

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Fraser v. Nova Scotia Barristers' Society*, 2024 NSCA 63

**Date:** 20240709

**Docket:** CA 529317

**Registry:** Halifax

**Between:**

Donn Fraser

Appellant

v.

Nova Scotia Barristers' Society, a statutory body corporate, through its Complaints Investigation Committee, and the Attorney General of Nova Scotia

Respondents

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**Judges:** Bourgeois, Fichaud and Derrick, JJ.A.

**Appeal Heard:** June 20, 2024, in Halifax, Nova Scotia

**Subject:** Interpretation of Regulation 9.1.3(a) of the *Nova Scotia Barristers' Society Regulations* under the *Legal Profession Act*, S.N.S. 2004, c. 28

**Summary:** Mr. Fraser is a practicing lawyer and a member of the Nova Scotia Barristers' Society. The Complaints Investigation Committee of the Society is investigating complaints of conduct unbecoming against Mr. Fraser. The Committee issued interim conditions on Mr. Fraser's practice. Mr. Fraser submitted the Committee had no jurisdiction to issue those conditions. The Committee issued a decision that rescinded the conditions. However, the Committee declined to rule it lacked jurisdiction to impose the conditions. Mr. Fraser appealed to the Court of Appeal under ss. 37(7) and 49 of the *Legal Profession Act*.

**Issues:** Regulation 9.1.3(a) of the *Nova Scotia Barristers' Society Regulations* deals with “conduct unbecoming” done in a personal or private capacity. Is Regulation 9.1.3(a) confined to the three items in its sub-paras. (i), (ii) and (iii), *i.e.* criminal, exploitative and dishonest conduct, as Mr. Fraser submits? Or, as the Society submits, does “conduct unbecoming” extend to conduct “that tends to bring discredit upon the legal profession”, of which items (i), (ii) and (iii) are non-exhaustive examples?

**Result:** The Court of Appeal dismissed Mr. Fraser’s appeal. Under Regulation 9.1.3(a), “conduct unbecoming” extends to conduct that tends to bring discredit upon the legal profession. Items (i), (ii) and (iii) are non-exhaustive examples of conduct unbecoming.

*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 8 pages.*

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**Judges:** Bourgeois, Fichaud and Derrick, JJ.A.

**Appeal Heard:** June 20, 2024, in Halifax, Nova Scotia. Last written submission filed June 27, 2024

**Held:** Appeal dismissed without costs per reasons for judgment of the Court

**Counsel:** Donn Fraser, Appellant  
Marie Henein, K.C. and Ewa Krajewska for the Respondent  
Nova Scotia Barristers' Society  
The Respondent Attorney General of Nova Scotia not participating

## Reasons for judgment:

[1] For twenty years, Donn Fraser has practiced law as a member of the Nova Scotia Barristers' Society ("Society"). Recently, he has been the subject of several complaints alleging conduct unbecoming. The merits of the complaints remain under investigation and have not been determined. This appeal involves the Society's interim regulatory powers.

[2] Under the *Legal Profession Act*, S.N.S. 2004, c. 28 ("Act") the Society's Council has made the *Nova Scotia Barristers' Society Regulations*. Regulation 9.1.3(c) deals with "professional" misconduct. Regulation 9.1.3(a), with which this appeal is concerned, states when a member's activities in a "personal or private capacity" constitute "conduct unbecoming":

9.1.3 When considering complaints or charges, the Complaints Investigation Committee and a hearing panel may determine that conduct constitutes:

(a) conduct unbecoming, if it involves conduct in a member's **personal or private capacity that tends to bring discredit upon the legal profession, including one (1) or more of the following:**

- (i) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or competence as a member of the Society,
- (ii) taking improper advantage of the youth, inexperience, lack of education, lack of sophistication, or ill health of any person,
- (iii) engaging in conduct involving dishonesty;

[bolding added]

[3] Section 37 of the *Act* authorizes the Society's Complaints Investigation Committee ("Committee") to impose interim conditions on a lawyer's practice certificate, pending the merits determination of a complaint. Further to ss. 37 (2) and (5), the conditions remain until they are varied or rescinded by the Committee or a hearing panel.

