NOVA SCOTIA COURT OF APPEAL

Citation: *Howe v. Nova Scotia Barristers' Society*, 2025 NSCA 62

Date: 20250731
Docket: CA 533958
Registry: Halifax

Between:

Lyle Howe

Appellant

v.

Nova Scotia Barristers' Society and Attorney General of Nova Scotia

Respondents

Judges:	Bryson, Van den Eynden and Gogan, JJ.A.
Appeal Heard:	May 22, 2025, in Halifax, Nova Scotia
Facts:	A disciplinary panel of the Nova Scotia Barristers' Society found a lawyer guilty of professional misconduct and incompetence, leading to his disbarment in 2017. The lawyer later applied to have the decision rescinded or varied, citing systemic racism and disproportionate sanctions compared to white lawyers. The panel dismissed his application, prompting an appeal to the Nova Scotia Court of Appeal (paras 1, 5-10).
Procedural History:	• *The Nova Scotia Barristers' Society v. Lyle Howe*, 2017 NSBS 3: The lawyer was found guilty of professional misconduct and incompetence. • *The Nova Scotia Barristers' Society v. Lyle Howe*, 2017 NSBS 4: The lawyer was disbarred.

- *Howe v. Nova Scotia Barristers' Society*, 2019 NSCA 81: The lawyer's appeal was dismissed by the Nova Scotia Court of Appeal.

Parties' Submissions:

- Appellant: Argued that the panel erred in denying procedural fairness by not hearing his application on the merits, allowing racial discrimination to affect the process, and misinterpreting the *Legal Profession Act* regarding the need for a change in circumstances (paras 11-12).

- Respondent (Nova Scotia Barristers' Society): Argued that the panel correctly dismissed the application due to a lack of material change in circumstances and that the process was not racially biased (paras 8-9, 13).

Legal Issues:

- Did the panel err in denying procedural fairness by not hearing the application on the merits?

- Did the panel err in law by allowing racial discrimination to affect its decision?

- Did the panel err in its interpretation of section 45(4)(m) of the *Legal Profession Act* by requiring a change in circumstances to be personal to the appellant?

Disposition:

- The appeal was dismissed.

Reasons:

Per Bryson J.A. (Van den Eynden and Gogan JJ.A. concurring):

The Court found no error in the panel's decision to dismiss the application for lack of a material change in circumstances. The panel's process was fair, and there was no evidence of racial discrimination affecting the decision. The panel correctly interpreted the Legal Profession Act, requiring a change in circumstances to justify reconsideration of the original decision. The fresh evidence presented by the appellant was deemed inadmissible and irrelevant to the issues at hand (paras 13, 29-41, 89-128).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 129 paragraphs.

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Judges:	Bryson, Van den Eynden and Gogan, JJ.A.
Appeal Heard:	May 22, 2025, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bryson, J.A.; Van den Eynden and Gogan, JJ.A. concurring
Counsel:	Laura McCarthy, appearing, Mr. Howe making oral submissions on his own behalf David Hutt and Ashley Hamp-Gonsalves, for the respondent Nova Scotia Barristers' Society Edward Gores, KC, for the respondent Attorney General of Nova Scotia, watching brief only

Reasons for judgment:

Introduction

[1] Following a 66-day hearing over approximately 16 months, a disciplinary Panel of the Nova Scotia Barristers' Society found Lyle Howe guilty of professional misconduct and professional incompetence.[1] At a later hearing on penalty, the Panel disbarred Mr. Howe from the practice of law effective October 20, 2017. The Panel ordered that he not be entitled to apply for re-admission to the Bar for five years from the date of its decision.[2]

[2] An appeal by Mr. Howe to this Court followed. Mr. Howe's appeal was dismissed.[3] With the consent of the Bar Society, the costs award against Mr. Howe was varied.

[3] Typically, this Court sits in panels of three judges. Mr. Howe's appeal was heard by five judges. They were unanimous that the Panel made no legal error in finding Mr. Howe guilty of multiple acts of professional misconduct. Nor did the Panel err in disbarring Mr. Howe. The Court described the findings:

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

[4] Regarding Mr. Howe's disbarment, this Court concluded:

> [201] Not only was the Panel's decision to disbar Mr. Howe reasonable, in light of the authorities and the facts of this case, it was the only remedy that would be appropriate in these circumstances.
>
> [202] I see no error in principle in the Panel's identification of the legal principles and their application to the facts of this case. Its decision is unassailable.

[5] On September 16, 2023, Mr. Howe applied to the Bar Society, asking that the original 2017 Panel decision be rescinded or varied. His application alleged

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[1] *The Nova Scotia Barristers' Society v. Lyle Howe*, 2017 NSBS 3 (CanLII).
[2] *The Nova Scotia Barristers' Society v. Lyle Howe*, 2017 NSBS 4 (CanLII).
[3] *Howe v. Nova Scotia Barristers' Society*, 2019 NSCA 81, leave to appeal to SCC denied 39004 (30 April 2020) ["*Howe NSCA*"].

"significant material change in circumstances since the issuance of the [2017] order" as follows:

- Public acknowledgment by the Society of systemic racism;
- Penalizing white members of the Bar less harshly for similar if not worse behaviour than his;
- A disproportionate sanction compared to the range of reasonable sentences imposed on white lawyers resulted in a violation of his s. 15 *Charter* rights.

[6] Mr. Howe sought a recission of his disbarment and return to practice without the need to re-apply or pay any previously ordered costs.[4] The original Panel that heard Mr. Howe's case was reconvened. It comprised Ronald J. MacDonald, K.C., Chair, Donald Murray K.C. and lay member Dr. David Richard Norman.

[7] Section 45(4)(m) of the *Legal Profession Act*[5] permits a panel to "rescind or vary any order made or action taken under this subsection". There is no elaboration on what might trigger the authority granted in subs. (4)(m).

[8] In a 2-1 decision, the Panel dismissed Mr. Howe's application because it found he had not identified a material change in his personal circumstances providing a jurisdictional basis for the Panel to proceed to a hearing on the merits. The majority decision is the Panel's decision. A distinction between majority and minority decision will only be made in these reasons when the distinction matters to the analysis. Otherwise these reasons will refer to the Panel's decision.

[9] The dismissal was without prejudice to Mr. Howe's ability to reapply for recission or variation on "appropriate grounds". The Minority agreed that "some change of circumstances" was required to invoke the statutory power to revisit the Panel's 2017 decision. But the Minority alone concluded that "some change of circumstances" would have permitted Mr. Howe to argue that later actions and disciplinary decisions of the Bar Society could constitute circumstances that would permit the Panel to vary or rescind its 2017 Order.

[10] Mr. Howe appealed the Panel's dismissal to this Court.

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[4] See Appeal Book, Tab 3, "Notice of Application […]" dated September 16, 2023, at para. 6.
[5] S.N.S. 2004, c. 28.

[11] Although he lists 12 grounds of appeal in his notice of appeal, the grounds are repetitive and can be conveniently restated as follows:

1. Did the Panel err in denying procedural fairness to Mr. Howe because it declined to hear his application on the merits?
2. Did the Panel err in law in allowing racial discrimination to taint the process relating to its decision?
3. Did the Panel err in its interpretation of section 45(4)(m) of the *Legal Profession Act* by:
    a. determining that a change in circumstances was necessary to ground any authority to alter the 2017 decision and if so,
    b. requiring circumstances be personal to Mr. Howe?

