NOVA SCOTIA LAW NEWS

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FROM THE NOVA SCOTIA COURT OF APPEAL

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Decisions received between November 4, 2010 and June 29, 2011.

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■ ADMINISTRATIVE LAW

ADMINISTRATIVE LAW – Judicial review – Social Assistance Appeal Board *Nova Scotia (Community Services) v. Boudreau,* Hfx. No. 338621, Rosinski, J., March 29, 2011. 2011 NSSC 126; **S627/25** ■

■ BANKRUPTCY

BANKRUPTCY – Discharge – application to annul *Deveaux (Re),* Court No. 35143; Estate no. 51-1291787, Cregan, Registrar in Bankruptcy, February 24, 2011. 301 N.S.R. (2d) 1; 2011 NSSC 82; **S624/22** ■ The trustee applied to annul the bankrupt's absolute discharge after it was discovered an internal error led the trustee to conclude the bankrupt did not have surplus income when he in fact did. *Held,* application to annul dismissed. There is no authority to annul an absolute discharge, especially in this situation when the bankrupt played no part in the error. There was no fraud on his part and he did not fail to perform the duties required of him.

■ BARRISTERS AND SOLICITORS

BARRISTERS AND SOLICITORS – Fees – infant settlement, contingency fee agreement *Wade et al. v. Burrell et al.,* Hfx. No. 185646; 263570, Smith, A.C.J., February 28, 2011; February 9, 2011 (orally). 300 N.S.R. (2d) 174; 2011 NSSC 60; **S624/25** ■ The 12-year-old infant plaintiff was grievously and permanently injured in an accident when he was two. His lawyer had acted for him for over 10 years, pursuant to a contingency fee arrangement. The matter had finally settled for almost $1.5 million (far less than the infant deserved, but only because there were insurance limits concerned) plus costs of over $18,000. The lawyer had managed to secure personal settlements from the individual defendants totalling almost $500,000. Time records showed the lawyer had spent about 688 hours on the file and using his various hourly rates over the years, this represented fees totaling $195,933.75. At issue was whether the lawyer's proposed fee of $392,000 (the amount properly owing under the terms of the contingency fee agreement) should be approved. *Held,* fees approved in the reduced amount of $280,000. The following factors must be considered in applications of this kind: time/effort spent; complexity/importance of the matter; skill required/provided; results achieved; terms of the contingency agreement; the person's financial circumstances; settlement amount; the allocation of the costs award; and the risks to the law firm in taking on the matter. Here, the proposed fees were not fair and reasonable in the circumstances. While the lawyer obtained a good result, the settlement was clearly inadequate to meet the infant's needs (although this was not the lawyer's fault). There was minimal risk involved in pursuing the matter since liability was not seriously in issue. The cost award will be applied directly to the fees.

BARRISTERS AND SOLICITORS – Freedom of information – solicitor-client privilege waiver *Nova Scotia (Transportation and Infrastructure Renewal) v. Peach,* C.A. No. 327470, Oland, J.A., March 4, 2011. 301 N.S.R. (2d) 19; 2011 NSCA 27; **S621/30** ■ In response to her inquiry on the status of a road, a department area manager sent the respondent an email that referenced and summarized a legal opinion obtained from a government manager. When she asked for access to the legal opinion, her request was denied on the basis of solicitor-client privilege. The judge found that while the opinion was subject to privilege, that privilege was impliedly waived by the area manager who was a person authorized to do so. The department appealed, arguing the area manager did not in fact waive the privilege and had

no authority to do so. *Held,* appeal dismissed; the entire opinion letter should be disclosed and costs of $2,500 plus disbursements paid to the respondent. The judge did not err by deciding solicitor-client privilege can be waived by other than an order-in-council made by the Executive Council. Looking at the case law and legislative framework, the judge was correct in determining a civil servant can waive privilege attached to confidential legal advice from a government lawyer. Waiver of privilege may be through actions and decisions of various government actors. The identity of the "client" in any given case is a question of fact. The area manager was acting within his scope of duty, there was nothing in the opinion that had the potential to impact policy or set precedents. The judge made no palpable and overriding error in finding he had the authority to waive privilege on these facts. He did so intentionally, not inadvertently, and did not do so in the context of litigation. The context is relevant. Significantly, the department hasn't argued there will be adverse effects on the workings of government if disclosure is allowed.

■ BUILDING CONTRACTS

BUILDING CONTRACTS – Breach of contract – monies owing *EDM Holdings Ltd. et al. v. Stearman Construction Management Inc.,* Claim No. 325498, O'Hara, Adjudicator, May 30, 2011. 2011 NSSM 40; **SmCl18/26** ■

BUILDING CONTRACTS – Deficiencies – damages *Budgell et al. v. MC Sales and Marketing,* S.C.C.H. No. 335689, Parker, Adjudicator, June 3, 2011. 2011 NSSM 36; **SmCl18/21** ■

BUILDING CONTRACTS – Deficiencies – damages *Mailman et al. v. Bezanson,* S.C.C.H. No. 339040, Parker, Adjudicator, June 3, 2011. 2011 NSSM 37; **SmCl18/22** ■

■ CIVIL RIGHTS

CIVIL RIGHTS – Appeals – right to counsel *R. v. MacGregor,* Ken. No. 333121, Warner, J., March 10, 2011. 301 N.S.R. (2d) 86; 2011 NSSC 100; **S625/11** ■ The accused was acquitted on a charge of failing the breathalyzer when it was found that his right to counsel had been violated. He had replied "not right now" when asked if he wished to contact a lawyer and was told that he should let an officer know if he changed his mind at any time during the process. The accused testified he had intended to contact a lawyer as soon as he got to the police station; however, once there, he was intimidated and just did whatever was asked. The trial judge held that the accused's response should have alerted the officer to the fact that he did not fully understand his rights and the offer to contact counsel should have been repeated at the station. The Crown appealed. *Held,* appeal allowed; the accused's s. 10(b) rights had not been violated; even if the accused's right to counsel was violated, the evidence should not have been excluded; matter remitted for trial completion on the basis that the breath certificate is admissible. Although the police must take steps to facilitate an accused's understanding if there is a positive indication that he does not understand his right to counsel, there was no evidence that the accused did not understand his rights after the officer's response or that the circumstances were such that he could not have contacted a lawyer at the station if he had exercised reasonable diligence. The officer's statement was clearly responsive and not misleading unless one concluded that any officer in that position should have known that to the accused "not right now" meant "at some future unknown date". There is no authority for the proposition that a waiver of the right to counsel at the roadside must be followed up with a reiteration at the station.

CIVIL RIGHTS – Exclusion of evidence – possession for the purpose of trafficking in cocaine, dog sniff case *R. v. Chehil,* C.R.H. No. 319974, Cacchione, J., August 26, 2010. 300 N.S.R. (2d) 28; 2010 NSSC 255; **S624/27** ■ When the police checked the passenger manifest for an incoming flight from Vancouver, they identified the accused as being the near-to-last passenger to purchase a ticket, which was one-way and paid in cash. Based on this information, a drug-detection dog sniffed his checked bag and when the dog indicated the presence of drugs, the accused was arrested and the suitcase opened, resulting in a charge of possession of cocaine for the purposes of trafficking. The accused was travelling under his own name and had made no attempt to disguise the luggage, which was unusual for a drug courier. The Crown argued that the accused had a low or no expectation of privacy because he had checked his bag with the airline and knew that it would be subject to a search prior to being put aboard the aircraft. *Held,* the evidence will be excluded; the accused's *Charter* rights were violated as he had a reasonable expectation of privacy with respect to the contents of his luggage and had been subject to an unreasonable search when the bag was sniffed by the police dog. The entire basis for the officer's decision to have the luggage searched consisted of nothing more than noting the information on the passenger manifest but only the purchase of a ticket at the last minute could be viewed as suspicious. Although the constitutional protection against unreasonable search and seizure has been lowered in cases involving a dog sniff, there is no reason to lower it further by holding that a traveller in an airport has no subjective expectation of privacy. The police cannot rely on speculation, intuition, hunches or educated guesses in using drug sniffer dogs as such does not amount to reasonable suspicion. The violation of the accused's rights was serious, as the officers had not met even the reduced standard of reasonable suspicion and the arbitrariness of such police searches over a five-year period was of concern.

CIVIL RIGHTS – Right to be tried within a reasonable time – Crown appeal dismissed *R. v. W. (R.E.),* C.A.C. No. 326328, Beveridge, J.A., February 15, 2011. 298 N.S.R. (2d) 154; 2011 NSCA 18; **S621/22** ■ Over five years after being charged with incest, the accused obtained a stay of proceedings on the basis that his right to be tried within a reasonable time had been violated. The police had decided not to pursue the complainant's initial complaint that the accused was the father of her child but had reopened the matter a year later. It was a further 18 months until the charge was laid. The post-charge delay was 66.5 months, which included 29.5 months from the charge date to the initial trial date. The accused was not initially summoned to appear in court due to his ill health and a further delay occurred to gather DNA samples. Evidence and disclosure issues existed at the time of the first scheduled trial date, following which defence counsel was appointed to the Bench, new defence counsel required time to review the file and the accused underwent non-elective surgery. The Crown appealed, arguing that the judge had incorrectly taken pre-charge delay into account and had not carried out a detailed analysis of the reasons for the delay. *Held,* appeal dismissed; the trial judge had clearly directed himself that the period of time to be examined was from the date of the charge to the end of the trial and although the accused's health had clearly played a role in delaying his appearance in court, there was no explanation provided as to why there was such a delay in providing basic disclosure so that when he appeared in court, election and plea could proceed without delay. The first trial date was lost due to this delay in disclosure and the second trial date was lost due to the Crown's late disclosure of DNA evidence. It was open to the trial judge to take into account the substantial investigation that had already occurred prior to the charge being laid, including the recognition of the significance of the DNA evidence from

the very beginning. Although it would have been preferable for the judge to have broken down the various periods of delay in more detail, this failure was not fatal to his decision. The acquiescence of an accused in how the Crown exercises its prerogative does not amount to waiver and maintaining the right to a jury trial cannot be used to diminish an accused's right to trial within a reasonable time. The trial judge was entitled to infer prejudice based on the length of delay and was entitled to find that, despite a strong societal interest in a trial on the merits, the accused's right to be tried within a reasonable time had been violated.

CIVIL RIGHTS – Unreasonable search and seizure – admissibility of evidence *R. v. Dunlop,* No. 2156276, Curran, J.P.C., June 7, 2011; March 29, 2011 (orally). 2011 NSPC 30; **M24** ■

CIVIL RIGHTS – Unreasonable search and seizure – charge dismissed *R. v. Bingley,* No. 2146727, Atwood, J.P.C., October 15, 2010. 300 N.S.R. (2d) 63; 2010 NSPC 72; **M23** ■ The accused applied for a determination of the legality of a search and seizure at her residence, conducted under the authority of a warrant obtained pursuant to the *Animal Cruelty Prevention Act*. The Information To Obtain ("ITO") set out that the police had received three complaints about various dogs at the accused's premises between certain dates, a letter of warning had been issued and an officer had made four rechecks but nothing had been done. *Held,* given the insufficiency of the ITO, the search and seizure violated the accused's s. 8 *Charter* rights. The deficiencies in the ITO were substantial and significant, the seriousness of the conduct was amplified by the fact that the location of the search was clearly a private residence and given the nature of the search and the importance of the collected evidence to the Crown's case, the impact upon the accused was significant; the evidence seized will be excluded. Some examples of the insufficiency of the ITO included that it failed to set out the exact dates of the complaints and whether they came from sources with first-hand information; there was no evidence to provide the issuing justice with any degree of legal certainty that the address given was a property owned or occupied by the accused or what conditions prevailed at the address when the officer made the rechecks; although it was stated that two complaints were received by the Society about the accused after the complainants responded to a Kijiji ad, there was nothing stating how the officer came into that information, when the complainants responded to the ad or any indication that any effort had been made to determine whether the information provided by the complainants was accurate; and there was nothing in the ITO that specified where on the property the complainants had made their observations, which was significant because the ITO referred to the property to be seized as being "in the dwelling and buildings" on the property.

■ CONTRACTS

CONTRACTS – Breach of contract – application for injunction, terms of settlement agreement posted to website *Aylward v. Dalhousie University,* C.A. No. 330594, Saunders, J.A., February 16, 2011. 300 N.S.R. (2d) 393; 2011 NSCA 20; **S621/23** ■ The parties entered into a confidentiality agreement when settling the appellant's first human right's complaint against her employer, the respondent. After making a second complaint, she published information concerning the first settlement. The respondent sued for a declaration that she breached the confidentiality agreement, an injunction requiring her to remove the offending material from her website, and nominal damages. The appellant counterclaimed for general, aggravated and punitive damages, and maintained the respondent's conduct justified her disclosure(s). The respondent moved for summary judgement under the *Civil Procedure Rules* (2008), Rule 13.04, and succeeded in having the injunction granted and counterclaim dismissed on the basis that the neither the appellant's defence nor counterclaim had any real chance of success. The appellant appealed. *Held,* appeal dismissed; costs of $3,000 (including disbursements) to the respondent. The case was tailor made for summary judgement. While the appellant argued the credibility contest at the heart of the dispute required a trial, she failed to provide any evidentiary basis upon which a court could conclude either her defence or counterclaim had merit. The *Civil Procedure Rules* (2008) require each side to put its best foot forward. The respondent conducted detailed discoveries and filed extensive affidavit evidence; the appellant's affidavits contained nothing more than bald assertions. On the basis of the materials before him, Kennedy, C.J.S.C. found there was no evidence to support her attack on the respondent's witnesses' credibility. As such, credibility can not be said to be a material issue in dispute. The remedy granted was narrow, and related only to the breach of the confidentiality agreement. The appellant will have the chance to have all of her allegations heard when her complaint is heard by the Human Rights Commission.

CONTRACTS – Breach of contract – marketing services *Orange A (Peel) Design Communications Inc. v. Murphy et al.,* Claim No. 344487, Slone, Adjudicator, April 21, 2011. 2011 NSSM 24; **SmCl18/9** ■

CONTRACTS – Loan agreement – monies owing *Millet v. Murphy,* S.C.C.H. No. 342422, Parker, Adjudicator, April 1, 2011. 2011 NSSM 21; **SmCl18/6** ■

CONTRACTS – Services – no agreement to winterize boat *Coghlin Enterprises Ltd. v. Schellerman et al.,* Claim No. 344761, Slone, Adjudicator, April 21, 2011. 2011 NSSM 22; **SmCl18/7** ■

■ COURTS

COURTS – Jurisdiction – arbitration clause *Newton v. Waterbury Newton,* C.A. No. 338183, Bryson, J.A., April 15, 2011. 2011 NSCA 34; **S626/6** ■ The respondent law firm sued the appellant lawyer, who – in response – filed some documents, and attended discoveries, but refused to give substantive answers. More than two years after the lawsuit started, the appellant sought a stay of proceedings, citing the fact the parties' partnership agreement provided for resolution of disputes by arbitration. The stay was refused. The appellant appealed, claiming the chambers judge erred by refusing the stay and by finding he had attorned to the court's jurisdiction. *Held,* appeal dismissed, with costs of $750 payable to the respondent. The chambers judge found as matters of fact that the appellant filed a substantive defence and took steps in the proceeding. The evidence supports these findings. The remedy of a stay is no longer available under s. 7 of the *Arbitration Act*. This was an interlocutory, discretionary decision and the chambers judge did not apply a wrong principle of law or make a clearly erroneous finding of fact, nor has there been a patent injustice.

■ CREDITOR AND DEBTOR

CREDITOR AND DEBTOR – Monies owing – hydroponic gardening operation *Gillespie v. S & L Worx Hydroponics Inc. et al.,* Claim No. 343301, Slone, Adjudicator, May 31, 2011. 2011 NSSM 33; **SmCl18/18** ■

■ CRIMINAL LAW

CRIMINAL LAW – Appeals – extension of time to file notice of appeal *R. v. M. (R.E.),* C.A.C. No. 334444, Beveridge, J.A., January

19, 2011. 299 N.S.R. (2d) 258; 2011 NSCA 8; **S621/9** ■ The defendant, who was convicted of inappropriately touching a young girl, applied for leave to extend the time to appeal the dismissal of his Summary Conviction Appeal Court (SCAC) appeal. He had not been present at the SCAC hearing and had not learned of the dismissal for some days. When he did, he immediately voiced his intention to appeal but had no realistic ability to formulate and file the appeal documents within the relevant time. Although the Crown conceded that he had a *bona fide* intention to appeal within the appeal period and a reasonable excuse for not doing so, it argued that the time should not be extended because the proposed grounds of appeal were devoid of merit. *Held,* application to extend time dismissed; despite being given every opportunity, the defendant was unable to identify any arguable issue. In order for the alleged incompetence of counsel on appeal to constitute an arguable ground of appeal, there must be at least some basis on which to conclude that counsel's decision to abandon an argument amounted to incompetence. In this case, the reason for counsel's decision was revealed in the materials filed and this type of assessment was exactly what competent counsel do. Although it was very rare to deny an application to extend the time to appeal when the defendant demonstrated that he had a *bona fide* intention to appeal within the applicable time and a reasonable excuse for the delay, it was not in the interests of justice to extend time in order for a prospective appellant to pursue an appeal that has no merit.

