NOVA SCOTIA LAW NEWS

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FROM THE NOVA SCOTIA COURT OF APPEAL

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■ ADMINISTRATIVE LAW

ADMINISTRATIVE LAW – Boards and tribunals – judicial review of decision of Nova Scotia Building Advisory Committee *Pink v. Davis et al.,* Hfx. No. 342580, Warner, J., June 16, 2011; June 15, 2011 (orally). 2011 NSSC 237; **S630/11** ■ The municipality granted the applicant's application for a permit in relation to renovations to her cottage. Her neighbours, the Davises, appealed the municipality's decision to the Nova Scotia Building Advisory Committee (the committee) under s.15 of the *Building Code Act* (the Act), which allows for an appeal by owners and permit holders. The applicant was not notified of the appeal until it was concluded and the committee overturned the municipality's decision. The municipality's submissions weren't considered by the committee in making its decision. The applicant applied for judicial review of the committee's decision, arguing the committee had no jurisdiction to hear the neighbours' appeal and further that it breached its duty of procedural fairness by failing to notify the applicant and allow her the opportunity to make submissions. *Held,* judicial review granted; the committee's decision was *ultra vires*. It had no jurisdiction whatsoever to hear the appeal. The Davises were not the owner(s) of the building or property in dispute. Any application by them should have been brought to the Supreme Court under s.16 of the Act. Even if this wasn't so, the decision fundamentally affected the applicant and procedural fairness required that she be made aware of the appeal and permitted to make submissions. Given the flagrant disregard for the applicant's interests, it was hard to accept the Davises acted in good faith. It was also incredible to think the committee could have thought it had any jurisdiction over the matter. Costs of $3,000 ($1,000 with a multiplier of three to recognize the fact appeals and judicial review applications are more involved than most chambers matters) payable by the committee to the municipality, and the same amount is payable by the Davises to the applicant. While it's unusual to require an administrative tribunal to pay costs, this was an exceptional case and the clearest example of a flagrantly obvious breach of the principle of procedural fairness. The committee failed to act conscientiously. It is not an excuse to say no one on the committee was legally trained. As for the respondents, they were wrong to bring the appeal in the manner in which they did and should have consented to the overturning of the committee's decision when it became so clear it was made with no authority. The court drew a negative inference from their insistence on contesting the application for judicial review.

ADMINISTRATIVE LAW – Boards and tribunals – right to determine own procedures *Wadden et al. v. Nova Scotia (Attorney General) et al.,* C.A. No. 332625, Oland, J.A., June 9, 2011. 2011 NSCA 55; **S626/27** ■ This appeal stemmed from a proceeding before the Securities Commission. The appellants sought to have motions relating to the integrity of the Commission's investigation, and in relation to certain staff allegations, decided before the matter is heard on its merits. The Commissioner disagreed and they appealed his decision. *Held,* appeal dismissed. This is a procedural matter and the Act authorizes the Commission to prescribe its procedures. Looking at the Commissioner's decision, it doesn't appear he discounted the possibility of deciding the motions at the outset of the hearing or that he will disregard the issues related to the integrity of the investigation. While it's taken a long time to get to this point, the appellants will still have the chance (at the hearing) to argue the motions should be decided first, and that a stay is warranted. After the Commissioner has ruled on the substance of the motions and/or staff allegations, the appellants will have a right to appeal that decision – on the merits. They won't be confined in their arguments at that point since the decision in question will be substantive rather than simply procedural.

ADMINISTRATIVE LAW – Judicial review – Human Rights Commission, discrimination *Green v. Nova Scotia (Human Rights Commission) et al.,* C.A. No. 333320, Oland, J.A., May 20, 2011. 2011 NSCA 47; **S626/19** ■ The appellant suffered from learning disabilities. She felt the respondent university failed to meet its duty to accommodate her academic needs, resulting in poor marks on two exams. She made a complaint to the Human Rights Commission, which was dismissed summarily on the basis that it had no merit. Her application for judicial review of the Commission's decision was also dismissed. She appealed, arguing the chambers judge was wrong to conclude: the Commission had no obligation to give reasons for dismissing her complaint; and the dismissal of her complaint was reasonable. *Held,* appeal dismissed. The Commission has specialized expertise and must be afforded deference. This was an administrative decision. The Commission is authorized, by statute, to dismiss a complaint for several enumerated reasons, including that it is without merit. While there is no duty to give reasons, the phrase "without merit" isn't meaningless. It means the Commission weighed the evidence and concluded the complaint had no chance of success at the board of inquiry level. There was procedural fairness. The appellant knew the arguments before the Commission well enough to know why it reached the decision it did. There was no error or injustice resulting from the Chambers judge's decision warranting intervention. It was a decision that falls within a range of reasonable outcomes based on the facts and law.

■ ARBITRATION (LABOUR)

ARBITRATION (LABOUR) – Judicial review – appeal dismissed, defeasible award *Canadian Union of Public Employees, Local 108 v. Halifax (Regional Municipality),* C.A. No. 332801, Fichaud, J.A., May 12, 2011. 2011 NSCA 41; **S626/13** ■ Although the arbitrator found that the employer had just cause to dismiss an employee, his award stated a "condition subsequent" that would render it "defeasible"; namely that the union could reopen the hearing within 30 days to lead evidence of the grievor's mental disability that would trigger the employer's duty to accommodate. This issue had not been presented at the hearing despite the arbitrator's urging to the union to pursue it and his adjournment of the hearing so the grievor could be psychologically tested and such evidence could be adduced. The employer successfully applied to have the condition subsequent set aside, with the court finding that the arbitrator had failed to provide a "final" decision, as he was obligated to do under s. 42 of the *Trade Union Act*. The union appealed, arguing that the court had erred in characterizing the matter as jurisdictional, attracting a correctness standard of review and in concluding that the arbitrator could not issue a defeasible award with the condition subsequent based on the new issue. *Held,* appeal dismissed; although the judge erred in applying correctness as the standard of review, the arbitration award should not have introduced an issue that the parties had decided not to raise in their submissions. The arbitrator's power to dispose of a grievance "by any arrangement it deems just and equitable" did not allow him, on his own initiative, to inject an issue that the parties had decided to exclude from their submissions, transforming what was expected to be a final award into a message with ongoing trial advice to one of the parties.