[12] In support of his appeal, Mr. Howe has filed a fresh evidence motion supported by two affidavits and a number of exhibits. He asks that the Court set aside the decision of the Panel and remit the matter back to a new Panel from which the Majority members be recused.

[13] For reasons that follow, the appeal should be dismissed. The fresh evidence is neither admissible nor relevant. Mr. Howe was not treated unfairly by the Panel. Nor did racial discrimination taint the Panel's decision. The Panel did not err in law when interpreting the legislative authority to vary or rescind its decision.

[14] It will be convenient to start by considering the proposed fresh evidence, followed by the foregoing three issues.

[15] An appeal to this Court is restricted to questions of law.[6]

[16] Questions of procedural fairness, including alleged bias, are questions of law, as are questions of statutory interpretation. Correctness is the common standard of review.[7]

The fresh evidence

[17] Mr. Howe moves for admission of fresh evidence in this appeal.

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[6] See *Legal Profession Act*, s. 49(2).
[7] See *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24 at para. 20; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 37 [*Vavilov*].

[18] The first and second issues relate to process. When a party seeks to impugn a trial process, the Court generally applies the test in *R. v. Wolkins*, 2005 NSCA 2 [*Wolkins*]. Subject to admissibility and relevance, the Court will receive fresh evidence with respect to trial process, as Justice Fichaud explained in *Nova Scotia (Community Services) v. T.G.*:[8]

> [79] The four-branched *Palmer*[9] test applies to issues that were *decided* at the trial that is under appeal. When the fresh evidence relates to the *process* of the tribunal whose decision is appealed, *Palmer*'s criteria recede and are replaced by a test that asks whether the evidence is "credible and sufficient, if uncontradicted, to justify the appellate court making the order sought": [*Wolkins*] at para 61, per Cromwell, J.A.. See also *R. v. Assoun*, paras 297, 316, and cases there cited.

[19] The *Wolkins* test would apply to Mr. Howe's complaints of unfair process.

[20] Accordingly, we should provisionally admit the fresh evidence on Mr. Howe's fairness of process arguments.

[21] Where the merits of an appealed decision are in issue, a different test applies. Two of Mr. Howe's grounds contained in his notice of appeal (captured in the third issue) address the merits of the Panel's decision:

> 9. The Majority Hearing Panel erred in law in determining that there must be a change in circumstances in order to bring the Application;
>
> 10. The Majority Hearing Panel erred in law in determining that a change in circumstances must solely relate to the personal circumstances of the Appellant, all the while refusing to allow the Appellant to submit evidence on the subject;

[22] Fresh evidence regarding these grounds of appeal must satisfy the four-part *Palmer* test of:

1. Whether there was due diligence in the effort to adduce the evidence at the proceeding below;
2. The relevance of the fresh evidence;
3. The credibility of the fresh evidence; and
4. Whether the fresh evidence could have reasonably affected the results.[10]

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[8] 2012 NSCA 43 at para. 79.
[9] Referring to *Palmer v. The Queen*, [1980] 1 S.C.R. 759 [*Palmer*].
[10] See e.g. *Armoyan v. Armoyan*, 2013 NSCA 99 at paras. 131-132.

[23] In addition, the fresh evidence must be in admissible form.

[24] Attached to his affidavits of February 23, 2024, Mr. Howe exhibits:

(1) a Bar Society Racial Equity Survey Report dated October 15, 2024;

(2) a report entitled, "Systemic Discrimination in Nova Scotia's Legal Community", authored by Doug Ruck, K.C. dated October 29, 2024. Mr. Ruck's report concludes with 21 recommendations;

(3) a document also dated October 29, 2024 and November 28, 2024 subtitled "Ruck Report: NSBS receives, accepts, and commits to change", noting that Bar Society Council voted to "fully accept the recommendations and commit to a transparent and accountable process for change"; and

(4) a transcript of Mr. Ruck's public presentation on October 29, 2024 together with introductory remarks of the Society's president.

[25] Mr. Howe deposes that these materials constitute "material evidence that ought to be considered in relation to the issues of procedural fairness, reasonable apprehension of bias, Panel composition and the ultimate decision of the Hearing Panel regarding racialized double-standards".

[26] Mr. Howe claims the fresh evidence is credible because it constitutes "reports and publications released by, on behalf and with the acceptance of the [Bar Society]."

[27] He adds the fresh evidence materials are relevant "[…] to the Application to rescind the sanction because they support the Applicant's position that he was treated with racialized double standards when he received his sanction. The admission that the [Bar Society] is discriminatory against black [*sic*] lawyers supports the argument that the [Bar Society] discriminated against him as a Black lawyer."

[28] Mr. Howe's submissions cannot overcome these obstacles. The proposed fresh evidence is irrelevant because:

(a) it fails to address the merits of the appeal – namely, whether the Panel erred in deciding Mr. Howe must show a "material change" in

personal circumstances affecting the 2017 Panel decision and penalty; and

(b) it fails to address Mr. Howe's argument that the Panel's process was procedurally unfair or racially tainted.

[29] Mr. Howe argues that his proposed fresh evidence shows that systemic racism exists within the Bar Society and has been acknowledged by the Bar Society. But the Bar Society's generic admission of the existence of systemic discrimination is not a condemnation of the Panel or its decision, nor does it address Mr. Howe's personal circumstances.

[30] Mr. Howe maintains that the Majority missed his key issue by focusing on the rulings of Panels, whereas his complaint is against the Society as a whole. He says Mr. MacDonald's Minority decision got it right, when he said:

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

[31] Mr. MacDonald here makes the mistake of which the Society complains when it submits that Mr. Howe confuses the Panel with the Society. Mr. Howe's proposed fresh evidence must relate to the 2017 Panel decision, which he wants to change. The *Act* does not give a disciplinary panel authority to investigate how the Society conducts its business.

[32] However, the main difficulty with Mr. Howe's argument is that the question of discrimination against him personally has been resolved. Systemic discrimination was considered at length by the original Panel in its July 17, 2017 decision. Almost 30 pages of the Panel's 140-page decision addressed Mr. Howe's concerns about racism potentially affecting his process.

[33] The 2017 Panel recognized that it should consider the potential impact of systemic, actual and historical racism as a mitigating factor in Mr. Howe's case. But as this Court observed on the earlier appeal, the Panel found there was no causal connection between Mr. Howe's unprofessional conduct and any systemic or actual racial discrimination:

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

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

> to make the mistake again. One can only learn from their mistakes if they admit them, particularly to themselves.
>
> 78. Therefore, while we acknowledge the role Mr. Howe's background must play in this case, in the end it [cannot] play a role to mitigate or reduce the ongoing and serious lack of integrity shown by Mr. Howe.
>
> [Bolding in original Panel decision; Underlining added by the Court of Appeal]

[34] The discipline process for all lawyers involves a stepped process often starting with warnings, directives, counselling and occasionally mentorship. If a member follows these directives, that usually ends the matter. In Mr. Howe's case, he did not fully cooperate with the Society's directives and a formal disciplinary process followed. As summarized previously by this Court, Mr. Howe's sanction was the product of professional "breaches [in] 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 [Bar] Society."[11] There was no differential treatment of Mr. Howe. He was treated like any other lawyer who was subject to discipline.