CRIMINAL LAW – Bail – pending appeal granted with conditions *R. v. Janes,* C.A.C. No. 338620, Beveridge, J.A., January 20, 2011. 298 N.S.R. (2d) 178; 2011 NSCA 10; **S621/10** ■ The defendant applied for bail pending appeal of his conviction on a charge of domestic assault. Both his father and employer offered to act as sureties. The Crown argued that he should not be trusted to turn himself into custody because he had breached so many previous court orders; however, he had never actually failed to show up for a court hearing. *Held,* application for bail pending appeal granted; were it not for the two sureties willing to guarantee the defendant's compliance with the strict terms of release, the application would not have been granted. If the defendant were not granted bail, he would have served the remainder of his sentence before his appeal would be heard and it was hardly in the public interest to keep a defendant who would likely comply with the terms of release and show up in court in custody, rendering his statutory right of appeal nugatory.

CRIMINAL LAW – *Canada Shipping Act* violation – sentencing *R. v. Atlantic Towing Ltd.,* No. 2133310, Derrick, J.P.C., March 3, 2011. 300 N.S.R. (2d) 378; 2011 NSPC 10; **M23** ■ The defendant, a large company operating a multi-million dollar business, pled guilty to taking action that might jeopardize the safety of a vessel or persons on board a vessel after a towed vessel capsized and sank in gale force winds. The defendant had towed the vessel, which had no valid ship inspection certificate, 20 miles offshore with a three-man crew despite the expired certificate restricting it to unmanned voyages not more than 15 miles offshore. The defendant had no prior safety-related convictions and had cooperated with the authorities and taken meaningful steps to ensure that it was operating a safe workplace. This was the first reported prosecution under s. 118 of the *Canada Shipping Act*. *Held,* defendant ordered to pay a fine of $75,000. This was a case of a corporation miscalculating the implications and risks of a known safety hazard (an approaching gale warning) and having undertaken an unsafe voyage, and culpability was not diminished because bad weather conditions were worse than predicted; however, the defendant's clean safety record and the steps it had taken since the incident were mitigating factors. The court had recourse to the principles of sentencing in occupational health and safety and environmental protection matters.

CRIMINAL LAW – Evidence – invalid search warrant, redacted Information to Obtain, evidence admitted *R. v. Dewolfe,* No. 2018372-3, Gibson, J.P.C., January 7, 2011. 297 N.S.R. (2d) 364; 2011 NSPC 1; **M23** ■ The accused, who was charged with various drug offences and theft of telecommunication services, alleged that his *Charter* rights had been violated when the police searched his residence pursuant to a warrant issued under the *Controlled Drugs and Substances Act*. *Held,* although the information provided in the redacted Information to Obtain ("ITO") failed to provide sufficient grounds to authorize the search of the property, resulting in a violation of the accused's s. 8 rights, the evidence will be admitted. The ITO was not time-specific as to when the source had been present at the property, nor was it possible to determine the frequency of the visits to the property and, absent any such detail, the court could not assess whether certain statements attributed to the source were any more than bald conclusory statements based on mere rumour or gossip. This had not been compensated for by greater detail about the alleged grow operation, increasing the possibility that the information was based upon rumour and gossip rather than actual observations. There was no confirmation as to whether past information provided by the source had led to arrests or convictions and, although the ITO indicated that the reliability of the source had been tested eight times by way of positive searches, it was not clear how recent those searches were. Even though the court accepted that theft of electricity was commonly associated with grow operations and the rate of power consumption was eight times that registered by the meter, it was unclear whether the rate of consumption was in excess of what might reasonably be expected for a similar property. Further, the absence of any detail from the source about the use of lights gave rise to a level of disconnect between the alleged electricity theft and the suspected grow operation. However, the police had acted in good faith in acquiring legal authorization for the search and the accused's decision not to challenge the redacted ITO in any way made it entirely inappropriate to presume that they had did anything other than conduct themselves as required. Although the search involved the accused's home, where he had a high expectation of privacy, the evidence sought to be excluded was entirely reliable and essential to the Crown's case and the charges were serious.

CRIMINAL LAW – Evidence – misapprehension of evidence, alibi evidence *R. v. J. (J.B.),* C.A.C. No. 332557, Farrar, J.A., February 8, 2011. 299 N.S.R. (2d) 195; 2011 NSCA 16; **S621/18** ■ The defendant was convicted of a historical sexual assault against his niece that was alleged to have occurred the day after a family wedding. His alibi defence that he was not present at the family's home the day after the wedding (which was corroborated by his two sisters) had been rejected by the trial judge. The defendant appealed. *Held,* appeal allowed; conviction quashed; new trial ordered; the trial judge had misapprehended the evidence and failed to properly apply the law with respect to alibi; this misapprehension was substantial and material and played an essential part in the decision to convict. The unequivocal evidence of the defendant's sister that he was not at their parents' home on the relevant day was rejected by the trial judge for not being independent, for the danger that it might have been coloured by a desire to protect her brother and because the sister's recollection was unclear; however, the sister had been very clear in her recollection of events and the trial judge's mistake in that regard resulted in him failing to consider evidence that was essential to the defendant's alibi defence. It was not incumbent on the defendant to prove his alibi as the evidence only needed to raise a reasonable doubt that he committed the crime; nor did the alibi evidence need to be corroborated by independent evidence in order to raise a defence.

CRIMINAL LAW – Evidence – voluminous documents exception to the hearsay rule *R. v. Lee,* No. 2119017; 2119018; 2119019, Derrick, J.P.C., January 31, 2011. 298 N.S.R. (2d) 194; 2011 NSPC 5; **M23** ■ The accused was charged with theft over $500 and two counts of defrauding her employer. The Crown sought to have the "voluminous documents" exception to the hearsay rule applied so that a spreadsheet prepared from the employer's raw data could be admitted at trial without the need for the thousands of source documents to be tendered into evidence. The spreadsheet was attached as a schedule to a forensic accountant's report and it was acknowledged that the spreadsheet, itself, contained no opinions, but was simply the recording of financial data and neither the Crown nor the defence, which had copies of the more than 15,000 underlying documents, were precluded from tendering any of those documents as exhibits. *Held,* application of Crown granted; where voluminous source data is used to create a condensed spreadsheet of financial information, containing no interpretation or opinions, the source documentation need not be tendered into evidence, although nothing precludes the Crown or defence from doing so and, provided the source documents have been disclosed to the defence, such a spreadsheet will be admissible under the "voluminous documents" exception to the hearsay rule. The court noted the clear distinction between admissible summaries of source data and inadmissible computer-generated opinions derived from source data; the application of the term "opinion" could properly be applied to a computer-generated product where the computer interpreted the information inputted to arrive at a conclusion that could be the subject of legitimate debate and such products are subject to the rules relating to opinion evidence.

CRIMINAL LAW – Exclusion of evidence – unlawful search *R. v. Clarke,* No. 2097768, Chisholm, J.P.C., November 8, 2010. 299 N.S.R. (2d) 85; 2010 NSPC 93; **M23** ■ An officer observed the accused stop outside a known drug house, where she gave a package (which was believed to be diapers) to a man with his head covered. She then waited until a second man, also with his head covered, exited the house and passed something to her, which she immediately placed in her pocket. The accused, who was charged with possession of cocaine, applied to have the cocaine excluded on the basis that the arresting officer did not have authority to arrest her. *Held,* application to exclude evidence dismissed; there was no violation of the accused's rights as the officer had lawful authority to arrest her; if wrong in that conclusion, the evidence should still be admitted. The arresting officer honestly believed that she had observed a drug transaction and had the lawful authority to arrest the accused and, in all the circumstances, the court was just persuaded that a reasonable person may have believed that the accused was in possession of a narcotic. The factors that supported that conclusion were the location of the incident, the accused interacting with two men from a known drug house, both of whom concealed their faces and the exchange of something of value in return for something small from one of the men. Although a reasonable person would have considered the possibility of an innocent explanation, they still may have concluded that the accused had taken possession of a narcotic. There is no reason why the Crown cannot argue authority to arrest under both s. 494(1)(b) and (a) when the narcotic believed to be in the accused's possession is unknown.

CRIMINAL LAW – Impaired driving – as soon as practicable *R. v. Orr,* No. 2064807; 2064808, Chisholm, J.P.C., January 19, 2011. 2011 NSPC 2; **M23** ■ The accused was charged with driving while impaired and driving with a blood alcohol content over the legal limit, after the police received notice of a possible impaired driver in the drive-through of a fast food restaurant. When the officers approached the vehicle, they noted a strong smell of alcohol from the accused's breath; glassy, bloodshot eyes; and slurred speech. When a breath screening demand was made, the accused broke down in tears. After four attempts, a suitable sample was obtained and the accused was placed under arrest and read her police rights and *Charter* caution. She was taken to the police station in a police wagon and upon arrival, was helped out of the police wagon, being unsteady on her feet and was noted to be very talkative. When she was again asked if she wished to speak to a lawyer, she advised that she wanted to speak to her father. The accused made several phone calls before eventually using the officer's cell phone to speak with him. The defence argued, *inter alia*, that the breath samples had not been taken "as soon as reasonably practicable". *Held,* accused found not guilty of impaired driving; accused convicted of driving with a blood alcohol level over the legal limit; the samples of the accused's breath were taken as soon as practicable. There was no evidence as to how long it took the accused to reach her father or how long they spoke but the evidence offered an explanation for what took place during the 50-minute interval between the accused arriving at the station and the first breath sample being taken. The overall period from the time of the alleged offence to the time of the first sample was 70 minutes, which was well within the two-hour statutory limit and the officers had acted reasonably in fulfilling their duties. Although there was no doubt that the accused had consumed some alcohol prior to being stopped and there was some evidence that her physical functioning was impaired, the evidence did not convince the court beyond a reasonable doubt that her ability to operate a motor vehicle was impaired.

CRIMINAL LAW – Impaired driving – causing bodily harm, admissibility of evidence, demand and medical samples *R. v. MacNeil,* P.H.J.S.C. No. 331346, Edwards, J., February 4, 2011. 300 N.S.R. (2d) 135; 2011 NSSC 73; **S624/11** ■ The accused was charged with three counts of impaired driving causing bodily harm following a motor vehicle accident. He sought to have the results of blood samples obtained by the police and the evidence of lab test results excluded from evidence on the basis that his *Charter* rights had been violated. When the officer arrived at the scene, he could smell alcohol and noticed the accused was unsteady on his feet. While transporting him to the hospital, the officer advised the accused that he believed he had been drinking and of his right to counsel; however, he neither arrested the accused nor made a breathalyzer or blood demand. When they arrived at the hospital, the officer read him the standard blood demand but did not re-advise him of his right to counsel. Approximately one hour later, a second blood demand was made and samples were taken, but the doctor failed to sign the Certificate of a Qualified Medical Practitioner. The accused was never advised that he was being investigated for impaired driving causing bodily harm and, on the one occasion that he had been given his right to counsel, he was not informed that he was suspected of having committed a criminal offence. Ten months later, the police obtained a search warrant for copies of the hospital's blood tests in an effort to show that the taking of the blood sample did not jeopardize the accused's life; however, the report required under s. 498.1 was not filed with the court until 49 days after the warrant was executed. The police later applied for and were granted a production order in order to show the chain of custody of the medical blood sample from the time it was drawn until it was analyzed. The Crown acknowledged that the police had failed to comply with s. 254. *Held,* the results of the blood sample obtained by the police is inadmissible by virtue of noncompliance with s. 254 and the violation of the accused's right to counsel; the medical blood sample will be admitted into evidence. Not only did the officer not have grounds to make a blood demand, his failure to provide the accused with the chance to consult counsel each time a blood demand was made deprived him of the opportunity to make an informed and appropriate

decision and of his right to be free from unreasonable search and seizure. However, there were no *Charter* violations in relation to the issuance of either the warrant or the production order as, although the officer was mistaken, he acted honestly and in good faith in obtaining the warrant and, taking the impugned sections out, there was still enough information before the Justice to issue the warrant.

CRIMINAL LAW – Impaired driving – causing death, guilty *R. v. MacDougall,* No. 1998231; 1998232; 1998322; 1998227; 1998228, Ross, J.P.C., February 16, 2011; January 26, 2011 (orally). 299 N.S.R. (2d) 122; 2011 NSPC 7; **M23** ■ The accused faced several alcohol-related charges following a single vehicle accident at night on the Cabot Trail in which one of his passengers was killed. Both the Crown and defence called expert evidence as to the amount of alcohol in the accused's body and whether he was impaired at that level. *Held,* based on the accused's driving, the circumstances of the crash and the proven blood alcohol level, the accused is guilty of impaired driving and impaired driving causing death; stay of proceedings entered on the remaining charges. When there is no evidence to suggest an extraneous cause for a traffic accident, the trial judge may take into account the circumstances of the accident in deciding the issue of impairment. In this case, there was nothing wrong with the vehicle, the accused had driven this same winding stretch of road earlier that evening, occupants of the car had described a general pattern of speeding, the accused had admitted to consuming a significant amount of alcohol prior to driving and his blood alcohol concentration was at least .108. The court accepted the Crown's expert's opinion that everyone's driving ability is impaired at .100.

CRIMINAL LAW – Motion for mistrial – allowed *R. v. Simpson,* Amh. No. 321840, Duncan, J., June 23, 2011; March 3, 2011 (orally). 2011 NSSC 251; **S630/27** ■

CRIMINAL LAW – Motor vehicle offences – appeal, failure to stop at amber light *R. v. Davidson,* No. 339627, Duncan, J., February 8, 2011. 300 N.S.R. (2d) 154; 2011 NSSC 55; **S624/4** ■ The accused, who offered no evidence, was found not guilty of failing to stop at an amber light. The Crown appealed, arguing that the trial judge erred in placing the burden on the Crown to prove beyond a reasonable doubt that the accused could have safely stopped at the intersection. *Held,* appeal allowed; conviction entered; the onus of proving an exception to a provincial offence is on the accused. The judge erred in finding there was insufficient evidence to assess whether it was safe to stop, as the accused had presented no evidence upon which to conclude it would have been unsafe to stop; although an accused is not required to call evidence, in not doing so, she rested the proof of the available exception on the evidence called.

CRIMINAL LAW – Police power to arrest – without warrant, in a dwelling house *R. v. Ellison,* No. 2158721; 2158722; 2158723; 2158724; 2158725, Williams, J.P.C., December 15, 2010. 299 N.S.R. (2d) 159; 2010 NSPC 78; **M23** ■ The police were advised that the accused was with his mother at a nearby community centre when they made a routine compliance check; however, the centre was closed and the police were unable to locate him. They returned a week later and advised the accused that he was "arrestable" for breaching his release conditions, to which he responded that they would required a warrant to arrest him. Although his mother refused the officers' request for permission to enter the premises, she tried, along with the accused's grandmother, to convince him to go with the officers. Waiting outside, the officers heard the sounds of a struggle and when the grandmother opened the door and asked them to assist, they saw the accused and his mother struggling in the narrow hallway and both fall backwards to the floor. The police separated them and arrested the accused. It was only when they arrived at the station that he was advised that he had been arrested for breaching the terms of his interim release and wilfully resisting a police officer. He challenged the legality of the arrest. *Held,* accused found guilty of breaching his curfew conditions; accused found not guilty of wilfully resisting the police in the execution of their duty as his arrest, inside the dwelling, without a warrant for the alleged prior offence, could not be supported in law. Although the police had reasonable grounds to believe he had violated a condition of his release order, the accused was not committing any criminal offence before or at the time of his arrest and there were no exigent circumstances justifying the police not obtaining a warrant. In circumstances such as this, the police have a statutorily imposed duty not to arrest a person, without a warrant, for minor offences, where they believe, on reasonable grounds, that the public interest can be satisfied without effecting an arrest. The police knew his identity and where he lived and this was not a case of preventing the continuation of the alleged offence, which was a week old; nor was there any evidence that the police had grounds to believe that if they did not arrest him he would fail to attend court. Although they could still lawfully exercise their power of arrest under s. 495(3), there were no exigent circumstances present (as evidenced by there being no forced entry to suggest any urgency or concern on the part of the police to prevent imminent bodily harm to the occupants) and it could reasonably be inferred that the grandmother's invitation to enter the dwelling was to assist in calming down the situation and not to authorize a warrantless arrest inside the dwelling.

CRIMINAL LAW – Second-degree murder – appeal of conviction *R. v. Hawkins,* C.A.C. No. 232269, Beveridge, J.A., January 17, 2011. 298 N.S.R. (2d) 22; 2011 NSCA 6; **S621/13** ■ The defendant was convicted of second-degree murder after the particularly violent, brutal and unprovoked murder of a handicapped man in his own home. The Crown's case had depended on circumstantial evidence, including a considerable body of post-offence conduct on the part of the defendant. The defendant appealed, arguing that although he admitted to being present in the deceased's home after he had been attacked, it was not reasonable to find that he had caused his death. He argued that there was no evidence linking him to any weapon, he had no motive to commit the offence, the Crown had not established an exclusive opportunity for him to do so and the Crown's theory of a robbery gone bad was not borne out by the evidence since none of the items missing from the home were ever linked to him. *Held,* appeal denied; the finding of second degree murder was neither unreasonable nor unsupported by the evidence. The trial judge made no error in admitting the evidence of post-offence conduct and although it would have been preferable if reasons had been given for this decision, the record disclosed the basis for the trial judge's ruling and it was up to the jury to consider the competing inferences and assign whatever weight to the evidence they should. Although some aspects of the charge to the jury were deficient (dealing with lies the defendant had told the police and others), this did not result in any substantial wrong or miscarriage of justice as the jury was not actively misdirected, the remainder of the charge was fair and balanced and the post-offence conduct was but one facet of the case against him. No authority was provided for the defendant's proposition that the Crown was required to prove its theory about the rationale for the commission of an offence beyond a reasonable doubt, nor was the Crown required to establish exclusive opportunity before the jury could be satisfied that the guilt of the defendant was the only rational conclusion to be drawn from the evidence.

