

[210] There are no remaining original claims against the defendants that have not been extinguished by the limitation period.

[211] On this basis, I must refuse Mr. Howe's motion for leave to amend the pleading as against all the defendants.

[212] Secondly, even if the new claims *had been* included in the original statement of claim, as they could have been, they would also be statute-barred presently.[96]

[213] As against Ms. Rees, Mr. Larkin, and to the extent that Mr. Howe relies upon the vicarious liability of the Society, as against the Society, he cannot rely upon section 22 of the LAA to "add" any claim to the original pleadings, because all of the claims therein, as against those parties were statute-barred and extinguished by the time the August 31, 2020, claim was filed.

[214] Nevertheless, in case I am wrong about all the causes of action in the August 31, 2020 statement of claim being so extinguished, I will go on to consider independently the sustainability of the new causes of action and examine whether otherwise Mr. Howe can rely upon section 22 of the *LAA* to add his

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[96] As Ms. Rees/Mr. Larkin noted at paragraph 172 and following of their December 2021 brief, in the reported cases where additional causes of action were permitted after the expiration of the relevant limitation period, the *original* causes of action were all commenced within the limitation period (e.g. see 2015 ABQB 235; 2015 ABQB 173; and 2006 ABCA 219). I agree with such reasoning and note that it prevails, in spite of the language in section 22 *LAA*: "Notwithstanding the expiry of the relevant limitation period established by this *Act*". Moreover, I keep in mind that the new causes of action or claims are only "brought" [see section 8 *LAA*] "where the claim is added to an existing proceeding by a new or an amended pleading that is not an originating process *when that pleading is filed*", per section 2 *LAA*, "Interpretation". As part of his motion to request an adjournment of Mr. Larkin's motion for summary judgment (originally scheduled for October 21, 2021) for which Mr. Larkin had filed his brief of September 27, 2021, Mr. Howe included a proposed Amended Statement of Claim as an attachment to his October 15, 2021, affidavit. Notably, that pleading is significantly different from his present proposed amended Statement of Claim – namely, the October 15, 2021, proposed Statement of Claim only pleads negligence, malicious prosecution, and defamation; whereas the November 15, 2021, proposed Statement of Claim is substantially longer overall, and pleads, in addition, civil conspiracy; section 15 *Charter* breach; and public malfeasance. Mr. Howe suggests that when on July 24, 2020, the charges on which he was suspended on September 1, 2016, were "withdrawn", that the proceedings were "terminated in his favour", and only after that point could he establish that he was wronged. As I previously stated, the proceedings were not "terminated in his favour" as that term is used in the jurisprudence. Moreover, he had likely discovered the existence of each one of the section 8(2) *LAA* criteria shortly after September 1, 2016, which started the limitation period running; and which was certainly the case by no later than October 21, 2017. Notably at paragraph 21 *in the original statement of claim Mr. Howe pleads*: "**After the Plaintiff's suspension from practising law on September 1, 2016, he provided written communications to the Nova Scotia Barristers Society highlighting the misleading statements by Raymond Larkin and the allegations of the Plaintiff breaching his practice restrictions being meritless**"; and at paragraph 23: "The Plaintiff was disbarred from practising law on October 20, 2017 as a result of the hearing that commenced in 2015." [My bolding added]

new claims/causes of action to the original pleadings as against each of the defendants.

b) the additional causes of action pleaded in the proposed amended statement of claim

[215] In relation to each of the new proposed causes of action, as against Ms. Rees, Mr. Larkin and the Society, Mr. Howe would certainly have known or ought reasonably to have known that all the section 8(2) requirements were in existence by the date he was disbarred by the Society: October 20, 2017.[97] Therefore, the limitation period for those proposed new causes of action would also have expired on or before October 21, 2019.[98]

[216] In order to add these new causes of action, Mr. Howe relies upon section 22 of the *LAA* (and also *CPR* 83.02 and 83.11(3)). Section 22 of the *LAA* reads, in part:

> Claims added to proceedings
>
> 22 **Notwithstanding the expiry of the relevant limitation period established by this Act**, **a claim may be added,** through a new or amended pleading**, to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim**
>
> (a) **is made by a party to the proceeding against another party to the proceeding** and does not change the capacity in which either party sues or is sued …

[97] See for example, *Fitzpatrick v. College of Physical Therapists of Alberta*, 2020 ABCA 164, at paragraphs 28-37, which involved successful arguments of statutory immunity and a late-pleaded action precluded by the *Limitations Act.* I note as well that section 20 of the *LAA*, entitled "Acknowledgements", provides that "where before the expiry of the relevant limitation period established by this Act, a person acknowledges liability in respect of a claim [for specific "claims", which I suggest are not applicable here] the limitation period begins again at the time of the acknowledgement." That section is generally not applicable to Mr. Howe's circumstances. Moreover, the acknowledgement must be *to the claimant*. The April 14, 2021, Acknowledgement from the Society does not meet any of the criteria under that section.

[98] Recall as well that his appeals from the Society's July 17 [misconduct] and October 20, 2017 [sanction], decisions were dismissed on October 24, 2019 - 2019 NSCA 81. Mr. Howe had been admitted to the Bar as a lawyer and practising since 2010. The circumstances strongly suggest that Mr. Howe had been actively involved in his Misconduct Hearing, his Sanction Hearing; and in his appeal. Yet, he waited another 10 months after the expiry of the limitation period, until August 31, 2020, to file his claims.

[217] *Presuming* that I am wrong to conclude that the limitation periods for all the causes of action in the original statement of claim were statute-barred when the claim was filed on August 31, 2020, and that the new proposed pleadings are otherwise tenable and sustainable (including that the common law prerequisites to leave under *CPR* 83.02,[99] and all **but** *CPR* 83.11(3) (b) are met: "**the amendment merely identifies, or better describes, the cause**"), the simple language of section 22 *LAA* ["claims added"] suggests that Mr. Howe should be permitted to add his *new claims* **if** they are "**related to the conduct, transaction or events described in the original pleadings**".

[218] Based on Justice Bodurtha's reasons in *Altschuler v. Bayswater Construction Limited*, 2019 NSSC 197, the Society expressly argues that all the material facts had not already been pleaded for the new causes of action in the original pleadings, and therefore it cannot be said that the amendment "merely identifies, or better describes, **the cause**".

[219] Let me examine that argument.

[220] The defendants argue that a comparison of the elements constituting the original causes of action: (negligence, defamation and malicious prosecution) with the elements constituting the additional causes of action (civil conspiracy, malfeasance in public office, and racial discrimination constituting a breach of section 15 of the *Charter of Rights*) reveal significant differences and consequently this creates a compelling argument that the amended pleadings are not "related to the conduct, transaction or events described in the original pleadings".

[221] I accept that a generous interpretation should be given to the phrase "related to the conduct, transaction or events described in the original pleadings"-see for example Justice Chipman's reasons in *Dyack v. Lincoln*, 2017 NSSC 187, at paragraphs. 48-56.

[222] On the other hand, when these words are brought to bear on the differences between elements of the respective causes of action in the original and proposed amended pleadings, the contrast is stark, particularly in relation to civil conspiracy and the section 15 *Charter* breach.

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[99] Regarding the common law factors relevant to amending pleadings generally (*CPR* 83.02), there is not sufficient proof of bad faith on Mr. Howe's part, or of non-compensable prejudice to the defendants.

[223] Mr. Howe has provided (at Tab 3 of his December 13, 2021, brief) a summary of his "proposed amendments and associated paragraphs from original pleadings" - being a 56-page tabulation in which he compares the original pleadings and the newly pleaded causes of action in an effort to satisfy this court that the new pleadings are "related to the conduct, transaction or events described in the original pleadings".

[224] I observe that a distillation of the *original* pleadings (including the Answers to Demands for particulars) reveals that they allege the following:

1. Ms. Rees was in an ongoing conflict of interest and acted with racial bias towards Mr. Howe and thus her conduct was actionable as negligence generally ["negligent in their investigation of the Plaintiff"], and malicious prosecution (there are no material facts pleaded that Mr. Larkin was motivated by Ms. Rees's alleged conflict of interest[100] and racial bias) in relation to the September 1, 2016, interim suspension hearing; whereas
2. Mr. Larkin was hired shortly before, and appeared on, September 1, 2016, at the interim suspension hearing of Mr. Howe, and while there is alleged to have "misled the [CIC] by indicating the Plaintiff was on the record for client DE and that the Plaintiff had a certificate from Legal Aid", and thus his conduct was actionable as negligence generally [see page 8 of the Answer to Demand for particulars of the Society] and malicious prosecution.

[225] Only one of the three original causes of action – negligence – is *not* oriented around that September 1, 2016, hearing process. The negligence claim is also focused on the conduct of Ms. Rees. For example, in his Answer to the Rees/Larkin's Demand for particulars in relation to how Ms. Rees was negligent, Mr. Howe replied in part, at page 2, that:

> Ms. Rees was negligent in her approach to selecting investigators and agents for the [Society]… the investigators and agents referred to in this paragraph include but were not limited to: Mr. Larkin… Michelle James; Stanley MacDonald QC; Malcolm Jeffcock, QC; Elaine Cumming; John Rafferty QC; Robert Hagell; Luke Craggs; and Elizabeth Buckle…

[100] His pleadings include that: "The hearing for the 2015 charges was held from 2015 to 2017, over which time the Plaintiff repeatedly highlighted Victoria Rees' conflict of interest and racial bias that influenced the investigation into his practice and his ongoing prosecution." That Mr. Howe pleaded this is also relevant to the defendants' motion for "abuse of process" relief. [My underlining added]

[226] The original statement of claim and proposed amended statement of claim bear out that some of these investigators were allegedly involved as early as 2013-14. Therefore, the negligence claim appears to span 2013-2014 and onwards to 2017, and is focussed on Ms. Rees. Yet the defamation and malicious prosecution claims (as well as the new public malfeasance claim) are focused on and around September 1, 2016. The malicious prosecution/public malfeasance claims are focused on the conduct of Mr. Larkin.

[227] In summary then, I conclude that the original statement of claim is focused on Ms. Rees's alleged negligence starting in 2013 – 2014 up to Mr. Howe's disbarment on October 20, 2017. Negligence may generally be said to be found if an act or omission to act by a person falls below a reasonableness standard and it caused a foreseeable harm to another person.[101]

[228] Similarly, I conclude that the original statement of claim is focused on Mr. Larkin's conduct, said to amount to malicious prosecution/public malfeasance after his retention as counsel to the Complaints Investigation Committee hearing of September 1, 2016, and shortly thereafter. Malicious behaviour requires an intentional act intended to or likely to injury another.[102]

[229] Regarding the new claims: there is no express, or reasonably articulated indirect, description of the time interval of the alleged "civil conspiracy" against Mr. Howe, although the original pleadings strongly suggest it was ongoing since as far back as 2013 – 2014.

[230] These claims allege ongoing conduct, and invite a comprehensive review of the interactions between Ms. Rees, Mr. Larkin, and all other persons involved in the relevant decisions preceding the interim suspension hearing, and thereafter in relation to the Misconduct Hearing which decision is dated July 17, 2017, and the Sanction Hearing dated October 20, 2017.

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[101] More precisely: 1) a claimant suffers some damage; 2) that damage is in fact caused by the conduct (act or omission) of the defendant; 3) the defendant's conduct must be negligent – i.e. in breach of the standard of care set by the law; 4) there must be a legal duty recognized by the law to avoid this damage; 5) the conduct of the defendant is a proximate cause of the damage/harm suffered by the claimant (i.e. the damage suffered is not too remote a consequence of the defendant's conduct); 6) the conduct of the claimant should not be such that it bars entirely or reduces their remedy for the damage suffered (e.g. where the claimant voluntarily assumes the risk of such damage or is contributorly negligent to their having suffered it – Canadian Tort Law, Lexis-Nexis Canada Inc, Toronto, Ontario, Canada, at pages 124-126. In the case of tort liability of governmental agencies, see *Swinamer v. Nova Scotia (Attorney General)*, [1994] S.C.J. No. 21.

[102] See for example the elements of public malfeasance in *Odhavji Estate v. Woodhouse*, [2003] 3 SCR 263.

