

# NOVA SCOTIA LAW NEWS

VOLUME 36 NO. 1 JANUARY 2011

FROM THE NOVA SCOTIA COURT OF APPEAL

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# NOVA SCOTIA LAW NEWS

Due to the change in frequency of publication of the *Society Record*, only four issues of the *Law News* will be published annually.

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ISSN number: 0316-6325

## ■ ADMINISTRATIVE LAW

**ADMINISTRATIVE LAW – Judicial review – Commercial Arbitration Act, private consensual arbitration** *Sharecare Homes Inc. v. Cormier*, Hfx. No. 308173, Smith, A.C.J., June 29, 2010. 293 N.S.R. (2d) 62, 321 D.L.R. (4th) 485; 2010 NSSC 252; **S613/22** ■ The respondent was the applicant's employee and a shareholder. After negotiations for a buy-out failed, the other shareholders terminated her employment (allegedly for cause), triggering a buy-out. They felt the buy-sell agreement allowed for a 20 per cent reduction in the share price based on "default". That agreement required the parties to use an arbitrator to determine share price. The parties elected to also have the arbitrator determine whether the respondent was wrongfully dismissed, and any remedies that should flow. The applicant alleged seven grounds it felt constituted "just cause", many in relation to information it discovered after the termination. After hearing the evidence, the adjudicator found the respondent was wrongfully dismissed, awarded significant damages, and held there was to be no discount in the share price based on "default". The applicant sought judicial review, arguing the adjudicator's decision was unreasonable, contrary to the evidence and wrong in law. The court, on its own motion, raised the issue of whether judicial review of a private, consensual arbitrator's decision is available beyond the scope of the *Commercial Arbitration Act*. *Held*, the court has no authority to conduct judicial review in this matter. The issues here are governed by the *Commercial Arbitration Act*, which is comprehensive and codifies issues of jurisdiction and breaches of natural justice. That Act, which was enacted shortly after the parties entered into the two agreements that governed their business relationship, provides that it applies, unless explicitly excluded by the parties. The parties did not modify their agreements to exclude the application of the Act. The Act was intended to limit a court's ability to intervene in consensual arbitrations. It doesn't allow for judicial review unless certain circumstances apply or the parties have agreed to a right to appeal. The prerequisites to appeal haven't been met here. Even if they had, the appeal still wouldn't be allowed. There is nothing in the evidence to suggest the applicant was the subject of manifestly unfair or unjust treatment. Costs of \$4,000 to the respondent, plus disbursements (about twice what Tariff C suggests). The importance to the parties and effort involved warrant an increase to the basic tariff, although the fact this was a novel issue tempers the increase somewhat.

**ADMINISTRATIVE LAW – Judicial review – Human Rights Commission, duty to accommodate** *Green v. Nova Scotia (Human Rights Commission) et al.*, Hfx. No. 312121, Bryson, J., June 22, 2010. 292 N.S.R. (2d) 246; 2010 NSSC 242; **S613/6** ■ The applicant had impairments that made it impossible for her to take tests in a traditional manner. The university made allowances that were satisfactory for a time. When she did poorly on a set of exams, the university offered to let her rewrite with additional safeguards in place. She declined, but made a human right's complaint based on what she alleged was a breach of the university's duty to accommodate her. The university was allowed to file a response to the investigator's report, which recommended the complaint be referred to a board of inquiry. The applicant was allowed to review both the report and the response, and to respond. The commission reviewed the materials and dismissed the complaint. It provided no reasons, other than to refer to having reviewed the materials on file. The applicant moved for judicial review, arguing: a lack of procedural fairness/insufficient reasons; and that the decision was unreasonable. *Held*, motion dismissed, with costs to the respondents in an amount to be determined. The lack of reasons doesn't mean there was insufficient procedural fairness. There were extensive materials on file, including the applicant's informed

response(s). Although there was little by way of explanation in the decision to dismiss, it can be reasonably inferred that the commission simply preferred the university's arguments over the investigator's recommendations and those of the applicant. It wasn't bound to accept the investigator's recommendations; its decision was not unreasonable. This was a "screening" decision, not a tribunal decision. Considerable deference should be given. The inference that the commission preferred the university's arguments is enough to allow for a meaningful review in this context. The result was within a reasonable set of outcomes given the materials on file.

## ■ BANKRUPTCY

**BANKRUPTCY – Discharge – Canada Student Loan** *Cook (Re)*, B. No. 34482, Cregan, Registrar in Bankruptcy, June 14, 2010. 291 N.S.R. (2d) 380; 2010 NSSC 224; **S612/24** ■ Following her discharge, the bankrupt (who was employed as a teacher and had a teenage son) applied for an order that s. 178(1)(g) did not apply to her substantial student loan debts. *Held*, application of the bankrupt granted; given the 37-year-old's current surplus income, it could take her up to 25 years to pay off the student loans and she should neither be expected to pay more than the surplus determined by the guidelines nor, absent some moral turpitude in incurring the debt, be burdened for that length of time.

**BANKRUPTCY – Discharge – student line of credit** *Gardner (Re)*, B. No. 34208, Cregan, Registrar in Bankruptcy, July 27, 2010. 293 N.S.R. (2d) 372; 2010 NSSC 298; **S614/28** ■ The bankrupt financed her medical degree on a line of credit (LOC) that had been recently renegotiated to remove her now estranged husband as guarantor. She suffered bouts of depression/anxiety, which had forced her to prolong her studies and eventually prevented her from completing a residency in family medicine. She didn't disclose this to the bank when the LOC was renegotiated, nor was she asked to. She now received disability benefits and had filed a letter from her family doctor to show she couldn't work as a doctor due to her long-standing mental health problems. She sought an absolute discharge. The trustee proposed a two year monitoring period, with a reassessment of her circumstances at that time. The bank wanted a conditional discharge, subject to a significant payment on the debt. *Held*, absolute discharge granted; costs, if sought, to be determined. After canvassing the case law on bankruptcy in relation to student loans in detail, the registrar found the bankrupt here cannot justly be held responsible for her circumstances. Although evidence from her psychiatrist might have been helpful, she met the burden on her by showing her illness will prevent her from making good use of her education and from being able to make a meaningful contribution to her estate. This was a long-standing problem, but she had no obligation to disclose it to the bank in the circumstances. She had a good faith intention to complete the residency at the time she renegotiated the LOC. Her condition has worsened. It's not reasonable to expect her health will improve in the reasonably foreseeable future such that she will be able to earn enough income to make a meaningful contribution to the estate.

**BANKRUPTCY – Discharge – student line of credit, costs** *Gardner (Re)*, Court No. B 34208; Estate No. 51-1171299, Cregan, Registrar in Bankruptcy, November 1, 2010. 2010 NSSC 393; **S618/24** ■ At issue was whether costs should be awarded to the bankrupt who was granted an absolute discharge despite the creditor's objections. The creditor opposed the discharge on numerous grounds, including a suggestion of fraud. The bankrupt (who was represented by counsel) was forced to prepare in relation to all of the grounds, although only

one was seriously pursued at the hearing. The registrar found there was no basis to suggest fraud. The bankrupt sought costs of \$750. The creditor argued s.197(7) of the *Bankruptcy and Insolvency Act* should be interpreted to mean costs in these circumstances can only be awarded when a creditor has opposed discharge in a frivolous or vexatious manner. *Held*, costs of \$750 awarded. The Act verifies the general discretion to award costs in s.197(1), and ss.(7) is a specific application of this general principle given for greater certainty to confirm that, in certain situations, costs may be allowed to the estate. Where the bankrupt has counsel, costs in discharge matters are not unusual or limited to extraordinary circumstances. Here costs are appropriate, especially because the creditor raised grounds (including fraud) that were unfounded and either not proven or not seriously pursued at the hearing. Tariff C suggests \$1,000 to \$2,000 is an appropriate range for costs. The bankrupt's claim for \$750 is modest and entirely reasonable.

**BANKRUPTCY – Discharge – unconditional, not required to disclose the name of a lender, illegal enforcement measures** *Yould (Re)*, B. No. 26796, Cregan, Registrar in Bankruptcy, September 22, 2010. 2010 NSSC 351; **S616/15** ■ The trustee learned the now 78-year-old bankrupt received a CCRA refund of \$132,000 one month before he filed for bankruptcy in 2004. The bankrupt eventually confessed to using the money to pay off a creditor, but refused to disclose that creditor's identity. He said the only reason for his refusal was fear for his safety and that of his family. He said he had, out of desperation, borrowed money from a loan shark who he believed would use illegal enforcement methods. He sought an absolute discharge. The superintendent felt discharge should be conditional on disclosure of the creditor's identity. The trustee took no position. *Held*, absolute discharge granted, but the circumstances require that it not take effect for one more year. There is little point in requiring the bankrupt to disclose the creditor's identity as a condition of discharge. There is no evidence it would result in efforts to collect the money and redistribute it to the other creditors. This situation is analogous to the defense of necessity in criminal law. The evidence was the bankrupt had a real fear for his and his family's safety. He was, however, less than forthright with the trustee prior to his assignment. He could have disclosed the payment immediately without disclosing the creditor's identity, rather than waiting for it to come to light through third party sources.

**BANKRUPTCY – Equitable set-off – lifting stay** *E.B.F. Manufacturing Ltd. v. White et al.*, Hfx. No. 247580, Moir, J., June 10, 2010. 2010 NSSC 225; **S612/21** ■ The plaintiff designed a new fencing system and entered into an agreement with the defendant company that gave him the exclusive licence to sell the product and provided for him to receive royalty payments. He successfully commenced an action against the defendant when a disagreement arose as to how the royalty payments were to be calculated and when they were to be paid. When the plaintiff returned to court for the third time, arguing that the defendant had committed further breaches of the agreement, the defendant provided evidence that the plaintiff had breached the agreement by unleashing a very harmful marketing campaign in breach of his promise for exclusivity and going into direct competition with the defendant. The court ordered the plaintiff to pay damages to the defendant for his breach of the exclusive licence agreement and that such damages could be set off against royalties as they came due to the plaintiff. Shortly after this ruling was made but before the order was taken out, the plaintiff made an assignment in bankruptcy. The defendant applied to lift the resultant stay of proceedings in order to settle the order and verify its right of set-off. *Held*, application to lift stay granted in order to allow for equitable set-off; the two claims were closely connected; the value of the defendant depended on the exclusive use of the product patented by the

plaintiff and for the past 10 years the plaintiff had, in bad faith, waged a campaign to deprive the defendant of the rights he had sold it; and the vast majority of the plaintiff's debt was owed to the defendant. Without equitable set-off, the effect of the bankruptcy would be to severely limit the defendant's access to the royalties; whereas, set-off would put a stop to 10 years of bad faith on the part of the plaintiff and uphold the contract, which was the source of the royalties.

**BANKRUPTCY – Procedure – costs** *Railside Developments Ltd. (Re)*, Hfx. No. 314695, Moir, J., June 18, 2010. 292 N.S.R. (2d) 398; 2010 NSSC 237; **S613/5** ■ The issue was whether the new national receivership provisions in the *Bankruptcy and Insolvency Act* (BIA) authorize a court to require registration of a building as a condominium. The receiver had sought to have the court do so in relation to a building developed by the company in receivership (while in receivership) with a view to registering it as a condominium. The Attorney General and Lafarge Canada Inc. (Lafarge) successfully defeated the motion, with the court finding such an order would amount to an unauthorized intrusion on applicable provincial law. The parties couldn't agree on costs, with the receiver arguing for a reduction of the applicable tariff saying the motion: wasn't factually complex; was of equal importance to the parties; turned on the appropriate interpretation of the BIA; and was broached by the receiver in good faith, as a request for directions by an officer of the court. It suggested a lump sum of \$1,000 to each party. *Held*, costs to the Attorney General and Lafarge in the full amount under the applicable tariff (\$3,500 to each), payable by the estate (not the receiver). The receiver will also have its costs paid out of the estate. The main issue was constitutional, complex, and of great importance to the parties and insolvency law in general. A lump sum of \$1,000 wouldn't come close to meeting the fundamental principle that costs should provide a substantial, partial contribution to a reasonable bill. The constitutional issues were so complex, \$1,000 wouldn't be just or appropriate.

**BANKRUPTCY – Sale of assets by receiver – sufficiency of price offered** *Bank of Montreal v. Sportslick Inc.*, Hfx. No. 314220, McDougall, J., August 5, 2010. 2010 NSSC 305; **S615/13** ■ The receiver sought the court's approval for the proposed sale of the defendant's shares in a company. The defendant took the position that the process used to sale the shares was flawed and unfair in that the failure to disclose the amounts of the previous unaccepted bids amounted to misinformation that resulted in a "fixed" bidding process. *Held*, the receiver's motion to approve the sale of the shares is approved; the receiver was under no obligation to disclose the details of the prior bid history. The two bidders involved in the final tender knew better than anyone else the value of these particular shares and the receiver had treated everyone who was invited to participate in the private tender equally.

## ■ BARRISTERS AND SOLICITORS

**BARRISTERS AND SOLICITORS – Fees – taxation** *Weldon McInnis v. Warnock*, S.C.C.H. No. 328544, Slone, Adjudicator, July 13, 2010. 2010 NSSM 50; **SmCI16/18** ■

**BARRISTERS AND SOLICITORS – Fees – taxation** *T. (J.) v. Planetta et al.*, S.C.C.H. No. 329962, Slone, Adjudicator, July 26, 2010. 2010 NSSM 52; **SmCI16/20** ■

## ■ BUILDING CONTRACTS

**BUILDING CONTRACTS – Breach of contract – damages** *Duralux Bath Systems v. Korun*, Claim No. 328761, Slone, Adjudicator, July 22,

2010. 2010 NSSM 51; **SmCI16/19** ■

**BUILDING CONTRACTS – Illegal contract – payment in cash to avoid taxes** *Ink Painting Ltd. v. Memar Homes Inc. et al.*, Claim No. 322533, Slone, Adjudicator, September 9, 2010. 2010 NSSM 58; **SmCI16/26** ■

## ■ CIVIL RIGHTS

**CIVIL RIGHTS – Right to be tried within a reasonable time – 18- to 20-month delay from charge to setting down of trial** *R. v. Routledge et al.*, No. 177088; 177089; 177090, Ross, J.P.C., July 9, 2010. 2010 NSPC 45; **M22** ■ The three defendants, who faced various charges under the *Occupational Health and Safety Act*, applied for a stay of proceedings on the basis that their right to be tried within a reasonable time had been violated. The delay was between 18 to 20 months and it was unknown when trial dates would be set. *Held*, applications for stay of proceedings dismissed. Although the plea was put over for nine months due to the Crown's desire to keep the matters together for scheduling purposes and the request of one of the defendants to adjourn due to the unavailability of counsel, there was no inevitability to the delay and none of the defendants had asserted their s.11(b) rights at that time; the intake period of four months during which Crown and defence perused 17 volumes of disclosure was not counted against the Crown and there was no evidence that the Crown had gone overboard with its disclosure, as alleged by the defence; a request for a later trial date due to a change in defence counsel was tantamount to a waiver of delay after the first scheduled trial date; and all the defendants were found to have waived the six-month period prior to the last scheduled trial dates. The court characterized 11 months as institutional delay, attributed another month solely to the Crown and found that eight months was due to the intake and inherent time requirements of the case.

**CIVIL RIGHTS – Right to be tried within reasonable time – sexual offences, charges dropped and relaid** *R. v. Garrison et al.*, Cr.T. No. 317077, LeBlanc, J., June 24, 2010; June 21, 2010 (orally). 2010 NSSC 247; **S615/19** ■ Two accused, charged with sexual assault, applied for a stay of proceedings on the basis of unreasonable delay, with one of the accused also seeking a stay on the basis of abuse of process. Numerous initial adjournments in which no pleas were entered were necessary due to the offence occurring outside the initial court's jurisdiction and ongoing issues with disclosure. One such issue involved DNA evidence, which the Crown had not attempted to collect from the accused until five months after they were arrested. The charges against both accused were dropped a year after they were laid, at which time the Crown advised that it would be re-laying charges after further investigation. New charges were filed five months later and an adjournment was then necessary to allow one of the accused to retain counsel. The preliminary enquiry was scheduled a month later than offered due to the unavailability of defence counsel and a trial was scheduled for nine months later. The Crown argued that the delay from the withdrawal of the original charges and the laying of the second information should serve to reset the clock, so that time was only counted from when the second information was laid. *Held*, applications for stay dismissed; although there was no doubt that the Crown had caused serious and unreasonable delay, in the absence of evidence of prejudice it was not appropriate to enter a stay. The entire period of 34 months must be counted and the Crown was found responsible for 10 to 12 months of the delay. There was no implied waiver by the accused on account of pursuing the DNA evidence and the initial disclosure component of the case ought to

have been concluded in significantly less than eight months. There was no difference in substance between the charges on the two sets of informations and when the Crown withdrew the first information, the accused were notified that they would be re-charged after further investigation. It was not clear why it was necessary to withdraw the informations in order to build the case as nothing stopped the police from continuing to investigate after the first informations were filed. Delay alone is not a sufficient basis for finding an abuse of process resulting in a stay of proceedings.

**CIVIL RIGHTS – Right to due process – no justification for requested adjournment** *R. v. Reddick*, No. 2175910; 2175911; 2175912, Atwood, J.P.C., September 27, 2010; September 10, 2010 (orally). 2010 NSPC 56; **M22** ■ The Crown applied for the adjournment of a trial on the basis that the transport order required to transport the accused to court had been received too late. Following a previous adjournment at the Crown's request, the accused had been sentenced to federal time in relation to other matters. *Held*, application for adjournment dismissed; to proceed with the trial in the accused's absence would constitute an abuse of process, a stay of proceedings issued; a satisfactory explanation had not been offered for the Crown's failure to provide the required two-weeks notice for the transport order. The requirement for significant advance notice of federal prisoner attendance was well known and the Crown either knew, or ought to have known, as of the date the accused was sentenced to federal time that it would be necessary on an expeditious basis to obtain a prisoner transport order to ensure his attendance in court. Contrary to the Crown's assertions, the other justice officials involved had acted diligently once the order was received.

**CIVIL RIGHTS – Unreasonable search and seizure – exclusion of evidence, appeal allowed** *R. v. Russell et al.*, CR.Bwt. No. 324240; 323732, MacAdam, J., August 31, 2010. 2010 NSSC 323; **S616/3** ■ The police seized over 200 cartons of unstamped cigarettes from the accused's vehicle and a garage at his residence after obtaining two search warrants. The warrants were quashed on the basis that insufficient grounds had been presented to the Justice of the Peace and all the cigarettes seized were excluded from evidence, with the court finding that each instance involved the negligent presentation of insufficient grounds to a judicial officer who had failed to identify the insufficiency of the grounds presented. The Crown appealed. *Held*, appeal allowed; the trial judge appeared to focus on what was not contained in the Information To Obtain (ITO) as opposed to what was included; although there was minimal information provided to support the ITOs, it could not be said that there was not "some evidence sufficient as a matter of law" to provide reasonable grounds to issue the warrants. Even if the information provided was inadequate, this was not a situation where the evidence should be excluded as the trial judge had not found the ITOs to be "misleading in their wording" and there was no basis to suggest that the officer was negligent or of any deliberate and egregious police conduct.

## ■ COMPANY LAW

**COMPANY LAW – Application for summary judgment – allowed** *Globex Foreign Exchange Corp. v. Launt et al.*, Hfx. No. 321220, Robertson, J., June 11, 2010. 2010 NSSC 229; **S612/19** ■ A corporation entered into contracts with the plaintiff for the purchase of currency in pounds sterling, using a deposit. When it failed to complete the purchase, the plaintiff sought to pierce the corporate veil and hold its sole director and shareholder responsible for the subsequent loss. The shareholder applied for summary judgment. *Held*, application

for summary judgment granted; a plaintiff cannot merely rely on allegations in its pleadings but must advance at least some evidence of the existence of the alleged agency relationship; there was no evidence before the court which would demonstrate that the shareholder was ever a party to the contracts or that he offered to guarantee them or provided any guarantees for payment.

**COMPANY LAW – Rights of shareholders – oppression remedy, application for interim relief** *Merks Poultry Farms Ltd. et al. v. Wittenberg et al.*, Hfx. No. 296583, Warner, J., July 12, 2010. 2010 NSSC 278; **S615/8** ■ The individual plaintiffs (the Merks) and individual defendants (Wittenberg and teStroete) are chicken farmers who banded together to form Synergy (the company) to supply feed and chicks to their various farms. The Merks were officers and managers from the company's inception until their abrupt resignation in 2007 after a falling out among shareholders. They used their own transport company (VTL) to transport all of the company's feed and chicks, which came to be seen as a conflict of interest by some of the shareholders. After their resignation, the company eventually made other transport arrangements. The Merks represented 40 per cent of the company's business. After resigning, they engaged in a number of aggressive tactics that compromised its viability. They tendered several invoices totalling over a half million dollars, for what they claimed was unpaid wages and other costs dating back to 2002. They used these invoices to offset ongoing purchases, creating a serious cash flow problem for the company. Eventually, they stopped buying from the company altogether. They sued for control of the company or damages in relation to what they claimed: oppressive conduct, breach of the shareholder's agreement, negligence, conspiracy, defamation, intentional interference with economic interests, illegal inducement of breach of contract, and failure to pay invoices. They brought a motion for interim relief, including: liquidation of the company; appointment of a receiver; a forced sale of the company to the Merks; and/or an order requiring Wittenberg and teStroete to execute a buy-sell agreement with the Merks. *Held*, interim motion dismissed. The SCC decision in BCE requires a two-part assessment of the evidence to establish whether it: supports the reasonable expectation asserted by the claimant; and establishes that the reasonable expectation was violated by conduct falling within the definition of oppression, unfair prejudice or unfair disregard of a relevant interest. After an extensive and detailed review of the evidence and having embarked upon the above two-part inquiry in relation to each of the 13 assertions made by the Merks, the court found that only two of the 13 allegedly oppressive acts could be construed as breaches of the Merks' reasonable expectations. The surrounding evidence suggests these breaches were technical in nature and did not amount to oppressive or unfair conduct. The court found that the Merks' conduct was extreme and resulted in the steps taken by the company to preserve its own interests. An interim order is meant to preserve the status quo. Three of the remedies sought are extreme. The other (appointment of a receiver) is not warranted, given there was no oppressive conduct. The evidence shows the company was operated in a reasonable manner, and in its best interests. The Merks' claims must be left for a full trial.