CRIMINAL LAW – Sentence – appeal of sentence for robbery *R. v. Morton,* C.A.C. No. 328179, Farrar, J.A., June 7, 2011. 2011 NSCA 51; **S626/23** ■

CRIMINAL LAW – Sentence – appeal of sentence for second-degree murder *R. v. Hawkins,* C.A.C. No. 232269, Beveridge, J.A., January 17, 2011. 298 N.S.R. (2d) 53; 2011 NSCA 7; **S621/14** ■ The defendant appealed his sentence of life imprisonment without parole for 20 years for the violent, brutal and unprovoked second-degree murder of a handicapped man in his own home. *Held,* appeal allowed; period that must be served before becoming eligible for parole is reduced to 15 years. The trial judge erred in considering the defendant's refusal to accept responsibility and lack of remorse as aggravating factors and in applying the sentencing principles of segregation and specific deterrence; concern for individual deterrence should not play any role in extending parole eligibility. Rather, the trial judge should have proceeded on the basis that the sentence was to be similar to other sentences imposed for second degree murder convictions in similar cases.

CRIMINAL LAW – Sentence – appeal of sentence for sexual assault, joint recommendations *R. v. N. (A.),* C.A.C. No. 310631, Fichaud, J.A., February 18, 2011. 300 N.S.R. (2d) 282; 2011 NSCA 21; **S621/25** ■ The defendant was sentenced to eight years' imprisonment for two counts of indecent assault, two counts of rape and one count of incest with regard to his two daughters over a six-year period. Although both the Crown and defence had recommended a sentence of five years, the trial judge noted that this was not a true joint recommendation and gave counsel an opportunity to address his concerns prior to passing sentence. Aggravating factors included the defendant abusing a position of trust and authority; the abuse having taken place over many years, involving all manner of sexually abusive behaviour; the abuse of one child continuing even after it was discovered and the abuse of the other child occurring around the same time; and the defendant having threatened foster care as punishment for disclosure or resistance. He appealed the sentence, arguing that the judge had erred in not following the joint recommendation, violated the parity principle and failed to take proper account of his remand time. *Held,* appeal dismissed; a joint recommendation exchanged for a guilty plea carries more weight than a mere coincident sentence recommendation after trial and, although there was discussion between defence counsel and the Crown before the joint recommendation was made, there was no *quid pro quo* as contemplated by the case law. There is no universal range with fixed boundaries for all instances of an offence and no fixed ceiling for the total of consecutive sentences, unless expressly stated in the *Code.* The calculation of credit for remand time is a matter for judicial discretion and although the sentencing reasons did not express his reasons for the departure from the usual two-for-one credit, the judge's comments to counsel during the sentencing submissions did.

CRIMINAL LAW – Sentence – leave to appeal allowed and appeal dismissed *R. v. Lewis,* C.A. No. 338902, Oland, J.A., June 1, 2011. 2011 NSCA 49; **S626/21** ■

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 – fraud *R. v. Wentzell,* C.R.H. No. 322479, Cacchione, J., May 25, 2011; February 15, 2011 (orally). 2011 NSSC 200; **S629/8** ■

CRIMINAL LAW – Sentencing – home invasion *R. v. Christie,* C.R.H. No. 336502, Moir, J., April 14, 2011; April 8, 2011 (orally). 2011 NSSC 146; **S627/23** ■

CRIMINAL LAW – Sentencing – impaired driving, causing death *R. v. Morine,* CR. No. 326294, Rosinski, J., February 3, 2011; January 25, 2011 (orally). 298 N.S.R. (2d) 314; 2011 NSSC 46; **S623/22** ■ The defendant, a relatively youthful first offender, pled guilty to four charges arising out of the crashing of his motor vehicle; namely, failure to comply with a breath demand, impaired driving causing bodily harm, impaired driving causing death and assaulting a police officer. While impaired, he had ignored his passengers' requests to slow down and drove at least 30 kilometres over the posted speed limit in the face of a sign warning of a sharp turn requiring him to reduce his speed by a further 30 kilometres per hour, resulting in the vehicle going over the end of the guardrail and down an embankment. Making no effort to check on his passengers, he had fled the scene and, upon his arrest, he had kicked and spat at a police officer and refused to provide a breath sample. *Held,* defendant sentenced to five years' imprisonment; 10-year driving prohibition imposed on each impaired driving charge; after determining the appropriate sentence for each individual offence, the court applied the totality principle and concluded that the overall sentence (six years' custody) was excessive and reduced it accordingly.

CRIMINAL LAW – Sentencing – impaired driving causing death *R. v. MacDougall,* No. 1998231, Ross, J.P.C., March 15, 2011. 2011 NSPC 12; **M23** ■

CRIMINAL LAW – Sentencing – impaired driving causing death *R. v. Morash,* C.R.H. No. 318789, Murray, J., March 3, 2011. 2011 NSSC 99; **S630/14** ■

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. 300 N.S.R. (2d) 126; 2011 NSSC 56; **S624/5** ■

CRIMINAL LAW – Sentencing – theft of a motor vehicle, breach of probation *R. v. Dann,* No. 2220004; 2220006; 2220007; 2220008, Derrick, J.P.C., April 28, 2011. 2011 NSPC 22; **M23** ■

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 – admissibility of evidence of other sexual activity *R. v. A. (W.H.),* C.R.A.T. No. 336695, Rosinski, J., April 29, 2011. 2011 NSSC 168; **S630/22** ■

CRIMINAL LAW – Sexual assault – credibility *R. v. R. (A.G.P.),* C.R.A.D. No. 324990, Rosinski, J., February 3, 2011. 299 N.S.R. (2d) 288; 2011 NSSC 47; **S624/23** ■ The accused was charged with sexual assault and touching a person under the age of 16 for a sexual purpose after the 12-year-old complainant alleged that, while

sleeping over at a friend's house, her friend's brother had entered the bedroom, undid her bra, touched her breasts and then left. When he returned a few minutes later, she pretended to be asleep but he rolled her over, put his finger and then his penis in her vagina and ejaculated on her back and arm after only a few seconds. The accused denied that any sexual contact had taken place. No male sperm was found on the complainant's clothing or body. *Held,* accused found not guilty on both counts; although the court believed the complainant's evidence, in light of the forensic evidence, the accused's evidence was capable of raising a reasonable doubt and, although gravely suspicious, it could not conclude that the Crown had proven its case beyond a reasonable doubt. The lack of human DNA on the t-shirt used to wipe the accused's ejaculate off the complainant's arm and back was not conclusive but, given that the accused was shown to normally have sperm present in his semen, the absence of any of his DNA on the t-shirt was meaningful and probative.

CRIMINAL LAW – Sexual assault of a minor – guilty *R. v. M. (J.M.),* Syd. No. 329940, Edwards, J., April 19, 2011. 2011 NSSC 153; **S628/6** ■

CRIMINAL LAW – Sexual assault of a minor – indecent assault and gross indecency, guilty *R. v. R. (D.A.),* C.R.T. No. 320306, Scaravelli, J., June 9, 2011. 2011 NSSC 192; **S630/20** ■

CRIMINAL LAW – Trafficking in a controlled substance – guilty *R. v. Calder,* C.R.H. No. 316393, Coady, J., March 10, 2011. 2011 NSSC 96; **S625/8** ■ The accused, a practising defence lawyer and former Crown attorney, was charged with three counts of trafficking and possession for the purposes of trafficking after she handed a "prison package" containing dilaudid wrapped in tobacco to her client in the correctional centre. A subsequent search of her office located two bubble wrap envelopes with similar containers. She alleged that the containers had shown up unbidden in her mailbox and she thought they contained only tobacco, which she delivered to her client due to the guilt she felt from her inability to represent him at a recent bail hearing. *Held,* accused found guilty on all three counts; although she was not a conventional trafficker and the packages had been delivered to her without her knowledge, as a practising criminal lawyer and regular visitor to the correctional facility, she was well aware of the protocol surrounding professional visits and it was inconceivable that she would not be alert to the very real likelihood that the package contained drugs. Even accepting that she did not know what a prison package looked like, the makeup of the package would have triggered an inquiry as to what it included. Although the court accepted the expert evidence that the accused was suffering from major depressive and personality disorders that may have impacted her resolve and dimmed her view of the consequences, that did not equate to a lack of intent.

CRIMINAL LAW – Voir dire – admissibility of evidence, impaired driving *R. v. Harper,* No. 2107269; 2107270, Tufts, J.P.C., March 2, 2011. 300 N.S.R. (2d) 364; 2011 NSPC 9; **M23** ■ While standing outside talking to the complainant in a theft investigation, an officer noticed an all-terrain vehicle approaching from the complainant's orchard. When he stopped and spoke with the driver, he detected the smell of alcohol, leading to a roadside screening demand, followed by a breath demand. The driver, who was charged with driving with a blood alcohol content over the legal limit, challenged the admissibility of the breathalyzer results on the basis that his *Charter* rights had been violated, in that he had been arbitrarily detained without receiving his right to counsel and the officer had no basis to make a breathalyzer demand as there was no evidence that the roadside screening device was an approved device. *Held,* application to exclude evidence dismissed. Although the accused was arbitrarily detained without being provided with his right to counsel, the officer had acted in good faith, honestly believing he was entitled to stop the ATV, which could have been justified had he directed his mind to the proper authority; and the initial stop and any breach of the accused's s.10 rights had minimal impact on his liberty, as he was detained for only a short time before the alcohol was detected. The same rationale allowing the police to make roadside screening demands in the case of motor vehicles applies to off-highway motor vehicles. It is not necessary for the Crown to prove that a roadside screening device is an approved device; it is only necessary for the officer to subjectively believe the device is approved and that this belief be reasonable in the circumstances.

CRIMINAL LAW – Young offenders – criminal negligence causing death by operation of a motor vehicle, not guilty *R. v. A. (G.W.),* No. 2198503, Atwood, J.P.C., January 24, 2011. 299 N.S.R. (2d) 272; 2011 NSPC 6; **M23** ■ The accused youth was charged with criminal negligence causing death when, after pulling his vehicle over to speak with friends, one of the youths grabbed onto the door of the vehicle as he pulled away, resulting in him being towed along on his skateboard. Moments later, the youth fell and suffered an injury that eventually resulted in his death. The Crown alleged that by allowing the youth to grab onto the vehicle and towing him, knowing he was holding on, the accused had shown wanton or reckless disregard for his friend's life or, in the alternative, he was criminally negligent for not having observed his friend's actions and taken action to prevent them. *Held,* accused found not guilty of criminal negligence causing death and not guilty of the included offence of dangerous driving. Since the accused did know his friend was hanging onto the vehicle when he pulled away, he had not "allowed" it; by all accounts, his driving was normal and prudent and there was no evidence that he had driven at an excessive rate of speed, erratically or haphazardly. The key element was whether the accused had allowed his friend to hold onto the side of the vehicle, which required actual knowledge that his friend was hanging onto the vehicle. The second youth had made an unannounced and spontaneous decision to hold onto the vehicle without the accused realizing he had done so and he had only travelled for a few seconds when the youth fell from the vehicle. The Crown's alternate theory of liability could not be accepted, as the count as charged alleged a wrongful act by the accused and made no mention of a failure to keep a proper lookout. If wrong in this regard, given that the accused was operating his vehicle in a normal manner well within the speed limit, and was unaware that his friend was holding onto the vehicle, the momentary and only partial loss of situational awareness could not be described as a wanton or reckless disregard for the lives or safety of others.

CRIMINAL LAW – Young offenders – firearms offences *R. v. F. (R.),* No. 2206031, Gabriel, J.P.C., November 5, 2010. 299 N.S.R. (2d) 66; 2010 NSPC 88; **M23** ■ The youth pled guilty to occupying a vehicle in which there was a firearm. The defence argued that since the Crown had never elected with respect to the charge, it was deemed to have proceeded summarily and summary offences carry a maximum term of six months' imprisonment, which overruled the sentencing provisions of the *Youth Criminal Justice Act*. *Held,* the matter is before the court by way of indictment; hybrid offences are to be treated as indictable unless the Crown elects otherwise. Silence on the part of the Crown, coupled with acts consistent with the indictment process, will constitute a deemed election to proceed by indictment; whereas, silence coupled with participation in a process that is only compatible with summary proceedings will constitute a deemed election to proceed summarily. In this case, there was nothing from the process

by which the Crown should be deemed to have proceeded summarily.

■ DAMAGE AWARDS

DAMAGE AWARDS – Personal injuries – escape from fire, liability and damages *Leslie et al. v. S & B Apartment Holding Ltd.,* Tru. No. 272838, Scaravelli, J., February 3, 2011. 299 N.S.R. (2d) 371; 2011 NSSC 48; **S623/23** ■ The two plaintiffs were forced to jump from the window of their third-floor apartment after a fire erupted in the building. The fire alarm system was not functioning and, despite being aware of previous problems with the 25-year-old system, the defendant had never maintained or inspected it; the self-closing hallway fire doors were continually in an open position; the battery-operated fire alarm in the plaintiffs' apartment was not functioning; and the plaintiffs were unaware of whether their smoke detector was wired into the building or was their responsibility. The male plaintiff suffered serious fractures to both ankles and a fractured fibula. He underwent four surgeries, was non-weight bearing for three months and was unable to run or engage in various sports. Although he had returned to work as a production worker, his condition would continue to deteriorate due to post-traumatic arthritis, most likely resulting in a future ankle fusion. The female plaintiff suffered a pelvic ring injury with bilateral pelvic and sacral fractures, a fractured elbow and a broken rib. She underwent surgery on her pelvis, was unable to look after her own hygiene for five months and developed bursitis in the hip. She continued to experience pain in the tailbone with extensive sitting and in the elbow with extension of the arm, had a permanent loss of elbow extension and walked with a limp. The worsening of her pre-existing anxiety and depression led to the diagnosis of post-traumatic stress disorder. The landlord argued that the plaintiffs' injuries had not been caused by any of its actions. *Held,* male plaintiff awarded the sum of $75,000 for general damages, $15,000 for past and future loss of valuable services and $45,000 for loss of earning capacity; female plaintiff awarded the sum of $55,000 for general damages, $35,000 for past and future loss of valuable services and $75,000 for future loss of income. Although there was no evidence that the defendant was responsible for the fire, its conduct created an unreasonable risk of harm in the event of a fire. Without evidence as to how much time the plaintiffs would have had to escape down the stairwell or how long they would have had to wait for the fire department had the smoke or fire alarms activated, the "material contribution" test was applied to the causation issue. When the plaintiffs first awoke, the fire had already worked its way up through the attic hatch to the roof, where the flames in the eaves were visible to the plaintiffs. Smoke and fire were able to flow freely through the adjacent stairwell as a result of the fire door being left open, and the failure of the smoke detectors and fire alarms allowed the smoke and fire to progress before being detected by the plaintiffs. The female plaintiff was found to have no meaningful residual earning capacity due to the combination of her physical and psychological injuries.

■ DAMAGES

DAMAGES – Appeal – charge to jury, new trial ordered *Marshall v. Annapolis County District School Board et al.,* C.A. No. 323155, MacDonald, M. C.J., February 4, 2011. 298 N.S.R. (2d) 373; 2011 NSCA 13; **S621/20** ■ The plaintiff had been seriously injured at the age of four when he ran into the road and was struck by a school bus. A jury found no negligence on the part of the bus driver and the plaintiff appealed, alleging errors in the judge's charge to the jury. *Held,* appeal allowed; new trial ordered; the court offered guidance for the jury charge in the potential retrial. After finding, as a matter of law, that the plaintiff was too young to be contributorily negligent, the judge erred when, in dealing with the bus driver's potential negligence, he invited the jury to consider the child's responsibility to be that of an adult. The invitation for the jury to consider whether the plaintiff did what a reasonable person would do or whether he failed to use reasonable care was an invitation to find him legally responsible for the accident. Although his actions were relevant in considering the defendant's potential negligence, they remained the actions of a young child who could not be found at fault for the accident.

DAMAGES – Costs – disbursements and prejudgment interest *Marsh v. Paquette et al.,* Hfx. No. 149594, Hood, J., February 21, 2011. 300 N.S.R. (2d) 301; 2011 NSSC 70; **S624/16** ■ The plaintiff (who had claimed damages of $275,000) was awarded $10,000 following a 19-day trial in regard to a motor vehicle accident that had occurred 13 years ago. Much of the plaintiff's evidence was not credible and the defendants' offers to settle were significantly higher than the amount awarded. The defendants sought lump sum costs based on their actual legal fees. *Held,* costs of $49,275 awarded to the defendants; prejudgment interest limited to four years; the amount involved was set at $200,000, with the resulting cost award reduced to reflect the plaintiff's limited success. Given that there had been a 19-day trial with voluminous medical evidence in which the plaintiff claimed to have been permanently disabled, the amount involved should not be the amount of the damage award. Although the plaintiff should have known that proving her claim would be problematic and taken a more reasonable approach to settlement, the defendants had been unsuccessful on the issue of liability and the plaintiff had received a small damage award.

DAMAGES – Nuisance – flooding due to changes to property *Swartz v. Verrette,* Claim No. 342868, Slone, Adjudicator, April 4, 2011. 2011 NSSM 23; **SmCl18/8** ■

DAMAGES – Oil spill – appeal and cross appeal *G & S Haulage Ltd. v. Park Place Centre Ltd. et al.,* C.A. No. 328260, Beveridge, J.A., March 24, 2011. 301 N.S.R. (2d) 200; 2011 NSCA 29; **S626/1** ■ The appellant, who delivered oil for Ultramar, was found negligent at trial for having overfilled Park Place's oil tank. Park Place was found contributorily negligent for failing to ensure the oil tanks were located in a leak-proof room. Damages relating to the cost of the cleanup of nearby soil were apportioned accordingly. Park Place appealed the finding of contributory negligence, arguing there was an absence of evidence of the applicable standard of care and the judge relied inappropriately on the National Building Code. The appellant appealed the finding of liability, arguing there was no negligence on their part and that the tanks had malfunctioned, although they had no evidence of it. *Held,* appeals dismissed. Costs will be paid by the appellants to Park Place at an amount slightly more than half of 40 per cent of the costs agreed to following trial. The appellants were trying to have the case retried by the appeal court, which is not this court's function. There are no palpable and overriding errors warranting interference in the trial judge's findings, nor does the record show he committed any extricable legal error. Park Place failed to show the trial judge erred in his interpretation or reliance on the Building Code, or by finding contributory negligence despite an absence of specific evidence on the standard of care.