[35] To repeat an earlier quotation regarding the ultimate sanction against him, this Court concluded:

> [201] Not only was ***the Panel's decision to disbar Mr. Howe reasonable***, in light of the authorities and the facts of this case, ***it was the only remedy that would be appropriate in these circumstances.***
>
> [202] I see no error in principle in the Panel's identification of the legal principles and their application to the facts of this case. ***Its decision is unassailable.***
>
> [Emphasis added]

[36] Even the Minority decision of Mr. MacDonald acknowledged the correctness of the 2017 Panel decision:

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

[11] *Howe NSCA* at para. 53.

> 3. Similarly, I remain firmly of the view that our decisions made with respect to the disbarment of Mr. Howe, and the conditions imposed, were appropriate. See *The Nova Scotia Barristers' Society v. Lyle Howe*, 2017 NSBS 4.
>
> […]
>
> 5. Simply put, ***Mr. Howe's behaviours justified the decisions and sanctions imposed, and were not mitigated by the real impacts of systemic and/or actual discrimination for the reasons discussed in detail in the Panel's decisions.***
>
> [Emphasis added]

[37] The preliminary, and ultimately determinative, question for the Panel in this case was not whether the original findings and sanctions against Mr. Howe were appropriate. They were. The question was what would trigger the authority for the Panel to revisit its 2017 Order?

[38] None of the fresh evidence which Mr. Howe proposes to introduce speaks to the issue of the correct test for reconsideration. None of the proposed fresh evidence addresses Mr. Howe's personal circumstances at all. Mr. Howe is not even mentioned in any of this evidence with one exception in the Ruck Report which will be discussed further below.

[39] Nor does the proposed fresh evidence address Mr. Howe's fairness argument regarding the refusal to hear his case "on the merits".

[40] Accordingly, on the basis of relevance alone, the fresh evidence is not ultimately admissible.

[41] The only mention of Mr. Howe in the fresh evidence he proposes to adduce appears in the Ruck Report at page 15 where Mr. Howe is included with Donald Marshall Junior under the category "History of Systemic Discrimination in Nova Scotia's Legal Community". It is an inappropriate comparison. Donald Marshall is the first example cited of "Historic Systemic Racism". Notoriously, Mr. Marshall was wrongfully convicted of murder in a process found to be racially biased. This is what the Ruck Report says about Mr. Howe:

> **Lyle Howe**
>
> The Lyle Howe case is a significant example of how systemic issues can impact access to justice for African Nova Scotians. Lyle Howe, a Black lawyer, faced high-profile legal proceedings that raised concerns about racial bias in the justice system.

> In 2011, Lyle Howe was charged with sexual assault and related offences. Throughout the trial, concerns were raised about potential racial bias, both in the courtroom and in media coverage. Many argued that stereotypes and racial prejudices influenced the perception of Howe, potentially affecting the fairness of the trial.
>
> Lyle Howe's conviction was overturned* in 2017, and the case brought attention to the need for addressing racial biases in the legal system and the importance of ensuring that all individuals have equal access to justice, regardless of their racial or ethnic background.
>
> The Lyle Howe matter serves as a reminder of the broader challenges faced by African Nova Scotians in seeking justice and highlights the ongoing need for systemic reforms to create a more equitable and just legal system for all.
>
> In consideration of all particulars of the case, the question remains as to whether Lyle Howe received treatment that was different from the treatment white lawyers received in similar circumstances.
>
> *This text has been corrected. Mr. Howe had his conviction overturned by the Court of Appeal due to an error in the jury instruction. The Crown did not proceed with [a] second trial because the complainant would not participate.

[42] Mr. Howe was originally found guilty of sexual assault. His conviction was set aside by the Court of Appeal owing to errors in the instructions given by the trial judge to the jury. A new trial was ordered, but the Crown did not proceed apparently because the complainant would not participate. There was no suggestion of systemic racism in Mr. Howe's trial or on his appeal to this Court. The 2017 disciplinary panel found no connection between any systemic racism and Mr. Howe's unprofessional conduct, and the Court of Appeal agreed. To the extent the Ruck Report implies otherwise, the Report is inconsistent with these rulings and is incorrect.

[43] Although provisionally admitted to assess Mr. Howe's fairness arguments, the Ruck Report provides no basis for suggesting that Mr. Howe's disbarment was marred by systemic racism. The Ruck Report is irrelevant and inadmissible as fresh evidence.

Was Mr. Howe denied a fair process?

[44] Mr. Howe argues that it was fundamentally unfair for the Panel below to deny him an opportunity to lead evidence and make submissions on the merits of his application to rescind or vary the 2017 Panel order. He argues that the Panel's refusal to hear him on the merits offends s. 45(4) of the *Legal Profession Act*

which he says permits him to present evidence and make oral submissions. The relevant portions of s. 45(4) provide:

> **Actions by panel during and after hearing**
>
> ***45 (4) Where a hearing panel finds a member of the Society, other than a law firm, guilty of professional misconduct, professional incompetence or conduct unbecoming a lawyer or articled clerk or makes a finding of incapacity, it shall, following an opportunity for the parties to present evidence and submissions respecting the proposed disposition by the hearing panel, do one or more of the following:***
>
> (a) where the member is a lawyer, disbar the member;
>
> […]
>
> (h) order the member to pay all or any part of the costs incurred by the Society in connection with any investigation or proceedings relating to the matter in respect of which the member was found guilty and, in particular, to pay the costs of the proceedings authorized by Sections 36 to 38;
>
> (i) order the member to submit to an assessment or examination, or both, as the hearing panel considers appropriate;
>
> (ia) order the member to submit to a medical assessment;
>
> […]
>
> ***(m) rescind or vary any order made or action taken under this subsection;***
>
> ***(n) make any other order or take any other action the hearing panel determines to be appropriate in the circumstances including an order to retain jurisdiction to monitor the enforcement of its order.***
>
> [Emphasis added]

[45] The prefatory paragraph of s. 45(4) refers to an initial finding against a lawyer. For Mr. Howe, that occurred in his 66-day hearing, culminating in his 2017 disbarment, confirmed as legally correct by this Court. But for subsection (m), which implicitly permits some form of review distinctive from the exhausted statutory appeal process, the disbarment decision was final.

[46] Relying primarily on s. 45(4)(m), Mr. Howe moved to vary or rescind. That required the Panel to consider his request and an appropriate process to do so.

[47] Although Mr. Howe cited subsection (n) as well as (m), his argument focused on variation and rescission, which is solely authorized by subs. (m). To add, the two subsections are different. Subsection (m) is retrospective and assumes a disciplinary decision has been made. Subsection (n) is prospective and contemplates an Order ancillary to the main Order, including retention of jurisdiction for future purposes.

[48] In support of his procedural fairness argument, Mr. Howe relies on the well-known *Baker* factors.[12]

[49] *Baker* lists the following non-exhaustive criteria for ascertaining the content of procedural fairness applicable to an impugned decision:

> (a) The nature of the decision and the process followed in making it;
>
> (b) The nature of the applicable statutory scheme and the terms of the statutes pursuant to which the decision-maker operates;
>
> (c) The importance of the decision to the individual affected;
>
> (d) The legitimate expectations of the person challenging the decision; and
>
> (e) The choices made by the decision-maker in determining its own procedures.

[50] In this case, the first three *Baker* criteria warrant a high degree of procedural fairness. The Panel is an adjudicative disciplinary body, accustomed to making quasi-judicial decisions in the public interest concerning the professional fate of individuals whose conduct is considered by the Panel. Plainly, the resumption of his professional practice is very important to Mr. Howe. He complains that he had an expectation of a full oral hearing on the merits and he challenges the choices made by the Panel in dismissing his application, in his words, “summarily”.

