

SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Farmer v. Hirtle, 2015 NSSM 11

BETWEEN:

**LLOYD GEORGE FARMER
and CHARLOTTE ROSE FARMER**

Clients
(Respondents on Preliminary Application)

- and -

**DAVID R. HIRTLE/HIRTLE LEGAL SERVICES INC.
and ALLEN C. FOWNES/FOWNES LAW OFFICES INC.**

Lawyers
(Applicants on Preliminary Application)

DECISION AND ORDER

(Preliminary Application to Disqualify Rubin Dexter
as Counsel to the Clients in These Proceedings)

Date of Hearing: Evidence and Submissions Were in Writing
(Final Written Submission Received on March 19th, 2015)

Court Location: Bridgewater, Nova Scotia

Heard Before: ***Gavin Giles, Q.C., Chief Adjudicator***

Counsel: For the Lawyers
(Applicants on Preliminary Application):
David Miller, Q.C.

For the Clients
(Respondents on Preliminary Application)
Rubin Dexter

Date of Decision: March 31st, 2015

Gavin Giles, Q.C., Chief Adjudicator

SUMMARY OF FINDINGS:

[1] A Taxation is at issue in these Proceedings.

[2] The Clients (the Respondents in the within Preliminary Application) are seeking the review and, impliedly, the reduction, of the fee accounts rendered to them by the respective Lawyers (the Applicants in the within Preliminary Application).

[3] The fee accounts in question were rendered by the Lawyers to the Clients pursuant to the terms and conditions of certain alleged Contingency Fee Agreements said by the Lawyers to have been concluded on June 16th, 2010.

[4] According to the materials filed with the Court in these proceedings, the Lawyers acted for the Clients in related personal injury claims.

[5] As a preliminary matter, the Lawyers have brought an Application seeking an Order disqualifying Ruben Dexter as the Clients' Counsel in these proceedings.

[6] The Lawyers have not alleged any wrongdoing against Mr. Dexter; or any actual bias on his part.

[7] Instead, the Lawyers have argued that as a recent former Adjudicator of this Court, Mr. Dexter should be disqualified from appearing before it as Counsel for at least the period of time within which these proceedings will be determined.

[8] The Lawyers have based their Application and related arguments on the provisions of Chapter 7, Section 7.7.1 of the *Nova Scotia Barristers' Society's Code of Professional Conduct*, as amended to January 23rd, 2015. The Section prohibits "[a] Judge who returns to practice after retiring, resigning or being removed from the Bench..." from appearing as Counsel before her or his former Court for a period of three years, unless the Society should otherwise rule.

[9] The Society has not ruled otherwise. Nor has the Society ruled at all.

[10] Put at its simplest, the Lawyers argue that the provisions of the Section apply, *mutatis mutandis*, to Mr. Dexter (and to Adjudicators of this Court generally). As such, the

Lawyers argue that Mr. Dexter should be prohibited from appearing a Counsel before this Court for a period of three years following his resignation as an Adjudicator of this Court in October of 2013.

[11] The Lawyers have based their arguments on the application of the provisions of Chapter 7, Section 7.7.1 of the *Code* to Mr. Dexter on some very broad and general definitions of the terms “Judge” and “Court”. In so doing, the Lawyers, in my respectful view, have misperceived the pedestrian nature of this Court and the clear distinctions between it and the types of Judges and Courts which they have otherwise defined.

[12] Also, in my respectful view, the Lawyers have ignored, or have at least failed to consider, some of the provisions of the *Judges Act*, R.S.C., 1985, c. J-1, the *Provincial Court Act*, R.S.N.S., 1985, c. 238 and the *Family Court Act*, R.S.N.S., 1985, c. 159; especially as those provisions apply to eligibility and qualification for appointment and to extra-judicial employment and full-time performance of judicial duties. There are no such correlative provisions set out in the *Small Claims Court Act* with respect to the Adjudicators of this Court.

[13] In fact, membership in the Nova Scotia Barristers’ Society is a prerequisite for the Adjudicators of this Court to continue to hold their offices. The distinction is that Judges appointed pursuant to the provisions of the *Judges Act*, the *Provincial Court Act* and the *Family Court Act* only require membership in the Nova Scotia Barristers’ Society as a prerequisite to their appointments. This distinction is significant in my view.

[14] Also put at its simplest, the Clients argue that an Adjudicator is not a Judge as contemplated pursuant to the provisions of Chapter 7, Section 7.7.1 of the *Code* and that the provisions of the Section do not therefore apply to Adjudicators of this Court. The Clients also point to several features which they say distinguish Judges as contemplated by the Section from Adjudicators of this Court. Some of them arise from the statutory provisions referred to above.

[15] For the reasons set out below, I agree with the Clients’ interpretations and definitions and with their stated concepts of the term “Judge” as set out pursuant to the provisions of Chapter 7, Section 7.7.1 of the *Code*. I have not ignored the Lawyers’ submissions with respect to perceptions as highlighted by the Canadian Bar Association. More about the issue of perception is set out below.