[231] Mr. Howe relies on *Tran v. University of Western Ontario*, 2016 ONCA 978, to support his argument that some of his causes of action (e.g. civil conspiracy/ section 15 *Charter*) were ongoing and were not completed, therefore not discoverable- such that the limitation period was not triggered. The facts in *Tran* (paragraphs 17-20) are materially distinguishable from the presumed facts in Mr. Howe's pleadings herein.

[232] Importantly for present purposes, in his submissions to this Court, Mr. Howe confirmed that with these civil proceedings, he is not attacking his disbarment *per se*, but that the focal point of his pleadings is his September 1, 2016, interim suspension hearing and the consequences thereof- including its effect on his ultimate disbarment.

[233] The proposed new claims of civil conspiracy and breach of section 15 of the *Charter* (which strictly speaking is an allegation of "unequal" or differential treatment based on race) are alleged over a much wider time span.[103]

[234] In my opinion, the proposed new claims of civil conspiracy and breach of section 15 of the *Charter* are sufficiently distinguishable from the originally pleaded claims (negligence, defamation and malicious prosecution) that they cannot be said to be "related to the conduct, transaction or events described in the original pleadings". By their nature, the constituent elements of those claims, and the time interval over which it is asserted the relevant conduct occurred, and the material facts relevant thereto, they are distinct "new" claims.

[235] Thus, in any event, this precondition to Mr. Howe relying on section 22 of the *LAA* is not established for the civil conspiracy and breach of s. 15 *Charter* claims. Consequently, he cannot rely on section 22, except insofar as the claim of public malfeasance is alleged in his proposed Amended Statement of Claim. The "conduct, transaction, or events" relevant to the malicious prosecution claim are "related to" the public malfeasance cause of action.[104]

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[103] Both of which claim at their core, individual and systemic prejudice against Mr. Howe which also invites a comprehensive review of the machinations of the Society involving Mr. Howe from possibly as early as 2011 - see paragraph 9; and February and September 2013 - see paragraphs 13 and 17 of the proposed Amended Statement of Claim.

[104] I am also satisfied that under *CPR* 83.11, specifically subsection 3 (b) ("the amendment merely identifies, or better describes, the cause") that Mr. Howe would be entitled to add the public malfeasance cause of action. I view the tort of malicious prosecution and of malfeasance in public office as "legal siblings". However, to clarify, the requirement of *CPR* 83.11(3)(a) that "the material facts supporting the cause are pleaded" has *not* in my opinion been met regarding the public malfeasance cause of action – I canvass this issue in the sustainability consideration of these pleadings.

[236] Given the jurisprudence that favours permitting the amendments, this low threshold has been met, but only in relation to public malfeasance.

[237] Nevertheless, for the sake of considering further argument regarding all his present and proposed claims, I will presume that Mr. Howe is in a legal position in all respects, to rely on section 22 of the *LAA*, and will consider further arguments as if he had been granted leave to amend his pleadings to include all the new causes of action.

[238] Let me then go on as if Mr. Howe's proposed new causes of action are viable for present purposes (public malfeasance; civil conspiracy; and breach of section 15 of the *Charter of Rights*).

ii) why some of the pleadings are unsustainable on an examination of the common law and statutory immunities that are claimed by the defendants

[239] I keep in mind what Justice Chalmers stated in *Mohammad v. Sajjad-Hazai*, 2021 ONSC 8490, at paragraphs 11-14, regarding Mr. Howe's negligence claims:

> *Immunity from any Claim for Damages*
>
> 11 Section 9 of the *Law Society Act*, R.S.O. 1990, c. L.8 provides immunity to all employees of the LSO for acts done in carrying out their duties in good faith.
>
> > No action or other proceeding for damages shall be instituted against the Treasurer or any bencher, official of the Society or person appointed in Convocation for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power under this Act, a regulation, a by-law or a rule of practice and procedure, or for any neglect or default in the performance or exercise in good faith of any such duty or power.
>
> 12 The purpose of the immunity provision is to ensure that the LSO may undertake its regulatory and public law duties. Absent bad faith, LSO employees cannot be subject to an action with respect to the performance of their duties or the exercise of their powers, including the undertaking of investigations: *Khan v. Law Society of Ontario*, 2021 ONSC 6019, at para.7. The LSO and its employees are not liable for errors in the exercise of its discretion as long as they acted in good faith and without malice: *Boldt v. Law Society of Upper Canada*, 2010 ONSC 3568, at para. 29.

13 The Plaintiff alleges that Ms. Wilson failed to properly investigate his complaint against Ms. Sajjad-Hazai. In the synopsis he pleads that Ms. Wilson failed to "conduct all matters and proceedings diligently and faithfully".

14 Ms. Wilson is immune from civil proceedings arising from claims arising out of the good faith exercise of her duties as an employee of the LSO. The Plaintiff does not specifically allege bad faith. There are no material facts pleaded to support a claim of bad faith or that Ms. Wilson was acting with malice. **There is a positive obligation on a plaintiff to plead bad faith in order to pre-emptively defeat the immunity provision in the *Law Society Act*. The claim must be pleaded with precision and full particulars**: *Potis v. The Law Society of Upper Canada*, 2019 ONCA 618, at para. 24.

[My bolding added]

[240] In Nova Scotia, we have a similar provision, which prevents a claim of negligence against those acting in good faith (*Legal Profession Act*, S.N.S. 2004, c. 28, s. 81). Mr. Howe alleges negligence by Ms. Rees and Mr. Larkin. I must presume the facts in his Statement of Claim to be true.

a) Immunity pursuant to section 81 of the Legal Profession Act, SNS 2004, c. 28, as amended

[241] It is not disputed that each of the defendants are entitled to rely on this immunity, provided they meet the prerequisites.

[242] Section 81 reads:

(1) No action for damages lies against the Society, the Council, members of the Council, committees of the Society, persons serving as members of committees of the Society, the Executive Director or officers, agents or employees of the Society

a) for any act or failure to act, or any proceeding initiated or taken, or anything done or not done, **in good faith** while acting or purporting to act on behalf of the Society in carrying out of the duties or obligations under this Act; or

b) for any decision, order or resolution made or enforced **in good faith** under this Act.

(2) No action lies against any person for the disclosure of any information or any document or anything therein pursuant to this Act unless such disclosure was made **in bad faith**.

…

(3) No member of the Society or officer, agent or employee of the Society is personally liable for any of the debts or liabilities of the Society unless such person expressly agrees to be so liable.

(4) The Society shall indemnify any person referred to in subsection (1) or (2) for any costs or expenses incurred by such person and the defence of any legal proceedings brought against them in their capacity under this Act.

[243] Do the existing or proposed pleadings (including the Answers to the Demands for particulars) herein allege "bad faith"?

[244] In the original statement of claim, one does not see the words "bad faith"; however, the pleadings do allege "malicious prosecution" against all defendants, and "racial bias" and "conflict of interest" against Ms. Rees expressly. More expansive language is found in the Answers to Demands for Particulars, and proposed amended statement of claim.

[245] Per Jamal JA, (as he then was), in *Potis v Law Society of Ontario*, 2019 ONCA 618, where the Law Society filed a defence, and afterwards filed a motion to strike the plaintiff's pleadings, the court concluded:

14 …While generally a defendant should move to strike a claim as disclosing no reasonable cause of action before filing a statement of defence, in some instances a defendant may bring such a motion without leave even after delivering a defence. One such instance is where it is obvious from the defendant's pleading that the defendant takes issue with the sufficiency of the plaintiff's claim: *Arsenijevich v. Ontario (Provincial Police)*, 2019 ONCA 150 (Ont. C.A.), at para. 7.

15 That is the case here. The Law Society's statement of defence pleads the very deficiencies that were relied on in the motion to strike, namely, the Law Society's statutory immunity under s. 9 of the *Law Society Act*.

[246] Of particular interest are the court's comments regarding whether the Law Society can rely on a statutory immunity in its pleadings in such circumstances:

20 The appellants raise two grounds to challenge the motion judge's decision to strike out their pleadings.

21 **First, the appellants contend that they were not required to plead bad faith to pre-emptively defeat the application of s. 9 of the *Law Society Act,* as good faith is a statutory defence to be pleaded by the Law Society**. The appellants say that their claim was not required to anticipate defences that might be raised.

22 **I do not agree** with the appellant's submission. This court has accepted that "*Hunt* does not preclude a court from striking out a claim on the basis that it discloses no cause of action because of the existence of an unanswerable defence": *Louie v. Lastman*, (2002), 61 O.R. (3d) 459 (Ont. C.A.) , at para. 21.

23 Here, the unanswerable defence is that it is settled law that s. 9 of the Law Society Act provides the Law Society with statutory immunity from civil claims for damages for the exercise of statutory duties and powers made in good faith: *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562 (S.C.C.) , at paras. 14-17; Robson v. The Law Society of Upper Canada2017 ONCA 46826 Admin. L.R. (6th) 133(Ont. C.A.), at paras. 4-7; and *Conway v. Law Society of Upper Canada*, 2016 ONCA 72, 395 D.L.R. (4th) 100 (Ont. C.A.), at paras. 21-22.

24 **While a claim against the Law Society alleging that it engaged in bad faith conduct may not be subject to the immunity provided by s. 9 of the Law Society Act, such a claim must still be pleaded with precision and with full particulars**, as required by the *Rules of Civil Procedure: Conway*, at para. 39; r. 25.06(8).

25 **Here, neither the statement of claim nor the amended statement of claim alleges that the Law Society engaged in any bad faith conduct. As such, there is no viable claim against the Law Society**.

26 **The appellants nevertheless assert that there is no authority for the proposition that s. 9 applies to an intentional tort committed by the Law Society. They note that *Edwards* involved a claim for negligence; *Robson* involved a claim of negligent investigation; while in *Conway* this court granted leave to amend to permit a claim for misfeasance in public office to be pleaded against the Law Society because such a claim does not fall within the statutory immunity provided by s. 9. The appellants note that this court in *Conway* stated, at para. 22, that "an absence of good faith or "bad faith", involving malice or intent, is sufficient to ground a properly pleaded cause of action against the [Law Society]."**

27 I do not read *Conway* as supporting the appellants' argument. The "intent" referred to is a malicious intent, which if pleaded would constitute bad faith and would therefore bring the impugned conduct outside the scope of s. 9. The court was not suggesting that the pleading of any intentional tort, even without a claim of bad faith, would necessarily fall outside s. 9.

28 **None of the causes of action pleaded by the appellants** — namely, "breach of confidence, confidentiality, trust, privacy and solicitor-client privilege, as well as conversion and trespass to chattels" — **involves bad faith as an essential element**: [citations omitted]. **As such, unlike *Conway*, it cannot be said that the pleadings implicitly allege bad faith so as to raise a tenable plea**. As noted, there is no plea of bad faith against the Law Society at all, either in respect of the alleged practice or in respect of the appellants themselves.

> 29 **Second, the appellants contend that the defence of good faith should not be determined on a motion to strike, as good faith is a question of fact requiring an evidentiary record.**
>
> **30 I do not accept this submission. As the appellants' pleadings do not allege any bad faith conduct by the Law Society, there is no need for an evidentiary hearing to determine the issue**.
>
> 31 Accordingly, I conclude that the motion judge did not err in striking out the appellants' pleadings as disclosing no reasonable cause of action.
>
> [My bolding added]

[247] It is helpful to revisit the elements of the alleged intentional torts, "malicious prosecution" and malfeasance in public office - see *Nelles v. Ontario*, [1989] 2 SCR 170, and *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at paras. 26-32.

[248] "Malice" by definition is associated with those claims, which require a primary purpose other than that of carrying the law into effect- an ulterior motive, which co-exists with deliberate and otherwise unjustifiable conduct intended to injure another person's interests. Such pleadings must however still meet the *CPR* 38.03(3) requirement that "full particulars" are pleaded.

[249] In present circumstances, the defendants are also being sued for "civil conspiracy" and breach of section 15 of the *Charter*, based on racial discrimination/prejudice.

