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From the Nova Scotia Court of Appeal

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Decisions received between September 8, 2010 and April 12, 2011.

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■ ADMINISTRATIVE LAW

ADMINISTRATIVE LAW – Freedom of information – exercise of prosecutorial discretion *Cummings v. Nova Scotia (Public Prosecution Service),* Hfx. No. 335079, Wright, J., February 1, 2011. 2011 NSSC 38; **S623/15** ■

ADMINISTRATIVE LAW – Freedom of information – solicitor-client privilege, redacted information *Coates v. Capital District Health Authority,* Hfx. No. 314177, Robertson, J., February 9, 2011. 2011 NSSC 62; **S624/7** ■

ADMINISTRATIVE LAW – Judicial review – Assistance Appeal Board *Nova Scotia (Minister of Community Services) v. M. (E.),* Hfx. No. 325930, Murphy, J., January 11, 2011. 2011 NSSC 12; **S622/15** ■

ADMINISTRATIVE LAW – Judicial review – expert evidence, expropriation and value of land *Yarmouth (Town of) v. Gateway Importers and Exporters Ltd. et al.,* C.A. No. 334765, Bryson, J.A., February 8, 2011. 2011 NSCA 17; **S621/19** ■

ADMINISTRATIVE LAW – Judicial review – Nova Scotia Police Review Board, internal discipline decision *Ranni v. Halifax (Regional Municipality) et al.,* Hfx. No. 332069, Wright, J., March 7, 2011. 2011 NSSC 83; **S625/4** ■

■ ARBITRATION (LABOUR)

ARBITRATION (LABOUR) – Judicial review – no reviewable error, application dismissed *Canada Post Corp. v. Canadian Union of Postal Workers,* Hfx. No. 326201, Coady, J., August 27, 2010. 294 N.S.R. (2d) 255; 2010 NSSC 336; **S616/1** ■ An arbitrator found that the employer had violated the collective agreement when it wrote to the union advising that access of its members to the workplace would be limited to scheduled breaks in the cafeteria and no access would be granted to the work areas. The employer applied for judicial review of the decision on the basis that the arbitrator had erred, *inter alia*, in not following a particular award made in similar circumstances. *Held,* application for judicial review dismissed; the arbitrator had not erred in relying on the award he had; nor did he impermissibly extend the scope of the grievance (it was within his mandate to consider the purpose of the visits and not limit himself to time and space) or shift the burden of proof to the employer. The arbitrator gave full consideration to the collective agreement and the facts of all the previous awards submitted for his consideration. The correctness standard of review should not apply simply because the arbitrator's jurisdiction was challenged.

ARBITRATION (LABOUR) – Judicial review – no reviewable error, application dismissed *Canada Post Corp. v. Canadian Union of Postal Workers,* Hfx. No. 329879, Wright, J., October 26, 2010. 295 N.S.R. (2d) 349; 2010 NSSC 372; **S618/19** ■ Despite being refused permission, three union representatives attended a forum held by the applicant Canada Post Corp. (CPC) for the purpose of informing and gathering information from employees. They felt the collective agreement allowed for union presence. At CPC's request, they were peacefully escorted off CPC's premises by police. Two days later CPC sanctioned all three, banning them from non-public CPC facilities for one year. The union filed a grievance. The adjudicator ruled in favour of the union, finding: CPC's refusal to allow union access to the forum was a clear violation of the collective agreement, rendering the bans

null and void; and that, under the agreement, CPC had no right or authority to ban the grievors from the workplace. The CPC applied for judicial review. They felt the arbitrator committed reviewable error: in interpreting and applying the relevant provisions of the collective agreement; and by denying them procedural fairness by refusing to allow an adjournment to give them more time to prepare for what they argued was unanticipated evidence. *Held,* application dismissed; costs of $1,500 to the union. The arbitrator's decision, both how it was reached and the outcome, met the reasonableness standard of review. His reasons were transparent, intelligible and justifiable and his conclusion(s) within a range of reasonable outcomes. There was no evidence he improperly failed to apply precedents. As for the denial of CPC's adjournment request, there was no evidence of any resulting material prejudice to CPC. The evidence in question should have been reasonably anticipated. It was implicitly, if not explicitly, apparent and relevant in the context of the grievance. There was no violation of procedural fairness or natural justice on the facts or face of the record.

ARBITRATION (LABOUR) – Judicial review – reviewable error, matter remitted to arbitrator for determination *Canadian Union of Postal Workers v. Canada Post Corp.,* Hfx. No. 319983, Kennedy, C.J., August 26, 2010. 322 D.L.R. (4th) 615, 294 N.S.R. (2d) 240; 2010 NSSC 331; **S615/30** ■ The union applied for judicial review of an arbitrator's decision on the basis that he had found himself bound by a previous award, which both parties had relied on in their submissions. *Held,* application for judicial review granted; matter remitted to the same arbitrator for reconsideration; the arbitrator erred in relying on the decision he had. The employer's argument that the union was bound by issue estoppel because it first submitted the decision complained of failed as it was not shown that the employer had suffered any detriment caused by the union's use of the award; in fact, the employer was enthusiastic in its use of the same award and was successful in convincing the arbitrator that the decision was binding on him. Nor was there any bar to the union raising a new argument on judicial review when a question of jurisdiction was put in issue.

ARBITRATION (LABOUR) – Judicial review – standard of review, reasonableness *Cape Breton-Victoria Regional School Board v. Canadian Union of Public Employees, Local 5050,* C.A. No. 325296, Fichaud, J.A., January 25, 2011. 2011 NSCA 9; **S621/11** ■ The grievor, a school board caretaker who started a relationship with a 14 year old student from another school, filed a grievance after he was dismissed by the board. An arbitrator found he was wrongfully dismissed and ordered his reinstatement. The board applied for judicial review of the reinstatement order and, when its application was dismissed, brought this appeal. The board said the trial judge: erred by choosing a reasonableness standard for review of the arbitrator's interpretation of s. 40 of the *Education Act* (which governs the conduct of support staff); and misapplied any standard of review by ruling the arbitrator reasonably interpreted the legal tests that governed the grievor's conduct with the girl. The board took issue with what the arbitrator cited as mitigating factors (the fact the girl was of legal age when the relationship started, was not a student at the grievor's school, etc.) and argued these shouldn't be taken into account when determining if the conduct in issue would result in harm to the board's reputation. *Held,* appeal dismissed, with costs of $1,500 all inclusive awarded to the respondent. The issue of whether this outside of the workplace conduct is just cause for dismissal is, according to the *Millhaven* test(s), whether it "harms the board's reputation". The arbitrator's mandate was to apply to principles of arbitral jurisprudence (i.e., in relation to what constitutes such harm) to determine if there was just cause within the meaning of the collective agreement; a consideration of s.40(1) happens to dovetail into this analysis, which is a labour arbitrator's core function and which attracts a reasonableness standard of review. To apply the reasonableness standard, a court must track the arbitrator's reasoning. If it follows a logical route to a reasonable outcome (which here it does) it doesn't matter if there is another rational path to a different outcome. Exploring the concept of harm to reputation in this context, the court found the arbitrator's conclusion there was no harm reasonable. This was not an award where the arbitrator found a lesser penalty should be substituted for dismissal. She found no penalty was warranted in relation to the grievor's conduct with the girl, but some was warranted (a three-month suspension) for his conduct and lack of cooperation/candour during the board's investigation. The mitigating factors are relevant in this context. The arbitral case law gives rise to the principle that an employee's privacy interests when off duty must be balanced against the employer's interest in its good reputation. This balancing exercise is highly factual and can consider mitigating factors in a proportionality analysis of both the grievor and board's respective interests. From the perspective of these arbitral principles, the arbitrator's analysis was understandable and transparent and her conclusions within a reasonable range of outcomes.

■ BANKRUPTCY

BANKRUPTCY – Limitation defence – disallowed *Chapin Estate v. Drum Head Estates Ltd. et al.,* Hfx. No. 262472, Coughlan, J., December 1, 2010. 2010 NSSC 447; **S623/2** ■

BANKRUPTCY – Procedure – rescinding order to annul bankruptcy made without jurisdiction *Lohnes (Re),* B. No. 9415, Cregan, Registrar in Bankruptcy, September 7, 2010. 2010 NSSC 337; **S616/4** ■ A bankrupt, who now wished to make a second assignment in bankruptcy even though he had never applied for a discharge of the first bankruptcy (in which the trustee had been discharged over 20 years ago), informally applied for and obtained an annulment of the first bankruptcy. The Superintendent applied to have that order rescinded on the basis that the court had no authority to annul a bankruptcy in such a situation. *Held,* application granted; order rescinded; absolute discharge granted. There was no jurisdiction to grant an annulment; if the normal formalities had been followed, the order would not have been granted and the public confidence in the bankruptcy system required that the order be rescinded.

■ BARRISTERS AND SOLICITORS

BARRISTERS AND SOLICITORS – Conflict of interest – between lawyer and client *Nova Scotia Barristers' Society v. Blaikie,* Hfx. No. 330973, May 10, 2010. 2010 NSBS 3; **HP2/4** ■

BARRISTERS AND SOLICITORS – Costs – solicitor and client costs, taxation *Mor-Town Developments Ltd. v. MacDonald,* S.C.C.H. No. 326928, Thompson, Adjudicator, August 31, 2010. 2010 NSSM 64; **SmCl17/1** ■ The applicant sought to tax the respondent lawyer's legal bills in relation to a property transaction. One bill ($51,750 plus HST/disbursements) was paid, the other ($5,565 plus HST/disbursements) was not. The applicant filed an expert report prepared by a senior property lawyer who opined the bills were excessive. There was no retainer letter, nor was there evidence to show the applicant was aware of how much things were costing him until he got his first bill on closing. *Held,* the lawyer must repay $28,055.69 (inclusive of HST/disbursements). The account can be taxed despite the fact that

much of it has already been paid (out of trust monies on closing). On the facts, the account is taxed and certified at $32,266.40. The lawyer should have kept the client apprised of how costs were accruing. A lawyer can't sleep on billing a file or telling a client how much the work is costing and then surprise them with a large bill at the end. The failure to keep his client informed was a significant factor in the decision to reduce the bill(s). Some of the time allegedly spent on the file was excessive in light of the result(s) reached and/or effort actually required. Some of the bill seemed like a justification after the fact. Costs of the expert will not have to be repaid. It is probably not necessary, on a taxation, to have the opinion of another lawyer when the taxing master is already a lawyer presumed to be equipped to deal with the assessment of the bill(s) in question. Regardless, the purpose of the Small Claims Court is to allow (relatively) inexpensive access to justice and the use of experts should not be routinely encouraged.

BARRISTERS AND SOLICITORS – Fees – taxation, estimates *Brian Bailey and Associates v. C. (D.M.),* Claim No. 332962, Slone, Adjudicator, October 25, 2010. 2010 NSSM 72; **SmCl17/10** ■ The client retained a lawyer with the applicant firm to represent her granddaughter in a child protection proceeding. When initially approached by the client, the lawyer gave an email estimate of $8,000 to $10,000, and an hourly rate of $350 with a $4,000 retainer. When he was retained a month later, the retainer agreement was time-based and quoted an hourly rate of $400 with a $5,000 retainer. The client paid an additional $5,000 and sought a return of that and the retainer. She refused to pay a further bill of about $5,650, claiming the lawyer failed to honour their agreement by: failing to: seek costs, general damages or perform other tasks; and allowing his associate to attend an appearance. Her complaint to the NSBS was dismissed. The firm sought taxation of their accounts and payment of the outstanding bill. *Held,* accounts taxed as reasonable and must be paid in full. The result achieved by the lawyer was ideal; the child was returned to its mother without a hearing. There's no evidence the lawyer undertook to seek costs or conduct other proceedings. They weren't part of the retainer for services. The NSBS findings on the complaint aren't binding, but there's no contrary evidence. While the email estimate was lower than the rates actually charged, the task appears to have required more work than originally estimated. There was no obligation for the lawyer to absorb extra costs, especially since there was no binding estimate. There's a legal distinction between a (perhaps too optimistic) estimate and a fixed quote. The agreement didn't put a cap on fees. Any prudent person would have at least skimmed it before signing.

BARRISTERS AND SOLICITORS – Integrity – disciplinary action *Nova Scotia Barristers' Society v. Hayes,* S.H. No. 93-2773, March 30, 2011. 2011 NSBS 1; **HP2/5** ■

BARRISTERS AND SOLICITORS – Trust funds – misappropriation *Nova Scotia Barristers' Society v. Van Feggelen,* Hfx. No. 330488, June 4, 2010. 2010 NSBS 2; **HP2/3** ■

■ BUILDERS' LIENS

BUILDERS' LIENS – Jurisdiction – application to transfer action to Small Claims Court *Global Paving Contractors Ltd. v. Cragg,* Hfx. No. 334533, Coughlan, J., December 29, 2010; November 25, 2010 (orally). 2010 NSSC 468; **S620/31** ■ The prothonotary denied the defendant's request to have his claim transferred to the Small Claims Court because it started as a builder's lien claim and concerned a dispute over a land interest. The defendant disagreed and the matter was referred for a judicial determination. The main action concerned a claim for damages or (in default of payment) the sale of the premises concerned, with proceeds applied towards payment of the claim. *Held,* the proceeding cannot be transferred; costs of $250 to be awarded in the cause. The Small Claims Court (under s. 9 of the *Small Claims Court Act*) has no jurisdiction to hear the claim because it concerns an interest or estate in land.

■ BUILDING CONTRACTS

BUILDING CONTRACTS – Breach of contract – damages *Caines v. Cheevers,* Hfx. No. 288435; 286894, Robertson, J., November 23, 2010. 2010 NSSC 435; **S619/25** ■ The defendants promised to buy land from the plaintiff and to build her a house by a certain date. After months of delay, they failed to complete either the sale or the home. The $60,000 the plaintiff had given them was never paid to the trades who had done work on the house, and the plaintiff was forced to: pay out liens on the home; reduce the price on the land, pay commission on the sale (at a loss of over $12,000); and engage a new builder to complete the house. She sought damages for her losses. Having obtained default judgement against Paul Cheevers, she proceeded to trial to recover from his father, Frank. *Held,* judgment entered against the defendant, Frank Cheevers, for $78,720 (general damages of $5,000 for suffering and inconvenience and special damages of $73,720 representing: the loss on the land; storage costs; rental allowance as originally agreed; value of repairs for damage to her neighbour's driveway; return of her deposit; with an adjustment for the fact the new building contract resulted in lower overall costs to the plaintiff) plus prejudgment interest of two-and-a-half per cent. The plaintiff proved a breach of both the contract in relation to the land and that concerning the home. She was justified in terminating the building contract. The evidence is clear that she did not acquiesce to the delay(s), and made repeated inquiries regarding progress and completion. The defendants were entirely unable to complete the contracts due to their lack of financial capacity. They didn't convey this to the plaintiff at any time and instead took her money and deposited it into their general account (which was overdrawn at the time). The agreement of purchase and sale in relation to the land had the financing clause crossed out making "inability to pay" an insufficient excuse for the failure to complete this transaction; it was specifically precluded as a relevant factor by the agreement.

BUILDING CONTRACTS – Breach of contract – payment for services *Maynard v. Cragg,* Claim No. 340788, Slone, Adjudicator, March 2, 2011. 2011 NSSM 13; **SmCl17/29** ■

BUILDING CONTRACTS – Breach of contract – payment for services *Leverman Roofing Ltd. v. Future Inns Halifax,* Claim No. 342401, Slone, Adjudicator, March 9, 2011. 2011 NSSM 15; **SmCl17/31** ■

BUILDING CONTRACTS – Change in contract – extras *Morgan Creek Developments Ltd. v. Kephart,* S.C.C.H. No. 32929, Parker, Adjudicator, December 23, 2010. 2010 NSSM 68; **SmCl17/6** ■

BUILDING CONTRACTS – Deficiencies – leaky roof *Nauss v. Tsimiklis,* Claim No. 340429, Slone, Adjudicator, January 31, 2011. 2011 NSSM 11; **SmCl17/27** ■

BUILDING CONTRACTS – Tender calls – duty to bidders *Guysborough (Municipality) v. Resource Recovery Fund Board Inc.,* Hfx.

No. 327143, Coady, J., January 13, 2011. 2011 NSSC 15; **S622/21** ■ The defendant sent out a request for proposal (RFP) in relation to a tire recycling venture. The plaintiff municipality submitted one of two shortlisted proposals but was not awarded the contract. It brought this action, claiming: a contract was formed when the proposal was submitted and the defendant failed to meet its many express and implied contractual obligations; the defendant negligently failed to evaluate the proposal in a fair and equitable manner; and the defendant owed a free-standing non-contractual duty of fairness. The plaintiff argued the court should look to all the circumstances surrounding the RFP when deciding if it was really a tender call. The defendant argued there was no contract, pointing to the clear wording in the RFP. They moved for summary judgment on the pleadings. *Held,* motion granted; action dismissed. Applying the law to the complex facts/issues, there are no genuine issues for trial and the plaintiff has shown no real chance of success in relation to any of the claims. There is no case for breach of contract; no contract A was formed. On its wording, the RFP was an invitation to propose; it reserved the defendant's right to reject all proposals. While it asked for proof of financial stability, a requirement for some detail does not in and of itself turn an RFP into a tender call. *In obiter*, the court agreed an obligation on a party to conduct itself fairly (independent of a contract) lies on a continuum, but there was no free-standing duty of fairness owed by the defendant on these facts. The RFP was only ever intended to lead to the possibility of negotiating a contract. There is no sustainable negligence claim. It was never intended the RFP would create a relationship of obligation. There was no duty of care owed to the plaintiff, nor was there forseeability of pure economic loss. The Provincial Procurement Policy isn't relevant to this situation, but could apply to any contract B formed once a successful proponent has been selected.

BUILDING CONTRACTS – Termination – payment for services *Econo Renovations Ltd. v. Reliable Rooter Ltd.,* S.C.C.H. No. 334239, Parker, Adjudicator, March 21, 2011. 2011 NSSM 16; **SmCl18/1** ■

■ CIVIL RIGHTS

CIVIL RIGHTS – Exclusion of evidence – right to counsel *R. v. Farahanchi,* No. 191300; 1991301, Williams, J., September 24, 2010. 295 N.S.R. (2d) 99; 2010 NSPC 57; **M22** ■ The accused, charged with impaired driving and driving with a blood alcohol content over the legal limit, argued that although he understood English, his language skills were insufficient for him to understand and appreciate the technical legal issues that arose in a stressful situation. Due to his cultural upbringing, he felt that he had to cooperate with the police or suffer adverse consequences and he neither understood nor appreciated his legal rights when arrested. The arresting officer was unfamiliar with the force's internal policy for dealing with foreign nationals, which required an enquiry as to the individual's country of origin and their status within Canada, whether they wished to contact their respective consulate and whether they required the services of an interpreter. The Crown argued that the accused had an appropriate working knowledge of English that enabled him to understand the tenor and import of what the officer was communicating; had responded appropriately to the officer's words and complied with his commands, without saying that he neither understood or required the services of an interpreter; and never said or did anything which would have reasonably alerted the officer that he was having any problems with his English comprehension. *Held,* application to exclude evidence of breathalyzer results granted; accused found not guilty on both charges. Although the police had not breached his *Charter* right to counsel in failing to provide him with the services of an interpreter or consular services, the accused's rights were breached when, after he enquired as to how he could contact counsel, he was not told that he could contact Legal Aid or duty counsel or given the information necessary to do so, leaving him with the impression that, as he had no personal lawyer, he had no access to legal advice and was placed in a room with a phone for two minutes, without any assistance in contacting counsel. The evidence showed that the officer was only concerned with satisfying the procedural requirements of reading the accused his rights rather than ensuring that the accused had understood the import of what was said. The full right to counsel had not been explained in any meaningful and comprehensive manner and, even if it could be said that he understood his rights, which he did not, he had not been given any reasonable opportunity to exercise those rights. Willful blindness cannot equate with good faith and the omission to provide the accused with the 1-800 numbers was not merely trivial or technical in nature.

CIVIL RIGHTS – Exclusion of evidence – right to counsel *R. v. Doran,* No. 2112093, Williams, J.P.C., December 17, 2010. 2010 NSPC 79; **M23** ■

CIVIL RIGHTS – Right to counsel – mother counsel of choice *R. v. Hunter,* No. 2121017, Beaton, J.P.C., September 22, 2010. 295 N.S.R. (2d) 43; 2010 NSPC 62; **M22** ■ The accused applied to have his statement to the police excluded on the basis that his right to counsel had been violated. After his request to phone his mother had been denied, he was advised of the availability of free and immediate legal advice and the phone numbers for duty counsel and Legal Aid. He confirmed that he understood those rights and was satisfied with the advice received from duty counsel, with whom he had spoken for approximately 20 minutes. He now argued that, although he had never conveyed this to the officer, he had wanted to contact his mother to ask her to find him a lawyer. *Held,* application to exclude evidence dismissed; the accused never tied the concept of speaking with his mother to the concept of his right to counsel despite being asked more than once if he had any questions about that right and there was nothing in the evidence to suggest that denying him access to his mother was part of a plan to deprive him of the opportunity to speak to a lawyer or to speak only to a lawyer chosen by the police.

CIVIL RIGHTS – Right to counsel – Rowbotham application for funded counsel *R. v. Canning,* No. 2052215; 2052216; 2052217; 2061807; 2061808; 2061809; 2061810; 2061811; 2061812; 2142245; 2142246; 2142247, Ross, J.P.C., September 24, 2010. 295 N.S.R. (2d) 115; 2010 NSPC 59; **M22** ■ After the accused, who was charged with a number of historical sexual offences against four individuals, had been refused Legal Aid, he applied to the court for the appointment of state-funded counsel (a Rowbotham application). The Crown applied for an order that would only have counsel appointed to conduct the cross-examination of each of the complainants. *Held,* application for a stay of proceedings pending provision of a lawyer to the accused denied; counsel ordered to be appointed pursuant to s. 486.3 in respect of two of the four complainants; the accused's present situation was a foreseeable result of his own deliberate actions in that he had essentially foreclosed his route to private counsel by giving away all of his assets and sources of income. It appeared that the accused, in the process of obtaining a divorce, had given virtually everything to his wife, including property that he had been given by his mother specifically for the purpose of generating rental income. Although he may have felt pressure from any number of directions, the court was not satisfied that his state of mind was such that he was incapable of

appreciating the situation he was in, the need for legal advice and his legitimate interest in significant assets. The meager evidence also failed to establish that the accused, if self-represented, would not get a fair trial; there was nothing to suggest that either side would be calling expert evidence, the issues appeared accessible to a layperson and the evidence would be easy to comprehend.

■ COMPANY LAW

COMPANY LAW – Rights of shareholders – oppression remedy, interim costs *Giffin v. Soontiens et al.,* Hfx. No. 292594, Smith, A.C.J., December 3, 2010. 297 N.S.R. (2d) 48; 2010 NSSC 438; **S620/9** ■ The plaintiff claimed oppression remedies against the defendants (his cousins and several companies they hold interests in). This was his second motion for interim costs under s. 7(4) of the *Companies Act* (3rd Schedule); the first was dismissed a year earlier. Since his first motion was denied, the plaintiff's financial circumstances changed. He was employed by the RCMP earning over $75,000 per annum. He had applied for loans with two banks and was refused. He argued his only recourse would be to either cash out RRSPs (which he had already done to some extent) or sell the family home. The defendants felt the plaintiff's wife's pension should be taken into account and that no costs were warranted. The evidence showed the plaintiff had no meaningful way to access his interests in the defendant companies. *Held,* motion granted; interim costs of $175,000 awarded to the plaintiff to cover both the billed but unpaid fees ($145,000) and the unbilled fees ($30,000). The remaining claim for $100,000 to cover estimated future fees denied; the court's discretion to award anticipated costs should be exercised carefully. Here, the figure in question is only an estimate and the plaintiff's financial circumstances could change between now and trial (as they had since the last motion for interim costs). Applying the two-part test from the Ontario decision of *Alles* v. *Maurice* (1992), the plaintiff proved on balance that: without deciding/analyzing evidentiary or credibility issues, he has a case of sufficient merit; and he is genuinely in financial circumstances that, but for an order for interim costs, would preclude him from pursuing his claim. Case law has established the policy that someone making a motion for interim costs shouldn't be forced to cash out RRSPs first. There is no strong reason to stray from this policy; nor should the plaintiff be required to sell his home. The wife's pension is irrelevant to this motion; she is not a litigant and the court has no information concerning its value. The fees incurred to date in this acrimonious family dispute are reasonable.