ARBITRATION (LABOUR) – Judicial review – application dismissed *Cherubini Metal Works Ltd. v. United Steelworkers of America,* Hfx. No. 297596, LeBlanc, J., March 4, 2011. 2011 NSSC 94; **S629/1** ■ The plaintiff company sued two unions and the Province, alleging conspiracy, negligence, intentional interference with economic interests and abuse of public authority. The plaintiff was a party to a collective agreement with the local union and the international union, although not a party to the collective agreement, had defined roles under it. The plaintiff alleged, *inter alia*, that the local union, acting in concert with the international union, had abused the grievance process in the collective agreement to harass and cause harm to its business interests. On appeal, the unions were successful in having the action against them dismissed on the ground that the plaintiff's claims arose out of the collective agreement and the grievance and arbitration process could provide effective relief, even though the international union was not a party to the agreement. The company now applied for judicial review of the arbitrator's interim award, in which he held that the international union was not a party to the collective agreement, based both on his own analysis and the fact that the statements made by the court in the summary judgment appeal constituted issue estoppel. The company argued that the statements made by the Court of Appeal were *obiter dicta* as the status of the international union was only a collateral issue in the appeal. *Held,* application for judicial review dismissed; the arbitrator did not err in failing to exercise his discretion to overrule the finding of issue estoppel and his findings that the international union was not a party to the collective agreement and the local union was the sole bargaining agent were within the range of reasonable conclusions in the circumstances. The constitution of the international union could not override the *Trade Union Act* or the collective agreement, both of which provided that only the employer and the certified bargaining agent were parties to the collective agreement and any arbitration.

ARBITRATION (LABOUR) – Judicial review – no reviewable error *Canada Post Corp. v. Canadian Union of Postal Workers,* Hfx. No. 333704, Wright, J., April 28, 2011. 302 N.S.R. (2d) 288; 2011 NSSC 147; **S628/9** ■ Two probationary employees hired by Canada Post Corporation (CPC) were let go after failing a mail sorting test. The union (CUPE) grieved the dismissals, and the arbitrator ordered their reinstatement, with conditions. CPC applied for judical review of the award. He found the employees were given insufficient training. CPC argued the arbitrator failed to provide justifiable, transparent and intelligible reasons for his conclusions, and pointed out that he had made erroneous statements regarding the applicability of the collective agreement. *Held,* application dismissed, with costs of $1,500 plus disbursement to CUPE. While the arbitrator's reasons contained incongruent statements and lacked clarity, read in the context of the overall decision and the way the case was argued, they are sufficiently intelligible, justifiable and transparent to satisfy the first part of the *Dunsmuir* test. The award itself falls within a reasonable range of outcomes, which satisfies the second part.

■ BANKRUPTCY

BANKRUPTCY – Property of bankrupt – applicability of *Land Actions Venue Act* *Zomar Investments Ltd. (Re),* Hfx. No. 337579, Rosinski, J., March 14, 2011. 2011 NSSC 104; **S628/23** ■ Shortly before Zomar went bankrupt, it transferred a piece of property to its owner, president and secretary, Matheson. Matheson claimed the property was always his, and that Zomar had held it in trust for him over the years. The trustee claimed the transfer was done to avoid its inclusion for the purposes of bankruptcy. Matheson argued the *Land Actions Venue Act* (LAVA) requires the determination of the validity of the transfer to be made in the judicial district where the land is situate, which would require a transfer of the interlocutory hearing from Halifax to Sydney. There were also some issues regarding a previously granted adjournment. *Held,* LAVA does not apply. Having

regard to the principles of statutory interpretation, history, the practical consequences of Matheson's argument(s), and its legislative context, LAVA is only intended to apply where title to lands is being determined by a trial, and where title is the predominant issue in the main proceeding. Matheson isn't even a party to the main proceeding. Rule 32 of the *Civil Procedure Rules* (2008) does not expressly say all interlocutory motions must be heard in the original place of proceeding (it only requires filing be done there), but this would not be an appropriate case for the court to use its discretion to allow a change of venue. The trustee chose Halifax, and the fact the land and a few witnesses may be in Cape Breton isn't sufficient grounds (eg. capricious actions by the trustee or strong evidence that it would be much more convenient) to warrant a change of venue.

BANKRUPTCY – Stay of proceedings – application to lift stay, proprietary claim by creditor *RJM Fisheries Ltd. (Re),* Hfx. No. 338236, Cregan, Registrar in Bankruptcy, February 1, 2011; January 21, 2011 (orally). 299 N.S.R. (2d) 324; 2011 NSSC 39; **S623/16** ■ When the creditor received notice of the debtor's intention to file a bankruptcy proposal, it successfully applied to have an interim receiver appointed and for a stay of proceedings to allow it to commence an application in the Supreme Court to have its propriety interest determined in fish inventories possessed by the debtor. Following the debtor's bankruptcy, the creditor applied to have the new stay lifted so it could proceed with its Supreme Court application. The trustee argued that the creditor should proceed under s. 81 of the Act. *Held,* stay of proceedings lifted; the creditor was likely to be materially prejudiced by the stay and s. 81 might not be applicable and did not provide the efficiency of a direct application to the Supreme Court. In order for s. 81 to apply, the property must have been in the bankrupt's possession on the date of the assignment but the inventories were in the possession of the interim receiver at the relevant time, resulting in a question of whether possession was with the creditor or the bankrupt and, if possession continued to be disputed, the matter would have to be judicially resolved. The court has a strong central supervising authority to ensure the efficient management of all litigation in which the bankrupt is or may become a party.