DAMAGES – Personal injuries – brain injuries *Vogler v. Szendroi et al.,* Hfx. No. 192712, Moir, J., October 22, 2010. 2010 NSSC 390; **S618/11** ■ The plaintiff (who was a very bright, remarkably engaging young man in his early twenties) was severely injured in a motor vehicle accident in which he suffered a fractured skull, severe brain injury,

punctured chest, bruised lung, fractured ribs and pelvis, injured arm and an eye injury. Although he had been accepted at various universities prior to the accident, he had entered a year of Buddhist studies, from which he was returning home when the accident occurred. He remained very intelligent and had made remarkable gains in his recovery but was left with permanent impairments in information processing efficiency and visual memory function that had serious consequences for his daily functioning. Following his recovery, he decided to begin a career in woodworking but was unsuccessful in two apprenticeships and eventually found a job earning a good income as a grocery clerk in a workers' cooperative. Liability was admitted, with only damages being in issue and the defendants argued that the plaintiff's eye and brain impairments did not restrict his employment or any education needed for employment. No actuarial evidence was offered. *Held,* general damages in the amount of $180,000 awarded; $180,000 awarded for loss of income-earning capacity; $15,000 awarded to compensate for parental care. The eye injury presented a lifelong impairment and although the plaintiff remained a bright, good-natured person with no change in his executive functioning, he had lost his remarkable capacity to instantly communicate those attributes. It was no answer for a defendant to say that the plaintiff had no career plans at the time of the accident; the question is what sort of career he would have had, meaning that the array of goals available to him before the injury must be considered. The plaintiff's processing and memory impairments went directly to the kind of income he had been and would be able to earn in comparison with what he would have earned without those impairments; his loss of function had led to a loss of capacity. But for the accident, the plaintiff most likely would have worked full time for a year and then continued his higher education and although there was no quantifiable income loss at the moment, as he would have earned substantially less in his twenties then he had actually earned and he would have made about what he currently earned in his thirties, he would have likely earned much more after age 40. The plaintiff's mother (a nurse) was compensated for taking a two-month leave from work to care for her son and then continuing to take him to all of his numerous medical appointments.

DAMAGES – Personal injuries – brain injuries, prejudgment interest *Vogler v. Szendroi et al.,* Hfx. No. 192712, Moir, J., November 1, 2010. 296 N.S.R. (2d) 76; 2010 NSSC 399; **S618/25** ■ The plaintiff suffered a severe traumatic brain injury in a motor vehicle accident for which he was awarded, *inter alia*, $180,000 for loss of future earning capacity. *Held,* the court clarified that given that the award for pecuniary damages was entirely for lost income starting in about ten years' time, no prejudgment interest would accrue to that portion of the award.

■ EMPLOYMENT LAW

EMPLOYMENT LAW – Wrongful dismissal – issue estoppel, tribunal's findings not to be reassessed *Nichol v. Royal Canadian Legion, Branch 138 Ashby,* Syd. No. 284735, Bourgeois, J., January 11, 2011. 298 N.S.R. (2d) 170; 2011 NSSC 11; **S622/24** ■ The plaintiff had previously successfully proceeded against his former employer in a claim for wrongful dismissal before the Labour Standards Tribunal. At issue was whether *res judicata* or issue estoppel should apply in regard to the Tribunal's findings in the plaintiff's current defamation action against his former employer. The defendant argued that the plaintiff was precluded from bringing the present action due to the matter being previously addressed by the Tribunal, and the plaintiff argued that issue estoppel (the Tribunal having found that he had not acted in a fraudulent fashion or been involved in wilful misconduct) should apply against the defendant in the present case. *Held,* the plaintiff is not precluded from proceeding with this action by virtue of res judicata; issue estoppel does not apply so as to limit the defendant from calling evidence relating to the allegations of malice or the defences pled, but no evidence may be adduced at trial that would tend to refute the Tribunal's findings that the plaintiff was wrongfully dismissed and his conduct had not been fraudulent or wilful. *Res judicata* did not apply because although the Tribunal decision was final and involved the same parties, it did not involve a determination of the same cause of action as that now being advanced before the court. Further, since the claim of defamation was not raised until over a year after the Tribunal's determination, it was highly unlikely that evidence relating to the issue of defamation or its possible defences was in the minds of the parties at the time of the hearing. Although too narrow an application of issue estoppel would result in an injustice, were the defendant to be prevented from responding to the allegations pled as to its motivations or from fully advancing the defences pled, the Tribunal had made clear findings as to the plaintiff being wrongfully dismissed and his conduct being neither fraudulent nor wilful and the court would not reassess those findings.

■ ENVIRONMENTAL LAW

ENVIRONMENTAL LAW – *Environment Act* – appeal to Supreme Court from decision of Minister re quarry *Parker Mountain Aggregates Ltd. v. Nova Scotia (Minister of Environment) et al.,* Hfx. No. 324761, Robertson, J., April 8, 2011. 2011 NSSC 134; **S627/12** ■

■ FAMILY LAW

FAMILY LAW – Access – by grandparents, application for leave granted *B. (J.) and B. (A.M.) v. J. (N.),* F.L.B.M.C.A. No. 072172, Gabriel, J.F.C., January 6, 2011. 299 N.S.R. (2d) 183; 2011 NSFC 5; **FC38** ■ The applicants are the one-and-a-half-year-old child's paternal grandparents; the respondent, his mother. The child's father committed suicide shortly after the child's birth. At the time, he was in the process of trying to secure some access with the child. The grandparents wanted access so the child could have some relationship with his father's family, and so that he could be exposed to the father's (native) culture. While they were not native, they had adopted and raised two children with native status and were well equipped to expose the child to native culture. The mother claimed she was concerned access would open the door to the grandparents, undermining her parental authority. She also expressed some concern over their alcohol/drug use. Historically, the parties got along well until an argument during the mother's pregnancy led to an estrangement. The grandmother regretted the part she had played in the estrangement. Both grandparents showed a strong desire to participate in the child's life and a willingness to respect and get along with his mother. At issue was whether leave should be granted opening the door for the application for access to be heard on the merits. *Held,* leave granted. The grandparent proved on balance that having this matter heard will likely benefit the child's welfare. Looking at the authorities, a number of factors are relevant including the grandparents' willingness to work to surmount earlier difficulties. They aren't interested in interfering with or undermining the mother. They followed the correct route to try and secure access (deferring to their son while he was alive, asking for access after his death and then filing this application). They are likely the only connection the child will ever have to his father, which is especially significant given his native status. The allegations of drug/alcohol use are unfounded. The question of whether a suitable access schedule can be set up given the prior conflict(s) is a question to be decided at the second stage of the hearing.

FAMILY LAW – Access – child refusing access to his mother *Brewer v. Brewer et al.,* No. 54530, Forgeron, J., April 27, 2011; April 19, 2011 (orally). 2011 NSSC 154; **S628/8** ■

FAMILY LAW – Access – infant *Smith v. Smith,* No. 1201-064588, Legere-Sers, J., February 1, 2011. 2011 NSSC 40; **S627/17** ■ The mother limited the father's access to their three year old and effectively denied him access to their young infant, alleging he was controlling, (emotionally) abusive and unable to care for the youngest child without help. She also complained the father (a member of the military) had missed visits. She felt the youngest child should be at least eight months old before the father could have access to the child in his home. *Held,* interim graduated access to the father, designed to reacquaint him with the three year old and allow the infant to get to know him. The goal is for him to have one overnight with the children each week. He will have access four days per week, plus an extra three hours per week for six weeks. The mother is not allowed to deny access because the children are sleeping. When a parent is in the military, access must be designed to maximize contact while they are available.

FAMILY LAW – Child in need of protective services – appeal dismissed *R. (G.) v. Nova Scotia (Minister of Community Services) et al.,* C.A. No. 346915, Saunders, J.A., June 21, 2011; June 17, 2011 (orally). 2011 NSCA 61; **S631/1** ■

FAMILY LAW – Child in need of protective services – application by grandparent for party status denied *M. (C.) v. Nova Scotia (Minister of Community Services),* S.F.S.N.C.F.S.A. No. 63742, Wilson, J., June 6, 2011. 2011 NSSC 222; **S629/26** ■

FAMILY LAW – Child in need of protective services – extended to the age of 21 through *parens patriae* jurisdiction *Nova Scotia (Minister of Community Services) v. B. (A.),* S.F.H.C.F.S.A. No. 074508, Lynch, J., March 21, 2011; March 17, 2011 (orally). 301 N.S.R. (2d) 59; 2011 NSSC 114; **S625/21** ■ The minister applied for permanent care and custody of the respondent child, who was about to turn 18. The minister was already responsible for the child pursuant to an equivalent order, made in Quebec and set to expire on the child's 18th birthday. The minister wished to continue offering services to the child while she finished high school and pursued post-secondary studies. An order under our legislation would allow for services to continue until the child turns 21. *Held,* permanent care order granted pursuant to the court's *parens patriae* jurisdiction; to remain in effect until she turns 21. The *Children and Family Services Act* has a gap that the court's inherent jurisdiction can be used to fill. While it allows for extending an order made in Nova Scotia past the age of majority, it does not allow for a similar extension when the original care order was made in another province. It is clearly in the child's best interests to continue to receive services for as long as possible.

FAMILY LAW – Child in need of protective services – permanent care and custody order *Mi'kmaw Family and Children's Services v. L. (B.) and I. (L.),* S.F.P.A.C.F.S.A. No. 065972, Legere-Sers, J., April 27, 2011. 2011 NSSC 161; **S628/13** ■

FAMILY LAW – Child in need of protective services – permanent care and custody order *Nova Scotia (Minister of Community Services) v. N. (S.) and S. (J.),* S.F.H.C.F.S.A. No. 067232, Lynch, J., May 25, 2011; April 14, 2011 (orally). 2011 NSSC 198; **S629/6** ■

FAMILY LAW – Child support – variation, request for disclosure not met *Shortell v. Nathanson,* S.F.S.N.D. No. 003347; 120148791, MacLellan, J., June 16, 2011. 2011 NSSC 243; **S630/25** ■

FAMILY LAW – Contempt order set aside and access to children reinstated *Soper v. Gaudet,* C.A. No. 316071, Farrar, J.A., January 25, 2011. 298 N.S.R. (2d) 303; 2011 NSCA 11; **S621/15** ■ The appellant grandparents were found guilty of contempt when their 13-year-old grandchildren failed to return to the respondent mother's home after a designated access period. The consent order in question allowed the grandparents overnight access, but did not specifically provide for how the children were to be transported to and from that access. On the occasion in question, the children had come to their grandparents house on their own. The mother called the police and an officer attended the grandparents' house and decided not to bring the children home. The respondent made no other attempt to get the children home, other than bringing a contempt application. The evidence was the grandparents' had tried to make the children go home. The grandmother was sick and couldn't attend the contempt hearing. While the judge accepted this as a valid excuse, she still made an almost immediate finding of contempt against both grandparents, and said the grandfather would be jailed if the children didn't return home by the next day. At no time was the self-represented grandfather told he had a right to cross-examine the mother's affidavit evidence, nor was he told he could give his own evidence. As a further penalty, the judge suspended all access. *Held,* appeal allowed. The judge erred by finding the grandparents in contempt, and by failing to identify in her reasons exactly what they did that was in contempt. Even if they had been in contempt, the suspension of their access failed to take into account the children's best interests. In its reasons, the appeal court laid out guidance for courts considering these types of applications. Contempt is a quasi-criminal proceeding; those accused of contempt must be given similar protections. While it is important to resolve these matters efficiently, and the court's time is limited, a judge hearing a contempt motion must consider all of the necessary elements of the offence and ensure the parties know their rights and are given a chance to be heard before a decision is made; especially where there are serious sanctions at stake including incarceration and the loss of access. Looking at the facts here, and using the relevant portions of the test in *Brown v. Bezanson* (2002) SKQB: The terms of the order were not clear or unambiguous: it was silent on who transports the children to and from access. There was no evidence before the court of the parties' existing practice. On this basis alone, the appeal succeeds because the judge erred in principle. There is no clear proof the grandparents broke the terms of the order. The judge erred in principle here too; the mere fact the children were not home by the time they should have been is insufficient to conclude the grandparents breached the order. There was no evidence of a wilful refusal on their part, nor did the judge make such a finding. There was no *mens rea* on the grandparents' part. The evidence showed they tried to make the children go home with the police officer, even though it was their designated access period at the time.

FAMILY LAW – Costs – appeal *Barkhouse v. Wile,* C.A. No. 341634, Saunders, J.A., June 7, 2011. 2011 NSCA 50; **S626/22** ■

FAMILY LAW – Costs – child support, spousal support *Lilly v. Lilly,* No. 1201-063739, O'Neil, J., April 27, 2011. 2011 NSSC 162; **S628/24** ■

FAMILY LAW – Costs – poverty exemption not proven, tariff applied *Mader v. Hatfield,* Syd. No. 294584, Bourgeois, J., April 5, 2011; January 31, 2011 (orally). 2011 NSSC 121; **S627/19** ■ The plaintiffs were successful. They sought more costs they were actually going to be billed. In her submissions, the defendant claimed she couldn't afford to pay costs. The plaintiffs argued it was too late to

raise this. The defendant also claimed costs weren't appropriate, given the dispute was akin to a family matter. *Held,* the defendant to pay costs of $28,000 (on a party and party basis, Tariff A, Scale 2 and an amount involved of $20,000 per day or $200,000), which is about 70 per cent of the plaintiffs' legal fees and represents a fair and substantial contribution to their actual costs. To award the amount claimed would be a windfall for them. While the defendant waited too long to raise the issue of impecuniosity, the mere fact of failing to comply with the requirements of Rule 77.04 doesn't necessarily preclude the court from hearing the issue of inability to pay. On the facts, however, it would be inappropriate to grant such relief.

FAMILY LAW – Costs – principles *Niles v. Munro,* No. 1201-56024, O'Neil, J., February 14, 2011. 300 N.S.R. (2d) 199; 2011 NSSC 57; **S624/12** ■ The mother's claim for child support was only partially successful, and she was awarded less than the father had offered to settle for – in part because the court found the eldest child was not a child of the marriage at the time the application was filed. Her delay in filing information led to an adjournment of the initial hearing. The father's legal fees were $29,513.57, and the amount involved was less than $65,000. He sought costs. The court determined that, since the matter was started before June 30, 2010, the old *Civil Procedure Rules* (1972) should apply. *Held,* costs of $7,250, plus $1,000 for disbursements awarded to the father; determined under Tariff A, scale 2 (basic), and payable at a rate of $250 per month. In reaching this conclusion, the court considered the various difficulties in awarding costs in complex family matters where success is often divided, and examined a number of such cases in which costs were awarded.

FAMILY LAW – Costs – settlement *Anderson v. Anderson,* No. 1201-063876, Gass, J., March 4, 2011. 301 N.S.R. (2d) 31; 2011 NSSC 90; **S625/7** ■ Although the respondent father agreed with the terms of the proposed Corollary Relief Judgment (which was based on the parties' consent order under the *Maintenance and Custody Act*), he forced the mother to go to great lengths to obtain a response to her petition and confirmation of his income for child support purposes. He was personally served four times, failed to heed Notices to Disclose or attend appearances. He argued he shouldn't be liable for costs, since the matter settled based on the parties' status quo. The mother's legal fees were $8,000. Disbursements attributable to the father's conduct totalled $1,100. *Held,* father to pay costs of $2,500 (including disbursements). The father's delay was unnecessary, prolonged the resolution and drove up the mother's costs.

FAMILY LAW – Costs – solicitor and client costs, custody and property division *Lockerby v. Lockerby,* No. 1201-063145, Jollimore, J., March 14, 2011. 2011 NSSC 103; **S625/16** ■ The father succeeded on the issues that consumed the most trial time: parenting matters and property division. He did not succeed in his claims for s. 7 expenses under the Child Support Guidelines, retroactive child support and reimbursement for various child-related costs. His total legal fees exceeded $100,000 and he sought substantial costs on a solicitor-client basis, citing his success and the mother's conduct. Prior to trial, he had made a comprehensive settlement offer that was for more than the mother was awarded at trial. He argued the amount involved was the disputed debt to his father ($200,000). The mother argued there should be low or no costs as she felt success was divided. *Held,* mother to pay $26,058 (including almost $6,000 in disbursements) in costs to the father. One third of the award relates to child support, and will survive any future bankruptcy by the mother. If all the issues were equally important, it could be said success was divided. As it was, the father was successful on the most significant issues, and those that consumed the most time. On the facts, a cost award won't adversely impact the children; however, the mother's claim for parenting time was *bona fide* and parents should not be discouraged from pursuing legitimate custody claims. Costs won't be awarded in relation to the time spent on the dispute over parenting time. Of the five-day trial, three days were spent on financial matters, the most significant of which was the contested property division. Costs will be awarded in relation to those issues alone, based on an amount involved of $200,000 plus $20,000 for each of the three days of trial and Tariff A's basic scale. Solicitor and client costs are not warranted. The evidence showed the mother's behavior improved as the trial dates approached. Of her three requests for adjournments, two were dismissed and one was made moot because a children and family services matter bumped the trial. There was no evidence the mother misused the court's time, although she had made an entirely unsupported allegation of fraud and her disclosure was lacking. While her behavior at times was vindictive and ill-considered, it was not so reprehensible, scandalous or outrageous to warrant solicitor and client costs.