■ CONFLICT OF LAWS

CONFLICT OF LAWS – Jurisdiction – filing of a defence *Waterbury Newton v. Lantz et al.,* Ken. No. 270667, LeBlanc, J., September 30, 2010; July 15, 2010 (orally). 297 N.S.R. (2d) 222; 2010 NSSC 359; **S619/30** ■ The second defendant, a lawyer and former partner with the plaintiff law firm, sought to stay proceedings on the basis that the parties' partnership agreement required them to resolve disputes by arbitration. The lawyer had already filed a defence in which he disputed every allegation and also raised the issue of jurisdiction. The firm argued the lawyer had attorned to the court's jurisdiction and could no longer challenge on the basis of the agreement's arbitration provisions. The other defendant was a client – represented by the lawyer both during and after his time with the firm. *Held,* motion dismissed, and the lawyer directed to attend for discovery. While the partnership agreement required disputes between the lawyer and firm to go to arbitration, the lawyer attorned to the court's jurisdiction by participating on the merits. He may have refused to participate in discoveries, but he still effectively complied with pretrial procedures (by producing a list of documents, providing additional documents, and agreeing to a discovery date). The *Arbitration Act* (s.7) requires a motion to stay/dismiss on the basis of jurisdiction to be brought before a defence is filed. Despite the lawyer's arguments, Rule 4.07 of the *Civil Procedure Rules* (2008) doesn't allow a defendant to file a defence on the merits and then seek a stay. Additionally, the first defendant here was not privy to the partnership agreement nor did he agree to submit any dispute to arbitration, which is a factor supporting the need for court proceedings.

CONFLICT OF LAWS – Jurisdiction – *forum non conveniens* *Check Group Canada Inc. v. Icer Canada Corp. et al.,* Hfx. No. 330888, Murphy, J., February 7, 2011; December 14, 2010 (orally). 2010 NSSC 463; **S623/26** ■ Neither the plaintiff (a New York-based company) nor defendants (based in Quebec) had any connection to Nova Scotia other than their 50/50 joint venture vehicle incorporated as a Nova Scotia unlimited liability company for tax purposes. After the joint venture failed, the plaintiff filed an action here, claiming remedies in tort and/or oppression remedies under our *Companies Act*. The defendants moved to dismiss or stay the action on the basis of Nova Scotia lacking territorial competence over the subject matter, or *forum non conveniens*. *Held,* motion dismissed; costs of $1,500 awarded to the plaintiff, but only if it succeeds in the cause. There is a real and substantial connection between the claim and Nova Scotia. Since the only basis here for territorial competence under the *Court Jurisdiction and Proceedings Transfer Act* is a real and substantial connection, it's not necessary to do a detailed analysis of all the factors in *Muscutt* (2002). In this case, two of those factors support a finding of real and substantial connection: the connection between the forum and at least one aspect of the claim (the oppression part), and unfairness to the plaintiff if jurisdiction is refused with a corresponding lack of unfairness for the defendants if it is accepted. The company was incorporated in Nova Scotia, and our the Nova Scotia Supreme Court has exclusive jurisdiction to adjudicate claims for remedies under the *Companies Act*; one of the remedies claimed falls under this Act. It would be inefficient and require much duplication of effort(s) to split the claim and have the oppression claim heard in Nova Scotia while the contract dispute is heard in Quebec; the secondary (oppression) claim is closely intertwined with the main claim(s). While the parties' memorandum of agreement indicated they wanted Quebec law to apply to disputes, it was neither signed or implemented, nor did it limit jurisdiction to Quebec. The parties were sophisticated and well aware of the risk in operating without an executed agreement. The defendants have failed to prove on balance that Quebec is a clearly more appropriate forum to hear the matter. While a hearing in Nova Scotia may require the application of foreign law, this is an interprovincial matter concerning a reciprocal state. Avoidance of multiple proceedings is important, especially given the scarcity of judicial resources across this country. In the absence of a binding choice of jurisdiction clause, fairness and efficiency demand hearing a matter that has claims connected to multiple forums in the forum that has exclusive jurisdiction over at least some of the claims.

■ CONSTITUTIONAL LAW

CONSTITUTIONAL LAW – *Tobacco Access Act* – display and storage of tobacco products *R. v. Mader's Tobacco Store Ltd. et al.,* No. 2063892-95, MacDonald, J.P.C., August 18, 2010. 294 N.S.R. (2d) 180; 2010 NSPC 52; **M22** ■ The accused, charged with displaying

and storing tobacco products in a manner not prescribed by the regulations, argued that the manner in which it stored and displayed tobacco was protected under s. 2(b) of the *Charter*. The Crown argued that although commercial expression is protected, the display of goods for sale does not constitute expression and the act of selling tobacco does not, by itself, convey a meaning. *Held,* the accused has met the burden of establishing that the relevant portions of the *Tobacco Access Act* and regulations infringe its s. 2(b) right to freedom of expression. Whether described as displaying for sale or displaying while stored, the activity engaged in was an activity with expressive content and, thus, protected under s. 2(b). Although the objective of the legislation was to protect the public's health, the purpose of the section was to prohibit the display of tobacco products, which went both to the form of expression (display for sale) and the content (tobacco products).

■ CONTRACTS

CONTRACTS – Auditor – payment for service *David L. Etter & Associates Inc. v. Certified General Accountants Association of Nova Scotia,* S.C.C.H. No. 336875, Parker, Adjudicator, January 7, 2011. 2011 NSSM 3; **SmCl17/15** ■

CONTRACTS – Breach of contract – no valid agreement *Lantz v. Grand Lodge of Nova Scotia Ancient Free and Accepted Masons et al.,* S.C.C.H. No. 332403, Parker, Adjudicator, December 27, 2010. 2010 NSSM 69; **SmCl17/5** ■

CONTRACTS – Campground – appeal from Small Claims Court *Gallant et al. v. Martin et al.,* Tru. No. 324563; 324552; 324556, Rosinski, J., October 15, 2010. 295 N.S.R. (2d) 376; 2010 NSSC 375; **S618/26** ■

CONTRACTS – IT services – payment for services *Bulletpoof Solutions Inc. v. Genie Knows Inc.,* S.C.C.H. No. 334738, Parker, Adjudicator, March 23, 2011. 2011 NSSM 17; **SmCl18/2** ■

CONTRACTS – Loan agreement – monies owing *Pettit v. Murchy et al.,* Claim No. 335234, Slone, Adjudicator, October 25, 2010. 2010 NSSM 73; **SmCl17/12** ■

CONTRACTS – Monies owing – services *Oler et al. v. Sherman Hines Photographic Ltd.,* S.C.C.H. No. 329065, Parker, Adjudicator, January 31, 2011. 2010 NSSM 78; **SmCl17/20** ■

CONTRACTS – Offer and acceptance – no contract *Doucette v. Lyndon Lynch Architects Ltd. et al.,* S.C.C.H. No. 338882, Parker, Adjudicator, January 1, 2011. 2011 NSSM 1; **SmCl17/7** ■

■ COURTS

COURTS – Jurisdiction of Supreme Court – to hear application under *Federal Access to Information Act* for disclosure *Canadian Broadcasting Corp. v. Canada (Attorney General),* C.A. No. 323826, Bryson, J., December 9, 2010. 297 N.S.R. (2d) 63; 2010 NSCA 99; **S617/26** ■

COURTS – Small Claims Court – jurisdiction, monetary *Roofing Connection v. Select Projects Ltd.,* Claim No. 336345, O'Hara, Adjudicator, March 1, 2011. 2011 NSSM 20; **SmCl18/5** ■

COURTS – Small Claims Court – territorial and subject matter jurisdiction *Richardson v. RxHousing Inc.,* Claim No., O'Hara, Adjudicator, December 6, 2010. 297 N.S.R. (2d) 254; 2010 NSSM 67; **SmCl17/4** ■ The claimant (a resident of Nova Scotia) leased residential premises in West Hollywood, California, from the defendant (a corporation based in Texas). The parties communicated by email and the claimant prepaid three months' rent as a deposit. The claimant later repudiated the contract and demanded a return of the deposit. The defendant refused and the claimant filed a claim with the Small Claims Court of Nova Scotia, seeking a return of the deposit. The defendant filed no defence on the merits and challenged the court's jurisdiction on the basis of: a lack of territorial competence to hear the matter; *forum non-conveniens*; and the court's lack of jurisdiction to hear *Residential Tenancies Act* matters. *Held,* the court has jurisdiction and will hear this matter. The *Court Jurisdiction and Proceedings Transfer Act* applies, and Nova Scotia has territorial competence. A solicitation that comes through the Internet to a person in Nova Scotia is received in Nova Scotia. Since the contract resulted from a solicitation of business in the province by the defendant, there's a presumption of a real and substantial connection. The defendant has failed to rebut that presumption; While the contract says "Texas property codes" apply, there's no information before the court about what that means; the property is in California, not Texas. The choice of law clause contains no wording that compels a finding of exclusivity and amounts to a "non-exclusive attornment" clause, meaning the "strong cause" test doesn't apply. The defendant has failed to show that Texas is a clearly more appropriate forum and Nova Scotia wins by default. The *Residential Tenancies Act* was not intended to, nor does it as a matter of law, apply to properties situated outside of Nova Scotia.

■ CREDITOR AND DEBTOR

CREDITOR AND DEBTOR – Monies owing – rental of storage space *Donald Gallant Enterprises v. Mont,* Claim No. 338055, Slone, Adjudicator, January 13, 2011. 2011 NSSM 9; **SmCl17/25** ■

CREDITOR AND DEBTOR – Monies owing – services *Fancy Lebanese Bakery v. Uncle Bucks Food Services Inc.,* Hfx. No. 312193, McDougall, J., February 8, 2011. 2011 NSSC 45; **S623/29** ■

■ CRIMINAL LAW

CRIMINAL LAW – Appeals – appointment of counsel *R. v. Morton,* C.A.C. No. 328179, MacDonald, M. C.J., December 9, 2010. 297 N.S.R. (2d) 65; 2010 NSCA 103; **S617/30** ■ The appellant, who had been convicted of robbery and related charges, sought the appointment of counsel to help prosecute her appeal. Identification had been the main issue at trial. It was conceded that she lacked sufficient means to obtain counsel. *Held,* motion dismissed; the appellant appeared as an intelligent and articulate person, who had written her own documents and had a good understanding of the Crown's appeal book; with the assistance of the court and the Crown, she should be able to effectively present her appeal and the panel appointed to hear the appeal could always reconsider the issue if warranted.

CRIMINAL LAW – Appeals – burden of proof *R. v. Liberatore,* C.A.C. No. 316092, Hamilton, J.A., October 29, 2010. 2010 NSCA 82; **S617/10** ■ The defendant was found guilty of possession for the purposes of trafficking and trafficking in cocaine after the police observed him pull up beside another vehicle that was parked outside

a gas station, the left hand of each driver come out with fists closed and meet, while the fists opened and closed and the hands then went back into the vehicles. A search of the defendant's vehicle found a concealed dime bag, containing cocaine and a significant amount of cash, separated between the defendant's two pockets. The defendant argued that he had stopped to give the other driver, an acquaintance, some business cards and that he was carrying the cash because he was involved in a cash business and had intended to put some of it in the bank. No business cards were found on either individual. The defendant appealed on the basis that the trial judge had misapplied the burden of proof. *Held,* appeal allowed; new trial ordered. The failure of the trial judge to state that the only reasonable inference was that this was a drug operation as opposed to him simply stating that "everything the officers testified to [was] consistent with a drug operation" convinced the court that he had failed to make the required analysis to conclude that the guilt of the defendant was the only reasonable inference to be drawn from the facts.

CRIMINAL LAW – Appeals – error of law, improper exercise of discretion *R. v. Deveau,* Hfx. No. 331818, Hood, J., January 27, 2011; December 16, 2010 (orally). 2010 NSSC 475; **S623/27** ■

CRIMINAL LAW – Appeals – fresh evidence allowed, guilty plea withdrawn, miscarriage of justice *R. v. Barton,* C.A.C. No. 327825, Saunders, J.A., January 24, 2011. 2011 NSCA 12; **S621/12** ■

CRIMINAL LAW – Arrest – whether swearing constitutes behaviour prohibited by law *R. v. Shea,* No. 2024045; 2024046, Derrick, J.P.C., December 15, 2010. 2010 NSPC 70; **M23** ■ The accused was charged with the willful obstruction of a peace officer and breach of a recognizance following a confrontation with the police in a parking lot. When his vehicle was pulled over for *Motor Vehicle Act* infractions, the accused approached the officers at a fast pace, cursing. He ignored the officer's warning that if he kept on cursing he would be arrested for creating a disturbance, but when a second police vehicle pulled into the parking lot a few seconds later, he turned to the occupant of that vehicle and began cursing and yelling at him. When the first officer advised him that he was under arrest for causing a disturbance, he turned and walked away. The officer pursued him and the accused ended up face down on the ground resisting the efforts to arrest him. He argued that since the arrest was illegal, he could not be found guilty of obstructing the officer during the arrest. *Held,* accused acquitted on both counts; although the swearing was offensive, there was no evidence that it caused a manifest interference with the ordinary or customary use of the premises and, thus, did not amount to criminal conduct; not was it a failure to keep the peace and be of good behaviour as required by the conditions of the recognizance. The swearing could not, by itself, amount to a breach of the recognizance as this would be contrary to the notion of reasonable bail, was not reasonably connected to the *Criminal Code* provisions governing pretrial release and offended the fundamental justice provisions of the *Charter*. The court rejected the Crown's argument that the accused's obstructive conduct occurred prior to his arrest, when he was diverting the officer's attention from the traffic stop, as the Information clearly alleged that the willful obstruction occurred during the arrest.

CRIMINAL LAW – Assault causing bodily harm, aggravated assault, assault with a weapon – acquitted *R. v. Brown,* C.R.H. No. 330361, Cacchione, J., November 17, 2010; November 3, 2010 (orally). 2010 NSSC 416; **S619/13** ■ After being arrested and held at a mall security office, the accused was placed in the back of a police vehicle for transport. The officer stopped the vehicle en route to research the accused on the basis that he had seen him take some pills. The search was conducted with the accused lying on the rear seat with his head toward the passenger door and the officer outside the vehicle by the rear driver's door. According to the officer, the accused was not handcuffed during this search but the accused stated that he was handcuffed, with his hands in front of him. The officer alleged that the accused rolled himself out of the car but the accused stated that he fell backwards out of the car. Both agreed that the accused struck his head when he exited the vehicle and the officer alleged that the accused swung at him with a black cylindrical object (which he believed to be his flashlight), which the accused denied. Both agreed that the officer struck the accused in the face and the accused alleged that this blow caused him to repeatedly stumble down the slope of the driveway where the vehicle was parked. He was eventually tackled by the officer and they both fell to the ground. The officer stated that the accused bolted from the car and, once tackled, they both rolled down the driveway, punching at each other. Both parties were injured in the incident. An individual who had stopped to assist the officer didn't see any punches being thrown or either party with a flashlight in their hand although he did hear something hit the ground. The flashlight that was supposedly in the police vehicle had neither fingerprints nor a vehicle number engraved on it. The accused was charged with assault causing bodily harm, aggravated assault, assault with a weapon, assault of a police officer, resisting a police officer, escaping lawful custody and breach of an undertaking. *Held,* accused found guilty of breaching a recognizance but not guilty on all other counts. When the officer first searched the accused, he found prescription pills, which he failed to take from him. The officer's evidence was very suspect in numerous ways, including the fact that it was difficult to accept that the accused could have managed to switch his handcuffed hands from his back to the front, take the pills out, remove the cap and take a pill in the security office with police and security stuff present without being seen. It was also difficult to accept that, having seen this, the officer would not have taken the pills away. Although the court did not believe the accused entirely, his evidence as a whole raised a reasonable doubt. However, even without his evidence, the court would not have found that the Crown had proven its case.

CRIMINAL LAW – Assault causing bodily harm – guilty *R. v. Good,* No. 2024286; 2024287; 2024288; 2024289, Williams, J.P.C., January 5, 2011. 2011 NSPC 4; **M23** ■

CRIMINAL LAW – Breathalyzer demand – reasonable and probable grounds *R. v. Tobin,* Syd. No. 333146, Bourgeois, J., January 28, 2011. 2011 NSSC 31; **S623/10** ■

CRIMINAL LAW – Breathalyzer – refusal *R. v. Beals,* No. 2075429, Tax, J.P.C., November 29, 2010. 2010 NSPC 66; **M23** ■

CRIMINAL LAW – Conspiracy to traffic – guilty *R. v. Shea,* 2003314; 2003315; 2003316; 2003317; 2003318, Derrick, J.P.C., November 24, 2010. 2010 NSPC 69; **M23** ■ The accused was charged with two counts of trafficking in controlled substances (cocaine and ecstacy) and unlawfully conspiring to traffick in cocaine and ecstasy after the police performed a "takedown" of a vehicle driven by another individual, which produced three bags of ecstacy and a bag of cocaine from the passengers. The Crown alleged that these drugs had been obtained by the vehicle's occupants from the accused several hours earlier in Halifax. The case was based primarily on intercepted telephone calls during a three-week period in which two individuals (one of whom the Crown

alleged was the driver of the vehicle and the other the accused) made repeated plans to meet in Halifax and argued that the court should infer from the content of the calls that they were conspiring to traffic in cocaine and ecstacy. Although the police had identified the subject vehicle parked briefly beside the accused's vehicle in a Halifax parking lot the previous evening, there was no evidence of where the vehicle went during the intervening four hours prior to the takedown. Expert evidence showed that drug transactions, which were routinely preceded by cellphone calls about pricing, quantity and meet details, were planned, coordinated and very brief to minimize risk of detection and conversations where the parties are familiar with each other tended to rely on being circumspect about what is discussed as opposed to coded language to describe illegal substances. *Held,* accused found guilty on charges of unlawfully conspiring to traffick and not guilty on charges of trafficking. Although the court accepted that the intercepted calls were all related to the purchase of illegal drugs and thus found the accused guilty of the conspiracy charges, there was nothing in the evidence that established a connection between the delivery and the events on the night in question and a finding that the drugs came from the accused either directly or indirectly was not the only reasonable inference to be drawn from the facts. The vehicle's whereabouts were unknown for a lengthy period, during which time the drugs could have been acquired from someone else, and the money referred to in the telephone conversations could have related to an earlier drug buy.

CRIMINAL LAW – Failure to stop – at the scene of an accident *R. v. Foley,* C.R.A.D. No. 316081, MacAdam, J., July 29, 2010; July 12, 2010 (orally). 294 N.S.R. (2d) 95; 2010 NSSC 288; **S616/22** ■ The accused, who had left the scene after his vehicle struck a horse-drawn wagon and went to see his girlfriend before turning himself in to the police, was charged with failing to stop at the scene of an accident. *Held,* accused found guilty of leaving the scene of an accident. The evidence established beyond a reasonable doubt that he knew he had hit something and was wilfully blind as to what had been hit. Although the accused's assertion that he did not know why he had left the scene was sufficient to rebut the presumption in s. 252(3) that he did so with intent to avoid liability, the Crown had established that he had the requisite intent at the time he left the scene. The fact that he later resolved to turn himself in did not raise a reasonable doubt as to his state of mind at the time of the offence.

CRIMINAL LAW – Impaired driving – appeal *R. v. Francis,* Hfx. 307073(A), Duncan, J., September 21, 2010. 295 N.S.R. (2d) 22; 2010 NSSC 349; **S616/14** ■ The defendant appealed his conviction for impaired driving after another driver observed him travelling in the wrong lane over a bridge and contacted the police. *Held,* appeal dismissed; despite the trial judge's misapprehension of some facts and certain of the evidence, if looked at in isolation, not being compelling evidence of impairment, the defendant's crossing the bridge in the wrong lane and failing to stop at a stop sign or after the officer indicated his pursuit, together with evidence of alcohol consumption and physical indicia of impairment could reasonably lead to an inference that he was impaired at the time he was operating the vehicle. Although the evidence relied upon by the defendant provided some alternate explanations for individual pieces of evidence, it simply spoke to the degree of impairment, not the existence of impairment.

CRIMINAL LAW – Impaired driving – care or control *R. v. Slaunwhite,* No. 1884428; 1884429, Chisholm, J.P.C., December 21, 2010. 2010 NSPC 71; **M23** ■

CRIMINAL LAW – Impaired driving – proof of service of notice of intention to produce certificate of qualified technician *R. v. Veinot,* C.R. Bwt. No. 326416, Pickup, J., December 14, 2010. 2010 NSSC 454; **S620/18** ■

CRIMINAL LAW – Sentencing – aggravated assault and assault with a weapon *R. v. Roach,* C.R.H. No. 324726, Bryson, J., October 13, 2010; October 6, 2010 (orally). 295 N.S.R. (2d) 211; 2010 NSSC 370; **S618/1** ■ The complainant testified that after allowing his son's friend and two other people to enter his home, one of the persons (the defendant) 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 defendant was convicted of two counts of aggravated assault, assault with a weapon, unlawful confinement, uttering a threat and failing to keep the peace. *Held,* defendant sentenced to ten years on the aggravated assault charge, five years on each count of assault with a weapon, three years on the unlawful confinement charge, two years on the uttering a threat charge and three months on the charge of failing to keep the peace, to be served concurrently. Aggravating factors included that the complainant was victimized in his own home by a stranger; the complainant's extension of hospitality and trust had been betrayed; the complainant was an older man who presented no threat to the defendant; this was a psychologically cruel attempt to terrorize the complainant; the violence and injuries inflicted were prolonged and painful and resulted in permanent scarring; the experience appeared to have had a serious psychological impact on the complainant; the unlawful confinement occurred in the complainant's home while it was occupied by him and the defendant was on release with respect to another matter.

CRIMINAL LAW – Sentencing – armed robbery *R. v. Brooks,* C.R.H. No. 325406, Kennedy, C.J., January 17, 2011. 2011 NSSC 64; **S624/8** ■

CRIMINAL LAW – Sentencing – break, enter and breach of probation, theft *R. v. Robson,* No. 2253053; 2253054; 2253057; 2253058, Atwood, J.P.C., December 14, 2010. 2010 NSPC 76; **M23** ■

CRIMINAL LAW – Sentencing – break, enter and theft *R. v. Davidson,* No. 2210542; 2217207; 2217208, Atwood, J.P.C., March 21, 2011. 2011 NSPC 14; **M23** ■

CRIMINAL LAW – Sentencing – failure to stop at the scene of an accident *R. v. Foley,* Cr.R.A.D. No. 316081, MacAdam, J., December 9, 2010. 296 N.S.R. (2d) 267; 2010 NSSC 449; **S620/13** ■ The defendant, who had left the scene after his vehicle struck a horse-drawn wagon and went to see his girlfriend before turning himself in to the police, was convicted of failing to stop at the scene of an accident. The Crown argued that the fact that he could have been charged with either or both of dangerous driving or criminal negligence causing death should be considered an aggravating factor. *Held,* defendant sentenced to one year of imprisonment, to be followed by one year of probation; three-year driving prohibition imposed. The court would not speculate about additional charges that could have been laid, as it was in the Crown's discretion to decide what charges to lay. Aggravating factors included that the defendant was aware that his vehicle did not

have properly operating headlights and did not turn himself in and acknowledge his involvement in the accident at the first opportunity and his prior criminal record. In determining whether an office is a "serious personal injury offence", the court found that, on a charge under s. 251(1.3)(b), the conduct constituting the offence included the original accident, not simply leaving the scene, as it was the accident, itself, that endangered or was likely to endanger the victim's life or safety and, as such, a conditional sentence was unavailable here.