[51] Mr. Howe started the variation/rescission process with a September 16, 2023 notice to the Bar Society. That notice was accompanied by a 20-page Brief in which Mr. Howe argued the statutory basis for his application. On the merits, he argued that the sanction of disbarment was too severe compared to penalties imposed on white lawyers in later cases, in what Mr. Howe claimed were similar

[12] See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*].

circumstances. Mr. Howe wanted a new hearing with "*viva voce*[13] and other evidence".

[52] There was disagreement about process. Mr. Howe wanted no restrictions with a "normal hearing". At first the Bar Society suggested a "paper" hearing. February 12, 2024 was set for oral submissions on process. In addition, both parties provided pre-hearing written Briefs to the Panel.

[53] It was clear at the February 12, 2024 process hearing that Mr. Howe had a very broad view of what the Panel should consider. He argued that the Panel should not be confined simply to reported cases. He said he should be allowed to examine Bar Society records and question Bar Society witnesses relating to disciplinary cases happening years after his. He wanted to call evidence on the "sentiment of the legal community". He wanted to tender media reports.

[54] The February 12, 2024 hearing lasted almost two hours. Towards the end, concern was expressed about the Panel's authority to entertain the reconsideration at all. Following submissions, Panel member Murray asked about the Panel's authority to change its 2017 decision in view of this Court's 2019 dismissal of Mr. Howe's appeal. He wondered about jurisdiction to vary a disbarment that had "expired". (Mr. Howe's restrictions on applying for re-admission to the Bar Society has now expired and he is now free to re-apply). He wanted to know if that was different from medical examination as a condition of reinstatement. Mr. Murray concluded:

> And then the fourth decision that we made was the disbarment decision. So, that still exists until such time as within we either change it under Section 45(4)(m), or Mr. Howe reapplies for admission, and then his disbarment disappears upon his readmission, very simply.
>
> So, I'd like – I'd like to hear from the parties in – with submissions, within a very reasonable period of time as to our jurisdiction to deal with those issues, because I think there's no point letting the parties think that they're going to be arguing about an issue if we're ultimately going to decide we don't have jurisdiction to deal with this.

[55] Mr. Howe queried:

> **MR. HOWE**: Now I don't want to overly complicate things, but can I ask a question on Mr. Murray's task that he gave us there? So I understand that if you

[13] Oral testimony.

> do something like put the cost award back up to what it was when you initially ordered it, that would clearly be outside of the jurisdiction of the Panel, I would think but if you do something that is reduction – I guess is it only if we modify the Disbarment Order as opposed to do away with it at all? Is that – like are those two separate issues and you only want us to deal with the latter, or the former?

[56] To which Mr. Murray replied:

> I'd like you to be able to point me to some authorities as to what the scope of our authority is […]

[57] As a result, the Bar Society and Mr. Howe were invited to make written submissions to the Panel on jurisdiction. They did so.

[58] The Panel Chair's email to the parties of February 15, 2024 concluded:

> ***The Panel will then consider those written arguments, together with the written submissions filed to date, and oral arguments we heard on Monday, February 12, and attempt to render a decision by the end of April***. This decision may help to inform future cases and we wish to ensure sufficient time is available to address all issues appropriately.
>
> [Emphasis added]

[59] In fact, both Mr. Howe and the Bar Society filed two Briefs — an initial Brief and a Reply.

[60] As earlier described, the Panel already had the benefit of Mr. Howe's original Brief filed with his application in September of 2023.

[61] So, the Panel had five Briefs before deciding the threshold question of whether its authority to trigger a s. 45(4)(m) rescission or variation was met, including three from Mr. Howe, together with 14 cases and two media articles and a Bar Society acknowledgement of systemic racism.

[62] More will be said later about these Briefs on jurisdiction. For present purposes it is only necessary to observe that the Panel did not make a decision on its authority to hear the application in the absence of submissions from the parties.

[63] Neither Mr. Murray's comments nor the Chair's email suggest that a further oral hearing would precede a ruling on the issue of jurisdiction. From Mr. Murray's comments and the Chair's email, Mr. Howe could not have a legitimate

expectation that an oral hearing would precede any determination of whether the Panel had authority to consider his application. Nor could that expectation arise from the *Legal Profession Act* or its related Regulations.[14]

[64] The statute gives the Panel broad discretion concerning how it conducts its business:

> **Powers of Hearing Committee**
>
> 42 (1) The Hearing Committee, and any hearing panel thereof, has all the powers conferred by this Act and the regulations in the discharge of its functions as well as the powers, privileges and immunities of a commissioner under the Public Inquiries Act.
>
> (2) ***A hearing panel may determine its own procedure and may*** […].
>
> [Emphasis added]

[65] The Regulations further provide discretion with respect to conduct of a Panel's process.[15]

[66] The Panel chose a written process for determination of the threshold of its authority or jurisdiction to hear the application. It was entitled to do so. Courts routinely show great deference to administrative bodies with respect to process, provided it is fair.[16]

[67] But Mr. Howe goes further and complains that the Majority decision referred to examples of other disciplined lawyers, which he had no opportunity to argue.

[68] Two points of reply can be made. First, the examples of other disciplined lawyers were argued by Mr. Howe himself in the Brief filed with his original application in 2023. He also provided the Panel with copies of those cases. Then he argued them at the February 12, 2024 hearing. Second, the Majority decided that comparison to other disciplinary decisions was not a basis for a s. 45(4)(m) reconsideration application.

[69] With respect to the first point, Mr. Howe elaborated on the merits at the February 12, 2024 hearing:

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[14] Regulations made pursuant to the *Legal Profession Act* [the "*Regulations*"].
[15] See e.g. Regulations 9.9.5 and 9.11.7.
[16] See e.g. *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27 at para. 28.

[…] I think that the evidence that there's a disparity in sanction is way stronger now than it was when I ran my Hearing because there's been three lawyers that were sanctioned for crimes of dishonesty that received far less than disbarment, between six and 12 months. I didn't have those cases at the time that I argued my case, otherwise I would have pointed to them then. So, in terms of the stakes and procedural fairness, I don't think the Society should think it can only get better for Mr. Howe. It's far worse. If this Panel doubles down and says, "Not only did we disbar you, but we're going to look at three more cases where white lawyers were sanctioned for crimes of dishonesty and they received a fraction of the sanction than you did," things can get a lot worse if you double down or you don't address what I see as a racial disparity, and some consequences for me and significance for Charter violations. […]

[…] He asked me something along the lines of, "Can lawyers be dishonest and still practice?" And I think that the answer is way more clear today than it was in 2016 or '17 when I was making submissions. We've got three of them in the last several years that are dishonest in their practice and, not only are they practising, you know, they've got pretty short suspensions compared to a five year ineligibility to re-apply after disbarment. […]

[…] How does the Society on the one hand say, "We accept that there's systemic discrimination and we commit to addressing it," and then on the other hand, say, "When we have a black lawyer saying he's being treated harsher than white lawyers, that *status quo* is okay." How is it okay? Even if they disagree with me ultimately and they say, "Oh, there's reasons for the white lawyer to be treated differently," fine. But the *status quo* that we have, undoubtedly, indisputably, is I think I was discriminated against and I got three white lawyers (inaudible, audio cuts out) to 12 months and less. […]