[16] Accordingly for all of the reasons set out below, the Lawyers' Application for an Order disqualifying Mr. Dexter as the Clients' Counsel in these proceedings is declined.

[17] An Order will follow. Prior to its entry, I will receive written submissions should Costs be sought.

INTRODUCTION:

[18] The Clients' Notice of Taxation has been outstanding for some months (since July 31st, 2014).

[19] The Clients' Notice of Taxation was filed by Mr. Dexter. It was filed some nine or ten months following his resignation as an Adjudicator of this Court.

[20] The Taxation has not proceeded on its merits to date because of two preliminary matters. Only the Lawyers' instant Application remains pending.

[21] The preliminary matters have been raised by the Lawyers. The Lawyers have brought considerable depth and focus to these preliminary matters. They have proceeded with them with dispatch. There can be no suggestion that the preliminary matters have been brought by the Lawyers solely to hinder the Clients in their pursuit of their Taxation.

[22] Shortly after the Clients' Notice of Taxation was served, the Lawyers raised their two preliminary matters: my recusal on an allegation of conflict of interest and Mr. Dexter's disqualification on the basis of the arguments summarized above.

[23] Until recently, the Lawyers were self-represented on their two preliminary matters. Latterly though, the Lawyers have been assisted by David Miller, Q.C. Mr. Miller, Q.C. can quite rightly be regarded as one of the country's leading Barristers. He has predictably brought additional depth and focus to the Lawyers' instant Application.

BACKGROUND:

[24] The respective contingent fee accounts rendered by the respective Lawyers to the Clients in the underlying proceedings totalled \$193,569.56 and \$177,291.67. Both accounts were rendered to the Clients on December 6th, 2012.

[25] My only knowledge of these accounts is the information set out in the Clients' Notice of Taxation. Appended to the Clients' Notice of Taxation are copies of the respective Lawyers' respective fee accounts.

[26] The fee portions of the respective Lawyers' respective accounts were \$154,166.66 and \$154,166.67. The remainder of each account was comprised of Disbursements and HST.

[27] Neither of the Lawyers' respective accounts was particularly detailed. One referred to "all services rendered" and included generic references to "court appearance, attendances, conferences, correspondence and telephone calls". The other referred to "all professional services" and included moderately less generic references to clients meetings, legal research into liability and damages, preparation for discovery and a Notice to Admit, negotiations with the Respondent's Section "B" insurer (for which no discrete fees were charged), discovery, work with respect to various experts and their reports, preparation for and attendance on Mediation and the drafting and filing of certain "closing" or "clean-up" documents.

[28] Set out in one of the Lawyers' accounts was a "Unit Price" heading and a reference to "33.33% of Settlement amount of \$925,000". I have inferred from that entry that net of fees, disbursements and HST, the Clients received \$554,138.77 of the agreed-upon settlement amount. I have also inferred that the Lawyers charged the Clients the maximum allowable compensation set out pursuant to the provisions of Article 4 of the respective Lawyers Contingency Fee Agreements, or a total of 33.33% of the settlement amount.

[29] Shortly after the Clients' Notice of Taxation was served, the Lawyers raised their two preliminary matters.

[30] Both preliminary matters were scheduled for Hearing before the Court in Bridgewater on Friday, October 31st, 2014. The Hearing was preceded by written Briefs. Both of the Lawyers were present. They argued the two preliminary matters themselves (with Mr. Fownes carrying the bulk of the Lawyers' arguments). The Lawyers were, and are, members of the Nova Scotia Barristers' Society in good standing. They were not at the time represented by Mr. Miller, Q.C.

[31] At the outset of the Hearing into their two preliminary matters, the Lawyers abandoned their position with respect to Mr. Dexter's disqualification. They informed the Court

that they would instead seek some form of “ruling” regarding Mr. Dexter’s status and role from the Nova Scotia Barristers’ Society. The Lawyers’ position at the time was acknowledged as being “without prejudice” to the possibility that this Application would be made.

[32] The Lawyers proceeded with and completed their Application seeking my recusal. My decision was reserved. The Lawyers’ Application for my recusal was subsequently declined by way of Written Reasons filed on November 3rd, 2014.

[33] For approximately six weeks thereafter, the Lawyers continued to consider their position with respect to Mr. Dexter’s disqualification as Counsel to the Clients in these proceedings. Their position culminated in a written submission to the Nova Scotia Barristers’ Society. What the Lawyers sought from the Society was a ruling regarding Mr. Dexter’s continued participation in these proceedings.

[34] Mr. Miller, Q.C.’s written submission on behalf of the Lawyers was made to the Nova Scotia Barristers’ Society generally but was immediately referred to its Ethics Advisory Committee. There appeared to have been some submission or conclusion, perhaps by the Nova Scotia Barristers’ Society itself, that Mr. Dexter’s continuance as Counsel to the Clients in these proceedings may be viewed as a matter pertaining to his professional ethics.