FAMILY LAW – Costs – tariff amount *Marchand v. Marchand,* No. 1201-062319; S.F.H.D. No. 056429, MacDonald, B. J., June 7, 2011. 2011 NSSC 224; **S630/4** ■

FAMILY LAW – Custody and access – application that Nova Scotia lacks jurisdiction to hear when children relocated *Yonis v. Garado,* S.F.H.M.C.A. No. 072415, Jollimore, J., March 18, 2011; March 16, 2011 (orally). 301 N.S.R. (2d) 148; 2011 NSSC 110; **S625/20** ■ The wife filed no documents or other evidence, but argued through counsel that the father's custody application should not be heard in Nova Scotia because the children were with her in Alberta. The evidence showed the children had lived in Halifax for several years after coming to Canada as refugees fleeing persecution in Ethiopia. They went to Alberta with their mother in June 2010 for what was supposed to be a three-week vacation. The mother had not spoken to the father since leaving Nova Scotia, but he heard from the children that she was planning to return to Ethiopia. In late September 2010 he brought this application for custody, primarily out of concern for the move. The issue was whether the court could and should assume jurisdiction over the matter. *Held,* the court has jurisdiction and will hear the matter on its merits. This application has a real and substantial connection to Nova Scotia and there is no more appropriate forum in which the matter should be heard. The mother, through her failure to provide any evidence, has not proven with clear and cogent evidence the father acquiesced to the move simply because he waited a few months before bringing his application. Absent any other information/evidence from the mother, the father's evidence shows the children continue to be domiciled in Nova Scotia. On balance, most of the relevant witnesses are connected to Nova Scotia. Fairness also dictates the matter proceed as quickly as possible. Forcing the father to start his application over again in Alberta will not be in the children's best interests. The children are young and the passage of time impacts their relationship with their father significantly.

FAMILY LAW – Custody and access – arrangement to include grandparent in substantial role *C. (C.) v. C. (F.) et al.,* F.N.G.C.F.S.A. No. 35242, Wilson, A.C.J.F.C., May 31, 2011. 2011 NSFC 15; **FC38** ■

FAMILY LAW – Custody and access – child support and costs *Giles v. Blois,* S.F.H.M.C.A. No. 072842, Legere-Sers, J., April 18, 2011. 2011 NSSC 149; **S627/29** ■

FAMILY LAW – Custody and access – child with medical issues,

retroactive support *Gouthro v. Gouthro,* No. 1206-5648, Forgeron, J., June 15, 2011. 2011 NSSC 214; **S630/7** ■

FAMILY LAW – Custody and access – interim parenting arrangement *Krszwda v. Henderson,* S.F.S.N.M.C.A. No. 074414, Forgeron, J., May 19, 2011. 2011 NSSC 193; **S629/4** ■

FAMILY LAW – Custody – application to vary, no material change in circumstances *Lamarche v. Lamarche,* S.F.H.M.C.A. No. 035030, MacDonald, B. J., February 23, 2011. 300 N.S.R. (2d) 322; 2011 NSSC 72; **S624/31** ■ The parties' 14-year-old son moved from his mother's home to his father's home for six months. The mother agreed to the move, despite an earlier court order giving her primary care and sole custody. At the time of the hearing, the son was again living with her. The father sought joint custody, primary care and retroactive child support. The mother (who did not pay support while the child lived with the father) asked the court to forgive any arrears that may have arisen during this time. She also sought to impute income to the self-employed father based on his earning potential and what she felt was under-reporting and/or underemployment on his part. The evidence showed the father was overly critical of the mother, and had been disrespectful and inappropriate with both her and the son at times. The father was less than credible. *Held,* there has been no change in circumstances justifying a change to the custody and access provisions of the prior order. The parents are unable to communicate in the positive fashion required for joint custody to work. While the child was having some troubles at school and with peers, there was no evidence the father was better suited to guide him more effectively such that a change in living arrangements was warranted. Although courts appear to forgive arrears often, there is no real jurisdiction for a court to do so. Here, the support the mother should have paid while the child was living with his father will be set off against the support the father should have been paying to the mother since the son's return to her home. Income is imputed to the father based on his ability to earn substantially more than he currently appears to earn through his own business. He is voluntarily underemployed and child support will be set based on an imputed income of $20,000 per year.

FAMILY LAW – Custody – mobility, application to remove precondition to relocation *Sabri v. Harara,* No. 1201-061957, Jollimore, J., May 25, 2011. 2011 NSSC 196; **S629/9** ■

FAMILY LAW – Custody – mobility, request of primary caregiver to relocate denied *Coughlan v. Coughlan,* S.F.H.M.C.A. No. 073957, Jollimore, J., May 6, 2011. 2011 NSSC 204; **S629/12** ■

FAMILY LAW – Divorce – application for preservation order to protect business assets *Korem v. Crown Jewel Resort Ranch Inc.,* S.Y.S.J.C. No. 339992, Edwards, J., February 16, 2011. 300 N.S.R. (2d) 397; 2011 NSSC 76; **S624/17** ■ A husband and wife ran a resort business, which operated through a number of corporate entities of which the parties were the sole owners/shareholders/directors. After separation, after a number of strategic moves by each party, the wife fired the husband and shut him out of the business. He moved for a preservation order, and alleged she was destroying assets and disrupting business. *Held,* motion denied, with costs of $1,500 to the wife. These issues are clearly matrimonial in nature and should be heard in the context of the ongoing divorce proceedings at the Family Division. The test in *RJR MacDonald* was not met: there was no serious question to be tried and no danger the husband would suffer irreparable harm without an order. The business has been at a standstill since separation. There is not now, nor will there be until things are resolved, much of a business to disrupt. The court did not accept the wife would destroy assets. She has a vested interested in maintaining the value of the business and its assets, and most of them are encumbered anyway. If she depletes assets, the husband can be compensated from her share of the matrimonial property. The husband is entitled to use a room on the property to store various business records, but the wife is entitled to hold the rest of the property/keys/records owned by the business.

FAMILY LAW – Divorce – division of assets, child support and custody *P. (J.) v. P. (K.),* No. 1201-064095, Legere-Sers, J., April 14, 2011. 2011 NSSC 142; **S627/26** ■

FAMILY LAW – Divorce – division of assets, custody and access *Fraser v. Fraser,* No. 1205-002925, Haliburton, J., May 19, 2011. 2011 NSSC 178; **S629/2** ■

FAMILY LAW – Divorce – interim spousal support, effect of marital misconduct *Foster-Jacques v. Jacques,* H.F.D. No. 1201-64463, MacDonald, B. J., February 2, 2011. 298 N.S.R. (2d) 199; 2011 NSSC 43; **S623/20** ■ The wife's affidavit filed in support of her interim application for spousal support contained details of the husband's extramarital affair. He brought a motion to strike the offending paragraphs, arguing only need and ability to pay (as opposed to conduct) is relevant to the determination of interim spousal support. The wife argued the husband's misconduct and its impact on her is relevant to the issue of her ability to become self sufficient – now and in the future. *Held,* motion denied; the details of the husband's misconduct are relevant to the wife's claim for support. Need and ability to pay are not the only matters relevant to a consideration of interim spousal support. The *Divorce Act* lists several other factors, including the recipient spouse's ability to become self sufficient. That must be taken into account; a court must consider all of the statutory factors and objectives.

FAMILY LAW – Divorce – spousal support, matrimonial assets *MacEachern v. MacEachern,* No. 1206-5384, Haley, J., June 3, 2011. 2011 NSSC 215; **S630/3** ■

FAMILY LAW – Divorce – variation of child support, termination of spousal support *Hanrahan-Cox v. Cox,* No. 1201-003921; S.K.D. No. 036896, MacDonald, B. J., May 11, 2011. 2011 NSSC 182; **S628/29** ■

FAMILY LAW – Gifts – property sold without permission *Armitage v. MacIntosh,* Claim No. 347091, Slone, Adjudicator, June 1, 2011. 2011 NSSM 30; **SmCl18/15** ■

FAMILY LAW – Interim custody order – joint custody, primary care to father *Straume v. Fleming,* S.F.H.M.C.A. No. 073622, Legere-Sers, J., June 1, 2011; April 28, 2011 (orally). 2011 NSSC 206; **S629/20** ■

FAMILY LAW – Interim spousal support – family business, imputing income *Jardine-Vissers v. Vissers,* No. 1207-003527, Beaton, J., May 18, 2011. 2011 NSSC 195; **S629/11** ■

FAMILY LAW – Jurisdiction – creditor/debtor matters *Lockerby v. Lockerby,* No. 1201-063145, Jollimore, J., March 30, 2011. 2011 NSSC 125; **S627/3** ■ The husband applied to the Family Division for relief in relation to a judgment for unpaid legal fees registered against the wife, which would take priority over family debts to be paid out of proceeds from the sale of the matrimonial home. At issue was whether the Family Division has jurisdiction to hear such an application. *Held,*

application will be transferred to the Supreme Court. The Family Division has only the jurisdiction conferred by s. 32A of the *Judicature Act*. The jurisdiction outlined therein does not include relations between creditors and debtors and their impact on third parties. There are no other pieces of legislation or rules of procedure that will enable this court to properly decide this application.

FAMILY LAW – Matrimonial property – division of assets *Andrist v. Andrist,* No. 1204-005025; Ken. No. 064361, Coughlan, J., May 25, 2011. 2011 NSSC 194; **S629/5** ■

FAMILY LAW – Parties – application for full party status under *Children and Family Services Act* *E. (R.) v. Nova Scotia (Minister of Community Services) et al.,* F.A.N. C.F.S.A. No. 073062, Comeau, J.F.C., May 12, 2011; May 10, 2011 (orally). 2011 NSFC 11; **FC38** ■

FAMILY LAW – Procedure – costs *Drozdowski v. Drozdowska,* S.F.H.M.C.A. No. 067442, Gass, J., June 1, 2011. 2011 NSSC 211; **S629/24** ■

FAMILY LAW – Procedure – costs *Lamarche v. Lamarche,* S.F.H.M.C.A. No. 035030, MacDonald, B. J., April 1, 2011. 301 N.S.R. (2d) 196; 2011 NSSC 133; **S630/13** ■

FAMILY LAW – Separation agreement – proceeds from sale of matrimonial home *Peach v. Melnick,* No. 1201-058389; S.F.H.D. No. 030137, O'Neil, A.C.J., June 16, 2011. 2011 NSSC 220; **S630/21** ■

FAMILY LAW – Spousal and child support – change in circumstances *Campbell v. Campbell,* Pic. No. 1205-002980; S.P.D. No. 069741, Kennedy, C.J., April 12, 2011. 2011 NSSC 145; **S627/28** ■ The divorcing parties' almost 30-year marriage produced three children, two of whom were grown; they disagreed on whether the youngest was still a child of the marriage. The mother claimed she was owed retroactive support under the terms of the parties' separation agreement, which provided for child and spousal support based on the father's then-annual income of $65,000 and 28.5 per cent of any additional income received in any given year. In 2007, the father was terminated and received a severance package of more than $100,000. He informed the mother, and invested the money in RRSPs, which he withdrew later that same year. The mother now sought a support top up based on both the severance and RRSP income in 2007. She argued the child was still a child of the marriage because she intended to return to high school soon. At 20, she still lived with the mother and neither worked nor attended school. The father sought to terminate spousal support. At 61 years of age, he claimed he had health problems that made it hard to work. *Held,* the child is no longer a child of the marriage, and has not been since she left high school. If her circumstances change, she can apply for support then. Retroactive support is owed, but it would be unfair to double count the severance money. Instead, the father's income is based on his calculation, which uses an average of his income over the two relevant years (2007 and 2008) to reflect the fact the severance was meant to be his 2008 salary paid in advance. Spousal support will continue at the present level. There is no medical evidence to support the husband's claims regarding his health. He cannot afford to retire, and could become employed in some low stress work on at least a part-time basis. The order for support should motivate him to do so.

■ FISH AND GAME

FISH AND GAME – Atlantic Fishery Regulations – appeal, possession mackerel less than 25 centimetres in length *R. v. Neary,* C.R.A.T. No. 328527, Rosinski, J., December 21, 2010. 296 N.S.R. (2d) 232; 2010 NSSC 466; **S620/26** ■ The Crown appealed the accused's acquittal on a charge of possessing undersize mackerel. Although it was undisputed that he had undersize mackerel, exactly how many he had was in dispute because as much as one-third of the catch had been taken by various individuals for their own consumption prior to the fisheries officers arriving to take their samples. The trial judge concluded that since there had not been an inspection of the entire catch, the Crown could not rely on the samples taken in order to prove that the entire catch had greater than 10 per cent undersize mackerel. *Held,* appeal allowed; acquittal set aside; conviction entered. It was clear from the trial judge's decision that he wrongly treated s. 48(2) of the Fisheries Regulations as an element of the offence to be proven by the Crown beyond a reasonable doubt; s. 48(1) is a strict liability offence and s. 48(2) is a statutorily created due diligence offence and, in this case, there was no evidence of due diligence on the part of the accused.

FISH AND GAME – Fisheries offences – fishing in an area closed to fishing *R. v. LaPorte,* No. 2111557; 2111558; 2111559; 2111560, Stroud, J.P.C., June 23, 2011. 2011 NSPC 36; **M24** ■

■ GIFTS

GIFTS – Parents to child – whether loan *MacDonald v. Wood,* Claim No. 343257, Slone, Adjudicator, June 3, 2011. 2011 NSSM 32; **SmCl18/17** ■

■ GUARANTEE AND INDEMNITY

GUARANTEE AND INDEMNITY – Undue Influence – inequality of bargaining power *DRL Coachlines Ltd. et al. v. GE Canada Equipment Financing G.P.,* C.A. No. 322580, Oland, J.A., February 22, 2011. 300 N.S.R. (2d) 312; 2011 NSCA 23; **S621/27** ■ GE successfully sought to enforce a personal guarantee against Ms. Roberts-Tetford. She appealed, arguing the judge erred by failing to take into account the parties' inequality of bargaining power. Although she was the sole director of the corporate appellant, DRL, Ms. Roberts-Tetford argued she had little education or business acumen. She claimed her son (now deceased) ran the business for her and pressed her to sign the guarantee to secure a business loan. While she admitted knowing the guarantee meant she might have to repay the loan personally, she argued GE failed to meet its duties to her. She claimed she had no idea DLR wasn't doing well financially and blamed GE and her son for misleading her and creating this situation. She also appealed the party and party cost award of $69,000. *Held,* appeal dismissed, with costs of $4,000 to the respondent. On appeal, Ms. Roberts-Tetford made the same arguments she made before the trial judge, who made clear findings of credibility and fact. Reviewing the decision, there is ample evidence to support these findings. There are no palpable and overriding errors that would permit appellate intervention. There was no significant inequality of bargaining power. The trial judge found Ms. Roberts-Tetford was a capable and experienced business person who was given a chance to ask questions and obtain independent advice before signing the guarantee. Her bargaining power was not "grievously impaired by reason of ignorance or infirmity". There was no undue influence; the trial judge found Ms. Roberts-Tetford was seeking to avoid the consequences of a decision made freely of her own will. There was evidence to support this conclusion. As for costs, the trial judge used Tariff A, Scale 2 based on an amount involved that was lower than that suggested by GE. He found the case was lengthy

and complex, pointing to the numerous factual/legal disputes, volumes of documentary evidence, various procedural matters and extensive testimony. There is no need for a court to have evidence of the actual legal fees incurred by the successful party when using the tariffs. Costs are discretionary and the award here was not manifestly unjust, nor was it made as the result of an error in legal principle.

■ INSURANCE

INSURANCE – Automobile insurance – limitation period *Fitzgerald v. Royal Sun Alliance Insurance Co. of Canada,* SYD. No. 332089, Edwards, J., March 31, 2011. 301 N.S.R. (2d) 314; 2011 NSSC 132; **S627/4** ■ The plaintiff brought a claim against the defendant insurer under Section D of her insurance policy, less than two months after the limitation period expired. She claimed she was seriously injured in a fall from the back of her parked pickup after it was struck by an unidentified vehicle. Since she thought she had no cause of action (because she couldn't identify the vehicle) she didn't report the incident to police or her insurer as required by the policy. As soon as she realized she could sue under Section D, she brought this action. The defendant brought a motion for summary judgment and sought to have the claim dismissed on the basis of: the plaintiff's failure to comply with the policy and/or the limitation period. *Held,* motion dismissed. There are genuine issues of fact requiring trial. The trial will hinge on the plaintiff's credibility. If her evidence is believed, it amounts to more than a theory; it's circumstantial evidence. Her failure to comply with the policy's reporting provisions is not fatal; s. 33 of the *Insurance Act* give a court discretion to grant equitable relief. It would be unfair to dismiss her claim solely on the basis of the imperfect compliance since it resulted from an honest, mistaken belief that she had no cause of action. The limitation period does not preclude the claim from proceeding. The prejudice to the defendant caused by the delay is, at best, minimal. The plaintiff acted as soon as she was aware of her right to proceed and the *Limitation of Actions Act* may act to trump the two-year limit in the policy anyway.