CRIMINAL LAW – Sentencing – manslaughter *R. v. Timmons,* PtH. No. 319272; 312647, Bourgeois, J., December 15, 2010; September 2, 2010. 296 N.S.R. (2d) 200; 2010 NSSC 456; **S620/25**

■ A group of young people, including the two defendants, attended at a residence to purchase alcohol. When the door was not immediately opened, one person in the group kicked it in and assaulted the 70-year-old occupant of the home. The first defendant ripped the phone out of the wall while the second defendant went to the fridge and took some alcohol. Other individuals in the group also struck the man, who had a pre-existing medical condition that contributed to his later death from internal bleeding. Both defendants, who were drunk at the time, pled guilty to manslaughter. Both had prior youth records, with the second defendant being on probation at the time of the incident. One of the issues involved in sentencing was whether they had committed a "serious personal injury" offence. *Held,* first defendant sentenced to three-and-one-half years' imprisonment; second defendant sentenced to three years' imprisonment. Although the court was not convinced that a conditional sentence was automatically precluded for the offence of manslaughter due to the 2007 amendments to the *Criminal Code*, the definition of a "serious personal injury" was met in this case. Although neither defendant had participated in the actual physical assault and events had occurred quickly, both had the opportunity to choose not to enter the home and to just walk away. Neither defendant acted as a bystander but each chose to participate by entering the home and removing property that did not belong to them.

CRIMINAL LAW – Sentencing – possession for the purpose of trafficking cocaine and marijuana *R. v. Banfield,* C.R.H. No. 301471, Hood, J., February 3, 2011. 2011 NSSC 56; **S624/5** ■

CRIMINAL LAW – Sentencing – robbery with violence, serious personal injury offence *R. v. Connors,* No. 2213633; 2180292, Ross, J.P.C., October 19, 2010. 295 N.S.R. (2d) 271; 2010 NSPC 63; **M22**

■ The defendant, who had no prior record, pled guilty to robbery with violence after two young persons were stopped by a group of youth, who restrained them and searched their pockets for money. One of the complainants was struck in the face and had her hair pulled. The defendant claimed to be remorseful and to have severed her ties with the others who had participated in the robbery. At issue was the appropriateness of a conditional sentence. *Held,* defendant sentenced to two years imprisonment; it did not matter that the offence was at the lower end of the scale, as it fell within the definition of a "serious personal injury offence" in s. 752 and, thus, was excluded from consideration for a conditional sentence.

CRIMINAL LAW – Sentencing – time served, controlled drug offence *R. v. Beals,* Cr.H. No. 320467, Cacchione, J., January 19, 2011. 2011 NSSC 17; **S622/25** ■

CRIMINAL LAW – Sentencing – trafficking in cocaine *R. v. Tolliver,* C.R.H. 320705, Kennedy, C.J., February 4, 2011. 2011 NSSC 54; **S624/3** ■

CRIMINAL LAW – Sexual assault – interim release pending appeal *R. v. M. (E.F.),* C.A.C. No. 333361, Fichaud, J.A., October 8, 2010. 295 N.S.R. (2d) 179; 2010 NSCA 77; **S617/1** ■ The defendant, convicted of 13 counts of sexual abuse, applied for interim release pending appeal. The Crown argued that he was a flight risk based on the fact that he had been extradited from India for his trial and had few remaining connections to Nova Scotia. *Held,* application for interim release granted with the defendant subject to full house arrest, to have his bank accounts frozen, possess no passport and provide a mortgage on his property in addition to the security already pledged. When the defendant left Canada, there were no charges, police complaints or allegations against him; he had not left the country as a fugitive and it was his right to contest the extradition process. He had abided by all conditions when free on a recognizance for over one year prior to trial and there was little risk that he would reoffend. The fact that the defendant's offences were reprehensible was not reason to deny the application.

■ DAMAGE AWARDS

DAMAGE AWARDS – Personal injuries – action dismissed, causation and credibility *Kremer v. Walker,* Hfx. No. 298906, Coady, J., November 30, 2010. 2010 NSSC 443; **S622/29** ■

DAMAGE AWARDS – Personal injuries – appeal allowed and remitted to trial judge *Gillis v. MacKeigan, Jr.,* C.A. No. 328060, Farrar, J., December 10, 2010. 2010 NSCA 101; **S617/28** ■ The plaintiff suffered injuries to his pelvis, hip and fractured his hand in a motor vehicle accident. He appealed from the determination that his injury was a "minor injury" within the meaning of the *Insurance Act*. *Held,* appeal allowed; matter remitted to the trial judge for an assessment of damages using the proper interpretation of the *Insurance Act* and the regulations. The trial judge mistakenly focused his analysis solely on the injuries excluded from the definition of "personal injury" in s. 2(1)(d) of the Regulations and, finding that the plaintiff suffered from chronic pain that did not meet the criteria set out in s. 2(1)(d)(ii), concluded that the injury, not being excluded, was a minor injury. The analysis cannot end simply because a plaintiff does not fall into one of the categories of excluded injuries; the court must go on to determine whether the injuries resulted in a permanent serious impairment of an important bodily function caused by a continuing injury, which is physical in nature and does not resolve within 12 months following the accident.

DAMAGE AWARDS – Personal injuries – permanent serious impairment of important bodily function *Gillis v. MacKeigan, Jr.,* Syd. No. 262862, Edwards, J., March 28, 2011; March 9, 2011 (orally). 2011 NSSC 123; **S625/28** ■

■ DAMAGES

DAMAGES – Assault – post-traumatic stress disorder, severe burns *Tomah et al. v. Sylliboy et al.,* No. 195115, MacLellan, J., November 30, 2010. 2010 NSSC 439; **S620/11** ■ The defendants approached the plaintiff, doused her with gasoline, pinned her down and lit her on fire. They then followed her into her house, where they prevented her from using the shower to put out the flames. Three of the plaintiff's children witnessed the attack. She suffered third-degree burns to her chest, neck and upper arms, resulting in excruciating pain; was placed in a coma for two days; underwent 18 surgeries, including numerous skin grafts; developed infection in the grafting site; was hospitalized

for ten weeks; wore burn garments for two-and-one-half years; was covered in scars on her face, neck, arms and chest; and developed post-traumatic stress disorder, with ongoing nightmares, anxiety, depression and insomnia. *Held,* plaintiff awarded the sum of $150,000 for general damages; $30,000 for aggravated damages and $50,000 for diminished earning capacity; plaintiff's claim for punitive damages dismissed as the defendants' criminal sentence was an appropriate punishment.

DAMAGES – Employee activity – liability *Sunshine Driveway Sealers v. Grant Gosbee,* Claim No. 339136, Slone, Adjudicator, January 24, 2011. 2011 NSSM 10; **SmCl17/26** ■

DAMAGES – Liability – of subcontractor, window installation *Dennis v. Sears Canada,* Claim No. 331337; 338427, Slone, Adjudicator, February 7, 2011. 2011 NSSM 8; **SmCl17/24** ■

DAMAGES – Negligence – damage to water main when digging monitoring wells *Halifax Regional Water Commission v. Environmental Solutions Remediation Services,* S.C.C.H. No. 329791, Parker, Adjudicator, December 17, 2010. 2010 NSSM 77; **SmCl17/17** ■

DAMAGES – Negligent misrepresentation – agreement of purchase and sale, employment opportunity *Smith v. Union of Icelandic Fish Producers Ltd.,* S.Y. No. 5889, Haliburton, J., March 31, 2010. 296 N.S.R. (2d) 8; 2010 NSSC 396; **S618/30** ■

DAMAGES – Nuisance – sewage treatment plant, appeal *Halifax (Regional Municipality) v. Willis,* C.A. No. 318258, Oland, J.A., October 14, 2010. 295 N.S.R. (2d) 190; 2010 NSCA 76; **S617/5** ■ A sewage treatment plant emitted odours frequently over a 18-year period. The plaintiff's home and farm neighboured the plant and he was frequently disturbed by the often wretched odours. He successfully brought an action in nuisance against the municipality and was awarded damages in the amount of $55,000. The court found that considering the type and severity of harm, the character of the locale and the utility of the defendant's conduct, the plant interfered substantially and unreasonably with his use of his land. Statutory immunity required proof that production of the odours resulted from the only treatment method that was practically feasible, which was not the case. The municipality appealed. *Held,* appeal dismissed; the trial judgment is varied to reflect the appropriate calculation of prejudgment interest on the damage award. A review of the decision showed that the trial judge was very much aware of the factors to be considered in determining whether the plant constituted a nuisance and only after identifying and weighing those factors did he find that the sewage plant substantially and unreasonably interfered with the plaintiff's use of property. Although the plant was conventional at the time it was installed, this did not prove that it was the only practically feasible method at that time or that it was practically impossible to avoid the odours by the use of that system or any other. There was no legal principle suggesting that an award of damages should be limited to that period from when notice was first given to when the nuisance ceased or that a cause of action does not arise until a defendant, who has created the nuisance, has knowledge of it.

DAMAGES – Renovations – failure to mitigate *Lee v. All Tech Ltd.,* Claim No. 335916, Slone, Adjudicator, October 28, 2010. 2010 NSSM 74; **SmCl17/13** ■

■ EMPLOYMENT LAW

EMPLOYMENT LAW – Breach of contract – negligent misrepresentation, constructive dismissal, damages *Carrigan v. Berkshire Securities Inc.,* Hfx. No. 194833, Murphy, J., October 15, 2010. 296 N.S.R. (2d) 42; 2010 NSSC 373; **S618/4** ■ The plaintiff, who was employed as the defendant's regional director, chose to be compensated based on an associate model whereby he personally incurred the expenses associated with establishing and operating regional offices, including the costs of recruiting other financial advisors and received part of the commissions generated by those advisors. He chose this model on the basis that, even though it carried more risk, it was expected to yield better returns. Three years later, the defendant eliminated the regional director structure and took away the plaintiff's duties outside Halifax. The Halifax branch was made a corporate model office, which limited the plaintiff's compensation to only commissions generated by his personal production and a small portion of commissions from the other financial advisors in the office. The plaintiff continued to work under this model for another year while the parties negotiated his compensation resulting from the change and then relocated his employment, claimed constructive dismissal and sought compensation by way of repayment of all the expenses he had incurred as a regional director, as well as "reliance damages" for lost production, based on the assumption that the assets he personally administered for clients would have continued to grow at the same rate he had experienced during his final 12 months with his pervious employer. Instead of paying "reliance damages", the defendant paid him compensation in the amount of $100,000. *Held,* plaintiff's claim dismissed; he had already received more than the court would have awarded as the reduction in his income was less than $5,000 per month and the reasonable notice period was less than 20 months. The elimination of the plaintiff's duties outside Halifax and the imposition of the corporate model constituted a constructive dismissal and his acceptance of the compensation payments did not result in him foregoing his right to pursue such a claim; however, he was entitled to recover "expectancy damages", calculated as the amount required to put him in the position he would have been in had his employment continued under the associate model, to be assessed as payment of remuneration for a reasonable notice period. The defendant had not made any negligent misrepresentations as any such representations must relate to an existing fact, not a promise as to future conduct and there was no breach of any "duration term" in the employment contract as the agreement did not provide that the plaintiff would act as the regional director for a sufficient time to profit from his personal investment in developing regional offices.

EMPLOYMENT LAW – Wrongful dismissal – immunity from legal process *Amaratunga v. Northwest Atlantic Fisheries Organization,* Hfx. No. 267432, Wright, J., September 30, 2010. 295 N.S.R. (2d) 331; 2010 NSSC 346; **S616/25** ■ The plaintiff was summarily dismissed from his 17-year employment as the deputy executive secretary of a fisheries organization. The employer, an international organization headquartered in Nova Scotia, challenged the court's jurisdiction to hear his wrongful dismissal claim on the basis that it had immunity from every form of legal process "to such extent as may be required for the performance of its functions", arguing that this immunity extended to any activity "related to" the functions of the organization. *Held,* the employer is not immune from the plaintiff's suit for wrongful dismissal. The employer failed to establish that there existed a rule of customary international law requiring immunity from legal process in this situation, with the result that its sole source

of immunity was the parliamentary Order-in-Council and, on the court's interpretation of that document, it was unable to prove that immunity from this legal process was required for the performance of its functions. This interpretation was based upon the principle that the Order-in-Council should be interpreted in a manner consistent with Canada's obligations under international treaties, which include recognition of the right of every person to a fair hearing of a competent, independent and impartial tribunal established by law, and on the plain and ordinary meaning of the word "required". The court reviewed the law concerning immunity granted to international organizations and the distinction between state and legislated immunity.

EMPLOYMENT LAW – Wrongful dismissal – judicial review *Miners' Memorial Manor v. International Union of Operating Engineers, Local 968B et al.,* No. 317814, Duncan, J., December 29, 2010. 2010 NSSC 464; **S622/1** ■ The respondent union represented a grievor who was dismissed by her employer, the applicant nursing home, for having abused residents. The collective agreement contained what was arguably a specific penalty clause that allowed the applicant to dismiss any employee found to have stolen or abused residents. An arbitrator reinstated the grievor, and substituted a lesser penalty for what he found was an unjust dismissal. He agreed there may have been some abuse but found that it wasn't significant enough to meet what he claimed was a higher threshold of proof where allegations of abuse are concerned. The applicant sought judicial review, arguing the arbitrator erred: in determining the applicable standard of abuse and by concluding he had the authority to impose a different penalty. They pointed to the collective agreement and s.43 of the *Trade Union Act* ("the Act"), which prevents an arbitrator from varying a penalty given pursuant to a specific penalty clause. The applicant also claimed there was no procedural fairness due to the arbitrator's refusal to allow them to cross-examine the grievor in relation to similar past conduct. *Held,* the arbitrator's decision is set aside; matter remitted for rehearing before a new arbitrator. The arbitrator's authority to vary the sanction in the face of a specific penalty clause is a true question of jurisdiction, a standard of correctness applies. The arbitrator gave no reasons for assuming jurisdiction, and made no mention of s. 43. He was obliged to consider whether the clause in issue was indeed a specific penalty clause to which s. 43 applies; his failure to do so before assuming jurisdiction was an error. Also subject to a standard of correctness is the fact the arbitrator used an incorrect test by requiring a higher standard of proof because the claim involved an allegation of abuse. His reasons show that he was looking for the applicant to provide clear/cogent/conclusive evidence as opposed to proof on a balance of probabilities and, by doing so, he was in error. As for his refusal to allow cross examination in relation to the grievor's past conduct, the allegations of past abuse wasn't documented in her disciplinary file, nor did she put her past performance into issue during the hearing. This was a decision the arbitrator had the discretion to make and he did not breach natural justice by making it. Providing a "full opportunity" to present evidence does not mean an uncontrolled or unfettered right to lead evidence.

■ EVIDENCE

EVIDENCE – Admissibility – of blood samples *R. v. MacDougall,* No. 1998227; 1998228; 1998229; 1998230; 1998231; 1998232; 1998233, Ross, J.P.C., September 20, 2010. 2010 NSPC 55; **M22** ■ The accused was charged with impaired driving causing death and driving with a blood alcohol content over the legal limit following a single vehicle accident. He contested the validity of the demand for a blood sample on the basis that the demand had not been made "as soon as practicable" and the officer who made the demand did not have reasonable grounds to do so. He also contested the seizure and admissibility of a toxicology report created by the hospital. *Held,* application to exclude evidence dismissed. There was nothing inappropriate in the officer deferring the demand until after the accused arrived at the hospital considering he had suffered a serious injury requiring medical treatment. In a situation where the officer had attended the scene and had an appreciation of the road conditions and overall circumstances of the accident, he was entitled to consider that there was no obvious reason for the accident other than driver error, the smell of an alcohol on the accused's breath and the unopened bottles of beer in the vehicle in assessing reasonable and probable grounds. The doctor was not acting under police direction when she took an extra blood sample and there was no breach of her duty of confidentiality as she had not reported the results of the analysis to the officer, but merely the fact that an analysis had been done. There is no requirement for an issuing judge to meet face to face with the applicant police officer; in this case, the applicant and the judge had dealt with each other through a member of the court staff, which constituted an appearance before the issuing judge. It was not necessary to include the results of the analysis of the police samples in the Information to Obtain and there was nothing preventing the Crown or police from obtaining relevant evidence, even if it resembled other evidence already obtained. Based on the accused's comments to the 911 operator and his later queries concerning his passenger (before he submitted to the blood demand), it was clear that he had a sufficient understanding of the seriousness of the situation and his own jeopardy when he waived his right to counsel.

EVIDENCE – Fresh evidence on appeal – new theory of the case *MacIntyre v. Cape Breton District Health Authority,* C.A. 317064, Oland, J.A., January 18, 2011. 2011 NSCA 3; **S621/7** ■ The appellant was an oral surgeon unable to work because of health problems. He claimed his problems stemmed from exposure to toxic heavy metals released into the air during renovations at the hospital where he used to work. His claim was dismissed at trial. The trial judge accepted he was presently disabled, but found he failed to prove heavy metals were released during the renovations or that they caused his medical condition. The appellant appealed both the dismissal of his claim and the provisional assessment of damages made at trial. He sought to introduce fresh evidence, and alleged the trial judge erred by: failing to find the burden of proof shifted to the respondent; applying the wrong test for causation; failing to address breach of contract and breach of statutory requirements, and to find the cause of his illness; admitting certain expert evidence; making several wrong findings of fact (including that the appellant didn't suffer from heavy metal toxicity); making an incorrect assessment of provisional damages; and allowing increased costs and costs of an expert report that was not relied upon much at trial. The proposed fresh evidence related to plaintiff's discovery, mid-way through trial, that toxic sewer gases were found at the hospital. *Held,* motion to allow fresh evidence dismissed; appeal dismissed; costs of $2,000 plus disbursements awarded to the respondent. The proposed fresh evidence relates to a whole new theory of the case (e.g., that these sewer gases caused the plaintiff's illness), which is not the purpose of fresh evidence. It is not relevant because it does not bear on the decisive issues relating to the claim of heavy metal toxicity; nor does it meet the test in the SCC case of *Palmer* (1980), as it was not discovered after trial and judgment. The plaintiff made a strategic decision at trial to not ask for an adjournment so as to minimize delay and must live with the consequences. As for the grounds of appeal: the trial judge did not err by weighing the evidence and deciding not to shift the burden to the defendants or draw an inference on causation; the trial judge didn't err by using the "but for" test and applying it to

his material findings of fact. The plaintiff has satisfied neither of the requirements to show the material contribution test should have been used, having failed to prove the breach released dust containing heavy metals or show he was exposed to an unreasonable risk of injury. In the context of the pleadings and counsels' submissions, it wasn't necessary for the trial judge to deal with the claim in contract separately from that in tort. He correctly applied the legal principles, determining the statutory breach alone did not establish negligence and moved on to consider causation. By doing so, he addressed the effect of that breach and committed no palpable and overriding error. Having decided the plaintiff's symptoms were not caused by the breach, it was not his job to determine what caused them. There is no evidence that the trial judge unduly or erroneously relied on a questionable expert report. There is no indication the trial judge's findings of fact, even that concerning the plaintiff's readiness to return to work, were wrong and unsupported by evidence. Having dismissed the appeal on the merits, it's unnecessary to decide whether the trial judge's provisional assessment of damages was wrong; and as for the cost award, there's no evidence the trial judge applied wrong principals of law, or made a decision so wrong that it amounts to a manifest injustice warranting appellate intervention. As for the award of $35,000 in relation to an expert report that was not relied upon much at trial, the trial judge only required the plaintiff to reimburse the defendant for a small portion of what it actually paid the expert. The question is whether it was reasonable for the expert to be retained, not whether his eventual report was relied upon in the end. There is no palpable or overriding error that would warrant intervention.

■ FAMILY LAW

FAMILY LAW – Appeals – application to dismiss for failure to perfect appeal *S. (S.) v. S. (D.) and Nova Scotia (Minister of Community Services),* C.A. No. 335120, Farrar, J.A., February 2, 2011. 2011 NSCA 14; **S621/16** ■

FAMILY LAW – Child Abuse Register – application to strike name from register *W. (K.R.M.) v. Nova Scotia (Minister of Community Services),* No. 09SB064844, Comeau, J.F.C., November 8, 2010. 297 N.S.R. (2d) 248; 2010 NSFC 27; **FC38** ■

FAMILY LAW – Child in need of protective services – appeal of permanent order dismissed *G. (J.) and G. (M.) v. Nova Scotia (Minister of Community Services),* C.A. No. 337122, Oland, J.A., February 18, 2011. 2011 NSCA 24; **S621/26** ■

FAMILY LAW – Child in need of protective services – application by grandparent for party status denied *M. (B.). v. Nova Scotia (Minister of Community Services) et al.,* F.N.G.C.F.S.A. No. 62376, Wilson, J.F.C., January 14, 2011. 297 N.S.R. (2d) 393; 2011 NSFC 1; **FC38** ■

FAMILY LAW – Child in need of protective services – application dismissed *Nova Scotia (Community Services) v. M. (C.) et al.,* No. 65623, Haley, J., March 17, 2011. 2011 NSSC 112; **S627/5** ■

FAMILY LAW – Child in need of protective services – permanent care and custody order *Nova Scotia (Minister of Community Services) v. H. (L.) et al.,* S.P.F.A.C.F.S.A. No. 065679; S.F.P.A.C.F.S.A. No. 068202, Legere-Sers, J., December 14, 2010. 2010 NSSC 452; **S620/19** ■

FAMILY LAW – Child in need of protective services – permanent care and custody order *Nova Scotia (Minister of Community Services) v. W. (S.) et al.,* S.F.H.C.F.S.A. No. 067471, Jollimore, J., January 5, 2011; December 31, 2010 (orally). 2010 NSSC 472; **S622/8** ■

FAMILY LAW – Child in need of protective services – permanent care and custody order *Nova Scotia (Minister of Community Services) v. H. (L.) and S. (B.),* No. 068217, Forgeron, J., January 28, 2011; January 21, 2011 (orally). 2011 NSSC 41; **S623/19** ■

FAMILY LAW – Child in need of protective services – permanent care and custody order *Mi'kmaw Family and Children's Services v. I. (C.),* S.F.S.N.C.F.S.A. No. 64474, Haley, J., January 26, 2011. 2011 NSSC 37; **S624/1** ■

FAMILY LAW – Child in need of protective services – permanent care and custody order *Nova Scotia (Minister of Community Services) v. C. (E.) and L. (J.),* S.F.H.C.F.S.A. No. 067086, O'Neil, J., February 8, 2011; December 30, 2010 (orally). 2010 NSSC 479; **S624/19** ■

FAMILY LAW – Child in need of protective services – permanent care and custody order *Nova Scotia (Minister of Community Services) v. D. (J.) et al.,* No. 061581, Haley, J., March 17, 2011. 2011 NSSC 113; **S627/6** ■

FAMILY LAW – Child in need of protective services – permanent care and custody order, no access *Nova Scotia (Minister of Community Services) v. R. (G.) et al.,* S.F.S.N.C.F.S.A. No. 70469, Forgeron, J., February 28, 2011. 2011 NSSC 88; **S625/2** ■

FAMILY LAW – Child in need of protective services – review of disposition order *Nova Scotia (Minister of Community Services) v. H. (K.) and G. (G.),* S.F.H.C.F.S.A. No. 055303, Dellapinna, J., March 25, 2011; October 27, 2010 (orally). 2010 NSSC 483; **S625/31** ■

FAMILY LAW – Child in need of protective services – review of temporary care order, permanent care and custody ordered *Nova Scotia (Minister of Community Services) v. W. (F.),* F.SB. No. 057662, Comeau, J.F.C., December 13, 2010. 2010 NSFC 32; **FC38** ■

FAMILY LAW – Child in need of protective services – shared custody with agencies involvement *Nova Scotia (Minister of Community Services) v. A. (J.) and R. (J.),* S.F.H.C.F.S.A. No. 067037, O'Neil, J., November 10, 2010; September 10, 2010 (orally). 2010 NSSC 419; **S619/14** ■ Parenting arrangements for the parties' four children (aged three to 10) was the issue in these parallel divorce/child protection proceedings that were heard together. The agency became involved in an effort to quell the acrimony following the parties' breakup. The mother claimed the father was abusive of her, but the allegations were never proven. He was diagnosed with bipolar disorder after the breakup and the evidence showed he had satisfactorily dealt with his issues. The children were living primarily with their mother, and the father now sought primary care. The agency supported the mother's plans. The parties agreed the children were in need of protection from a risk of emotional harm and sought the agency's continued involvement. *Held,* shared custody on a week on/week off basis, with continued agency involvement as per the parties' agreement. Divorce and disposition order granted; jurisdiction reserved to deal with any issues relating to child support, holiday access and the conditions sought under the child protection order.