[35] I reiterate that the Lawyers have not alleged any wrongdoing against Mr. Dexter. They have likewise not alleged any actual bias against him. They have only raised the issue of his disqualification as Counsel to the Clients in these proceedings given his role as a recent former Adjudicator of this Court and the related perceptions which his former office could bring to these proceedings, if any. More about that perception, especially as it has been discussed by the Canadian Bar Association, will be set out below.

[36] Mr. Miller, Q.C.’s written submission on behalf of the Lawyers was filed with the Nova Scotia Barristers’ Society on December 17th, 2014. Mr. Miller, Q.C.’s stated intention on behalf of the Lawyers was “to seek the guidance of the Nova Scotia Barristers’ Society as to whether s. 7.7.1 of the *Code of Ethics*, when read in the context of the balance of the *Code*, the *Small Claims Court Act* and other relevant considerations, prohibits recently retired Small Claims Court Adjudicator from appearing as Counsel in that Court absent the consent of the Society.” Further, Mr. Miller, Q.C.’s written submission on behalf of the Lawyers “left it to the Society to determine what, if any, steps should be taken if it agrees with the submission.”

[37] I was not favoured with a copy of Mr. Miller, Q.C.'s written submission to the Society on behalf of the Lawyers, nor did I want to be. Mr. Miller, Q.C. volunteered a copy of his written submission but I demurred.

[38] Though somewhat unfortunate, the Nova Scotia Barristers' Society took considerable time with its deliberations. In an e-mail message from Ms. Elaine Cumming, the Society's Professional Responsibility Counsel, dated January 13th, 2015, Mr. Dexter was informed and that Mr. Miller, Q. C.'s written submission would be circulated to the Society's Ethics Advisory Committee. That was almost a month following the date upon which the submission had been received by the Society generally.

[39] Ms. Cumming also informed Mr. Miller, Q.C. and Mr. Dexter that the Ethics Advisory Committee "is not able to make rulings nor otherwise give any opinion that is 'binding'; rather, they [sic] are only able to advise as to their [sic] interpretation of the rules as they may apply to the circumstances." These comments were repeated by Ms. Cumming in correspondence to Mr. Miller, Q.C. dated January 15th, 2015.

[40] Ms. Cumming also invited Mr. Dexter could make a response submission of his own. Mr. Dexter filed that submission with the Society on January 19th, 2015.

[41] Mr. Miller, Q.C. next advised of a response from the Society's Ethics Advisory Committee dated February 10th, 2015. According to that response, the Ethics Advisory Committee was "unanimous in their [sic] view that this question is appropriately before the Court and as such is not an issue upon which they [sic] wish to provide their opinion." In the result, Mr. Miller, Q.C. indicated that the within Application would be forthcoming and proposed that it proceed on the basis of written submissions only.

[42] The proposal by Mr. Miller, Q.C. made intuitive sense to me but I sought input from Mr. Dexter. He replied positively, seeking only a short extension of time within which he could provide his submission on behalf of the Clients.

[43] Mr. Dexter's submission on behalf of the Clients was filed on March 19th, 2015. There have been neither additional submissions nor requests for Leave to file additional submissions.

ANALYSIS:

[44] The Lawyers' position on this Application is summarized at Page 8 of Mr. Miller, Q.C.'s exceptionally comprehensive Brief.

[45] The Lawyers made the seminal submission that the Adjudicators of this Court are "Judges" and are such bound by the provisions of Section 7.7.1 of the Nova Scotia Barristers' Society's *Code of Professional Conduct*.

[46] The Lawyers have provided further contextual basis for this submission by way of reference to the *Nova Scotia Legal Ethics Handbook, 1990*, the *Canadian Bar Association Code of Professional Conduct, 1974* and the *Canadian Bar Association Code of Professional Conduct, Amended to 2006*. The Lawyers have also provided additional parenthetical context in reference to the statutory definition of this Court as set out pursuant to the provisions of Section 3 of the *Small Claims Court Act*.

[47] I have considered all of these submissions, as well as all of the materials cited in reference to them. I have rejected them on the basis that they all fail to comprehend an important distinction between Courts and the Judges appointed to them generally and this Court and the Adjudicators appointed to it more specifically.

(a) The Small Claims Court of Nova Scotia

[48] As the Lawyers have accurately noted, the structural basis for the establishment on this Court has been set out pursuant to the provisions of Section 2 of the *Small Claims Court Act*:

It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.
[Underlining Added]

[49] The concept of informal adjudication has been the subject of considerable comment by the Supreme Court of Nova Scotia (and by the Nova Scotia County Court prior to its abolition).

[50] For example, in *Trimper v. McClement, et al.* (1989), 19 N.S.R. (2d) 104, the County Court (as it was) held that the Small Claims Court of Nova Scotia was never intended by the Legislators to be a Court in which technical arguments would prevail.