[250] I am of the opinion that generally speaking, such claims (prejudice/bias and associated racial discrimination) are properly considered as "unconscionable conduct" contemplated in *CPR* 38.03(3).

[251] Therefore, the immunities relied on by the defendants pursuant to section 81 of the *Legal Profession Act* and the common law arguably *may* not be available in response to these two pleaded causes of action or the claims of malicious prosecution and malfeasance in public office.[105]

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[105] Presuming each of those pleadings are otherwise tenable and sustainable. I concluded earlier in relation to the sufficiency of the pleadings regarding the malicious prosecution claim (and elsewhere in relation to malfeasance in public office), based on an examination of the entire pleadings (the original Statement of Claim, the Answers to the Demands for particulars, and the proposed amended statement of claim): "the pleadings of 'malice' are largely conclusory… I conclude the 'malice' alleged is not sufficiently pleaded as against Ms. Rees, Mr. Larkin and the

[252] However, for present purposes, the immunities remain available in relation to the claims of negligence and defamation.

[253] Consequently, based on the pleadings, Ms. Rees and Mr. Larkin would not be dis-entitled to rely on the protections afforded by section 81 of the *Legal Profession Act*, regarding the negligence (and likely) the defamation claims.

[254] That statutory immunity operates in their favour and precludes Mr. Howe from recovering against them or the Society in any "action for damages" arising from their conduct ("any act or failure to act, or any proceeding initiated or taken, or anything done or not done, in good faith while acting or purporting to act on behalf of the Society in carrying out of the duties or obligations under this *Act*; or for any decision, order or resolution made or enforced in good faith under this *Act*… for the disclosure of any information or any document or anything therein pursuant to this *Act* would unless such disclosure was made in bad faith.").

b) common law immunity for quasi-judicial decision-making persons and bodies

[255] Mr. Larkin also points out that there are common law immunities available to he and Ms. Rees in these circumstances regarding the claims of negligence and defamation.

[256] Provided the Barristers' Society and its employees and agents acted in good faith in exercising a quasi-judicial discretion, they will not be liable for even an erroneous exercise of that discretion: *Voratovic v. Law Society of Upper Canada*, (1978) OR (2d) 214; *Calvert v. Law Society of upper Canada*, (1982) 32 OR (2d) 176. This immunity was further commented on in *Edwards v. Law Society of Upper Canada*, 2001 SCC 80:

> II. Judgments
>
> A. *Ontario Court (General Division)* (1998), 1998 CanLII 14637 (ON SC), 37 O.R. (3d) 279
>
> 5 **In the Ontario Court (General Division), Sharpe J. allowed the respondent's Rule 21 motion to strike for failure to disclose a cause of action.** Sharpe J. first reviewed the jurisprudence predating *Anns v. Merton London Borough Council*, [1978]

Society." I have earlier also found that the claims of civil conspiracy, and breach of section 15 of the *Charter* are untenable.

A.C. 728 (H.L.), and *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, **on the tort liability of the Law Society and concluded its quasi-judicial function immunized it from liability in negligence. For this point, Sharpe J. relied on *French v. Law Society of Upper Canada* (1975), 1975 CanLII 40 (ON CA), 61 D.L.R. (3d) 28 (Ont. C.A.), which characterized the Law Society's Discipline Committee as an "adjudicative body" (p. 32), as well as numerous cases, both Canadian and foreign, immunizing bodies such as the Law Society from suit: …** In answer to the appellants' claim that the *Anns/Kamloops* test governed the liability of public authorities, Sharpe J. reasoned that the quasi-judicial immunity test from earlier cases had evolved into the policy/operational distinction in *Anns*. Common to both approaches, in his view, was the principle that a "body charged with the exercise of quasi-judicial powers must act in the public interest and must take into account a number of factors, only one of which will be the private interest of individuals such as the plaintiff" (p. 285). On this basis, he held it was "plain and obvious" the appellants would not succeed at trial: …

…

6 **In the Ontario Court of Appeal, Finlayson J.A. upheld Sharpe J.'s judgment, although he applied the *Anns/Kamloops* test more directly.** In his view, even the first branch of *Anns/Kamloops* was a live issue, as "the appellants in this case do not appear to have been involved with Mills in a traditional lawyer-client relationship, but rather dealt with him as part of an investment scheme" (p. 339). On this basis, he doubted whether a sufficient relationship of proximity existed between the appellants and the Law Society. **Moving to the second stage, Finlayson J.A. reviewed the cases on quasi-judicial immunity and *concluded that the jurisprudence "clearly establishes a judicial immunity from negligence for the Law Society's discipline process, including the investigative function at the front end" (p. 343)*.** He then took the analysis a step further, asking whether "the conduct of the Secretary in not following through on the complaint received by the Law Society" (p. 343), as opposed to the hearing process itself, constituted an operational decision under *Anns/Kamloops*. In his view, several policy considerations dictated otherwise. **First, even at the so-called operational level of the investigation, the *Law Society Act*, R.S.O. 1990, c. L.8, required delicate policy choices such as whether to interfere with a member's practice. Second, it was only reasonable that the judicial immunity extended to Benchers by s. 9 of the *Law Society Act* would also extend to employees who investigate complaints. Third, the tort liability proposed by the appellants would, as in *Cooper, supra*, apply to an indeterminate class of persons for an indeterminate amount:** *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 31. For these reasons, **Finlayson J.A. concluded that imposing tort liability on the Law Society would, barring *mala fides*, be inconsistent with its "public interest**" role (at p. 347):

> Following . . . the . . . remarks of Huddart J.A., it seems to me that there are very sound policy reasons for not burdening this judicial or *quasi*-judicial process with a private law duty of care. The public is well-served by refusing to fetter the investigative powers of the Law Society with the fear of civil liability. The invocation

> by the plaintiffs of the "public interest" role of the Law Society seems to be misconceived as it actually works to undermine their argument. . . . [T]he Law Society cannot meet this obligation if it is required to act according to a private law duty of care to specific individuals such as the appellants. The private law duty of care cannot stand alongside the Law Society's statutory mandate and hence cannot be given effect to.

For substantially similar reasons as the British Columbia Court of Appeal in *Cooper*, therefore, Finlayson J.A. dismissed the appeal.

[My bolding and italicization added]

[257] Similarly, the Barristers' Society, its employees and agents who act as advocates/lawyers are protected by the common law immunity of lawyers as advocates, and enjoy an absolute privilege for their actions and statements in court subject to malice or acting outside the scope of their duties: *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130; this principle has also been applied to claims of intentional interference with economic relations, **conspiracy**, intentional infliction of emotional distress (*Peak Innovations Inc. v. Pacific Rim Brackets Ltd*., 2009 BCSC 1034), and **defamation**: *Munster v. Lamb*, (1883) 11 QBD 588 (UKCA), cited with approval in *Big Pond Communications 2000 Inc. v. Kennedy*, [2004] OJ No. 820 (SC).[106]

[258] In conclusion, presuming the pleadings are otherwise tenable and sustainable, given the specific pleadings here, each of the defendants would be precluded from relying upon section 81 of the *LPA* and available common law immunities as against the claims of malicious prosecution/public malfeasance, civil conspiracy and breach of section 15 of the *Charter of Rights*. The defendants can avail themselves of these immunities in relation to the claims of negligence and defamation.[107]

I - Why allowing the amendments would effect an abuse of process or violate other legal principles

[106] See also: *Dooley v. CN Weber Ltd.*, [1994] OJ No. 2328 (SC) at paragraph 13; *Hansra v. Joss*, 2021 BCSC 805.

[107] Presuming such is possible in relation to defamation, which has its own peculiar legal rules and requirements.

i) The defendants' "abuse of process" arguments[108]

[259] The defendants argue that the court should strike Mr. Howe's original pleadings, and not grant him leave to amend his pleadings, because to do otherwise would be to perpetuate an abuse of process by Mr. Howe as contemplated by the common law[109] and by CPR 88. They say this primarily because his pleadings are *res judicata* (subject to issue estoppel), and contrary to the rule against collateral attacks.[110]

[260] Justice Abella neatly summarized these various concepts in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52:[111]

> 22 **The question then arises: when two bodies share jurisdiction over human rights, what ought to guide the Tribunal under s. 27(1)(f) in deciding when to dismiss all or part of a complaint that has already been decided by the other tribunal?**
>
> 23 In *Matuszewski*, Pitfield J. explored the contours and concepts of this provision. In that case, the collective agreement had banned the accrual of seniority while an employee was on long-term disability. The union grieved, alleging that the provision was discriminatory. The arbitrator concluded that it was not. The union did not seek judicial review from the arbitrator's decision. One of the employees in the bargaining unit filed a complaint with the Human Rights Tribunal alleging that the same collective agreement provision was discriminatory. The Human Rights Tribunal refused to dismiss this fresh complaint.
>
> 24 On judicial review of the Tribunal's decision, Pitfield J. concluded that the Tribunal's refusal to dismiss the complaint was patently unreasonable. In his view, s. 27(1)(f) is the statutory mechanism through which the Tribunal can prevent conflicting decisions arising from the same issues. This flows from the concurrent jurisdiction exercised over the *Code* by the Tribunal and other tribunals. **While s. 27(1)(f) does not call for a strict application of the doctrines of issue estoppel, collateral attack, or abuse of process,**

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[108] When I collectively refer to the arguments made in relation to "abuse of process" strictly construed, *res judicata* (issue estoppel), and the rule against collateral attacks, as effecting an "abuse of process", I do so remaining mindful of their differences.

[109] See for example *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, wherein Justice Abella noted that "the common law doctrines [of issue estoppel, *res judicata*, and the rule against collateral attack] also find expression in the administrative law context …"

[110] As Justice LeBel noted in *Boucher v. Stelco Inc.*, 2005 SCC 64, at para. 33: *res judicata* has two branches: issue estoppel and cause of action estoppel. These were helpfully revisited by Justice Beveridge in *Kameka v. Williams*, 2009 NSCA 107, at paras. 12-21.

[111] See also Justice Jamieson's recent reasons in *Arnold v. O'Regan Halifax Limited*, 2022 NSSC 221.

the principles underlying all three of these doctrines are "factors of primary importance that must be taken into account when exercising discretion under s. 27(1)(f) of the *Human Rights Code* to proceed, or to refrain from proceeding, with the hearing of a complaint" (para. 31).

25 I agree with Pitfield J.'s conclusion that s. 27(1)(f) is the statutory reflection of the collective principles underlying those doctrines, doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness. They are vibrant principles in the civil law as well (*Civil Code of Québec*, S.Q. 1991, c. 64, art. 2848; *Boucher c. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279 (S.C.C.); *Dominion Ready Mix Inc. c. Rocois Construction Inc.*, [1990] 2 S.C.R. 440 (S.C.C.), at p. 448).

26 As a result, given that multiple tribunals frequently exercise concurrent jurisdiction over the same issues, it is not surprising that the common law doctrines also find expression in the administrative law context through statutory mechanisms such as s. 27(1)(f). **A brief review of these doctrines, therefore, can be of assistance in better assessing whether their underlying principles have been respected in this case.**

27 **The three preconditions of issue estoppel are whether the same question has been decided; whether the earlier decision was final; and whether the parties, or their privies, were the same in both proceedings** (*Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), at p. 254). These concepts were **most recently examined by this Court in *Danyluk*, where Binnie J. emphasized the importance of finality in litigation: "A litigant ... is only entitled to one bite at the cherry.... Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided" (para. 18).** Parties should be able to rely particularly on the conclusive nature of administrative decisions, he noted, since administrative regimes are designed to facilitate the expeditious resolution of disputes (para. 50). All of this is guided by the theory that "estoppel is a doctrine of public policy that is designed to advance the interests of justice" (para. 19).

28 **The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route**: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (S.C.C.), and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.).