[…] I didn't have a lot of cases that were recent with dishonesty. If I would have had the cases that I have now, the Panel knows in their own heart that I would have presented it and I would have said, "Look, here is precedent that I should get between six and 12 months." I didn't have those cases. So, should I be deprived the benefit of that now because it happened after I was disbarred? […]

[…] But I want to point out something that's really important. Even if I was white, you should change this decision. So, if we have three white lawyers that are sanctioned to between six months and 12 months, and then we have me, imagine I was white; I could still come here and say, "My sanction does not fit within what is a modern-day sanction for what I've done." […]

[…] But I think the main issue that the Panel had was dishonesty and adjournment request, lack of candor. So, if we compare that to the financial-related dishonesty issues that we see in the other decisions and the nature of their dishonesty, I'm hoping that the Panel is going to say, "Well hold on, not only should he be in the range, there were people that were sanctioned for less than he got that did something more serious than what he did." And so, from the Panel's perspective, you should have the discretion, white, black, white, Chinese. You

> should have the discretion to say, "I don't want the Society to make my sanctions look stupid." And frankly if we looked at your decision with me and the Society's pre – decisions, you know, it makes your decision look bad. […]
>
> […]The people who you see getting disbarred are people who have been around for 20 years and they have a storied history of dishonesty. If you look at the people who actually get disbarred, their history looks nothing like mine. And then you look at the people whose history looks like mine, they get six to 12 months. So I think that that's what this case really needs to reflect on from an evidentiary perspective. […]

[70] The Panel did not accept these submissions.

[71] With respect to Mr. Howe's argument of differential treatment, the Majority observed that the conduct of Duane Rhyno – a white lawyer who, like Mr. Howe, was disbarred with a 5-year prohibition against applying for re-admission – resembled Mr. Howe's case:

> 27. Most notable, in its absence from Mr Howe's cited examples, is the case of Mr Duane Rhyno, a white Nova Scotian lawyer with a prior record of discipline having been found guilty of professional misconduct, primarily for deceptive practices involving mortgage financing, and failing to deal with the Society with candour (see *The Nova Scotia Barristers' Society. v. Rhyno*, 2019 NSBS 2). ***Many of these instances of misconduct were, like Mr Howe's, permeated with dishonesty. Mr Rhyno's Decision on Sanction emphasized the similarity between his aggravating factors and those of Mr. Howe*** (paragraphs 40-43), and the elements of the dispositions in both cases demonstrate substantive parity:
>
> i) Disbarment for 5 years;
>
> ii) Costs payable to the Society on a schedule which could be negotiated with the Society;
>
> iii) Provision of a medical report relating to ethical capacity at the time of applying for re-admission as a lawyer.
>
> Mr Rhyno's obligations for re-admission initially also included completion of an ethics course, and post-readmission practice under supervision.
>
> [Emphasis added]

[72] More fundamentally, after considering Mr. Howe's cases, the Majority ruled that comparing different panel rulings could not constitute grounds for a s. 45(4)(m) review.

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

[73] Mr. Howe also complains he was not fully heard on the issue of jurisdiction.

[74] At first, during oral arguments to this Court, Mr. Howe claimed he was not aware that the Panel was concerned about jurisdiction. Mr. Howe's claim is not reasonable in view of the comments of the Panel recited above. And when it was pointed out to him, during oral argument before this Court, that his own post-hearing Brief was entitled "Response Brief on Jurisdiction", he withdrew the submission that he was not aware jurisdiction was in issue.

[75] But then he claimed that he had not specifically addressed "material change of circumstance" as related to jurisdiction. That submission must be measured against the following facts, some of which have already been noted:

- in his initial Brief of September 16, 2023, Mr. Howe invoked "a significant material change in circumstances" as the jurisdictional basis of his motion;
- filed with his motion was an extensive Brief in which Mr. Howe alleged differential treatment of white lawyers which he relied upon as a basis for this significant material change in circumstances;
- the Bar Society's January 26, 2024 written submissions to the Panel argued jurisdiction was limited and that the Panel's inquiry had to be confined to "consideration of the changes Mr. Howe alleges". It concluded by reiterating the basis for reconsideration was a change of circumstances;
- Mr. Howe's written reply of February 8, 2024 contested any need for a "change of circumstances" for reconsideration. He asserted "a wide and basically unfettered jurisdiction to revisit […] past decisions". He responded directly to the suggestion of needing a *prima facie* case.

> "This clearly precludes an obligation to advance evidence to meet a threshold for a change of circumstances";
>
> - at the February 12, 2024 oral hearing, Panel member Murray raised the issue of jurisdiction saying "because I think there is no point letting the parties think they are going to be arguing about an issue if we are ultimately going to decide we are going to have jurisdiction to deal with this […] statutory tribunals like ourselves from time to time are unable to fix things";
>
> - Mr. Murray concluded "I'd like you to be able to point me to some authority as to what the scope of our authority is […]"; and
>
> - on February 15, 2024, the Chair wrote to the parties with dates for submissions "on the issue of how the Court of Appeal's decision respecting the original hearing might impact, if at all, our jurisdiction to vary or rescind our previous orders".

[76] Normally, Mr. Howe would argue first on jurisdiction because it was he who asserted that the Panel had jurisdiction to vary its original decision. But he asked the Bar Society to go first. The Society obliged. In its March 22, 2024 Brief to the Panel, the Bar Society argued that the Panel's jurisdiction to vary or rescind was limited by *res judicata*, abuse of process, and mootness which would preclude much of the reconsideration sought by Mr. Howe. In addition, the Panel had to determine the scope of its authority for variance or rescission based on changed circumstances. The Society put it this way:

> The Society maintains its position that the hearing of Mr. Howe's Application must be constrained to matters not before the Court of Appeal in 2019. ***In the circumstances this amounts to a consideration of any material changes or fresh evidence*** which were not before this Panel or the Court of Appeal when the Order was rendered (and upheld).
>
> […]
>
> The Panel must constrain the hearing of Mr. Howe's Application to matters not before the Court of Appeal in 2019 – ***this amounts to a hearing of allegations of material changes in circumstances*** or fresh evidence relevant to the Panel's disposition of the complaint against Mr. Howe only (allegations which the Society disagrees support Mr. Howe's request for recission or variance of the Order).

[Emphasis added]

[77] In his reply "Brief on Jurisdiction", Mr. Howe did not agree that he was required to show a material change of circumstances. He cited *Rhyno*[17] as authority for "unfettered jurisdiction".

[78] He claimed that the 2019 Court of Appeal decision did not impair the Panel's jurisdiction because:

> 40. The purposes of the application to reconsider the Panel's decision is related to the disparity in sanctions given the white and Black lawyers, and based on the new information as alleged in Mr. Howe's motion and brief. This question was never adjudicated upon by the Court of Appeal, nor this Panel and thus breaches no principles of *res judicata* or *issue estoppel*.

[79] He concluded:

> 49. Based on the decision of the NSBS in *Rhyno*, *supra*, in conjunction with the apparently settled law as adopted in British Columbia, and by the Federal Court, it appears that the Panel indeed has effectively unfettered jurisdiction to sustain a decision, rescind it, or vary it without limitation – when acting to promote fairness and justice. And in doing so, the Panel is the master of its own procedure.