[51] At issue in *Trimper* was the service of a Small Claims court of Nova Scotia Claim Form by Certified Mail, the then-accepted practice. Although the Adjudicator found that proof of service of the Claim Form on the defendant had been made out, the defendant appealed on the basis that the Adjudicator's conclusion was unsustainable given the illegible signature on the Certified Mail receipt.

[52] The County Court dismissed that argument on the basis that such "highly technical" arguments were inconsistent with the informal and inexpensive ideals set out in Section 2 of the *Small Claims Court Act*.

[53] Whilst I do not for a minute suggest that the informal and inexpensive ideals of this Court can stand as a proxy to permit the relaxation of natural justice and other established legal principles, the concepts of informality and efficiency cannot be ignored either. In fact, Decisions of the Supreme Court of Nova Scotia subsequent to *Trimper* have been equally clear that this Court must balance the concepts of informality and efficiency with those of natural justice and other established legal principles. This balancing is not an easy task.

[54] In *Spencer v. Bennett*, 2009 NSSC 368, Bryson, J. (as His Lordship then was) held (at Paragraph 13) that:

It is clear that the legislature did not intend that informality and modesty of expense were to be purchased at the price of the loss of natural justice. There is some compromise. This compromise has been described by MacDonald, A.C.J. (as he then was) in *Whalen et al. v. Towle*, 2003 NSSC 259 (CanLII); (2003), 223 N.S.R. (2d) 135; 705 A.P.R. 135:

This *Act* therefore represents a compromise in the area of civil justice in this Province. It provides for a less expensive, less formal and more efficient process for claims that involve relatively small amounts of money. For example, most of the expensive pre-trial safeguards are abandoned in the interest of efficiency. There is no formalized regime for the exchange of documents, no discovery process (either written or oral), no pre-trial conferences, nor mandatory pre-trial submissions.

...

Therefore, the Small Claims Court regime represents a less than perfect regime, but it is a fundamentally fair one. Whether in the criminal vein or the civil vein, in Canada's justice system, we strive for justice that is fundamentally fair and we acknowledge that perfect justice is often unobtainable. This was succinctly pointed out, albeit, in the criminal context by Chief Justice McLachlin in the Supreme Court of Canada decision of *R. v. O'Connor (H.P.)*, 1995 CanLII 51 (SCC), [1995] S.C.J. No. 98; 191 N.R. 1; 68 B.C.A.C. 1; 112 W.A.C. 1 (S.C.C.). At paragraph 193 she states:

"What constitutes a fair trial takes into account not only the perspective of the accused but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. *What the law demands is not perfect justice but fundamentally fair justice.*" (Emphasis Added)

So the question before this Court is whether the process here was fair. Was it consistent with both efficiency and natural justice?

[55] In *Parslow v. Galeb Construction 1998 Ltd.*, 2014 NSSC 390 (CanLII) Van den Eynden, J. (as Her Ladyship then was) set out the variability of the concept of natural justice as it pertains to this Court. There, at Paragraph 33, Van den Eynden, J. applied the reasoning of Bryson, J. in *Spencer* (at Paragraphs 15 and 16):

Natural Justice is not defined in the *Small Claims Court Act*. Nevertheless it is a familiar concept to the common law, although elusive of definition. In *Lloyd v. McMahon*, [1987] A.C. 625 at 702, Lord Bridge puts it this way:

...the so called rules of natural justice are not engraved on tablets of stone...what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.

These criteria have been echoed and amplified in *Baker v. Canada*, 1999 CanLII 699 (SCC), [1999] S.C.J. No. 39; [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193 (S.C.C.), (per: L'Heureux-Dubé).

Natural Justice really means that the parties are entitled to a fair process..... no one should be a judge in his own cause (the adjudicator must be independent) and that one should always hear 'the other side.'

[56] The sum and substance of what I take from the principles set out in these authorities is that this Court is different, that it was intended by the Legislators who created it to be different and that it functions, and must be permitted to function, differently than do the other Courts.

[57] In fact, in *Royal Insurance Company of Canada v. Legge*, (1996) 152 N.S.R. (2d) 283, Gruchy, J. (as His Lordship then was) held that this Court "has status similar to that of an administrative or domestic tribunal...".

[58] I agree of course with the submission by the Lawyers that fairness of process is the hallmark of any Court; and in fact, the most important certainty by which any Court can draw its authority.

[59] I also agree that the Lawyers have highlighted a valid point with respect to the Canadian Bar Association's *Code of Professional Conduct, 1974*, and to its related commentary that a litigant would be "bound to think that a former Judge will be in a preferred position before the Courts whether or not such is the fact".

[60] But then again, context is important to a full and fair understanding of this concept as well.

[61] To be recalled is that the Courts of Nova Scotia website, more about which will be set out below, currently lists four discrete Courts, the members of which make up The Nova Scotia Judiciary. The smallest of those Courts is the Nova Scotia Court of Appeal. It comprises eight full-time Justices. The largest of those Courts is the Supreme Court of Nova Scotia. It comprises 36 full-time Justices. Close in size to the Supreme Court of Nova Scotia are the Nova Scotia Provincial and Family Courts. Those Courts together comprise 35 full-time Judges. Though I appreciate that these numbers would be bolstered by the numbers of Supernumerary Justices and Judges there are, this added number would be small and would not affect, contextually, my over all conclusions.