BANKRUPTCY – Survival of debts – obtained by fraud *Coyle (Re),* Court No. B-31647; Estate No. 51-1034823, Cregan, Registrar in Bankruptcy, June 20, 2011. 2011 NSSC 238; **S630/16** ■ The applicant had received employment insurance benefits based on representations made by her that were found to be untrue. The order by the Employment Insurance Commission ("the Commission") that she was required to repay the benefits was confirmed by a Board of Referees. During this process, she made an assignment in bankruptcy and the Commission took the position that the debt survived bankruptcy under s. 178(1)(e) of the *Bankruptcy and Insolvency Act*. The applicant applied for an order declaring that the debt did not survive bankruptcy as there had not been a competent judicial finding of fraud. *Held,* application dismissed; the debt was covered by s. 178(1)(e) and survived bankruptcy. A Board of Referees is equipped by its enacting legislation to competently make the findings of fraud contemplated in s. 178(1)(e). In this case, the decisions of the Board made it very clear that the bankrupt knew or ought to have known that she was making false and misleading statements when she completed her application for benefits and the Commission relied on those statements in providing her benefits.

■ BARRISTERS AND SOLICITORS

BARRISTERS AND SOLICITORS – Conflict of interest – in family matter *Mullen v. Mullen,* S.F.H.M.P.A. No. 076391, Jollimore, J., August 26, 2011. 2011 NSSC 326; **S634/19** ■

■ BUILDING CONTRACTS

BUILDING CONTRACTS – Construction – incorporating arbitration clause into subcontract, grounds for vacating lien *Sunny Corner Enterprises Inc. v. Dustex Corp. et al.,* Hfx. No. 326628, Kennedy, C.J., May 6, 2011. 2011 NSSC 172; **S628/17** ■ The defendant was the main contractor in a construction contract and the plaintiff was a subcontractor. After the plaintiff was paid for its work, the owner advised that there were deficiencies in that work and the defendant refused to pay the invoice when the plaintiff made the required changes. The plaintiff argued that it was not correcting true deficiencies, as the defendant had provided only inadequate verbal instructions and proceeded to register a lien against the property and bring an action against the defendant. The defendant applied to stay the action pursuant to s. 9(3) of the *Commercial Arbitration Act* and for an order discharging the lien and notice of *lis pendens* on the basis that they were out of time. It argued that its subcontract with the plaintiff incorporated the provisions of the main contract between it and the property owner, which included an arbitration clause and that the decision in *Dynatec Mining Ltd. v. PCL Civil Constructors (Canada) Inc.* (1996) (Ont. Gen. Div.) ("Dynatec") either did not apply to the present facts or was no longer good law. *Held,* both the application for a stay and the application to vacate the lien are dismissed. *Dynatec* remains good law and as there was no express incorporation of the arbitration clause into the subcontract in this case, the plaintiff was not bound by that clause. The timeliness of the lien should not be summarily determined as there was a great deal of dispute as to the material facts concerning whether the last work performed by the plaintiff constituted completion or correction work and the scope of the various purchase orders and their relationships.

■ CIVIL RIGHTS

CIVIL RIGHTS – Appeals – pat down search *R. v. Aucoin,* C.A.C. No. 336128, Hamilton, J.A., July 13, 2011. 2011 NSCA 64; **S631/7** ■ Noting the smell of alcohol on the defendant's breath during a motor vehicle stop, the officer performed a roadside breath test. The result was in breach of the zero tolerance policy for newly licensed drivers and the officer decided to place the defendant in the back seat of his vehicle while he wrote a summary offence ticket. He performed a pat down search prior to doing this, at which time he felt items in the defendant's pockets, which were identified as Ecstacy and cocaine. The defendant appealed his conviction for possession of cocaine for the purposes of trafficking. *Held,* appeal dismissed; the trial judge had not erred in finding that the defendant's s. 8 rights had not been violated. The officer was in a situation where he had to issue a motor vehicle ticket with essentially no backup, when it was late at night, he needed the light in the front of the police car in order to write the ticket, he could not place the defendant in his own vehicle because it was being removed and that could be a continuing offence given the alcohol in his blood and he was concerned the defendant might take off if left on his own outside the police car. In such circumstances, a brief detention in the back seat of the police car was reasonable and within the scope of investigative detention and, having decided to place the defendant in the back of the police car, it was also reasonable to do a pat down

search to ensure the defendant had no weapons that he could use to harm the officer or himself. Per Beveridge, J.A., dissenting, the officer had no lawful authority to search the defendant and the results of that search must be excluded from evidence. The test is not whether it was reasonable to request the defendant to be seated in the police vehicle; the officer simply did not have the lawful authority to take the defendant into custody while he wrote the ticket. There was no evidence to provide any grounds for the officer's subjective fear that the defendant might possibly walk away and instead of directing him to wait on the sidewalk, the officer carried out a *de facto* arrest by deciding to place him in the police car. Not only did the officer arbitrarily create the officer safety issue by his own actions, but he had no reasonable grounds to believe that his safety was at risk and the search, itself, went beyond one reasonably limited to locating weapons. The evidence should be excluded because the officer acted arbitrarily in deciding to impose an unnecessary restriction on the defendant's liberty and it could not be said that this was done in good faith; the search was not in conformity with the clear terms laid out in *R. v. Mann* (2004) (SCC); namely, that an officer must act on reasonable and specific inferences in forming a concern for officer safety; the defendant had been subject to an unlawful detention and his right to counsel had been violated; the officer's unlawful conduct appeared to be part of his normal approach in dealing with detained motorists; and the evidence was not discoverable without the unauthorized search.