## ■ CONTRACTS

**CONTRACTS – Breach of contract – damages, mobile home pad** *Conrad v. Havill's/Northland Mini & Mobile Sales Ltd.*, Claim No. 330527, Slone, Adjudicator, August 10, 2010. 2010 NSSM 53; **SmCI16/21** ■

## ■ COURTS

**COURTS – Parties – whether a judicial or executive function to name a court as a party** *Canadian Broadcasting Corp. v. Nova Scotia (Attorney General)*, Hfx. No. 319522, Moir, J., July 27, 2010. 293 N.S.R. (2d) 187; 2010 NSSC 295; **S614/25** ■ The applicant sought disclosure of various search warrants, but court staff couldn't find them. They moved for "an order directing the Provincial Court to index its records of search warrants" and named the Attorney General as the opposing party. The Attorney General responded by arguing the motion was fatally flawed because it named the executive instead of judicial branch, and the principle of judicial independence was so fundamental the motion couldn't stand. They also argued the motion wasn't a proper dispute, but a reference (which only the Governor in Council can seek). These preliminary objections were before the court for determination before the motion could proceed on its merits. *Held*, the motion is flawed, but the flaw is only an irregularity that can be cured. The motion must be amended to name the Provincial Court or (perhaps more conveniently) the chief judge of that court (as a representative party under Rule 36.02 of the *Civil Procedure Rules* (2008)). The accessibility of search warrants relates to a fundamentally importance concept (open court). While it appears the Supreme Court's inherent jurisdiction to supervise "boards, commissions or other tribunals" is enough, the Rules clearly allow the Provincial Court to have status independent of the Attorney General when the decision at issue is one it is authorized to make independently (see Rules 35.04(2) and (3)). While the court is authorized to make decisions about record keeping, judicial independence allows for the executive branch to be involved in matters that don't "bear directly and immediately on the exercise of judicial function". The order sought here is in relation to an administrative matter. If it appears the executive is at all involved (i.e., in relation to funding), the Attorney General should continue to be named.

## ■ CRIMINAL LAW

**CRIMINAL LAW – Atlantic Fishery Regulations – failure to comply with a condition of communal licence** *R. v. Boudreau*, Syd. No. 318126, MacAdam, J., August 10, 2010. 293 N.S.R. (2d) 300; 2010 NSSC 317; **S615/15** ■ The accused was acquitted on charges of failing to comply with the conditions of his fishing licence, fishing for snow crab without authorization and possessing snow crab in contravention of the *Atlantic Fisheries ("AF") Regulations*. He had been fishing with an Aboriginal commercial communal fishing licence that authorized fishing for snow crab on a particular vessel. The evidence showed that although the accused, the captain of the vessel specified in the licence, had been a designated fisher under the snow crab licence in past years, he was not confirmed under the licence for this year until shortly after he was charged. The defence successfully applied for a directed verdict on the basis that he met the requirements of the AF Regulations, in that he had a fisher's registration card and was on board a vessel, the owner of which (the First Nation) was the holder of a licence that authorized the use of the vessel in fishing for snow crab and was an operator not named in the licence. The Crown had relied on the Aboriginal Communal Fishing Licences ("ACFL") Regulations, which provided that only a designated person could fish under the authority of an Aboriginal licence, which the accused was not at the time he was charged. The court held that the accused was authorized to fish snow crab under the AF Regulations, which was what he was charged with having contravened. The Crown appealed, arguing that the court had erred in its interpretation of the AF Regulations in that the provisions of the ACFL Regulations should be found to apply to the exclusion in s. 14(2)(d) of the AF Regulations and the resulting

conflict should be resolved by subordinating the AF Regulations to the conflicting provisions of the ACFL Regulations. *Held*, appeal dismissed; the accused is entitled to know his potential legal jeopardy and such would not be the case if he was convicted of an offence by virtue of having violated the ACFL Regulations when he was charged with violating the AF Regulations.

**CRIMINAL LAW – Dangerous driving – appeal allowed, new trial ordered** *R. v. Delorey*, C.A.C. No. 321742, Oland, J.A., July 22, 2010. 293 N.S.R. (2d) 170; 2010 NSCA 65; **S606/30** ■ The appellant was given a loaner car by the car dealership servicing his car. That night, he got into a serious car accident. After a three day trial, he was convicted of dangerous driving causing bodily harm and death based on: excessive speed/weather conditions, alcohol consumption and the condition of the tires on the loaner vehicle. He appealed his conviction on several grounds, including the judge's: inadequate reasons; misapprehension of evidence on the issues of speed and impairment; and error in deciding the appellant should have checked the tires on the loaner vehicle. The evidence showed they were in such poor condition they wouldn't have passed inspection. *Held*, appeal allowed on the basis of the judge's implicit finding that the appellant ought to have checked the condition of the tires; matter sent for a new trial before a different judge. A reasonable person in the appellant's situation would not have been aware of the risk. It was not unreasonable for him to rely on the dealership to give him a loaner with tires that would meet minimum standards. The other grounds of appeal dismissed. The judge's reasons, while not detailed, were sufficient to explain the basis of the decision to the parties, provide public accountability and allow for a meaningful appeal. The appellant failed to prove there were significant errors in the judge's understanding of the substance of the evidence. There was no misapprehension of the evidence that could have led to an injustice.

**CRIMINAL LAW – Home invasion – unlawful confinement, threatening and assault, guilty** *R. v. Roach*, Cr.H. No. 324726, Bryson, J., September 17, 2010; September 9, 2010 (orally). 2010 NSSC 342; **S616/11** ■ The accused was charged with nine counts following a home invasion. The complainant testified that after allowing his son's friend and two other individuals to enter his home, one of the individuals (the accused) demanded that he drink alcohol and threatened to torture him. He forced the complainant to go in the kitchen on three occasions, where he heated a knife and spoons on the stove and, on one occasion, rubbed the heated knife on the complainant's arm, leaving burn marks. The complainant also testified that the accused had followed him for the entire time he was in the home (approximately three hours). The police believed the complainant, an admitted alcoholic, to be intoxicated when they arrived, as his speech was "erratic" and "stuttering". Although the complainant was uncooperative when the police arrived, he identified the accused from a photo lineup the following day. The defence argued that there was no credible evidence linking the accused to the home invasion, with identity being the key issue. *Held*, accused found guilty on all counts. Despite the complainant being an alcoholic and poor historian, having admitted memory problems and being in shock when the police arrived, the court found that he had good reason to be interested and attentive while confined under circumstances, which afforded him an excellent opportunity to remember and recognize his assailant. The 24-hour delay was not a serious impediment to the identification of the accused and, although police policy had not been completely followed, the photo lineup was not unfair and the video showed that identification of the accused was spontaneous and emphatic. The court accepted the complainant's evidence that he had not been drinking prior to the accused's arrival and found that although the alcohol he

drank afterwards might have affected his recollection of later events, it had not significantly impaired his recollection of the actual assaults, threats and confinement.

**CRIMINAL LAW – Intoxicated in a public place – assaulting a peace officer** *R. v. Affleck*, No. 2105437; 2107729, Tax, J.P.C., August 13, 2010. 293 N.S.R. (2d) 311; 2010 NSPC 51; **M22** ■ The accused was charged with being intoxicated in a public place and assaulting a police officer after she became involved in a verbal altercation with the police and kicked an officer during her arrest. The police were investigating a report of property damage during a large community event when the accused refused to heed their instructions to leave the area and interfered with their questioning of another individual. She became very loud and vocal, screaming obscenities at the officers. The defence submitted that the accused was not intoxicated but acted the way she had due to her lack of respect for this particular police force and the fact that they were abusing their authority. *Held*, accused found guilty on both counts; not only did the arresting officers subjectively have reasonable and probable grounds to believe that the accused was apparently intoxicated in a public place and that her behaviour caused or was likely to be a danger, nuisance or disturbance to others, but a reasonable person, armed with the same information as the officers, would have reached a similar conclusion. The officers were well positioned to make their observations of the accused and had used a flashlight to get a good view of her eyes, which were red and glossy; they also noted a strong odour of alcohol coming from her mouth and her belligerent, aggressive and repetitive statements. Although they did not feel that she was intoxicated to the point of passing out and injuring herself, they believed that she was intoxicated to the point of being out of control and causing problems by possibly inciting the crowd. Given the context of the crowd and the evidence that a large number of them had consumed alcohol, crowd control, protecting property and maintaining officer safety were clear and present concerns.

**CRIMINAL LAW – Possession – cocaine** *R. v. Timmons*, Pt.H. No. 310652, Edwards, J., June 16, 2010. 2010 NSSC 236; **S615/29** ■

**CRIMINAL LAW – Procedure – designation of counsel of record** *R. v. Butler*, Cr.H. No. 324525, Coughlan, J., July 20, 2010. 2010 NSSC 284; **S614/16** ■ The accused did not appear at his arraignment but instead a solicitor appeared with a document purporting to be a designation of counsel. The document did not set out the charges, the dates of the alleged offences or any particulars of the matters for which he was designated to act as counsel for the accused. *Held*, the proposed designation is not accepted; although no particular form of designation is required, the designation must identify the charge(s), dates of alleged offences or some other particulars of the proceedings so the court can be satisfied counsel has authority to deal with the charges before it.

**CRIMINAL LAW – Procedure – judge alone or change of venue** *R. v. Maguire et al.*, C.R.H. No. 311283, Coughlan, J., July 13, 2010; May 21, 2010 (orally). 293 N.S.R. (2d) 33; 2010 NSSC 200; **S614/7** ■ The two accused were charged with first-degree murder. The details of the alleged crime were exposed by the media a year earlier, after the police forgot to apply for a sealing order when obtaining a search warrant. The accused claimed extensive and prejudicial pretrial publicity meant a jury trial in Halifax Regional Municipality was in breach of their rights under s.7 and 11(d) of the *Charter*. They argued the appropriate remedy would be to have the matter heard by a judge alone or moved to a court outside Halifax Regional Municipality. *Held*, application dismissed; on balance, the appellants failed to prove (at this stage) their rights were breached. A similar application could be heard

in the future if it becomes apparent at the jury selection stage that an impartial jury can't be found. There is no constitutional right to a trial before a judge alone. Absent an abuse of process, which hasn't been established, the court can't review the Crown's exercise of discretion. Here the Crown appears to have acted in good faith and without improper motive; they are entitled to insist on a jury trial. A change in venue is not warranted. The accused haven't shown there is a fair and reasonable likelihood of partiality in Halifax Regional Municipality that can't be addressed by the safeguards in the jury selection process. Halifax Regional Municipality has a much larger population pool to choose from, the media reports were dated, and were made available throughout all of Nova Scotia anyway.

**CRIMINAL LAW – Release pending sentencing – application dismissed, sexual assault** *R. v. M. (E.F.)*, C.A.C. No. 333361, Farrar, J.A., August 13, 2010. 293 N.S.R. (2d) 327; 2010 NSCA 68; **S611/26** ■ The defendant applied for release pending appeal of his sexual assault conviction prior to sentence after the trial judge had refused his request for release pending sentencing. He had spent 13 months in custody prior to his release pending trial. *Held*, application for release pending appeal denied without prejudice to the defendant making a fresh application after he is sentenced; the pre-conviction custody did not amount to an unusual circumstance and there was nothing presented to persuade the court that it should interfere with the trial judge's exercise of discretion.

**CRIMINAL LAW – Sentence – appeal for attempted murder** *R. v. Porter*, C.A.C. No. 317392, Saunders, J.A., November 18, 2010; November 12, 2010 (orally). 2010 NSCA 93; **S617/20** ■

**CRIMINAL LAW – Sentence – appeal for break and enter** *R. v. Adams*, C.A.C. No. 313056, Bateman, J.A., May 13, 2010. 291 N.S.R. (2d) 206; 2010 NSCA 42; **S611/2** ■ The defendant was sentenced to 42 months' incarceration, followed by 12 months' probation and 150 hours of community service along with fines of \$82,000, after he pled guilty to two counts of break, enter and theft; a separate count of theft and eight counts of possession of stolen property. The total value of the goods involved was \$690,000. He also pled guilty to counselling perjury for attempting to have an individual fabricate a story that one of the stolen items was his and the defendant had unwittingly borrowed it from him. The Crown appealed the sentence. *Held*, appeal allowed; defendant sentenced to a total of eight years' imprisonment for the break and enter, counselling perjury and possession of stolen property charges and a \$2,000 fine on the theft charge. The judge erred in working backwards from a global disposition as opposed to turning his mind to the appropriate sentence for each individual conviction. The duration of the criminal activity, number of victims, value of the property stolen and possessed and the fact that the only reasonable inference was that the defendant acted as a fence for stolen property contributed to a high level of moral blameworthiness. The court explained how the totality principle should be applied and rejected any approach that would suggest that, when sentencing for a collection of offences, the aggregate sentence should not exceed the "normal level" for the most serious of the offences.

**CRIMINAL LAW – Sentence – appeal, fresh evidence on appeal, ineffective counsel** *R. v. Hobbs*, C.A.C. No. 302995, Saunders, J.A., June 16, 2010. 291 N.S.R. (2d) 340; 2010 NSCA 53; **S611/13** ■ The defendant, who was represented by experienced trial counsel, was convicted of two offences related to having possession of the proceeds of crime after a large sum of money was found wrapped in a heat-sealed plastic package in his suitcase prior to his boarding a flight. His bag had

been searched after a police dog indicated the presence of drugs in the suitcase but, although traces of cocaine were found on the suitcase, the clothing in the suitcase and the handle of the bag containing the money, no drugs were found. The defendant testified that the money was not derived from any illegal source but was to be used for a one-day gambling junket to British Columbia. The court found that his testimony did not withstand the scrutiny of cross-examination and he was sentenced to nine months' imprisonment on each charge, to be served concurrently and two-years' probation. He appealed both conviction and sentence, seeking to introduce fresh evidence regarding his allegation that his trial counsel was ineffective. He also sought to raise a *Charter* argument around the search of his suitcase, which had not been raised at trial and, *inter alia*, argued that the trial judge had erred in allowing evidence of bad character to be introduced. *Held*, both appeals dismissed; application to introduce fresh evidence dismissed; the defendant cannot raise this *Charter* issue for the first time on appeal. The defendant's new evidence was not credible; it was constantly being expanded on and appeared to be made up as he went along. The court accepted counsel's version of events as to the instructions he received and that the decision not to raise a *Charter* argument concerning the search was a deliberate tactical decision to avoid the risk that the Crown would introduce compromising evidence as to police surveillance of the defendant. The *Charter* issue could not be raised on appeal when the defendant had made an intentional choice not to raise it at trial, the law had not radically changed since the trial and the evidentiary record at trial was incomplete. The evidence of bad character was directly relevant to the Crown's theory with respect to the source of the funds and directly linked to proof of the fact that the currency in question was derived from the illicit drug trade and it was clear that the trial judge was aware of the limited use that could be made of the evidence. It was not necessary for the Crown to prove that the defendant had committed the initial crime which led to his being found in possession or transporting the proceeds thereof.

**CRIMINAL LAW – Sentence – appeal of sentence for possession for the purpose of trafficking in cocaine** *R. v. Butt*, C.A.C. No. 321080, Bateman, J.A., June 22, 2010. 291 N.S.R. (2d) 376; 2010 NSCA 56; **S611/16** ■ The defendant pled guilty to possession of cocaine for the purposes of trafficking after police intercepted a package addressed to his home, which contained over two kilograms of cocaine. He argued that he was simply a middleman providing an address for shipment of the cocaine but was not otherwise involved in its distribution and advised that he had changed his life drastically in the two years awaiting trial, becoming and staying drug free. He was sentenced to a prison term of three-and-one-half years. The Crown appealed. *Held*, appeal allowed; defendant sentenced to five years' imprisonment. The defendant's assertion that he had changed his life was clearly central to the sentence imposed, as was the court's misunderstanding of current medical condition and the sentencing range provided by the Crown. The defendant had been since sentenced for a number of offences committed after he was charged with the current offence that had not been raised at the time of sentencing; his representation that he had turned his life around was simply not true as he had continued to offend up to the month before sentencing.

**CRIMINAL LAW – Sentencing – aggravated assault** *R. v. MacDonald*, Cr.H. No. 327153, Coughlan, J., July 20, 2010. 293 N.S.R. (2d) 50; 2010 NSSC 281; **S614/13** ■ The defendant (who had an extensive criminal record, including five assault convictions) attempted to force two other panhandlers to leave the area he wanted to use. When one of the individuals, who was sitting on the sidewalk, yelled at him and pushed him away, he punched her in the face with enough force to knock her over. Her jaw was fractured in two places,

requiring surgery, and she suffered permanent nerve damage. He was found guilty of aggravated assault and breach of an undertaking. *Held*, defendant sentenced to 12 months' incarceration for the aggravated assault; one month's incarceration on the charge of breach of an undertaking, to be served concurrently; and 12 months' probation.

**CRIMINAL LAW – Sentencing – attempted murder** *R. v. LeBlanc*, Cr.H. No. 326639, Cacchione, J., September 15, 2010. 2010 NSSC 347; **S616/13** ■

**CRIMINAL LAW – Sentencing – dangerous offender, long-term offender** *R. v. Overton*, No. 1904212; 1904213; 1904214, Campbell, J.P.C., October 5, 2010. 2010 NSPC 61; **M22** ■ The Crown brought a dangerous offender application in respect of a very intelligent young woman with a serious and long-standing mental illness who had burned down a women's shelter. She had a previous conviction for arson and over the past several years had made serious threats and acted violently on numerous occasions. Although both experts agreed on her diagnosis (schizoaffective disorder), one felt that her psychiatric condition and history of behaviour showed she constituted the kind of risk that could only be managed through the dangerous offender provisions, while the other maintained that a major breakthrough had been made and, with the appropriate medication and course of treatment, she could eventually be released into the community. *Held*, defendant sentenced to three years' imprisonment and declared a long-term offender, to be subject to a ten-year supervision order. The second psychiatrist, who had been her treating psychiatrist over the past year, had developed a therapeutic relationship with the defendant and his clinical observation that her behaviour had changed dramatically since her medications were adjusted was particularly significant. This psychiatrist had also described a significant breakthrough in that the defendant had now shown a willingness to take her medication in the appropriate doses, which increased her insight into her condition and the potential that she would continue to take the medication. Based on this, he was satisfied that a treatment plan could be developed for her release into the community and that, with ten years of monitoring, the chances she would take her medication and be well would be high. Although the options available to the defendant when released into the community would be limited, it would be a travesty for a woman to be incarcerated simply because resources were not available based on her gender.

**CRIMINAL LAW – Sentencing – possession of stolen vehicles “chop-shop” activities** *R. v. Brown*, No. 1975323; 1975325; 1975327; 1975329; 1975331; 1975333; 1975335; 1975337; 1975339; 1975341; 1975343; 1975345; 1975347; 1975349; 1975351; 1975353; 1975355; 1975357; 1975359; 1975361; 1975363; 1975365; 1975367; 1975369; 1975371, Derrick, J.P.C., April 30, 2010. 291 N.S.R. (2d) 109; 2010 NSPC 38; **M22** ■ The defendant pled guilty to unlawfully having in his possession property that was derived from the commission of an indictable offence; namely motor vehicles or components of motor vehicles, the total value of which exceeded \$5,000. The defendant was operating a “chop shop” for stolen motor vehicles and the total value of the vehicles involved was estimated at \$400,800. *Held*, defendant sentenced to 12 months' imprisonment; no restitution ordered because the evidence did not establish that the defendant had any involvement in the actual theft of the vehicles. As this was the first “chop shop” sentencing in the province, the court considered both English and Ontario case law.

**CRIMINAL LAW – Sentencing – robbery** *R. v. Hanlon*, Cr.T. No. 325505, Scaravelli, J., July 6, 2010. 2010 NSSC 286; **S615/4** ■

**CRIMINAL LAW – Sentencing – robbery, conditional sentence** *R. v. Griffin*, No. 1945751, Williams, J.P.C., July 23, 2010. 2010 NSPC 47; **M22** ■ The defendant, who had a history of mental health and substance abuse issues, pled guilty to the robbery of a gas station, during which she tapped a knife on the counter and demanded cash. At issue in the sentencing was whether the defendant had committed a “serious personal injury offence”. The Crown argued that an armed robbery was, by its intrinsic nature, an act of violence. *Held*, defendant sentenced to two years less one day to be served in the community, with the first 18 months to be served under house arrest and the remaining six months under a curfew, followed by two years of probation with a curfew; the defendant’s conduct did not constitute a serious personal injury offence. The defendant’s conduct did not constitute an act of violence or a threat of violence as she neither directed the knife towards the attendant nor uttered any words that contextually could be construed as threatening violence. The defendant was not a risk to the safety of the community; this was an isolated offence that was atypical to her character, committed by a desperate young woman who suffered from mental health and substance abuse issues and was spiralling out of control.

**CRIMINAL LAW – Sentencing – sexual assault, conditional discharge** *R. v. W. (J.)*, No. 1991450, Tax, J.P.C., May 19, 2010. 292 N.S.R. (2d) 141; 2010 NSPC 40; **M22** ■ The 18-year-old defendant was found guilty of sexual assault after he held his girlfriend against the wall while he removed her shirt and touched her breasts. He ignored her verbal and physical efforts to stop him and forced her hand on to his penis while he pulled down her pants and touched her vagina. She continued to struggle and eventually managed to get away. He had no previous criminal record, an excellent pre-sentence report and extensive family and community support and his actions were described as being very “out of character”. He sought a conditional discharge so that he could join the military, as planned. *Held*, defendant given a conditional discharge with probation for 15 months; decision reserved on application for an order under the *Sex Offender Information Registration Act*. The defendant was a person of good character and this was an isolated incident of an impulsive nature involving two teenagers in which he had failed to exercise self-control or heed the clearly stated wishes of his girlfriend. He had clearly and repeatedly expressed his remorse for his actions and as the assault had not gone beyond the inappropriate touching of the complainant’s body in a sexual manner, it was objectively characterized as at the lower end of the continuum.

**CRIMINAL LAW – Sentencing – sexual exploitation** *R. v. F. (A.D.)*, Cr.H. No. 307794, Cacchione, J., May 18, 2010. 291 N.S.R. (2d) 193; 2010 NSSC 194; **S610/25** ■ The defendant teacher was convicted of sexual exploitation after engaging in a year-long relationship with a student. *Held*, defendant sentenced to nine months’ incarceration, probation for one year and 50 hours of community service. Aggravating factors included the age difference between the defendant and the student, his lack of remorse and failure to take moral responsibility, the length of the relationship and the nature of the sexual activity.

**CRIMINAL LAW – Sexual assault – credibility** *R. v. MacIntosh*, Pt.H. No. 311459, MacDonald, S. J., July 27, 2010. 292 N.S.R. (2d) 355; 2010 NSSC 300; **S614/27** ■ The accused was charged with numerous accounts of historic indecent assault and gross indecency against three complainants. He denied that any of the events ever took place. *Held*, accused found guilty of several of the charges against two of the complainants and not guilty of other charges concerning those same complainants; the court rejected the accused’s evidence that there was ever any sort of consensual sexual relationship between him and one of the complainants. Where convictions were entered, the court was

impressed with the complainants’ evidence, the details recalled and the manner in which they testified regarding the events. On those charges where the accused was not convicted, the court found not just mistakes made in trying to recall past events, but that the events alleged just didn’t happen. There was either hesitation and contradictions evident in the complainant’s cross-examination around these particular incidents or the complainant was vague on details such as who was around or the time of year when the events occurred.