[62] Full-time Justices and Judges and their Supernumerary colleagues more often than not work together in very close quarters. Additionally, those full-time Justices and Judges and their Supernumerary colleagues must assiduously foster and maintain certain social isolation so as to continue to enhance their independent and impartial roles.

[63] For those reasons, the positions of these Justices and Judges and their Supernumerary colleagues can tend to become insular. These Justices and Judges and their Supernumerary colleagues are also reliant, sometimes highly, on each other for advice, direction, assistance and normal collegiality.

[64] It is on that basis that a litigant, to adopt the nomenclature of the Canadian Bar Association's stated 1974 concern, might well conclude, with good reason, that Justices and Judges form mutual friendships, affections, respects and reliances; all of which might very well transcend their precise periods of appointment.

[65] But that is not at all the case with respect to the Adjudicators of this Court; many of whom could go for extended periods of time, extending into years, without seeing, speaking with or interacting in any manner with any other Adjudicator. And it is also not likely to be seen or apprehended as being the case given that many Adjudicators, qua Counsel, often appear opposite each other in both transactional and dispute-oriented matters unrelated to this Court.

[66] It is for some of those reasons that I have determined that Section 7.7.1 of the Nova Scotia Barristers' Society's *Code of Professional Conduct* does not apply to this Court.

(b) Adjudicators as Judges

[67] Notwithstanding the Lawyers' arguments that Adjudicators of this Court are Judges, in that they are people or publicly appointed officials authorized or appointed preside over, hear, decide and determine matters before a Court, they are not currently recognized as members of the Nova Scotia Judiciary.

[68] Quite to the contrary, the Courts of Nova Scotia website, maintained under the auspices of the Chief Justice of Nova Scotia and the Director of the Executive Office of the Nova Scotia Judiciary, under its heading "Who are the Judges sitting in Nova Scotia Courts?" sets out the following:

Collectively, the Province's Judges are known as 'The Nova Scotia Judiciary'.

There are 8 full-time Justices in the Court of Appeal and 36 full-time Justices in the Supreme Court and the Supreme Court Family Division. At any given time, there are also a number of "supernumerary" Justices in both of these Courts. "Supernumerary" Justices work part-time.

In the Provincial Court and the Family Court, there is a total of 35 full-time Judges. Some Judges sit only in Provincial Court. Others sit only in Family Court. And still others sit primarily in one or the other but can sit in both. There are also part-time (or "Per Diem") Judges sitting on either or both Courts.

For a list of Judges and Justices of the various Courts, click on the appropriate link below:

[69] Below that form of introduction are "links" to each of the Courts wherein the members of Nova Scotia's Judiciary are said to preside. The linked Courts are the Nova Scotia Court of Appeal, the Supreme Court of Nova Scotia, the Supreme Court of Nova Scotia (Family Division), the Nova Scotia Provincial Court and the Nova Scotia Family Court. Noteworthy is that absence of any reference in any linkage to this Court, its Adjudicators or its Adjudicators as Judges.

[70] In fact, the very obverse is the case; in that the website directs that "Adjudicators, not Judges or Justices, preside in the Small Claims Court."

[71] Similarly, the Courts of Nova Scotia website, under its heading "How to Address the Judge" sets out the following:

Collectively, the Judges of the Nova Scotia Courts are known as "The Nova Scotia Judiciary". The Judiciary consists of the Justices of the Supreme Court and Court of Appeal as well as Judges of the Family Court and the Provincial Court (including the Youth Justice, Mental Health, and Domestic Violence Courts).

There are a number of other courts in Nova Scotia as well. The Small Claims Court, the Bankruptcy Court, and the Probate Court fall under the jurisdiction of the Supreme Court. Although Justices of the Supreme Court do, on occasion, sit in these courts, Registrars and Adjudicators usually preside. Registrars and Adjudicators are not members of the Judiciary.

[72] Consistent with the reasoning set out above, it appears clear that some effort has been made to exclude the Adjudicators of this Court from that group which has defined itself as “The Nova Scotia Judiciary”. Many of the possible reasons for that exclusion are obvious. Some of them have been in fact highlighted already in these reasons.

[73] Chief amongst those reasons is that all of the members of The Nova Scotia Judiciary, as styled, have been appointed to permanent judicial positions which terminate only at fairly advanced retirement ages or upon findings of bad behaviour or of incapacity. Also chief amongst those reasons is that all of the members of The Nova Scotia Judiciary, as styled, are required as terms of their appointments to surrender every other form of occupation.

[74] In the result, the distinction between members of The Nova Scotia Judiciary and the Adjudicators of this Court is stark; and in my view, this distinction serves to reinforce my reasoning as stated above.