CIVIL RIGHTS – Right to counsel – statement inadmissable *R. v. Simpson,* Amh. No. 321840, Duncan, J., June 23, 2011; March 3, 2011 (orally). 2011 NSSC 250; **S630/26** ■ After the accused was arrested and provided with his *Charter* rights, he was released and advised that he would need to attend at the detachment at a later date. Following a series of phone calls, he eventually returned and was escorted to an interview room, where, prior to a videotaped statement being taken, he was advised that he could contact a lawyer at any time and reminded that he had been provided with his *Charter* rights upon his arrest six days ago. The Crown sought to have his statement admitted at trial. *Held,* the statement will be excluded from evidence as it was obtained by threats and inducement and the accused's right to counsel had been violated. When the accused refused to answer a question as to who owned the grow operation, the officer advised him that his wife would be charged with the same offences as him and then asked whether the operation was his alone or both of theirs, at which point he stated that it was his alone. The references to the accused's wife, when taken in the context of the questioning, left a doubt as to whether his responses were the product of his free will or were provided as a means of convincing the police not to carry out the threat to charge his wife. Although it was made clear that the accused was not under arrest when the statement was taken, a reasonable person would conclude that his physical liberty was restricted by the officer's conduct, if only by reason of the location and it was clear that they intended for him to stay in the room and cooperate with them. The duty to provide the informational component of s.10(b) cannot be satisfied by confirming that the accused recalls his rights as provided to him almost a week previously and this defect is not cured by telling him that he can call a lawyer if he wishes. The object of providing a suspect with his s.10(b) right to counsel is to support his right to choose whether to cooperate with the police at the time of the interview and to give him access to legal advice on the situation he is facing at that time. The *Charter* breach showed a negligent disregard for his s.10(b) rights and it could be inferred that, in an effort to obtain a more inculpatory statement, the officers had sought to minimize the likelihood that he would exercise his right to counsel by passing over the *Charter* advisory in a cursory manner. As a result of this breach, the accused entered into an interview that lasted over an hour, without the benefit of counsel, from which inculpatory evidence was generated. The circumstances in which the statement was taken also called into question its reliability as a question arose as to whether the accused had assumed sole responsibility for the illegal activity in order to insulate his wife from prosecution.

CIVIL RIGHTS – Right to remain silent – voluntariness of statements *R. v. A. (W.H.),* C.R. Ant. No. 336695, Rosinski, J., April 21, 2011. 2011 NSSC 157; **S630/6** ■ The accused, charged with two counts of sexual assault, argued that both the videotaped statement he gave to the police (in which he maintained his innocence) and a spontaneous utterance made during his arrest were inadmissible on the basis that they were not voluntary and his s. 7 and s. 10 *Charter* rights had been violated. In regards to voluntariness, he argued that his will was overborne by the police interviewers creating an atmosphere of trust and minimizing the charges, which caused him to lose sight of his right to silence. Although he had initially declined the opportunity to speak with counsel, an officer was able to convince him to do so before he was formally interviewed and at the start of that interview, he was again reminded that he had a right to speak to a lawyer and did not have to answer any questions. *Held,* application to exclude statements dismissed; the initial statement was so spontaneous that the officer did not even have an opportunity to advise the accused of his right to counsel; there was no violation of the accused's s. 10 rights with regard to the videotaped statement and, even if there had been, the statement should be admitted into evidence; the accused was well aware of his right to silence and, having had the benefit of legal advice and being of an operating mind, took part in the videotaped conversations in a completely voluntary fashion and in no way was his will to remain silent overborne. The accused had been advised of his right to counsel concurrently with the reason for arrest and, after initially declining to exercise it, spoke to counsel and had the opportunity to be advised of the right to silence prior to giving the videotaped statement. The fact that he was not specifically provided with a telephone number associated with free immediate preliminary legal advice was irrelevant as there was no authority for excluding evidence obtained after contact with duty counsel, following an imperfect s. 10(b) advisement; nor did the police failure to videotape the accused being advised of his right to counsel violate s. 7 of the *Charter* as the videotaped statement contained confirmation that he had been advised of his right to counsel and had exercised that right prior to the statement. Although the accused may have dropped his guard because he felt comfortable speaking with the officers, he did so wilfully, aware of his right to silence and in an effort to persistently reinforce his position that he was not guilty.

CIVIL RIGHTS – Unreasonable search and seizure – evidence admitted *R. v. Ryan,* C.R.A.M. No. 317760, MacLellan, J., March 11, 2011; January 18, 2011 (orally). 300 N.S.R. (2d) 97; 2011 NSSC 102; **S625/12** ■ The accused's vehicle was pulled over when it was observed that his licence plate was obscured. Based on a change in demeanour when he was asked if he had ever been in trouble with the law and his refusal to answer any more questions, the officer followed the vehicle while he attempted to get more information on the accused. As they were approaching the provincial border, he was advised that a confidential source in the accused's home province opined that if he was on the mainland now, he was probably in possession of a large amount of marijuana. Upon receiving this information, the officer again stopped the vehicle and had his sniffer dog go around it. When the dog indicated the presence of narcotics, the accused was arrested and the vehicle searched, where a large amount of marijuana was found. The accused applied to

have the drugs excluded from evidence. *Held,* application to exclude drugs dismissed; the accused's *Charter* rights had not been violated. The officer had the right to stop and detain the accused once he received the new information, which, combined with his earlier suspicions, established a reasonable suspicion that the accused was in possession of marijuana. The officer also had valid grounds to engage the dog sniff procedure based on that information and that procedure was reasonable, as it was done very quickly and did not prolong the detention.