INSURANCE – Disability insurance – interpretation of "no longer disabled" *Inglis v. Nova Scotia Public Service Long Term Disability Trust Fund,* Hfx. No. 203247, McDougall, J., February 2, 2011. 299 N.S.R. (2d) 330; 2011 NSSC 36; **S623/14** ■ The plaintiff was in receipt of long-term disability benefits due to severe chronic diabetes, which resulted in severe episodes of hypoglycemia that prevented him from carrying out his duties as a plumber. His inability to work eventually led to depression and he was later diagnosed with post-traumatic stress disorder following a motor vehicle accident. Although he expressed a desire to return to work on a trial basis, medical treatment for carpal tunnel syndrome prevented it. After the plaintiff's employer terminated his employment, the insurer cut off his benefits, arguing that he was no longer disabled within the meaning of the disability plan. *Held,* declaration granted that the plaintiff was disabled and remains disabled, which entitles him to the benefits he had been denied with a reduction to account for a portion of the damages paid to him for lost wages in a wrongful dismissal suit against his former employer; as a matter of "real world" employability, the plaintiff has established that he was totally disabled under the plan as of the date his benefits were terminated. The onus is on the plaintiff to prove that a global settlement with a third party tortfeasor, characterized as "general damages", did not include a wage loss component.

INSURANCE – Life insurance – preliminary determination of question of law under Rule 12 *Mahoney v. Cumis Life Insurance Co.,* C.A. No. 327577, Fichaud, J.A., March 30, 2011. 301 N.S.R. (2d) 302; 2011 NSCA 31; **S626/3** ■ A man with a pre-existing heart condition died of a heart attack suffered after a motor vehicle accident. His widow (the appellant) sued to collect accidental death benefits. The insurer applied under Rule 12 for a determination that the death was not recoverable as an "accidental death" under the policy. The chambers judge dismissed the action after finding the death was caused partly by the pre-existing condition and was thus expressly outside the policy's definition of "accidental". The widow appealed. *Held,* appeal allowed in part, with the parties to bear their own costs. While the chamber's judge correctly interpreted the policy, the cause of death is a question of fact that can only be decided after all the medical evidence is heard. The order should be changed to read that, if (as a matter of fact) the pre-existing condition is found to have been even a partial contributing factor, the matter will be dismissed.

INSURANCE – Life insurance – revocable beneficiary discussed *McMasters Estate (Re),* Hfx. No. 317247, Coady, J., November 9, 2010. 298 N.S.R. (2d) 83; 2010 NSSC 414; **S622/27** ■ A man had twice named his daughter as the sole beneficiary on his life insurance policy and although he had hand-written in the word "irrevocable", neither designation contained the statements required for an irrevocable designation pursuant to the *Insurance Act*. Some years later, he completed a new beneficiary designation form, naming his common-law wife as the sole beneficiary. This form contained a declaration stating that any previous beneficiary designations were revoked. Both parties now claimed to be the sole beneficiary of the life insurance proceeds. *Held,* the common-law wife is the sole beneficiary of the policy; there was no evidence that the requirements of s. 193(3) of the *Insurance Act* were met with regard to the first two beneficiary designations and, thus, the daughter was never a valid irrevocable beneficiary. The wording of the section is clear and, if its requirements are not met, a beneficiary designation cannot be irrevocable.

INSURANCE – Property – coverage limit *Martitime Steele and Foundries Ltd. et al. v. Economical Mutual Insurance Co. et al.,* Hfx. No. 340921, Duncan, J., April 18, 2011. 2011 NSSC 151; **S628/1** ■

INSURANCE – Snowmobile – ownership *Goodick Estate v. Conrad Estate,* Pt.H. No. 276741, Wright, J., February 11, 2011. 300 N.S.R. (2d) 236; 2011 NSSC 51; **S624/24** ■ Mr. Conrad was an experienced snowmobiler killed in a snowmobile accident. At issue was whether Mr. Conrad or McLeod's Farm Machinery Ltd. (McLeod's) owned the Polaris 700 he was driving at the time. McLeod's argued there was a binding sale (an even trade) made when an irate Mr. Conrad returned his nearly new Polaris FST ("FST") the day before the accident. There was no paperwork drawn up to complete the transaction. The evidence from McLeod's was that the deal happened late in the day and the parties agreed to meet at a later date to complete the paperwork and transfer title of the "FST". They claimed they had no loaner or test vehicle program, and that Mr. Conrad was insistent that he did not want his clearly defective "FST" repaired for a third time. The evidence showed McLeod's told Mr. Conrad the Polaris 700 would not be covered under their policy and that he should get his own insurance coverage before driving it. The evidence also showed Mr. Conrad called his son and asked him to have the insurance changed. Mr. Conrad's son insisted his father told him the Polaris 700 was only a loaner and that he was having the "FST" repaired. His son's fax to the insurance adjuster reflected this. *Held,* McLeod's has proven on balance there was an even trade and binding sale; Mr. Conrad owned the Polaris 700 at the time of the accident. Although one party was deceased and the only other witness to the transaction gave totally unreliable evidence, the test for whether title transferred is that of an objective reasonable

bystander. Using the *Civil Procedure Rules* (1972) to help ascertain the parties' intention under ss. 20 and 21 of the *Sale of Goods Act*, it can be said they agreed on all of the essential terms of a contract for sale/trade. While no paperwork was completed, the contract was made and implemented when Mr. Conrad took the snowmobile. Mr. Conrad and his son worked in the sales and automotive industry and were taken to be aware that loaners are covered by dealer insurance. The fact Mr. Conrad agreed to obtain his own coverage and the FST's numerous defects and previous repairs tend to show he more likely than not intended to assume ownership of the Polaris 700.

■ LANDLORD AND TENANT

LANDLORD AND TENANT – Residential tenancies – appeal *M. v. Oxford Properties,* Claim No. 340123, Slone, Adjudicator, April 12, 2011. 2011 NSSM 26; **SmCl18/11** ■

LANDLORD AND TENANT – Residential tenancies – appeal *Buteau v. Summa Holdings Inc. et al.,* S.C.A.T. No. 324450, O'Blenis, Adjudicator, March 31, 2011. 2011 NSSM 27; **SmCl18/12** ■

LANDLORD AND TENANT – Residential tenancies – appeal *Burke v. Classic Property Management,* Claim No. 346358, Slone, Adjudicator, May 18, 2011. 2011 NSSM 38; **SmCl18/23** ■

LANDLORD AND TENANT – Residential tenancies – appeal, claim for cost of heating other units *Kera-Maris Investments Ltd. v. Dockrill,* Claim No. 346347, Slone, Adjudicator, June 6, 2011. 2011 NSSM 35; **SmCl18/20** ■

LANDLORD AND TENANT – Residential tenancies – appeal, noise complaints, vacant possession *Tynes v. Killam Properties Inc.,* Claim No. 347505, Slone, Adjudicator, May 12, 2011. 2011 NSSM 31; **SmCl18/16** ■

LANDLORD AND TENANT – Residential tenancies – appeal, rental arrears and vacant possession *Harris v. Molcsan,* Claim No. 344186; 344188, Slone, Adjudicator, March 25, 2011. 2011 NSSM 25; **SmCl18/10** ■

LANDLORD AND TENANT – Residential tenancies – enforcement of order *Metro Regional Housing Authority v. Doucette,* S.C.C.H. No. 344114, Parker, Adjudicator, March 9, 2011. 2011 NSSM 7; **SmCl17/22** ■ In response to an application by the applicant landlord, the director of residential tenancies ordered the respondent tenants to pay the landlord damages and vacate their rental unit. The landlord did not take any action to force the tenants to leave for almost six months. They then applied for an order for vacant possession. *Held,* application denied. A considerable period of time has elapsed since the director's order was made. New circumstances could have (and probably did) arise in the time that has transpired since the order was issued. It also appears the application was not made on the same grounds the original application was made. There must be a new hearing. The "60 day" rule is a valid policy of substances. There is a presumption that circumstances have changed between the parties for the landlord to have decided to hold off on enforcing the order for more than 60 days.

LANDLORD AND TENANT – Residential tenancies – jurisdiction of Small Claims Court *Killam Properties Inc. v. Patriquin,* Claim No. 340137, Parker, Adjudicator, April 7, 2011. 2011 NSSM 29; **SmCl18/14** ■

LANDLORD AND TENANT – Residential tenancies – summary judgment application *Corfu Investments Ltd. v. Oickle,* Hfx. No. 298682, Rosinski, J., March 23, 2011. 301 N.S.R. (2d) 168; 2011 NSSC 119; **S625/23** ■ The plaintiff landlord sued its tenant (the defendant, Ms. Oikle), seeking to have her held vicariously liable for $55,000 of damage caused by a fire in her rental unit. She argued the *Residential Tenancies Act* precludes a court from hearing a dispute between a landlord and tenants at first instance, and brought a motion for summary judgement on the pleadings. *Held,* motion granted. Ms. Oikle has shown it is plain and obvious the plaintiff's cause of action is in the exclusive jurisdiction of the Residential Tenancies Board and Director. The proceeding is dismissed. In reaching this conclusion, the court considered the historical legislative and case law framework at play. The Act conclusively vests the authority to deal with landlord and tenant disputes in the authorities charged with implementing the Act. The nature of the dispute is relevant. The court has no residual, concurrent jurisdiction to deal with matters between landlords and tenants that can be addressed and suitably remedied under the Act. Such is the case here, and similar matters have already been addressed by the Director.

■ MAINTENANCE

MAINTENANCE – Child support – child not attending school *Brown v. Brown,* No. 1201-058992; S.F.H.D. No. 034489, MacDonald, B. J., April 20, 2011. 2011 NSSC 148; **S628/2** ■

MAINTENANCE – Child support – child of the marriage, special or extraordinary expenses *Turple v. Turple,* No. 1201-059200, Jollimore, J., April 18, 2011. 2011 NSSC 150; **S627/31** ■

MAINTENANCE – Child support – common law relationship *Darlington v. Moore,* S.F.H.M.C.A. No. 068167, Lynch, J., April 18, 2011. 2011 NSSC 152; **S628/3** ■ The partners were in a common-law relationship for 20 years and had two children. The mother was and continued to be their primary caregiver. The father, who was now on stress leave from the RCMP, was the primary income earner throughout the relationship. The mother had not worked as a nurse since she quit her job to look after their then sick child. The parties owned a home together. At issue was: the division of property, including the father's pension, RRSPs and investments; determination of his income for support purposes; and the mother's entitlement to spousal support. The proceeding had a long history and included a pattern of the father failing to disclose or answer questions asked of him in court. He failed to cross-examine the mother or any of her witnesses. A preservation order had been granted at the mother's request, requiring him to preserve his (personal and company) assets. *Held,* given concerns over the father's credibility, lack of disclosure, refusal to answer questions or cross-examine, the court disregarded his evidence entirely. The home will be sold and divided equally. Having regard to the Supreme Court of Canada's recent clarification of the law in relation to unjust enrichment in *Kerr v. Baranow*, the father would be unjustly enriched if he retained the pension, RRSPs, and investment accounts in his name. The parties were engaged in a joint family venture. It was a partnership (mutual effort); there was economic integration; the external evidence confirms they intended to function and present as a family (actual intent); and the mother's career and financial stability were clearly secondary to the needs of the family unit (priority of family). The mother is entitled to half of the father's pension for the duration of the relationship, and half of the RRSPs and investments in his name. The father's income is grossed up to take into account the portion of it that is tax free and his rental and company income is imputed at $24,000 per annum for a

total income of $189,475 for support purposes. The mother is entitled to ongoing and retroactive spousal support in the amount of $3,000 per month.

MAINTENANCE – Child support – variation *Foss v. Foss,* No. 1201-059561, Jollimore, J., March 24, 2011; March 10, 2011 (orally). 2011 NSSC 115; **S625/24** ■ The parties agreed to a shared custody arrangement for their two daughters, but could not agree on child support. When the children lived primarily with the mother, the father paid child support of $500 per month, and less than his share of extra expenses. Both parents now earned more than they had at the time the original order was issued, the mother significantly so. She lived with her mother, near the children's school. The father and his new spouse lived some distance away. When their parenting time fell on school days, they would drop the girls at the mother's house early in the morning and then pick them up from her house at suppertime. The maternal grandmother cared for the girls during these times. Taking into account the maternal grandmother's income and the mother's child tax and HST benefits, the mother's household has 76 per cent of the total income the father's household has. Using only each parent's income, the set-off amount of child support would be $255. The evidence showed the father paid an unequal and disproportionately low share of extra expenses relating to the children. The mother asked the court to order that she be entitled to continue to claim the girls for tax purposes. *Held,* child support will continue to be paid at the rate of $500 per month. While the mother earns more now, she still bears a disproportionately higher share of expenses related to the children. The court must be especially concerned with the children's standard of living in each household. It is not the maternal grandmother's responsibility to support the children or subsidize their standard of living. The girls should first look to their parents for support. The mother cannot afford the same extras the children enjoy in the father's home (internet, vacations, pets). Her costs are higher because she often feeds the children before and after school, even on the father's parenting time. The grandmother's willingness to continue caring for the girls after school is the reason the new shared parenting arrangement works. Maintaining this status quo without impacting the girls' standard of living in their mother's home requires the additional support. While the court cannot order the father not to apply for the child tax benefit, this income is essential to the mother's household and the girls' standard of living. The mother's loss of these benefits will constitute a change in circumstances warranting a possible variation of child support.

MAINTENANCE – *Maintenance and Custody Act* – custody, child support, division of proceeds from the sale of home *Simpkin v. Chalmers,* S.F.H.M.C.A. No. 71808, Legere-Sers, J., April 29, 2011. 2011 NSSC 164; **S628/10** ■

MAINTENANCE – Spousal support – application to terminate *Shurson v. Shurson,* S.F.H.M.C.A. No. 040843, O'Neil, J., April 27, 2011. 2011 NSSC 163; **S628/25** ■

MAINTENANCE – Spousal support – variation *Hewens v. Guitard,* No. 1201-55652, Gass, J., May 25, 2011. 2011 NSSC 201; **S629/22** ■

■ NEGLIGENCE

NEGLIGENCE – Negligent misrepresentation – statements of insurance company and adjuster *Tingley et al. v. Wellington Insurance Co. et al.,* Hfx. No. 115328, MacAdam, J., December 29, 2010. 296 N.S.R. (2d) 288; 2010 NSSC 465; **S620/30** ■ The plaintiffs claimed against their insurance company and an adjustor, on account of the handling of an alleged incident of chemical contamination in a house occupied permanently by some plaintiffs and sporadically by others. The house had been broken into and a substance that was never definitively identified was spread throughout. The plaintiffs alleged that following various cleaning procedures, the defendants had advised them that the house was safe to occupy but they subsequently suffered from multiple chemical sensitivities as a result of their exposure to a toxic substance in the home, resulting in their claims against the defendants for negligent misrepresentation and equitable fraud. The defendants denied that the presence of any toxic substance had ever been established and denied telling the plaintiffs that the house was safe. In the alternative, they took the position that any such statement would have been reasonable and neither negligent nor fraudulent. *Held,* the plaintiffs' claims are dismissed; although the court was satisfied that there were substances left in the home following the break-in that had not been there before, the plaintiffs were unable to establish that a toxic substance was spread through the house, that any substance they had encountered in the house had harmed them or that the defendants had made the statements alleged; there were significant issues of credibility and reliability in relation to the plaintiffs' evidence. The evidence did not support the claim of equitable fraud, given the absence of any evidence of dishonesty on the part of the defendants; although the claim of negligent misrepresentation had not been made out as the evidence did not establish either that the statements alleged had been made or that any exposure to any toxic substances had caused their health problems, there was a duty of care owed to all the plaintiffs (including those that were only sporadically invited guests) and, had the other elements been established, reliance would have been found. Although the evidence supported the conclusion that the plaintiffs suffered from various health problems, it did not support a causative link with their occupancy of the house after the break in or with any substance they had encountered there.

NEGLIGENCE – Occupier's liability – duty of care, winter road maintenance *Langille v. Bernier et al.,* Hfx. No. 191895, Bourgeois, J., November 2, 2010. 296 N.S.R. (2d) 127; 2010 NSSC 402; **S619/2** ■ The plaintiff was injured when he attempted to turn his fuel delivery truck around so as not to have to navigate an icy private road. He commenced an action against the individuals residing adjacent to the private road, claiming to have injured his back, neck and shoulders and to be suffering from anxiety, depression and nightmares. One of the defendants argued that he owed no duty to the plaintiff as he used only a small portion of the roadway, was not a party to the road maintenance agreement and did not attend meetings to discuss maintenance issues or contribute financially to the winter plowing and, thus, could not be considered either an owner or an occupier under the *Occupiers' Liability Act*. *Held,* action dismissed; the roadway was not a sheet of ice, as alleged, but rather contained some areas of patchy ice under a light snowfall that did not impede its usage for the defendants or normal vehicular traffic; general damages provisionally assessed at $18,000; action dismissed against one defendant, on the basis that he was neither in physical possession of the roadway (his deed appeared to reserve out the property upon which the right of way was located from the land deeded to him) nor a person who had responsibility for and control over the condition of the roadway. The fact that the plaintiff's truck left the road did not create a presumption of negligence on the part of the defendants; the defendant homeowners had acted reasonably by way of having a ploughing system in place and applying traction material when needed and it was not reasonable, given the frequent temperature fluctuations, to expect a homeowner responsible for a rural laneway to anticipate every thaw and freeze

and apply some form of traction material. Had liability been found, it would have been apportioned equally among the defendants, collectively, and the plaintiff, as once the plaintiff recognized the risk the road conditions posed, he failed to act appropriately given that other options were available. The plaintiff suffered soft tissue injuries to his back, shoulders and upper arms and had been off work for three weeks, twice discharging himself early from physiotherapy. Although he continued to experience episodic soreness nine years later, he coped by using over-the-counter medications.