FAMILY LAW – Child in need of protective services – substance abuse and domestic violence *Nova Scotia (Minister of Community Services) v. L. (N.) et al.,* C.F.S.A. No. 072248, Forgeron, J., January 27, 2011; January 21, 2011 (orally). 2011 NSSC 35; **S623/13** ■

FAMILY LAW – Child in need of protective services – temporary care and custody order with supervised access *Nova Scotia (Minister of Community Services) v. M. (J.),* S.F.S.N.C.F.S.A. No. 070478, Forgeron, J., December 1, 2010; November 25, 2010 (orally). 2010 NSSC 441; **S620/7** ■

FAMILY LAW – Common-law relationship – division of pension and property, spousal maintenance *Fougere v. Jessome,* S.F.H.M.C.A. No. 063544, Lynch, J., December 30, 2010. 2010 NSSC 469; **S622/3** ■ The parties, who were 60 and 56 when they met, lived in a common-law relationship for five years. At the time of trial, the applicant was 66 and the respondent 61. The respondent was the primary income earner throughout the relationship. The applicant at first contributed $400 per month to expenses, and had access to vehicles, trips and a credit card. When the respondent purchased a neighboring property midway through their relationship, the parties agreed to share future profits and the wife started contributing an extra $100 per month towards related expenses. When they met, the wife worked in retail and lived in co-op housing. After they started living together (in the respondent's home), she quit her job and devoted her time to making and selling jewelry and helping with renovations to the income property (painting, dealing with tenants). The applicant sought: a division of the respondent's pension for the time they were together; a share of equity in the income property; and spousal support. An interim order required the respondent to pay support of $400 per month. *Held,* the applicant is not entitled to a division of the respondent's pension. The parties kept their finances separate. There's no evidence the applicant contributed money to the pension, directly or indirectly. The applicant is entitled to a 25 per cent share of the equity in the income property. There's no need to consider the benefit she had from living so cheaply in the respondent's home. Her claim is in relation to an income property she did not live in. The money she owes on the respondent's credit card will be deducted from her share, but there will be no deductions for the benefits she received during the relationship. Those were part of the parties' agreement about how their relationship would be conducted. The respondent will pay spousal support of $450 per month for an indefinite period of time. The spousal support guidelines would suggest this award is in the mid-range for a relationship of this nature. While it was short, there was a pattern of dependance established; the applicant has need and the respondent has an ability to pay. The respondent was less than credible in his testimony. Where the evidence conflicted, the applicant's version was accepted.

FAMILY LAW – Common-law relationship – length of relationship, division of assets and spousal support *Davis v. Munroe,* S.F.H.M.C.A. No. 67212, Ferguson, A.C.J., January 17, 2011. 2011 NSSC 14; **S622/20** ■

FAMILY LAW – Common-law relationship – unjust enrichment *Taylor v. Wanless et al.,* S.F.H.M.C.A. No. 060086, Jollimore, J., January 31, 2011. 2011 NSSC 25; **S623/11** ■

FAMILY LAW – Contempt – interpretation of a court order, or minutes of settlement / separation agreement *MacDonald v. Trenchard,* No. 1201-50701, O'Neil, J., March 14, 2011. 2011 NSSC 105; **S625/14** ■

FAMILY LAW – Contempt – of order to vacate and reimburse for respite care *Mason v. Lavers et al.,* Hfx. No. 311778, Duncan, J., March 9, 2011; February 15, 2011 (orally). 2011 NSSC 97; **S625/9** ■

FAMILY LAW – Corollary relief judgment – contempt *Stephen v. Patriquen,* No. 1201-60795, Legere-Sers, J., March 28, 2011. 2011 NSSC 117; **S625/27** ■

FAMILY LAW – Costs – defamation action *Salman v. Al-sheikh Ali et al.,* Hfx. No. 256952, Hood, J., January 27, 2011. 2011 NSSC 30; **S623/28** ■ The defendants brought a successful non-suit motion after the plaintiffs closed their case. The result was the plaintiffs' defamation action was dismissed. It was clear after discoveries took place that, unless a witness recanted, the plaintiffs were never going to be able to prove their case. They chose to proceed anyway and the defendants felt this, and the plaintiffs' conduct during the trial (but outside of court) warranted an award of solicitor-client costs. The (now unrepresented) plaintiffs felt they should not be required to pay costs. *Held,* lump sum costs of $65,000 plus disbursements awarded to the Shahnins, representing a partial but substantial contribution to their actual costs, and $4,000 plus disbursements to the Al-Sheikh Alis (who were self-represented at trial) – all on a party-party basis. There are good reasons to depart from the tarriffs; costs calculated using them are insufficient. The amount involved should be calculated based on the rule of thumb that each day of trial represents $20,000 and using the number of days set for trial, not the number of day actually used before the non-suit motion was brought. Solicitor-client costs are not warranted. While the discovery evidence showed the action was futile, the plaintiffs could have proven their case if even one witness had recanted at trial. The plaintiffs' conduct was civil in court. Their claim was not brought for malicious or frivolous reasons; although it was not made out at trial, the test is not one of hindsight. The plaintiffs claimed little by way of damages, which is some evidence of their motive. Anger and high emotions are not sufficient, especially in a defamation case, to warrant solicitor-client costs.

FAMILY LAW – Costs – effect of offer to settle *Harrington v. Coombs,* S.F.H.P.A. No. 071113, Dellapinna, J., April 11, 2011. 2011 NSSC 141; **S627/21** ■

FAMILY LAW – Costs – exclusion of property from division *Brandon v. Brandon,* No. 1201-061257, Jollimore, J., Apirl 1, 2011. 2011 NSSC 128; **S627/9** ■

FAMILY LAW – Costs – mixed success *Williams v. Williams,* No. 1201-62581, Gass, J., November 3, 2010. 2010 NSSC 403; **S619/21** ■

FAMILY LAW – Custody and access – application for home study and children's wish report *Jarvis v. Landry,* S.F.H.F. No. 10960, Jollimore, J., March 24, 2011; March 21, 2011 (orally). 2011 NSSC 116; **S625/25** ■

FAMILY LAW – Custody and access – division of assets, spousal and child support *Walker v. Baker,* S.F.H.M.C.A. No. 057933, Dellapinna, J., November 30, 2010. 2010 NSSC 440; **S620/10** ■

FAMILY LAW – Custody and access – mobility, primary caregiver relocating *C. (K.) v. L. (J.),* No. 10Y070134; 08Y061231, Comeau, J.F.C., November 15, 2010. 2010 NSFC 29; **FC38** ■ The mother sought the court's permission to relocate to Saskatchewan with the parties' three-year-old son. The father sought joint custody and

to prevent the move. The mother agreed to stay in Nova Scotia if permission to move was denied. The mother and child currently lived with the child's maternal grandmother. The mother had other family members in Saskatchewan and felt her job prospects would be better there, although she hadn't spent much time looking – either in Nova Scotia or Saskatchewan. Desperate to move, she had offered access on a three-month rotating basis until the child reached school age. The evidence showed the child had a very close relationship with his paternal grandmother (in Nova Scotia), who was granted leave to apply for access and also opposed the move. *Held,* permission to relocate to Saskatchewan denied. The parties will continue to share joint custody. Although it wasn't explicitly set out in the previous order, it was implied and employed in practice. Neither parties' preference regarding the move should be given a greater weight. The mother's access proposal is not in the best interests of such a young chid, who requires shorter, more frequent visits. The mother's plan lacks specifics and certainty. Although there's family in Saskatchewan, the child doesn't know them. The grandmothers have been an enormous source of support to the parents and the child; he knows them well. The father is expected to share his access times with the paternal grandmother since they live together, and the order will explicitly allow her other access as agreed, as well the opportunity to babysit when either party needs childcare.

FAMILY LAW – Custody and access – mobility, primary caregiver relocating *N. (Y.) v. M. (D.),* No. 1201-054794, Legere-Sers, J., February 25, 2011. 2011 NSSC 81; **S625/1** ■

FAMILY LAW – Custody and access – sole custody to mother, appeal dismissed *Gill v. Hurst,* C.A. No. 318440, Hamilton, J.A., December 9, 2010. 2010 NSCA 98; **S617/25** ■

FAMILY LAW – Custody – appeal dismissed *Hubley v. MacRae,* C.A. No. 333519, Hamilton, J.A., March 1, 2011. 2011 NSCA 25; **S621/28** ■

FAMILY LAW – Custody – application to vary parenting plan denied *G. (N.R.) v. G. (S.R.),* No. 07Y053247, Comeau, J.F.C., January 25, 2011. 2011 NSFC 4; **FC38** ■

FAMILY LAW – Custody – joint custody *A. (J.) v. R. (J.),* S.F.H.D. No. 062365; 1201-063236, O'Neil, J., November 10, 2010; September 10, 2010 (orally). 2010 NSSC 420; **S619/15** ■ Parenting arrangements for the parties' four children (aged three to 10) was at issue in these parallel divorce/child protection proceedings. The agency became involved in an effort to quell the acrimony following the parties' breakup. The mother claimed the father was abusive, but the allegations were unproven. He was diagnosed with bipolar disorder after the breakup and the evidence showed he had satisfactorily dealt with his issues. The children were living primarily with the mother, and the father sought primary care. Historically the mother was home full time, but she soon planned a return to school and was focused on her social life. The agency supported the mother's plan. The parties agreed the children were in need of protection and sought the agency's continued involvement. *Held,* shared custody on a week on/week off basis, with continued agency involvement as per the parties' agreement. Although there's an excessively high level of conflict here, it isn't an obstacle to shared parenting. Much of the conflict appears to stem from the uncertainty over parenting arrangements. The status quo hasn't worked, and is changing at any rate (due to the mother's change in focus). The father is more child-centered than the mother now, but both are loving, capable parents. Their competition for custody has likely inflamed the conflict between them. A week on/week off arrangement will allow the mother time/freedom to pursue an education/social life, and ensure both parents are securely and actively involved, which should lessen the stress on each. Divorce and disposition order granted, reserving jurisdiction to deal with child support, holiday access and anything relating to the conditions sought under the child protection order.

FAMILY LAW – Custody – mobility and parenting schedule, RESP contributions, division of tax debt *Hillier v. Hillier,* No. 1201-062273, Legere-Sers, J., November 23, 2010. 2010 NSSC 429; **S619/27** ■

FAMILY LAW – Custody – primary care, motion to stay order dismissed *Godin v. Godin,* C.A. No. 340365, Farrar, J.A., February 11, 2011. 2011 NSCA 19; **S621/21** ■

FAMILY LAW – Custody – shared parenting, best interests of child *Marchand v. Marchand,* No. 1201-062319; S.F.H.D. No. 056429, MacDonald, B. J., April 7, 2011. 2011 NSSC 138; **S627/15** ■

FAMILY LAW – Divorce – custody, access, child support, division of assets and debts *M. (M.D.) v. M. (D.T.),* No. 1207-003205; 059646, Boudreau, J., January 6, 2011; December 6, 2010 (orally). 2010 NSSC 474; **S622/10** ■

FAMILY LAW – Divorce – custody and access *Langmead v. Langmead,* S.F.H.M.C.A. No. 067776, Jollimore, J., February 18, 2011; August 13, 2010 (orally). 2010 NSSC 481; **S624/20** ■

FAMILY LAW – Divorce – custody and access, matrimonial property, division of assets and debts, spousal and child support *Trzcinski v. Robitaille-Trzcinski,* No. 1201-064069, Legere-Sers, J., November 24, 2010. 2010 NSSC 415; **S620/4** ■

FAMILY LAW – Divorce – division of pension, spousal and child support, shared parenting *Whalen v. Whalen,* No. 1201-063785, O'Neil, J., November 22, 2010. 2010 NSSC 432; **S619/28** ■ The divorcing parties were together for 15 years and had one child who was now almost 16. The father was retired from the military and receiving a pension as well as working. He claimed the parties were in a shared custody arrangement; the mother disagreed. She sought the table amount of support, a division of the father's military pension predating their relationship by eight years, and spousal support. The father argued income should be imputed to the mother, who worked at a bar, since (he claimed) she didn't report all of her tips on her income tax return. *Held,* divorce granted. The court accepts the parties are in a shared custody arrangement. They appear to agree time should be calculated by counting hours as opposed to days. In this situation, it's appropriate. The child is 16. He's very involved in extra-curricular sports, where the father takes an active role. Some school time should be counted as neutral or credited to the father, even when the child is dropped off in the morning to get ready for school at the mother's house – especially given his age and the fact he spends most weekends with his father. The father's calculations credit the mother with time on the same basis as he credits himself, making them fair. The evidence seems to support that the father spends even more time with the child than reported. The pension should be divided equally from the date of the father's employment (which predates the relationship by eight years) onward. This was a medium-to-long-term relationship and there is nothing other than the date/manner of acquisition of the

asset warranting anything other than an equal division. Income will be imputed to the mother, given evidence her tips are $750 more per month than reported. This figure will be grossed up to recognize its tax-free nature when taking into account child and spousal support. The father's employment and pension income will be used to calculate child support, which will be in the set-off amount of $105 per month after the parties' house sells. Until that time, or until the mother receives her share of the pension, the father will pay the mortgage and expenses on the home. Only the father's employment (not pension) income will be used to calculate spousal support. Although the parties' employment incomes are nearly equal after taking into account the father's child support set-off payments, the mother is still entitled to spousal support of $50 per month, to be reviewed in just over a year. Historically, the husband was the primary income earner and the wife was hardworking and motivated but suffered from debilitating health problems and was still adjusting to the change in her financial circumstance.

FAMILY LAW – Divorce – interim spousal support *Foster-Jacques v. Jacques,* No. 1201-064463; S.F.H.D. No. 069582, MacDonald, B. J., March 29, 2011. 2011 NSSC 124; **S627/2** ■

FAMILY LAW – Divorce – parenting arrangement, child support and division of assets and debts *Snelgrove v. Snelgrove,* No. 1201-064220; S.F.H.D. No. 68230, Ferguson, J., March 3, 2011. 2011 NSSC 77; **S625/10** ■

FAMILY LAW – Divorce – severance of divorce and corollary relief hearings *Al-Khouri v. Al-Khouri,* No. 1206-6002, Forgeron, J., March 25, 2011. 2011 NSSC 122; **S625/26** ■

FAMILY LAW – Divorce – sole custody to mother, supervised access to father *U. (M.) v. U. (A.),* S.F.S.N.H. No. 1201-064202, Wilson, J., December 30, 2010. 2010 NSSC 470; **S622/4** ■

FAMILY LAW – Divorce – spousal and child support *Lilly v. Lilly,* No. 1201-063739, O'Neil, J., February 9, 2011. 2011 NSSC 61; **S624/13** ■

FAMILY LAW – Divorce – spousal and child support, division of assets *Cove v. Cove,* No. 1201-063292; S.F.H.D. No. 62705, Dellapinna, J., December 10, 2010. 297 N.S.R. (2d) 74; 2010 NSSC 407; **S620/14** ■

FAMILY LAW – Divorce – spousal support claim not barred by separation agreement *Peraud v. Peraud,* No. 1201-064299, Jollimore, J., January 6, 2011. 2011 NSSC 1; **S622/6** ■ The parties cohabited for 17 years, 13 of which they were married. They had no children together, but the wife had spent several years helping to raise the husband's son from a previous marriage. Throughout the relationship, the husband was the primary breadwinner. Since 1996 she worked with the husband. Upon separation they, without the benefit of any legal advice, prepared a separation agreement that provided no claim would be made for spousal support for so long as the wife remained employed by the husband's business. She released any interest in her business in exchange for the husband releasing her from any responsibility for its debts. She had access to the company's financial records and knew its expenses exceeded its income. The lawyer who prepared the agreement (but advised neither party) made notes to the effect that the wife was okay with the agreement because she was confident her income was guaranteed one way or the other. What she didn't appear to realize, and what was never pointed out to her, is that the agreement failed to protect her in the event the business failed. When it did, the husband was able to find a new job immediately, at a comparable rate of pay ($54,000 per annum). The wife was not. While she made little effort to find work, at 56 with some minor health problems (for which very little supporting evidence was provided), she wasn't necessarily capable of earning much more than she did and certainly not as much as she had earned while employed by the husband. She sought spousal support and claimed the husband's poor business decisions caused the once viable business to fail. *Held,* spousal support payable to the wife in the amount of $1,100 per month, with no termination date. Undergoing a *Miglin* analysis, the court found there was a fundamental flaw in the separation agreement's negotiation process; there was a power imbalance between the parties, and it wasn't compensated for by the provision of independent legal advice. For years, the wife was entirely financially dependent on the husband and his business decisions. Her financial self-sufficiency on separation remained tied to her husband's successful operation of the business. *In obiter*, the court found the substance of the agreement failed to recognize the wife's long-term financial dependance on the husband, whether she could achieve self-sufficiency on her own and how long it would require. It was not in compliance with the objectives under the *Divorce Act*. The economic disadvantages of the marriage weighed more heavily on her. She is entitled to support, has need and the husband has an ability to pay.

FAMILY LAW – Interim parenting arrangement – primary care to father, best interests of the children *Young v. McVey,* No. 74207, Forgeron, J., February 21, 2011. 2011 NSSC 78; **S624/21** ■

FAMILY LAW – Matrimonial property – matrimonial assets, division of assets and spousal support *Sheehan v. Sheehan,* No. 1201-062713; S.F.H.D. No. 059102, MacDonald, B. J., November 16, 2010. 2010 NSSC 428; **S619/19** ■ The parties were married for 16-and-a-half years, and had two children (now ages 16 and 11). Their matrimonial home was landlocked. When it was inherited (by the wife from her father), it came with a licence to use a roadway over a neighbouring property for access. The licence expired and the home's value dropped sharply. The husband claimed the wife let it lapse, and sought to be compensated for the value of the home with the licence for access. The evidence showed both parties contributed all of their income to the family. The wife sought an unequal division of the home since it was willed to her by her father. She also sought spousal support. The husband sought an equal division (based on an inflated value for the home), and disputed the wife's entitlement to spousal support. *Held,* the matrimonial home's value is the current fair market value based on the home being landlocked. The evidence shows the wife is doing all that she can to secure a new licence for access. She should not be penalized for the fact that it lapsed – an event out of her control. Assets, including the home, are to be divided equally. Looking at the facts as a whole, it is not unfair or unconscionable to do so. Both parties contributed to the marriage differently, but equally. If the wife can't afford the equalization payment, the home must be sold with the equalization payment to be recalculated based on the sale price. The wife's entitlement to spousal support is on a non-compensatory basis. There was insufficient evidence to show she was in fact disadvantaged by the marriage; however, even with child support, she has insufficient income to meet both her and the children's reasonable needs. Her budget is "bare bones" and the court should not determine her need only in light of her frugality. Indefinite spousal support awarded in the amount of $500 per month, which will essentially equalize the parties' net disposable income and is in the upper range suggested by the spousal support guidelines.

FAMILY LAW – Matrimonial property – matrimonial assets, division of assets, validity of separation agreement *Andrist v. Andrist,* No. 1204-005025; Ken. No. 064361, Coughlan, J., March 3, 2011. 2011 NSSC 58; **S625/19** ■

FAMILY LAW – Matrimonial property – unequal division and foreign property *Drozdowski v. Drozdowska,* S.F.H.M.C.A. No. 067442, Gass, J., March 3, 2011. 2011 NSSC 89; **S625/6** ■

FAMILY LAW – Parenting order – application to vary *Lunn v. Giffin,* No. 1201-057127, Jollimore, J., November 16, 2010. 2010 NSSC 413; **S619/23** ■

FAMILY LAW – Parenting order – application to vary *Harrison v. MacKinnon,* S.F.H.F. No. 11137, Jollimore, J., December 9, 2010; October 18, 2010 (orally). 2010 NSSC 445; **S620/15** ■ The mother applied to vary the parties' shared parenting arrangement for their 13-year-old son, seeking primary care. The son wanted to spend more time with her and resisted spending time with his father; an interim order provided for him to choose to have extra parenting time with either parent. Since the original shared parenting order was issued, the father's marriage ended and he had moved in with a new partner and her daughter. There was some evidence the son was exposed to a lot of turmoil while the father's marriage was ending. The mother and father had totally different parenting styles. At the mother's house, the child: had a television and computer in his bedroom (unlimited use); set his own bedtime; stayed home from school frequently; and was paid generously for any chores he did. The father's home was more structured, with set expectations, chores and bedtimes. TV and computer use were supervised and limited. A children's wish report indicated the child said he wanted to live with his mother, but couldn't articulate exactly what he wanted and the reasons for it. The author of the report felt he lacked the emotional maturity to decide where he should live. *Held,* application for primary care dismissed; the existing shared custody arrangement will continue, with the interim order modified so that the child no longer gets to decide when/if he spends extra time with each parent. The father's move to a new home with a new partner was a material change in circumstances (the other factors raised by the mother were not), but not one that warrants a major change to the existing order. Each parent is a capable parent and has something different to offer. The child may spend extra, unscheduled time with either parent, but this will be decided in consultation with both parents and their mutual agreement. Extra access can only happen for one day at a time and for a maximum of three times per month, which will ensure the child maximizes his contact with both parents.

FAMILY LAW – Parenting order – application to vary *Seguin v. MacDonald,* S.F.H.F. No. 13113, Jollimore, J., January 26, 2011. 2011 NSSC 26; **S623/7** ■

FAMILY LAW – *Partition Act* – sale of matrimonial home and occupational rent *Soubliere v. MacDonald,* S.F.H.P.A. No. 068566, Jollimore, J., March 14, 2011. 2011 NSSC 98; **S625/15**

FAMILY LAW – Procedure – costs, spousal support application *Peraud v. Peraud,* No. 1201-064299, Jollimore, J., February 24, 2011. 2011 NSSC 80; **S625/3** ■

FAMILY LAW – Settlement agreement – contested *Butler v. Mills,* No. 1201-063950, Gass, J., November 8, 2010. 2010 NSSC 408; **S619/22** ■ The parties attended a settlement conference where the father was represented, but the mother was not. They reached an agreement on parenting issues that was read into the record. Two days later, the mother decided to put forward a different parenting proposal. The court told her the parties were bound by what was read into the record unless the father agreed to a change. The mother protested this was not her understanding. *Held,* the purported agreement is not binding; parenting issues will be adjudicated. The settlement conference was off the record. The agreement was the only thing recorded. It's clear the mother wasn't advised the agreement was subject to her getting independent legal advice. While she is an educated person, she was still unrepresented, and the "agreement" cannot stand.