CIVIL RIGHTS – Unreasonable search and seizure – warrantless search *R. v. Timmons,* C.A.C. No. 329645, Oland, J.A., May 5, 2011. 2011 NSCA 39; **S626/11** ■ The police responded to a call from a woman identified as the defendant's girlfriend's mother to the effect that her daughter was being abused. Initially unable to locate the residence, they spoke to the girlfriend on the phone, who advised them that she was fine and did not require the police. They nevertheless continued to the residence, where they heard a scream from inside. Knowing that the defendant was a suspected drug dealer and potentially violent, they demanded entry into the home. The daughter opened the door and told them everything was fine, there had been no assault and she had simply wanted a ride home. From where they entered, the officers could see a person lying down in the bedroom. They approached the man, searched him for officer safety and then conducted a warrantless search to locate any other occupants. During the search, certain items were noted that caused them to obtain a search warrant, following which drugs were found. The defendant's argument that the search was illegal was unsuccessful as the court found that, in these particular circumstances, the police had a responsibility to enter the home without a warrant, do a pat down search of the accused and search for other occupants. Once drugs were seen in plain view, they proceeded to obtain a search warrant. Judicial notice was taken of the fact that complainants in domestic situations often recant due to threats of coercion by their partners. The defendant appealed. *Held,* appeal allowed; conviction set aside; although a violation of the defendant's *Charter* rights had occurred, the record was insufficient for this court to engage in a s. 24(2) analysis. Although it was reasonable, in the circumstances, for the police to search for the girl, go to the defendant's home and not simply leave once she told them she was fine, the trial judge erred in failing to consider alternatives short of police entry (such as conferring with the girl after they had her step outside and close the door) and the search of the home, without a warrant. Police authority to investigate such a call includes locating the alleged victim and determining if their assistance is required, but, without more, does not extend to the entry or search of the premises.

■ COMPANY LAW

COMPANY LAW – Shareholder's agreement – interpretation, "duty of utmost good faith" *3233954 Nova Scotia Ltd. v. Systemcare Cleaning & Restoration Ltd. et al.,* Hfx. No. 323940, Warner, J., January 25, 2011. 298 N.S.R. (2d) 275; 2011 NSSC 22; **S623/5** ■ The company was equally owned by two shareholders. After buyout negotiations failed, in compliance with the right of first refusal (RFR) in the shareholder's agreement, one shareholder advised the other of an offer received for the purchase of his shares. The second shareholder questioned the *bona fides* of the offer but made another lower offer, which was rejected. The purchaser, who was unable to complete the purchase on his own, turned to his father, who used his company to conclude the share purchase. The purchase price remained the same as in the original offer but the frequency of the instalments necessary to complete the purchase was changed from monthly to annually. The shareholder also lent money to the father in return for a mortgage on a piece of property, which funds were later used as part of the purchase price. When the second shareholder refused to recognize the share transfer, the purchaser applied for an order recognizing and effecting the transfer. *Held,* application to recognize the share transfer granted. The shareholder's agreement only called for the proposed sale price and whether or not it was fully payable on closing to be provided; the identity of the proposed purchaser was not required and the change in the terms of payment did not constitute a breach of the RFR provisions or nullify the notice to the second shareholder. Although the prospective purchaser expected the other shareholder to exercise his RFR and knew he could not afford to buy the shares on his own when he made the offer, it was still a *bona fide* offer as the offer price was genuine and the parties were not related or affiliated in any way; further, the loan was not an issue as it had been made for valuable consideration and was properly secured. The second shareholder was also estopped from challenging the *bona fides* of the offer, as he had intentionally rejected the offer, assuming the purchaser would be unable to close the deal and took the chance that his lower offer would be taken over the other more "dubious" offer. The court examined the meaning of the "duty of utmost good faith" called for in the shareholder's agreement.

■ CONFLICT OF LAWS

CONFLICT OF LAWS – Contracts – forum selection clause *Curves International Inc. v. Archibald et al.,* Tru. No. 339137, Coughlan, J., June 7, 2011; May 31, 2011 (orally). 2011 NSSC 217; **S629/27** ■ The parties entered into a franchise agreement for a gym in Nova Scotia. The plaintiff sought: a declaration terminating the agreement; permanent injunctions preventing the defendants from certain actions and enforcing post-termination obligations; general damages; special damages; and costs. They also sought an interlocutory injunction pending a final resolution. The agreement stated any contractual disputes would be litigated in Texas. The defendants sought to have the action dismissed for lack of jurisdiction. *Held,* motion dismissed. The plaintiff has established there is a good reason not to enforce the choice of forum clause. Looking at the *Court Jurisdiction and Proceedings Transfer Act*, our court has territorial competence; there is a real and substantial connection to this province. All defendants are Nova Scotia residents; none have a real and substantial connection to Texas. The business operates here. Most of the witnesses are here. Texas law only applies to the contractual dispute, while our law applies to the tort claim. There might be an enforcement issue if the injunction is granted in Texas. It will be cheaper to litigate here. All of this amounts to a strong cause why the action should not be dismissed or stayed.

■ CONTRACTS

CONTRACTS – Formation – enforceability *Park v. Arsenault,* Claim No. 346984, Slone, Adjudicator, June 20, 2011. 2011 NSSM 44; **SmCl18/30** ■

■ COURTS

COURTS – Small Claims Court – jurisdiction, breach of fiduciary duty *Pictou Landing First Nation v. Clark,* Pic. No. 339884; S.C.P. No. 307476, Coughlan, J., July 7, 2011. 2011 NSSC 270; **S632/27** ■ The respondent, a minor at the time she was awarded almost $4,000 in a settlement in the early 1990s, brought a small claims action against the appellant, arguing it was negligent of them to pay the money to her mother on her behalf. The small claims adjudicator

found he had jurisdiction to hear the matter and found in her favour. The appellant appealed, arguing the adjudicator erred in law. They felt the respondent's claim was not within the court's jurisdiction because it concerned questions of fiduciary duty and guardianship. The respondent argued her claim was based in tort and was thus properly before the court. *Held,* appeal allowed. The claim concerned an alleged breach of equitable duties (fiduciary duty/trust), and was not made in relation to a contract. The Small Claims Court did not have jurisdiction to hear it. Having found this, it is not necessary to decide whether the claim was in respect of a "settlement" as set out in s. 10(b) of the Act.