[80] The Bar Society clearly raised the need to establish changed circumstances to ground the Panel's a authority to vary or rescind its earlier decision. Mr. Howe was not denied the opportunity to argue the point. He simply disagreed that such a change was required.

[81] It was Mr. Howe's burden to show why the exceptional jurisdiction in s. 45(4)(m) should be invoked in his favour. It was Mr. Howe who initially argued that a material change of circumstances provided the jurisdictional basis for intervention. It was also Mr. Howe who abandoned that position, arguing for "unfettered discretion" to change the 2017 decision. He can hardly complain now that the Panel accepted his original submissions but found he had not met that test.

Was the process tainted by racial discrimination?

[82] To some extent, this issue overlaps with the first.

[17] Discussed further below at para. 117.

[83] Mr. Howe argues that he was denied "access to basic and procedural and substantive fairness in relation to the application" which was "contrary to the principles of fundamental justice and was an error of law". He cites refusal to allow him to make arguments or submit evidence on racially motivated decisions as "tantamount to racially driven bias".

[84] Mr. Howe did not argue before the Panel that it was biased or that there was any appearance of bias. He did not request any member of the Panel recuse himself on the basis of racism or anything else.

[85] Typically, courts will not entertain arguments about bias or recusal for bias that were not submitted to the original decision-maker.[18] Nevertheless, courts have considered bias arguments even when the original court was not asked that question.[19] In this appeal, Mr. Howe presents no evidence and makes no argument about a reasonable apprehension of bias against him by any member of the Panel other than to point to the result of the decision. It is well settled that disagreement with a court or tribunal's decision itself is not a basis for a reasonable apprehension of bias.[20]

[86] There is a strong presumption of judicial impartiality which extends to statutory tribunals.[21] Anyone making an allegation of bias must present evidence establishing serious grounds sufficient to justify a finding that a decision-maker should be disqualified on account of bias.[22]

[87] An apprehension of bias must be a reasonable one, held by a reasonable and fully-informed person.[23] The Majority Panel members – Mr. Donald Murray, K.C. and Dr. Richard W. Norman – are professional people performing a professional function. There is no basis to conclude that a reasonable person, informed of the facts and having reviewed the record,[24] would entertain an apprehension of bias against them.

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[18] See *R. v. K.J.M.J.*, 2023 NSCA 84 at paras. 76-81 [*K.J.M.J.*].
[19] See *K.J.M.J.* at paras. 76-81.
[20] See e.g. *Stanton v. Stanton*, 2025 NSCA 38 at para. 36.
[21] See *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24 at paras. 39 [*MacLean*]; see also *R. v. Nevin*, 2024 NSCA 64 at para. 49..
[22] See *MacLean* at paras. 39-41.
[23] See *MacLean* at paras. 39-41.
[24] See e.g. *Fraser v. Nova Scotia Barristers' Society*, 2024 NSCA 94 at para. 115 [*Fraser*].

[88] That brings us to the real question on this appeal — whether the Panel erred in law by misinterpreting its statutory authority under s. 45(4)(m) of the *Legal Profession Act*.

> **Did the Panel err in its interpretation of s. 45(4)(m) of the *Legal Profession Act*?**

[89] The Majority's decision regarding the change required to ground its jurisdiction in order to authorize variation or rescission of the 2017 Panel decision made these points:

> **Evidence of Change to Ground Jurisdiction**
>
> 29. Fairly understood, ***Mr. Howe's real argument in support of a variation appears to be instead that things have happened at or in relation to "the Society" since 2017, and that these changes constitute the sufficient "change" to give us jurisdiction to vary the disposition that was crafted in October 2017.*** He also suggested that we, on our own motion, might want to identify and declare some change that would move us to change our minds about the disposition that we had determined was appropriate in October 2017.
>
> 30. At several points in his written and oral submissions, ***Mr. Howe conflated, and used interchangeably, "the Panel" and "the Society."*** It should be plain that as a Panel, we are not the Society. Our mandate in relation to Mr. Howe and the complaints which he faced in 2015 comes from specific appointment by the then Chair of the Hearing Committee under s.2(u) of the *Legal Profession Act*, and Regulation 9.9.4 of the Regulations made pursuant the *Legal Profession Act*, S.N.S.2004, c.28. We have no lawful jurisdiction separate from that appointment.
>
> 31. ***We have no authority under statute to pass judgment on the appropriateness of the decisions made by other appointed Panels under the Act***, whether those Panels have been constituted before or since the date of our own initial appointment. We have no authority under s.45(4)(m) of the *Act*, or otherwise, to direct the Society to do anything in relation to Mr Ruck, K.C. Those are things that Mr Howe is requesting us to do under cover of this application under s.45(4)(m) of the *Act*, but which we cannot do.
>
> 32. While s.45(4)(m) of the *Act* does provide for a potentially wide scope for variations and/or for rescission of orders in professional responsibility matters, ***we are of the view that the applicant (or in some circumstances both parties) must begin by demonstrating that there has been a change in the burden, or effect, of the previous disposition from what had been contemplated at the time of the initial disposition ruling. That was the acknowledged case in Rhyno***, *supra*. That kind of change has not been hinted at here.

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

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

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

[…]

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

[…]

Racism

37. We appreciate that Mr. Howe is not seeking a *Rhyno* kind of variation through this process. ***Mr. Howe is effectively seeking the recission of the whole disposition reached on October 17, 2024, based on arguments of racism. Mr. Howe argued unsuccessfully before us in 2017 that racism justified his professional misconduct***. Mr. Howe argued that claim unsuccessfully before the Nova Scotia Court of Appeal as well. ***His current argument appears to be that an acknowledgment of systemic racism by the Society (not this Panel) should retroactively make those unsuccessful arguments successful***, and thus insulate him from consequence for his professional misconduct. We disagree. ***Whatever the Society may have acknowledged, that does not change our rulings, nor the Nova Scotia Court of Appeal's rulings, with respect whether racism was the cause of either Mr. Howe's professional misconduct, or infected our identification and sanctioning of his professional misconduct.***

[…]

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

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

> ***a) some kind of change in his personal circumstances, or***
>
> ***b) an unanticipated change in the impact of the disposition,***

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

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

[Emphasis added; Underlining is Panel's original emphasis.]

[90] The Minority's fundamental disagreement with the Majority is expressed this way:

The Current Case for Change of Circumstances:

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

[91] The obvious rejoinder which the Majority makes is that the Panel is not the Bar Society, and the Panel is not judging the conduct of the Bar Society but that of the member. That judgement has been made and even the Minority acknowledges it was correct.

[92] Mr. Howe founds his application on two fundamental arguments:

1. A public acknowledgment by the Bar Society of systemic discrimination in the legal profession; and
2. Recent disciplinary decisions allegedly showing Mr. Howe's sanction is disproportionate.

[93] The Panel's decision as to the scope of its authority and Mr. Howe's criticism of it must take account of appropriate interpretive principles, the legislation and the facts.

[94] Legislation must be interpreted reading the entire words in the context of the scheme of the *Legal Profession Act*, the object of the *Act* and the intentions of the legislature.[25] Accordingly, interpretation of s. 45(4) of the *Act* must consider whether "the merits of an administrative decision maker's interpretation of [the] statutory provision [is] consistent with the text, context and purpose of the provision."[26]

[95] Section 4 of the *Legal Profession Act* describes the purpose of the Bar Society:

> **Purpose of Society**
>
> 4 (1) ***The purpose of the Society is to uphold and protect the public interest in the practice of law.***
>
> (2) In pursuing its purpose, the Society shall
>
> (a) ***establish standards for the qualifications of those seeking the privilege of membership in the Society;***
>
> (b) establish standards for the professional responsibility and competence of members in the Society;
>
> (c) regulate the practice of law in the Province; and

[25] See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 [*Rizzo*].
[26] *Vavilov* at para. 120.