[4] On August 11, 2021, further to s. 37, the Committee held a hearing to address one of the complaints against Mr. Fraser. By a Confirmatory Resolution dated August 13, 2021 and a Decision, Resolution and Reasons dated August 31, 2021, the Committee found *prima facie* that Mr. Fraser had acted in an abusive manner toward other members of his law firm and the allegations, if substantiated and believed, may constitute conduct unbecoming. Further to Regulation 9.1.3(a),

the Committee imposed interim conditions on his practice certificate, including limitations on his contact and communications with the complainants.

[5] On August 27, 2021, the Committee conducted a further hearing to consider additional allegations. The Committee imposed an interim suspension. The suspension was lifted on December 13, 2021.

[6] Further complaints were made against Mr. Fraser dated January 24, 2022, March 3, 2022, November 17, 2022 and December 1, 2022.

[7] On April 21, 2023, under s. 37(4), the Committee imposed interim conditions that had been jointly recommended by the Society and Mr. Fraser. Mr. Fraser's assent was without prejudice to his right to challenge the Committee's jurisdiction to impose conditions. These conditions replaced the earlier ones and required that Mr. Fraser "be civil and professional in his communications with all persons".

[8] Several months later, under s. 37(4), Mr. Fraser asked the Committee to remove all the practice conditions, as being beyond the Committee's jurisdiction. The Committee received briefs and convened on November 17, 2023, for oral submissions from counsel for Mr. Fraser and the Society. The Society did not object to the conditions' removal but disagreed there had been no jurisdiction to impose them.

[9] On November 26, 2023, the Committee issued a Decision, signed by Mr. Brian Bailey as Acting Chair, which included:

Reasons:

[2] The Nova Scotia Barristers' Society (the Society) currently has before it 5 complaints against Mr. Fraser. These complaints remain under investigation by the Society. Until that investigation is completed, there can be no decision by the Committee on the merits. This would exceed the role of the Committee and would be contrary to the applicable legislation.

[2] (*sic*) The Complaints and Investigation Committee has not yet received the Society's completed investigation and has yet to make any determination on the merits of those complaints. As part of the investigative process, Mr. Fraser advised that he has provided his response in connection with that investigation, which can include his view that the complaints are regarding his behaviour as a private citizen and not governed by the Society or the Committee.

...

[4] The Committee bears in mind that the entire matter remains under investigation and the role of the Committee within a Section 37 hearing is not permitted to adjudicate the merits of the allegations. ...

...

[7] The thrust of Mr. Fraser's submissions is that his conduct was private in nature and had nothing to do with his practice of law and accordingly is outside the purview of the Society and the Committee. To agree with that submission, the Committee sitting in a Section 37 hearing would need to make findings of fact and adjudicate on the merits of the conduct that we are not permitted to make, and which is beyond our mandate at this interim stage.

...

Conclusion:

[9] Our sole function at a section 37 hearing is to determine what, if any interim actions ought to be taken against Mr. Fraser that are required for the protection of the public. Therefore, we decline to make any determination on the issue Mr. Fraser wishes adjudicated at this time.

[10] The Committee sitting in the Section 37 hearing acknowledges that Mr. Fraser wants an adjudication made that the Society and the Committee has no ability to regulate the private conduct of Mr. Fraser.

[11] The Committee does not believe that we should make any statements on those arguments at this hearing and to do so, we would be required to make determinations on the merits of the complaints against Mr. Fraser, which we ought not to do.

[12] Mr. Fraser was under conditions and both Counsel indicated on November 17, 2023 that they wished us to remove them. We unanimously agreed to do so at that time.

[13] It is acknowledged that Mr. Fraser wishes us to make the additional finding that the conditions are being removed because there was no jurisdiction to impose them in the first place. As we have already stated, we are not prepared to make any such determination.

[14] However, the Committee did agree with both Counsel that the conditions ought to be removed and that was our determination.

[15] The Committee has advised Mr. Fraser that the conditions jointly requested by the parties on April 21, 2023 were removed as jointly requested by both parties, effective November 17, 2023.

### ***The Appeal***

[10] Mr. Fraser appeals from the Committee's Decision.