■ PRACTICE

PRACTICE – Abuse of process – application to strike defence *Oliver v. Robinson,* Hfx. No. 316242, Coughlan, J., March 15, 2011; February 4, 2011 (orally). 2011 NSSC 106; **S625/18** ■ The plaintiff moved for an order striking the defendant's defence. The defendant had failed to provide an affidavit disclosing documents, make himself available for discovery or provide his witness list. The defendant's lawyer gave evidence that he had not been able to contact his client to secure instructions (either directly or indirectly) for almost a year. He had no current contact information and did not know if the client had received any correspondence sent to him via email since their last contact more than a year ago. *Held,* motion granted; the defendant has abused the court's process and it is appropriate to strike his defence.

PRACTICE – Appeals – extension of time to file notice of appeal *Hatfield v. Mader,* C.A. No. 347856, Bryson, J.A., May 16, 2011. 2011 NSCA 44; **S626/16** ■

PRACTICE – Costs – jurisdiction application *Armco Capital Inc. v. Armoyan,* C.A. No. 330968; 326710, Hamilton, J.A., February 17, 2011. 300 N.S.R. (2d) 255; 2011 NSCA 22; **S621/24** ■ Ms. Armoyan removed a hard drive from her husband's work computer after they separated. His company, Armco, claimed ownership of the hard drive and sought its return. Before the matter could be heard in Nova Scotia, she persuaded the Florida judge hearing their matrimonial dispute(s) to take possession of her copy of the drive. While the Nova Scotia chambers judge agreed the Florida court was the most convenient forum in which to decide matters related to the hard drive, he ordered Ms. Armoyan to pay costs of $12,031 to Armco, penalizing her for failing to admit, prior to cross examination, she had copied the drive and for apparently misleading the Florida judge about the nature of the possible orders a Nova Scotia court could make. She appealed the cost award. Also at issue was costs in relation to two abandoned appeals/cross-appeals on the jurisdiction motion. *Held,* appeal allowed; the cost order requiring Ms. Armoyan to pay costs set aside; Armco will pay her costs of $2,500. The chambers judge erred in principle and was clearly wrong. There was no reason to depart from the general rule that the successful party is entitled to costs. Her actions did not constitute the type of exceptional circumstances or misconduct warranting such an approach. While costs can be awarded to penalize bad behavior, there was insufficient evidence before the judge for him to make a determination about her behavior in the context of the overall divorce litigation. That was something best left for the Florida judge, who was privy to all of the issues surrounding the dissolution of the Armoyans' marriage. In reaching this conclusion, the appeal court took into account two Florida court decisions that post-dated the chambers decision at issue; not for the truth of their contents, but to illustrate how the proceeding before the Nova Scotia court was but a small part of the ongoing Florida divorce litigation. As for the abandoned appeals, each party abandoned their appeal(s) and should bear their own costs.

PRACTICE – Costs – stay of order, shareholder oppression claim *Soontiens et al. v. Giffin,* C.A. No. 341510, Beveridge, J., January 4, 2011. 297 N.S.R. (2d) 316; 2011 NSCA 1; **S621/4** ■ The appellants appealed an order requiring them to pay the respondent $175,000 in interim costs under s. 7(4) of the *Companies Act*, 3rd Schedule. They sought a stay pending a disposition of their appeal, which was set to be heard in May 2011. The trial was scheduled to start in January 2011. The trial judge had found the respondent's financial circumstances were such that, without the cost award, he would be unable to continue to fund the litigation. The appellants cited their concern that the respondent would be unable to repay the costs if ordered to do so following a successful appeal. *Held,* stay denied. The costs are payable immediately. This was an unusual order for costs, requiring the corporate appellant, XL Electric, to fund the respondent's litigation against the majority shareholders. Given the respondent's existing consent, a condition will be added requiring him to deposit his shares in the appellants' companies with the court as security in the event he is asked to repay the costs following the appeal. While there are arguable issues raised by the appeal, risk of inability to repay costs in the future does not automatically give rise to a finding of irreparable harm warranting a stay. The impact of the risk varies according to the context of the case. The money here will go to pay existing legal bills so the litigation can continue. The history shows this has been an acrimonious proceeding. The onus is on the appellants to prove the balance of convenience favours a stay (or other restrictions). The conditions regarding deposit of the shares are sufficient to safeguard against non-recovery and prevent irreparable harm. It's not necessary to go further and have the respondent prove he will suffer irreparable harm if the stay is granted.

PRACTICE – Defamation – motion of spouse to intervene *Reading v. Johnson,* Syd. No. 289967, Bourgeois, J., March 2, 2011; February 28, 2011 (orally). 301 N.S.R. (2d) 3; 2011 NSSC 87; **S627/18** ■ The self-represented plaintiff brought this action for defamation against her nursing supervisor (the respondent). There had already been a number of interlocutory issues before the court. The plaintiff's husband sought to act as an intervenor, arguing the litigation affected him directly. He cited potential financial consequences and his wife's health circumstances. He had already attended court many times with and on behalf of his wife. The plaintiff brought a motion for directions in relation to her discovery of the respondent. She felt the respondent's lawyer had, at discoveries, acted inappropriately by objecting to questions on his client's behalf and wanted the respondent's answers to those questions. *Held,* motion for intervenor status dismissed. The old cases apply to the new *Civil Procedure Rules* (2008), Rule 35.10. The rule creates a two-staged analysis, the first asking whether granting the motion would cause undue delay or serious prejudice. The person making the motion will usually be the one who must prove there will be no undue delay if the motion is granted. Logically, the burden of proving serious prejudice should generally lie with the person opposing the motion. The second stage of the test looks at whether one of four factors (outlined in Rule 35.10 (2)) apply. Here, the court was not satisfied granting the motion would not lead to undue delay, especially given the history and the fact the plaintiff and proposed intervenor are both self-represented. This alone is sufficient to deny the motion, but, *in obiter*, the court went on to consider the rest of the test. The proposed intervenor does not have a direct interest in the proceeding. He was not part of the allegedly defamatory act. The mere potential of liability for a possible future cost award is not enough. There must be some other independent or direct financial consequences arising from the issues being litigated. The plaintiff's health does not give him a direct interest, beyond that of general concern for one's spouse. Rule

34.08, which allows him to assist the plaintiff in presenting her case, might be a more appropriate route. As for the motion for directions, Rules 18.17(3) and (4) do not mean that a party represented by counsel must instruct their counsel to make objections during discoveries. Such a restricted role for counsel is not supportable either on the basis of the wording of the Rules or common sense. The court gave additional directions to help focus and smooth the flow of future discoveries. The plaintiff will pay costs of $250 to the respondent forthwith. The motion pertaining to discoveries was entirely without merit and an unnecessary delay.

PRACTICE – Disclosure of documents – blanket confidentiality for documents, appeal dismissed *Cummings et al. v. Belfast Mini-Mills Ltd. et al.,* C.A. No. 341131, Farrar, J.A., June 9, 2011. 2011 NSCA 56; **S626/28** ■

PRACTICE – Disclosure – settlement privilege *Brown v. Cape Breton (Regional Municipality),* C.A. No. 334499, Bryson, J.A., April 1, 2011. 2011 NSCA 32; **S626/4** ■ The appellant suffered knee injuries in two separate accidents. She was proceeding against the respondent in relation to the first, but settled her claim in relation to the second. The respondent obtained a far-reaching order for disclosure of the settlement agreement and all related documents. The appellant appealed. *Held,* appeal allowed, with costs of $1,000 to the appellant. The chambers judge was clearly wrong, and erred in law by ordering disclosure. While such disclosure may have been compellable under the old Civil Procedure Rules, (1972), the new *Civil Procedure Rules* (2008) impose a higher standard for determining relevance. There was insufficient evidence, or analysis, to conclude that the settlement documents related to a 2004 accident are relevant to measuring damages from a 2002 accident. The chambers judge also failed to determine whether settlement privilege was a bar to disclosure. Detailing the reasons why, the appeal court found all settlement documents must be found *prima facie* privileged. To find otherwise is contrary to the policy that out of court settlement should be encouraged. While a risk of double recovery could count as a possible exception to privilege, there is insufficient evidence in this case to warrant disclosure of the otherwise privileged materials.

PRACTICE – Execution order – ability to borrow money to pay legal counsel *Geophysical Service Inc. v. Sable Mary Seismic Inc. et al.,* Hfx. No. 190408, Robertson, J., February 15, 2011. 2011 NSSC 67; **S624/9** ■ The defendants sought an order confirming their ability to pay billed and future legal fees for ongoing litigation without violating the terms of two previous execution orders made in favour of the plaintiffs. They were concerned about offending the portions of the execution order derived from Rule 79.15, which restrains judgment debtors from giving up control of their property except in limited circumstances. They suggested the payments would come from third party loans, but provided no details on the loans. *Held,* declaration granted. Assuming the loans are entirely new money and not secured by the judgment debtors' property/assets, they don't offend the provisions of the execution order and can be used to pay the legal fees.

PRACTICE – Execution order – ability to borrow money to pay legal counsel, supplemental decision *Geophysical Service Inc. v. Sable Mary Seismic Inc. et al.,* Hfx. No. 190408, Robertson, J., February 16, 2011. 2011 NSSC 71; **S624/10** ■ The judge declared the defendants could pay legal fees from third party loans without offending two prior execution orders that prevented them from disposing of any property. The declaration was explicitly made on the assumption that the loans would not be secured against the defendants' existing assets. Later, the defendants' counsel wrote to the court essentially indicating he could not confirm the loans would not be secured against any assets. The court issued this supplemental decision. *Held,* in the absence of any evidence the loans will not be secured against assets already subject to the execution order, or will not otherwise reduce those assets, the order and declaration sought can no longer be granted.

PRACTICE – Judgments and orders – application for contempt order *Mason v. Lavers et al.,* Hfx. No. 311778, Duncan, J., February 9, 2011. 300 N.S.R. (2d) 5; 2011 NSSC 63; **S624/6** ■ The applicants/respondents, Donna and Pamela Mason, and respondent/applicant, Lisa Laver are sisters involved in a dispute over their 83-year-old mother's care. Their mother (the respondent/applicant, Dolorosa Mason) appointed Lisa to act as her attorney under an enduring power of attorney in 2008. Shortly after, she was declared incompetent and Lisa moved her to a nursing home. Donna and Pamela attended the nursing home to have Dolorosa execute a new enduring power of attorney in favour of Pamela. They moved her from the nursing home to her former home and Donna, Donna's husband and her children moved in to help care for her. They found her a new family doctor, Dr. Morash. Lisa brought a motion to have herself reinstated as Dolorosa's attorney and the matter was settled by way of a consent order providing that, as attorney, Lisa would not remove her from the home without first consulting and obtaining a medical opinion from Dr. Morash, and that – once Dolorosa was removed from the home – Donna and her family would vacate the premises so the home could be sold. Lisa moved Dolorosa to a nursing home without first obtaining Dr. Morash's opinion, but after consulting with several geriatric specialists. Donna refused to vacate the home and both argued they had not been compensated for several expenses as provided for by the order. Each accused the other of being in contempt of various provisions of the consent order. *Held,* both are in contempt of the order; remedies (penalties) and costs will be decided at a later hearing. The purpose of civil contempt is to secure compliance with an order, but that does not always lead to a practical result. Lisa moved her mother after consulting Dr. Morash, but without obtaining her opinion, which (technically) amounts to contempt; however, it would not be an appropriate remedy to remove Dolorosa from the nursing home and return her home. The evidence shows she is suffering from mild dementia and is being well cared for at the nursing home. Dr. Morash's report, filed after this proceeding was started, makes conclusions without explaining the basis upon which they were reached. She is a GP, not a specialist, and her opinion is not as reliable as those of the specialists Lisa consulted before moving Dolorosa. As attorney, Lisa is entitled to make care decisions for Dolorosa, even if (under the terms of the order) she should have obtained an opinion from Dr. Morash before making her decision. Even if the court ordered Dolorosa to return home, Lisa would be entitled to move her back to the nursing home immediately, which is an impractical result. Lisa is in contempt as a result of her failure to pay various expenses paid by Donna on Dolorosa's behalf, but only those expenses properly supported by receipts. Donna is in contempt as a result of her failure to vacate the home, and her failure to contribute to utility costs as provided in the order.

PRACTICE – Judgments and orders – motion for execution order denied *Drozdowski v. Drozdowska,* No. 1201-062589, Gass, J., July 6, 2011. 2011 NSSC 264; **S632/13** ■

PRACTICE – Judgments and orders – stay of execution, security for costs *Hatfield v. Mader,* C.A. No. 333604, Bryson, J.A., May 16, 2011. 2011 NSCA 45; **S626/17** ■

PRACTICE – Motion to withdraw as counsel – final decision *Williams et al. v. Halifax (City of),* Hfx. No. 126561, Duncan, J., February 17, 2011. 300 N.S.R. (2d) 265; 2011 NSSC 84; **S624/29** ■ At the initial hearing of their motion to withdraw as counsel for the remaining plaintiffs in a long-standing lawsuit they had settled on behalf of other plaintiffs, the lawyers were told it was premature to decide the application. The matter returned to court for a final consideration after they had time to meet individually with each client, most of whom they had never spoken with in person. The clients indicated mistrust of the lawyers and their conduct of the case, but were worried about how difficult it would be to find new lawyers at this stage of the process. The lawyers indicated it would be impossible to continue representing these clients given the breakdown in the solicitor-client relationship. *Held,* motion to withdraw granted, with no award of costs made. There is no basis upon which to reasonably continue the solicitor-client relationship. While it would be better for the remaining plaintiffs to have representation, they have questioned the quality of the legal work. A relationship between a client and lawyer must be based on trust and respect; none exists here.

PRACTICE – Parties – order of presentation *Saturley v. CIBC World Markets Inc.,* Hfx. No. 305635, Moir, J., March 30, 2011. 301 N.S.R. (2d) 310; 2011 NSSC 129; **S625/30** ■ This wrongful dismissal case also involved a tort claim (by the plaintiff financial advisor) for economic interference. The defendant claimed the plaintiff had engaged in unauthorized trading, which amounted to just cause for his dismissal. The plaintiff financial advisor claimed he was wrongfully dismissed and asked the court to force the defendant to present its case on liability first. The plaintiff characterized this as the primary issue for trial. *Held,* the case should not be split, nor the usual order of presentation reversed. This was not a straightforward wrongful dismissal case. There are many prominent issues involved. The issue of liability cannot be clearly split from the rest of the case. Evidence on cause will also relate to the alleged tort and to some of the claims for damages. There is a real risk of procedural unfairness in confining the defendant's response to rebuttal. All of the risks do not outweigh the only benefit, which isn't as great as it appears. After extensive discoveries and the particulars provided to him, the plaintiff should have a clear appreciation of the case he has to meet. He will have a chance to deal with any surprises in rebuttal.

PRACTICE – Pierringer agreement – disclosure of settlement amounts *Sable Offshore Energy Inc. et al. v. Ameron International Corp. et al.,* Hfx. No. 220343, Hood, J., January 31, 2011; December 23, 2010 (orally). 299 N.S.R. (2d) 216; 2010 NSSC 473; **S624/28** ■ A number of parties settled with the plaintiffs. After their Pierringer agreement was approved by the court, the non-settling defendants sought to have the settlement amounts disclosed. *Held,* settlement amounts will remain confidential. While at this stage of the litigation the settlement amount meets the old *Civil Procedure Rules* (1972) semblance of relevancy threshold applicable in this case, there are limits on disclosure of otherwise relevant information. The settlement is, by its nature, structured in such a way that there is no chance of over recovery. The settling defendants bear the risk of paying for more than their share of damages and the plaintiffs bear the risk of under recovery. There is no risk to the non-settling defendants. The public's interest in encouraging settlements is better furthered by protecting the settlement amounts. If privilege is not protected, there would be little incentive for a party to be the first to settle in multi-party lawsuits. To decide otherwise could extinguish the possibility of settlement negotiations in cases like this. The disadvantage to the non-settling defendants (of not knowing the settlement amounts) does not outweigh the benefit of encouraging settlements in multi-party lawsuits. Settlement privilege for Pierringer agreements is impacted only to the extent necessary to ensure there is sufficient protection for the non-settling defendants. Disclosure is limited and doesn't include the exact amounts settled on.

PRACTICE – Production of documents – redacted material *Banks et al. v. National Bank Financial Ltd. et al.,* Hfx. No. 227347, Muise, J., February 21, 2011. 2011 NSSC 79; **S627/30** ■

PRACTICE – Question of law – separated from other issues *Mahoney v. Cumis Life Insurance Co.,* Ant. No. 265133, McDougall, J., August 6, 2010; March 26, 2010 (orally). 2010 NSSC 307; **S627/14** ■ A man with a pre-existing heart condition died of a heart attack suffered after a motor vehicle accident. When his widow tried to collect on a accidental death policy, the insurer insisted the death was not accidental. They asked the court to determine, as a question of law under Rule 12, whether recovery under the policy was specifically precluded by the express exclusion for accidental death resulting directly or indirectly from any pre-existing condition(s). *Held,* plaintiff's claim dismissed. The chambers judge found the man's pre-existing heart condition was a contributing factor, and so the death was not "accidental" as defined by the policy. The first finding was later overturned and sharply criticized on appeal as a finding of fact that is not authorized under Rule 12.