■ CREDITOR AND DEBTOR

CREDITOR AND DEBTOR – Stay of execution – sheriff sale *Halifax Equipment Rentals, Sales and Service Ltd. v. Bonin et al.,* Hfx. No. 343382, Rosinski, J., April 21, 2011. 302 N.S.R. (2d) 261; 2011 NSSC 158; **S628/4** ■ The plaintiff was acting in relation to a debt assigned to him for collection. He was granted an *ex parte* order that resulted in an execution order being issued in relation to a 1991 judgment against Dauphinee. Dauphinee moved to set aside the order pursuant to Rule 22.06(3) of the *Civil Procedure Rules* (2008), or to permanently stay the order pursuant to Rule 79.22(1). He justified his prior inaction by saying he honestly believed the judgment had already been satisfied. He argued latches on the part of the creditor and also argued that, because the request to stay wasn't raised in the *ex parte* hearing, the parties weren't restricted (on that issue) to the substance of the affidavits filed at the time. The evidence showed the creditors had waited for government judgments to cease to exist before executing on theirs. *Held,* motion(s) dismissed. Given the overall circumstances, and the government judgments, the creditor has a reasonable excuse for the delay, and Dauphinee failed to show it caused him serious prejudice or irreparable harm. The court found he neither satisfied nor reasonably believed he had satisfied the judgment. On balance, the prejudice to the plaintiff if a permanent stay of the execution order is granted is greater than the prejudice to Dauphinee if the order is issued.

■ CRIMINAL LAW

CRIMINAL LAW – Admissibility – of accused's previous criminal record *R. v. A. (W.H.),* C.R.A.T. No. 0336695, Rosinski, J., May 3, 2011. 2011 NSSC 173; **S630/23** ■ In a sexual assault trial, the Crown applied for permission to cross-examine the accused (if he testified) with respect to his criminal record, particularly in respect of certain specific convictions. The defence argued that the jury had already seen the accused in shackles, observed that he was in custody and heard improper evidence to the effect that forensic testing had identified him as a known offender and that to now draw their attention to a specific group of "crimes of dishonesty", spread over time, would irrevocably paint him as a habitual criminal and, thus, less trustworthy than the complainant. It might also cause the jury to rely on prohibited propensity to crime reasoning to find that he had likely committed the current offences as well. *Held,* application to cross-examine the accused on certain specified offences allowed; the Crown may not extend its examination to either the sentence or circumstances of the offences but the defence is not so limited. The defence position appeared to be that the complainant had a history of rebelliousness and had lied to her mother to explain her absence at the relevant time, leading to her not being able to retreat from that lie. Given this context, it was appropriate for the Crown to have the opportunity to question the accused about certain select convictions that were relevant to his credibility; however, only the most recent convictions were allowed, as the others were too stale or crossed the line by casting him as a hardened, habitual offender.

CRIMINAL LAW – Admissibility – of complainant's statement to police *R. v. Ord,* No. 2174190; 2174191, Derrick, J.P.C., April 8, 2011. 2011 NSPC 34; **M24** ■ When the complainant in an assault case was either unable or unwilling to provide a clear account of what had happened, the Crown sought to have her previous statement entered into evidence in order to cross-examine her on it. The complainant testified that she was almost hysterical when she gave the statement but acknowledged that it was given voluntarily. The officer testified that her demeanor had alternated between calm and distress but she was not upset to the degree indicated and there were no signs that she had been drinking or was otherwise impaired. There was also a small area of discolouration visible under her eye at the time she gave the statement (two weeks after the alleged assault) that was consistent with her being hit in the eye, as she had described to the police. However, the officer had not cautioned her about the consequences of making a misleading statement and had not taken the statement under oath. *Held,* statement admitted into evidence; as the statement was necessary to the Crown's case and there was no evidence that distracted from its threshold reliability, the Crown had met its burden for admissibility. The complainant was upset, but not hysterical when the statement was given; there was no suggestion that she was impaired in any way at the time; she was not now claiming that the statement was untrue or that she was trying to retaliate against the accused in making it; the statement was largely a narrative, with no leading questions from the officer; she had a visible mark under her eye at the time, which she now acknowledged might have been sustained in the altercation; and the fact that the statement was not videotaped and the officer had not warned the complainant about the consequences of giving a false statement did not undermine the statement's credibility.

CRIMINAL LAW – Appeal – of conviction for assault, burden of proof *R. v. Walker,* Pt.H. No. 339447, Murray, J., July 8, 2011. 2011 NSSC 279; **S632/23** ■ The defendant appealed her assault conviction on the basis that the trial judge had made certain comments showing that he had predetermined her guilt before hearing all the evidence and had misapplied the test in *R. v. W.D.*. *Held,* appeal allowed; new trial ordered; although there was no reasonable apprehension of bias on the part of the trial judge, his statement that if he accepted the defence evidence, he must acquit and if he accepted the Crown's evidence and rejected the defence evidence, he must convict was inconsistent with *R. v. W.D.* and skipped the second stage of that analysis. Although the trial judge made it clear that when the Crown's evidence conflicted with that of the defence, he believed the Crown's evidence, he had not given reasons for so deciding, resulting in the suggestion that it was a credibility contest, with the trial judge preferring one over the other. Further, in finding the defendant guilty, the trial judge had made no mention of whether, when accepting the Crown's evidence, the defence evidence left him with a reasonable doubt. Where the burden of proof and credibility were concerned, the court could not say with certainty that the verdict would necessarily have been the same had the law been properly applied.