29 **Both collateral attack and *res judicata* received this Court's attention in *Boucher*. The Ontario Superintendent of Pensions had ordered** and approved a partial wind-up report according to which **members of the plan employed in Quebec were not to receive early retirement benefits, due to the operation of Quebec law. The**

employees were notified, but chose not to contest the Superintendent's decision to approve the report. Instead, several of them started an action against their employer in the Quebec Superior Court claiming their entitlement to early retirement benefits. LeBel J. rejected the employees' claim. Administrative law, he noted, has review mechanisms in place for reducing error or injustice. Those are the mechanisms parties should use. **The decision to pursue a court action instead of judicial review resulted in "an impermissible collateral attack on the Superintendent's decision" (para. 35):**

> Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions.... [para. 35]

30 **In other words, the harm to the justice system lies not in challenging the correctness or fairness of a judicial or administrative decision in the proper forums, it comes from inappropriately circumventing them** (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 46).

31 **And finally, we come to the doctrine of abuse of process, which too has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings, as was explained by Arbour J. in *Toronto (City)*. The case involved a recreation instructor who was convicted of sexually assaulting a boy under his supervision and was fired after his conviction. He grieved the dismissal. The arbitrator decided that the conviction was admissible evidence but not binding on him.** As a result, he concluded that the instructor had been dismissed without cause.

32 **Arbour J. found that the arbitrator was wrong not to give full effect to the criminal conviction even though neither *res judicata* nor the rule against collateral attack strictly applied. Because the effect of the arbitrator's decision was to relitigate the conviction for sexual assault, the proceeding amounted to a "blatant abuse of process" (para. 56).**

33 **Even where *res judicata* is not strictly available, Arbour J. concluded, the doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as "judicial economy, consistency, finality and the integrity of the administration of justice" (para. 37).** She stressed the goals of avoiding inconsistency and wasting judicial and private resources:

> [Even] if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the

> credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [para. 51]

(See also *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316 (S.C.C.), at para. 106, *per* Charron J.)

34 At their heart, **the foregoing doctrines** exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). **Their common underlying principles can be summarized as follows:**

• It is in the interests of the public and the parties **that the finality of a decision can be relied on** (*Danyluk*, at para. 18; *Boucher*, at para. 35).

• Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).

• **The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature** (*Boucher*, at para. 35; *Danyluk*, at para. 74).

• **Parties should not circumvent the appropriate review mechanism by using other forums** to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).

• Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

35 These are the principles which underlie s. 27(1)(f). **Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.**

[My bolding added]

[261] The most relevant portions of *CPR* 88 are:

> 88.01 Scope of Rule 88 -Abuse of Process
>
> (1) These Rules do not diminish the inherent authority of a judge to control an abuse of the court’s processes.

(2) This Rule does not limit the varieties of conduct that may amount to an abuse or the remedies that may be provided in response to an abuse.

(3) This Rule provides procedure for controlling abuse.

88.02 **Remedies for abuse**

(1) **A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including** any of the following:

(a) **an order for dismissal or judgment**;

(b) **a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding**;

(c) a conditional stay of a proceeding, or of the prosecution of a claim in a proceeding;

(d) an order to indemnify each other party for losses resulting from the abuse;

(e) **an order striking or amending a pleading**;

(f) an order expunging an affidavit or other court document or requiring it to be sealed;

(g) an injunction preventing a party from taking a step in a proceeding, such as making a motion for a stated kind of order, without permission of a judge;

(h) any other injunction that tends to prevent further abuse.

(2) A person who wishes to make a motion under section 45B of the *Judicature Act* may do so by motion in an allegedly vexatious proceeding or a proceeding allegedly conducted in a vexatious manner, or by application if there is no such outstanding proceeding.

88.03 **Unsustainable pleading**

(1) **It is not an abuse of process to make a claim, or raise a defence or ground of contest, that may on the pleadings alone be unsustainable**, and such a claim, defence, or ground may be challenged under Rule 13 - Summary Judgment.

(2) A party or the prothonotary may make a motion to strike a pleading on the basis that it amounts to an abuse of process.

[262] Mr. Larkin and Ms. Rees argue that the original statement of claim filed August 31, 2020, effects an abuse of process, as would the proposed amended statement of claim.

[263] Mr. Larkin and Ms. Rees also argue that the one or more of the doctrines of *res judicata* (issue estoppel), and the rule against collateral attacks, operate against all claims made by Mr. Howe and consequently the court ought to strike his original pleadings *to that extent*, and *not* to grant leave to amend the pleadings to add the new causes of action.[112]

1 - Collateral attack

[264] Mr. Larkin in his brief argues:

> In *Danyluk v Ainsworth Technologies Inc.*, supra, Binnie, J. discussed collateral attacks as follows:
>
> > [20] ….. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: …
>
> The rule against collateral attacks was described by Moldaver, J. in *R v Bird*, 2019 SCC 7 as follows:
>
> > [1] The general rule against collateral attacks on court orders is well-established: with limited exceptions, an order issued by a court must be obeyed unless it is set aside in a proceeding taken for that purpose…
>
> In *Freeman v APEGA (Association of Professional Engineers and Geoscientists of Alberta)* 2021 ABQB 556 (aff'd 2021 ABQB 682), the plaintiff was a previous member of the Association of Professional Engineers and Geoscientists of Alberta ("the Association") and an employee of Canadian Natural Resources Limited ("CNRL"). The plaintiff claimed he was dismissed from employment with CNRL for being a "whistleblower" about practices he alleged were improper. The plaintiff entered into an agreement with CNRL to settle his claims against that organization, but subsequently alleged the agreement was coerced.
>
> …

[112] To the extent that Mr. Howe may suggest the "parties" in the Society's proceedings, and his civil suit are different, I would disagree. I find Ms. Rees and Mr. Larkin to be privies of the Society as contemplated by the jurisprudence – e.g. see Justice Beveridge's reasons in *Kameka v. Williams*, 2009 NSCA 107, paras. 67-70.

> The Association argued the plaintiff's claim against it was an abuse of process that was hopeless, outside the Court's jurisdiction and a collateral attack and/or duplicative proceeding. Rooke, A.C.J. concluded the Statement of Claim against the Association exhibited characteristics of abusive litigation and should be subject to a show cause document-based review (a tool used by the Court to determine if a proceeding is unmeritorious, has no prospect of success, or is otherwise abusive and vexatious). **With respect to collateral attacks, His Lordship stated:**
>
> > [17] **A collateral attack is a litigation step or proceeding, that challenges directly or indirectly, a prior court decision or result**. **Collateral attacks are generally prohibited and an abuse of process**: *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 28. Collateral attacks subvert "the orderly and functional administration of justice": *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 871, 120 DLR (4th) 12. **Any action or application that is identified as a collateral attack should be terminated, immediately**: *Alberta v Pocklington Foods Inc*, 1995 ABCA 111 at para 14.
> >
> > [18] **Examples of prohibited collateral attacks include:**
> >
> > 1. **bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction,**
> >
> > 2. using previously raised grounds and issues improperly in a subsequent proceeding,
> >
> > 3**. conducting a proceeding to circumvent the effect of a court order, and conducting multiple proceedings with the same litigation objective.**
>
> His Lordship subsequently undertook a document-based review and concluded that the Statement of Claim was a "hopeless proceeding" since the Association was immune to the lawsuit on the basis of the statutory immunity found in section 82(1) of the *Engineering and Geoscience Professions Act*. His Lordship also concluded that the proceeding was a collateral attack on Freeman's "previous and now dismissed" actions.

[265] Mr. Larkin characterizes Mr. Howe's civil suit as him arguing that his suspension from practice, not his disbarment *per se*, is the wrong that he is alleging. Although Mr. Howe did not request a reconsideration, or appeal the suspension decision, per section 37 *LPA*, he had these options available. These specifically provided a means to challenge his suspension. Not having invoked those options, Mr. Larkin says, he is now seeking to collaterally challenge those same decisions by civil suit. Mr. Larkin cites as an example, the following case in support: *Skrypichayko v. Law Society of Alberta*, 2020 ABQB 461, where a disbarred lawyer sued the Law Society and others while his disbarment decision was under appeal.

[266] In his brief Mr. Larkin argues, at paras. 131-134:

> In finding that the civil proceeding was a collateral attack on the Law Society decision Rooke, A.C.J., made several comments which are relevant to the present motion. His Lordship stated:
>
> > [60] **There is a general issue that underlays both of Mr. Skrypichayko's lawsuits. Both are built around a central point: the LSA Decision was wrong.** Counsel for the LSA advises that Mr. Skrypichayko has appealed the LSA Decision, pursuant to the LPA, and that appeal is ongoing.
> >
> > …
> >
> > [64] Where there is a right to appeal a decision of an administrative body then that means there is potentially a mechanism to challenge an administrative order: *Bird* at paras 32, 47-49.
> >
> > [65] The LPA appears to provide a mechanism of appeal from the LSA Decision. Though **the 1st and 2nd Actions** do not seek to re-instate Mr. Skrypichayko as a lawyer, they nevertheless **appear to be based on the same underlying question: should Mr. Skrypichayko be disbarred?** This is precisely the question that will be before the body that hears Mr. Skrypichayko's appeal, pursuant to the LPA.
> >
> > [66] There are also duplicate elements in the details of what was argued during the LSA disciplinary process, and in the 1st and 2nd Actions. …
> >
> > [67] This is the first apparent and general issue with both the 1st and 2nd Actions. **Mr. Skrypichayko has already pursued the questions of the correctness and fairness of the LSA Decision by means of the ongoing appeal. The 1st and 2nd Actions appear to be an attempt to re-open issues determined by the LSA Decision, which are currently on appeal, and seek relief on bases and questions which are incompatible with the LSA Decision**: *Unrau v National Dental Examining Board*, 2019 ABQB 283 at paras 613-614 (*Unrau* # 2).
> >
> > [68] **The 1st and 2nd Actions therefore appear to be collateral attacks on the LSA Decision, and, if so, are an abuse of court processes**: *Unrau* # 2 at paras 616-617.

In ***Ouellette v Law Society of Alberta*, 2019 ABQB 492**, a disbarred lawyer sought *inter alia* reinstatement and damages in civil proceedings by alleging in civil court that the Law Society of Alberta process and decision were void. Her Ladyship stated:

…

> [73] **If disbarred lawyers, such as Mr. Ouellette were allowed to go outside of the appeal process prescribed by the Act before exhausting that process and instead**

> **were allowed to sue for damages in this Court on the bald faced assertion that there was fraud, malice, or bad faith amounting to an "intention to convict", that would mean the Court would be condoning a possible collateral attack should a trial judge reach a different conclusion from that of the LSA Hearing Committee (which in this case disbarred Mr. Ouellette). As pointed out by Master Robertson at paras 81 and 82, that collateral attack is an abuse of process and to allow Mr. Ouellette's Claim to go forward could lead to a different conclusion by the trial judge to that of the Hearing Committee.** As stated above, the inconsistency itself would undermine the credibility of the process, thereby diminishing its authority, its credibility, and its aim of finality. Mr. Ouellette failed to appeal the 2016 decision leading to his disbarment, which means that his disbarment remains valid. That being the case, even if damages were available (which I have determined they are not), **for Mr. Ouellette's Claim for damages to succeed, it must certainly involve a determination that his disbarment was improper. Clearly, in this case the appeal process under the Act is the proper route to make that determination; not through litigation in this Court.**

In ***Broda v Alberta*** **2020 ABQB 221**, a disbarred lawyer brought an action against the Law Society of Alberta for, *inter alia*, reinstatement and damages. The lawyer was disbarred by the Hearing Committee in 2010. The Hearing Committee's decision was upheld by the Benchers' Appeal Panel and the Alberta Court of Appeal. Broda also commenced, but failed to pursue, an application for judicial review of the Benchers' Appeal Panel's decision. **Master Summers concluded the claim ought to be set aside as an abuse of process. In so doing, he discussed the rule against collateral attacks. He stated:**

> [9] **The Supreme Court of Canada discussed the legal doctrine "abuse of process" in the case of *British Columbia (Workers' Compensation Board) v Figliola, 2011 SCC 52*. In that case the court considered common law principles of finality in litigation (issue estoppel, collateral attack and abuse of process) as the principles underlying these three doctrines had to be considered by an adjudicator when exercising discretion under a piece of British Columbia provincial legislation.**
>
> [10] **Instructive comments on these doctrines of finality in litigation are found at paragraphs 27-34 of the majority decision, as follows:**
>
> **…**
>
> [28] **The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route**: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629.
>
> [29] **Both collateral attack and *res judicata* received this Court's attention in *Boucher*.** The Ontario Superintendent of Pensions had ordered and approved a partial

> wind-up report according to which members of the plan employed in Quebec were not to receive early retirement benefits, due to the operation of Quebec law. The employees were notified but chose not to contest the Superintendent's decision to approve the report. Instead, several of them started an action against their employer in the Quebec Superior Court claiming their entitlement to early retirement benefits. **LeBel J. rejected the employees' claim. Administrative law, he noted, has review mechanisms in place for reducing error or injustice. Those are the mechanisms parties should use. The decision to pursue a court action instead of judicial review resulted in "an impermissible collateral attack on the Superintendent's decision":**

Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions. ...