FAMILY LAW – Spousal support – application to terminate, early retirement *Harris v. Harris,* No. 1201-058093, Jollimore, J., November 8, 2010. 2010 NSSC 410; **S619/5** ■ The husband voluntarily retired at age 57, and applied to terminate his spousal support payments to the wife. There was some evidence of the husband's health problems, but neither he nor his doctor suggested they prevented him from continuing to work. The parties agreed the husband had always talked about wanting to retire early, but the wife felt it was inappropriate for him to do so now given their present circumstances. The wife had a long history of poor health and her only other income was CPP disability payments. Without spousal support, the wife was very close to the low income threshold found in the Federal Child Support Guidelines. *Held,* application dismissed. There is no change in circumstances warranting a variation (termination) of spousal support. The husband voluntarily stopped work. The evidence suggests he knew he hoped to retire early when the original order was made, but failed to address it at that time. He must resume payments and pay any arrears forthwith.

FAMILY LAW – Stay of execution – pending appeal, financial provisions of corollary relief judgment *Gill et al. v. Hurst et al.,* C.A. No. 338209, Fichaud, J.A., December 13, 2010. 297 N.S.R. (2d) 97; 2010 NSCA 104; **S621/1** ■

■ FISH AND GAME

FISH AND GAME – Atlantic fishery regulations – fishing for crab in closed area *R. v. Boyd,* PtH. No. 325031, Bourgeois, J., November 10, 2010. 296 N.S.R. (2d) 164; 2010 NSSC 417; **S619/9** ■ The accused was acquitted on a charge of fishing for crab in a closed area after his traps were placed within the one-mile buffer zone. The defence had argued that the traps were erroneously placed due to a malfunction in the boat's computerized electronic plotter. After the system malfunctioned, the wrong data for the closed zone was manually re-entered by the accused's brother. When it was realized that the traps had been placed in the buffer zone, the accused had immediately advised the Department and co-operated completely, releasing the crabs out of the traps, as directed. The court found that although the accused had not established a "due diligence" defence prior to setting the traps, given that he stopped fishing before he took any of the crabs aboard the vessel, he demonstrated that he had made all reasonable efforts to avoid causing any harm to the conservation of the crab stocks in the buffer zone and, thus, had exercised due diligence in all the circumstances of the case. The court also held that a proper interpretation of the term "did unlawfully fish" required the act of fishing to be completed by the accused actually removing the crab from their natural habitat and landing them on his boat. The Crown appealed. *Held,* appeal allowed; verdict of guilt entered. The

diligence shown by the accused after he discovered the misplacement of the traps did not relate to the offence itself, and could not ground a due diligence defence; there was no authority to allow a court to consider one definition of "fishing" for the purpose of establishing the elements of an offence and another definition for the purposes of considering the availability of a due diligence offence.

■ INSURANCE

INSURANCE – Automobile insurance – determining Actual Cash Value (ACV) *Publicover v. Echelon General Insurance,* Claim No. 340616, Slone, Adjudicator, February 17, 2011. 2011 NSSM 12; **SmCl17/28** ■

INSURANCE – *Motor Vehicle Act* – interpretation of "vicarious liability requirements" *Gilbert v. Giffin et al.,* C.A. No. 319253; 319252, Farrar, J., November 25, 2010. 296 N.S.R. (2d) 183; 2010 NSCA 95; **S617/22** ■ The first defendant was the lessee and driver of a motor vehicle that was involved in a motor vehicle accident with the plaintiff. The second defendant was the lessor of the vehicle. The plaintiff brought an action against both the lessor and lessee, arguing that the second defendant was liable, both as the owner of the vehicle under the *Motor Vehicle Act* and pursuant to common law vicarious liability, for the lessee's negligence. The second defendant successfully applied for summary judgment, with the court finding that the lessor was not liable under the *Motor Vehicle Act* as the lease was not a "rental contract" as defined in s. 62 of the Act and the lessor was not an "owner" as defined in s. 2(ak) and the current state of the law did not suggest that a claim of vicarious liability had a real chance of success between a lessor and lessee. Both the plaintiff and the first defendant appealed. *Held,* appeal dismissed; the reverse onus provision in s. 248 does not apply in this case; the argument that the lease was not a conditional sales agreement but rather a rental agreement had no real chance of success and the fact that a vehicle is subject to a lease does not change the fact that there is no vicarious liability at common law between the owner and the driver of a vehicle.

INSURANCE – Procedure – severance of bad faith claim from the contract claim *Kirby v. Dominion of Canada General Insurance Co.,* S.H. No. 283704, Haliburton, J., December 13, 2010. 297 N.S.R. (2d) 29; 2010 NSSC 455; **S620/21**

INSURANCE – Statutory interpretation – *Health Services and Insurance Act* *Slauenwhite v. Keizer,* Hfx. No. 284491, Warner, J., December 13, 2010. 297 N.S.R. (2d) 263; 2010 NSSC 453; **S620/17** ■ The elderly plaintiff was seriously injured in a motor vehicle accident, following which she was forced to move into a retirement and assisted living facility. At issue was whether the Department of Health had a subrogated right to claim against the defendant for nursing home costs arising from injuries sustained in the motor vehicle accident following amendments made to the legislation in 1992. *Held,* the Province has a subrogated right pursuant to s. 19 of the *Health Services Insurance Act* to claim against a person insured by a policy of third-party liability insurance for nursing home costs arising from personal injuries sustained in a motor vehicle accident. Although s. 18(10) of the Act, read in isolation, clearly released motor vehicle accident tortfeasors and liability insurers from responsibility for certain health costs by subrogation, other subsections, read in isolation, equally clearly imposed liability on tortfeasors and their liability insurers for health costs resulting from personal injuries caused by any wrongful or negligent act or omission and did not exclude automobile accidents. Subsection 18(10) must be read harmoniously with and in the entire context of s. 18; the amendments could not be read as giving tortfeasors in respect of motor vehicles a free ride with respect to nursing home costs that is not available to all other tortfeasors.

■ INTELLECTUAL PROPERTY

INTELLECTUAL PROPERTY – Infringement of copyright – educational materials *Miller Lake Learning Services Inc. v. Latta et al.,* S.C.C.H. No. 310113, Parker, Adjudicator, December 7, 2010. 2010 NSSM 76; **SmCl17/16** ■

■ LABOUR LAW

LABOUR LAW – Construction Industry Panel – judicial review *Cape Breton Island Building & Construction Trades Council et al. v. Nova Scotia Power Inc. et al.,* Hfx. No. 309073, Hood, J., August 26, 2010. 294 N.S.R. (2d) 212; 2010 NSSC 333; **S615/31** ■ A trade council ("the council") filed a grievance on the basis that the employer had failed to comply with the collective agreements to which it was bound. The employer applied for a declaration that it had never been bound by any collective agreements between the Construction Management Bureau ("the Bureau") and the council and asserted that it had never been a member of the Bureau and had never provided any authorization for the Bureau to bargain on its behalf. It later applied for a reconsideration, requesting a finding that the council and its affiliates had abandoned any bargaining rights they had to the employer. When the Construction Industry Panel ("the Panel") found for the employer on both points, the council applied for judicial review, arguing that the Panel had erred by not considering the concept of sectoral bargaining and that it had failed to appreciate the effects of certification and the "Steen amendments", which resulted in the employer being bound by the sector clause negotiated by the council. *Held,* application for judicial review dismissed; the Panel addressed the council's arguments as to the effect of the Steen amendments and reached the opposite conclusion to that presented by the council; it justified its conclusions based on the wording of s. 98(3) of the *Trade Union Act* and its explanation was both intelligible and transparent. The Panel also concluded that the language of the Industrial Agreement most closely resembled the wording of s. 92(j) of the Act and that the s. 98(7) prohibition was with respect to someone who is not a union member as opposed to someone who is not a construction union member. The Panel is the authority with respect to such decisions and has the power to determine what s. 98(7) means. The Panel limited the application of the doctrine of abandonment to the unique circumstances of this case; it is not bound by previous decisions and had the authority, ability and expertise to conclude that there had been a limited abandonment of bargaining rights.

LABOUR LAW – Judicial review – jurisdiction of adjudicator, standard of review *Nova Scotia Government and General Employees Union v. Nova Scotia (Transportation and Infrastructure Renewal),* C.A. No. 324157, Hamilton, J., November 3, 2010. 296 N.S.R. (2d) 142; 2010 NSCA 85; **S617/12** ■ Following a consensual grievance (decided in the union's favour) in relation to whether a new position had been created, the adjudicator retained jurisdiction to deal with any future disputes arising in relation to the determination of pay-rate for that position. After negotiations failed, the union sought to have the adjudicator decide the pay-rate. The Province took the position the adjudicator had no jurisdiction to do so. It appealed his finding of jurisdiction to the Supreme Court where the motions judge found the adjudicator failed to meet a standard of correctness and erred

in law. The union appealed. It argued the judge erred by applying a standard of review of correctness, and by finding the adjudicator had no jurisdiction to decide pay-rate. *Held,* appeal dismissed, with costs of $1,500 to the respondent. The jurisprudence makes it clear that a jurisdiction issue is reviewed on a standard of correctness, so there was no need for the judge to engage in a more detailed standard-of-review analysis. He was correct when he determined the adjudicator did not have jurisdiction to decide the pay-rate issue. His decision on the initial issue extinguished his authority to arbitrate. The pay-rate issue didn't exist at the time of the original grievance, nor was the arbitrator properly appointed under the *Collective Bargaining Act*, to deal with it. It was a new issue and a fresh engagement requires the consent of the parties.

■ LAND REGULATION

LAND REGULATION – Land use by-law – interpretation *Halifax (Regional Municipality) v. Mrkonjic,* Hfx. No. 328679, Wright, J., November 30, 2010. 297 N.S.R. (2d) 1; 2010 NSSC 434; **S620/8** ■

■ LANDLORD AND TENANT

LANDLORD AND TENANT – Residential tenancies – appeal, unacceptable water quality *Rogers v. Burke et al.,* Claim No. 341673, Slone, Adjudicator, Jaunary 5, 2011. 2011 NSSM 14; **SmCl17/30** ■

LANDLORD AND TENANT – Residential tenancies – landlord and tenant relationship *Connors v. Mood Estate,* S.C.C.H. No. 342800, Parker, Adjudicator, February 25, 2011. 2011 NSSM 6; **SmCl17/21** ■

■ MAINTENANCE

MAINTENANCE – Child support – application for maintenance under *Interjurisdictional Support Orders Act* *Unser v. Yourex,* S.F.H.I.S.O. No. 65536, Ferguson, A.C.J., November 15, 2010. 2010 NSSC 421; **S620/2** ■ The two children (ages six and four) lived with their mother in Alberta. She sought child support from the father in Nova Scotia under the authority of the Nova Scotia Child Maintenance Guidelines. Since the separation in 2008, the father had seen the children once (in Alberta). He claimed high access costs would make it an undue hardship (under s.10) for him to pay the full table amount of support. The mother lived with her parents and the father felt their income should be taken into account in calculating the standard of living in the mother's household. There was also some issue about the father's income, which was under-reported by him on his statement of financial information. *Held,* child support will be paid according to the full table amount using the father's full income. The father has not met the burden of proving hardship. His access costs aren't unusually high given the fact he only intends to visit once per year. Access parents who live close to their children and see them regularly incur similar costs. It's not appropriate to impute the mother's parents' income to her simply because they live together. The mother is not in a situation similar to one where she lives with a partner earning that level of income and receives an "economic benefit" from doing so. Access costs could be revisited in the context of custody and access arrangements where it is not uncommon for parents to be ordered to share access costs.

MAINTENANCE – Child support – application for retroactive increase in support and imputed income *Young v. Marshall,* No. 1206-004432, Forgeron, J., February 4, 2011. 2011 NSSC 50; **S624/2** ■

MAINTENANCE – Child support – application to vary, adjustment of arrears *Butler v. Bowie,* S.A.T.D. No. 023311; 1210-000680, Kennedy, C.J., January 11, 2011. 2011 NSSC 7; **S622/13** ■

MAINTENANCE – Child support – recalculation of obligations, forgiveness of arrears *Martell v. MacPhee,* S.F.H.D. 061315, O'Neil, J., February 16, 2011. 2011 NSSC 69; **S625/29** ■

MAINTENANCE – Child support – retroactive arrears *O'Brien v. O'Brien,* S.F.P.A.F. No. 12268, Legere-Sers, J., February 2, 2011. 2011 NSSC 42; **S623/17** ■

MAINTENANCE – Child support – retroactive arrears, blameworthy conduct *Martin v. Burke,* S.P.D. No. 046695; 1205-002587, Kennedy, C.J., January 11, 2011. 2011 NSSC 6; **S622/12** ■

MAINTENANCE – Child support – retroactive support *Burns v. Barrett,* No. 1206-03851, Forgeron, J., January 12, 2011. 2011 NSSC 9; **S622/17** ■ The mother applied for a retroactive variation of child support for three children, the eldest of which was no longer a child of the marriage when the application was filed. The father's income had substantially increased in the years following the October 2006 variation order that allowed him to pay less support than required by the tables because of anticipated high access costs. The mother argued the costs didn't materialize because the father failed to exercise all of the access provided for in the order. He felt there should be no retroactive support, based on: his consistent payment history; a lack of blameworthy conduct; the fact the eldest child lived with him for three months in 2007; and a history of making "extra payments" directly to the children. *Held,* child support for two children increased retroactively to the full table amount based on the father's actual income from 2008 onward; costs of $1,000 to the self-represented mother. The court can't order retroactive support for the eldest child because she wasn't a child of the marriage when the application was filed. The 2006 order must be given judicial acknowledgment for a reasonable period of time; and since the eldest child lived with the father for a three-month period ending in December 2007 it's appropriate to start the retroactive adjustment as of January 2008. The mother's delay in filing was reasonable given the father's lack of disclosure and severe (but unrelated) emotional distress she experienced during the relevant period (e.g., her marriage ended, her ex-spouse burned down their home). The father's conduct was blameworthy (failure to disclose), his access costs lower than anticipated, the children suffered financially during the relevant time and a retroactive award won't cause him hardship. The extra money he gave the kids was in the form of an annual shopping spree and didn't amount to additional support. The court won't require the money be paid directly to the children. There's no evidence the mother failed to look after the children's needs despite her limited financial circumstances.

MAINTENANCE – Child support – retroactive support *Carlaw v. Carlaw,* No. 1201-060825, Jollimore, J., February 3, 2011; September 16, 2009 (orally). 2009 NSSC 428; **S623/31** ■

MAINTENANCE – Child support – retroactive support and calculating income *Leet v. Beach,* No. 1201-058384, O'Neil, J., November 22, 2010. 2010 NSSC 433; **S619/29** ■

MAINTENANCE – Child support – variation *F. (M.) v. W. (M.),*

F.L.B.M.C.A. No. 017862, Dyer, J.F.C., January 31, 2011. 2011 NSFC 2; **FC38** ■

MAINTENANCE – Child support – variation, application for retroactive support *MacDonald v. MacDonald,* No. 1201-062450, Jollimore, J., Janaury 27, 2011. 2011 NSSC 27; **S623/8** ■

MAINTENANCE – Child support – variation, duty of parents and guardian *R. (M.L.A.) et al. v. R. (G.T.) et al.,* F.Y.M.C.A. No. 038252, Comeau, J.F.C., March 2, 2011. 2011 NSFC 7; **FC38** ■

MAINTENANCE – Spousal and child support – table amounts awarded *Gordon v. Gudal,* S.F.H.I.S.O.S. No. 72442, MacDonald, B. J., April 7, 2011. 2011 NSSC 139; **S627/11** ■

MAINTENANCE – Spousal support – variation, application to terminate *Risser v. Bell,* F.T.M.C.A. No. 65618, Legere-Sers, J., November 17, 2010. 2010 NSSC 427; **S619/20** ■ Following a 33-year traditional marriage that produced three (now independent) children, the husband applied in British Columbia to terminate spousal support payments to his wife in Nova Scotia. He asked the court to declare what he claimed was the parties' unequal division of property (as outlined in their April 2008 separation agreement) a full and final settlement of all support claims. He had a lawyer when the first draft of the agreement was prepared; he signed without obtaining further advice, after the changes requested by him were made. The evidence showed he had voluntarily quit his job in Nova Scotia to move to British Columbia to start over. Once in British Columbia, he was out of work for three month and then started and finished a job in the span of another three months. It was unclear whether he had quit or was fired. He argued the wife could earn more and that he was unable to pay. He said he was under duress when the agreement was executed. *Held,* application dismissed. The evidence fails to establish undue duress, or that the husband didn't have the chance to consult a lawyer, or that he did not enter into it with full knowledge of the circumstances (including his intent to move). There is insufficient evidence to show the parties' property was divided unequally. The husband agreed to the income fixed in the agreement, even knowing he would be quitting his job. There's little evidence to show what he's doing to find work now. Absent sufficient evidence the husband's lack of employment is outside his control, there is insufficient evidence to establish a change in circumstances warranting a reduction of the existing spousal support arrangements.

MAINTENANCE – Spousal support – variation, no change in circumstances *Rondeau v. Rondeau,* C.A. No. 323131, Hamilton, J.A., January 14, 2011. 2011 NSCA 5; **S621/6** ■ The appellant wife's spousal support was reduced at trial after the trial judge found there was a material change in the parties' circumstances due to: the mere passage of time; the husband's health problems; and his age/wish to accumulate money for retirement. The wife appealed, and also sought to be compensated for having had to obtain personal health insurance after the husband unilaterally terminated her coverage under his plan. *Held,* appeal allowed; costs of $5,000 plus disbursements awarded to the wife. Support will be reinstated at the previous level, with no termination date. The trial judge erred in principle by finding a material change in circumstances warranting a reduction of support. The husband's income had increased significantly since the original order. The wife's circumstances hadn't changed, and her income was still very low. None of the changes cited by the trial judge amount to a material change in circumstances. Health problems can amount to a change in circumstances if they result in a significant change in income. That was not the case here. In fact, the husband's income is significantly higher now. Determinations as to whether there has been a material change in circumstances are based on the facts as they are at trial, not on speculation on what might happen in the future. The husband unilaterally removed the wife from his health plan and must reimburse her for similar coverage under her new plan.

■ MORTGAGES

MORTGAGES – Foreclosure – deficiency judgment *Batdorf v. MacLean et al.,* Pt.H. No. 291613; 291335; 291337, Bourgeois, J., December 21, 2011. 297 N.S.R. (2d) 286; 2010 NSSC 462; **S622/22** ■ The plaintiff was an experienced businessman who made several business loans to the defendant MacLean. One of the larger loans was eventually secured (after most of the money was already handed over) against six cottage properties MacLean professed to own. The mortgage was prepared by the plaintiff and neither party got independent legal advice before signing. It specifically provided that forbearance on repayment did not disentitle the plaintiff to the remedies provided therein. Over the years, he allowed MacLean to make inconsistent payments and ignored other requirements written into the agreement. When he finally moved to collect, it was discovered that MacLean only had title to five of the six cottages, and the others were subject to a prior-charge. Most of the issues raised by this litigation were settled before trial. The court was left to consider whether the plaintiff was entitled to a deficiency judgment should the sale of the cottages result in proceeds insufficient to cover the debt. MacLean argued: he never understood he could be responsible for a deficiency judgment (the mortgage didn't mention it); a lack of business acumen; the plaintiff's failure to advise him to get independent legal advice; the existence of an oral agreement; promissory estoppel; and laches. The plaintiff contended the ability to seek a deficiency is created by virtue of the covenant to pay the original debt and refuted MacLean's other defences. *Held,* the plaintiff is entitled to a deficiency judgment in relation to any future shortfall after the cottages are sold. The absence of a specific provision in a mortgage contemplating a deficiency judgment doesn't bar the plaintiff from making a claim for one. There was no undue influence exerted on Mr. MacLean, nor was he compelled to sign to get the money. Their relationship was not one with the potential for domination, nor did it work an unfairness between the parties. The evidence shows MacLean was able to successfully negotiate with the plaintiff, had experience with other mortgages he had used a lawyer for and had time to get independent advice. There was no oral contract or part-performance as allegedly evidenced by the plaintiff's acceptance of reduced or late payments over the years. The mortgage specifically contemplated forbearance would not be a bar to eventual enforcement of the strict terms of the mortgage. The supposed terms of the purported oral agreement are far from clear and unambiguous. Promissory estoppel does not apply; even if it did, the fact MacLean wasn't honest about not owning one of the cottages and having charges on the others would be relevant and contrary to an equitable resolution of the matter. The defence of laches has no merit on the facts (again see the reference to forbearance in the mortgage).

■ MOTOR VEHICLES

MOTOR VEHICLES – Operating a motor vehicle while disqualified – appeal dismissed *R. v. Guilbault,* C.A.C. No. 325298, Saunders, J.A., December 9, 2010. 297 N.S.R. (2d) 21; 2010 NSCA 102; **S617/29** ■

MOTOR VEHICLES – Speeding – credibility *R. v. DeWolfe,* Hfx. No. 319217A, LeBlanc, J., July 5, 2010. 294 N.S.R. (2d) 35; 2010 NSSC 268; **S616/17** ■ Spotting a speeding vehicle, the officer turned his vehicle around, pursuing and eventually stopping the other vehicle. He had been unable to keep constant eye contact with the vehicle, losing sight of it for a few seconds on a series of blind turns. The defendant appealed his conviction for speeding, alleging that he was stopped shortly after turning on to the road and had never driven past the location where the officer's car was parked. *Held,* appeal allowed; new trial ordered. The trial judge found that the Crown had established guilt beyond a reasonable doubt before giving any consideration to the defendant's evidence and although it was clear that he had some concern about that evidence in relation to time, distance and speed, he failed to specifically deal with the evidence that the defendant had not been in the area where the radar was being operated. The trial judge had failed to assess the defendant's credibility as required; believing the evidence of the police officer, he concluded that the Crown had proven its case, consequently dismissing any opposing evidence from the defendant.

■ MUNICIPAL LAW

MUNICIPAL LAW – Assessment – appeal of assessment dismissed *Nova Scotia (Director of Assessment) v. van Driel et al.,* C.A. No. 319648, Fichaud, J.A., November 16, 2010. 296 N.S.R. (2d) 244; 2010 NSCA 87; **S617/15** ■ The director of assessment appealed the Utility and Review Board's (URB) decision to reduce the property tax assessment for the van Driel's home. In their reasons, the URB commented on (and rejected) the director's uniform method of conducting assessments. The director appealed on the basis that the URB: erred in its treatment of mass appraisal; erred respecting uniformity or the general level of assessment (GLA); and erred by misapplying the burden of proof or violating procedural fairness. The director claimed the URB exceeded their jurisdiction by commenting on the director's methods of assessment, which (he argued) amounted to a direction to change methodologies. The director also sought to admit new evidence concerning the department's methods of calculations. *Held,* appeal dismissed, without costs. Request for permission to adduce fresh evidence denied. With due diligence, the evidence could have been adduced at the original URB hearing (as required by Rule 90.47(1) of the *Civil Procedure Rules* (2008)). The URB's criticism of the director's methodologies is found in the reasons, not the order. While this decision may have precedential value in future appeals, it does not purport to compel the director to change his method of calculation for all assessments, nor should it. Not all assessments are appealed. There was no error of law or jurisdiction and no error the court can analyze for correctness under the applicable standard of review. The authorities and principles remain the same: uniformity is the dominant principle of assessment; consistent use of the same appraisal method (including the mass appraisal method) does not suffice to achieve uniformity; and uniformity is achieved by multiplying the GLA (the calculation of which is outlined in this decision) by the particular assessment in issue.