CRIMINAL LAW – Appeals – extension of time to file notice of appeal *R. v. Janes,* C.A.C. No. 350487, MacDonald, M. C.J., July 8, 2011. 2011 NSCA 66; **S631/5** ■

CRIMINAL LAW – Appeals – ineffective counsel *R. v. Fraser,* C.A.C. No. 330167, Saunders, J.A., July 21, 2011. 2011 NSCA 70; **S631/11** ■ The defendant teacher appealed his conviction for

touching a former student for a sexual purpose on the grounds of ineffective assistance of trial counsel. He also applied to admit fresh evidence. *Held,* appeal allowed; new trial ordered; application to admit fresh evidence allowed; the conduct and failure of trial counsel amounted to incompetence that resulted in a miscarriage of justice. The court applied the decision in *R. v. Parks* (1993) (Ont. C.A.) and found trial counsel incompetent in various ways, including on the basis that, despite repeated and specific enquiries, the defendant was never advised that he had the right to challenge potential jurors for cause on the basis that they might discriminate against him because he was black and the complainant was white, effectively denying him his statutory right to challenge potential jurors for cause. The defendant had also shown that the level of careful investigation and preparation that one would reasonably expect of any criminal trial lawyer in such a matter had not occurred. Counsel had refused to consider the importance of the defendant's wife as a material witness or seek a copy of her statement to the Crown, failed to interview and call as defence witnesses persons who could be expected to seriously discredit the Crown's case, failed to seek an adjournment when first told that the complainant had provided important last-minute information to the Crown, failed to prepare the defendant for trial and had him swear a detailed affidavit that contained a great deal of information that was later used against him by the Crown. Counsel had also been unprepared for the preliminary inquiry, resulting in an ineffective cross-examination that fell well below a reasonable standard. In circumstances where the principal ground of appeal is that trial counsel was not diligent in his preparations and not effective in providing legal representation, one could not expect a defendant to make a case for due diligence; given that the purpose of introducing the new evidence was to convince the court that the process was so unfair that the defendant was denied an opportunity to effectively defend himself, the court exercised its discretion to admit the new evidence in the interests of justice.

CRIMINAL LAW – Appeals – ineffectiveness of counsel, validity of a guilty plea on appeal *R. v. Riley,* C.A.C. No. 312177, Beveridge, J.A., June 7, 2011. 2011 NSCA 52; **S626/24** ■ The defendant agreed to plead guilty to production of marijuana in exchange for the Crown dropping the charge against his co-accused. Although he was granted a conditional discharge, he expressed surprise when the mandatory ten-year firearms' prohibition was imposed, claiming his counsel had not discussed the issue with him. He appealed his conviction, seeking to introduce fresh evidence to demonstrate the circumstances surrounding the entry of his plea, especially the lack of information about the firearms' prohibition order and contended that his trial counsel's failure to advise him of the prohibition amounted to ineffectiveness of counsel and tainted the validity of his guilty plea, which he sought to withdraw. *Held,* appeal dismissed; motion to introduce fresh evidence dismissed; even assuming that counsel had failed to advise him of the mandatory minimum firearms prohibition, the defendant had failed to establish that his claimed lack of knowledge caused him any prejudice and as there was no basis to conclude that he would have done anything different had he been aware of the mandatory prohibition order, no miscarriage of justice had occurred. The law does not demand that an accused possess perfect knowledge about all of the myriad consequences of a guilty plea for the plea to be valid.

CRIMINAL LAW – Appeals – insufficient reasons *R. v. Reddick,* C.A.C. No. 336643, Hamilton, J.A., April 20, 2011. 301 N.S.R. (2d) 354; 2011 NSCA 36; **S626/8** ■ The defendant appealed his convictions for robbery, assault causing bodily harm and breach of probation, arguing that the trial judge's reasons were insufficient. *Held,* new trial ordered; the trial judge's reasons were insufficient to allow meaningful appellate review. Given that the decision made it clear that identification was the only live issue, the trial judge's final comments concerning doubt and inconsistency were a cause for concern. Although he only expressed doubt with respect to the third count, given the recognized inconsistency in finding the defendant guilty of assault and robbery but not breach of probation and the interconnectedness of the events underlying the three counts, it was reasonable to assume any doubt he may have had also applied to the first two counts. It was impossible to tell, from the reasons, whether this was the case or whether he had no doubt on the third count but was merely trying to give the defendant a break by finding him not guilty on one of the charges.

CRIMINAL LAW – Appeals – methodology for consecutive sentences discussed *R. v. Bernard,* C.A.C. No. 329696, Saunders, J.A., June 9, 2011. 2011 NSCA 53; **S626/25** ■ The defendant was sentenced to two years less a day (29 months, reduced to 24 months for time spent on remand) for five drunk driving-related offences. Although he had prior convictions for drinking and driving and breaching court orders, he had never before been incarcerated. The Crown conceded that the trial judge had erred in the methodology applied (first calculating a global sentence and then assigning individual sentences to fit within the whole) but argued that the sentence should not be reduced. *Held,* appeal allowed; defendant sentenced to 24 months' imprisonment (less time spent on remand), calculated as follows: five months (driving with blood-alcohol content over legal limit); seven months (driving with blood-alcohol content over legal limit), consecutive; nine months (refusal to comply with breathalyzer demand), consecutive; one month (breach of recognizance), consecutive; two months (breach of recognizance), consecutive. If the sentencing judge commits an error in principle, the sentence imposed is no longer entitled to deference and the appellate court will impose the sentence it thinks fit, which, in this case, was incremental, consecutive sentences. The proper approach is to fix a sentence for each individual offence, determining which should be consecutive and which should be concurrent and only then reduce the sentence if the total exceeds what would be just and appropriate and the judge's failure to do this was compounded by his failure to address the "jump" and "gap" features that were relevant to the defendant's case. The court conducted an extensive review of the principles of sentencing, including "totality", "jump", "step" and "gap".