[30] In other words, the harm to the justice system lies not in challenging the correctness or fairness of a judicial or administrative decision in the proper forums, it comes from inappropriately circumventing them (*Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 46).

Master Summers concluded the proceeding was a collateral attack on the disciplinary process, which he referred to as the "Conduct Litigation". He stated:

> **It is an attempt to "use an institutional detour to attack the validity of an order by seeking a different result from a different forum".** It is a duplicative proceeding. It would either result in a duplicate result and hence a waste of judicial resources and unnecessary expense to the parties; or if the result in this proceeding were different, the inconsistency would undermine the entire judicial process.

[My bolding added throughout]

[267] In summary, Mr. Larkin makes the following points:

1. Mr. Howe could have requested a reconsideration of his suspension effected on or about September 1, 2016, **or** appeal to the Court of Appeal (albeit limited to a question of law) – but he did neither;
2. Mr. Howe fully participated in his suspension **and** misconduct hearings that led to his disbarment (2017 NSBS 3 and 2017 NSBS 4). He appealed to the Nova Scotia Court of Appeal "from both the decision to disbar him and the sanction imposed"- 2019 NSCA 81, at para. 5; and his appeal was dismissed.

[268] Mr. Larkin argues that, instead of claiming malicious prosecution and misfeasance in public office against Mr. Larkin, the appropriate forum for Mr. Howe to challenge the events and outcome of the September 1, 2016, CIC hearing, including the representations made by Mr. Larkin, was pursuant to section 37 of the *LPA*. This is because "Mr. Howe's action against Mr. Larkin in malicious prosecution is based on the [same] underlying question of whether the September 1, 2016 CIC hearing, its outcome and Mr. Larkin's participation in it, were proper".

[269] Mr. Howe did not avail himself of the processes provided for in section 37(4), which permits him to request a meeting with the Complaints Investigation Committee after receipt of their decision on his interim suspension - and in response to which the CIC "shall… confirm, vary or terminate the suspension, restrictions or conditions imposed…"; **or** section 37(7), which permits him to appeal to the Nova Scotia Court of Appeal on any question of law from a decision of the Complaints Investigation Committee.

[270] Mr. Larkin argues that the pleadings are a collateral attack on the events at, and the outcome of, the September 1, 2016, CIC hearing, and therefore constitute an abuse of process.

[271] The Society also relies on the rule against collateral attack specifically in relation to Mr. Howe's claim of racial discrimination and breach of section 15 of the *Charter of Rights and Freedoms*. In their brief, they point out:[113]

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[113] I accept that, before concluding that a proceeding is an abuse of process, a court should be firmly so satisfied; and that in appropriate cases, a court could conclude the abuse is apparent on the face of the pleading (even without a specific procedural Rule that permits this): see for example, *Khan v. Law Society of Ontario*, 2020 ONCA 320, and 2021 ONSC 6019; and *Scaduto v. The Law Society of Upper Canada*, 2015 ONCA 733, where the court stated: "**7** Rule 2.1 is a relatively new rule that came into force on July 1, 2014. The motion judge has decided a number of cases which have helped to delineate both the procedure and the test to be applied under the rule: … **8** Under this line of authority, the court has recognized that the rule should be interpreted and applied robustly so that a motion judge can effectively exercise his or her gatekeeping function to weed out litigation that is clearly frivolous, vexatious, or an abuse of process. **However, the use of the rule should be limited to the clearest of cases where the abusive nature of the proceeding is apparent on the face of the pleading and there is a basis in the pleadings to support the resort to the attenuated process**. **9** We fully endorse that case law and the guidance that has been provided by the motion judge in the interpretation and operation of r. 2.1. This approach is summarized in *Raji*, at paras. 8-9, as follows:'[R]ule 2.1 is not for close calls. Its availability is predicated on the abusive nature of the proceeding being apparent on the face of the pleadings themselves. No evidence is submitted on the motion.... [T]here are two conditions generally required for rule 2.1 to be applied. **First, the frivolous, vexatious, or abusive nature of the proceeding should be apparent on the face of the pleading** as required by the rule. Second, there should generally be a basis in the pleadings to support the resort to the attenuated process of rule 2.1.... This second requirement is not in the rule and is not a fixed requirement. It strikes me as a **guideline that reminds the court**

> … Mr. Howe stated in his February 18, 2021, Answer to Demand for Particulars that 'he continues to challenge through the Nova Scotia Human Rights Commission' the charges for which he was convicted and disbarred and which he unsuccessfully appealed to the Nova Scotia Court of Appeal… Mr. Howe is forum shopping by his own admission… [In relation to Mr. Howe's reliance on section 15 of the Charter]… breaches must be articulated so that the defendants can understand the action against them. This is particularly important as again, prior decisions have addressed Mr. Howe's allegations of breaches of section 15 (1) of the Charter at length and dismissed those allegations, or fully and finally addressed and remedied those issues (*Howe v Nova Scotia Barristers Society*, 2019 NSCA 81… at paras. 69 – 110; *Nova Scotia Barristers Society v Lyle Howe*, 2017 NSBS 3, at paras. 15-87). Therefore, insofar as Mr. Howe is attempting to re-litigate those issues, [the Society] would again object on the basis of estoppel and abuse of process.

[272] Mr. Howe's civil pleadings (i.e. malicious prosecution, malfeasance in public office, civil conspiracy, and breach of section 15 of the *Charter*) are fundamentally built upon his claims of individual and systemic racism.

[273] By his civil suit against these parties, is Mr. Howe attempting to re-litigate the core issues already addressed by other legal processes? He is.

[274] It is useful to review Mr. Howe's legal arguments before the Misconduct Hearing Panel, and their responses.

A - The decision of the Misconduct Hearing Panel[114]

[275] According to the Decision of the Hearing Panel regarding the alleged misconduct of Mr. Howe [2017 NSBS 3]:

> 6 … The following were important facts of this hearing:
>
> …
>
> **e)** This hearing involved the Society seeking formal discipline against a member of the African Nova Scotian community. In this case, Mr. Howe contended this impacted the case in a variety of ways. The position of the panel on this point was summed up in our

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that there are other rules available for the same subject matter and that resort to the attenuated process in rule 2.1 should be justified in each case.' … We also recognize that the case law will develop as the rule becomes more widely utilized." [My bolding added]

[114] I appreciate that Mr. Howe argues that he is not attacking his disbarment (Misconduct) decision directly, but that he is directly attacking the September 1, 2016, suspension decision, on which he bases his civil suit. For purposes of the motions before me, I consider the circumstances of both.

decision… 2016 NSBS 4. That decision dealt with Mr. Howe's attempts to subpoena witnesses on issues that not directly related to the charges. The panel stated:

> '**The panel is well aware the case before us offers issues that are not directly related to the facts necessary to prove the charges in a narrow sense: Mr. Howe has raised additional issues related to racial bias, differential treatment, and discrimination and how the matters were reported, investigated and decided upon by the Society.**
>
> …
>
> **The panel accepts the existence of systemic racism in our province. This results in a system that they cause discriminatory treatment of persons from a minority group. It therefore makes good sense to allow Mr. Howe to explore this area. We must allow for the possibility of racial bias playing a role in this hearing. It is necessary for a full consideration of the matter.** We must also remember that such evidence is not always plain or obvious. People do not usually admit such biases. Sometimes people do not recognize their biases. Thus, **we must be prepared to allow a broad examination of the question, which means comprehensive inquiries and possibly additional witnesses.**'

f) Simply put, the Panel found that Mr. Howe must have the opportunity to show whether bias and discrimination impacted him. In our view, it would have been wrong to simply assume that if no evidence of discrimination was evident from evidence directly relevant to the charges that discrimination did not play a role in the matter. **For these reasons, Mr. Howe was given the ability to call evidence, asked questions, and make arguments on these areas. While it is true that this added to the length of the hearing, the panel is of the view that it was a critical part of this hearing and necessary.**

[My bolding added]

[276] With respect to the *Charter* application, the Panel said the following:

> 16 **Since the outset of these proceedings, Mr. Howe has been clear about his view that the Society's oversight, investigation, and prosecution of him has been either motivated by, or poisoned by, racist thinking…** He has also suggested that criminal justice institutions and actors have also objected to him not falling into line with professional (but inherently racist) norms in relation to fee rates and methods of practice.
>
> 17 Mr. Howe also says that in his ongoing dealings with the Society, the Society has failed to give due account to the inherent challenges of his background and has therefore failed to support his membership in the profession. The professional challenges identified by Mr. Howe include his status as a member of a racialized community, as well as his "north end Halifax" cultural location.

…

19 Mr. Howe has also been consistent in his objections to us as a panel, since at least September 2015, for our lack of visible racial diversity.

…

The *Charter* motion

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 [Public Prosecution Service of Nova Scotia] 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 in 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;

…

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";**

…

23 **The remedies sought by Mr. Howe for the alleged discrimination** against him are through section 15 of the Canadian Charter of Rights and Freedoms. **If we find there is a breach**… Mr. Howe asked that we use section 24 of the Charter to exclude all of the evidence that we have heard since December 2015. As he put it, **we should exclude:**

> **… All of the Society's evidence as it was obtained based on racial profiling, discrimination and a biased investigation in a culturally hostile context**. Relying on evidence obtained through discriminatory decision-making and actions undermines the public interest and the integrity of self-governing professions…

24 **Somewhat as an alternative argument, short of an exclusion of specific evidence,** Mr. Howe argues that we should discredit or devalue the evidence heard in this hearing which we deem racially motivated, or infected, or clouded, by racist perceptions.

25 **Mr. Howe's argument really is that the totality of the Society's behaviour towards him, beginning with his admission to the Bar in 2010 and running through to April 2017 when new charges of professional misconduct were recommended against him by the Society's Complaints Investigation Committee, has discriminated against him on the basis of race, ethnic cultural location, colour** and, as we will discuss below, 'criminality'."

[My bolding added]

[277] The Hearing Panel commented on these arguments (the alleged scope of the s. 15 *Charter* discriminatory behaviour alleged is set out at paragraphs 35 – 37) by Mr. Howe as follows:

> 42 **So, the question is this**. Have individual members of the dominant group, or social institutions, **imposed burdens or expectations on Mr. Howe which are different than the burdens or expectations imposed on lawyers with different racial or ethnic backgrounds? If so, the evidence of discrimination is real**. If any such discrimination is relevant to our process, it would demand that we provide a remedy.
>
> …
>
> *Finding on Discriminatory Impact*
>
> 71 In responding to this situation, the evidence tells us that the Society accepted the necessity of addressing the racial, cultural, and ethnic issues that were inherent to Mr. Howe's personal life experience. The section 15 Charter question is whether, by including race, colour, and cultural considerations in its decisions about Mr. Howe, the Society caused some discriminatory impact to him. That detrimental impact might manifest as a failure to accommodate, or it might manifest itself as a differential, negative treatment.
>
> 72 We do not believe that there was any failure by the Society to accommodate Mr. Howe's racial, colour, or ethnic background. …
>
> *Conclusion on the [s. 15] Charter issue*

85 We have concluded, after much thought, that Mr. Howe, Mr. Robert Wright, and the Society (both through its actors and institutionally) accept that race, colour and ethnicity are factors in relation to how and why Mr. Howe practices the way he does. For Mr. Howe, the historic context of his race, colour, and ethnic background provides him with a baseline against which to daily measure his personal psychic and economic achievement.