[11] Section 37(7) of the *Act* permits an appeal to the Court of Appeal “on any question of law from a decision of the Complaints Investigation Committee pursuant to this Section, in accordance with Section 49”. Section 49(2) provides for an appeal on a question of law.

[12] Mr. Fraser submits the conditions exceeded the Committee’s jurisdiction. He contends the Committee’s authority is confined to the three enumerated categories of conduct in sub-paras. (i), (ii) and (iii) of Regulation 9.1.3(a) [criminal, exploitative or dishonest conduct] and alleges the complaints against him lie outside those categories.

[13] The Society disagrees. It says the complaints against Mr. Fraser extend beyond the personal and private sphere into professional territory. It submits Mr. Fraser’s appeal is moot. On the issue of interpretation, it submits the Committee’s powers extend to “conduct in a member’s personal or private capacity that tends to bring discredit upon the legal profession”, of which sub-paras. (i), (ii) and (iii) are non-exhaustive examples.

### *Analysis*

[14] Our views are the following.

[15] We decline to address the characterizations of the complaints against Mr. Fraser – *i.e.* whether they are “personal”, “private” or “professional” – because:

- There is no ruling or factual finding by a tribunal on the merits of the complaints. We have nothing to review. This Court does not exercise original jurisdiction over professional misconduct.
- The record does not have evidence of the circumstances surrounding the complaints. The Court has an appeal record containing the Society’s allegations and the cross-allegations in the briefs from Mr. Fraser’s counsel to the Committee, followed by the factums and oral submissions of the Society’s counsel and Mr. Fraser, now self-represented, in this Court, all of which is unsworn, none of which qualifies as evidence in a court.
- This Court’s appellate authority is limited to issues of law under ss. 37(7) and 49(2) of the *Act*. It does not include making factual findings of what Mr. Fraser may have done on the occasions of these complaints.

[16] Any consideration by this Court of what happened, and whether what happened is “personal”, “private” or “professional”, must await a determination by the appropriate committee of the Society, from which an appeal may be filed.

[17] This leaves the legal issue: what does “conduct unbecoming” mean in Regulation 9.1.3(a)? Specifically, is the “personal or private” conduct to which it applies confined to the three items in sub-paras. (i), (ii) and (iii), as Mr. Fraser submits? Or, as the Society urges, does it mean any “conduct in a member’s personal or private capacity that tends to bring discredit upon the legal profession”, of which sub-paras. (i), (ii) and (iii) are mere examples?

[18] Findings in the factual landscape may illuminate an unadorned legal point. It is tempting to say the interpretive issue is premature until there is a determination on the merits of the complaints. However, both parties have thoroughly argued the issue, and the process to come would benefit from guidance on the disputed point. We will address the question of interpretation but stop short of territory where evidence would assist the analysis.

[19] The short answer is – this Court determined the point in 2009 and nothing material has changed since.

[20] In *Lienaux v. Nova Scotia Barristers’ Society*, 2009 NSCA 11, Mr. Lienaux made a similar argument. Chief Justice MacDonald for the Court rejected it:

[56] By this ground, Mr. Lienaux suggests that the Panel misinterpreted regulation 9.1.3 of the **LPA**. ...

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

9.1.3 When considering complaints or charges, the Complaints Investigation Committee and a hearing panel may determine that conduct constitutes

(a) conduct unbecoming, if it involves conduct in a member’s personal or private capacity that tends to bring discredit upon the legal profession *including*:

i) committing a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or competence as a member of the Society;

ii) taking improper advantage of the youth, inexperience, lack of education, lack of sophistication, or ill health of any person;



iii) engaging in conduct involving dishonesty [LSUC definition];

[Chief Justice MacDonald's italics and underlining]

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

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

[bolding added]

[21] Mr. Fraser points out that, since *Lienaux*, Regulation 9.1.3(a) has been amended. In 2014, the words “one (1) or more of the following” were added after “including”. The unamended version is set out in *Lienaux*, para. 57, quoted above. The current version, with the amendment, is quoted above, para. 2. Mr. Fraser submits the amendment nullifies the Court's interpretation in *Lienaux*. His factum says:

95. The new and current language of Regulation 9.1.3(a) is expressly limiting; it serves to limit conduct unbecoming to conduct falling within “one or more” **(but at least one)** of the three enumerated categories. ... [bolding added]

[22] The submission assumes the Society's Council enacted the amendment to nullify the interpretation the Society successfully advanced in *Lienaux* several years earlier.