(c) Exclusivity of Office

[75] At page 2 of his Brief, Mr. Dexter, on behalf of the Clients, argues that:

Unlike, [sic] judges of the superior and provincial courts, Adjudicators of the Small-Claims Court of Nova Scotia are appointed on a part-time basis and continue during the currency of their appointment, which is for a fixed term, to be practicing members of the bar. In fact, s. 6(3) of the *Small Claims Court Act* explicitly requires that, in order to be appointed as an Adjudicator, a person must be a practicing member of the Nova Scotia bar in good standing of the Nova Scotia Barristers' Society. As such, Adjudicators neither withdraw from practice upon their appointment nor ‘return to practice’ after the termination of their appointment.

Moreover, unlike judges of the superior and provincial courts, as practicing members of the bar is not uncommon for Adjudicators to appear as opposing counsel in matters in other courts or before administrative tribunals.

Thus the separation between bench and the practicing bar found in the superior and provincial courts is absent in the Small Claims Court.

[76] I find myself attracted to this argument; albeit from a slightly broader perspective.

[77] Put succinctly, Section 6(3) of the *Small Claims Court Act* provides that:

No person shall be appointed or serve as an adjudicator unless that person is a practising member in good standing of the Nova Scotia Barristers' Society. [Underlining Added]

[78] The maintenance of membership in the Nova Scotia Barristers' Society as a prerequisite to this Court's Adjudicators continuing to serve is an indication that the Legislators who created this Court possessed the expectation that its Adjudicators would also continue in some manner with other aspects of their respective legal practices or other legal endeavours.

[79] This analysis would appear to be especially apposite in that this Court's Adjudicators only serve at the direct pleasure of the Governor-In-Council (See: Section 6(4) of the *Small Claims Court Act*), have no form of tenure and are remunerated only on a part-time basis by way of an hourly rate paid only with respect to actual time the Adjudicators spend in Court (as opposed to in preparation, in research or in the rendering of reserved written decisions). These are not limitations which the Judges of any of the Province's other Courts face.

[80] In that regard, Section 6(1) of the *Provincial Court Act*, under the heading "Term of Office", provides that "[e]very judge shall hold office during good behaviour unless he is removed from office by the Governor in Council as provided in subsection (4)." Though now repealed, and replaced with other disciplinary and removal from office provisions, Section 6(4) of the *Provincial Court Act* spoke generally to a Judge's misbehaviour, incompetence or diminished (physical or mental) capacity.

[81] Additionally, Section 11(1) of the *Provincial Court Act*, under the heading "Full-Time Performance of Duties", provides that "[n]o judge shall practise any profession or actively engage in any business, trade or occupation but shall devote his full time to the performance of his duties as a judge."

[82] Similarly, Section 55 of the *Judges Act*, under the heading "Judicial Duties Exclusively", provides that "[n]o judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties."

[83] In the plain and ordinary meaning of its wording therefore, it can only be a Judge's exclusivity of office to which the wording of Section 7.7.1 of the Nova Scotia Barristers'

Society's *Code of Professional Conduct* can apply. The Judges bound by exclusivity of office are the only ones who are required to leave the legal profession upon appointment and are thus the only ones capable of returning to the legal profession once those appointments end. The Adjudicators of this Court cannot do that as they cannot leave the legal profession without at the same time sacrificing their offices.

(d) Section 7.7.1

[84] It is on the basis of all of the above reasoning that the context of Section 7.7.1 of the Nova Scotia Barristers' Society's *Code of Professional Conduct* must be considered.

[85] First, the Section is set out in the *Code of Professional Conduct* under the heading "Retired Judges Returning to Practice". That is not a category of Nova Scotia Barristers' Society membership to which Mr. Dexter belongs. In simple terms, he is not returning to practice.

[86] Second, the Section provides that:

A judge who returns to practice after retiring, resigning or being removed from the bench must not, for a period of three years, unless the Society approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions.

[87] Apropos my conclusion immediately above, Mr. Dexter is not is not "a Judge who [is returning] to practice after retiring...".

[88] Third, the Section makes no reference to any form of judicial officer other than to a Judge. It does not refer to Adjudicators, Presiding Justices of the Peace, Commissioners (as in the Nova Scotia Utility and review Board) or to Chairs of the various statutory hearing and appellate bodies within the Province.

[89] It would be difficult for me to conclude that the Nova Scotia Barristers' Society failed to consider Adjudicators, Presiding Justices of the Peace, Commissioners (as in the Nova Scotia Utility and review Board) and the Chairs of the various statutory hearing and appellate

bodies within the Province as a matter of simple oversight. More likely is that the Society did consider Adjudicators, Presiding Justices of the Peace, Commissioners (as in the Nova Scotia Utility and review Board) and the Chairs of the various statutory hearing and appellate bodies within the Province and concluded that the risk of the mischief the Section is designed to protect against does not exist in the context and circumstances of those legal functionaries.