86 **For the Society, Mr. Howe's choices about how he pursues his economic and psychic success have too often been made at too much cost to other professional practice values**. …

87 **But Mr. Howe's race, colour and ethnic status does not and cannot insulate him from having to answer as to whether his professional behaviour met the ethical requirements of the *Handbook* and the *Code*. We are not prepared to find that Mr. Howe has proven a material violation of section 15 of the Charter in relation to the investigation or prosecution of these complaints**. He has therefore not proven any entitlement to a remedy pursuant to section 24 of the Charter."[115]

[My bolding added]

B - What the Court of Appeal decided in relation to the Hearing Panel decisions [2019 NSCA 81]

[278] On behalf of the five sitting Justices who were unanimous, Justice Farrar set out the circumstances preceding Mr. Howe's appearance in the Court of Appeal:

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.

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[115] The issues of individual and systemic racism were also considered by the Hearing Panel in its Sanction Decision - 2017 NSBS 4 - at paragraphs 61-64.

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.

[My bolding added]

[279] Justice Farrar next set out Mr. Howe's grounds of appeal:[116]

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 [Donald] Murray [QC];

[116] I am satisfied that very extensive quotations from the Court of Appeal decision are necessary.

(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 (S.C.C.);

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 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.
> [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.**

…

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.

…

Conclusions on this Ground of Appeal

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.**
>
> [My bolding added]

[280] Mr. Howe says the civil proceeding is distinguishable from the Bar Society proceedings (and consequently the Court of Appeal's decision) because, among other things:

1. Section 37 of the *LPA* provides different and more limited remedies arising from the Sept. 1 2016, suspension from practice hearing – i.e. reconsideration of the interim suspension and an appeal on a question of law to the Court of Appeal;
2. More information became available to Mr. Howe as time went on after September 1, 2016, (e.g. Ms. Rees' later employment with the law firm Pink Larkin; a greater understanding of the involvement of Mr. Larkin and Ms. Rees in the proceedings which led to his interim suspension and disbarment; a greater understanding of the nature of the systemic and individual racism prevalent in the Bar Society, which it acknowledged openly on April 14, 2021; the relevance of the later withdrawal of the interim suspension based charges, in July 2020);
3. I understood him also to argue that his civil suit will bring to light discrimination prevalent in the Bar Society, that is not only in his interest, but also in the public interest.

[281] I am not persuaded by these or any other of Mr. Howe's arguments.

[282] He has had his day in court in relation to the core allegations that underlie and run through the administrative proceedings herein as well as in his existing and proposed civil suit – namely, that individual and systemic racism were at the root of how he has been treated by the Nova Scotia Barristers' Society, and specifically its agents Ms. Rees and Mr. Larkin, which ultimately led to his disbarment.

[283] Though Mr. Howe argues his civil suit is focussed on his interim suspension on or about September 1, 2016, not his disbarment, the former is indivisible from the later for present purposes. They are the same proceeding – one is an interlocutory step; the other is a final step.

[284] With the exception of the causes of action in defamation and negligence, to permit his civil suit to proceed would be to allow a collateral attack upon the decisions of the Misconduct Hearing Panel, the Sanction Panel, and the Nova Scotia Court of Appeal.

[285] On this basis, his civil suit (as originally drafted or as proposed to be amended) would effect an abuse of process.

[286] The proper remedy for this abuse of process is to dismiss his civil suit, except to the extent that the alleged defamation and negligent investigation claims are concerned, and to the extent that they are *not* based upon alleged racist beliefs/racial discrimination.[117]

2 - Other bases for concluding there is an abuse of process

[287] Mr. Howe's civil suit also offends the common law principles distilled and referred to as *res judicata* (issue estoppel) which were described by Justice Warner in *Layes v. Layes*, 2021 NSSC 176, affirmed by the reasons of Chief Justice Wood, 2022 NSCA 48:

> *The Law*
>
> **45** The Supreme Court of Canada in *Toronto v. CUPE* wrote:
>
> > 52 ... from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example:
> >
> > > (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.
> >
> > 53 **The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the**

[117] I say this having given consideration to residual discretionary concerns of fairness and such – e.g. see *Kaiser v. Dural*, 2003 NSCA 122, per Hamilton, J.A. and Justice Warner's summary at paras. 45-47 in *Layes v. Layes*, 2021 NSSC 176, affirmed 2022 NSCA 48.

doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

46 In addition, this Court incorporates the thorough analysis of the principle, and application of the principle of abuse of process by litigation, contained in Donald J. Lange's text at chapters 4 and 5.

47 Among the fundamental points Lange makes are:

1. **The doctrine bars a second proceeding or determination of the same issue in a second proceeding where the integrity of the judicial decision-making process in the first proceeding would be undermined (Lange, p. 187).**

2. **The abuse of process doctrine is an extraordinary remedy that is applied sparingly, only in the clearest of cases (Lange, p. 188).**

3. Rarely has the abuse doctrine been invoked alone, in and of itself, to preclude relitigation (Lange, pp. 191-192).

4. **The discretionary factors considered in the application of the doctrine of issue estoppel apply to the abuse of process doctrine (Lange, p. 190).**

5. Showing that the real purpose of the abuse doctrine is to do justice and not to be an instrument for injustice, Lange notes that in *Danyluk v. Ainsworth Technologies Inc.*,2001 SCC 44 (“, the Court exercised discretion not to invoke issue estoppel even when the technical requirements of issue estoppel had been met, while in *Toronto v. CUPE*, the Court exercised discretion to apply the abuse doctrine to preclude relitigation when none of the technical requirements of issue estoppel or collateral attack had been established (Lange, p. 196).

6. **Relitigation alone is not a sufficient basis to find an abuse of process** (Lange, pp. 200-201). In support, he cites several decisions including Fraser v. Westminer Canada Ltd., 2001 NSSC 176.

   [My bolding added]

[288] I bear in mind the regulatory context here - that of the legal profession. Mr. Larkin and the Society have referenced cases of "abuse of process"/relitigation specifically arising in that context (e.g.: *Skrypichayko v. Law Society of Alberta*, 2020 ABQB 461; *Ouellette v. Law Society of Alberta*, 2019 ABQB 492; *Broda v. Law Society of Alberta*, 2020 ABQB 221).

[289] Issue estoppel has been described by Justice Cromwell (as he then was), in *Wright v Nova Scotia Public Service Long-Term Disability Plan Trust Fund*, 2006 NSCA 101:

> 36 **The principle of issue estoppel bars a subsequent claim if the same issue has been finally decided in a prior judicial proceeding between the same parties. There is a discretion, however, to relax this rule to prevent injustice.**
>
> 37 The judge found that the requirements of issue estoppel had not been met in this case and that, even if they were, he would disallow the defence as a matter of discretion. The appellant challenges both of these conclusions. I will address each in turn, but it will be helpful first to set out a brief summary of the applicable legal principles.
>
> *1. Issue estoppel: general principles*
>
> 38 The general principle is that once a dispute has been judged with finality, it is not subject to relitigation. **Thus, prior adjudication bars the reassertion of the same claim (estoppel *per rem judicatum*) or the relitigation of any of the "...constituent issues or material facts necessarily embraced therein..." (issue estoppel)**: *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 (S.C.C.) at para. 20. The present case is concerned with whether a prior tribunal decision (the medical appeal board), not a court decision, bars Mr. Wright's action. The discussion which follows relates to that sort of claim of issue estoppel.
>
> 39 **A claim**, such as the appellant's, **that issue estoppel bars the court's determination of an issue must be considered in two steps. At the first, the appellant must establish all three of the requirements of a plea of issue estoppel: that the same question was decided between the same parties in a previous, final judicial decision: see *Danyluk* at para. 25. A decision is "judicial" if it is made by a tribunal capable of exercising adjudicative authority which is required to and did act in a judicial**

> **manner within its jurisdiction**: *Danyluk* at para. 35. If all of these requirements are established, **the court must go on to the second step and decide whether, as a matter of discretion, it should disallow the plea of issue estoppel**: *Danyluk* at para. 33.
>
> [My bolding added]

[290] Regarding whether the "same parties" participated in the *Legal Profession Act* disciplinary proceedings and consequent appeal, as are implicated in Mr. Howe's civil suit, I make the following observations.

[291] In the disciplinary proceedings, the nominal parties were Mr. Howe and the Society. In the civil suit the nominal parties are Mr. Howe and the defendants: the Society, Mr. Larkin and Ms. Rees.

[292] In the disciplinary proceedings, Ms. Rees and Mr. Larkin were implicated because of the status they had under the LPA, namely as agents of the Society, and while they are additionally nominal parties in the civil suit, the significant question of discrimination expressly alleged by Mr. Howe in both contexts against each of them individually (*with the possible exception of the defamation and negligence causes of action*), had been decided by the Misconduct Panel, which afforded a wholesale opportunity for him to present evidence and argue the issue comprehensively.

[293] Therefore, the fact that Mr. Larkin and Ms. Rees were not nominal parties to the disciplinary proceedings is of no material effect, as I have earlier concluded in relation to the rule against collateral attack. The relevant decision was his disbarment – it was final (and he unsuccessfully appealed it). Moreover, there is no articulable basis for exercising a residual discretion to not allow the defendants to rely on issue estoppel in the circumstances.

[294] Mr. Howe's core complaint is that he was singled out for investigation, and prosecution, substantially because of racial prejudice, discrimination, and racist beliefs.

[295] Furthermore, in his Answer to Demand for Particulars of the Society filed March 3, 2021, at para. 2(d)(i), Mr. Howe stated:

> **With respect to the charges referenced in paragraphs 9, 16 and 17 of the statement of claim, the plaintiff was convicted and disbarred based on disciplinary matters, which he continues to challenge through the Nova Scotia Human Rights Commission. …**

[296] This was said in respect of the malicious prosecution claim - but see also his statement under paragraph 2(a) that: "the claim also relates to Mr. Larkin's actions and misleading defamatory statements regarding Aubrey Seymour… These statements were false."

[297] Similarly see his Answer to Demand for Particulars of Ms. Rees and Mr. Larkin filed February 18, 2021, at paragraph 4 (regarding malicious prosecution) where he stated: "the actions of Ms. Rees that constituted malicious prosecution include Ms. Rees acting as the operating mind of the [Society], overseeing and investigating proceedings while being driven by racial stereotypes and prejudice as well as improper motives and/or while acting in a conflict of interest… conducted overbroad hypervigilant and discriminatory investigations… malicious acts were an aggregate of actions and a corresponding discriminatory attitude that manifested over these dates… The outcome of the proceedings are as follows: 4(c)(i) **with respect to the charges referenced in paragraphs 9, 16 and 17 of the statement of claim, the plaintiff was convicted and disbarred based on disciplinary matters, which he continues to challenge through the Nova Scotia Human Rights Commission**."

[298] Mr. Howe's Answers in February and March 2021 support the defendants' position that with his civil suit, Mr. Howe is forum shopping, in an attempt to re-litigate the core allegations he made against the defendants in his disciplinary proceedings.

[299] I am satisfied that there is no persuasive basis to conclude that the civil suit (except for the defamation and negligence causes of action) has supervening and distinct issues that have not been adequately and fairly addressed in the disciplinary proceedings, and the consequent appeal.

[300] In addition, I am satisfied that no material residual issues have been left unaddressed thereby (for example, any fresh new evidence previously unavailable that could impeach the outcome of the disciplinary proceedings), and that there are no fairness concerns that should prevent the disciplinary proceedings results from effectively being binding, and justifiably precluding Mr. Howe's civil suit.[118]

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[118] I bear in mind Justice Moldaver's words in *Groia v. Law Society of Upper Canada*, 2018 SCC 27, at paragraphs 50-52, regarding lawyers and law society disciplinary tribunals: "… law society tribunals have significant expertise regulating the legal profession … disciplinary panels are composed, in part, of other lawyers … [per Cory J in *Stevens*] "Probably no one could approach a complaint against a lawyer with more understanding …"]

[301] With the exception of the defamation and negligence causes of action, precluding Mr. Howe's civil suit from proceeding because it effects an abuse of process would serve to enhance the integrity of the justice system, whereas letting it proceed would undermine the integrity of the justice system.