**CRIMINAL LAW – Sexual assault – miscarriage of justice, appeal allowed** *R. v. W. (E.M.)*, C.A.C. No. 321590, Farrar, J.A., October 8, 2010. 2010 NSCA 73; **S606/31** ■ A father was convicted of inappropriately touching his 12-year-old daughter during overnight access visits. The allegations came to light after the girl told a friend and the girl’s mother had not talked to her about what had happened, but immediately brought her to the police station for an interview. The girl clearly had a hard time testifying. Although the father denied the accusations (suggesting the girl fabricated them to avoid access or get attention) and the father’s version of events was “plausible”, the court found the girl to be the more reliable of the two and concluded that the father’s evidence failed to raise a reasonable doubt. The circumstances surrounding the disclosure, and its content, weighed heavily against an inference the girl was motivated to lie and the court had such confidence in the reliability of her evidence that, even in light of the father’s denials, her evidence displaced doubt. The father appealed. *Held*, appeal allowed; conviction quashed; new trial ordered; the conduct of the trial and the manner in which the evidence was admitted were such that it deprived the father of a fair trial. The concern was not with the trial judge’s analysis of the evidence or his application of the direction in *R. v. W.(D.)* but rather with the evidence he used to undertake the analysis. Credibility was seriously in issue and the Crown had used leading questions to establish the girl’s credibility by suggesting to her that the information the police had at the initial interview was accurate, thereby suggesting that her complaints were consistent throughout. Incriminating evidence was also elicited from the girl by leading and binary questions and not from her own words. The judge went beyond using the content of the girl’s prior statements as part of the narrative and used the consistency in those statements to assess her credibility and displace the reasonable doubt that the father’s evidence had raised. Much of the other evidence relied on for the purposes of assessing the girl’s credibility had been elicited through hearsay and was inadmissible. Per Fichaud, J.A., dissenting, inadmissibility of evidence, miscarriage of justice or defence counsel’s poor performance at trial could not form the basis of an appeal as no such grounds of appeal had ever been raised. The trial judge had not stated that, after assessing all the evidence together, the father’s testimony was plausible but, rather, that the father’s evidence in isolation was plausible, as was the girl’s version in isolation. He then assessed all the evidence, together, before making any finding of who did what and any conclusion that on reasonable doubt. He did not use the girl’s prior statements as corroboration, oath helping or proof of content but cited her initial silence, hesitancy and unscripted response to refute the defence’s suggestion that she had an agenda to terminate her visits with her father, which approach was consistent with the limited use of prior statements in sexual assault cases permitted in *R. v. G.C.* (2006) (Ont. C.A.).

**CRIMINAL LAW – Voir dire – admissibility of accused statements** *R. v. Martin*, C.R.H. No. 316875, Kennedy, C.J., October 20, 2010. 2010 NSSC 383; **S618/7** ■

**CRIMINAL LAW – Young offenders – adult sentence imposed**

*R. v. Smith*, No. 2022905; 2022906; 2022907; 2022908; 2022909; 2022910; 2022911, Campbell, J.P.C., August 24, 2010. 293 N.S.R. (2d) 341; 2010 NSPC 53; **M22** ■ A youth was convicted of attempted murder, dangerous operation of a motor vehicle, failure to stop at the scene of an accident, robbery, theft and possession of stolen property after he stole a vehicle, attended at a stranger's home and shot him in the chest and then attempted to elude the police. He had a long-standing pattern of offending, with 14 convictions, including numerous charges of assault, threats of violence and drug trafficking. *Held*, the youth is sentenced to 14 years' imprisonment; his actions were callous, cold and calculated and a youth sentence would not provide meaningful consequences or hold him accountable for his actions. The youth did not suffer from any mental illness or addictions but had a number of antisocial personality traits that were described as "quite resistant to change", including lack of remorse, shallow affect, a grandiose sense of self worth and callousness. The evidence showed that he would require a lengthy period of incarceration to allow him to address his pro-criminal attitudes in a structured environment and that the best treatment for such individuals was a group-based cognitive behaviour program, which was not available in youth facilities.

**CRIMINAL LAW – Young offenders – sentencing, home invasion and arson** *R. v. P. (M.) et al.*, No. 2102949; 2102950; 2102952; 2102953; 2102928; 2102930; 2102932; 2102933; 2102934; 2102937; 2103099; 2103101; 2103103; 2103104, Tax, J.P.C., August 20, 2010. 2010 NSPC 54; **M22** ■ Three youths were convicted of the break, enter and arson of a judge's homestead and the theft of motor vehicle. One also pled guilty to the theft of a purse; a break, enter and theft at a boy scout camp; uttering a threat to cause bodily harm; recklessly causing damage to a bridge by fire; and breach of an undertaking. All of the offences had occurred in a small community and the youths had been drinking and taking drugs at the time. None of them had any previous criminal record. The Crown argued that this was one of those exceptional cases where custodial sentences should be imposed. *Held*, the first two youths are each sentenced to six months' deferred custody, followed by 18 months' probation (with a curfew imposed during the first 12 months) as well as 180 hours of community service; the third youth is sentenced to twelve months' deferred custody, followed by 24 months' probation (with a curfew imposed during the first 12 months) and is ordered to complete 210 hours of community service; a restitution order shall issue against each youth, with the third youth paying an additional \$300 in restitution. Although this was one of those clearest cases involving "non-violent" indictable property offences where the circumstances were so exceptionally aggravating that custodial sentences must be imposed, all three youths had accepted full responsibility for the offences, none of them had a previous criminal record and they all resided in their family homes, were enrolled in school when the pre-sentence reports were prepared and currently held part-time jobs. In considering what would amount to "exceptional circumstances that would shock the local community", the court found it significant that the crimes had occurred in or around small villages in a rural area.

**CRIMINAL LAW – Young offenders – sexual assault** *R. v. T. (P.) et al.*, No. 2166884; 2166885, Derrick, J.P.C., July 30, 2010. 2010 NSPC 49; **M22** ■ Two 13-year-old boys were charged with the sexual assault of a 14-year-old girl. The complainant was spending the night at her friend's house, along with her friend's brother and his friend. She alleged that she fell asleep on the top bunk of a bunk bed in the brother's room, where the boys were playing video games. When she awoke to hear the boys discussing her appearance, she pretended to still be sleeping. The boys then began touching her arms and legs, trying

to put their hands down her sweat pants. Still pretending to be asleep, she clasped her legs together and then heard the sound of the boys masturbating and felt something being rubbed on her arm and face. She alleged that the brother then expressed that "it" was "gross" and he "didn't want to do that" and got a washcloth and wiped her off. Her eyes remained closed the entire time. The friend's brother then climbed up to the top bunk and straddled her, pulling her towards him. He undid his pants and she felt his penis touch her face. When he got down from the bunk, her friend entered the room and she ran to the bathroom. When she emerged, her friend and the two boys told her to calm down and suggested that she was drunk even though she had only consumed one beer earlier. She went along with this and asked her friend to join her in the top bunk. Eventually she fell asleep and when she awoke, the friend was gone. Her friend's brother was asleep in the bottom bunk and his friend was asleep in a chair. She climbed into the lower bunk with her friend's brother and slept at his feet, seeking protection from the other boy. When she awoke she called her father to take her home. Although she did not report the event to the police until three years later when the brother's friend began threatening her younger brother, she had told her father and some of her friends that she had been sexually assaulted at the time. Both the boys and the complainant's friend disputed the critical parts of her evidence but there were inconsistencies between the details in their evidence and both boys admitted to discussing the complainant while she slept and that the brother's friend had joined the complainant on the top bunk for a while, although they said they were just talking. *Held*, the brother's friend is guilty of sexual assault; the brother is not guilty of sexual assault. Although the court accepted the complainant's evidence that she was sexually touched and groped by what she thought were two sets of hands during the first assault, she had not seen which boy was touching her and there was no evidence as to how she knew there were two sets of hands; thus, the court could not be satisfied beyond a reasonable doubt who, exactly, touched her during that assault. Even on the defendants' own accounts, the atmosphere in the bedroom was to some degree sexually charged and the defendants' downplaying of this atmosphere was one of the reasons the court did not accept their version of events. The evidence of the brother's friend that he had carried on a long conversation with the complainant on the top bunk while continuing to play video games was inconsistent with the brother's evidence that no one was playing video games at that time. The complainant, however, was a credible witness and gave her evidence in a consistent and unvarnished manner. She admitted that she didn't really know why she hadn't left the room but stated that she was scared and didn't want anyone to know or get angry with her.

## ■ DAMAGES

**DAMAGES – Motor vehicle accident – liability and personal injuries** *Mawdsley v. McCarthy's Towing and Recovery Ltd.*, Hfx. No. 203216, Bryson, J., May 19, 2010. 291 N.S.R. (2d) 229; 2010 NSSC 168; **S610/23** ■ The plaintiff was injured when he was trapped between one stationary and one moving garbage truck, which truck was being towed by one of the defendants. After the defendants arrived to tow the plaintiff's truck, the plaintiff intended to leave in the second garbage truck. The two trucks were parked side by side and just as the tow truck slowly moved forward, the plaintiff opened the door and attempted to enter the second truck, at which time his head and upper body became trapped between the driver's door of the one truck and the side of the moving truck. One of the defendants testified that he had told the plaintiff they were about to leave but the plaintiff testified that he never heard him. He suffered a crush injury to his head and upper body resulting in a broken jaw and severed facial nerve, laceration from ear to neck, two fractured ribs, a sensory injury to the forearm and a mild

traumatic brain injury. He underwent two jaw surgeries, lost all feeling on one side of his face and some sensitivity to touch in one arm and continued to experience pain in the shoulders, neck, back and jaw. *Held*, liability apportioned 60 per cent to the plaintiff and 40 per cent to the defendant driver; general damages assessed at \$100,000. The tow truck began moving forward either before the plaintiff entered the gap between the two trucks or virtually as he did so and he should have known both by sight and sound not to place himself in such a dangerous situation. Although the defendant driver had checked his mirrors and pulled away slowly, he should have continued to pay attention to his right rear by checking the mirrors one more time as, if he had, he surely would have either seen the plaintiff make his move or the second truck's door open.

**DAMAGES – Motor vehicle accident – liability, personal injuries, personal property** *Pelletier v. Forbes*, Hfx. 288960, Pickup, J., August 3, 2010. 2010 NSSC 309; **S615/5** ■

**DAMAGES – Standard of care – burner service technician** *Paradigm Investments Ltd. v. Bremner's Plumbing & Heating Ltd.*, Hfx. No. 322800A; S.C.C.H. No. 297915, Robertson, J., July 21, 2010; June 28, 2010 (orally). 2010 NSSC 263; **S614/9** ■ The respondent attended an evening service call at the appellant's apartment building to check a suspected oil leak. He determined the smell was likely due to a spill during an earlier delivery, and didn't shut off the fuel line. A leak was discovered the next morning. The appellants sued for damages and loss. They appealed, claiming: the Small Claims Court Adjudicator erred in finding the respondent met the standard of care for a reasonably competent burner service technician; and that he erred by failing to address expert evidence regarding standard industry practices in similar circumstances. It being a Small Claims Court matter, there was no trial record, just the adjudicator's summary report and reasons. The appellant tried to argue things they said were before the adjudicator, but were not mentioned in his summary report or reasons. They agreed an adjudicator isn't required to mention every piece of evidence but argued these were crucial pieces of evidence that were ignored. *Held*, appeal dismissed, with costs of \$50 to the respondent. The only realistic option that could address the alleged evidence shortage would be a re-hearing by the Small Claims Court, but that wasn't the issue before the court on appeal. The adjudicator made no palpable or overriding error, which is the appropriate standard for review. The court must make an assessment based on the evidence as it appears in the adjudicator's summary report and reasons, and not based on what counsel for the appellant says it was. Looking at the reasons as a whole, including the adjudicator's grasp of the evidence, issues and trade standards, it does not appear the expert's evidence was ignored. He made sufficient findings to reasonably reach the conclusions he did. Without an official record, it's impossible to conduct a more critical review.

**DAMAGES – Strict liability – damage by goat to car** *Pittman v. Morin*, S.C.C.H. No. 327421, Parker, Adjudicator, September 30, 2010. 2010 NSSM 56; **SmCI16/24**

## ■ EASEMENTS

**EASEMENTS – Enforcement of construction of enforcement road – appeal dismissed** *Olympic International Realty Ltd. v. Halifax (Regional Municipality)*, C.A. No. 325220, MacDonald, M. C.J., October 14, 2010. 2010 NSCA 80; **S617/7** ■

**EASEMENTS – Right of way – trespass** *Seabright Partners, LLC et al. v. Frank George's Island Investments Ltd. et al.*, Hfx. No. 318133, Scaravelli, J., October 12, 2010. 2010 NSSC 368; **S616/31** ■ The

plaintiffs owned land, over which a limited right-of-way (use of an access road) was granted in favour of the individual defendants (the Viehbecks). Restrictive covenants prevented the use of the road for any commercial purposes. The Viehbecks used it to access the waterfront lot they lived on. They transported a number of goods they used to renovate both their home and a nearby island property, which happened to be owned by their company FGIL. The applicants grew concerned the island was being developed for commercial purposes and applied for declarations that the grant of right-of-way: is restricted to a limited use of accessing only the benefitted properties (and not the island); doesn't entitle the respondents to use it for commercial purposes; is not made in favour of FGIL, and doesn't entitle the respondents to access the island over the right-of-way. *Held*, application granted in relation to the second and third declarations sought. The first and fourth are too broad. The Viehbecks are entitled to access the water (and the island) using the right-of-way. They are not, however, allowed to do so for the colourable purpose of enlarging the scope of the right-of-way to the benefit of FGIL. FGIL has no right to use it for any purpose. While the Viehbecks own FGIL, the company is a separate entity. Using the right-of-way to transport materials to renovate FGIL's island imposes a greater burden on the servient tenement than was expressed by the grantor.

## ■ EMPLOYMENT LAW

**EMPLOYMENT LAW – Wrongful dismissal – constructive dismissal, mitigation of loss** *Irwin v. Sysco Halifax*, Hfx. No. 311662, Hood, J., July 22, 2010; June 23, 2010 (orally). 292 N.S.R. (2d) 258; 2010 NSSC 291; **S614/19** ■ The plaintiff was hired to work for the defendant for a one-year term as an human resources generalist. Midway through the term, another person was hired to do that job on a permanent basis. The plaintiff was told she would be kept on for special human resources projects, and to train her replacement. Her pay and benefits would stay the same. She was also told there might be permanent work in other areas. The specifics were not discussed. A day after her replacement started, she quit saying she felt humiliated and that her supervisor had treated her badly. The supervisor testified she hadn't known the plaintiff was unhappy; she liked and wanted to continue working with her. The plaintiff sued for damages, alleging constructive dismissal. The defendant disputed the claim and said the plaintiff had failed to mitigate. *Held*, claim dismissed, with costs to the defendant in an amount to be determined. The plaintiff was constructively dismissed when her job title and duties were given to another person; but, she failed to mitigate. The fact she wasn't hired to do the job on a permanent basis and had to train her replacement might have been uncomfortable, but were not sufficient reasons to quit. While the plaintiff may have subjectively felt humiliated, that isn't the test. She was a term employee. Looked at objectively, a reasonable person would have continued to work for the defendant for the balance of the term. The evidence showed the defendant acted in good faith. The plaintiff was looking for human resources experience, and the work that was offered could have exposed her to a wide range of human resources duties.

## ■ EVIDENCE

**EVIDENCE – Admissibility – of expert report** *Ocean v. Economical Mutual Insurance Co. et al.*, Hfx. No. 190673, Smith, A.C.J., August 5, 2010. 293 N.S.R. (2d) 394; 2010 NSSC 315; **S615/10** ■ The self-represented plaintiff alleged that, as a result of the motor vehicle accident, she experienced enhanced cognitive skills and suffered from post-traumatic stress disorder. She claimed to have special knowledge of a parallel world and “the Root Language of Mankind”, and authored

and filed two “expert reports” – one over 150 pages, the other in excess of 5,000 (including attachments). She sought to use them to: prove her injuries; prove monopoly and conspiracy exist in the insurance industry; and to refute a diagnosis of “delusional disorder, persecutory type” made by a doctor hired by the defendants. She claimed to be an expert researcher, and an expert on her own life. The defendants moved to strike the reports, or for an order requiring them to comply with the Rules. Preliminary issues were: whether the court could rule on the admissibility of evidence prior to trial; and whether the *Civil Procedure Rules* (1972) or *Civil Procedure Rules* (2008) applied. The plaintiff argued the defendants acquiesced to the first report by failing to object until she had (encouraged by their silence) already prepared the second. *Held*, since the parties agreed, and since the matter was before the same judge who will hear the trial, the court will rule on admissibility at this stage. Left undecided is whether such a ruling could be made absent consent. The *Civil Procedure Rules* (1972) apply. These old Rules apply to the defendants’ reports. Although the case has taken several recent twists and turns, the matter is sufficiently advanced that all reports should be measured against the same set of Rules. The plaintiff’s reports don’t comply with Rule 31.08(1). There will be no order to comply because they can’t be made to comply. An expert witness is expected to be objective and independent of the litigation. Leaving aside whether she’s an expert, the plaintiff can’t be an expert in her own litigation. While it would have been helpful for the defendants to object to the first report in a more timely manner, the *Civil Procedure Rules* (2008) (which require a timely objection to expert reports in Rule 55.10(1)) don’t apply here.

## ■ EXPROPRIATION

**EXPROPRIATION – *Expropriation Act* – consent** *Nova Scotia (Attorney General) (Re)*, S.A.R. No. 313370, Kennedy, C.J., September 23, 2010. 2010 NSSC 354; **S616/21** ■ The Attorney General applied late to expropriate lands upon which a highway had already been built several years earlier. The landowner argued she should be compensated based on the value of the land and the highway improvements. There was evidence from the Department of Transportation that the landowner had given her verbal consent to the construction of the highway. She denied having done so, and argued the Department was a trespasser at the time the highway was built. *Held*, compensation to the landowner will not take into account the highway improvements. Leaving aside the question of whether the Department could be a trespasser in this context, it was not a trespasser here in light of the landowner’s verbal consent.

## ■ FAMILY LAW

**FAMILY LAW – Child in need of protective services – admissibility of expert opinion** *Nova Scotia (Minister of Community Services) v. A. et al.*, F.B.W.C.F.S.A. No. 068123, Dyer, J.F.C., April 22, 2010; April 7, 2010. 2010 NSFC 9; **FC37** ■

**FAMILY LAW – Child in need of protective services – dismissed, mother to regain custody with restrictions** *Nova Scotia (Minister of Community Services) v. E. (J.) et al.*, S.F.H.C.F.S.A. No. 049202, O’Neil, J., November 12, 2010; August 20, 2010 (orally). 2010 NSSC 422; **S619/16** ■

**FAMILY LAW – Child in need of protective services – jurisdiction to attach conditions to permanent care and custody** *Nova Scotia (Minister of Community Services) v. H. (T.) et al.*, C.A. No. 325503, Fichaud, J.A., July 27, 2010. 322 D.L.R. (4th) 275, 293 N.S.R.

(2d) 200; 2010 NSCA 63; **S611/24** ■ A family court judge placed the children (ages eight and ten) in permanent care, subject to them remaining in their current foster placement. His order included access for the parents and conditions designed to prevent the agency from seeking adoptive placements, suggesting a possible future return to the mother. The minister appealed the conditions on placement, but not the access order. *Held*, appeal allowed, with each party to bear their own costs. The judge erred in law and exceeded his jurisdiction. This was not a temporary care order. He had no authority to impose these conditions on a permanent care order. Unlike the *Adult Protection Act* (considered by the Supreme Court of Canada in *J.J.* [2005]), the *Children and Family Services Act* (CFSA) is a comprehensive legislative scheme that dictates what “best interests” means in the context of permanent care. The minister is allowed to determine where a child in permanent care is to reside, having regard to the child’s best interests. Specific provisions define how, when and by whom a child’s best interests are to be determined and promoted with respect to adoption. The judge failed to consider the provisions that apply to adoption (ss.67 to 87). His reasons don’t mention s.3(3), which should have prevented him from deciding “best interests” by comparing the agency’s plan for adoption to the merits of an eventual return to the mother. The Act doesn’t include “a disposition judge’s approval” in the pre-requisites to (or consents required for) adoption. It specifically provides there will be a separate proceeding at the adoption stage. Section 2(2) is intended to be construed consistently with other provisions in the Act; it’s not abrogative and doesn’t empower to the court to ignore the clear directions in the Act.

**FAMILY LAW – Child in need of protective services – no reasonable and probable grounds for protective services** *Nova Scotia (Minister of Community Services) v. G. (J.P.)*, S.F.H.C.F.S.A. No. 072011, Jollimore, J., October 19, 2010. 2010 NSSC 378; **S618/27** ■ The Minister apprehended the 15-year-old respondent’s seven-week-old baby, K, after two vague, anonymous referrals were made. At the five-day hearing, they argued there were (several) reasonable and probable grounds upon which to believe K was a child in need of protective services. The evidence showed the respondent’s mother had contacted the Agency for assistance with/for the respondent both before and during the pregnancy. When the baby was a few weeks old, the respondent agreed (in writing) to give her mother primary care of the child, although she continued to live with them. The respondent’s mother was not named as party to this proceeding. *Held*, application dismissed. There are no reasonable and probable grounds, proven by credible and trustworthy evidence, to believe the child is in need of protective services. Considering the nature of the (anonymous) allegations, the arrangements made with the respondent’s mother for the care of the child, and the conflicts in the evidence, there’s insufficient evidence to establish any of the grounds asserted under s.22(2) of the *Children and Family Services Act* (here ss. (b), (g), (ja) and (k)). Giving up custody to her mother does not mean the respondent has abandoned the child, or refuses to resume her care.

**FAMILY LAW – Child in need of protective services – order for access to family rescinded** *Children and Family Services of Colchester County v. T. (K.)*, C.A. No. 325959, MacDonald, M. C.J., September 9, 2010. 2010 NSCA 72; **S611/30** ■ The two children, aged seven and nine at the time of trial, were placed in permanent care. Although the minister’s plan was for third-party adoption, the permanent care orders provided for access to the mother, siblings and extended family members. The evidence showed the children had strong family ties and that access had been a positive thing. The minister appealed, seeking to have the access provisions struck. The evidence was that access

orders would inhibit or prevent the agency from finding appropriate adoptive placements for these children. *Held*, appeal allowed. The trial judge exceeded his statutory mandate, and appeared to have done so without a proper, meaningful consideration of the relevant sections in the *Children and Family Services Act* (CFSA). The trial judge was trying to maintain the status quo (placement in foster care with access), which was a temporary care arrangement. When a child has been placed in permanent care, the Act precludes the court from considering the importance of preserving family ties when determining that child's best interests. The agency becomes the child's parent and is required to make a plan to secure a permanent placement for the child. In order to have a permanent care order with access when an adoption is planned, s. 47(2)(d) requires the party seeking access to prove: (1) there are special circumstances and (2) they are such that they will not jeopardize the child's future permanent placement. Such was not the case here. Access that will impair a future permanent placement is deemed not to be in the child's best interests by virtue of s.47(2).