[23] We respectfully disagree. Nothing in the amendment suggests that “conduct unbecoming” *must* embody at least one of items (i), (ii) and (iii).

[24] The basis of this Court's ruling in *Lienaux* was Regulation 9.1.3(a)'s wording: “conduct unbecoming ... involves conduct in a member's personal or private capacity that tends to bring discredit upon the legal profession, including”. To make that point, in *Lienaux*, para. 57, the Chief Justice italicized and underlined “*including*”. That wording has not changed.

[25] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6<sup>th</sup> ed. (Markham: LexisNexis Canada, 2014), p. 74, #4.39, discusses the meaning of “including” in a statutory list:

The purpose of a list of examples following the word “including” is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included.

[26] In *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, para. 42, under the *Copyright Act*, R.S.C. 1985, c. C-42, s. 3(1), Abella and Moldaver JJ. for the majority described “including” as “illustrative” in contrast to the verb “means”, which is an “exhaustive” term that “confines” the subject.

[27] If the amendment had intended that “at least one” of items (i), (ii) and (iii) must exist, then the amendment would have included confining wording. It could have added “at least” before “one or more of the following”. It could have replaced “including” by “meaning” or by “which must include”.

[28] Section 33 (b) of the *Act* states an objective of conduct regulation is to “preserve the integrity of the legal profession by ... resolving complaints of professional misconduct, conduct unbecoming a lawyer ...”. Hence, Regulation 9.1.3(a) aims to discourage “discredit upon the legal profession”, and the same wording governs “professional” misconduct in Regulation 9.1.3(c). The Regulation’s animating purpose promotes the statutory objective.

[29] By downplaying the purpose to focus on the examples, Mr. Fraser’s submission attributes a different centre of gravity than the Regulation maintains.

[30] Before the amendment, items (i), (ii) and (iii) were not followed by a conjunction – *i.e.* “and” or “or”. The addition of “one (1) or more of the following” clarifies that the three items are disjunctive. That housekeeping task was the amendment’s object. The amendment did not attenuate the standard “that tends to bring discredit upon the legal profession”.

[31] In summary, under Regulation 9.1.3(a), “conduct unbecoming” extends to personal or private conduct that tends to bring discredit upon the legal profession. If one or more of items (i), (ii) and (iii) is shown, that is “conduct unbecoming”. If none is shown, then proof of other personal or private conduct that tends to bring discredit upon the legal profession may establish “conduct unbecoming”.

[32] Any further elaboration of what other conduct would “tend to bring discredit upon the legal profession” is a question of mixed fact and law that is beyond the scope of this appeal.

***Conclusion***

[33] We dismiss Mr. Fraser’s appeal.

[34] Often on an administrative appeal, costs are not awarded. However, this appeal was sharply contested. Mr. Fraser requested \$5,000 costs of the appeal while the Society proposed \$2,000 to \$3,000.

[35] At the hearing in this Court, the Society raised a substantial new issue not set out in its factum, to which Mr. Fraser was required to file a post-hearing brief. The Society says it was obligated to bring the issue to the Court’s attention. Even so, the Society should have raised the point in its factum, allowing Mr. Fraser time to prepare before the hearing. In our view, the late maneuver bears on costs.

[36] Despite the Society’s success, the parties should absorb their own costs.

[37] On June 14, 2024, a chambers justice of this Court issued an Interim Confidentiality Order respecting Exhibits to Mr. Fraser’s Supplementary Affidavit of June 12, 2024 and the transcript of the s. 37 hearing from April 21, 2023. At the appeal hearing on June 20, 2024, both parties agreed that the Interim Confidentiality order should be continued. We agree and note s. 40(1) of the *Act* provides: “All complaints received or under investigation and all proceedings of the Complaints Investigation Committee shall be kept confidential by the Society”. Consequently, the Court’s Order will indicate that the Confidentiality Order remains in place.

Bourgeois J.A.

Fichaud J.A.

Derrick J.A.