Overall Conclusion

[302] I deny Mr. Howe's motion for leave to amend his existing pleadings. I grant Mr. Larkin's motion for summary judgment on the pleadings, *and* declare all the causes of action Mr. Howe claims in his original and proposed pleadings (except negligence and defamation) to constitute an abuse of process, as they violate legal doctrines such as *res judicata* (issue estoppel) and the rule against collateral attacks.

[303] The upshot of my conclusions is that I dismiss Mr. Howe's original and proposed civil suits against each of the defendants.

[304] If they cannot agree, I will receive written costs submissions (maximum 10 pages) from the defendants 30 days after release of this decision; and from Mr. Howe, a further 30 days thereafter.

Rosinski, J.

APPENDIX A

Form4.02A Hfx No. 500125

SUPREME COURT OF NOVA SCOTIA

Between:

LYLE HOWE

Plaintiff

and

VICTORIA REES, RAYMOND LARKIN, NOVA SCOTIA BARRISTERS' SOCIETY

Defendant(s)

Amended Notice of Action

To: Victoria Rees
1463 South Park Street
Halifax, NS B3J 3S9

Raymond Larkin
1463 South Park Street
Halifax, NS B3J 3S9

Nova Scotia Barristers'
Society800-2000
Barrington Street
Halifax, NS B3J 3Kl

Action has been started against you

The plaintiff takes action against you.

The plaintiff started the action by filing this notice with the court on the date certified by the prothonotary.

The plaintiff claims the relief described in the attached statement of claim. The claim is basedon the grounds stated in the statement of claim.

Deadline for defending the action

To defend the action, you or your counsel must file a notice of defence with the court no more than the following number of days after the day this notice of action is delivered to you:

- 15 days if delivery is made in Nova Scotia

- 30 days if delivery is made elsewhere in Canada
- 45 days if delivery is made anywhere else.

Judgment against you if you do not defend

The court may grant an order for the relief claimed without further notice, unless you file the notice of defence before the deadline.

You may demand notice of steps in the action

If you do not have a defence to the claim or you do not choose to defend it you may, if you wish to have further notice, file a demand for notice.

If you file a demand for notice, the plaintiff must notify you before obtaining an order for the relief claimed and, unless the court orders otherwise, you will be entitled to notice of each other step in the action.

Rule 57 - Action for Damages Under $150,000 Civil Procedure Rule 57 limits pretrial and trial procedures in a defended action so it will be more economical. The Rule applies if the plaintiff states the action is within the Rule. Otherwise, the Rule does not apply, except as a possible basis for costs against the plaintiff.

This action is not within Rule 57.

Filing and delivering documents

Any documents you file with the court must be filed at the office of the prothonotary located at1815 Upper Water Street, Halifax, NS B3J 1S7 (telephone # 902-424-4900).

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact information

The plaintiff designates the following address:

c/o Laura McCarthy
608-1888 Brunswick Street
Halifax, NS B3J 3J8

Documents delivered to this address are considered received by the plaintiff on

delivery. Further contact information is available from the prothonotary.

Proposed place of trial

The plaintiff proposes that, if you defend this action, the trial will be held in Halifax (except Family Division), Nova Scotia.

Signature

Signed ~~August , 2020~~ November 2021.

_____

Signature of the Plaintiff, Lyle Howe

Prothonotary's certificate

I certify that this notice of action, including the attached statement of claim, was filed with the court on .

_____

Prothonotary

Form 4.03B

<u>Amended</u> Statement of Claim

1 This statement is made by the Plaintiff, Mr. Lyle Howe of Halifax, Nova Scotia.

2 The first defendant is the Nova Scotia Barristers' Society. The Plaintiff claims the defendant was negligent in their investigation and actions taken against the Plaintiff. The Plaintiff claims ~~claims~~ negligence, defamation in both slander and liable, civil conspiracy, public malfeasance and such other claims that become apparent through the course of this action. The Plaintiff further claims the Nova Scotia Barristers' Society is vicariously liable for the actions of Victoria Rees and Raymond Larkin.

3 The second Defendant is Victoria Rees. The Plaintiff claims negligence, defamation in both slander and liable, malicious prosecution, civil conspiracy, public malfeasance and such other claims that become apparent through the course of this action.

4 The third Defendant is Raymond Larkin. The Plaintiff claims ~~negligence, defamation in both slander and liable~~, malicious prosecution, civil conspiracy, public malfeasance and such otherclaims that become apparent through the course of this action.

5 The Plaintiff pleads that Defendants the Nova Scotia Barristers' Society, Victoria Rees and Raymond Larkin were negligent in their investigation of the Plaintiff, malicious in their prosecution of the Plaintiff and through the course of their investigation and prosecution, defamed the Plaintiff in both slander and liable, as well as such other claims that become apparent through the course of this action.

6 The Plaintiff pleads that Defendants the Nova Scotia Barristers' Society, Victoria Rees and Raymond Larkin maliciously prosecuted the Plaintiff by their motives and conduct in making an ex- parte application to have the Plaintiffs ability to practice law suspended and in the dishonest manner in which they conducted the hearing.

7 The Plaintiff pleads that Defendants the Nova Scotia Barristers' Society and VictoriaRees ~~and Raymond~~ ~~Larkin~~ defamed the Plaintiff by way of slander

and liable.

FACTS

8 Mr. Howe was a Halifax lawyer that practiced principally criminal law.

9 There was a number of investigations of the Plaintiff's legal practice spanning 2011 through to 2016 by the Nova Scotia Barristers' Society.

10 Victoria Rees was the Director of Professional Responsibility for all of the time period spanning the investigations of the Plaintiff's legal practice and prosecution regarding the same. Victoria Rees was central to the investigation of the Plaintiff such that she had a gate-keeping role for the complaints process for the Nova Scotia Barristers' Society. The charges that the Plaintiff faced originated from investigations that were led by Victoria Rees. As the Director of Professional Responsibility for the Nova Scotia Barristers' Society, Rees was in charge of ensuring lawyers compliance with the Code of Ethics and the Regulations of the Nova Scotia Barristers' Society including dealing with complaints and their investigation and prosecution, as well as providing support to the Complaints Investigations Committee of the Nova Scotia Barristers' Society, as well as receivers of the Plaintiff's practice. Rees instructed, directed, retained and received reports from investigators hired by the Nova Scotia Barristers' Society.

11 The Nova Scotia Barristers' Society and Victoria Rees owed the Plaintiff a duty of care to not discriminate against the Plaintiff and to conduct an investigation that was not negligent.

~~11~~12 Victoria Rees at all material times was married to the Nova Scotia Director of Public Prosecution Service and at no time during her investigation or interactions with the Plaintiff disclosed her relationship with the Director of Public Prosecution prior to her cross examination before members of the Nova Scotia Barristers' Society's hearing committee.

~~12~~13 The Plaintiff had filed a lawsuit naming the Public Prosecution Service on February 4, 2013.

~~13~~14 During the years of his legal practice, the Plaintiff had incidents involving employees of the Public Prosecution Service which were investigated by Victoria Rees in her role as the Director of Professional Responsibility for the Nova Scotia Barristers' Society.

~~14~~15 Victoria Rees expressed racial bias toward the Plaintiff during the investigations into his practice. Victoria Rees expressed racial bias in the following ways.

(a) Victoria Rees, when acting in her role as the Director of Professional Responsibility for the Nova Scotia Barristers' Society, sent an email to two investigators for the Nova Scotia Barristers' Society, Elizabeth Buckle and Stan MacDonald. The email stated in part as follows:

> (Robert Wright) 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. …. As Dr. Wright **aptly** has said, he's often seen **problems when professionals "bring the hood" into practice** (emphasis mine)

(b) Victoria Rees expressed that she believed that being "hood" meant that the Plaintiff was Black. Rees acknowledged that she did not know what community the Plaintiff was from, he could have been from a white community and she never asked and that this was not relevant to the investigation. Victoria Rees also explained that it was not her impression that the Plaintiff was from the hood. Victoria Rees did not factor in the Plaintiff's disadvantages and did not aim to address them. Victoria Rees' cross examination makes it clear that bringing the Plaintiff "Blackness" into the profession was a problem from her perspective.

(c) This stereotype was not present in Robert Wright's report, and the word "hood" was not in his correspondence at all with Victoria Rees or her notes. Victoria Rees kept many notes about conversations with various people connected to her investigation with the Plaintiff, including Robert Wright. Rees, believed that being

Black is one of the potential precursors for what Rees viewed as the Plaintiff's bad behavior (that they investigated and were continuing to investigate).

(d) Victoria Rees' letter to Emma Halpern two days prior to the *hood into practice email* acknowledged that the Plaintiff expressed that he was being treated different than other lawyers and that racism impacted how people viewed his behavior. During the investigation, Victoria Rees expressed her view that it is the Plaintiff's behavior that affected how others treat him and not "things such as race". Victoria Rees did not accept that discrimination was an issue that needed to be addressed. She was unconcerned about how people treated or viewed the Plaintiff as a result of his race. This is despite a claim by Nova Scotia Barristers' Society that they sought to address the cultural challenges of equity seeking members.

(e) During the prosecution of the Plaintiff, Victoria Rees was asked about her expressed biases regarding the Plaintiff and she stated that it was "not her job", nor her intention to deal with issues of systemic discrimination.

(f) The Nova Scotia Barristers' Society accepted information and evidence against the Plaintiff that was collected by members of the bar, including the Public Prosecution Service, who had expressed hostility toward the Plaintiff, which created prejudice against the Plaintiff within the Nova Scotia Barristers' Society investigation spearheaded by Victoria Rees and subsequent prosecution of the Plaintiff. Public Prosecution members expressed extremely negative views of the Plaintiff, contributed to the hostile working environment of the Plaintiff and sought out information for the Nova Scotia Barristers' Society in a unique fashion while treating the Plaintiff like a criminal, marginalizing him in the legal practice and supporting stereotypical views of the Plaintiff. Victoria Rees and the Nova Scotia Barristers' Society erroneously relied on these negative views of the Plaintiff in their prosecution of the Plaintiff to justify their treatment, investigation and prosecution of the Plaintiff.

(g) Victoria Rees characterized innocuous behavior of the Plaintiff in a criminalizing manner when investigating complaints, wherein there was no criminal allegation made by a complainant. For example, when investigating the complaint of client "BH" in an interview of the Plaintiff, Victoria Rees questioned the Plaintiff's interactions with BH within a context of characterizing the interactions as threatening. Victoria Rees also indicated that from her perspective the matter that was subsequently dismissed by the panel involving Michelle James could be construed as a threat as well.

16 In September 2013, the Plaintiff spoke with Victoria Rees regarding an interaction with Michelle James wherein the Plaintiff expressed Michelle

James had stereotypical views of the Plaintiff and that she was reacting to the Plaintiff based on stereotypes by alleging the Plaintiff had committed criminal acts in the Dartmouth Provincial Court. Victoria Rees advised the Plaintiff to not file a complaint against Michelle James however she welcomed a complaint from the Public Prosecution Service on behalf of Michelle James against the Plaintiff. This complaint by the PPS was involving the same circumstances wherein the Plaintiff complained about Michelle James expressing stereotypical views and reactions to the Plaintiff. Victoria Rees nor the Nova Scotia Barristers' Society conducted any

investigation of the Plaintiff's concerns of being subjected to stereotypes or the fact that complaints based on stereotypes were being held against the Plaintiff through Victoria Rees' investigation for the Nova Scotia Barristers' Society.

~~15~~17 Victoria Rees acted in conflict of interest and influenced the Nova Scotia Barristers' Society investigations and malicious prosecution of the Plaintiffs legal practice based on her conflict of interest as well as racial bias she expressed toward the Plaintiff.

~~16~~18 The Plaintiff was charged by the Nova Scotia Barristers' Society in 2015 for allegations of breaching the Code of Conduct, which proceeded to hearing.

~~17~~19 The hearing for the 2015 charges was held from 2015 to 2017 over which time the Plaintiff repeatedly highlighted Victoria Rees' conflict of interest and racial bias that maliciously influenced the investigation into his practice and his ongoing prosecution, and breaching their duty of care to the Plaintiff.