PRACTICE – Summary judgment – fresh evidence *Frothingham v. Perez et al.,* C.A. No. 329647, Farrar, J.A., June 14, 2011. 2011 NSCA 59; **S626/31** ■

■ REAL PROPERTY

REAL PROPERTY – Boundary dispute – adverse possession *Robichaud v. Ellis et al.,* Amh. No. 311661, McDougall, J., March 1, 2011. 300 N.S.R. (2d) 350; 2011 NSSC 86; **S624/30** ■ The applicants sought to establish the boundary line between their property and their neighbours' (the respondents') properties. They relied on a plan of survey that conflicted with an earlier survey, and which the evidence showed was based on an incorrect assumption about the width of an adjacent road. They argued conventional lines supported their claim, and said their proposed boundary was the only one that made sense, pointing to the location of various outbuildings and an iron post. They also claimed adverse possession. Their well was located on the disputed portion of land. *Held,* the claim based on conventional lines is dismissed: there is no clear or convincing evidence any of the lots various owners ever came to an agreement that the boundary lines were other than those indicated in the deed. The claim based on adverse possession is also dismissed: there is no evidence ownership was asserted over the piece of land allegedly being possessed. There is insufficient evidence to establish title by adverse possession. They were aware when they purchased the property there was a dispute over the boundary line. They are the ones who chose to proceed with the purchase relying on a survey known to be incorrect.

REAL PROPERTY – Boundary dispute – adverse possession *Behie v. Carrigan,* Ant. No. 299328, Duncan, J., May 4, 2011. 2011 NSSC 171; **S628/14** ■

REAL PROPERTY – Easements – right of way by prescription not proven *Longard v. Keel,* Hfx. No. 224020, Kennedy, C.J., February 18, 2011. 300 N.S.R. (2d) 272; 2011 NSSC 75; **S624/14** ■ After a piece of family property was divided into two parcels, one of the brothers continued to use a driveway and maintain a garden on the

other parcel. When this brother died, his son continued to use the driveway and garden, even after the second property changed hands many times. When the current owners of the second property refused to allow the continued use of their property, the son claimed that his use of the driveway was of right on the basis of expressed reservation or prescription. He argued that his uncle was incompetent when he executed a statutory declaration stating that the use of both the driveway and the garden had been with his express permission. *Held,* judgment for the defendants; there was no express reservation of the driveway in the deed to the second property and the plaintiff did not have a prescriptive right to use the driveway. Although the plaintiff and his father had used the driveway in a continuous, uninterrupted and peaceful manner for well in excess of 20 years, the statutory declaration showed that this use had been with the uncle's permission.

REAL PROPERTY – *Land Registration Act* – *lis pendens Inform Inc. v. Real Rossignol et al.,* Hfx. No. 333223, Hood, J., February 2, 2011; November 5, 2010 (orally). 299 N.S.R. (2d) 73; 2010 NSSC 478; **S623/18** ■ Immediately after commencing an action, the plaintiff filed a certificate of *lis pendens* at the Registry of Deeds. When the defendant became aware of the certificate, it applied to have it vacated, arguing that the certificate was either invalid or, if valid, should nonetheless be discharged. *Held,* application granted; the certificate of *lis pendens* is discharged as invalid due to lack of notice; alternatively, if valid, it is discharged; a person filing a certificate of *lis pendens* must give notice to the landowner immediately. Although the *Land Registration Act* provides for the filing of a certificate of *lis pendens* without court order, there is no mechanism for the timely notification of the landowner and there must be a means of notifying the landowner of the filing of the certificate, as to conclude otherwise could result in a *lis pendens* remaining for a year or more and only being found when the landowner wished to deal with the land. In any event, a certificate of *lis pendens* was not appropriate in this case, which was really a claim compensable in damages; not all claims for unjust enrichment result in the party who has been deprived obtaining an interest in land and, in this case, the connection between the allegations made in the pleadings and the lands of the defendant did not give rise to a claim for constructive trust.

REAL PROPERTY – Real estate agents – duty of disclosure *Grant v. V & G Realty Ltd. et al.,* Hfx. No. 309750A, Moir, J., January 6, 2011. 2011 NSSC 2; **S622/5** ■ The same firm of agents acted for both the seller and the purchaser in a real estate transaction. Some years later, the purchaser discovered that the competing offer of which her agent had advised that resulted in an increase in her offer had been made by a company owned by the ex-wife of one of the agents and that he had been an officer of the company at the time. She commenced an action in Small Claims Court, arguing that the agent had breached its duties of disclosure and seeking damages in the amount of the difference between what she paid for the house and what she had originally intended to offer. The adjudicator found that although a real estate agent retained under a dual agency agreement is not a fiduciary, it still owed a contractual duty of disclosure, which it had breached by failing to disclose a material fact. However, the court found no loss and dismissed the claim. The claimant appealed and the defendant filed a notice of contention. *Held,* appeal dismissed; the contract provided for disclosure and the adjudicator had not erred in interpreting the content of the duty to disclose; the court deferred to the adjudicator's fact-finding, which both determined that the information withheld was material and precluded an award of damages based on lost chance. Although the *Small Claims Court Act* Regulations do not provide for a notice of contention, that does not stop a respondent from arguing that the decision under appeal was right for other reasons.

REAL PROPERTY – *Safer Communities and Neighbourhoods Act* – entitlement to Community Safety Order *Nova Scotia (Director of Public Safety) v. Dixon et al.,* Syd. No. 331105, Murray, J., January 6, 2011. 297 N.S.R. (2d) 337; 2011 NSSC 5; **S622/11** ■ The Director of Public Safety applied for a community safety order in respect of the defendants' property, on the basis that it had been used as a "drug house" for some time and the female defendant's association with a particular gang, resulting in the gang congregating at the property for "liquor" and "crack" parties, had instilled fear in the community. It was also argued that since the return of the defendants to the property, there had been an increase in drug activity and related offences. The defendants lived at the property with their three young children and denied it was involved in any drug activity. They also argued there was no present need for the Order because any activity had ceased. *Held,* property ordered closed for a period of 70 days, following which it may be returned to the defendants; given that there was ample evidence to find the defendants were involved in the use, consumption and sale of controlled substances, the only inference that could be drawn was that the property was being habitually used for the possession, use, consumption, sale or transfer of a controlled substance. Although the labelling of persons in attendance at the residence as known drug traffickers or users, based largely on community chatter, was insufficient to draw a nexus between the activity and the defendants, there was other evidence before the court, such as the police smelling burnt marijuana and seeing roaches spread over the ground, the female defendant's admission that marijuana was being smoked on the property and the finding of crack cocaine secreted in the baby's crib during a search of the premises. The number of police files with regard to the property had also increased dramatically since the female defendant was released from prison and the officers' extensive surveillance and experience with the duration and frequency of visits to the property was consistent with drug activity. The property was located close to an elementary school and the evidence favoured a conclusion that the community was in fear as a result of the activities emanating from the property. As to the present need for the Order, the defendants were the owners of the property and the female defendant had demonstrated she was not willing to abide by conditions. Considering all the circumstances and the fear in the community, the court found a present need to deal with the situation that had occurred over the past year; the operative time is the bringing of the application, not the rendering of a final decision. The court was mindful that the defendants had three young children, two of whom attended the elementary school and one of whom was autistic, and that the property in question was their home.

■ SALE OF LAND

SALE OF LAND – Negligent misrepresentation – sewer problems *Paterson v. Murray,* Claim No. 344901, Slone, Adjudicator, May 4, 2011. 2011 NSSM 34; **SmCl18/19** ■

■ TORTS

TORTS – Defamation – online bullying, right to publication ban *B. (A.) and D. (C.) v. Bragg Communication Inc. et al.,* C.A. No. 330605, MacDonald, M. C.J., March 4, 2011. 301 N.S.R. (2d) 34; 2011 NSCA 26; **S621/29** ■ The teen appellant brought an action in defamation related to online bullying (via Facebook). She sought a publication ban and to use initials in order to protect her identity. When her request was denied in Chambers, she appealed, arguing the chambers judge erred by failing to recognize children are especially

vulnerable and by ignoring the obvious and serious risk of harm to her. She argued the matter was decided prematurely, in the context of a separate disclosure application, and that the judge should have exercised his *parens patriae* jurisdiction to grant the order(s) sought. The respondent media outlets strongly opposed the appeal. The Herald also raised a question of jurisdiction, pointing out that Rule 90.09 of the *Civil Procedure Rules* (2008) refers to a leave application being heard by an appeal court "judge" (as opposed to a "panel" such as the one hearing this matter) and so, they argued, a separate leave application should have been made. *Held,* appeal dismissed, with a temporary confidentiality order to remain in place in recognition of the likelihood this will be appealed to the Supreme Court of Canada. While the Appeal Court refused to decide the jurisdiction issue on the merits (since the Herald failed to seriously pursue it early on in the proceeding and not deciding won't result in prejudice), the court opined it seemed beyond doubt that whatever authority lies with a single judge of the court also lies with a panel of the court. Also rejected was the appellant's argument regarding the timing of the chambers decision. Postponing it would have achieved no purpose other than postponing the inevitable. The appellant sought a discretionary remedy, and the standard of review on appeal asks only whether the appellant can show the judge made an error in principle or his decision resulted in a patent injustice. The Appeal Court considered the historical and legal framework surrounding Rule 85 confidentiality orders. It also spoke at great length about how and why deferential standards of review exist in general, and about the subtle distinction between the varying standards of review that apply to an interlocutory discretionary order depending on whether it has a terminating effect. The decision here does not have a terminating effect, since the denial of confidentiality doesn't mean the appellant can't pursue her action. The judge didn't err by failing to exercise his *parens patriae* jurisdiction to take into account the special vulnerability of children: he was never invited to do so at the hearing, and those powers are subject to both express and implied limits. There is no reason in fact or law to characterize the appellant as a party so marked by disability as to trigger the court's obligation to protect her. Further, the Supreme Court of Canada has held *parens patriae* is not to be invoked to circumvent civil procedure rules, nor should it be invoked where there is a complete legislative framework (our rules) in which to resolve the issues. The "best interests of the child" is a family law concept and isn't appropriate in an action where the issues are related to an alleged act of defamation. The chambers judge wasn't wrong to conclude her age itself is insufficient to establish a special vulnerability, or warrant placing her interests above the constitutional rights of others. Open court is a principle fundamental to justice. Defamation claims are unique. To be able to proceed with one anonymously is contrary to the essential features and public nature of defamation law. The use of sex-themed words doesn't make this case analogous to cases where identities are shielded to protect victims of abuse. Embarrassment is an unavoidable consequence of an open justice system. The test for harm is not subjective. It should've been relatively easy for the appellant to give some evidence of harm or potential harm. Her failure to do so is significant. The fact damage will be presumed if defamation is presumed at trial is insufficient on its own. Real evidence should have been filed.

■ WILLS AND ESTATES

WILLS AND ESTATES – Executor – absolute authority *Synott v. Bartlett Estate,* Tru. No. 327067, LeBlanc, J., January 17, 2011. 299 N.S.R. (2d) 251; 2010 NSSC 477; **S624/18** ■ The applicant applied for what she felt should be her share of her deceased mother's personal belongings. Her brother, the executor of their mother's estate, had absolute discretion under the will. There was significant animosity between them, and the evidence showed he had kicked her out of a family meeting and refused to give her anything while the other siblings had all gotten a share. He claimed the estate's lawyer made an unauthorized offer to settle, and he refused to abide by its terms. *Held,* application allowed; no cost award. An executor is required to exercise even such wide powers of discretion in a fair and impartial manner. The level of animosity between the applicant and her brother is sufficient to establish bias on the part of the brother in exercising his duties as executor. While she made no application for an accounting, the applicant accepted and relied on the settlement offer. The court found the lawyer was authorized to make that offer and it resulted in a binding agreement that the court is authorized to enforce.

WILLS AND ESTATES – Funds held in trust – entitlement to funds *Laing Estate v. Nova Scotia (Minister of Finance),* Hfx. No. 320623, McDougall, J., August 10, 2010. 298 N.S.R. (2d) 395; 2010 NSSC 306; **S624/15** ■ Ms. Laing died in 1943, leaving the residue of her estate to her son, Mr. Laing. When it came time for its distribution in 1949, Mr. Laing could not be located. The money was held by the Royal Trust Company and invested until 1994, at which time Royal Trust applied for permission to pay the funds to the Public Trustee. The application was granted and about $392,592 was transferred to the Public Trustee. From 1994 to the present, it was kept in a provincial bank account accumulating interest at a reduced rate of prime minus three-and-a-half per cent. Mr. Laing had since died, and his executrix applied to have the funds released to his estate and argued interest should be paid at a higher rate. She claimed the province has fiduciary obligations akin to those owed by an ordinary trustee, and should have kept the money invested and in a "special fund" as defined by the *Provincial Finance Act*. *Held,* application to distribute funds granted; interest will be paid based on the interest that actually accumulated during the relevant time (prime minus three-and-a-half per cent), with all legal fees paid out of the fund before distribution. In order to impose payment of a higher rate of interest than was earned on the funds in the first place, the court would require a special legislative provision authorizing it to do so. The province made no profit. The *Trustee Act* doesn't apply. There is no obligation on the Crown to keep such funds invested.

WILLS AND ESTATES – Interpretation – meaning and effect of certain bequests *Sampson v. Dilney Estate,* Syd. No. 331980; Probate No. 19258, Bourgeois, J., January 24, 2011. 299 N.S.R. (2d) 279; 2011 NSSC 29; **S623/1** ■ The testatrix, mother of seven children, left her son, Mr. Dilny, the use of two acres of land for business purposes. Her will provided he could use the land until the business ceased or he died. Mr. Dilny's sister, Ms. Sampson, applied as her mother's executrix to clarify whether Mr. Dilny was required to use a certain two acres, or could choose the acreage at will; Mr. Dilny was entitled to use more than two acres, as it appeared he was doing; and whether Mr. Dilny's use of the land was more in the nature of a licence than a life interest. Mr. Dinly felt the gift was a life estate, and that the condition related to his business ceasing was invalid for lack of detail. *Held,* Mr. Dilny can choose his two-acre parcel, provided a portion of the lot he chooses borders the lot his business owned at the time the will was made; Mr. Dilny is only entitled to use two-acres, not more; and the gift is a life-estate, not a licence, and it will expire when either the business ceases or Mr. Dilny dies. The condition relating to the business is not too vague to be valid. In reaching these determinations, the court looked to the plain language in the will to determine the testatrix's intentions, regarding the will as a whole and not paying attention to any legal rules. A will must be given a fair and literal interpretation, with ordinary/

grammatical meaning applied to the words used, and having regard to the context and surrounding circumstances. Here, the testatrix was aware Mr. Dilny used certain portions of her land for his business. The language in her will and the surrounding circumstances led the court to believe it was her intention that he be guaranteed the use of a two-acre portion of her land to continue doing so, and that this portion should in some way abut the land he was already using. As for the life-interest, the court was given no authority to suggest a condition other than death cannot be used to terminate a "life" interest. The testatrix here intended to eventually divide all of her estate equally amongst all of the children and it was her wish that the land in question be divided too, as soon as Mr. Dilny no longer needed it for his business. If the parties have problems determining what constitutes a cessation of business, and whether the life interest has terminated, they can apply to court at that time for clarification.

WILLS AND ESTATES – Interpretation – meaning and effect of certain bequests *Peach Estate (Re),* SYD. No. 21051, Murray, J., March 31, 2011; March 28, 2011. 301 N.S.R. (2d) 226; 2011 NSSC 74; **S627/1** ■ The testator gifted the residue of his estate to a local hospital in 1980, specifying interest on the principle could be used to buy equipment for the existing facility and the principle withdrawn to assist in the construction of a kidney care unit if a new facility were built. He further said if the hospital ceased to exist, the residue would go to the Salvation Army (the SA). He made no changes to his will, and was of sound mind until his death in 2009. In 1986, the hospital was replaced by a new building at a different location. By 2009, the hospital still functioned but was owned and operated by the regional district health authority (the DHA). At issue was whether the residue of the estate should go to the local hospital's charitable foundation, the DHA or the SA. *Held,* the residue will go to the DHA. After a great deal of discussion regarding the correct interpretation of wills, the court found the testator: was a careful, informed man who was attempting to be clear and precise, knew the old hospital building was becoming obsolete; wanted the capital used towards a kidney care unit at the new building; and wanted the money to go to the SA only if the old hospital was torn down and a new one not constructed. The hospital's charitable foundation has a limited purpose. The DHA is in a position to ensure the funds are used towards a kidney care unit and has a clear fiduciary duty to do so. The DHA is the hospital's successor. The gift does not offend the rule against perpetuities as argued by the SA.

WILLS AND ESTATES – Procedure – costs *Hand Estate (Re),* Probate No. 56949; Hfx. No. 325163, Moir, J., February 7, 2011. 298 N.S.R. (2d) 391; 2011 NSSC 53; **S623/30** ■ A co-executor and beneficiary under his mother's will, Mr. Hand applied for an order confirming her gift of a one-half interest in a condo held jointly by his parents until her death. His sister and his father, Dr. Hand, successfully defeated the motion, with the court holding the gift was invalid and the condo passed solely to Dr. Hand on Mrs. Hand's death. Dr. Hand abandoned his motion for costs, but Mr. Hand sought to have his solicitor-client costs paid out of the estate. In the alternative, he sought party and party costs against his father and sister. *Held,* the parties will bear their own costs. There is no need to depart from the general rule that the successful party is entitled to costs. Here, this would be Dr. Hand but since he is not seeking costs, none will be awarded. As for the proposition that it's appropriate to have the estate pay costs related to estate litigation, it doesn't apply here. The will's meaning was not unclear, the gift was just invalid. The central issue was between Mr. Hand and his father: was Dr. Hand required to stand by his previous gift, and were the wills made by he and his wife mutual wills subject to a promise against revocation? In this sense, this was not estate litigation, but rather a dispute between two living persons about the contractual obligations of one of them.