[90] Fourth, the Nova Scotia Barristers' Society's *Code of Professional Conduct* was approved by its Governing Council on September 23rd, 2011 and proclaimed in force as of January 1st, 2012. It has since been amended on five occasions: January 20th, 2012, July 20th, 2012, February 22nd, 2013, September 19th, 2014 and January 23rd, 2015.

[91] On none of those occasions does there appear to have been any interest or inclination on behalf of the Nova Scotia Barristers' Society to amend, modify or extend Section 7.7.1 to include the Adjudicators of this Court, Presiding Justices of the Peace, Commissioners (as in the Nova Scotia Utility and review Board) and the Chairs of the various statutory hearing and appellate bodies within the Province. It is on that basis that I have concluded that the Nova Scotia Barristers' Society must be content with the restrictions set out in Section 7.7.1 of the *Code of Professional Conduct* as they currently are.

[92] Fifth and finally, the Preface to the *Code of Professional Conduct* speaks to its all-encompassing nature as a model or seminal document by which the whole of the Province's legal profession is regulated:

One of the hallmarks of civilized society is the Rule of Law. Its importance is manifested in every legal activity in which citizens engage, from the sale of real property to the prosecution of murder to international trade. As participants in a justice system that advances the Rule of Law, lawyers hold a unique and privileged position in society. Self-regulatory powers have been granted to the legal profession on the understanding that the profession will exercise those powers in the public interest. Part of that responsibility is ensuring the appropriate regulation of the professional conduct of lawyers. Members of the legal profession who draft, argue, interpret and challenge the law of the land can attest to the robust legal system in Canada. They also acknowledge the public's reliance on the integrity of the people who work within the legal system and the authority exercised by the governing bodies of the profession. While lawyers are consulted for their knowledge and abilities, more is expected of them than forensic acumen. A special ethical responsibility comes with membership in the legal profession. This Code attempts to define and illustrate that responsibility in terms of a

lawyer's professional relationships with clients, the Justice system and the profession.

The Code sets out statements of principle followed by exemplary rules and commentaries, which contextualize the principles enunciated. The principles are important statements of the expected standards of ethical conduct for lawyers and inform the more specific guidance in the rules and commentaries. The Code assists in defining ethical practice and in identifying what is questionable ethically. ...

...

The practice of law continues to evolve. Advances in technology, changes in the culture of those accessing legal services and the economics associated with practising law will continue to present challenges to lawyers. The ethical guidance provided to lawyers by their regulators should be responsive to this evolution. Rules of conduct should assist, not hinder, lawyers in providing legal services to the public in a way that ensures the public interest is protected. This calls for a framework based on ethical principles that, at the highest level, are immutable, and a profession that dedicates itself to practise according to the standards of competence, honesty and loyalty. The Society intends and hopes that this Code will be of assistance in achieving these goals.

[93] This Preface too, would seem to suggest that the Nova Scotia Barristers' Society must be content with the restrictions set out in Section 7.7.1 of the *Code of Professional Conduct* as they currently are.

[94] Approved by its governing Council on September 23rd, 2011, the Nova Scotia Barristers' Society would have by that time had some 15 years of experience with its Ruling 1996-1, which approved of Adjudicators of this Court appearing as Counsel before other Adjudicators of this Court on matters coming before this Court. With such an experience as this, it is inconceivable that the Society would not have moved to amend not only the Ruling but the provisions of Section 7.7.1 should a mischief have been perceived which required redress.

[95] In considering the concept of a "mischief" to be considered, redressed or ameliorated, I have referred above to the Canadian Bar Association's *Code of Professional Conduct, 1974*, and to its commentary on what a litigant would be "bound to think". Noteworthy is that the relevant prohibition set out in the Canadian Bar Association's *Code of Professional Conduct, 1974* was permanent whilst the similar one set out in Section 7.7.1 of the Nova Scotia Barristers' Society's *Code of Professional Conduct* was much more temporal in nature. The

inference I draw is that different times, different locales and different circumstances are bound to produce different results.

[96] It was almost a year between Mr. Dexter's resignation as an Adjudicator of this Court and the Clients' filing of their Notice of Taxation in these proceedings. By now, Mr. Dexter's resignation as an Adjudicator of this Court has been outstanding for more than 18 months. Should there be a mischief to be considered, redressed or ameliorated, as inferentially argued by the Lawyers, I do not see it. Nor do I accept the Lawyers' interpretation of what they contend as their remedial provision.

[97] Additionally, I find the Nova Scotia Barristers' Society's Ruling 1996-1 must be taken for greater seminal importance than that argued by the Lawyers. Though true that the precise underpinnings of the Ruling have not been well set out, its rationale was explained at the relevant time.

[98] Also at the relevant time, the Nova Scotia Barristers' Society's overarching concern, as set out by Donald Taylor, Q.C., appeared to be that Adjudicators of this Court appearing before it as Counsel "might receive favourable treatment from their fellow [presiding] Adjudicators." The concern was considered and the members of the Society's then Administration of Justice Committee were consulted about it. The concern was obviously rejected. And I again reject it now.