~~18~~20 The Nova Scotia Barristers' Society hired Raymond Larkin in 2016 to make an application to have the Plaintiff suspended at an ex-parte hearing with the allegation that the Plaintiff was breaching his practice restrictions imposed by the Complaints Investigation Committee of the Nova Scotia Barristers' Society.

~~19~~21 On September 1, 2016 during an ex-parte hearing, Raymond Larkin maliciously mislead the Complaints Investigation Committee by indicating the Plaintiff was on the record for client "D.E." and that the Plaintiff had a certificate from Legal Aid.

22 Raymond Larkin intended to have his statements mislead the Complaints Investigation Committee into believing that the Plaintiff was double booked and missed the court appearance of the client "D.E." Raymond Larkin's intention was to wrongfully convince the Committee that a suspension of the practicing license of the Plaintiff was warranted in the circumstances.

23 Raymond Larkin was aware that his own statements were not true at the time that he made the misleading statements. For example, prior to making the statements, Raymond Larkin was in possession of materials, including audio recordings and/or transcripts and/or endorsed information's from court proceedings, that demonstrated that the Plaintiff was not retained and that the Plaintiff had no intention of becoming retained for the client "D.E." , that the Plaintiff did not commit to attending the impugned court appearance.

24 Prior to making the misleading statements, Raymond Larkin was also in possession of materials that demonstrated to him that neither the court, the client (D.E.), the crown, or anyone else could have reasonably believed that the Plaintiff was retained or had any intention to become retained for "D.E." and that the intention of the client was to retain possibly retain a different lawyer.

25 Raymond Larkin was aware that the Plaintiff had no obligation, and was not expected to attend the impugned court appearance for "D.E.", and nonetheless Raymond Larkin intentionally mislead the Complaints Investigation Committee into believing that the Plaintiff was unethical for failing to attend the same appearance.

26 The defendants agreed to use lawful means to cause the Plaintiff harm and, further, or in the alternative, the defendants agreed to use unlawful means to cause the Plaintiff harm, particulars of which include any or all of the following:

(a) using the Nova Scotia Barristers' Society's complaint process, investigation and disciplinary process to force the suspension and disbarment of the Plaintiff from practicing law; and,

(b) using the Nova Scotia Barristers' Society's complaint process, investigation and disciplinary process for inappropriate or ulterior means, namely, conflicts of interest and racial bias to deflect criticism of the way in which the complaint process, investigation and disciplinary proceedings were used against the Plaintiff.

(c) using the Nova Scotia Barristers' Society's complaint process, investigation and disciplinary process to create racialized stigma against the client.

27 Victoria Rees, Raymond Larkin and other Nova Scotia Barristers' Society employees were acting as public officers in their roles as counsel, Director of Professional Responsibility for the Nova Scotia Barristers' Society and other positions.

28 It was within their roles that Victoria Rees and Raymond Larkin engaged in deliberate conduct that was not within their lawful roles as public officers and in particular, misleading the Complaints Investigation Committee to have the Plaintiff suspended from practicing law, discriminating against the Plaintiff, acting in a conflict of interest when dealing with the Plaintiff and other actions not known to the Plaintiff.

29 Victoria Rees and Raymond Larkin were aware that their deliberate conduct was unlawful and that harm to the Plaintiff would flow from their actions.

30 Victoria Rees, Raymond Larkin and other Nova Scotia Barristers' Society employees/contractors/agents acting in their capacities as Nova Scotia Barristers' Society employees/contractors/agents and legal counsel engaged in communications and conversations, the details of which are partially unknown to the Plaintiff and as a result of the communications and conversations, the Defendants unlawfully conspired and/or agreed to allow for or support the systemic discrimination (including stereotypes and marginalization) of the Plaintiff within the practice of law whilst unjustly investigating and prosecuting the Plaintiff.

31 In furtherance of the conspiracy, the following acts were done by the Defendants and their employees/agents/contractors:

(a) The Nova Scotia Barristers' Society, Victoria Rees and Ray Larkin applied racialized double standards to the Plaintiff and pursued meritless charges against the Plaintiff;

(b) The Nova Scotia Barristers' Society and Victoria Rees hired Raymond Larkin to conduct an exparte application before the Complaints Investigation Committee to have the Plaintiff suspended from practicing law;

(c) The Nova Scotia Barristers' Society and Victoria Rees (and perhaps Raymond

Larkin) hired Luke Craggs to conduct an investigation into possible professional misconduct of the Plaintiff;

(d) Luke Craggs provided a report to the Defendants including transcripts and/or audio recordings and/or endorsed information's from the court in support of his investigation;

(e) In an exparte hearing before the Complaints Investigation Committee, Raymond Larkin falsely indicated the Plaintiff was solicitor of record for an individual when the report and materials provided by Luke Craggs clearly indicated that the Plaintiff was not solicitor of record for the individual;

(f) As a result of the Defendants conducting the hearing with the Complaints Investigation Committee as an exparte hearing, the Plaintiff was not present or able to make submissions to the Complaints Investigation Committee to the correct the misleading statements of Raymond Larkin.

32 The actions of the Defendants noted in the above paragraph were committed knowing in the circumstances that their actions would likely cause injury to the Plaintiff and the Plaintiff suffered injury as a result.

33 The actions of the Defendants in using and conspiring to unjustly present false information to the Complaints Investigation Committee to have the Plaintiff suspended from practicing law has caused pecuniary and non pecuniary loss to the Plaintiff.

~~20~~34 On September 1, 2016, the Plaintiff was suspended from practicing law as a result of the Complaints Investigation Committee of the Nova Scotia Barristers' Society making a finding that the Plaintiff should be suspended after hearing submissions by Raymond Larkin on behalf of the Nova Scotia Barristers' Society.

~~21~~35 After the Plaintiffs suspension from practicing law on September 1, 2016, he provided written communications to the Nova Scotia Barristers' Society highlighting the malicious misleading statements by Raymond Larkin and that the allegations of the Plaintiff breaching his practice restrictions being meritless and

warranted no probable cause to justify the actions of Raymond Larkin, Victoria Rees or the Nova Scotia Barristers' Society.

~~22~~36 The Plaintiff is not aware of any action taken by the Nova Scotia Barristers' Society to address the misleading statement by Raymond Larkin or addressing the meritless charges until July 24, 2020 when the charges were withdrawn.

~~23~~37 The Plaintiff was disbarred from practicing law on October 20, 2017 as a result of the hearing that commenced in 2015.

~~24~~38 Victoria Rees ended her employment with the Nova Scotia Barristers' Society in spring 2020 and now works for the law firm owned by Raymond Larkin.

~~25~~39 ~~It~~ To the Plaintiff's knowledge, Victoria Rees' conflict of interest and racial bias were not addressed by the Nova Scotia Barristers' Society.

40 Victoria Rees acted maliciously toward the Plaintiff in her role as Director of Professional Responsibility of the Nova Scotia Barristers' Society.

41 Raymond Larkin's investigation was motivated and otherwise influenced by his desire to further the interests of Victoria Rees. Raymond Larkin was influenced by the bias held and expressed by Victoria Rees and possibly other members of the Nova Scotia Barristers' Society including Darrel Pink, against the Plaintiff to act maliciously against the Plaintiff. Victoria Rees was the Director of the Complaints Investigation Committee and the Plaintiff alleges that she was in many ways the operating mind of the Nova Scotia Barristers' Society and played a role in Raymond Larkin's selection to be counsel responsible for seeking the suspension of the Plaintiff.

42 Raymond Larkin is and was at all material times, a business partner of local lawyer Joel Pink. Joel Pink was called as a witness in the professional discipline hearing of the Plaintiff on August 9, 2016, by the Plaintiff. During the plaintiff's examination of Joel Pink, on the record, he questioned Joel Pink about instances of Joel Pink being double booked for court appearances and

missing court appearances to highlight that the standards the Plaintiff was being held to were discriminatory. Joel Pink is the brother of Darrel Pink and the later was the Executive Director of the Nova Scotia Barristers' Society at all material times. Darrell Pink sought unsolicited negative information from the Chief Judge of the Provincial Court about the Plaintiff, after referring to the race of the Plaintiff.

43 Victoria Rees, the Nova Scotia Barristers' Society and Raymond Larkin acted in a racially discriminatory fashion against the Plaintiff by furthering meritless charges, racialized double standards and held the Plaintiff to an unreasonable standard that lawyers in this region are not held to.

44 Prior to, during and after the Nova Scotia Barristers' Society investigated and prosecuted the Plaintiff, the Nova Scotia Barristers' Society failed to explore whether the Appellant was perceived and/or treated (by themselves or others) in a manner that reflected racial stereotypes. Prior to the Nova Scotia Barristers' Society retaining Raymond Larkin, the Nova Scotia Barristers' Society engaged all white competitors of the Appellant to investigate him including Elizabeth Buckle, Stanley MacDonald, Luke Craggs (and one antagonist of the Plaintiff, Michelle James).

45 On April 14, 2021, the Nova Scotia Barristers' Society released an "Acknowledgment of Systemic Discrimination" on their website. In this acknowledgment, the Nova Scotia Barristers' Society admitted the existence of systemic discrimination within the justice system and the society. They stated that by systemic discrimination they mean "a system of disproportionate opportunities or disadvantages for people with a common set of characteristics such as race, gender, disability, sexual orientation, and/or socio-economic status".

46 At the time that Raymond Larkin was retained to investigate the Plaintiff, the Nova Scotia Barristers' Society had not ever employed a Black staff lawyer and hired exclusively white investigators to investigate the Plaintiff in a racially biased fashion. The Nova Scotia Barristers' Society relied on sources of information and complainants that were racially biased and otherwise hostile towards the Plaintiff.

47 Victoria Rees, the Nova Scotia Barristers' Society and Raymond Larkin also perpetuated discrimination and systemic discrimination by proceeding against the Plaintiff in the fashion that they did.

48 The actions of Victoria Rees, Raymond. Larkin and the Nova Scotia Barristers' Society violated the Charter of Rights and Freedoms, including Section 15.

49 The Defendants and others employed by, contracted by or associated with the Nova Scotia Barristers' Society agreed to apply to have the Plaintiff's ability to practice law suspended unjustly.

50 The Nova Scotia Barristers' Society has been dealing with resignations of employees and Council members as a result of the systemic discrimination within the Nova Scotia Barristers Society since the Plaintiff was suspended from practicing law including Morgan Manzer, Denise Mentis-Smith, and others.

~~26~~51 The charges relating to the allegations resulting in the Plaintiffs suspension from practicing law as of September 1, 2016 were withdrawn by the Complaints Investigation Committee on July 24, 2020 without a hearing.

~~27~~52 The Plaintiff is seeking compensation for any loss, injury, or damage suffered to the Plaintiff naturally arising from the Defendants' tortious actions including a remedy pursuant to section 24(1) of the Charter of Rights and Freedoms for breaches of the Plaintiff's Charter rights.

~~28~~53 The Plaintiff is seeking general damages, punitive pecuniary damages, compensatory damages, nominal damages, loss of income, pre-judgment and post judgment interest.

Signature

Signed this day of ~~August, 2020.~~ November, 2021.

_____

Lyle Howe

SUPREME COURT OF NOVA SCOTIA
Citation: *Howe v. Rees*, 2022 NSSC 230

Date: 20221104
Docket: Hfx No. 500125
Registry: Halifax

Between:

Lyle Howe

Plaintiff

v.

Victoria Rees, Raymond Larkin, Nova Scotia Barristers Society

Defendants

ERRATUM

Judge:	The Honourable Justice Peter Rosinski
Heard:	April 1, 2022, in Halifax, Nova Scotia
Counsel:	Laura McCarthy, for the Plaintiff Michael Brooker K.C. and Sydney Hull, for the Defendants Ms. Rees and Mr. Larkin Geoffrey Breen and Erin Mitchell, for the Defendant Nova Scotia Barristers Society
Erratum Date:	December 8, 2022
Erratum Details:	K.C. was added to Michael Brooker's name on the title page