**FAMILY LAW – Child in need of protective services – permanent care and custody order** *Children's Aid Society of Inverness/Richmond v. K. (J.M.) et al.*, S.F.P.A.C.E.S.A. No. 060546, Legere-Sers, J., June 7, 2010. 2010 NSSC 216; **S616/27** ■

**FAMILY LAW – Child in need of protective services – permanent care and custody order, best interests of the child** *B. (K.) and J. (B.) v. Nova Scotia (Minister of Community Services)*, C.A. No. 328959, Farrar, J.A., October 13, 2010. 2010 NSCA 75; **S617/2** ■

**FAMILY LAW – Common-law relationship – division of debts by Small Claims Court** *Dyke v. Skinner*, Claim No. 326212; 326213, Slone, Adjudicator, July 27, 2010. 2010 NSSM 49; **SmCl16/17** ■

**FAMILY LAW – Costs – custody** *Tamlyn v. Wilcox*, S.F.H.M.C.A. No. 064146, Dellapinna, J., October 7, 2010. 2010 NSSC 363; **S616/29** ■

**FAMILY LAW – Costs – divorce, quantum of spousal support** *Hamilton v. Hamilton*, No. 1201-063091; 61449, Jollimore, J., October 20, 2010. 2010 NSSC 381; **S618/28** ■ Costs were in issue following a three-day trial in a family law matter. The primary issue at trial was quantification of the husband's income for the purpose of determining his child and spousal support obligations. Neither party had filed current Statements of Expenses despite having been ordered to do so. The wife was successful, and sought costs. She suggested the amount in issue should be determined using the amount she was awarded and assuming it will be paid for ten years. The husband felt the amount in issue should be calculated based on the difference between his (informal) settlement offer and what the wife was actually awarded – again calculated over ten years. *Held*, costs to the wife of \$9,750, payable forthwith. Where it's difficult/impossible to assess the amount involved in a family matter such as this, costs should be calculated using the rule of thumb that each day of trial equates to \$20,000. Here the duration of support at the level awarded cannot be predicted on any reasonable basis. Using the ten-year calculations proposed by husband and wife results in an entirely arbitrary amount since there is nothing to suggest the order will survive that long. In fact, it is expected that circumstances will change over time. Looking at Tariff A and an amount involved of \$66,000 the appropriate award is \$9,750, which represents a 60 per cent contribution to the wife's actual, reasonable, after-tax legal expenses (including fees, disbursements and taxes).

**FAMILY LAW – Costs – parenting plan, child care expenses** *Wile v.*

*Barkhouse*, S.F.H.F. No. 12245, MacDonald, B. J., November 2, 2010. 2010 NSSC 400; **S619/1** ■

**FAMILY LAW – Costs – settlement offers declined, unreasonable litigant** *Robar v. Arseneau*, No. 1201-061904, O'Neil, J., November 12, 2010. 2010 NSSC 425; **S619/12** ■

**FAMILY LAW – Custody, access and child support – best interests of child** *Cadegan v. Hearn*, S.F.S.N.M.C.A. No. 068242, Wilson, J., November 4, 2010; October 21, 2010 (orally). 2010 NSSC 405; **S619/3** ■

**FAMILY LAW – Custody and access – interim application** *Hewitt v. McGrath*, No. 1201-64509; S.F.H.D. No. 69899, MacDonald, B. J., July 9, 2010. 2010 NSSC 275; **S614/3** ■ The parties couldn't agree on a suitable interim parenting arrangement for their five-year-old child. After separation, because of her then-temporary living arrangements, the mother reluctantly shared parenting; she had the child 12 out of 30 days, while the father had him for 18. She now sought to change the arrangement to an equal time-share, based on a seven-day cycle that would see the child with each parent for three or four days per week. The father wanted the post-separation "status quo" to continue. His plan involved more frequent transitions and meant the mother had little weekend time with the child. The mother, who had a flexible work schedule, lived with her new partner. The child was already acquainted with her partner, and spent time with him during access. The father didn't like this, alleging concerns over the stability of the relationship and the potential for the child to experience a loss if it came to an end. The mother maintained the relationship was stable, and that the partner would not have an involved parenting role. She wanted the court to anticipate the child's upcoming enrollment in elementary school and to order that shared parenting will change to a week on/week off arrangement when school starts. *Held*, shared parenting to continue on an interim basis, according to the schedule proposed by the mother. The post-separation arrangement was not in the child's best interests and was not the "status quo". The mother's plan gives more stability and will allow the parties to better plan. The parties don't respect each other, but there was no evidence to suggest their conflict adversely impacted the child. As for the father's concerns over the new partner, there are no guarantees any relationship will last. Children are often subject to changes in caregivers (e.g., at daycare). The child has already been introduced to and spends time with him under the father's proposed plan. Provided the mother doesn't allow him to assume an active parenting role, the child's interest in spending time with his mother overrides any concern of this nature. It is premature to rule on what should happen when the child starts school. Neither party lives near the school. It is possible that long-term shared custody will prove unworkable. This is something best left for a full hearing. Costs will be determined then.

**FAMILY LAW – Custody and access – interim parenting arrangement** *LeBlanc v. Khallaf*, S.F.H.M.C.A. No. 069695, MacDonald, B. J., June 8, 2010. 2010 NSSC 219; **S612/27** ■ The parties' hostility prevented them from reaching an agreement on interim parenting arrangements for their two-and-a-half-year-old child. There was a no contact order in place pending the outcome of domestic violence charges against the father (who had not seen the child for four months). The mother had nothing positive to say about him. They disagreed about the extent of his marijuana use, and the extent of his involvement with the child. He agreed to abstain from drugs around the child and for 12 hours before access. The mother expressed concern the father was a flight risk because he was from Egypt and had family support outside the country. *Held*, sole custody to the mother, with supervised access for a period

of time (to reintroduce the father to the child), moving to increasingly longer periods of daytime access. The father must complete a parenting course to better learn how to meet the child's various needs. There was insufficient evidence to show he is unable to protect the child from her severe nut allergy. There was insufficient evidence to establish he is a flight risk. Even if he had threatened to flee with the child, it is relevant that he lacks the means to do so. While there has been unpleasantness and some violence between the parties, the evidence does not establish domestic violence of a nature that would require supervised access on an ongoing basis.

**FAMILY LAW – Custody and access – primary care to father** *Godin v. Godin*, S.F.H.M.C.A. No. 054806, Lynch, J., October 8, 2010. 2010 NSSC 365; **S616/30** ■ The parties were together for 14 years. The mother had two (now adult) children from a previous relationship and three more with the father (now ages 16, 15 and 11). In 2007, the mother told them all she was being treated for terminal cancer. Eventually it was learned she was lying and the parties separated. The children remained in the father's primary care. There was no medical evidence to show she ever had cancer or any medical treatments other than cosmetic surgery. In 2009, their eldest son left to live with his mother. The father applied to have him returned to his care. The mother opposed the application, sought retroactive and ongoing support (child and spousal). As assessment suggested the father should have custody and the mother limited, supervised access. It opined that the mother couldn't separate her needs from the children's, nor could she provide them with emotional security. It recommended she have a psychological assessment. She refused, although she did engage in therapy. There was an issue of whether email messages surreptitiously obtained by the mother were admissible. *Held*, custody to the father, with unsupervised daytime access to the mother provided she participate in a complete psychiatric assessment and copy the results to the father. When this condition is met, he must agree to overnight access. If the mother refuses the assessment, her access will be jeopardized. The emails are not admissible. None of them had any direct bearing on the best interests of the children. Given the (deceitful) manner in which they were obtained, their probative value is not sufficiently high to outweigh their prejudicial effect. The mother was not credible. Looking at the factors in *Foley*, the father addressed concerns raised in relation to his parenting (such as the inappropriate use of discipline). His use of internet pornography doesn't impact the children. There is concern about the mother's ability to be a good role model. Aside from lying to her children about the cancer, she's acted in other hurtful, childish, selfish ways towards her eldest daughter. She's involved the children in the dispute, and has inappropriate boundaries. While the children (especially the eldest son) have expressed some desire to live with her, their wishes are not determinative of their best interests. Their health, not happiness, is most important. The mother will pay the guideline amount for three children. No order for retroactive child or spousal support. Ongoing spousal support (the mother's entitlement/quantum) is left for determination after the matrimonial assets and debts have been divided.

**FAMILY LAW – Custody and access – sole custody to father, access to mother** *S. (D.) v. S. (M.)*, No. 1201-062188, Campbell, J., October 5, 2010. 2010 NSSC 360; **S618/2**

**FAMILY LAW – Custody and child support – joint custody continued** *Conrad v. Cado*, S.F.H.M.C.A. No. 036529, Ferguson, C.J.E.C., August 16, 2010. 2010 NSSC 327; **S615/24** ■ The parties, who separated in 2004, have three children (ages 22, 14 and 12). For three years post separation, they spent three nights per week with the father and four with the mother, and were enrolled in a school

near the father's home. When the mother met her current spouse, she unilaterally reduced the father's parenting time and enrolled the two youngest children in a school near her new home. She claimed the father was domineering and threatening, and that she was better situated to provide them with a nice home and financial security. The evidence showed the children were doing well in the new school, but a children's wish assessment suggested they wanted more time with their father. Their older sister lived with him. There was no evidence they had not done well under the original post-separation parenting arrangement. The mother, who had mostly supported the children without help from the father, wanted retroactive child support. *Held*, joint custody; the children will be enrolled in a French immersion school near the father's home. The mother's parenting time will include three weekends and one weeknight every four weeks, as well as vacation and holiday access. The post-separation status quo was disrupted by the mother, primarily to accommodate her then new relationship. There was no evidence the children were not happy with the original parenting arrangement, or with the amount of time they spent with each parent. While the children are too young to decide, it is in their best interests to spend a considerable amount of time with each parent. It has not proven detrimental to them in the past, and it's what they want. No child support payable. It's the father's turn to step up financially, given the mother has primarily supported them in the past; her claim for retroactive support is denied.

**FAMILY LAW – Custody and child support – variation** *S. (S.) v. O. (S.)*, No. 1204-002832, Duncan, J., July 5, 2010. 2010 NSSC 269; **S618/5** ■ The father applied to vary parenting arrangements for the only remaining child of the marriage (now aged 17). He claimed primary care, child support and sought to impute income to the mother whose income had recently dropped (drastically) as a result of her decision to work part time to be more available to her five-year-old son. By recent order, the child had lived with her mother and enjoyed liberal access to the father. That order designated the mother the primary caregiver and required the father to pay table child support. The child had recently moved in with the father and the mother's access was almost identical to that previously exercised by the father. The mother sought to characterize parenting arrangements as "shared custody". By her calculations (which also took into account time spent with the child in excess of that outlined in the order), the child was with her about 41 per cent of the time. *Held*, the father has primary care and the mother will pay the table amount of support based upon her actual income. Her decision to work part time was reasonable in the circumstances, and the father has sufficient resources to provide for the child even without her help. The mother was prepared to call the parenting arrangements "primary care" and accept full table support when it worked in her favour. Now that she was exercising virtually the same access as the father previously had, she tried to call it "shared custody" to reduce the support payable by her. On the facts, the mother does not have care of the child for more than 40 per cent of the time. The court will not include the time not accounted for in the order. The parties have always been flexible when it comes to parenting time(s). The father didn't try to hold it against the mother when he spent extra time with the child in the past. It's counterproductive to the child's interests to start such a time accounting system at this stage, as it might cause the parents to become less flexible at a time when more flexibility is needed.

**FAMILY LAW – Custody and child support – variation, costs** *S. (S.) v. O. (S.)*, No. 1204-002832, Duncan, J., September 22, 2010. 2010 NSSC 352; **S618/18** ■

**FAMILY LAW – Custody – application for primary care of child**

by **paternal aunt** *G. (C.) v. D. (P.) and G. (J.)*, F.N.G.M.C.A. No. 61186, Wilson, J.F.C., October 7, 2010. 2010 NSFC 23; **FC37**

**FAMILY LAW – Custody – change in circumstances** *R. (A.) v. R. (G.)*, No. 1201-063544, O’Neil, J., October 15, 2010; October 7, 2010 (orally). 2010 NSSC 377; **S618/14** ■ After separation, the father had primary care of the parties’ daughters (now ages 10 and 11). During that time, the children made several allegations of abuse, which were investigated and then dismissed as unfounded. Evidence showed the children tended to make false allegations. They had traumatic pasts and had spent a lot of time in foster care. At that time, the mother supported the father and the children remained with him. Recently the arrangement had become one of shared custody. In May 2010, the mother denied the father access. She claimed the children made allegations of abuse, contacted the Department of Community Services (which supported her denial of access) and then applied for primary care with supervised access to the father. She also sought child support – both she and the father make roughly \$70,000 per year. *Held*, mother’s application dismissed; shared custody will resume after a five-week transition period. The mother’s evidence was vague and less than credible. It appeared she simply wanted child support, and to spend more time with her children now that she was living in their community. The children’s statements are unreliable, inconsistent and there is a history of fabrication on their parts. The father admitted some inappropriate discipline but addressed it. At most it can be said he’s yelled at his children and maybe slapped one daughter in the face. The mother’s actions appear to be motivated by something other than concern for the children’s best interests. She either exaggerated her concerns or fabricated them. The impact on the children has been severe. They haven’t seen their father in months, and the Department has played a mind-boggling role in helping that happen.

**FAMILY LAW – Custody – joint custody ordered with conditions** *Forgeron v. Forgeron*, S.F.P.A.M.C.A. No. 063735, Legere-Sers, J., October 22, 2010. 2010 NSSC 384; **S618/10** ■

**FAMILY LAW – Custody – mobility, joint custody primary caregiver relocating** *Sabri v. Harara*, No. 1201-061957, Jollimore, J., August 17, 2010. 293 N.S.R. (2d) 330; 2010 NSSC 329; **S615/26** ■ The mother had always been the child’s primary caregiver. She lived on social assistance without any financial support from the father (who exercised weekend access). The evidence showed the father had left the country for extended periods of time in the past, and had not always maintained contact with the child during these absences. The mother sought child support and the court’s permission to move with the child to Dubai, where she had secured employment. Her plans lacked specificity given she had not yet obtained permission to move. The father opposed the move and sought shared custody, on a week-on/week-off basis. He was expecting a baby with his new wife. The child didn’t have his own room at the father’s home and slept with his father and his pregnant stepmother. Recently the mother had denied access following the child’s disclosure (in therapy) of upsetting conduct by the father, but visits had been reestablished. *Held*, the mother is permitted to move to Dubai, after she registers this order there. She will have to bring him to Halifax once per year, at her expense. The father, who is intentionally underemployed, will pay child support on an imputed income of \$32,775 (calculated based on what he makes for the hours he works multiplied by the number of hours he should be working). The table amount will be reduced by half, with the mother’s consent and to take into account the father’s high access costs. The child has never been separated from his mother, with the exception of weekend visits with his father. She is the only stability he’s known. His ties are mostly to her and not the surrounding community. He is old

enough to maintain a relationship with his father through phone calls and web camera visits. The disruption of the move will impact him less than a disruption in custody. The mother doesn’t have to prove beyond a reasonable doubt that the father acted inappropriately. The standard is the civil burden of proof. The evidence shows there is some anxiety marking the child’s relationship with the father. The father’s access will not include overnights until he has appropriate (separate) sleeping arrangements for the child.

**FAMILY LAW – Custody – primary care to father, access to mother** *MacNeil v. Playford*, S.F.S.N.M.C.A. No. 059303, Forgeron, J., August 25, 2010; August 20, 2010 (orally). 2010 NSSC 330; **S615/28** ■ The parties’ four-year-old daughter was well adjusted despite her parents’ many shortcomings. Both wanted custody and vilified the other. A detailed interim order gave the father sole custody and required both parties to engage services/counselling, but neither completed all services nor met all guidelines. The mother: more than once unilaterally restricted the child’s contact with the father; didn’t take an anger management course as ordered; allowed her abusive partner to have unsupervised contact with the child, contrary to the court order; and exposed the child to significant risk of harm. The father: did not engage in counselling; acted hostilely towards the mother in front of the child; has serious parenting deficits; and lacks basic knowledge of proper hygiene and child-parent boundaries. *Held*, this is not an appropriate case for joint or sole custody. A parallel parenting arrangement ordered, with a review to be held in seven months. In the meantime, the parties must complete certain services (outlined in the order), and meet the guidelines therein. The purpose of the review will be to ascertain the extent of the parties’ cooperation with the terms of the order, and the child’s best interests – there will be no need to show a change of circumstances and primary care might change. For the time being, the child will live primarily with the father, and have parenting time with the mother every weekend. The father must take courses to educate him and improve his parenting deficits, as well as engage in other services. The mother must also engage in services. The parties both have problems with anger, violence, hostility, impulse control and reactivity, but the father’s anger has resulted in less serious consequences to the child. While the father has deficits and lacks certain parenting skills, violence has a more serious impacts on a child than hygiene problems, permissive parenting and anger.

**FAMILY LAW – Custody – variation, best interests of child** *Ross-Johnson v. Johnson*, No. 1201-59476, Legere-Sers, J., July 12, 2010. 2010 NSSC 262; **S614/2** ■ The mother’s behavior (both toward the child and others) and her lack of insight into her problems resulted in her losing custody to the father almost a year ago. The order imposed a number of conditions on both parties. The family division had retained jurisdiction for the purposes of a review to monitor the child’s needs during the transition in custody. For the most part, the father was doing very well at fulfilling his obligations, and the child appeared to be happy and thriving in his care. They lived in the United States, and the mother had not exercised all of the access provided for in the custody order (arguing hardship). The evidence showed she continued to try to undermine the child’s relationship with the father; still placed her needs ahead of the child’s; and hadn’t made sufficient progress in counselling. There were problems with the provisions in the order requiring her calls with the child to be monitored; the court had proposed the child’s therapist help out and the mother missed calls for two months because she refused to cooperate. These hearing dates were secured in anticipation of the mother filing a variation application, which she failed to do and so the matter was before the court for a review. *Held*, there has been no material change in the child’s circumstances since the original order. Even if there was, the weight of the evidence supports

the child's current placement; his best interests are addressed by the existing order. The mother (and her behavior) is the primary cause of her telephone and in-person access problems. There is insufficient evidence as to why/how she can't afford visits. Any issues (access, the supervision of phone calls) can be addressed by slight modifications to the original order. Retaining jurisdiction for a review can be helpful in custody/access situations like this where serious uncertainty may arise and require case management of transitions for limited purposes. From this point forward, the court releases jurisdiction.

**FAMILY LAW – Divorce – custody and access, imputing income, child support, spousal support, division of assets** *Slater v. Slater*, No. 1206-004771, Haley, J., September 24, 2010. 2010 NSSC 353; **S616/20** ■

**FAMILY LAW – Divorce – custody and child support** *Williams v. Williams*, No. 1201-62581, Gass, J., August 13, 2010. 2010 NSSC 325; **S615/27** ■

**FAMILY LAW – Divorce – matrimonial property** *Willison v. Willison*, Tru. No. 1207-0030405; 066673, Bourgeois, J., November 8, 2010. 2010 NSSC 411; **S619/6** ■

**FAMILY LAW – Divorce – property division, child support, spousal support, costs** *Brandon v. Brandon*, No. 1201-061257, Jollimore, J., October 28, 2010; October 25, 2010 (orally). 2010 NSSC 394; **S618/29** ■

**FAMILY LAW – Interim child support – appeal dismissed** *S. (S.) v. S. (D.)*, C.A. No. 322845, Fichaud, J.A., October 13, 2010. 2010 NSCA 74; **S617/4** ■

**FAMILY LAW – Interim parenting arrangement – referred to Children's Aid** *F. (A.) v. M. (K.)*, No. 55013, Forgeron, J., June 10, 2010. 2010 NSSC 223; **S612/23** ■ The parties could not agree on interim parenting arrangements for their two children (ages six and four), and the mother's 14-year-old child from a previous relationship (to whom the father was a *de facto* parent). They agreed the children should stay together, but not who they should live with. A child protection agency was involved on a voluntary basis. The mother was historically the primary caregiver, but the father had recently left work in Alberta to parent and participate with agency services. The mother refused to participate with services, and denied she had substance abuse issues or an eating disorder. The father wanted sole custody. The mother wanted primary care to continue with her, arguing the father was abusive and had untreated anger issues. The court was also concerned about where the children would live. The father owned the home, but the mother still lived there and there was a provincial court undertaking in place respecting the parties' living arrangements. *Held*, sole custody to the father, provided he: obtain counselling for personal and anger management issues and submit to drug screening. Specified daytime and holiday access to the mother, subject to stringent conditions. She continues to abuse drugs; has an untreated eating disorder; and is unable to meet the children's basic material, physical and emotional needs. The father, while not ideal, is capable of parenting (at least in the interim). He recognizes his deficits and is working with the agency to improve. For stability, the children should continue to live in the home with him. Mother ordered to leave the home: it is not in the children's best interests for the parents to have contact; the home is in the father's name; and if there is a provincial court undertaking regarding the parties' living circumstances, it should be amended to reflect the current situation so the children will not

have to move. This decision and the order will be forwarded to the agency. These children are at risk.

**FAMILY LAW – Matrimonial property – equalization payment** *Williams v. Williams*, No. 1201-62581, Gass, J.F.C., August 25, 2010. 2010 NSSC 332; **S616/6** ■

**FAMILY LAW – Matrimonial property – matrimonial assets, division of assets** *Jensen v. Brown*, S.F.H.M.C.A. No. 049225, O'Neil, J., October 15, 2010. 2010 NSSC 374; **S618/13** ■

**FAMILY LAW – Mobility – relocation plan** *M. (M.G.) v. N. (K.L.)*, S.F.H.M.C.A. No. 040079, O'Neil, J., October 15, 2010; September 8, 2010 (orally). 2010 NSSC 371; **S618/12** ■ The seven-year-old child had only seen her father twice in three years. The father sought specified access, and the mother sought the court's permission to relocate with the child to Ontario to pursue a new relationship. The father had a history of drug abuse, crime and incarceration, but had gained some insight and achieved a sustained period of sobriety. A recent order gave him supervised access at Veith House. The child was resistant and so Veith House chose not to schedule further visits. The evidence showed the mother's new partner was a positive influence. She was willing to facilitate some contact between the father/child, but felt this could happen from Ontario. *Held*, graduated, supervised access to the father, the success of which will be reviewed by the court every six weeks. The child will have to remain in Nova Scotia until June of 2011, at which time the mother's relocation plan will be reviewed. The parties should avail themselves of counselling services, but these are not a precondition to access taking place. A move now would eliminate the possibility of the child ever having a relationship with her father. The mother's plan isn't ready to be put into motion – details still have to be worked out to ensure the plan is secure and workable. Chances are the move will be allowed at the final review in 2011. The time between now and then should be used to (rather informally) establish a relationship that will allow for its continuation after the move (through Skype, phone calls and a few visits per year). By making the access informal, and allowing the parties to exercise significant control over it, the court avoids being "... held hostage to the requirement to involve a lot of professionals in this access schedule".