■ NEGLIGENCE

NEGLIGENCE – Duty of care – owed by police officers to victims of crime *Spencer v. Canada (Attorney General) et al.,* Hfx. No. 257053, Pickup, J., December 8, 2010. 2010 NSSC 446; **S620/12** ■ The plaintiff, Ms. Spencer, sought the RCMP's assistance after her husband assaulted her. She told the RCMP her primary concern was having him removed from the home for the night. He was jailed and released the next day to retrieve his belongings from the family home. Ms. Spencer was told he would be accompanied to the home by an RCMP officer; however he was simply dropped off and he burned down the home. Ms. Spencer and her children sued the defendants for negligence, negligent misrepresentation and claimed personal liability of the named RCMP officers. The plaintiffs cross-examined one of the defendant's witnesses, but filed no affidavits and agreed with the defendants' statement of facts. The defendants sought summary judgment on the evidence. *Held,* summary judgment motion granted; action dismissed with no costs payable given the plaintiffs' circumstances. There appear to be no material facts in issue. Applying the law to the facts, there's no possible chance of success on any of the claims. The harm suffered by the plaintiffs wasn't a reasonable or foreseeable consequence of the RCMP's actions. In applying the law, the court accepted that: the *RCMP Act*'s primary purpose is to impose a duty on police to protect the public; the RCMP don't owe a duty of care to victims of crime; if there was a duty, it wasn't breached; and there was no negligent misrepresentation because there was no foreseeability (which is required to establish the necessary proximity for a duty of care). The individual officers were acting in the scope of their employment and owed no duty of care to the plaintiff. Even if they had, it wasn't breached.

NEGLIGENCE – Liability – damage to moored boats during tropical storm *Sabadash v. 2175208 Nova Scotia Ltd. et al.,* Claim No. 338379, Slone, Adjudicator, January 5, 2011. 297 N.S.R. (2d) 326; 2011 NSSM 2; **SmCl17/11** ■

NEGLIGENCE – Motor vehicle – apportionment of liability *Romney v. Flinn,* S.C.C.H. No. 338227, Parker, Adjudicator, February 9, 2011. 2011 NSSM 5; **SmCl17/19** ■

NEGLIGENCE – Motor vehicle – liability for repair *Bundy v. MacPhee Chevrolet Buick GMC Cadillac Ltd.,* Claim No. 338746, Slone, Adjudicator, December 21, 2010. 2010 NSSM 71; **SmCl17/9** ■

■ OCCUPATIONAL HEALTH AND SAFETY

OCCUPATIONAL HEALTH AND SAFETY – Sentencing – failure to provide appropriate site-specific WHMIS training *R. v. O'Regan Chevrolet Cadillac Ltd.,* No. 2056788, Williams, J.P.C., December 8, 2010. 297 N.S.R. (2d) 8; 2010 NSPC 68; **M23** ■ The defendant, a sizeable corporate entity, pled guilty to one count of failing to take every reasonable precaution to ensure the health and safety of persons in the workplace after an employee was killed in an explosion at an auto body repair shop. The specifics of the charge involved failing to provide appropriate site-specific Workplace Hazardous Material Information Systems ("WHMIS") training to the employee (who had completed previous WHMIS training, but had not received refresher training for close to one year nor any site-specific WHMIS training), failing to store chemicals in the appropriate manner and failing to make information about the chemicals in use available in the manner required by the regulations. Following the incident, the defendant had put considerable efforts into developing a more robust supervisory and compliance system. *Held,* defendant ordered to pay penalty of $38,750, comprised of a fine of $25,000 with victim surcharge of $3,750, a donation in the amount of $5,000 to an organization providing ongoing support for survivors and families of persons involved in workplace accidents and a contribution of $5,000 toward the educational program at the provincial auto dealers association; the defendant is also directed to help plan, organize and present a session on related workplace safety for this program. No causal connection

had been established between the offence and the fatality as the plea entered by the defendant did not include an acknowledgment that any of its failures caused the fire or the death of the employee and this was not a case where it could generally be said that safety policies were inadequate or lacking or that the defendant was part of an "impoverished safety culture." The court rejected the submission that there was a trend towards a baseline fine of $25,000 emerging in the province for occupational health and safety cases.

■ PRACTICE

PRACTICE – Actions – consolidation *Comeau et al. v. Ballam Insurance Services Ltd. et al.,* Hfx. No. 322874, Hood, J., November 30, 2010; November 3, 2010 (orally). 2010 NSSC 404; **S620/6** ■ The plaintiffs moved for partial consolidation of the damage portions of two actions. The defendants were opposed. One matter (Nova Oil) was scheduled for a trial in eight weeks. The other (Ballum) was in the discovery stage. A consolidation would either mean an adjournment of the Nova Oil trial, or that counsel for Ballum would have very little time to prepare for a trial on damages. The plaintiffs did not want an adjournment. Counsel for Ballum had other commitments. *Held,* motion dismissed; costs of $1,000 payable forthwith to each defendant in any event of the cause. The factors against consolidation outweigh the factors in favour of it. The court shouldn't force a lawyer to abandon other matters for other clients to meet a trial date. The plaintiffs' expenses will be minimally impacted should the actions remain separate. Further, if the action against Nova Oil is successful, the claim against Ballum might become unnecessary. While the *Judicature Act* urges the avoidance of multiple proceedings, there would still be two trials given the need to deal with the issue of Ballum's liability. Should the impending Nova Oil trial dates fall through for some other reason, the consolidation can be revisited (although not necessarily granted).

PRACTICE – Adjournment – availability of counsel *Caterpillar Inc. v. Secunda Marine Services Ltd.,* C.A. No. 337520, Fichaud, J.A., December 16, 2010. 297 N.S.R. (2d) 279; 2010 NSCA 105; **S621/2** ■ The appellant moved for an adjournment of the imminent trial because their lawyer was committed to another trial. In denying their motion, the trial judge noted the defendant's lawyer worked for a large firm with many other competent lawyers that could step in and take over. The judge observed the potential prejudice to the respondents outweighed the prejudice to the appellants. This prejudice included the inconvenience and cost of the respondents having to rearrange the attendance of two witnesses travelling from Saudi Arabia. They appealed. *Held,* appeal allowed; adjournment granted. The appellants will indemnify the respondent for their reasonable costs (assessed on a solicitor-client basis) for: the costs of the adjournment motion and the appeal; and any wasted/duplicated effort from preparing twice for trial (including the increased cost related to securing witness attendance). While a deferential standard of review applies, the trial judge erred in his assessment of the potential prejudice to the respondent. The matter has moved at a sluggish pace so far; another delay won't make much difference since 10 years have already passed since the cause of action arose. As for the cost and inconvenience of rescheduling witnesses – especially those travelling from far away – the judge failed to consider the fact these costs can be indemnified by the appellants (see Rules 4.21(e) and (f)). The potential of indemnity is relevant to the appraisal of prejudice under Rule 4.20(3). In terms of potential prejudice to the public from lost trial time, Rule 4.20(3) refers to matters that are "frequently adjourned" and would have more significance if the appellants seek another adjournment in the future.

PRACTICE – Adjournment – non-disclosure documents at trial *Kairos Community Development Inc. v. Nova Scotia (Attorney General) et al.,* Hfx. No. 265555, Coady, J., January 11, 2011. 2011 NSSC 8; **S622/14** ■ The plaintiff applied to adjourn mid-trial as a result of the defendant's failure to disclose relevant documents prior to trial. While the critical documents were in the possession of each party, they were not felt to be relevant until produced during cross-examination of the principal plaintiff. Once produced, they changed the thrust of the trial entirely and suggested the possibility that the plaintiff was fraudulent in its relationship with the defendant and was, in part, suing for money already received. Both the plaintiff and its counsel were taken by surprise by their introduction and were unprepared to respond. *Held,* adjournment allowed; with $10,000 in "throw away" costs awarded to the plaintiff forthwith. While the documents should have been disclosed well before trial, the defendant's failure to do so does not necessarily justify the adjournment; what does is its failure to produce until the direct examination was complete. This was fatal to the possibility of a fair trial and, without the adjournment, would amount to trial by ambush. There is no need to require the defendant to amend the pleadings since they won't be counterclaiming on the basis of fraud. No further disclosure ordered; the critical documents were produced and will likely be used solely for credibility purposes. Further discoveries allowed, but must remain limited in focus to the core issue(s). Leave granted for both parties to amend their expert reports to the extent those reports are impacted by these further discoveries. Plaintiff's counsel may discuss the case with the plaintiff's main witness, who remains under oath. To order otherwise would be impractical. An expanded redirect will be allowed if it appears necessary when the trial resumes, and the court reserves the right to rule on further related issues that may arise to help ensure the scope of the proceeding are not expanded beyond what was originally anticipated when the trial started.

PRACTICE – Appeals – denial of leave *Walsh v. Unum Provident,* C.A. No. 329541, Saunders, J.A., December 3, 2010; December 2, 2010 (orally). 2010 NSCA 97; **S617/24** ■

PRACTICE – Appeals – extension of time to file appeal *Cummings et al. v. Nova Scotia (Minister of Community Services) et al.,* C.A. No. 341127, Beveridge, J.A., January 6, 2011. 297 N.S.R. (2d) 331; 2011 NSCA 2; **S621/5** ■

PRACTICE – Application for injunction – restricting introduction of previous court documents *Cummings et al. v. Belfast Mini-Mills Ltd. et al.,* Hfx. No. 333144, Coughlan, J., December 29, 2010; November 9, 2010 (orally). 2010 NSSC 459; **S620/29** ■

PRACTICE – Costs – adjournment of motions, self-represented litigant *Leigh et al. v. Belfast Mini-Milss Ltd. et al.,* Hfx. No. 272748, LeBlanc, J., January 25, 2011. 2011 NSSC 23; **S625/5** ■

PRACTICE – Costs – amount payable, third party costs *Bishop v. Nova International Ltd. et al.,* Hfx. No. 243845, Kennedy, C.J., November 10, 2010. 2010 NSSC 418; **S619/8** ■ The plaintiff claimed for damages after an excavator, modified for use as a wood harvester by the defendant, was destroyed in a fire. The defendant joined the manufacturer and a previous owner as third parties, and brought a successful motion to dismiss the plaintiffs' claim. At issue was: the appropriate calculation of costs (Tariffs A vs. C); and whether the plaintiffs should be held liable for the third parties' costs. *Held,* costs should be calculated under Tariff A. Although

this was a chambers motion, the decision was a final one and ended the matter. Costs as calculated under Tariff A reflect the substantial preparation required to defend the claim, and result in an amount that substantially indemnifies the defendant for the actual costs incurred. No multiplier added; disbursements reduced by 25 per cent. The plaintiff is responsible for third party costs in the amount agreed upon. It was inevitable the defendant would join the manufacturer as a third party given the claim they were facing; and their joining of the previous owner was reasonable and predictable.

PRACTICE – Costs – departure from tariffs *Vogler v. Szendroi et al.,* Hfx. No. 192712, Moir, J., January 13, 2011. 297 N.S.R. (2d) 391; 2011 NSSC 13; **S622/18** ■

PRACTICE – Costs – determining "amount involved" in non-monetary cases (boundary dispute), survey costs *MacCormick v. Dewar,* Tru. No. 334080, Bourgeois, J., January 11, 2011. 2011 NSSC 10; **S622/23** ■ After four days of trial, the court established the boundary line between the plaintiffs' and defendants' cottage properties in accordance with the plaintiffs' expert survey evidence. On the eve of trial, the defendants decided they wouldn't be relying on their own expert and instead conducted a lengthy cross examination of the plaintiffs' expert. Costs were in issue: both party and party costs as well as the defendant's contribution to the plaintiffs' expert's fees. The plaintiff was awarded $400 in damages in relation to their claim for trespass; much less than was claimed at trial. *Held,* party and party costs of $15,250 to the plaintiffs, determined under Tariff A, using the rule of thumb of $20,000 per day of trial to arrive at an amount involved of $80,000, plus $2,000 per day of trial. There's nothing to warrant increasing the scale or awarding a lump sum. As for the argument this doesn't represent a substantial contribution to the plaintiffs' actual legal costs, no proof of those costs was submitted. When a party asks for increased costs to reflect a substantial contribution to their actual costs, they should file evidence to allow the court to knowledgeably and objectively assess their request. The defendants will pay $5,000 towards the initial survey fees of $9,263 and the entire second invoice (relating to the surveyor's trial preparation and attendance). The survey will continue to have some lasting benefit to the plaintiffs beyond the scope of this litigation. The invoice for trial prep time, while high, is reasonable in light of the defendants' last-minute decision to abandon their expert report and their allegations of professional misconduct.

PRACTICE – Costs – intervenors, conduct of party *B. (A.) and D. (C.) v. Bragg Communications Inc. et al.,* Hfx. No. 329542, LeBlanc, J., September 28, 2010. 297 N.S.R. (2d) 42; 2010 NSSC 356; **S620/1** ■ The intervenors were media corporations who successfully opposed the applicant minor's applications for, in part, a publicity ban and the right to use a pseudonym. The applicant's appeal of the dismissal of her motions is pending. The initial hearing was adjourned to give the applicant further time to file submissions on the privacy issue; the matter was eventually heard over two-and-a-half days. The intervenors argued costs should follow the result and sought costs based on Tariff A in the range of $6,000 each. They argued an application in chambers is akin to an application in court since it was started by an originating application. They felt costs should be increased to reflect the fact the applicant was ill prepared for the initial hearing. The applicant argued intervenors are not typically awarded costs and that no costs should be awarded here. *Held,* costs of $1,500 to the first intervenor and $750 to the second intervenor. *In obiter* the court observed this application was more in the form of a trial than a motion where Tariff C applies. Generally, intervenors shouldn't be awarded costs. There are several factors relevant to whether the court should deviate from this general rule. Here, the intervenors have demonstrated a good reason to do so. Costs are awarded in any event (and not following the result) primarily because the applicant asked to have the application heard within an abridged time-frame and then failed to file relevant and necessary submissions in a timely manner. This lead to the adjournment and drove up the intervenors' costs. Also relevant: the application was initiated for the benefit of a child and children shouldn't be dissuaded by the threat of costs from requesting a protection of privacy; the media is generally a good gatekeeper for the open court principle; and the respondent didn't oppose any of the orders sought.

PRACTICE – Costs – two cross applications heard concurrently in chambers, multiplier applied *MGL Consulting and Investments Ltd. v. Perks Coffee Ltd.,* Hfx. No. 334114; 332445, Murphy, J., November 15, 2010; September 9, 2010 (orally). 2010 NSSC 426; **S619/18** ■ The parties couldn't agree on costs after two opposing applications were heard together in chambers over less than one day. They agreed to use Tariff A because the decision ended the matter. The landlord was the successful party. *Held,* costs of $3,000 to the landlord, based on the amount under Tariff C with a multiplier of three. Despite the fact the parties agreed on the use of Tariff A, costs in relation to applications in chambers (as opposed to applications in court) should usually be calculated under Tariff C. The fact the matter was complex and required substantial preparation can be addressed by adding a multiplier. It's better to do this in a non-monetary claim than to assign an arbitrary "amount involved" based on the rule of thumb or some other arbitrary calculation. The applications were very closely connected and warranted only one cost award.

PRACTICE – Costs – whether payable forthwith or on final outcome of case *Amaratunga v. Northwest Atlantic Fisheries Organization,* Hfx. No. 267432, Wright, J., Janury 10, 2011. 297 N.S.R. (2d) 385; 2011 NSSC 3; **S622/9** ■ The defendant was ordered to pay costs after it lost on a motion to disallow its defence of international organization immunity. Costs were comprised of: costs of the motion ($25,109); and costs of two, related prior contested motions where costs had been assessed as costs in the cause ($1,000 plus disbursements). At issue was whether these costs should be paid forthwith or at the end of the litigation. *Held,* costs payable forthwith. Since the *Civil Procedure Rules* (2008) are silent as to the timing of payment, the court must look to the case law. In light of the wide discretion a court has when it comes to awarding costs, they can be ordered payable forthwith even when the paying party has acted reasonably and appropriately throughout (as the defendant has here). Costs payable forthwith are not inherently punitive. Relevant is the fact that: the immunity/jurisdiction issue has been disposed of entirely; a trial won't bring the benefit of hindsight; the motion was very complex and a major undertaking for both parties; the quantum of costs are agreed upon; costs payable forthwith won't prove burdensome to the defendant; and it will likely be another two years before the matter progresses to trial. Not relevant are the defendant's failure to file a defence on the merits and its refusal to respond to two prior settlement offers. It was perfectly reasonable to insist on having the jurisdiction issue sorted out first.

PRACTICE – Disclosure of documents – relevancy *Johnson v. Mill,* Hfx. No. 326583, Hood, J., February 15, 2011. 2011 NSSC 66; **S624/26** ■

PRACTICE – Intervenor – motion for leave to intervene by appellant's former counsel *R. v. Fraser,* C.A.C. No. 330167, Beveridge,

J.A., December 14, 2010. 296 N.S.R. (2d) 281; 2010 NSCA 106; **S617/31** ■ The appellant's former lawyer moved to intervene in an appeal from a criminal conviction. Everyone consented to the motion, but agreed it had to be addressed by a judge in chambers. *Held,* motion granted after submissions heard. The lawyer will be allowed to intervene on the condition that he limit his factum to less than 25 pages and his oral argument to the complaints concerning his conduct. He can't address the merits of the appeal. The lawyer has an interest in the proceeding, given the allegations made regarding his conduct from the time of his retainer to the conclusion of the trial. Granting the motion won't cause delay, and his submissions may well be useful to the court.

PRACTICE – Judgments and orders – stay of execution *Tingley et al. v. Wellington Insurance Co.,* C.A. No. 337720, Fichaud, J.A., November 8, 2010. 296 N.S.R. (2d) 224; 2010 NSCA 86; **S617/13** ■ The appellants' action related to what they claimed was the defendant insurer's failure to address toxins allegedly deposited in their home in 1991. The trial took place over 118 days. Immediately before the expiry of the six-month deadline for his decision (under s.34(d) of the *Judicature Act*), the trial judge faxed a letter to counsel saying the appellants' claims were dismissed with reasons to follow. The appellants were distraught over the outcome and the lack of explanation for it. They applied either for a stay under Rule 90.41(2), or for directions to be given to the trial judge. They claimed their *Charter* rights (ss. 7 and 12) were breached. *Held,* application dismissed. The judgment was issued in time; only the reasons could be said to be late: s. 34(d)) directs there must be a decision within six months, but says nothing about the rendering of reasons. There is no arguable appeal on this basis alone, and the first branch of the *Fulton* test cannot be met. Further, there is no violation of a principle of fundamental justice under s.7. When the reasons are issued, the appellants can exercise their right of appeal. They have not suffered irreparable harm. The stress they claim over the uncertainty surrounding the lack of reasons is not sufficient to meet the *Fulton* test for exceptional circumstances warranting a stay. All unsuccessful litigants experience stress.

PRACTICE – Judicial review application – filing timelines *Eco Awareness Society v. Antigonish (Municipality) et al.,* Hfx. No. 336179, Robertson, J., December 21, 2010. 2010 NSSC 461; **S620/27** ■ The applicant did not agree with the development officer's decision to issue a permit to allow the installation of wind turbines and applied for judicial review of the decision 26 days after the appeal deadline expired. It asked the court to use its general discretionary powers to extend the time limit and allow the appeal to proceed. The respondents moved to have the application dismissed on the basis of the late filing. *Held,* motion granted; application dismissed. The applicant failed to appeal within the requisite time frame. The new Rule 7.05 of the *Civil Procedure Rules* (2008) shortens the timeline from six months to 25 days, contemplating judicial review in an expeditious manner on a prescribed short time limit that should only be ignored when there is a very significant excuse/reason for the delay. The time begins running when the decision is conveyed, not when the written decision or other supporting documents is/are received. The criteria used for determining whether an extension should be granted under Rule 90 are helpful (i.e., is there: a bona fide intention to appeal in time; a reasonable excuse for failing to do so; and a strong case on the merits warranting intervention?). The applicant has no reasonable excuse for the delay. The fact the group was waiting for legal opinions or had trouble assembling for a meeting during the summer are insufficient reasons. The respondent is exposed to the greatest prejudice, having made financial commitments and proceeded with work based on the strength of the decision under appeal. A development officer's decision must be afforded a high degree of deference; the standard of review is one of reasonableness. This is the sort of case where, after a public decision-making process, the decision should be accorded finality, subject only to the statutory appeal deadlines.

PRACTICE – Jurisdiction – when procedural error of lower court *Coates v. Capital District Health Authority et al.,* C.A. No. 326406, Oland, J.A., January 7, 2011. 2011 NSCA 4; **S621/8** ■ In an effort to obtain access to records, the plaintiff appealed to the Supreme Court under s. 41 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP Act*). After that appeal was dismissed, she appealed to this court. Before the appeal could be heard, it came to light the plaintiff had inadvertently failed to give notice of either the Supreme Court appeal or this appeal to the Minister of Justice as required by the legislation. Notice was given shortly after the error was discovered. The Minister and respondents filed an agreed statement of facts in which the Minister indicated he would likely not have participated on the merits at either appeal even if notice had been given in a timely manner. The plaintiff sought to have her appeal heard on the merits and argued her failure to give timely notice was merely a procedural error that could be overlooked. She also sought to admit fresh evidence. *Held,* the original appeal is remitted back to the Supreme Court judge who heard it for the sole purpose of curing the defect in notice. Should she so choose, that judge may rely solely on the extensive materials already filed in the previous proceeding. The Minister will have 21 days to file and serve notice that the Minister is a party. If the Minister chooses not to participate, the court may proceed to decide the matter. Should the Minister choose to participate, the court will establish when submissions should be filed and whether oral submissions should be heard. Because notice to the Minister is an essential requirement, the fact it wasn't met means the Supreme Court had no jurisdiction to hear the original appeal. The court's original order is *ultra vires*, and there is simply no decision to appeal to this court as of yet. In coming to these conclusions, the court found: the inclusion of firm timelines in other parts of the *FOIPOP Act* don't lead inevitably to the conclusion that s.41(1A) notice is less essential; a *nun pro tunc* order is inappropriate on the facts; and there is no need to show prejudice to the Minister resulting from the lack of notice. The cases dealing with third party notice and constitutional validity relied upon are distinguishable. As a matter of statutory interpretation, the wording of s.41(1A) doesn't allow the court latitude to exercise discretion under s. 41(g) of the *Judicature Act* to take jurisdiction. There's no conflict between the plain meaning of s.41(1A) and the purpose stated in s.2. The motion for fresh evidence is denied, except as it relates to the agreed statement of facts signed by the Minister and respondents.

PRACTICE – Jury trials – charge to jury *March v. Hyndman,,* C.A. No. 326467, Farrar, J.A., December 9, 2010. 2010 NSCA 100; **S617/27** ■ The appellant appealed the dismissal of his medical negligence claim, arguing the trial judge erred in charging the jury. In his original charge, the trial judge told the jury that if they were "in a state of doubt" the burden of proof was not met. After the appellant objected, he recharged the jury by simply reading the standard of probabilities definition. *Held,* appeal allowed; matter remitted for a new trial, with costs of $2,500 payable in the cause. This concerned a question of law, to which the correctness standard applies. The plaintiff has proven the case was not fairly put to the jury. The original charge was unclear/confusing on the critical issue of proof. There's a serious likelihood this error caused the jury to misapprehend the correct standard of proof. The trial judge's

recharge failed to remedy his earlier misstatements. The appellant's failure to object to the recharge is not fatal.

PRACTICE – Motion for summary judgment – dismissed, slip and fall, claim against owner of adjacent property *Shane v. 3104854 Nova Scotia Ltd.,* Hfx. No. 315268, Coughlan, J., December 17, 2010. 2010 NSSC 448; **S620/28** ■ The plaintiff slipped and fell on ice while walking on a public sidewalk adjacent to a parking lot owned and maintained by the defendant. The defendant brought a motion for summary judgement and dismissal of the plaintiff's claim, pointing to the fact the Halifax Regional Municipality was responsible for maintaining the sidewalk. *Held,* motion dismissed. There's evidence to suggest that if sufficient water accumulated in the defendant's parking lot, it could run off on to the sidewalk. Whether it did so and froze is a genuine material fact requiring a trial; as is the question of whether the defendant knew or ought to have known that such a dangerous situation could result in injury to pedestrians using the sidewalk.