(e) The Magnitude of the Claim

[99] I have considered the Lawyers' argument regarding this Court's changing monetary and other jurisdictions and how much more can now be potentially at stake in proceedings before this Court than was the case in 1996. I reject the view that the magnitude of the claim alone can stand as a proxy for the quotient of natural justice which the Court must exhibit and reflect.

[100] In my view, each litigant who comes before the Court does so seeking a remedy. The remedy can be the provision of something the litigant does not have but wants; or it can be the retention of something the litigant has and does not want to surrender. And in the more than 3,500 claims over which I have personally presided, I cannot think of a single one wherein the litigants were not driven to the righteousness of their causes and their efforts to propound them, notwithstanding their magnitude.

[101] Moreover, I cannot accept that the Nova Scotia Barristers' Society would have been driven to its Ruling 1996-1 on the basis that the monetary jurisdiction of this Court at the relevant time was limited to \$5,000 and did not include Residential Tenancies Appeals and Taxations. One assumes, and I have in fact concluded, that the approach of the Nova Scotia Barristers' Society to its Ruling 1996-1 was far more principled.

CONCLUSION:

[43] In arriving at these conclusions, I have not ignored the Decision of the Supreme Court of Nova Scotia (per: Warner, J.) in *Kemp v. Prescesky*, 2006 NSSC 122, nor any of the subsequent Decisions which are reliant on it for their authority.

[44] Though the issue in *Kemp* was very narrowly drawn and related only to the procedural remedies available to a defendant seeking to overturn an adverse Order obtained *ex parte*, many observers consider the Decision to be an a form of indictment on this Court because of some strange anomalies on its procedural rules.

[45] Commencing at Paragraph 11, Warner, J. held in *Kemp* that:

As noted in the 1991 Report of the Canadian Bar Association Task Force on Court Reform in Canada, 'nothing is more important to court reform than the enhancement of public respect for and confidence in the courts' (page 31); surveys cited in the report indicated that the overwhelming majority of people believed that justice favoured the rich, was too complicated to understand, and too slow to bother with. The report recognized the importance of better access to justice, more efficiency, and the need for forums for dispute resolution without formal litigation, but without sacrificing a clear understanding of the role of courts, and that they be just and perceived to be just. 'Nothing is more important to public order and the legitimacy of government than public confidence in the independence, impartiality and justice of the courts.' (Page 46).

The creation of the Small Claims Court in the manner it was set up was a progressive and important improvement to access to justice by ordinary people. Since 1980 the structure and rules of the Small Claims Court have not changed significantly, but the monetary limits have. In 1992 the limit of \$3,000.00 was raised to \$5,000.00; in 1999 the limit was raised to \$10,000.00; in 2002 the limit was raised \$15,000.00 and last year the Legislature passed a law to increase the limit to \$25,000.00. That monetary limit comes into effect next week - on April 1, 2006. While s. 3(1) of the Small Claims Court Act says the Small Claims Court is a court of law and of record, there is no recording of the proceedings. The only record is the summary report of the

Adjudicator, prepared only in response to an appeal of his or her decision.

The rules of procedure in the court may have been appropriate, and met the threshold requirements of natural justice, at a time when the monetary limit was \$3,000.00. However, according to Statistics Canada, the average annual earnings for all adult Nova Scotians, as of the 2001 census, is \$26,632.00. Of those, the average for people with some university education is \$41,146.00. This means that everyone who does not have a university education - which is most Nova Scotians - has an average annual income far less than the monetary jurisdiction of the Small Claims Court, which court can enter a judgment against that person for more than his or her gross annual income. This fact, in my view, informs the requirements of natural justice, one of the bases for appeal in section 32(1) of the Act.

[46] Compelling though those statements might be, they mean neither more nor less than the overarching requirement for natural justice in any Court, especially where procedural matters are concerned.

[47] But the issue raised by the Lawyers in the instant Application as it relates to Mr. Dexter is not procedural but substantive in nature. I make the point as the Lawyers' Application strikes at the very right of the Clients to be represented by a Counsel of their choosing, whose work they know or know of and in whom they have confidence.

[48] Important though it remains, as a result of the application of *Kemp* and a result of the application of other factors, to consider the importance of this Court to those who appear before it, that cannot be the only issue by which this Court governs itself, at least with respect to the regulation of those who appear before it on behalf of others. Instead, first principles are always relevant. And an important first principle is the Clients' right to be represented by Counsel of their choosing; in this case, Mr. Dexter.

[49] Attractive though some of the Lawyers' arguments may initially have struck me, I have simply found that they have all fallen short of compelling me to the view that there is sufficient risk of mischief relative to Mr. Dexter's role on behalf of the Clients that his removal as their Counsel is warranted.

[50] Subject to any appeal, or stay pending appeal, the Taxation will proceed subject to scheduling.