**FAMILY LAW – Parenting arrangement – location of school** *Taylor v. Kennedy*, S.F.H.M.C.A. No. 063455, Legere-Sers, J., November 8, 2010. 2010 NSSC 401; **S619/7** ■

**FAMILY LAW – Procedure – application for leave to extend time to appeal** *O. (C.) and F. (D.) v. Nova Scotia (Minister of Community Services)*, C.A. No. 337524, Fichaud, J.A., October 22, 2010. 2010 NSCA 83; **S617/9** ■

**FAMILY LAW – Procedure – costs** *Hopkie v. Hopkie*, No. 1201-062717, Gass, J.F.C., September 14, 2010. 2010 NSSC 345; **S616/12** ■

**FAMILY LAW – Procedure – costs** *R. (A.) v. R. (G.)*, No. 1201-063544, O'Neil, J., November 12, 2010; October 7, 2010 (orally). 2010 NSSC 424; **S619/17**

**FAMILY LAW – Procedure – extension of time to file notice of appeal** *L. (N.) v. Nova Scotia (Minister of Community Services)*, C.A. No. 337308, Fichaud, J.A., October 29, 2010. 2010 NSCA 84; **S617/11** ■

**FAMILY LAW – Procedures – costs** *Provost v. Marsden*, No. 1201-

057557, O'Neil, J., November 12, 2010. 2010 NSSC 423; **S619/11** ■

**FAMILY LAW – Stay of execution – pending appeal, sale of matrimonial home** *Patriquen v. Stephen*, C.A. No. 330795, MacDonald, M. C.J., July 30, 2010. 2010 NSCA 67; **S611/29** ■

## ■ GUARANTEE AND INDEMNITY

**GUARANTEE AND INDEMNITY – Personal guarantee – liability for default** *Nova Scotia Credit Union Ltd. v. Dunn*, S.C.C.H. No. 330377, Parker, Adjudicator, September 7, 2010. 2010 NSSM 55; **SmCI16/23** ■

## ■ INSURANCE

**INSURANCE – Automobile insurance – stay of execution pending appeal to Supreme Court of Canada, minor injury cap** *Watkins v. Hines*, Hfx. No. 272509, Robertson, J., June 23, 2010; May 4, 2010 (orally). 2010 NSSC 241; **S613/8** ■ A large number of non-test cases (including this one) are before the court involving a constitutional challenge to the cap on minor injuries on s.113B of the *Insurance Act*. This matter was stayed pending the appeal of test cases to the Nova Scotia Court of Appeal. The appeals had concluded, but leave to appeal to the Supreme Court of Canada was being sought. The plaintiff asked to have the stay continue pending resolution of the leave application and (if granted) the appeal to the Supreme Court of Canada. The defendant argued he had a right to have the claim heard in a reasonable period of time, and that trial dates should be set. The decision here would likely impact the 100 or so other non-test cases before the court. *Held*, stay granted until the Supreme Court of Canada renders a final decision on the appeal(s). The circumstances now are identical to those that existed when the original stay was granted. This is consistent with the results in many similar cases. Procedural fairness and efficiency will be best served by a stay. Prejudice to the defendant by granting the stay doesn't outweigh the prejudice to the plaintiff (who is more seriously affected by the passage of time in terms of making a case for damages). If trial dates were set now, the plaintiff would also certainly bear the additional burden of proving they don't fall within the cap. Most non-cases will be sorted rather quickly once the law is settled.

**INSURANCE – Insurance policy – interpretation of “named perils”, damage to wharf** *Thorburn Wharf Fisheries Ltd. v. ING Insurance Co. et al.*, C.A. No. 326134, Saunders, J.A., November 30, 2010. 2010 NSCA 96; **S617/23** ■

## ■ LANDLORD AND TENANT

**LANDLORD AND TENANT – Residential tenancies – appeal, rent, cleanup and repair costs** *Bonhomme v. Can-Euro Investments Ltd.*, Claim No. 337121, Slone, Adjudicator, October 14, 2010. 2010 NSSM 57; **SmCI16/25** ■

**LANDLORD AND TENANT – Residential tenancies – appeal, security deposit** *Theriault v. Townsend*, Claim No. 334208, Slone, Adjudicator, September 30, 2010. 2010 NSSM 60; **SmCI16/28** ■

**LANDLORD AND TENANT – Residential tenancies – appeal, security deposit** *Shortt v. Jennings et al.*, Claim No. 335834, Slone, Adjudicator, October 5, 2010. 2010 NSSM 61; **SmCI16/29** ■

**LANDLORD AND TENANT – Residential tenancies – termination of tenancy due to mold** *Reid v. Killiam Properties Inc.*,

Claim No. 332267, Slone, Adjudicator, July 26, 2010. 2010 NSSM 48; **SmCI16/16** ■

## ■ MAINTENANCE

**MAINTENANCE – Child support – appeal of variation order dismissed** *Koval v. Brinton*, C.A. No. 323360, Saunders, J.A., October 13, 2010. 2010 NSCA 78; **S617/3** ■

**MAINTENANCE – Child support – application for maintenance under Interjurisdictional Support Orders Act** *O. (E.) v. M. (M.)*, F.L.P.I.S.O.S. No. 068060, Dyer, J.F.C., July 20, 2010; June 23, 2010 (orally). 2010 NSFC 17; **FC37** ■

**MAINTENANCE – Child support – retroactive variation to allow for shared parenting agreement** *MacInnis v. Kennedy*, S.F.P.A.M.C.A. No. 027597, O'Neil, J., August 4, 2010. 2010 NSSC 318; **S615/20** ■

The parties' corollary relief judgment (CRJ) required the father to pay child support for the two children (ages 13 and eight), based on the mother having primary care. He applied to vary (retroactive and ongoing) support based what he felt had become a shared parenting arrangement. He submitted a calendar that showed the time he spent with the children. He argued he should be credited for a full day of parenting time for each day he spent more than four hours with them. His calculations did not credit the mother in the same manner. As coach of his son's hockey team, he took the lead in ensuring the son's attendance at practices, games and tournaments. The mother disagreed with the father's calculations, maintained the children were still in her primary care, felt he had underpaid child support and sought to impute rental income to him because he boards students for part of the year. *Held*, the father's application to vary dismissed because the children are still in the mother's primary care. The court considered how parenting time should and should not be calculated. Calculations of parenting time is not simply an accounting exercise. A court must assess the nature of the circumstances and the context in which parenting happens, and must be mindful not to sanction calculations that encourage a primary parent to deny the other parent quality time with the children. The father's calculations failed to take into account that the children spent more than four hours with each parent on many of the days in issue. On some occasions, he was in the role of a supportive parent at a sporting event also attended by the mother. Some of the time is simply neutral time, credited to neither party. There will be no retroactive adjustment to support: the father overpaid voluntarily for months preceding the CRJ, and he pays a disproportionate share of special expenses. Both parents are paying what they can to support the children; requiring the father to pay a retroactive sum would be inequitable and deny the children. Ongoing support will be based on the table amount and the father's current employment income (and not his modest rental income).

**MAINTENANCE – Child support – split custody** *Stevenson v. Kubn*, S.F.H.M.C.A. No. 060415, Jollimore, J., November 9, 2010; August 18, 2010 (orally). 2010 NSSC 398; **S619/10** ■

**MAINTENANCE – Child support – variation** *MacDougall v. Horne*, No. 1201-53097, Gass, J., October 28, 2010. 2010 NSSC 397; **S618/31** ■

**MAINTENANCE – Child support – variation, application for retroactive support** *Brudy v. MacQuin*, S.F.H.M.C.A. No. 065571, Legere-Sers, J., September 15, 2010. 2010 NSSC 338; **S616/10** ■

**MAINTENANCE – Child support – variation, application to reduce** *McPhee v. Thomas*, No. 50077, Forgeron, J., October 18, 2010. 2010 NSSC 367; **S618/3** ■

**MAINTENANCE – Child support – variation, application to vary** *Goyette v. Metzler*, S.F.H.M.C.A. No. 022009, O’Neil, J., September 9, 2010; June 15, 2010 (orally). 2010 NSSC 344; **S616/9** ■

**MAINTENANCE – Child support – variation, application to vary allowed, child of the marriage** *Patriquen v. Stephen*, No. 1201-060795, Gass, J., October 21, 2010. 2010 NSSC 386; **S618/16** ■

**MAINTENANCE – Child support – variation, application to vary, undue hardship** *MacEachern v. Hardy*, S.F.S.N.F. No. 004323, Haley, J., July 23, 2010. 2010 NSSC 246; **S615/1** ■ The child’s mother applied in New Brunswick to vary the father’s ongoing child support payments. His income had increased significantly after the original order was issued in 2000. That order provided he would pay the table amount based on his then salary, plus 10 per cent of his annual bonus. The father claimed (under s. 10 of the Federal Child Support Guidelines) undue hardship, arguing: he has two young children with his new wife, pays her student loans, and also supports a child from another relationship. *Held*, final order granted: support to increase to the table amount calculated using the father’s current salary; he will still pay 10 per cent of his annual bonus as per the previous order. The change in the father’s income was a material change in circumstances. He didn’t meet the heavy burden for proving undue hardship. He failed to show an increase in support would be more than awkward or inconvenient. He has a healthy income with the potential for a substantial bonus. He will have to rearrange his financial affairs (i.e., in relation to his current wife’s student loans). Child support takes priority. The mother isn’t seeking special expenses or retroactive support. The father’s contribution should be reflective of his current earning capacity.

**MAINTENANCE – Child support – variation, imputing income** *Labey v. Wright*, S.F.H.E.M.C.A. No. 001735, Legere-Sers, J., September 7, 2010. 2010 NSSC 339; **S616/5** ■

**MAINTENANCE – Child support – variation, quantum and arrears** *Walsh v. Phelps*, S.F.H.I.S.O.V. No. 062619, O’Neil, J., April 26, 2010. 292 N.S.R. (2d) 113; 2010 NSSC 158; **S613/11** ■ A father sought to determine his ongoing child support obligation and to cancel any arrears owing under the parties’ 2002 corollary relief judgment (CRJ). At the time the CRJ was issued, the parties entered into a side agreement in which the mother agreed not to enforce the child support provisions of the CRJ. The father relied on this until 2008, when the mother registered with the maintenance enforcement program (MEP) and he was told he owed almost \$30,000 in arrears. The evidence showed two of the three children were no longer children of the marriage. The father was on social assistance. *Held*, ongoing support is payable for one child as soon as the father’s income increases. At this time it is less than the cut-off in the Guidelines. Child support is reduced retroactively to reflect the father’s actual income and the number of children who qualified from the date the CRJ was registered with the MEP onward. The parties’ agreement, if not enforceable, is a relevant consideration. The principles that apply are similar to those that apply when retroactive support is sought. The father did not engage in blameworthy conduct. He followed the terms of the parties’ collateral agreement in good faith and returned to court as soon as he learned the mother was challenging the agreement. He has fallen on hard times and it would be a hardship if he had to pay. The evidence showed the father had primary care for a number of years without any support from the mother. His arrears from

the date of registration with MEP are not forgiven, simply recalculated to reflect that no support was payable based on his income at that time.

## ■ MOTOR VEHICLES

**MOTOR VEHICLES – Speeding – Crown disclosure obligations** *R. v. Murray*, Hfx. No. 323044; Charge No. MVA106AC; Person No. 348135-2, Moir, J., July 27, 2010. 293 N.S.R. (2d) 264; 2010 NSSC 296; **S614/26** ■ The appellant was unaware of Crown disclosure obligations when he represented himself at trial. After he was found guilty of exceeding the posted speed limit by 31 or more kilometers an hour, fined \$394.50 and suspended from driving for six months, he learned there were officer notes on the back of his speeding ticket that were never disclosed to him. He appealed, claiming the disclosure could have helped his defence: the notes said traffic was light, information he could’ve used to mount a challenge to prove he was forced to keep up with the traffic or be struck; and since he was clocked at exactly 31 kilometers over the limit, information in the notes on the device used could have helped him establish its margin of error, allowing the judge to conclude the speed was lower. *Held*, appeal allowed; matter remitted for a new trial. There is a reasonable possibility that having the disclosure would’ve improved the defence. Even at a minimum level of seriousness, complexity and penalty, rights to disclosure exist. A prosecutor in a speeding case must inform an unrepresented accused who pleads not guilty that he/she is entitled to disclosure. The volume of speeding cases and option of entering a plea by mail preclude an obligation to inform the accused before a plea is entered. Upon the accused’s request, the Crown must (at a minimum) disclose any relevant information it possesses. Case law suggests the obligation may even extend to requested, relevant information not in the Crown’s possession, but of which it is aware.

## ■ MUNICIPAL LAW

**MUNICIPAL LAW – Assessment – appeal of assessment dismissed** *Nova Scotia (Director of Assessment) v. Creelman et al.*, C.A. No. 319649, Fichaud, J.A., November 16, 2010. 2010 NSCA 88; **S617/16** ■

**MUNICIPAL LAW – Assessment – appeal of assessment dismissed** *Nova Scotia (Director of Assessment) v. Crane et al.*, C.A. No. 319650, Fichaud, J.A., November 16, 2010. 2010 NSCA 89; **S617/17** ■

**MUNICIPAL LAW – Assessment – appeal of assessment dismissed** *Nova Scotia (Director of Assessment) v. Schrader et al.*, C.A. No. 319651, Fichaud, J.A., November 16, 2010. 2010 NSCA 90; **S617/18** ■

**MUNICIPAL LAW – Assessment – appeal of assessment dismissed** *Nova Scotia (Director of Assessment) v. Aucoin et al.*, C.A. No. 319652, Fichaud, J.A., November 16, 2010. 2010 NSCA 91; **S617/19** ■

**MUNICIPAL LAW – Dangerous or unsightly premises – validity of Notice of Intention to Sell** *Delpont Realty Limited et al. v. Halifax (Regional Municipality)*, Hfx. No. 326469, Bryson, J., July 21, 2010. 293 N.S.R. (2d) 240; 2010 NSSC 290; **S614/18** ■ Although, unknown to the owners, the Order to Remedy issued by the municipality (with regard to unsightly premises) had been returned by the post office, a second copy of the Order was placed on a For Sale sign posted by the owners. The owners advised the municipality that they believed the debris complained about was not on their property but they refused to have a survey conducted. The municipality eventually had a survey conducted, which confirmed that the debris was located on the subject property. After the municipality cleaned up the land, it issued a Notice of Intention to sell the property to recover its costs. The owners

challenged the validity of the Notice, arguing that the original Order had not been properly served and the survey costs were not a proper charge on the property. *Held*, application dismissed; the Order could not now be attacked due to the six-month limitation period in former Rule 56.06; although survey costs cannot generally be recovered as a lien on property, in the special circumstances of this case, the survey was a necessary part of the work, which could not have been done without dispelling the doubt raised by the applicants. Although the owners had no obligation to conduct a survey, having raised the boundary issue and not resolving it, they had potentially frustrated the municipality's ability to enforce the Act. The mailing of the Order to the address given to the municipality complied with the statutory obligation to give notice; there is no requirement that each owner must receive notice and it was clear that all of the owners had received actual notice of the Order.

**MUNICIPAL LAW – Planning – appeal of fine for construction without building permit** *R. v. Mira Vista Apartments Ltd.*, Hfx. No. 326459, Pickup, J., July 28, 2010. 293 N.S.R. (2d) 381; 2010 NSSC 302; **S614/30** ■ The defendant appealed a \$75,000 fine for constructing a building without a permit. When the correspondence received from the municipality following the submission of a modified site plan made no mention of the modifications, the defendant proceeded with site preparation. Although some months later it applied for and was granted a building permit, it was charged with building without a permit during the month after which a building permit had been requested but not yet issued. The defendant argued that the sentencing judge had relied on general deterrence without considering the relevant mitigating factors and applying the principles of proportionality, parity and restraint. *Held*, appeal dismissed; the court found that the fine imposed was within the range for similar offences, noting that the defendant had continued to violate the law after it was charged and arraigned and in the face of a stop work order.

#### ■ NEGLIGENCE

**NEGLIGENCE – Occupiers' liability – slip and fall** *Hill v. Cobequid Housing Authority*, Tru. No. 259625, MacAdam, J., July 26, 2010. 293 N.S.R. (2d) 248; 2010 NSSC 294; **S614/22** ■ The plaintiff fell while walking behind his vehicle in the covered parking lot of an apartment building. Although the plaintiff's evidence was that the whole parking lot was covered with ice, with no sand or salt anywhere, another individual who was with him at the time testified that the lot was clear except for a small patch of black ice and that salt and sand were present. He suffered injuries to his hip and shoulder and although the hip injury resolved, the shoulder pain increased. Despite surgery to repair the rotator cuff, he did not regain a full range of motion in the shoulder. The defendants argued that the plaintiff had failed to mitigate his damages by failing to attend physiotherapy, as recommended. *Held*, judgement for the defendants; general damages provisionally assessed at \$40,000, less a \$5,000 reduction for the plaintiff's failure to mitigate. The evidence suggested that the snow-clearing regime adopted by the defendants was reasonable in the circumstances and just because there was a patch of black ice did not mean that the parking lot had not been plowed or sanded and salted, as was the usual policy. Pursuant to the *Occupiers' Liability Act*, a plaintiff is no longer required to establish that there was an "unusual danger", but only that the defendant had not taken reasonable care, in the circumstances, to make their premises safe.

#### ■ PERSONAL PROPERTY SECURITY

**PERSONAL PROPERTY SECURITY – Priorities – security**

**agreement** *C. Dixon Fuels Ltd. v. S.W.S. Fuels Ltd.*, Yar. No. 305082, MacDonald, S. J., April 22, 2010. 292 N.S.R. (2d) 80; 2010 NSSC 259; **S613/21** ■ The defendant sought an order discharging the interest of the registered owner of a motor vehicle and declaring that it had first charge over the vehicle. The defendant had entered into a credit agreement with the plaintiff whereby the (leased) vehicle had been provided as security and seized the vehicle when the plaintiff breached the agreement; however, title to the vehicle was in the name of a company that had bought out the original lease after the vehicle had been given as security. Although the plaintiff never had registered title to the vehicle, the registered owner (which was not a party to the action) never had possession of the vehicle. *Held*, the registered owner of the vehicle is added as a party to the action; the valid security interest of the registered owner is second to that filed by the defendant. Pursuant to the *Personal Property Security Act*, the defendant was entitled to file its security agreement even though the plaintiff never had registered ownership of the vehicle and when the registered owner took title to the vehicle, the defendant's properly filed financing statement was already in place. The registered owner, in registering its security interest, had neither increased the asset pool of the plaintiff nor financed a new asset.

#### ■ PRACTICE

**PRACTICE – Actions – severance of issues, liability and damages** *Jeffery v. Naugler et al.*, Hfx. No. 193869, Duncan, J., October 21, 2010. 2010 NSSC 385; **S618/15** ■ The plaintiff was injured after a piece of metal flew into her car. She started the action against the individual defendant several years ago. After extensive pre-trial procedures (including discoveries), her claim was amended to include her section D insurer as a defendant. Responsibility for damages would be determined according to whether it could be established the piece of metal came from the individual defendant's truck. Only months before trial, and three months after the date assignment conference, the individual defendant moved to bifurcate the issues of liability and damages. He argued a determination on liability would effectively remove one defendant, saving on costs and time. The plaintiff argued: delay, increased expense, duplication of witnesses, and that bifurcation would result in an artificial separation of some witness testimony. She was impecunious, and living on a disability pension. *Held*, application dismissed. Applying the new test under Rule 37.05 of the *Civil Procedure Rules* (2008): both defendants were appropriately joined at first instance. It continues to be appropriate that both are joined. It is apparent that liability will attach to one or the other, assuming the plaintiff can show the metal projected onto her vehicle. The benefit of bifurcation does not outweigh the advantage of leaving the claims joined. The factors that can be considered under the new rule are open ended, provided they're relevant and assist the court in weighing the advantages/disadvantages of severance. While a short liability trial would eliminate one defendant, it is only that defendant that will benefit by saved costs/time. There's a potential that bifurcation will result in the plaintiff and remaining defendant spending more total time in court. Some of the plaintiff's witnesses would have to testify twice, resulting in increased costs and inconvenience to her. Witness testimony would be artificially cut off, unreasonably restricting counsel's (and the court's) ability to demonstrate/assess credibility. Anything that will put the 2011 trial dates in jeopardy should be avoided. Here there is a real chance things could be delayed, including the possibility the unsuccessful defendant could appeal the liability finding. On balance, bifurcation offers limited or no advantages but significant possible adverse consequences having regard to the interests of all of the parties.

**PRACTICE – Actions – severance of issues, liability, damages and**

**bad faith** *Ocean v. Economical Mutual Insurance Company et al.*, Hfx. No. 190673, Smith, A.C.J., August 3, 2010; July 30, 2010 (orally). 293 N.S.R. (2d) 387; 2010 NSSC 314; **S615/6** ■ The self-represented plaintiff's first statement of claim concerned a section D claim against her insurer as a result of injuries allegedly sustained in a collision with the (uninsured) defendant motorist. Her amended statement of claim included a second claim for negligence and bad faith against the insurer. The insurer successfully applied to bifurcate the claims, retaining one lawyer for the first (section D) claim, and another for the second (negligence/bad faith) claim. The section D claim was ready for trial. The negligence/bad faith claim was still in the early stages. The question before the court was in relation to damages. At issue was whether damages should be severed and heard at a third separate hearing, or heard together with the other claims. The proponents of trifurcation argued it would allow the court to narrow the damage issue(s) based on the outcome of each trial, and result in a more efficient process. The plaintiff wanted all three issues heard together, although she hadn't made a motion to combine the two that were already set to be heard separately. She argued: inconvenience (missed work, the need to rearrange witnesses); and that three proceedings would be too complicated and unmanageable for an unrepresented litigant. *Held*, damages will be severed and heard at a third separate hearing following the conclusion of the two trials relating to liability. Although it represents a departure from the norm, it's appropriate to hear all three matters separately. There were several issues warranting a continuation of the existing arrangement, including the fact the plaintiff failed to file a motion to combine the first two claims. Also relevant was the likelihood of delay should the liability trials be combined. The first claim is ready for trial; the second claim isn't; and the defendant insurer would need a new lawyer to deal with the section D claim to avoid having counsel who is also a witness. Also, the insurer could have to disclose privileged information in relation to the second claim, which it normally wouldn't have to produce in relation to the first, weighing heavily in favour of separate liability hearings. As for damages, the evidence on damages in relation to each claim overlaps. Dealing with damages at both trials will drive up costs and likely require some witnesses, including experts, to testify twice. Severance means the motorist won't need to participate in the (likely lengthy) trial in relation to the second claim against the insurer. Breaking things into three separate, shorter proceedings will likely be more manageable for the self-represented plaintiff. Given her suggestion that her injuries were exacerbated by the defendant insurer's negligence/bad faith, it's unlikely the court could have awarded any damages until both liability claims had been heard anyway. Taken together, these factors outweigh any alleged inconvenience to plaintiff.