> (d) seek to improve the administration of justice in the Province by
>
> (i) regularly consulting with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and
>
> (ii) engaging in such other relevant activities as approved by the Council. *2004, c. 28, s. 4; 2010, c. 56, s. 2.*
>
> [Emphasis added]

[96] Two objects or purposes stand out from this language. First, the Bar Society is to uphold and protect the public interest in the practice of law. Second, membership in the Bar Society is a privilege.

[97] The Regulations elaborate on the objects of the professional responsibility process in the following language:

> **Objects of the Professional Responsibility Process**
>
> **9.1.2** The objects of the professional responsibility process are to protect the public and preserve the integrity of the legal profession, by:
>
> […]
>
> **9.1.2.1** In this Part, when […] a Committee exercises discretion in the public interest, the objects of the professional responsibility process should be considered.

[98] A Panel's original jurisdiction arises from the referral of a disciplinary charge to a hearing in accordance with the *Legal Profession Act*.[27] If a Panel makes a finding of misconduct, s. 45(4) of the *Act* requires issuance of an Order disposing of the matter.

[99] The disciplinary authority granted to a Panel under the *Legal Profession Act* is mandatory. Section 45(4) provides, in part:

> 45 (4) ***Where a hearing panel finds a member of the Society***, other than a law firm, ***guilty of professional misconduct***, professional incompetence or conduct unbecoming a lawyer or articled clerk or makes a finding of incapacity, ***it shall***, following an opportunity for the parties to present evidence and

[27] See e.g. *Fraser* at para. 9.

> submissions respecting the proposed disposition by the hearing panel, ***do one or more of the following***:
>
> (a) where the member is a lawyer, disbar the member;
>
> […]

[100] The mandatory authority described in s. 45(4) is echoed in the Regulations. Regulation 9.14.1 says:

> Upon completion of a hearing, the panel ***must dispose*** of the charge as provided in s. 45(4) […] of the Act provided in Sectio[n]E 45(4) […] of the Act.
>
> [Emphasis added]

[101] The decision of the Panel is final subject to appeal, which is provided for in s. 49 of the *Legal Profession Act*:

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

[102] The supplementary authority of s. 45(4)(n) contemplates a retention of jurisdiction simultaneous with the original Order. The Panel in Mr. Howe's disciplinary proceeding made no such auxiliary Order in 2017.

[103] But the legislature has provided a somewhat enigmatic authority to a Panel to rescind or vary its decision. To repeat s. 45(4)(m) of the *Legal Profession Act*:

> 45 (4) Where a hearing panel finds a member of the Society, other than a law firm, guilty of professional misconduct, professional incompetence or conduct unbecoming a lawyer or articled clerk or makes a finding of incapacity**,** ***it shall***, following an opportunity for the parties to present evidence and submissions respecting the proposed disposition by the hearing panel, do one or more of the following:
>
> […]
>
> (m) rescind or vary any order made or action taken under this subsection;
>
> [Emphasis added]

[104] Plainly, subs. (m) does not logically belong in a list of initial dispositions ordered by a Panel. Rather, subs. (m) assumes such disposition has already occurred and the lawyer seeks to rescind or vary it. It could be that, in particularizing these powers, the legislature simply intended to permit varying or rescinding an existing Order when the same impugned lawyer is found to have committed further professional misconduct. In any event, what is clear is that while the Panel must take action following a finding of professional misconduct, it reserves the discretion to determine what that action entails.

[105] In the context of a medical professional's disciplinary case, this Court relied on binding Supreme Court authority respecting a disciplinary body's discretionary authority:[28]

> 49 ... As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme [citation omitted] "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments" [citation omitted].
>
> 50 Consequently, ***a grant of authority to exercise a discretion*** as found in s. 15(3) of the AEUBA and s. 37 of the PUBA ***does not confer unlimited discretion to the Board***. As submitted by ATCO, ***the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters***, for which the legislature is assumed to have regard in passing that legislation [citation omitted]. In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756:
>
> > The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.
> >
> > [Emphasis added]

[28] *Moodley v. College of Physicians and Surgeons of Nova Scotia (Hearing Committee)*, 2023 NSCA 70 at para. 40 [*Moodley*], citing *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at paras. 49-50.

[106] *Moodley*'s description of the medical society's disciplinary regime is apposite here:

> [43] Clearly the statutory regime assumes the operation of a fair and effective process for professional conduct review. To that end, the *Act* and the Regulations establish a stepped progression from (1) an initial screening and disposition of "complaints" which on their face have no substance, or which may be resolved informally, to (2) a detailed investigation of "matters" of concern that, if proven, could warrant sanction, to (3) a *quasi*-judicial hearing of "charges" that emanate from those investigated matters of concern.

[107] The *Legal Profession Act* creates a carefully calibrated, stepped process. *Moodley* was an appeal of a preliminary administrative decision sentence. Here, Mr. Howe has exhausted the disciplinary process which resulted in his disbarment in 2017. The jurisdiction granted by subs.(m) of section 45(4) of the *Act* must be constrained by that earlier, comprehensive process consistent with the purposes of the *Act*, generally, and the disciplinary process, in particular.

[108] An important constraint is the principle of finality. The statutory language here permits variation or rescission. But finality does not disappear as a guiding principle. Statutory authority to make a variation is the exception to the common law doctrine of finality. It is not the other way around. That doctrine would not support the unfettered discretion to vary claimed by Mr. Howe. The legislature is presumed to respect the common law.[29] As the Supreme Court said in *Vavilov*: "[…] the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority."[30]

[109] Ordinarily, the Panel's jurisdiction would be exhausted upon the issuance of an Order, as required following a finding of professional misconduct, and the Panel would become *functus officio*.[31] In a recent decision, the Supreme Court of Canada commented on the doctrine as follows:[32]

> [33] In its contemporary guise, *functus officio* indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision. A court loses jurisdiction, and is thus said to be *functus officio*, once the formal judgment has been entered. After this point, the court is understood only to have the power to amend the judgment in very

[29] See e.g. *Bryan's Transfer Ltd. v. Trail (City)*, 2010 BCCA 531 at para. 45.
[30] *Vavilov* at para. 68.
[31] Literally having performed one's office in the sense of finality, without further authority.
[32] *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 [*Manitoba*].

> limited circumstances, such as where there is a statutory basis to do so, where necessary to correct an error in expressing its manifest intention, or where the matter has not been heard on its merits.
>
> [34] ***This rule serves goals of finality and, by stabilizing judgments subject to review, of an orderly appellate procedure***, for the parties to litigation, finality meets both an economic and psychological need as well as serving as a practical necessity for the system of justice as a whole (pp. 264-65). More specifically, if lower courts could continuously reconsider their own decisions, litigants would be denied a reliable basis from which to launch an appeal to a higher court. The appeal record would be written on "shifting sand", ultimately inhibiting effective review of an orderly appellate procedure […] for the parties to litigation".
>
> [Authorities omitted; Emphasis added]

[110] The power to vary or rescind in subs. 45(4)(m) must be interpreted as an exception to common law principles of finality and the legislative finality ascribed to Panel decisions in s. 49(1).