PRACTICE – Motion – to shorten notice period *Nova Scotia (Director of Public Safety) v. Clarke et al.,* S.N. No. 309387, Edwards, J., April 8, 2009. 2009 NSSC 427; **S619/24** ■ The applicant sought an order under the *Safer Communities and Neighbourhoods Act* and applied (on an ex-parte basis) to abridge the time frame for filing documents/providing notice, on the basis of public safety concerns (a fear of reprisal) should the respondents learn of the application a full 25 days before the hearing as typically required. A provincial Department of Justice investigator's affidavit contained information concerning complaints from neighbours about illegal drug activity at the respondents' home and outlined the respondents' lengthy criminal records. *Held,* application granted as sought, although the judge hearing the matter will be free to modify any notice period or deadline ordered. Notice is reduced to 10 days. The respondents will then have five days to respond. Notice will likely lead to violence and an *ex parte* order will likely avoid the violence. The respondents should still have sufficient time to prepare a response. While there is still a potential for violence with the shortened notice period, the potential is lessened by it.

PRACTICE – Motion to withdraw as counsel – service *Williams et al. v. Halifax (City of),* Hfx. No. 126561, Duncan, J., December 29, 2010. 297 N.S.R. (2d) 104; 2010 NSSC 467; **S622/2** ■ Counsel for the plaintiffs moved to withdraw in relation to a number of the plaintiffs. They claimed they either could not contact them and/or that the plaintiffs wouldn't follow their advice to accept the defendant's settlement offer. The evidence showed that, for the duration of their retainer (over 10 years), the lawyers didn't communicate directly with each of the plaintiffs, but rather with a Society that represented their collective interests. *Held,* motion to withdraw allowed in relation to the plaintiffs who are deceased and/or were unable to be served despite reasonable attempts to do so; motion also allowed in relation to those who can be shown to have received some notice of this proceeding and who chose not to attend. As for the plaintiffs who wanted continued representation, motion adjourned. The lawyers won't be permitted to withdraw until they have personally consulted and advised those plaintiffs. Generally speaking, a refusal to follow a lawyer's advice is evidence of a breakdown in the solicitor-client relationship so serious it cannot continue. Here there's no evidence of such a breakdown given the lack of personal interaction, although there may be after the lawyers have individually consulted each of the remaining plaintiffs. It's difficult for a lawyer to withdraw representation (especially in a long-standing and ongoing litigation matter), and sufficient proof is required to establish the withdrawal is warranted. The fiduciary relationship that existed between the lawyers and plaintiffs must be honored to the extent that ethical guidelines will permit (see Chapters 6 and 11 of the *Legal Ethics Handbook*).

PRACTICE – Parties – motion to remove one party and add another *M5 Marketing Communications Inc. v. Ross et al.,* Hfx. No. 293140, McDougall, J., January 26, 2011. 2011 NSSC 32; **S623/9** ■ The plaintiff, M5 Marketing, sought leave to withdraw its claim against the defendant, Mr. Ross, and to add another party, GJR Developments, in his place; Mr. Ross is GJR's president, secretary and sole director. The amendments would require further changes to the already once-amended statement of claim, and a revised defence from the corporate defendants. Mr. Ross was self-represented and didn't appear, despite having been served with notice. The corporate defendants disputed the motion, claiming it was motivated by bad faith. They pointed to a series of settlement and indemnity agreements they had entered into with GJR. The proposed changes, they argued, were being made simply to improve the plaintiff's chances of success on a third party beneficiary claim against the corporate defendants. *Held,* motion granted; leave granted to amend, withdraw the claim against Mr. Ross and add GJR in his place; Mr. Ross has 30 days to amend his counterclaim against the plaintiff. The new *Civil Procedure Rules* (2008) appear to take an even more generous approach to amendments. They should be allowed unless the other party will suffer "serious prejudice" that can't be compensated by costs. Bad faith could be fatal, but it's a serious allegation; there would have to be strong and compelling evidence in favour of it and there is none here. The plaintiff has explained any inconsistencies between the materials filed in support of this motion, and older affidavits referencing Mr. Ross personally. It's not uncommon to seek to amend a claim, or replace one defendant with another, if new facts and a new appreciation of the claim comes to light based on information uncovered during discoveries. While the settlement agreements and accompanying releases between the corporate defendants and GJR could create a problem for some of the parties, this isn't a sufficient basis to prevent the plaintiff from amending the claim to replace a defendant.

PRACTICE – Parties – representative action *Allen v. Royal Canadian Legion,* Hfx. No. 264961, Scaravelli, J., December 9, 2010. 297 N.S.R. (2d) 22; 2010 NSSC 451; **S620/16** ■ The plaintiff was a member of the defendant Legion's Branch 25. For various reasons, the Legion sold the properties from which the Branch operated and revoked the Branch's charter. The plaintiff brought this action, claiming the sale(s) amounted to a form of conspiracy and that Branch 25 was closed in bad faith. He sought a reinstatement of the charter and an accounting, and brought motions to confirm him as a representative plaintiff, allowing him to represent all members of Branch 25; and compel further documentary disclosure related to the sale of the properties. *Held,* motions denied, with costs payable to the defendants in any event of the cause. The action was commenced before the *Class Proceedings Act* existed. Rule 5.09 of the *Civil Procedure Rules* (1972) allowed a person to act as a representative if they had the same interests as those they represented. There is insufficient evidence on file to allow the court to determine whether this is the case here. There is also insufficient evidence to allow the court to appoint a representative under the new *Civil Procedure Rules* (2008), Rule 68.08(2). The plaintiff's motion wasn't made under this Rule, nor did his affidavit meet the required criteria. The common interest exception to solicitor-client privilege doesn't apply: the plaintiff hasn't established a sufficient fiduciary relationship, and is not entitled to disclosure of what are privileged materials related to the property sale(s). The other documents sought amount to a fishing expedition.

There is no evidence (e.g., no information disclosed on discovery) they even exist, let alone are relevant.

PRACTICE – Pierringer agreement – scope of discovery of experts *Ameron International Corp. et al. v. Sable Offshore Energy Inc. et al.,* C.A. No. 328825, Farrar, J.A., December 22, 2010. 297 N.S.R. (2d) 300; 2010 NSCA 107; **S621/3** ■ The respondent/appellant by cross-appeal, Sable, is the plaintiff in a multiparty lawsuit. Sable settled with a number of defendants and third parties to the main action, and entered into two Pierringer Agreements that provided for a full dismissal of the claims between the settling parties. The court approved the agreements, but: ordered that any subsequent discovery of the settling defendants' experts be limited to questions of fact; and ordered Sable to leave in, but shade, the portions of the statement of claim relating to the settling defendants. A non-settling defendant, Ameron, appealed the limitation on experts and Sable cross-appealed the court's refusal to allow them to delete all references to the settling defendants from the pleadings. *Held,* leave to appeal granted in respect of both appeals: Ameron's appeal allowed in part; Sable's appeal dismissed. The chambers judge erred by limiting future discovery of experts to fact only, but was led down the wrong path by counsel at the hearing. No one at that hearing actually asserted litigation privilege in respect of any of the expert reports. Without deciding whether any of the experts' evidence is subject to litigation privilege, the materials should be retained and the possibility of requesting disclosure or asserting privilege left open for the future. The decision to leave in, but shade, portions of the statement of claim that refer to the settling defendants doesn't violate any principle of law and is not patently unjust. The claims don't stay alive by virtue of staying in; they just help to give context to the action. It was an appropriate exercise of discretion by the chambers judge and shouldn't be disturbed.

PRACTICE – Post-trial issues – costs, prejudgment interest, expert's fees and currency conversion *Van Duren v. Chandler Marine Inc.,* Hfx. No. 250847, Coady, J., December 16, 2010. 2010 NSSC 458; **S620/22** ■ The plaintiffs purchased a boat from the defendants. They made a successful claim in relation to a number of defects and were awarded over $92,000 in general and special damages at trial. Special damages were either incurred or would be incurred in U.S. dollars, while the award was made in CDN dollars. At issue were: costs, expert fees, prejudgment interest and currency conversion, as well as whether a $5,000 holdback retained by the plaintiffs on delivery of the vessel should be deducted from the damage award. *Held,* basic costs of $24,500 awarded, on the basis of Tariff A, scale 2 (basic) plus $2,000 per day of trial. The $5,000 holdback is akin to holding funds in trust and shouldn't be deducted from the damage award, which was set based on the merits. While the plaintiffs claimed a lot more than they were awarded, costs shouldn't be reduced under Rule 77.07(2)(a) of the *Civil Procedure Rules* (2008). There is nothing to suggest the amount claimed stood in the way of settlement discussions or added to the length of the trial. As for the defendant having agreed to a quantification of damages on the day the trial started, the quantification was close to the amount awarded. The foreign expert fees are allowed, with the exception of two days' worth of fees in relation to one expert who charged for six days for his one day in court. Prejudgment interest for general damages is two-and-a-half per cent from the time the plaintiffs took possession to the date of the decision and for past (but not future) special damages is five per cent for the same period. There are no local authorities concerning what is the appropriate date to convert the award to U.S. dollars. Currency will be converted based on the rates that exist the day before the payment is made.

PRACTICE – Pre-trial motion for dismissal – non-suit, want of prosecution, abuse of process *Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd. et al.,* Hfx. No. 192468, LeBlanc, J., October 8, 2010. 296 N.S.R. (2d) 17; 2010 NSSC 364; **S619/31** ■ The defendant, United, had a contract with the plaintiff, Boehner, to move and spread soil for a development. Boehner had a contract with the third party, Whebby, to remove fill from lands owned by the fourth party. Boehner sued United for breach of contract for allegedly depositing contaminated fill. Boehner joined Whebby, who joined the fourth party. United then amended its claim to include Whebby. They obtained summary judgement against Boehner, with damages to be assessed. Before the first trial, Boehner and United executed a settlement agreement that dealt with the distribution and allocation of damages that might be awarded, as well as the sharing of any cost award and also agreed to certain limits on cross-examination. At the conclusion of the first trial, Whebby and the fourth party paid damages of $304,000, all but $19,000 of which was distributed to Boehner. Later, the Court of Appeal ordered a new trial, making it necessary for Boehner and United to return the money. Boehner couldn't pay because of financial hardship. United undertook to repay on Boehner's behalf. Before the second trial could begin, Boehner withdrew its claim and eventually made an assignment in favour of United. Whebby now sought: an order for non suit; or a stay of proceedings for want of prosecution; and to have the assignment between Boehner and United set aside as an abuse of process amounting to maintenance and champerty. *Held,* non-suit motion dismissed: this can only be addressed after the trial has started. Webby's jeopardy can only be ascertained after the plaintiffs by counterclaim (United and Greater Homes) call their evidence. Given this hasn't happened yet, it is premature to consider a non-suit motion. Motion to dismiss for want of prosecution dismissed. While the evidence in the first trial wasn't fully recorded, there's no evidence counsel failed to take notes of the testimony of each witness at discoveries and/or trial. There's no evidence (or even claim) of actual prejudice. In light of the many steps taken to date, including the appeal, the delay has not been inordinate. The assignment from Boehner to United does not amount to maintenance, champerty or an abuse of process, regardless of whether it concerns an unliquidated claim. Whebby didn't object to the original settlement agreement when it was disclosed. United's motives are transparent and appropriate. The assignment was intended to put United in the same position it would have been in had Boehner participated in the trial. It does not create additional prejudice to Whebby. The defences available to Whebby remain the same in relation to the action in tort as well as the *Sale of Goods Act* claim in contract by Boehner made at the first trial. Looking at the authorities on the subject, it's clear the analysis must be applied on a case-by-case basis. United is not a stranger to the proceedings seeking to take a benefit. They've: been engaged since the beginning; hold a judgment against Boehner; participated in pre-trial procedures, as well as the trial and appeal; and paid out funds to Whebby.

PRACTICE – Production of documents – redacted material *Fisher v. West Colchester Recreation Association,* Hfx. No. 142886C, Coady, J., October 20, 2010. 2010 NSSC 382; **S619/26** ■ After reviewing redacted portions of a security file, the court released this addendum outlining which portions were properly redacted as opinion and which should be disclosed as fact. *Held,* several paragraphs must be disclosed as consisting of entirely fact. The remaining redactions are entirely related to opinion and/or the criminal investigation/review and were properly made.

PRACTICE – Production of documents – relevancy *Saturley v. CIBC World Markets Inc.,* Hfx. No. 305635, Moir, J., January 7, 2011. 297 N.S.R. (2d) 371; 2011 NSSC 4; **S622/7** ■ The plaintiff investment broker brought a wrongful dismissal suit against the defendant, his former employer. He alleged the defendant used him as a scapegoat for expensive errors made by a third party contractor, and that this impacted his reputation. He sought disclosure of communications between the defendant and contractor. The defendant sought disclosure of all communications between the plaintiff and clients after he was let go. At issue was the meaning of relevancy in Part 5 of the *Civil Procedure Rules* (2008), and whether the documents requested by each party meet that definition. *Held,* the new Rule 14.01 abolishes the semblance of relevancy test for disclosure and discovery. Relevance is to be determined from the vantage of a trial, as best as it can be constructed. The determination of relevance must be made according to the meaning of relevance in evidence law generally, not a watered-down version. Just as at trial, the determination of whether something is relevant is made on basis of the pleadings and evidence known to the judge at the time the ruling is made. These conclusions stem from the principle that it's fundamental to justice that relevant material be disclosed while irrelevant material is not. Overly broad disclosure practices worked injustices in the past, and were less cost-effective and efficient. Despite this, there's still a broad approach to disclosure and discovery of relevant information in Nova Scotia, as has existed since 1972. While the definition of "relevancy" has been curtailed, disclosure/discovery still operates on a liberal basis. With two narrow exceptions, the documents requested by the plaintiff are irrelevant. Parts of those requested by the defendant are relevant as they relate to mitigation.

PRACTICE – Production of documents – relevancy *Atiyah v. Twin Lighthouse Farm Ltd. et al.,* Syd. No. 304367, Murray, J., December 23, 2010. 2010 NSSC 389; **S622/31** ■

PRACTICE – Settlement agreement – valid and enforceable *Langthorne v. Humphreys,* Hfx. No. 245880, Rosinski, J., February 2, 2011. 2011 NSSC 44; **S623/21** ■ The plaintiff was injured in a car accident. He retained a lawyer to represent him on a contingency-fee basis. His lawyer and counsel for the defendant reached a full and final settlement of all outstanding claims. The plaintiff refused to sign the release and denied authorizing his lawyer to enter into a settlement on his behalf. The lawyer's file was well documented, and included memos to file regarding the plaintiff's very specific instructions. The defendant moved under Rule 10.04 of the *Civil Procedure Rules* (2008) for a declaration that the settlement was/is a binding one. *Held,* the settlement is a binding one and the defendant is released from any further claims by the plaintiff. Costs of $1,000 to the defendant, payable forthwith. Whether the plaintiff's lawyer had express, implied, usual or even apparent authority, the plaintiff is bound, absent any supervening considerations (e.g., evidence of duress, unconscionability, undue influence or mistake on an essential term). The lawyer's evidence was credible and his documentation well maintained. The plaintiff's evidence was confusing, self serving and less than credible. The plaintiff more likely than not had authorized his lawyer to negotiate the settlement, agreed to its terms and then changed his mind. All essential terms were agreed upon, the settlement must stand. The plaintiff's refusal to sign the release is not a repudiation and, even if it were, the defendant satisfied the court the contract was affirmed and treated as a continuing one.

PRACTICE – Small Claims Court – non-suit, request to reconvene to hear additional evidence *Bedash v. Integrity Homes 2000 Inc.,* Claim No. 337164, Slone, Adjudicator, December 21, 2010. 2010 NSSM 75; **SmCl17/14** ■ The claimant bought a two-year-old home and later suffered water damage that he felt stemmed from a building flaw. At issue was whether the defendant builder could be held liable for the cost of repairing the water damage. The claimant was self-represented. On the first hearing date, the defendant sought and got an adjournment. The adjudicator ran into the claimant after the hearing, asked whether he was ready to proceed, and cautioned him about the need to prove his case. The claimant assured the adjudicator he was more than ready. At the final hearing, he led evidence of similar problems in other homes in the area that were also built by the defendant. He suggested the prior owners were aware of the problem, but failed to call them as witnesses or provide documentary evidence to that effect. After he closed his case, the defendant successfully moved for non-suit. The claimant asked to have his case reopened to allow him to call the necessary evidence it appeared was lacking. *Held,* motion for non-suit granted; claim dismissed. There was no admissible and probative evidence to show a breach of the home's warranty. The claimant failed to prove there was a deviation from the National Building Code that caused his water problems. The "similar fact" evidence was prejudicial and not probative and should carry no weight. While the small claims process is flexible and encourages self-represented litigants, the defendant is entitled to procedural fairness and shouldn't be made to meet the same case more than once. The claimant is intelligent and capable, and was confident he knew what he was doing. Allowances were made at the hearing for his inexperience. He had ample chance to know the case he had to prove and simply chose to focus on things that didn't achieve what he hoped. Even a small amount of legal advice might have steered his focus to a better trial strategy. It would be unjust to allow him to reopen his case.

PRACTICE – Statement of claim – amendments *Oldford v. Canadian Broadcasting Corp. et al.,* Yar. No. 191333, Rosinski, J., February 3, 2011. 2011 NSSC 49; **S623/24** ■The plaintiff sought leave to file an amended statement of claim in this defamation action relating to an episode of *The Fifth Estate* that aired in 1998. The defendants were aware of the proposed amendments since 2007. The plaintiff's old lawyer had already amended the claim once. There was little reason given for the amendments. *Held,* amendments allowed; costs to the plaintiff of $1000 in any event of the cause, payable at the end of the proceeding. The new *Civil Procedure Rules* (2008) don't alter the old legal test for when leave will be granted to amend. An amendment should be granted unless requested in bad faith or the other party would suffer serious prejudice if it's allowed. There was no direct evidence of any bad faith. The court can only speculate on the plaintiff's motives. Instead of inferring based on the proven facts, the court inferred good faith. Since the law on defamation has changed since the claim was first amended, further amendments could be required for this reason. There is no evidence of possible serious prejudice. The defendants have known about the proposed amendments since 2007 and presented no evidence of actual prejudice they expect to suffer if granted. The court can only infer this is because there is none. The proposed amendments don't advance a new "theory of the case". While they reflect a more detailed claim, at its core the claim is essentially the same the defendants were originally facing. The factual foundation upon which the claims are based are not perceptibly different. While this will necessitate the filing of a new defence, and some change in the defendant's approach at trial, there's ample time to allow for the modest adjustments that may be required. The court won't require the plaintiff to indemnify the defendant for the cost of preparing a new defence at this time; that's something best left for the trial judge.

PRACTICE – Statement of claim – application to strike, defamation *Poirier v. White,* S.N. No. 331283, Murray, J., November 4, 2010. 296 N.S.R. (2d) 152; 2010 NSSC 406; **S619/4** ■The plaintiff alleged (among other things) slander, defamation and malicious prosecution by his former girlfriend, the defendant. She moved for summary judgment under Rule 13 of the *Civil Procedure Rules* (2008), and sought a dismissal/striking of the action. She also alleged abuse of process under Rule 88. *Held,* motion(s) denied, but the plaintiff must amend his pleadings and file a properly pleaded statement of claim within 30 days. There are material and other facts in dispute, and it is not plain and obvious that the pleadings disclose no cause of action. The defendant failed to meet the test for summary judgment, either on the evidence or the pleadings; however, deficiencies in the pleadings gave rise to her motion and (using the discretion allowed for by Rule 77) she is to be awarded $1,000 in costs.

PRACTICE – Stay of execution – pending appeal *Dixon et al. v. Nova Scotia (Director of Public Safety),* C.A. No. 343192, Farrar, J.A., February 3, 2011. 2011 NSCA 15; **S621/17** ■The appellants sought a stay pending their appeal of an order made under the *Safer Communities and Neighbourhoods Act* requiring them to vacate their home for 70 days. The had abided by the terms of an interim order placing conditions on their use of the home for more than five months. They gave evidence that a move would force them to take their three children out of school and move to a new community. Their eldest daughter is autistic and unable to take a school bus. She can walk to school from this home. *Held,* stay granted, with conditions including a requirement that no one but the appellants, their children and an approved babysitter(s) be at the home between 11 pm and 6 am. Without a stay, the appellants and their children would suffer irreparable harm. The potential damage to the children can't be measured in monetary terms and without a stay, the issue would be moot by the time the appeal is heard. The balance of convenience favours a stay. The appellants have followed the conditions in the interim order(s). There is no suggestion the community has suffered harm during this time.

PRACTICE – Summary judgement – abuse of process *Cormier v. Universal Property Management Ltd. et al.,* Hfx. No. 327439, Rosinski, J., January 14, 2010. 2011 NSSC 16; **S622/19** ■The plaintiff operated a hair salon on premises owned by the defendant Fenwick. The defendant Universal was Fenwick's property manager, and the defendant Schelleman, an agent working for Fenwick. When the plaintiff decided to move his business, he found another tenant to take over the lease. He claimed Schelleman promised him the new tenant would be approved and then told him the new tenant was approved. Relying on that, he moved and stopped paying rent. Approval was denied. He brought an action claiming against: Universal and Fenwick, breach of contract; Fenwick, abuse of process; Universal, negligent misrepresentation or equitable fraud; and Schelleman, negligent or fraudulent misrepresentation. The defendants cross-claimed for unpaid rent; denied promising or giving approval; claimed Schelleman wasn't authorized to do so; argued the plaintiff could not bring the claim in his name because the lease was between them and Snip It First Ltd.; and claimed the issue of restriction on use was already decided at an appeal of an earlier, related small claims proceeding, where Robertson, J. found the "use" term was not subject to a requirement not to unreasonably withhold consent. They moved for summary judgment on the evidence. Two Universal employees testified and were cross-examined; so too was the plaintiff. No exhibits were filed. *Held,* motion granted in part; summary judgment allowed only in relation to the claim of abuse of process, which is dismissed. The rest of the claims stand and are left for trial. There are material facts in issue in relation to each claim except the abuse of process claim. Having determined there are material facts in issue, there is no need to consider whether the defences have a real chance of success. Whether there was an agreement or contract is a matter of fact to be determined from the objective viewpoint of a reasonable person. It does not matter that the defendants deny subjectively intending to grant approval. Whether such was granted is a fact to be determined after all the evidence is heard at trial. The court examined the varieties of authority (actual, implied or apparent), and vicarious liability. It is a question of fact as to whether Schelleman could bind the other defendants to an approval. The restriction of use issue is also a fact best left for trial. As for whether the plaintiff was a party to the lease agreement and capable of suffering damages in relation to a breach, the defendants treated him as the owner throughout, despite the fact the lease was in the name of a prior business. They let him sign a lease extension in his personal capacity, accepted personal cheques for rent, and conducted their property management duties as if they considered him the tenant. It would not be appropriate to prevent a trial on the basis of this submission.

PRACTICE – Summary judgment – genuine issue of material fact *Bell Aliant Regional Communications Inc. v. Cabletec Ltd. et al.,* Hfx. No. 307920; 307917, Boudreau, J., April 6, 2011. 2011 NSSC 136; **S627/13** ■

PRACTICE – Summary judgment – granted, liability of casino for problem gambler *Burrell v. Metropolitan Entertainment Group et al.,* Hfx. No. 274367, Murphy, J., January 13, 2011; October 8, 2010 (orally). 297 N.S.R. (2d) 228; 2010 NSSC 476; **S622/16** ■The plaintiff sued the defendants in relation to the losses he suffered as a result of his gambling addiction. The crux of his claim was that they owed him a duty of care and negligently breached that duty by failing to take steps to prevent or minimize his casino gambling. It was clear his gambling addiction had damaged his life, but the evidence showed the casino honoured his eventual request to be banned. The defendants brought a motion for summary judgement on the pleadings, seeking to have the claim(s) dismissed. *Held,* motion granted. It's plain and obvious the pleadings are unsustainable; claim dismissed. Relying heavily on the law/reasoning as set out in the parties' briefs, the court attached those briefs to the decision as Appendix A. In summary: the claim is not supportable on the basis of a common-law duty of care. Applying the test from *Anns*, the law doesn't support the existence of a broad duty of care to problem gamblers. The claim based on regulatory negligence is certain to fail. The duties owed under the *Gaming Control Act* are owed to the public and not individual gamblers. A statute is only interpreted to create a private duty of care when it's expressly set out therein. The claim based on negligent promotion is also unsustainable. The province's decision to allow/regulate gambling was a policy decision that didn't give rise to individual liability. The claim doesn't disclose a cause of action based on breach of fiduciary duty, or one based on a duty of care arising from statute.