**PRACTICE – Adjournment of trial dates – availability of counsel**

*Secunda Marine Services Ltd. v. Caterpillar Inc. et al.*, Hfx. No. 178147, Coughlan, J., October 26, 2010; September 27, 2010 (orally). 2010 NSSC 392; **S618/17** ■ The defendant, Caterpillar Inc., moved for an adjournment of the December 2010 trial dates in order to accommodate its choice of counsel, who had a conflicting trial in Ontario. Evidence showed the lawyer was aware of the conflict for months, but the motion was only made after the finish date (and just under three months before the trial was set to start). He had represented Caterpillar Inc. since the litigation's inception, although he worked at a large law firm with several senior litigators on staff. The plaintiff opposed the adjournment. They had witnesses lined up, and were concerned an adjournment would mean significant delay in what had already been a very long process. *Held*, motion dismissed, with costs of \$750 to the plaintiff in any event of the cause. The new *Civil Procedure Rules* (2008) establishes a regime for securing trial dates based on the premise that all steps necessary to trial will be completed by the finish date. When a motion for an adjournment

is made after the finish date, there is prejudice to the operation of the court and of judicial resources resulting in prejudice to the public. The parties will also suffer prejudice if there is an adjournment. The lawyer was aware of this conflict for several months and apparently failed to develop a contingency plan resulting in prejudice to Caterpillar Inc. The other parties should not be made to suffer simply because of this.

**PRACTICE – Appeals – extension of time to file appeal**

*Farrell v. Casavant*, C.A. No. 334399, Beveridge, J., September 1, 2010. 2010 NSCA 71; **S611/28** ■ The applicant, who was entirely without fault, was injured when the respondents' car crossed the center line and struck his vehicle. He turned down a significant settlement offer. At trial, the judge found the respondents had exercised due care and were not liable for any damages. The applicant was ordered to pay them costs in the amount of over \$10,000. He didn't appeal, nor did he pay the costs. When the respondents took steps to enforce the cost order more than eight months after the deadline for filing an appeal passed, the applicant changed his mind and moved to extend the time for filing his appeal. He said he was shocked and confused by the original decision, awaiting surgery in relation to his injuries, and decided he didn't have the financial or emotional resources to pursue an appeal at that time. Over time, his condition improved and he realized he wanted to borrow the money to launch an appeal. *Held*, motion dismissed, with costs of \$750 to the respondent. It is a fundamental principle that, subject to a clearly defined right to appeal, a court's decision is final. The *Civil Procedure Rules* (2008) give no guidance on when a court should extend filing timelines. The case law establishes that the time for filing an appeal will only be extended in exceptional circumstances. A court must look at the reason for the delay and the proposed merits of the appeal. It is a sliding scale – when the grounds for appeal are strong, the need to show a bone fide intention to appeal within the prescribed time period is less important. The objective is to do justice between the parties. Here, there was no medical or supporting evidence to bolster the applicant's claim that he was medically or emotionally unable to appeal within the allowed time frame. He maintained full-time work throughout the relevant period. The only change between then and now is that he decided he could afford to launch the appeal, which does not justify eight months' delay. Further, the proposed appeal fails to raise fairly arguable issues. The trial judge made very specific findings of fact. The applicant does not suggest she made any clear and overriding errors in doing so. He failed to show how she erred in law, or otherwise. While the applicant was understandably disappointed with the trial decision, the evidence shows he understood his options and made a conscious decision not to pursue an appeal until more than eight months after the filing deadline had passed.

**PRACTICE – Appeals – extension of time to file appeal**

*Classic Property Management Ltd. v. Greenwood et al.*, S.C.C.H. No. 10-326227, Casey, Adjudicator, May 21, 2010. 2010 NSSM 54; **SmCI16/22** ■

**PRACTICE – Appeals – rescinding or varying security for costs order**

*Harris v. Harris*, C.A. No. 324354, Farrar, J.A., November 19, 2010. 2010 NSCA 94; **S617/21** ■

**PRACTICE – Application – conversion to action**

*Langille v. Dzierzanowski et al.*, Pic. No. 330215, Kennedy, C.J., October 19, 2010. 2010 NSSC 379; **S618/6** ■ The 90-year-old applicant accused the respondents of medical malpractice in relation to what ended up being an unnecessary colostomy. His damages weren't quantified in the claim. The respondents moved to have the application converted to an action, claiming: the matter was too complex, credibility would be an

issues, and that they wished to have a jury trial. The applicant pointed to his advanced age and argued his rights would erode if not dealt with expeditiously. He filed an actuarial report that showed there was a 75 per cent chance of him dying before the matter could get to trial. *Held*, motion granted; matter converted to an action. While the passage of time is a legitimate factor in this case, the respondents have established a presumption in favour of an action (see Rule 6.02 of the *Civil Procedure Rules* (2008)). It would be unreasonable to deprive them of their *prima facie* right to a jury trial. It is realistic to expect there will be issues of credibility such that it is unreasonable to require the parties to disclose information about their witnesses at an early stage. Citing *Monk v. Wallace* (2009), the court is not convinced an application is the most efficient, or a less costly, route. A trial offers safeguards. There is no evidence the applicant's substantive rights will erode. It does not appear there will be several hearings required. A case management judge will be assigned to the matter to ensure things move as quickly as possible. The court will authorize a special jury sitting to accommodate things when the matter is ready to be heard.

**PRACTICE – Costs – conduct of parties** *Edwards et al. v. Edwards Dockrill Horwich Inc. et al.*, Hfx. 175050, MacAdam, J., July 20, 2010. 293 N.S.R. (2d) 150; 2010 NSSC 287; **S614/6** ■ The parties disagreed over who had more success at trial. Their dispute involved a hostile dissolution of a businesses relationship. Some of the plaintiffs' claims were allowed in whole or in part, and some were dismissed. The defendants' counterclaim succeeded. The defendants felt they were more successful and entitled to \$150,000 to \$175,000 in costs from the individual plaintiff. The plaintiffs disagreed and sought \$275,000 to \$310,000 in costs from the individual defendants. *Held*, each party to bear their own costs. The manner in which the parties conducted themselves, the proceeding and the way they presented their evidence didn't help the court in determining who was more successful for the purpose of setting party-and-party costs. There was no clear "winner"; considering the costs incurred by each side, there were no winners. Each failed to see the strengths in the other parties' case, or the weaknesses in theirs. In the course of the breakdown of the business relationships, all sides disregarded the interest of the other. Their conduct then, and as the dispute unfolded, precluded them from an entitlement to equitable relief at trial and (along with the mixed results) disentitles them to costs now.

**PRACTICE – Costs – expert's fees, prejudgment interest, HST, photocopy costs** *Purdy Estate v. Morash*, Hfx. No. 245454, Warner, J., October 6, 2010. 2010 NSSC 362; **S616/28** ■ The plaintiff succeeded in its claim for damages after a negligently installed wood stove caused a fire and property loss. Party-and-party costs were decided, but the parties couldn't agree on: prejudgment interest (whether it should be awarded from the date of claim onward); whether damages for property loss included HST (the appraisal report did not specify); nor the reasonableness of the plaintiffs' expert fees and copying costs. *Held*, prejudgment interest awarded from 11 months after the date of claim onward: arrived at by subtracting the 11 months of delay attributable to the plaintiffs. Claim for HST dismissed: the report is silent and the plaintiffs haven't proven the valuations contained therein did not include HST. The expert fees to be paid in full, including the time spent by the expert waiting to testify: the amounts claimed were necessary and reasonable. Photocopying costs reduced by about 25 per cent as per the reasoning in *Osborne v. Osborne* [1994].

**PRACTICE – Costs – lump sum, conduct of parties** *Geophysical Services Inc. v. Sable Mary Services Inc. et al.*, Hfx. No. 190208, Warner, J., September 29, 2010. 2010 NSSC 357; **S616/23** ■ The plaintiff was successful in proving its claim and defeating the defendants' counterclaim

for \$1.3 million. The plaintiff was awarded over \$1.7 million, and the individual defendant was found jointly liable for about \$450,000 of the award (the amount attributed to his fraudulent misrepresentation). The 13-day trial involved a significant volume of documentary evidence and some complex issues. Costs were in issue. The plaintiff sought solicitor-client costs (pointing to the finding of fraud), or a lump sum award representing a substantial contribution to its actual legal costs. The defendants argued costs should be awarded under Tariff A. They also felt prejudgment interest should not be awarded from the date of the commencement of the action onward, pointing to delay they felt was caused by the plaintiff. *Held*, although there was fraudulent conduct on the part of the defendant(s), this does nothing more than open the door to a consideration of solicitor-client costs. Here there are no special circumstances warranting such costs. The facts do not establish abuse sufficient to invoke rebuke beyond the damage award itself. The amount involved was approximately \$3.1 million (the total amount claimed by the plaintiff, plus the amount sought by way of counterclaim). Much of the pretrial disclosure and processes, as well as the evidence at trial, was in relation to the defendant's unsuccessful counterclaim, which increased the plaintiff's costs. A substantial contribution to a successful party's costs should be more than 50 per cent and less than 100 per cent of actual costs. Using Tariff A only allows for an award that is 39 per cent of the plaintiff's actual costs. A lump sum award of \$275,000 (50 per cent of actual reasonable costs) plus disbursements is appropriate. Prejudgment interest is awarded from the date the action was started onward. The defendants failed to prove the plaintiff caused significant delay in getting the matter to trial. Both parties made and were the subject of several pretrial motions. Both were responsible for the time it took to finally get to trial.

**PRACTICE – Costs – misconduct by successful party** *Armco Capital Inc. v. Armoian*, Hfx. No. 321297, Moir, J., June 2, 2010. 292 N.S.R. (2d) 187; 2010 NSSC 206; **S612/9** ■ The respondent initially refused to admit to copying the hard drive on her estranged husband's work laptop. The applicant paid an expert over \$10,000 and examined three witnesses to prove it was copied, and sought an injunction to require her to hand over the copy. She successfully moved for a stay on the basis that Florida is the most convenient forum. *Held*, costs to the applicant, based on one-half of Tariff C costs at the highest level, plus \$10,031 to cover the cost of the expert. Although she was the successful party, the respondent's deliberate lack of candour added significant expense for the applicant. When she finally admitted to copying the drive, the expert evidence and witness testimony became irrelevant. Consequences are necessary when tactics make a motion more complicated (and expensive) than necessary.

**PRACTICE – Costs – mixed success, no costs** *Canadian Broadcasting Corp. v. Nova Scotia (Attorney General)*, Hfx. No. 319522, Moir, J., October 22, 2010. 2010 NSSC 388; **S618/9** ■

**PRACTICE – Costs – settlement offer and eligibility to be heard in Small Claims Court** *Irwin v. Sysco Food Services of Atlantic Canada*, Hfx. No. 311662, Hood, J., September 10, 2010. 2010 NSSC 341; **S616/8** ■

**PRACTICE – Costs – tariff for chambers applications** *MacPhee v. O'Leary*, No. 1207-001541; S.T.D. No. 064762, LeBlanc, J., July 30, 2010. 2010 NSSC 312; **S616/18** ■ The wife's successful interlocutory application in this family law matter occupied less than six hours of the court's time. She asked for solicitor-client costs, and used Tariff A to arrive at claim for costs in the range of \$6,000 to \$7,000. The husband argued against costs, pointing to the fact the court did not

expressly address them in its decision and his substantial child support obligations. *Held*, costs of \$2,000 (including disbursements and HST) awarded, which is within the range provided for in Tariff C. In the court's opinion, Tariff A applies to trials and not chambers matters. Typically trials are more complex and require greater effort/time than interlocutory proceedings. Costs under this tariff are higher because of the nature of the proceedings, which include many interlocutory steps prior to trial (e.g., amendments, interrogatories, notices to admit, discoveries, documentary production and settlement conferences). This was an interlocutory proceeding not a trial and Tariff C (which deals entirely with chambers matters) applies, without a multiplier.

**PRACTICE – Costs – tariffs, costs of summary judgment application**

*Barthe v. National Bank Financial Ltd. et al.*, Hfx. No. 208293, Hood, J., June 7, 2010. 2010 NSSC 220; **S616/19** ■ Costs were in issue after the dismissal of the second plaintiff's motion for summary judgment against the defendant NBFL. Although the motion was made solely in relation to the defendant NBFL, two of the third parties (SMSS and R. Blois Colpitts) also participated in the hearing of the motion and sought costs. The plaintiff argued costs should be awarded on the basis of Tariff C, since the matter was heard in chambers (over two days). He also argued the third parties should not be entitled to costs because they were no longer parties by the time the summary judgment decision was released (they were parties when it was heard). The defendant and third parties argued for the use of Tariff A given: the complexity of the matter, questions of admissibility that had to be addressed, and lengthy pre-hearing matters (including a two-day discovery cross-examination of the plaintiff, followed by undertakings and interrogatories). NBFL also sought costs in relation to the plaintiff's abandoned motion for summary judgment, made under the *Civil Procedure Rules* (1972). *Held*, Tariff C applies, with a multiplier of four plus lump sum costs for a total award of \$30,000 (plus disbursements) to NBFL, plus an additional \$2,000 in relation to the abandoned motion. Tariff C (which refers to applications) wasn't revised after the new *Civil Procedure Rules* (2008) (which now refer to applications as motions) came into effect, but the new rules intend that it applies to motions. Looking at the case law, including *Armour Group Ltd. v. Halifax (Regional Municipality)* (2008), there are no special circumstances here that would allow the court to use Tariff A in what was a chambers motion. The facts were complicated, but the law applied to them was not. Unsettled areas of law were left for trial. Although the affidavit materials were extensive, they were provided as background information only and not subject to extensive cross-examination. Although multiple parties are involved in the litigation, the summary judgment motion was narrow and made in relation to only one defendant. The third parties who were involved made limited submissions. The complexity was not greater than one would anticipate in ordinary chambers motions although it was lengthier than most due to the complicated facts. The third parties are entitled to costs. Although they were no longer parties at the time the decision was released (several months after the motion was heard) they should not be penalized for the court's delay in issuing a decision. The timing was not within their control, and it would be unjust to deprive them of their costs. They played a supportive role, and did not file affidavit evidence. The court used its discretion to award \$14,000 to SMSS and \$8,000 to R. Blois Colpitts (plus disbursement).

**PRACTICE – Costs – whether payable forthwith or in any event of the cause**

*Merks Poultry Farms Ltd. et al. v. Wittenburg et al.*, Hfx. No. 296583, Warner, J., October 28, 2010. 2010 NSSC 395; **S618/22** ■ The plaintiffs agreed to the quantum of costs payable by them after their unsuccessful interlocutory application for corporate oppression remedies was dismissed. They parties could not agree whether the

agreement on costs required them to be paid forthwith or "in any event of the cause". The agreement did not specifically reference either. The plaintiff argued: the interim hearing was a dress rehearsal for the trial; all of the issues remained live issues; this wasn't like the other three interlocutory motions (all of which resulted in costs payable forthwith); and the court should look behind the agreement and find it was made based on the assumption costs should be payable in the cause in circumstances such as these. The defendants argued the agreement's silence on when costs are payable makes it a matter for judicial discretion. Given the circumstances of this case (the high legal costs, the plaintiffs' ability to pay, length/complexity of litigation, number of pretrial motions, etc.) it is appropriate to order costs payable forthwith. *Held*, costs payable forthwith. The agreement is silent on when costs should be payable, making it a matter for the court to determine having regard to the rules of court and common law. The litigation has been (and will likely continue to be) costly, time-consuming and complicated. The oppression claim was only one of many, and it appears that it has been settled. While it was an interim application, it was made in an effort to secure final remedies. Applying *NBFL v. Potter*, costs after interlocutory hearings should be paid when ordered, unless the primary issue is the same intended at the final hearing or where requiring payment forthwith could prevent the matter from being heard on its' merits. Here the parties had agreed on the amount, and it would be artificial to delay payment. Relevant too is that costs were ordered payable forthwith on all three prior motions.

**PRACTICE – Default judgment – substituted service, no reasonable excuse**

*Farrow v. Butts*, Syd. No. 330822, Murray, J., October 21, 2010. 2010 NSSC 387; **S618/8** ■ The small claims adjudicator granted an order for substituted service after the respondent had trouble serving the appellant with notice of her claim. As per the order, she personally served the appellant's mother and notified the appellant of the hearing date by text message. He didn't appear and default judgement was granted against the appellant in the amount of \$11,031.35. The appellant appealed, arguing the adjudicator failed to follow the natural requirements of justice. He denied being in contact with his mother. He admitted receiving the text message(s) but said he didn't believe the respondent, but didn't make any further inquiries. New evidence (a letter from his mother saying she was not in contact with her son) was allowed on the appeal. *Held*, appeal dismissed. The right to be heard is a fundamental right, and an appeal of a default judgment must be subject to the highest scrutiny. Here the respondent's claim was valid. The adjudicator had the jurisdiction/authority to make an order for substituted service and the respondent followed it. At the very least, the appellant was notified of the hearing dates by text message(s). While he may not have believed the messages, he should have taken some steps to confirm with the court if there was indeed a hearing set. He failed to prove he had a reasonable excuse for defaulting, chose to ignore the notice, and was mistaken only as to what would be the outcome if he failed to appear.

**PRACTICE – Disclosure – compliance with order to produce documents**

*Halifax Dartmouth Bridge Commission v. Walter Construction Corp.*, Hfx. No. 227346, LeBlanc, J., September 21, 2010. 2010 NSSC 350; **S618/21** ■ The defendants sought to compel disclosure under a previously issued order for production, claiming the plaintiff failed to disclose sufficient materials. The plaintiff maintained it had made full disclosure. The defendants argued the disclosed documents were insufficient and said there must be more. They had no proof, but suggested documents that were disclosed suggested there were other relevant and related documents in the possession of third parties. They also claimed there was insufficient internal correspondence. There was an issue with respect to minutes of meetings that were disclosed with

some portions having been redacted to protect what the plaintiff felt was privileged material. The defendants felt that, by disclosing parts of the minutes, the plaintiff had waived privilege over the rest. The plaintiff asked the court to review the redacted materials to determine whether they were properly excluded. Also, there were a number of unfulfilled undertakings, mostly in relation to the discovery of one of the plaintiff's witnesses – a former employee. The plaintiff maintained it had no control over someone no longer employed by it and could not be held responsible for his unfulfilled undertakings. *Held*, application granted in part, with costs of \$1,000 to the applicant and \$300 to each of the other defendants who appeared at the hearing, payable in the cause. There is no basis for the court to compel a party to give evidence on the non-existence of documents simply because the other party believes they should exist. It is open to the defendants to conduct discoveries in relation to the alleged documents. Privilege is not waived simply because portions of a report/minutes have been disclosed. The burden of proving privilege rests with the party asserting it. Here most of the redacted materials were irrelevant and should be disclosed. Some was properly covered by privilege. The plaintiff is responsible for ensuring its witness, despite the fact he is no longer employed by them, fulfils his undertakings as they relate to the time he was acting as their official.

**PRACTICE – Disclosure – “pre-action discovery”, identity of anonymous computer user** *B. (A.) et al. v. Bragg Communications Inc.*, Hfx. No. 329542, LeBlanc, J., June 4, 2010. 293 N.S.R. (2d) 222; 2010 NSSC 215; **S613/17** ■ The applicant minor was the victim of a false Facebook page purporting to be hers. The page was set up anonymously under a known IP address, and contained allegedly defamatory content. She moved by way of litigation guardian (her father) under the *Civil Procedure Rules* (2008) for: permission to use pseudonyms (Rule 85.04(2)(d)); a publication ban on the exact content of the page (Rule 85.04(2)(c)); and an order requiring Eastlink to disclose information relating to the identity of the owner(s) of the IP address (Rule 14.25 or 18.25). There was also some issue about hearsay in the applicant's father's affidavit. *Held*, the applicant is a minor and could not start an application on her own. Her father's affidavit was necessary and, despite its frailties, used to allow the matter to proceed. Order requiring disclosure of information on identity of the owner(s) of the IP address granted: a *prima facie* presumption of defamation was made out; there are no other means by which the information can be obtained; and there is no compelling interest warranting anonymity. Where there is a *prima facie* case of defamation and no interest beyond “freedom of expression” in support of maintaining anonymity, public interest favours disclosure. The information sought is an issue of documentary production. This is an early stage in the proceeding, and Rule 14.25 applies. Motions for permission to use pseudonyms and publication ban denied: there was no evidence showing harm/potential harm to the applicant; the presumption that damages flow from defamation does not in itself establish the kind of harm required to obtain this type of confidentiality order; and a ban would not necessarily benefit the applicant, although it would compromise the public's interest in knowing the details of the litigation. This type of conduct (bullying) should be exposed and condemned by society.

**PRACTICE – Discovery – solicitor-client and litigation privilege** *Saturley v. CIBC World Markets Inc.*, Hfx. No. 305635, Moir, J., October 5, 2010. 2010 NSSC 361; **S616/26** ■ The plaintiff investment advisor brought this action soon after the defendant terminated his employment. His firing stemmed from the recommendations of a working group comprised of several of the defendant's senior advisors. The group was formed to address problems arising as a result of third-party errors (which the plaintiff had relied on, but which he eventually

noticed and alerted them to) that led to significant client losses. The group eventually reached a large, monetary settlement with some of the clients. Others filed a class action suit. He brought this motion to compel disclosure of numerous documents (emails, recorded communications, letters, etc.) identified by the defendant as protected by solicitor-client and/or litigation privilege. *Held*, motion granted in part; most of the documents must be disclosed. After a detailed review of the law in relation to both solicitor-client and litigation privilege, the court examined each document to determine whether the criteria for either had been established. To have protection under solicitor-client privilege, the communication must: be between solicitor-client; entail the seeking/giving of legal advice; and be intended confidential. For litigation privilege to attach: litigation must have been a reasonable prospect; and the document must have been produced with litigation in mind, with the dominant purpose of receiving legal advice or aiding the litigation. One must look at the dominant purpose driving each document. Initially, the working group's dominant purpose was dealing with the client losses; later, it was dealing with whether or not to terminate the plaintiff. The substance of the document, not just its form (e.g., a heading that reads “for counsel”) matters most. The function the documents' author is performing is more important than his title. Here the company's general counsel was also the CEO. It was necessary to look at whether a particular communication was made in relation to his capacity as counsel or as senior management. A draft document can be privileged while the final report is not. This is an interlocutory matter and unnecessary findings (such as how the plaintiff's employment became a subject of controversy in the first place) should not be made.