[111] Originally, Mr. Howe took the view that power to review in subs. (m) could be invoked owing to "a significant material change in circumstances".[33] Then he changed his mind.

[112] Mr. Howe later took the view that the Panel had unlimited jurisdiction to reconsider. He relied on this language from another Panel reconsideration decision:[34]

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

[113] Applied literally, this interpretation would allow an indefinite series of variation applications notwithstanding a "final" decision on the merits by a disciplinary Panel. The foregoing unqualified language was later tempered in that decision:[35]

> [11] Notwithstanding that wide and basically unfettered jurisdiction, and notwithstanding the fact that the variation being sought is on a joint (or consent) basis, it is still incumbent on the current Hearing Panel to exercise its discretion against the backdrop of both the public interest in

[33] See Appeal Book, Tab 3, "Notice of Application […]" dated September 16, 2023.
[34] *The Nova Scotia Barristers' Society v. Duane Rhyno*, 2021 NSBS 4 (CanLII) at para. 9 [*Rhyno*].
[35] *Rhyno* at para. 11.

> the practice of law and the continuing trust, confidence, and prestige which the legal profession must enjoy.

[114] Respectfully, the Panel's comments in *Rhyno* that it has an unfettered jurisdiction conflicts with the principle of finality which finds expression in the doctrines of *functus officio*,[36] *res judicata*, issue estoppel, collateral attack, and abuse of process.[37]

[115] The jurisdiction to reconsider is not unfettered; rather, it must be interpreted in the context of the regulatory objectives of the legislation.

[116] There are two reported decisions respecting the reconsideration power granted by subs. (m) of s. 45(4). In *Nova Scotia Barristers' Society v. Tan*, 2008 NSBS 3 (CanLII) [*Tan*], the Panel varied an approved settlement agreement upon consent of Mr. Tan and the Bar Society because Mr. Tan needed more time to fulfil the obligations he was ordered to undertake. There was an evidentiary connection between Mr. Tan's conduct and his mental health. Accordingly, the Bar Society was willing to "extend the time" and it was the Bar Society that requested a Panel conference "to consider the Society's request to vary" the agreement.

[117] In allowing the variation, the Panel resolved "that the Panel retains jurisdiction to monitor the interpretation, implementation and enforcement of this Order and the previous Order approved by Resolution in this matter […]." Although not explicitly mentioned, the presence of mental health factors and the Bar Society's support would reflect an interest in preserving the integrity of the legal profession.

[118] In *Rhyno*, the Bar Society jointly recommended with Mr. Rhyno a variation to his pre-existing sanction. As referenced above, the Panel noted it had discretion to exercise its authority "against the backdrop of both the public interest in the practice of law and the continuing trust, confidence, and prestige which the legal profession must enjoy." While it approved the joint request, the Panel commented that it would have been preferable for more evidence to have been led justifying the joint recommendation.

[119] Notably, unlike *Tan* and *Rhyno*, Mr. Howe's variation application was not supported by the Bar Society, which is tasked with protecting the public interest by

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[36] See e.g. *Manitoba.*
[37] See e.g. *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 [*Toronto*].

virtue of its role as a regulator. This weakens any suggestion that the public interest is engaged by Mr. Howe's application.

[120] Considering the language in subs. (m), in the context of the purposes of the *Legal Profession Act*, any variation must be based on change that would take into account protection of the public interest and preservation of the integrity of the legal profession. Any such change must be measured against the potential to affect the original decision either as to liability or penalty, taking into account all of the relevant circumstances.

[121] As the Federal Court observed in the immigration context:[38]

> [20] […] the question of whether an immigration officer is *functus officio* after rendering [a] decision need only be decided if the additional information adduced […] was significant enough to have potentially affected the outcome of a reconsideration decision.

[122] The Bar Society's acknowledgement of systemic discrimination does not provide a basis for supposing any different outcome with respect to liability or sanction in Mr. Howe's case. There is simply no connection between the Bar Society's acknowledgement and the Panel's Order. The 2017 Panel proceeded to consider the issue of systemic racism when it found Mr. Howe guilty of professional misconduct and penalized him with disbarment. Mr. Howe appealed. The Court of Appeal noted that no connection had been established between systemic racism and Mr. Howe's unprofessional conduct or his discipline for that conduct. Subject to the authority to vary, the issues of guilt and penalty are *res judicata.*[39]

[123] Mr. Howe's alternative argument that he has been treated differently from other lawyers – and in particular, white lawyers – is akin to appealing a criminal sentence based on later sentencing decisions for other offenders. As Justice Cromwell said in *R. v. Sipos*:[40]

> [30] Fresh evidence addressing events that have occurred between the time of sentencing and the time of the appeal may raise difficult issues which bring

[38] *Kurukkal v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 695 at para. 20. The Federal Court of Appeal (overturning the decision on a different point), went on to confirm that the decision-maker had the discretion to exercise reconsideration jurisdiction: see *Canada (Citizenship and Immigration) v. Kurukkal*, 2010 FCA 230 at para. 4.
[39] See *Toronto*.
[40] 2014 SCC 47 [*Sipos*].

> competing values into sharp relief. On one hand, we must recognize, as Doherty J.A. put it in *R. v. Hamilton* (2004), 2004 CanLII 5549 (ON CA), 72 O.R. (3d) 1, at para. 166, that "[a]ppeals take time. Lives go on. Things change. These human realities cannot be ignored when the Court of Appeal is called upon to impose sentences well after the event." However, we must equally pay attention to the institutional limitations of appellate courts and the important value of finality. ***Routinely deciding sentence appeals on the basis of after-the-fact developments could both jeopardize the integrity of the criminal process by undermining its finality and surpass the appropriate bounds of appellate review***: *Lévesque*, at para. 20; *R. v. Smith* (2005), 2005 ABCA 404 (CanLII), 376 A.R. 389 (C.A.), at paras. 21-25.
>
> [Emphasis added]

[124] Justice Cromwell does not here suggest a discretion to change an original outcome on appeal based on different cases, but on potentially different facts in the case under appeal.

[125] Moreover, the policy reasons in favour of finality described by Justice Cromwell in *Sipos* are even stronger in a regulatory context where the public interest in regulation is high, the member's interest is one of privilege not right, and there is a lesser regulatory penalty for the member than the serious consequences of a criminal conviction.

[126] In concluding that s. 45(4)(m) did not authorize reconsideration of Mr. Howe's case based on later cases with allegedly different outcomes, the Panel made no error of law.

[127] In sum, a disciplinary Panel has the discretion to assume jurisdiction to reconsider a prior sanction when it determines that doing so is necessary to uphold the objects of the *Legal Profession Act*. The Panel in this case correctly proceeded on this basis.

[128] This statutory appeal is confined to questions of law. The Panel's subsequent determination of what was needed to merit the exercise of its discretionary jurisdiction in the entire circumstances of Mr. Howe's matter – namely, a personal change in circumstances – does not demonstrate any error of law, nor does its ultimate decision to decline to do so based on the grounds advanced by Mr. Howe.

Conclusion

[129] The Panel made no error of law in declining to consider Mr. Howe's application for reconsideration. The appeal is dismissed. The point of statutory interpretation has not previously been considered by this Court. Accordingly, there will be no costs.

Bryson, J.A.

Concurred in:

Van den Eynden, J.A.
Gogan, J.A.