PRACTICE – Summary judgment – personal guarantees *Bank of Nova Scotia v. Shivjii Granite & Marble et al.,* Hfx. No. 294075, McDougall, J., January 25, 2011. 2011 NSSC 21; **S623/4** ■ The non-corporate defendants (the Colemans and the Janmengas) signed personal guarantees to secure loans made by the plaintiff bank to the corporate defendant, Shivjii. The Janmengas and Mr. Coleman were directly involved in the company. Mrs. Coleman was not, but executed two personal guarantees for it. Before she signed the first, the bank advised her to obtain independent legal advice. She did and

signed anyway. At no time did she suggest that advice was insufficient. The bank started an action to collect on the guarantees when Shivjii defaulted on payments. The band obtained a consent judgment in relation to all defendants but the Colemans; these defendants made payments against the debt and significantly reduced the amount owing. The bank moved for summary judgement against the Colemans, both in relation to their defence and their counterclaim. The crux of the Colemans' argument was the bank failed to meet its fiduciary duty to Mrs. Coleman by not fully explaining the consequences of her signature and by failing to offer the company's financial information for her consideration before she signed. *Held,* summary judgement granted; judgement entered against the Colemans in relation to the amounts owing under the guarantees; their counterclaim is dismissed. The majority of the court's reasons relate to the main action. It found the bank fulfilled any duty it may have had to Mrs. Coleman by advising her to obtain independent legal advice. The bank was entitled to rely on the certificate of independent advice absent any evidence Mrs. Coleman wasn't satisfied with the advice already given, especially since she signed the certificate herself to acknowledge she understood it. As for Mr. Coleman, he's an experienced businessman, well versed in the risks and benefits of such guarantees. He either knew or ought to have known the liability to which he was exposing himself by signing. His relationship with the bank was totally contractual. There is no evidence of any misrepresentation, inducement or suggestion the bank acted in a commercially unreasonable manner. There are no material facts requiring trial. The Colemans failed to show their defence has a genuine chance of success. Similarly, there is no material fact requiring trial or chance of success in relation to their counterclaim.

PRACTICE – Summary judgment – third party release *Johansson v. General Motors of Canada Ltd.,* Hfx. No. 230488, McDougall, J., January 21, 2011. 2011 NSSC 20; **S623/3** ■ The plaintiffs, Steven and Jody Johansson, were injured in a single vehicle crash while driving with the plaintiff, Mary Johansson. They both received a damage settlement from, and signed releases in favour of, the vehicle's owner and his insurance company ("Citadel"). More than five years later, they brought this action against the car's manufacturer (the defendant, GMCL), claiming the accident was caused by an inherent flaw in the vehicle's design and seeking further damages. GMCL moved for summary judgement on the pleadings in relation to Steven and Jody Johansson, on the basis of the releases. They indicated that, should this matter proceed to trial, they would be joining Citadel as a third party. *Held,* motion granted; Steven and Jody Johansson's claims dismissed. There are no genuine issues for trial; the only facts in dispute relate to Mary Johansson. The releases were clear and unambiguous. Although neither plaintiff had the benefit of independent legal advice when signing, they both accepted payment in full and final settlement of any damages arising from the accident. They should not now expect to recover further compensation, especially where pursuing the claim will result in a claim for contribution or indemnity against Citadel. While GMCL was not a party to the release, the release did contemplate third parties being covered insofar as those third parties "might claim contribution or indemnity". Both conditions from the SCC case of *Fraser River* [1999] have been met: the parties to the contract (Citadel and the plaintiffs) intended to extend the benefit in question to the third party seeking to rely on it; and the very activities concerned are those contemplated as coming within the scope of the contract in general. GMCL should be entitled to use the releases to defend the action brought by these plaintiffs. To allow the action to proceed would be an abuse of the court's process.

■ PROFESSIONAL OCCUPATIONS

PROFESSIONAL OCCUPATIONS – Engineer – duty to inform client of bylaws *MacKay v. Forgeron Engineering Ltd. et al.,* Claim No. 338466, Slone, Adjudicator, December 22, 2010. 2010 NSSM 70; **SmCl17/8** ■

PROFESSIONAL OCCUPATIONS – Nursing – judicial review *MacDonald v. College of Registered Nurses of Nova Scotia,* Hfx. No. 334699, Coughlan, J., December 17, 2010; November 12, 2010 (orally). 2010 NSSC 430; **S620/24** ■

PROFESSIONAL OCCUPATIONS – Real estate agents – negligence *Cholewa v. McAuley et al.,* S.C.C.H. No. 339722, Parker, Adjudicator, February 10, 2011. 2011 NSSM 18; **SmCl18/3** ■

■ REAL PROPERTY

REAL PROPERTY – *Private Ways Act* – process for obtaining a right of way discussed *Cron v. Halifax (Regional Municipality) et al.,* Hfx. No. 337014, Rosinski, J., December 17, 2010; December 15, 2010 (orally). 297 N.S.R. (2d) 118; 2010 NSSC 460; **S620/23** ■ The applicants sought a declaration that the municipality did not have the legal authority to grant a petition made by their neighbour pursuant to the *Private Ways Act* ("PWA") that would grant her a private "way or road" over their property. The neighbour's property could currently only be accessed using a footpath that was a public easement over the applicants' land. The applicants argued that the legislation was only relevant in cases where the affected landowner consents to the transfer of title to their property as non-consensual takings were no longer permitted and the municipality could only "expropriate" land pursuant to the *Expropriation Act*, the HRM City *Charter* or the *Municipal Government Act*. No interpretation under the PWA had previously been made. *Held,* application dismissed; Part 2 of the PWA is operative legislation within the province and any municipal council petitioned for the "obtaining and laying out of a private road" may properly consider such a petition. The court examined the history and interaction of the various pieces of legislation and found that the object of the *Expropriation Act* is to take land, without consent, for the benefit of the public, whereas the object of the PWA is to transfer land, without consent, from one private person to another. Although the PWA could have significant consequences for affected landowners, the process under the Act did not constitute expropriation as contemplated by the *Expropriation Act*.

REAL PROPERTY – Restrictive covenants – application for summary judgment allowed, no cause of action *Rice v. Armco Capital Inc. et al.,* Hfx. No. 322416, LeBlanc, J., October 13, 2010. 296 N.S.R. (2d) 217; 2010 NSSC 369; **S620/3** ■ The defendant Armco developed and conveyed various lots to the plaintiffs and the defendants, the Rayneses. The defendant Ms. Condran was the plaintiff's lawyer for the transaction. These conveyances contained restrictive covenants, including one forbidding lot owners from keeping "horses or other animals other than household pets" on the lot(s). Armco waived the covenant for the Rayneses, allowing them to keep horses. The plaintiffs argued the covenants could/should only be waived with the agreement of the owners of the lots for whom the covenants were intended to benefit. The covenants themselves allowed for a unilateral waiver by Armco. The plaintiffs claimed against Armco based on a representation allegedly made by Ms. Condran during the course of the transaction: that the waiver clauses were illegal and

unenforceable. They argued there was a building scheme that was breached, but the pleadings did not directly tie Armco to the scheme/breach. Armco brought this motion for summary judgment on the evidence and the pleadings. *Held,* motion for summary judgment granted on the pleadings alone; there's no need to consider the evidence. The pleadings, as drafted, disclose no cause of action against Armco known to law. There is no genuine issue for trial. If they had wanted to bring a successful motion against Armco, the plaintiffs would have had to allege that Armco breached a duty of good faith or fiduciary duty owed to them, or that Armco was a party to a contractual relationship established by an alleged building scheme and breached that scheme. It is not enough to simply plead damages in order to make out a cause of action on the pleadings.

REAL PROPERTY – Title – establishing title to land, summary judgment for certificate of title *Nova Scotia (Attorney General) v. Brill et al.,* C.A. No. 313430, Fichaud, J.A., September 9, 2010. 294 N.S.R. (2d) 307, 323 D.L.R. (4th) 601; 2010 NSCA 69; **S611/31** ■ The applicant applied for summary judgment in his application for a declaration of title for an island for which he had paper title. The Crown argued against title on the basis that there had been no initial Crown grant for the island. The chambers judge ruled on the applicability of the *Marketable Titles Act* and the common law rules respecting chains of title (finding that the statutory 40-year rule for marketable title applied to the Crown) and dismissed the application for summary judgment. The Crown appealed the finding that it was subject to the 40-year rule and the applicant cross-appealed the denial of his summary judgment application. *Held,* both appeal and cross-appeal dismissed; the 40-year rule for "marketable title" applies to the Crown; the application of the principles under the provincial legislation and the common law respecting the legal effect of a chain of paper title to this case was a triable issue. The court traced the antecedence to the 60-year rule and found no merit in the Province's suggestion that the *Marketable Titles Act* jettisoned the common law's treatment of constructive or presumed possession, from a chain of title, in an adverse possession claim under the *Limitations of Actions Act*. The holder of documentary title need not trace his ostensible title back to an original Crown grant to have colour of title.

■ SALE OF LAND

SALE OF LAND – Agreement of purchase and sale – breach *Whalen v. Murphy et al.,* S.C.C.H. No. 338659, Parker, Adjudicator, March 24, 2011. 2011 NSSM 19; **SmCl18/4** ■

SALE OF LAND – Agreement of purchase and sale – inaccurate disclosure statement, dry well *McDermott v. Allen,* Claim No. 318962, Thompson, Adjudicator, June 8, 2010. 2010 NSSM 65; **SmCl17/2** ■ The drilled well on the property purchased by the claimant went dry shortly after the purchase. Also, a second shallow well that provided water to a neighbouring property was discovered on the property after the claimant moved in, for which she sought the cost of fencing. The defendants had not lived on the property for the year prior to the sale and the disclosure statement was a year out of date when it was provided to the claimant. The Agreement provided that the defendants would mark the location of the well before closing. *Held,* judgment for the claimant for the cost of the new well as well as the cost of building a safe cover for the second well; prudent and knowledgeable homeowners would not have warranted the adequacy of the water supply when they had not lived on the premises for a year and the clause concerning the defendants' obligation to mark the location of the well imposed an obligation to disclose the location of all wells on the property. The second well, in its current condition, was both an undisclosed latent defect and an undisclosed, unregistered possessory easement.

SALE OF LAND – Agreement of purchase and sale – inaccurate disclosure statement, leaky basement *Skinner v. Crowe,* Claim No. 315628; 332326, Thompson, Adjudicator, November 16, 2010. 2010 NSSM 66; **SmCl17/3** ■ The basement of the home purchased by the claimants flooded a few months after the purchase. The vendors had the home built for them and, shortly after construction, the basement had twice flooded. After they trenched the front of the house to create drainage, there were no more such incidents. The disclosure statement referenced a crack in the foundation in answer to a question concerning repairs to correct leakage problems but no mention was made of the trench to relieve flooding issues. A separate action was commenced against the defendants' real estate agent. *Held,* judgment for the claimants against both the vendors and their real estate agent. Although the court did not find any fraudulent intent but rather that the vendors believed that since the drainage trench had functioned well there was no need to disclose the work done, they were careless in their response to the question and this constituted a negligent misrepresentation. The claimant had been reasonably diligent in inspecting the premises with his father, who had experience in building and he, himself, had built a home of his own and was engaged as a safety consultant on work sites. When the claimants had questioned how the crack in the foundation occurred and how it was fixed, they had been misdirected by incomplete and misleading information. The vendors' failure to state that they had constructed a drainage trench across the front of the house due to the flooding was also a breach of a term of the contract and the court was satisfied that, had the claimants known about the extensive work and the previous flooding problem, they likely would have terminated the contract.

■ TORTS

TORTS – Defamation – non-suit *Salman v. Al-Sheikh Ali et al.,* Hfx. No. 256952, Hood, J., January 26, 2011; August 24, 2010 (orally). 2010 NSSC 450; **S623/25** ■

■ TRADE REGULATION

TRADE REGULATION – Validity of legislation – *Dairy Industry Act* regulations *Taylor et al. v. Dairy Farmers of Nova Scotia et al.,* Tru. No. 314398, Duncan, J., November 25, 2010. 2010 NSSC 436; **S620/5** ■ The applicant dairy producers challenged regulations created by their governing body that created a capped price for the exchange of saleable milk quota, on the basis that the regulations were *ultra vires* the statute and that the legislative scheme mandated the expropriation of "property", namely milk quota, without compensation. *Held,* the impugned regulations are *intra vires* and *prima facie* valid; the milk quota is not "property" and, even if it was "property", it was not being "expropriated" because the state acquires nothing in the transaction; if milk quota was property that was being expropriated, the only logical inference was that the governing body has the authority to do so without compensation. It is clear that the legislative intent was to construct a comprehensive regulatory scheme for every part of the dairy industry and the power to adjust the quota as set out in the regulations is authorized by s. 14(1)(e)(iii) of the Act. Quota and the "opportunity" it presents for profit in an open market, while capable of being used as security for borrowing purposes and for purchase and

sale, is not "property" capable of being subject to expropriation; rather, it is a revocable licence that provides a conditioned entitlement to produce milk, with no right to renew or even retain the quota allotted.

■ WILLS AND ESTATES

WILLS AND ESTATES – Conflict of laws – validity and effect of marriage upon will *Davies v. Collins,* Hfx. No. 328880, Rosinski, J., December 16, 2010. 297 N.S.R. (2d) 136; 2010 NSSC 457; **S620/20** ■ Dr. Davies was officially domiciled in Nova Scotia but lived with the respondent in Trinidad for years. They married two days before he died in 2007. In Trinidad, their union was considered a marriage *in extremis*, or death-bed marriage. Under local law, such marriages are valid, but (unlike regular marriages) do not operate to invalidate a prior will. The applicant, Dr. Davies' ex-wife, was executor and beneficiary under a will executed by Dr. Davies in Nova Scotia in 1989; well before their divorce in 2001. When the applicant tried to probate the will, she was told by the registrar of probate there were prior existing proceedings in Trinidad (brought by the respondent) and the will could not be probated in Nova Scotia. She applied under Rule 5 of the *Civil Procedure Rules* (2008), seeking a declaration that, as a matter of law in Nova Scotia, the 1989 will was not revoked by the 2007 marriage *in extremis* in Trinidad and therefore may be properly probated in Nova Scotia. She argued the question of the effect of the marriage on the will should be characterized as a question of matrimonial rather than succession law, making the governing law that of the intended matrimonial domicile (Trinidad) as opposed to the deceased's domicile (Nova Scotia). In the alternative, she argued the marriage was invalid under Nova Scotia law and therefore didn't qualify as a marriage under s. 17 of the *Wills Act*. *Held,* the 2007 marriage was a valid marriage and operates to invalidate the prior will. A valid marriage meets the definition of "marriage" in s. 17, which doesn't intend to distinguish between marriages that either revoke or don't revoke a prior will in the way Trinidadian law does. Undergoing a detailed analysis of the leading texts and case law on the choice of law question, the court considered the rules on moveables (that whether a marriage revokes a prior will depends on the law of the testator's domicile at the date of marriage) and immovables (which are governed by the law of the country where the immovables are situate), finding sufficient authority/rationale to depart from the traditional rules. The question of whether a marriage revokes a prior will (both in relation to moveable and immovables) should be governed by the law of the testator/testatrix's domicile at the time of marriage. One rule should be applied to both movables and immovables; it's appropriate to do so in this case. The concept of a person's domicile is one of the more stable legal concepts in the area of conflict of laws. Promissory estoppel (in relation to waiver of rights to each other's estate(s) in the Minutes of settlement) doesn't apply, but the end result is the same. As for *res judicata*, while the Trinidadian court already considered the will, it's still appropriate for this court to decide the question and make a declaration regarding the invalidity of the Nova Scotia will: courts should be reluctant to deprive a litigant of the opportunity to have their case decided on the merits; the Trinidadian court had the benefit of a Nova Scotia expert opinion on the validity issue, but not a judicial determination; it was more than appropriate for this court to rule on the matter given Dr. Davies was domiciled here, maintained investments here, received pensions from the Canadian government, was entitled to provincial health care coverage, and since the will was made (and probate attempted) here. The court, of its own motion, considered the question of jurisdiction: this application was essentially a question of judicial review of the registrar's decision, but isn't a typical judicial review scenario and involves questions of foreign law. In the circumstances, it was properly brought under Rule 5 (instead of Rules 7 or 38.07(5)).

WILLS AND ESTATES – Power of attorney – application for removal and restitution *H. (B.F.) v. H. (D.D.),* Hfx. No. 304990, LeBlanc, J., September 7, 2010. 295 N.S.R. (2d) 365; 2010 NSSC 340; **S618/23** ■ The applicant applied for an accounting of, and partial reimbursement for, expenditures made during his sister's time as their mother's attorney. The evidence showed his sister (the respondent) had acted as their mother's attorney for several years, both before and after she was declared incompetent. In particular, he contested three purported gifts made to the respondent before their mother was declared incompetent. The first ($25,000) was a cheque made out by the mother to the respondent; the other two ($6,000 each) were cheques drawn by the respondent. Evidence to show the mother had made similar gifts to the applicant. Also at issue was an advance on inheritance ($200,000) taken by the respondent when the mother's house sold. The respondent agreed to remove herself as attorney and to provide an accounting but claimed that (under the *Powers of Attorneys Act*) the applicant only had standing in relation to the period of time after their mother's declaration of incompetence. She argued the court had no jurisdiction to compel a return of the monies in question or an accounting of her conduct as attorney prior to her mother's incompetence. *Held,* application granted in part. The court looked at the Act and the interpretation of s. 5 in detail. There would be a jurisdictional issue if the court were being asked to compel the passing of accounts in relation to a time preceding incapacity; however, here the respondent voluntarily submitted accounts for the period of time in question. It is open to the court to examine the legitimacy of the already disclosed transactions. The Act doesn't limit the court's powers to grant appropriate relief where cause is shown (see s.5(1)(e)). The respondent owed her mother a fiduciary duty from the moment the power of attorney was executed. In order for gifts conveyed to her after that time to be valid, she must established her mother's intention(s) beyond a reasonable doubt. After looking at the circumstances in which gifts will/won't be seen to be valid, the court found the first gift valid. The others are not and must be repaid, along with the respondent's advance on inheritance.

WILLS AND ESTATES – Probate – proof in solemn form *Nieuwland v. Yorke Estate,* Hfx. No. 277576, Robertson, J., January 21, 2011. 2011 NSSC 19; **S622/26** ■ The applicant sought to set aside her mother's 2006 will on the basis that she had lacked the mental capacity to execute it. At the time the will was made, the testatrix was in her mid-90s. All previous wills, including one made in 2005, essentially sought to divide the estate equally between the applicant and her only sibling (the respondent). The 2006 will left substantially more to the respondent and virtually nothing to the applicant. The evidence showed that, through the years, the testatrix gave money to both in relatively equal amounts. In later years, the respondent assumed greater care of their mother because the applicant had five children, two of whom required brain surgery for serious genetic conditions, as well as a husband who suffered from debilitating depression. She maintained contact with her mother by phone. The respondent was single with no children, and was her mother's attorney. She gave the instructions for the preparation of the 2005 and 2006 wills, but there was evidence that by 2006 she was telling people her mother was suffering from dementia. She failed to mention this to the lawyer who prepared and oversaw execution of the will. At trial she denied her mother was anything other than "sharp as a tack" on the day the will was signed. She said her mother felt she had helped the applicant more over the years (given her large family) and felt the respondent

was owed a greater share of the estate to "balance things out". The lawyer gave evidence that he talked about the will with the testatrix but did not ask her about her assets. He had no idea there were issues with her mental capacity. *Held,* 2006 will set aside; 2005 will stands. The evidence clearly shows the testatrix took pains to ensure, over the years, her daughters were treated fairly and equally. The applicant has proven on balance there were suspicious circumstances surrounding the preparation of the 2006 will. The respondent was in control. She had a duty to mention her mother's mental decline to the lawyer. The court did not accept the 2006 will expressed the testatrix's wishes. The respondent failed to, on balance, prove the testatrix possessed a disposing mind and memory such that she understood and approved the contents of her 2006 will.

WILLS AND ESTATES – Probate – proof in solemn form *Fennell et al. v. Crookshank Estate,* Hfx. No. 325839, LeBlanc, J., December 1, 2010; November 5, 2010 (orally). 2010 NSSC 442; **S622/28** ■ The testatrix executed a will in January 2002. After she died, letters of probate were granted in relation to that will. It later came to the applicants' attention that a second will was executed six months later, the original of which could not be found. The lawyer who prepared the will didn't witness its execution, but met with the two witnesses who did (two nursing home employees) to prepare their affidavits of execution. She didn't have the original will and claimed she had given it to the witnesses to safeguard. They denied having it, but maintained it wasn't given to the testatrix either. The testatrix's room wasn't a safe place for important documents and she never kept them there. *Held,* proof in solemn form granted for the second will. Absent evidence the testatrix was in possession of the original will, the fact it's missing doesn't give rise to a presumption it was destroyed/revoked by her. The formalities of execution have been proven. The presumption the testatrix understood the will's contents hasn't been rebutted. The evidence confirms she had capacity at the time the will was made, and there were no suspicious circumstances or undue influences at play.

■ WORKERS' COMPENSATION

WORKERS' COMPENSATION – Statutory interpretation – conflict of laws *MacDougall v. Nova Scotia (Workers' Compensation Appeals Tribunal) et al.,* C.A. No. 312587, MacDonald, M. C.J., November 10, 2010. 2010 NSCA 92; **S617/14** ■ The appellant was employed in Nova Scotia. Her employer sent her to Newfoundland on business. While there, she lost control of the car she was driving and killed a co-worker. The deceased's family elected, under the *Nova Scotia Worker's Compensation Act*, to have the matter proceed according to Newfoundland law. Unlike Nova Scotia law, Newfoundland law allows for an injured employee to personally sue a co-worker. Although proceeding under Newfoundland law, they filed their claim in Nova Scotia (as the most convenient forum). The appellant sought to have the Nova Scotia Worker's Compensation Appeals Tribunal (WCAT) declare the claim barred under Nova Scotia's regime. They refused; she appealed. *Held,* appeal dismissed, with costs to the respondents of $2,000 plus disbursements. There's no need to decide the appropriate standard of review because, on the facts, WCAT's decision was correct. Despite the appellant's arguments, there is no need to inject the law of contracts into the analysis. Analyzing/interpreting the relevant provisions of the *Nova Scotia Act* in detail, it clearly means to treat "in province" and "out of province" accidents differently; it allows workers to opt in or out of the Nova Scotia regime if they're injured in an "out of province" accident, providing certain circumstances are met. Here, they were. The decision to proceed under Newfoundland law is permitted under the Act. A broad interpretation of "compensation" lives harmoniously with the scheme and object of the Act, regardless of whether weight is placed on the use of the word "laws" (as opposed to"law": s.27(1)(b)). Further, the result is consistent with private international law. Despite the fact Newfoundland law will apply, the action may proceed in Nova Scotia. The appellant has not openly challenged jurisdiction on the basis that Nova Scotia is not a convenient forum, but it is open to her to do so.