**PRACTICE – Examination – for proceeding outside jurisdiction** *B. (J.S.) v. B. (J.D.A.) et al.*, Hfx. No. 331646, McDougall, J., September 8, 2010. 2010 NSSC 343; **S616/7** ■ The applicant was charged in the United States in relation to an alleged sexual assault of a minor. He sought to compel the complainant's 14-year-old brother (the subject of child protection proceedings in Nova Scotia) to submit to an examination by a local lawyer. He argued the child could provide relevant testimony to aid his defence. The child protection agency refused their consent. The child had been diagnosed with Asperger Syndrome and ADHD. An expert report claimed the child was incapable of functioning as a witness and opined that it could be traumatizing to make him testify. *Held*, application allowed. The child must submit to an examination. The court suggested several (optional) safeguards to help mitigate any potential harm to the child (including allowing his foster parents or other support people to be present). Although the psychiatric report said it might be harmful to make him testify, it focused primarily on the child's inability to function as a witness. There was no evidence to show harm was likely. The charges, and potential repercussions (incarceration for up to 30 years), for the applicant are serious. The request for examination was properly made through the United States court. To refuse the accused's request might deny him the right to make a full answer and defence, a right afforded to all accused persons in Canada under our *Charter*. The child's ability to function as a witness, and the relevance and reliability of his evidence, must be left for the court to decide.

**PRACTICE – Intervenor – conditions for standing** *B. (A.) v. Bragg Communications Inc. et al.*, C.A. No. 330605, Farrar, J.A., August 30, 2010. 2010 NSCA 70; **S611/27** ■ The appellant's claim was in relation to a false Facebook profile that contained allegedly defamatory statements. When her motion for a confidentiality order was denied, she appealed. Beyond Borders (a non-profit children's special interest group) sought intervenor status on the basis of what they felt was a broad public interest. They claimed a special understanding of debates, trends and

needs in relation to children's privacy interests; argued the decision in this matter will have a broad application in future cases involving children who ask for publication bans or to use pseudonyms; and had an interest in promoting a presumption of anonymity when a case involves a child. *Held*, intervenor status denied; no costs awarded. Beyond Borders sought to change the state of the law, by making arguments beyond the scope of what was at issue in this appeal. Their intended submissions were not relevant and they overstated the public importance of this decision. The law on when a confidentiality order will be granted is well established, and this case (like others) simply turns on whether there was sufficient evidence (on the facts) to justify the confidentiality order sought.

**PRACTICE – Limitation of actions – when cause of action arises, discoverability rule** *Thornton v. Economical Insurance Group*, Hfx. No. 290561, Boudreau, J., September 24, 2010. 2010 NSSC 355; **S616/16** ■ The plaintiff sued the defendant section B insurer for lost wages about ten years after he was denied further such benefits. The defendant applied under Rule 12 of the *Civil Procedure Rules* (2008) for a declaration that the plaintiff's claim was statute barred and should be dismissed. They argued it exceeded the applicable statutory limitation period, and was brought well outside the discretionary provisions of the *Limitation of Actions Act*. The plaintiff argued his cause of action only arose when he received medical evidence to support and settle his section A claim (eight years after the accident, and seven years after the denial of further section B benefits). He also argued benefits of this nature comprise a "rolling cause of action" and are not subject to a limitation period as such. He further argued the matter could not be dealt with under Rule 12 because it involved complex determinations of fact and law that should be left for trial. *Held*, motion dismissed. This is not an appropriate matter to decide summarily. The facts and law in relation to the issues to be decided are inextricably linked and best left for the trial judge. The court embarked on a detailed review of the Canadian authorities involving "rolling causes of action", an issue that hasn't been addressed in any detail in Nova Scotia yet.

**PRACTICE – Motion for summary judgment – test, when costs payable** *Ristow v. National Bank Financial Ltd. et al.*, C.A. No. 323308, Saunders, J.A., October 14, 2010. 2010 NSCA 79; **S617/6** ■ The appellant appealed the dismissal of his motion for summary judgment. His was the first motion to be decided under Rule 13.04 of the *Civil Procedure Rules* (2008). At the hearing, he argued the new Rules changed the law concerning the requirements for summary judgment in Nova Scotia. The judge rejected his arguments, finding the wording has changed but the test essentially remains the same. She found he failed to demonstrate there were no legitimate, material facts in dispute and, in the alternative, that the respondent raised arguable issues to be tried. The appellant didn't challenge the cost award, but challenged the order that he be required to pay costs immediately regardless of the final outcome at trial. *Held*, appeal dismissed, with \$2,000 in costs to the respondent NBFL and \$750 to each of SMSS and Blois Colpitts – plus disbursements. The chambers judge was correct to observe the law on summary judgment remains essentially the same under the new Rules. The appellant hasn't shown she applied the wrong principles of law or that a patent injustice occurred; nor has he shown it was an inappropriate exercise of discretion to order that costs be paid forthwith. The appeal is without merit.

**PRACTICE – Notice of application – conversion to action** *Monk v. Wallace et al.*, Amh. No. 306720, Murphy, J., June 9, 2010; April 23, 2009 (orally). 291 N.S.R. (2d) 104; 2009 NSSC 425; **S612/16** ■ The applicant sued the respondents after she was injured in what she claimed was an act of medical malpractice. Liability and quantum of

damages were both in issue. The respondents moved to convert the application to an action, arguing: issues of credibility; the need for experts; and that they wanted a jury trial. *Held*, motion to convert granted. The respondents have satisfied the burden of proving an action is the appropriate route. The new rules provide more streamlined procedures for actions, and the applicant will not necessarily be prejudiced (in terms of time/cost) by having the matter proceed as an action. The case raises many disputed issues. None of the situations in Rule 6.02(3), suggesting an application is preferable, apply: there was no evidence the applicant's rights will erode pending trial and no indication the court will have to hold several hearings. The criteria in Rule 6.02(4) were met, showing an action is the preferable route: the respondents have a good faith intention to choose a jury trial, and early disclosure of witness information is unreasonable particularly since the respondents predict credibility will be a fundamental issue. The factors in favour of an application in Rule 6.02(5) are not present: the parties can't quickly ascertain who their important witnesses will be; it's unrealistic to expect a medical malpractice case in an early stage will be ready to be heard in months as opposed to years; the length and content of trial can't yet be predicted; and credibility issues that can't be addressed by an application may arise. It's not necessarily more efficient and less costly to proceed by way of an application. An action safeguards the right to a jury and offers more procedural safeguards. If this matter were to proceed as an application now, there is a likelihood the parties would be forced to convert to an action at a later date.

**PRACTICE – Parties – intervenors** *Parker Mountain Aggregates Limited v. Nova Scotia (Minister of Environment)*, Hfx. No. 324761, Coady, J., July 9, 2010. 292 N.S.R. (2d) 298; 2010 NSSC 277; **S614/1** ■ The appellant obtained the respondent's approval to operate a quarry. Ten years later, they applied for a renewal and started operations. Approval was suspended on the basis that the appellant was operating the quarry outside the area designated in the original approval. The appellant appealed, arguing the respondent's decision should be overturned and the approval reinstated. Four local residents applied to be added as respondents to the appeal. Three lived within 800 meters of the quarry and, under the Pit and Quarry Guidelines, their consent was required for operations to continue. The other lived 1000 meters away, but claimed quarry operations caused damage, diminished property value and impeded her enjoyment of the property. The respondent consented to the motion; the appellants disagreed, arguing it would be sufficient for them to appear as witnesses. *Held*, all four will be added as respondent parties. They are all "interested parties" under the *Civil Procedure Rules* (2008), Rule 7.10(f) by virtue of the quarry's impact on their property values and enjoyment of the otherwise pastoral setting they chose to live in. A successful appeal would drastically impact their living environment(s). Simply acting as witnesses for the respondent is insufficient. It is too early to determine if their interests are the same, or will remain the same throughout the appeal. Adding the parties won't prejudice the appellant. The appeal is in its early stages and this order is not likely to generate excess delay.

**PRACTICE – Pretrial motions – right to testify, production of documents and amendment of pleadings** *Fisher v. West Colchester Recreation Association*, Hfx. No. 142886C, Coady, J., September 30, 2010. 2010 NSSC 358; **S616/24** ■ The plaintiff suffered a serious brain injury when she was struck by an errant puck at a hockey game in 1996. By way of litigation guardian, she accused the defendant of negligence in relation to the rink in which the incident occurred. The medical evidence showed her cognitive, speech and motor functions were severely impaired. She filed two interlocutory motions, seeking to amend an expert report and the statement of claim to include two

new grounds of negligence. The defendant also filed two interlocutory motions, seeking an order that the plaintiff not be allowed to testify and requesting disclosure of a private investigator's file that had long since gone missing. The (jury) trial was set to take place less than two months after the motions were heard. *Held*, plaintiff's motions granted in part. The expert report can be amended, given that the change is not substantive and already in the defendant's possession. The statement of claim can be amended to include one of the two proposed grounds, given that it concerns issues already covered in discovery and the expert reports. The motion to amend came at a late stage in the proceeding, but there is no evidence of bad faith. A lack of excuse for lateness does not equate to bad faith. The other proposed amendment is too new and would seriously prejudice the defendant if permitted to go ahead. There are no exceptional circumstance that would warrant its admission. The defendant's motion for an order preventing the plaintiff from testifying is denied. Had the evidence shown she had no independent recall of the incident or subsequent events, the court would not allow her to testify; however, it appears she has some memory of the events in issue. Although she can't speak in a traditional sense, the evidence shows that she is able to communicate. The right to testify at a civil or criminal trial is a fundamental right, provided the witness has relevant and admissible evidence to offer. Should competence become an issue, that can be raised at trial. The private investigator's report is unlikely to turn up. No disclosure will be ordered on a contingent basis.

**PRACTICE – Proceeding – whether 1972 Rules or 2008 Rules apply** *Milburn et al. v. Growthworks Canadian Fund Ltd. et al.*, Syd. No. 296202, Bourgeois, J., June 2, 2010. 2010 NSSC 210; **S613/3** ■ The applicants moved to have the *Civil Procedure Rules* (2008) apply to the proceeding, while the respondents (who initially agreed) decided the *Civil Procedure Rules* (1972) should continue to apply. A related action had been brought under the Rules (2008) in a neighboring jurisdiction, and there was a chance these would be heard together at some point. The proceeding was in its early stages and several procedural determinations and future motions were likely. *Held*, motion granted: the Rules (2008) will apply; costs of \$1,000 awarded to the applicants. The respondents were initially willing to have these rules apply. At least one party asserts they will be seeking to have the new action and this matter heard together. If they are ever heard together, it would be illogical and cumbersome to have separate sets of rules apply. Permitting two very similar matters, concerning the same parties and circumstances, to be determined under different sets of rules creates a very strong potential for some or all parties to have an unfair advantage. Even if a party can show applying the Rules (2008) will result in an unfair advantage to one party, the court (by implication, under Rule 92.08(2)) retains discretion to apply them anyway.

**PRACTICE – Proceedings – converting application in chambers to application in court** *Polycorp Properties Incorporated v. Halifax (Regional Municipality)*, Hfx. No. 327941, Wright, J., July 22, 2010. 2010 NSSC 283; **S614/15** ■ The applicant filed an application in chambers to get the matter before the court as quickly as possible. They agreed to allow it to be converted to an application in court, provided the respondent municipality agreed to withdraw its motion to convert the proceeding to an action. Although the parties agreed on the conversion, there was some issue as to the authority under the *Civil Procedure Rules* (2008) to convert in this manner. *Held*, while the Rules don't explicitly provide for a matter to be converted from an application in chambers to an application in court (or vice versa), the discretion to do so exists under the broad authority conferred to a judge under Rule 2.03. That discretion must be exercised subject to the considerations set out in the rules regarding choice of proceedings.

**PRACTICE – Production of documents – scope, pre versus post-accident documents** *Murphy v. Lawton's Drug Stores Limited*, Hfx. No. 281666, LeBlanc, J., July 21, 2010. 2010 NSSC 289; **S614/17** ■ The plaintiff claimed she injured herself when she slipped on a slippery substance and fell in the respondent's store. She sought production of the store's maintenance and inspection logs for the six months preceding and 18 months following the accident. The respondent agreed to produce the monitoring log for that day and the inspection report for that month, but felt further disclosure irrelevant. The plaintiff argued the voluntarily disclosed materials were insufficient to establish the existence, implementation or maintenance of an inspection system. She pointed to the presumption in favour of disclosure in Rule 14.08 (1) of the *Civil Procedure Rules* (2008). *Held*, disclosure of the monitoring logs for the month preceding and the month of the accident ordered; inspection report for both months must also be disclosed. No post event records must be disclosed without showing evidence of a change in the way the system was being maintained. Here, none was shown. The current *Civil Procedure Rules*, (2008) are intended to limit pretrial effort and expense, including that incurred in relation to discovery and production. The new threshold is "trial relevance", which appears to be a higher standard than the old "semblance of relevancy" test. Following a detailed review of the case law concerning the appropriate time frame to use when compelling similar types of disclosure, the court found the scope of production requested was overreaching, but the scope of relevance captured material beyond that already voluntarily disclosed.

**PRACTICE – Publication ban denied – sexual relationship with treating doctor** *Cabuzac v. Wisniewski et al.*, Hfx. No. 275771, Coughlan, J., July 13, 2010; March 3, 2010 (orally). 293 N.S.R. (2d) 1; 2010 NSSC 258; **S614/8** ■ The plaintiff was married and had an affair with the defendant doctor. Both she and her husband were patients. She sued the doctor and his medical practice for damages and moved for a confidentiality order (publication ban/use of pseudonyms) under Rule 85.04 of the *Civil Procedure Rules* (2008) to protect her daughter from public scrutiny and embarrassment, and to help herself move on. She filed a report from her therapist, which said she suffers from post-traumatic stress disorder and struggles to maintain reasonable mental health. The therapist felt further publicity would negatively impact on her mental health. The evidence showed the affair had already been the subject of media reports. *Held*, motion dismissed; with each party to bear their own costs. The relationship between the parties has already been made public. Although the therapist's affidavit opined that publicity would significantly impact the plaintiff's mental health, it did not set out the basis upon which that opinion was formed. Publicity will certainly cause her embarrassment and emotional stress, but she failed to prove that, on balance: the order is needed to prevent a serious risk to the administration of justice or; the benefits outweigh the detrimental impact on the rights of the parties (and the public) to an open court.

**PRACTICE – Small Claims Court – application to set aside default judgment, reasonable excuse for failing to file defence** *George L. Mitchell Electrical v. Rowalis*, Hfx. No. 319620A, LeBlanc, J., May 26, 2010. 2010 NSSC 203; **S613/23** ■ A Small Claims Court adjudicator granted default judgment to the appellant. When he planned to execute on the judgment, the respondents successfully applied to have it set aside. Their excuse for having failed to file a defence on time was that they didn't read page two of the notice, which warned of the need to file before the hearing. They offered no reason for not having done so. The appellant appealed, arguing the adjudicator should be held to a standard of correctness and was wrong in setting aside the judgment. The respondents felt there should be a less exacting standard of review applied due to the mixed question of law/fact, and that the adjudicator

properly exercised his discretion. *Held*, appeal allowed, with costs and disbursements to the appellant. The adjudicator made an error in law when he interpreted “reasonable excuse” (*Small Claims Court Act*, s. 23(2)(a)) to include a failure to read the second page of the notice. While the analysis of what constitutes “reasonable excuse” must look at the surrounding circumstances, it is fundamentally a question of law. The standard is correctness, and the adjudicator was not correct in setting aside the judgment. Even subject to the less exacting standard, this appeal would still be allowed. He made a palpable and overriding error in setting aside the judgment. Despite the respondents’ arguments, s.2 (which sets out the intent and purpose of the Act) cannot override the specific requirements of s.23 and does not provide a basis upon which the adjudicator could have properly set aside the judgment.

**PRACTICE – Small Claims Court – application to set aside quick judgment, no reasonable excuse for failing to file defence** *Wagner v. East Coast Paving Ltd.*, Claim No. 332612, O’Hara, Adjudicator, October 28, 2010. 2010 NSSM 63; **SmCI16/31** ■ The defendant applied to set aside a default judgment on the basis that its agent (a self-represented litigant) didn’t understand she had to file a written defence. There was evidence from the Better Business Bureau to show the defendant intended to dispute the claim, and its agent testified she always intended to attend the hearing to defend and present her case. *Held*, application dismissed. The question is not whether the defendant has an excuse for default, but whether there’s a “reasonable” excuse. Here the claim form clearly said a defence had to be filed ten days before the hearing or a default judgment could be entered. The agent’s failure to read or understand it is not a reasonable excuse. The fact she appeared at the hearing is not sufficient alone; there must also have been a reasonable excuse for the failure to file.

**PRACTICE – Summary judgment – arguable issue to be tried** *Maritime Travel Inc. v. Boyle*, Hfx. No. 312635, Moir, J., June 30, 2010; June 23, 2010 (orally). 292 N.S.R. (2d) 193; 2010 NSSC 260; **S613/25** ■ The plaintiff successfully sued the travel company for which the defendant was/is the principal officer/director. They were awarded damages. When the travel company appealed, the plaintiff agreed to a stay (pending the outcome) on the basis of what they said was the defendant’s acceptance of personal liability for the full amount of the judgment. A consent order was issued. It said the defendant would pay money into trust for the full amount of the judgment. When he failed to make the payments required by the order and the appeal was dismissed, the plaintiff took steps to collect: bringing this action to enforce the agreement they say was reached collateral to the consent order. The defendant denied accepting personal liability (implicitly or explicitly), arguing: he didn’t sign the order, nor did it name any counsel as having acted or signed for him personally; he was not a party to the litigation; the company’s lawyer was retained to represent the company only – not him personally; and there was no “apparent authority” to bind him to an agreement. The plaintiff sought summary judgment on the basis of the consent order. *Held*, motion for summary judgment dismissed due to the plaintiff’s failure to clearly prove its case. The defendant wasn’t a party to the original dispute giving rise to the consent order. There was insufficient evidence to allow the court to conclude on a summary judgment motion that either the defendant or the company’s lawyer had authority to bind him to an agreement in relation to that litigation. There were still related material facts in dispute, requiring trial. Agency estoppel was not clearly established. The legal question of whether absolute privilege applies could have been determined at this stage if it were the only genuine issue before the court requiring trial.

**PRACTICE – Summary judgment – limiting issue for trial** *Bank of*

*Nova Scotia v. A. MacKenzie’s Auto Mart Inc. et al.*, C.A. No. 324501, Farrar, J., October 21, 2010. 2010 NSCA 81; **S617/8** ■ The respondent (one of six defendants named in the main action) acknowledged signing one personal guarantee to secure a portion of the car dealership’s debt. There was a second guarantee purporting to be signed by him, which he denied signing. After the dealership defaulted, the bank brought the claim and sought summary judgment in relation to the first guarantee. The respondent raised several matters in his defence, alleging the bank: failed to keep him informed; varied the terms of the principal contract without his consent; accepted fraudulent/forged documents without exercising due diligence; and failed to properly monitor the dealership’s activities. After the bank’s motion for summary judgment was dismissed, a dispute arose as to the form of order, with the bank insisting it limit the issues for trial to three matters. The chambers judge refused to limit the issues and dismissed the bank’s motion in that regard. The bank appealed both the original dismissal and the decision not to limit the issues for trial, pointing to what they felt were a number of errors. *Held*, appeal dismissed. The order in question did not have a terminating effect and so the standard of review asks only whether wrong principles of law were applied or a patent injustice resulted. Matters of controversy are best left for trial. Here there are facts in dispute (e.g., whether the bank was aware of certain questionable conduct) that form the factual matrix in which the legal issues need to be determined. The chambers judge applied the proper test and felt these can only be determined after a full trial. Her decision not to limit the issues was a proper exercise of discretion. If she committed an error by erroneously noting the bank waived their right to directions under Rule 13.07(1) of the *Civil Procedure Rules* (2008), such an error has no practical effect in the circumstances.

**PRACTICE – Summary judgment – motion dismissed, disputed issues of fact, credibility** *Reading v. Johnson*, Syd. No. 289967, Bourgeois, J., August 26, 2010. 2010 NSSC 334; **S616/2** ■ The plaintiff claimed the defendant maliciously distributed a defamatory letter. The action was vigorously defended. A number of facts were in dispute, including whether the comments in the letter were true and whether the letter was ever “published”. The plaintiff moved for summary judgment and, as she was not available to attend the hearing, asked the court to allow her husband to speak on her behalf. *Held*, the plaintiff’s husband allowed to appear as the plaintiff’s agent; her motion for summary judgment dismissed. The court agreed with Coady, J.’s comment in *Broussard v. Hawley* (2009): if there is a reasonable issue as to credibility, then a summary judgment motion will likely fail. Such issues exist here. While the plaintiff showed some evidence that could prove her claim, much of it is in dispute. There are factual determinations to be made. Even if the plaintiff had shown a *prima facie* case, the defendant has established a genuine issue for trial in relation to several potential defences.

**PRACTICE – Summary judgment – no genuine issue for trial, costs** *Fitzgerald v. Brogan et al.*, Syd. No. 320856, Bourgeois, J., August 31, 2010; August 24, 2010 (orally). 2010 NSSC 335; **S618/20** ■

## ■ REAL PROPERTY

**REAL PROPERTY – Boundary dispute – determination, cottage property** *MacCormick v. Dewar*, Tru. No. 301062, Bourgeois, J., June 2, 2010. 2010 NSSC 211; **S613/4** ■ The parties were owners of adjacent cottage properties. When the plaintiffs refused to take down a fence they had erected on what the defendants believed to be their property, the defendants removed it. This prompted the plaintiffs to obtain a full survey of their property and commence an action against the defendants for a declaration that the boundary between the two

properties was as determined on their survey plan. They also claimed against the defendants in trespass. The defendants argued that the boundary set out in the plaintiffs' survey was fundamentally flawed due to the surveyor's failure to recognize an iron pin as the northwest corner of a neighbouring property. *Held*, judgment for the plaintiffs; the boundary is as shown on the plaintiffs' plan of survey; general damages of \$400 awarded; there was evidence that the iron bar did not now or ever reflect the corner of any property and the plaintiffs' surveyor had shown that he had properly applied the hierarchy of evidence to the determination of the boundary in question. Both parties had committed a trespass on the property of the other – the plaintiffs' fence minimally encroached on the defendants' property and the defendants, by directing the removal of the portion of the fence that was within the plaintiffs' property, had also committed a trespass.

**REAL PROPERTY – Joint tenancy – ability to sever by conveyance to oneself not possible** *Presseau v. Presseau Estate*, S.F.H.M.P.A.Y. No. 068042, Dellapinna, J., May 31, 2010. 293 N.S.R. (2d) 40; 2010 NSSC 201; **S615/16** ■ The parties had purchased their matrimonial home in joint tenancy and it was only after the wife died that the husband discovered that, some time prior to her death, she had executed a warranty deed to herself, effectively transferring her interest in the matrimonial home to herself. The husband applied to have the deed set aside. *Held*, application granted; the wife's deed is a nullity. Although a joint tenancy between spouses can be severed and the *Matrimonial Property Act* does not prohibit such a conveyance, there is no legislative authority in Nova Scotia allowing for the conveyance of a deed to one's self.

#### ■ SALE OF GOODS

**SALE OF GOODS – Implied warranty of fitness – motor vehicle that had been in accidents** *Rumboldt v. Sackville Fine Cars et al.*, S.C.C.H. 319355, Parker, Adjudicator, October 22, 2010. 2010 NSSM 62; **SmCI16/30** ■

#### ■ SALE OF LAND

**SALE OF LAND – Negligent representation – damages, leaking roof and damaged floor joists, drywall** *Ranallo v. Ells*, Claim No. 332527, Slone, Adjudicator, October 14, 2010. 2010 NSSM 59; **SmCI16/27** ■

#### ■ SHIPS AND SHIPPING

**SHIPS AND SHIPPING – Procedure – jurisdiction** *McDermott Gulf Operating Company v. Oceanographia Sociedad Anonima de Capital Variable et al.*, Hfx. No. 09-309795, Duncan, J., March 31, 2010. 290 N.S.R. (2d) 118; 2010 NSSC 118; **S608/1** ■ The first plaintiff, the vessel's owner, was incorporated under the laws of Panama. The second plaintiff, the charter's manager, was an Nova Scotia body corporate. The first defendant was a Louisiana body corporate and the second defendant, a guarantor of the first defendant's obligations, a Mexican body corporate. The third defendant owned the first defendant and was part-owner/director of the second defendant. The vessel operated under a charter in Mexican waters, but the charter provided it was to be governed and construed in accordance with the laws of Nova Scotia and any disputes were to be resolved in our Supreme Court or the Federal Court of Canada. After the first defendant defaulted on its obligations, the corporate lines between the first and second defendants became blurred and arrangements were made for all invoices to be submitted directly to the second defendant. The plaintiffs brought an

action against the same defendants in Alabama, seeking a lien against the vessel's equipment and judgment for the same amount and on the same basis claimed in this action. The second defendant moved to dismiss the plaintiffs' claim on the basis that Nova Scotia lacked territorial competence (jurisdiction simpliciter) or, in the alternative, the court should decline to exercise such jurisdiction because there was a more appropriate forum (*forum conveniens*). *Held*, motion dismissed; Nova Scotia has territorial competence and the evidence fails to show another jurisdiction is a more appropriate forum. Although there was no basis upon which the second defendant could be said to have become a party to the charter in addition to, or in substitution of, the first defendant and the plaintiffs had not shown any of the enumerated circumstances set out in s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, they had met the common law test for establishing Nova Scotia has a "real and substantial connection" to the proceeding. The charter was drafted with the intent that Nova Scotia would be the place to litigate such a dispute; very substantive parts of the plaintiffs' evidence would emanate from key witnesses based here and documents located here; and the injury to the plaintiffs (non-payment of accounts) might reasonably be said to have occurred across jurisdictions, including Nova Scotia. It would not be manifestly unfair to require the defendant to defend in Nova Scotia because the costs associated with litigating the matter were held in common with the plaintiffs; the defendant must have contemplated the possibility of defending in Nova Scotia given the correspondence exchanged between the parties and this defendant had relied on Canadian maritime law in order to successfully vacate the arrest of the vessel in Alabama. It would be unfair to the plaintiffs to parse out the claim against this defendant, when they appeared to have a substantial claim against two of the three defendants who were subject to the jurisdiction of Nova Scotia and there was no evidence that any other jurisdiction had or would assume territorial jurisdiction.

#### ■ WILLS AND ESTATES

**WILLS AND ESTATES – Testamentary capacity – suspicious circumstances, undue influence** *Kerfont et al. v. Fraser et al.*, S.Y. No. 299571, Robertson, J., July 23, 2010. 2010 NSSC 293; **S614/21** ■ Ms. Fraser died in hospital at the age of 87, one day after the defendants retained a lawyer to prepare her will and deeds transferring her real property to them. They were her grandchildren, and sole beneficiaries under the will. The plaintiffs (two of Ms. Fraser's children) sought to set aside both the will and deeds, arguing their mother either lacked capacity to sign them or was unduly influenced by the defendants in doing so. The lawyer who prepared the documents testified that he was contacted by the first defendant and told Ms. Fraser was in hospital dying. He testified that he asked Ms. Fraser's attending physician to provide a report as to her competence to instruct in relation to legal matters. The physician, who knew Ms. Fraser well, felt she was completely lucid and mentally competent. When the lawyer attended the hospital, he met with Ms. Fraser alone. Before showing her the will and deeds, he assessed her competence and confirmed her wishes (which matched the instructions given to him by the first defendant). There was no extensive inquiry as to why Ms. Fraser was excluding her children. The evidence showed the defendants continued to live close to her and were a part of her day-to-day life, while her children were not. They were in daily contact, helped care for her and spent time with her. The children lived independent and established lives of their own. *Held*, application dismissed. Compelling evidence, both from the doctor and lawyer involved, show Ms. Fraser was competent at the time she signed the documents in issue. Although she did not instruct the lawyer directly, he confirmed that his instructions matched her wishes before showing the documents to her. His procedures did

not fall below the standard of care required from a lawyer engaged to follow the instructions of a dying woman. The plaintiffs failed to prove suspicious circumstances that meet the degree of proof required to make a finding of undue influence. The defendants were good and loyal children who continuously cared for their grandmother. The evidence supports the fact Ms. Fraser wanted to leave her property to the family members closest to, and very much present in, her life.

**WILLS AND ESTATES – Wills – mutual wills, promise against revocation** *Hand Estate (Re)*, Hfx. No. 325163, Moir, J., July 26, 2010. 293 N.S.R. (2d) 195; 2010 NSSC 297; **S614/23** ■ The applicant's parents, Dr. and Mrs. Hand, made separate wills in 1999. In essence, they provided for a division of property between the applicant and his two siblings. Under these wills, the applicant's share was to be a condo they held jointly. Dr. Hand's will provided that the condo would only be transferred to the applicant if Mrs. Hand died first. Should she survive him, it would become hers absolutely. Mrs. Hand's will provided that the condo would be transferred to the applicant regardless of whether Dr. Hand died first or not. Mrs. Hand died in 2008, after which Dr. Hand conveyed the condo into trust, revoked the 1999 will and made a new one that left most of his property to one daughter. The applicant sought an order granting him a one-half interest in the condo. He argued the 1999 wills were mutual and the subject of a promise against revocation. Dr. Hand disputed the application, arguing the condo remained in joint tenancy and passed wholly to him when Mrs. Hand died. In the alternative, he argued that if the 1999 wills purported to sever joint tenancy, they were contrary to s.8(1)(a) of the *Matrimonial Property Act*. The lawyer who prepared the wills gave evidence to show he had explained the effect of the differences between the wills. *Held*, the 1999 wills were not mutual, nor were they subject to a promise against revocation. There were remarkable differences between the two wills. The court reviewed the relevant authorities and found the similarities in these wills, in light of their differences, did not suggest a requirement against revocation. The evidence, including the terms of the wills and surrounding circumstances, shows the Hands understood they could change their wills in the future. Although it appears they intended to leave the condo to the applicant for a number of years following the execution of the 1999 wills, this doesn't support a finding of an agreement against revocation. Given this, Mrs. Hand's gift ignores the reality of joint tenancy and must fail.

## 3021386 *Nova Scotia Ltd. v. Barrington (Municipality)*, 2010 NSSC 173

By Sean Foreman, Wickwire Holm

*This case involves a defendants' motion for summary judgment on the pleadings in the context of a contaminated site claim.*

### FACTS

In 2007, the plaintiff numbered company (the “Company”) purchased property from the Municipality of Barrington (the “Municipality”) that was the site of the former Barrington Municipal High School. The school was operated by the local school board (the “Board”) from 1968 until 2005, when the Board declared the property surplus and conveyed it back to the Municipality pursuant to the *Education Act*.

The Company alleges that prior to it purchasing the property, the Municipality sought an environmental clearance letter from the Board but never received it. It further alleges that the Board was aware the clearance letter was required in order to transfer the property from the Municipality to a third party, and that the Municipality promised to provide the Company with an environmental clearance letter prior to conveying the property but never provided it.

After purchasing the property, the Company began to develop it for a subdivision. During development, it discovered evidence of a former underground fuel oil tank and soil contamination. The Company incurred costs to investigate and remediate the contamination.

The Company sued both the Municipality and the Board for breach of the *Education Act* and *Petroleum Management Regulations*, misrepresentation, negligence and breach of contract. The Board and Municipality brought a motion for summary judgment on the pleadings and sought to have the Company’s claims against them dismissed pursuant to *Nova Scotia Civil Procedure Rule* 13.03.

### LAW AND ARGUMENT

Justice Duncan’s decision is instructive, as this is one of the few cases dealing with a defendant’s motion for summary judgment on the pleadings under the new *Civil Procedure Rules*. He reminds us that because summary judgment affords such a drastic remedy, the threshold for dismissing a claim in this manner is very high and will only be met in rare cases.

In determining whether summary judgment should be granted, Justice Duncan begins by discussing Rule 13.03. He confirms that the burden on a defendant seeking summary judgment on the pleadings under this rule is the same as under the old rule, *Nova Scotia Civil*

*Procedure Rule* (1972) 14.25; that is, assuming the facts pled can be proved, is it plain and obvious that the statement of claim discloses no reasonable cause of action?

Justice Duncan then turns to consider whether the defendants met this burden with respect to the various claims against them. His findings with respect to the claims based on breach of the *Education Act* and *Petroleum Management Regulations* and misrepresentation are particularly interesting, as they serve as important reminders of how such claims should be pled.

### (a) Breach of the *Education Act* and *Petroleum Management Regulations*

Justice Duncan held that the Company’s claim based solely on breach of the *Education Act* and *Petroleum Management Regulations* did not disclose a recognized cause of action and was therefore wrong at law. He relied on the leading Supreme Court of Canada decision in Saskatchewan *Wheat Pool v. Canada*, [1983] 1 S.C.R. 205, and concluded “there can be no liability for the breach of the statute” and at most, a statutory breach is “evidence of negligence”. Instead of dismissing this part of the claim, he granted the company the opportunity to amend its pleading.

### (b) Misrepresentation

The Company alleges that the Board and the Municipality were aware of its intent to develop the property and that it relied on their representations with respect to the environmental clearance letter in purchasing the property. The Board and Municipality argued that the claim pled insufficient particulars to support that they made any representations to the Company. Further, the Board’s position was that because it never dealt directly with the Company, there could be no basis for a claim in misrepresentation. The Company dealt directly with the Municipality, had a contract with the Municipality for the purchase of the property and any claim based on misrepresentation should be brought against the Municipality **and not the Board**.

The Company relied on the Northwest Territories Court of Appeal in *Fallowka v. Royal Oak Mines Inc.*, 1996 CarswellNWT 70 (C.A.) and argued that direct communication between parties was not necessary to support a claim for misrepresentation. All that is required is that the claim plead that there was sufficient proximity in the relationship between the parties. Justice Duncan agreed. The claim pled that the Board was aware that the Municipality intended to sell the property to a third party and therefore knew or ought to have known that its representations to the Municipality would be relied upon by the purchaser. Those pleadings were sufficient to disclose a reasonable cause of action in misrepresentation.

### CONCLUSION

In the final result, Justice Duncan denied the motion to dismiss and permitted the Company to amend its pleadings.

The decision reaffirms that motions for summary judgment on the pleadings are rarely likely to succeed except in the clearest of cases. Further, where pleadings disclose some but not all facts and law to support a cause of action, the Court may prefer granting the party the opportunity to amend their pleadings rather than the more prejudicial remedy of summarily dismissing the entire claim.

## ***Dalhousie University v. Aylward*, 2010 NSSC 65**

By Franco P. Tarulli, Haynes LAW

The case of *Dalhousie v. Aylward*<sup>1</sup> is an instructive illustration of how our Court is likely to apply the new *Nova Scotia Civil Procedure Rules* as they relate to summary judgment motions.

### **FACTUAL BACKGROUND**

Carol Aylward has been a professor at Dalhousie University since 1991. She twice complained to the Nova Scotia Human Rights Commission, alleging that the university discriminated against her on the basis of race, colour and gender.

The first complaint was filed in March 2004, and resolved by way of a settlement agreement between her and the university in July 2005. The terms of the agreement provided that she would be elevated to the rank of associate professor and paid a sum of money in general damages. In addition, the agreement contained a confidentiality clause preventing the parties from publishing or communicating any of the terms of the agreement.<sup>2</sup>

Eventually, Professor Aylward sought a promotion to the rank of full professor. She was denied. As a result, she filed a second complaint to the Commission in August 2007, again alleging discrimination on the basis of race and/or colour.<sup>3</sup>

The university and the other named respondents filed responses to the complaint, and Professor Aylward filed rebuttals to the responses. Her rebuttals disclosed the terms of the July 2005 settlement agreement. In addition, she posted the rebuttals to her personal website, further publishing the terms of the settlement agreement.

The university became aware of this publication in February 2008, and asked Professor Aylward to remove the settlement agreement contents from her rebuttals, and from the website. When she refused to do so, Dalhousie University commenced an action alleging breach of contract, and claiming a declaration of the breach and a permanent injunction against further publication, together with damages in the

amount of \$1.00.<sup>4</sup>

In her defence and counterclaim, Professor Aylward did not deny publishing the terms of the settlement agreement, but claimed she was justified in doing so because Dalhousie University made the terms public once it provided the Commission with copies, and then by misrepresenting the terms of the agreement. In addition, she claimed absolute and qualified privilege in the disclosure.

Her counterclaim alleged the tort of abuse of process, arguing that the university's suit was motivated by an ulterior motive; namely, to dissuade her from proceeding with her second complaint to the Commission.<sup>5</sup>

The university brought a motion for summary judgment, seeking judgment in the main action and a dismissal of the counterclaim.

### **Reasoning and result**

Chief Justice Joseph Kennedy reviewed the language of the current *Nova Scotia Civil Procedure Rule* 13.04, together with the well-known common law articulation of the requirements for summary judgment, referring, in particular, to *MacNeil v. Bethune*<sup>6</sup>, where the Court of Appeal stated:

[21] As stated in *Selig v. Cooks Oil Company Ltd.*, 2005 NSCA 36, it is a two part test:

[10] ... First the applicant must show there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

His Lordship then noted that the terms of the settlement agreement for the first complaint (including the confidentiality agreement) and

1 2010 NSSC 65.

2 *Ibid.*, at paragraphs 3 et seq.

3 *Ibid.*, at paragraph 7.

4 *Ibid.*, at paragraphs 8-10.

5 *Ibid.*, at paragraphs 11-18.

6 2006 NSCA 21 and, specifically, paragraph 21.

the fact that the terms had been published were not in dispute.<sup>7</sup>

He went on to analyze Professor Aylward's defences, commencing with her defence of justification.

Professor Aylward's defence of justification turned upon her interpretation of the words "coincidence" and "grant". She alleged that when the university stated in its response to her complaint that she was awarded tenure and promoted following a review of her file "coincident" with the settlement of her human rights complaint, this was a misrepresentation. She argued that the university was saying it was a term of the settlement agreement that her file be reviewed subsequent to the agreement in assessing her suitability for promotion when, in fact, the agreement provided for her unconditional promotion. This alleged misrepresentation, according to her argument, justified her disclosure of the terms of the settlement agreement.<sup>8</sup>

In addition, Professor Aylward argued that when the university stated she was "granted" a promotion in 2001, this was also a misstatement of the terms of the settlement agreement. She argued that it suggested this necessarily indicated the promotion was the result of the review of her file, when in actuality, her promotion was pursuant to the terms of the settlement agreement.<sup>9</sup>

Chief Justice Kennedy examined various dictionary definitions for the word "coincident", and concluded that Professor Aylward's interpretation was untenable. He also found her interpretation of the word "grant" untenable, and concluded that her defence had no "real chance of success", as *Selig, supra*, requires.<sup>10</sup>

As to Professor Aylward's argument that the documents were made public when the university provided copies to the Human Rights Commission, His Lordship noted that the terms could only be made public, if at all, in response to a request made under the *Freedom of Information and Protection of Privacy Act*<sup>11</sup>. In the absence of a successful application for the disclosure of the terms of the agreement under that Act, the argument had no validity and, accordingly, no "real chance of success".<sup>12</sup>

His Lordship then turned to the defence of privilege, noting that Professor Aylward appeared to be claiming witness immunity. His Lordship found that Professor Aylward forfeited any claim to witness immunity when she published the terms of the settlement agreement on her website.<sup>13</sup>

Finally, Chief Justice Kennedy examined the counterclaim, finding that on a plain application of the law of abuse of process, the counterclaim was unsustainable. In the result, the counterclaim was dismissed.

7 *Dalhousie University v. Aylward, supra*, at paragraphs 30 and 76.

8 *Ibid*, at paragraph 39.

9 *Ibid*, at paragraph 62.

10 *Ibid*, at paragraph 82.

11 R.S.N.S. 1993, c. 5.

12 *Dalhousie University v. Aylward, supra*, at paragraphs 87.

13 *Ibid*, at paragraph 91.

## ANALYSIS

**As the Supreme Court of Canada stated in *Canada (A.-G.) v. Lameman*<sup>14</sup>:**

[10] ... The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[11] ... the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial"... The defendant must prove this; it cannot rely on mere allegations or the pleadings ... If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal ... Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried ... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts ...

Historically, however, motions for summary judgment have been perceived as being difficult motions to bring successfully, with the Court demonstrating some reluctance to dismiss claims without the benefit of full argument at trial.

One reason might be that the 1972 *Civil Procedure Rules* contained a greater discretion in the chambers judge to dismiss a motion for summary judgment, even where there was "no arguable issue for trial". With the implementation of the 2008 *Civil Procedure Rules*, that discretion has now been removed and, where there is no genuine issue to be tried, the chambers judge must grant summary judgment.<sup>15</sup>

With the removal of that discretion, the second branch of the test for summary judgment (where the respondent must demonstrate a "real chance of success") appears to have assumed greater importance.

The requirement for the responding party to demonstrate that its claim or defence has a "real chance of success" is capable of at least two approaches: firstly, the requirement can be read to mean that notwithstanding the lack of any genuine issue for trial, the application of the law, and any inferences to be drawn from the facts, ought to be left to the trial judge. This approach can be justified on the ground that a trial judge would have the greater opportunity of assessing all of the witnesses, their intentions and their motivations. This appears to have been the approach that Justice Hood took at first instance in *Eikelenboom v. Holstein Canada*<sup>16</sup>.

14 2008 SCC 14

15 *Ibid*, at paragraph 24. Cf. *CPR 13.04(1) (2009 Rules)*, and *CPR 13.01 (1972 Rules)*.

16 2003 NSSC 241, at paragraph 10.

The approach that the Court of Appeal<sup>17</sup> took in that same matter illustrates the second approach. There, the Court of Appeal took the view that provided that there were no issues for trial, then the chambers judge is entitled to apply settled law to those undisputed facts in order to dispose of the matter.

This can be seen where the Court of Appeal responds to Justice Hood's statement, at paragraph 10 in her reasons, that if the responding party points to circumstances that suggest it could succeed at trial, it should be left to the trial judge to examine the surrounding circumstances and arrive at a decision to dispose of the matter. The Court of Appeal stated:

[30] ... With respect, all of the surrounding circumstances were already well known. The material facts, as found by the Chambers judge, were not in dispute. The record as to what occurred prior to and in the presence of the panel is evident from the transcript of the hearings and the answers to interrogatories of Mr. Kestenberg. This is not a case where the motions judge had to reconcile competing affidavits from opposing sides. The only disagreement between the parties concerned the application of the law of waiver to undisputed facts in order to decide whether waiver had in fact occurred. This is precisely what occurred in *Gordon Capital*, *supra*, where the only dispute concerned the application of the law, a point with which the [Supreme Court of Canada] quickly dispensed in rather terse prose:

The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding.

While this approach may result in fewer matters proceeding to trial, it has the advantage of better complying with the Supreme Court of Canada's reasoning, both in *Guarantee Co. of North America v. Gordon Capital Corp.*<sup>18</sup>, and in *Canada (A.-G.) v. Lameman*<sup>19</sup>. In addition, the freedom that this approach permits chambers judges better accords with the stated object of the 2008 *Civil Procedure Rules*, being promoting the just, speedy and inexpensive determination of every proceeding.

With this approach, however, in most cases, the requirement of demonstrating a "real chance of success" will likely amount to a restatement of the requirement to "put one's best foot forward" in leading evidence that identifies a material issue of fact or law for trial.

The case law in Nova Scotia is uniform in stating that the burden in a summary judgment motion lies on the moving party to establish the lack of a genuine issue for trial. It goes on to state that once the burden has been met, the onus shifts to the respondent to demonstrate that the claim or defence has a "real chance of success".

In practice, however, it seems that the shifting burden will only play out in more complex factual matrices, where a moving party demonstrates certain undisputed facts, but then urges the chambers judge to draw a particular set of inferences from those undisputed facts. In those cases, it would be open for a respondent to argue that

a trial judge ought to draw different inferences, and that therefore a trial is justified.

In cases with simpler facts, the practical reality is likely that the burden does not actually shift, but that showing a "real chance of success" amounts, in reality, to ensuring that all of the evidence available has been supported by the response affidavit, in arguing that there is a genuine issue for trial, since the chambers judge will apply existing law to the facts presented.

This was the approach that Chief Justice Kennedy took in *Aylward*. In that case, the facts were relatively simple, and His Lordship simply applied settled law to them. The question of whether there was a "real chance of success" involved Professor Aylward's urging a particular definition of "coincident" and "grant" upon the chambers judge. The particular interpretation would not likely be affected by any inferences to be drawn from the undisputed facts. Indeed, no particular inference was urged upon or drawn by the chambers judge.

For counsel defending a summary judgment motion, the lesson is that it has become even more important to ensure that the response affidavit contains all of the available evidence in support of a finding that there is a genuine issue for trial. In addition, the response affidavit should take care to lead any evidence that would support a particular inference from a complex set of facts.

Given the removal of the motions judge's discretion to grant summary judgment, a failure in this regard presents a greater risk than perhaps existed prior to the implementation of the 2008 *Civil Procedure Rules* that the case will be summarily dismissed.

## W. AUGUSTUS RICHARDSON, QC

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17 2004 NSCA 103.  
18 [1999] 3 S.C.R. 423.  
19 *Supra*.