CRIMINAL LAW – Attempted murder – acquittal *R. v. Dann,* No. 2220001; 2220002; 2220003, Derrick, J.P.C., April 20, 2011. 2011 NSPC 21; **M23** ■ While sleeping, the complainant was severely beaten around the head with a dumbbell he kept in his apartment. Although the accused (who was living with the complainant, along with two other young people at the time) pled guilty to stealing the complainant's car and other related charges, he maintained he was innocent of the charges of attempted murder, aggravated assault and unlawful possession of a weapon (the dumbbell). The accused testified that when differences occurred between the complainant and the other occupants, they discussed leaving the apartment, beating up the complainant and taking his vehicle. When the complainant went to lie down for a nap, the accused also went to sleep and was woken up by one of the young people, who said that the complainant had left in a vehicle he was thinking of buying and had left his wallet in his other vehicle. They grabbed their belongings and left in the remaining vehicle, attempting to get money from the complainant's account and eventually driving to Montreal. However, one of the young people testified that he and the accused had returned to the apartment to

get a bag that had been forgotten. They briefly became separated and when he found the accused, he was in the bedroom bludgeoning the complainant with the dumbbell. The accused denied beating the complainant or returning to the apartment once leaving it. *Held,* accused acquitted of all charges; the court was unable to determine who was responsible for the attack. The Crown's case rested on the evidence of the young person who allegedly witnessed the attack but much of his testimony was not believable and it was possible that he was fingering the accused to protect himself. All three individuals had a motive to render the complainant unable to report the theft of his vehicle and wallet and no motive for the accused, in particular, to beat the complainant had been established. Both the young people had good reason to lie about the accused's involvement in the attack as they had both been originally charged in the matter and had initially lied to the police, alleging that the accused had drugged and kidnapped them.

CRIMINAL LAW – Attempted murder and conspiracy to commit – guilty *R. v. LeBlanc,* C.R.H. No. 329528, Coady, J., June 21, 2011. 2011 NSSC 245; **S630/18** ■ The first accused was advised by his girlfriend that the complainant, a rival gang member, was at a hospital. He advised two friends of this and then proceeded to the hospital himself. The co-accused was with the first accused when this occurred and at one point took the phone to direct the two friends to the complainant's exact location in front of the hospital. Upon their arrival at the hospital, the first accused instructed his friends to "blaze" the parked vehicle the complainant was in and one of them shot the complainant. The police had been monitoring the first accused's communications and had captured the entire phone call on tape and cameras at the hospital had captured the arrival of all parties and the actual shooting. Both accused were charged with conspiracy to commit murder and attempted murder. The first accused testified that he wasn't targeting the complainant and didn't know his friends were coming to the hospital; he was simply explaining what he was observing and when he said to "blaze" the vehicle, he was just repeating what he had heard one of his friends say. *Held,* both accused found guilty of conspiracy to commit murder and attempted murder. The Crown had proven the existence of a conspiracy to murder the complainant and that the first accused drove this conspiracy. Although there was no evidence that the co-accused was involved prior to the first accused receiving the phone call and he insisted that he had no idea what was going on, it was impossible to believe that he sat in the middle of a time bomb oblivious to its existence. There was ample evidence that the first accused was both an aider and an abetter to the shooting in that he not only directed his friends to the location but also encouraged them to shoot the complainant. When the co-accused learned the others were on their way to the hospital, he had to know something bad was going to happen to the complainant and his words on the phone amounted to a targeting of him; in those few minutes, he became a party to attempted murder.

CRIMINAL LAW – Bail – pending appeal *R. v. MacDonald,* C.A.C. No. 347642, Bryson, J.A., May 16, 2011. 2011 NSCA 46; **S626/18** ■ The defendant, who was found guilty of the careless use of a firearm, possession of a weapon for a purpose dangerous to the public peace and possession of a restricted or prohibited firearm applied for bail pending appeal. He had been found, in his residence, with a firearm licensed in Alberta but not licensed to be brought into this province or possessed here. The defendant had residences in both Alberta and Nova Scotia but his Halifax residence was now up for sale and he travelled extensively around the world for his work. Although he had no criminal record and had been on a recognizance for 16 months prior to sentencing, the Crown argued that he was a flight risk given that his convictions would result in a mandatory three-year prison term and he had only a tenuous connection to the jurisdiction. *Held,* application for bail pending appeal granted provided the defendant enter into a recognizance of $25,000 with conditions. The defendant's actions bore no resemblance to the known problem of indiscriminate firearm use locally as he was a middle-aged professional and gun hobbyist and the circumstances that purportedly made him a flight risk had nothing to do with these charges but rather with his professional obligations.

CRIMINAL LAW – Breathalyzer – refusal, not guilty *R. v. Shaw,* No. 1870632; 1870633, Williston, J.P.C., December 6, 2010. 2010 NSPC 95; **M23** ■ When the accused, who had been given a breathalyzer demand, was twice unable to contact her lawyer, the officer phoned duty counsel on her behalf. However, she indicated her dissatisfaction with this call, claiming that the lawyer had fallen asleep during their initial conversation and, when asked if she would now take the breathalyzer test, she responded that she was not taking the test but not refusing it. She then called a third lawyer, following which she again stated that she wasn't taking the test but wasn't refusing and indicated that she first wanted her lawyer present, at which point she was charged with failing to comply with a breathalyzer demand and impaired driving. *Held,* accused found not guilty on both counts; considering the short period of time she had been observed driving along with the other evidence, the impaired driving charge had not been proven beyond a reasonable doubt; although it is not lawful to refuse a breath sample unless a lawyer is present, the accused's responses were not sufficiently clear to conclude that she was unequivocally refusing to provide a sample. Before concluding that she was refusing to provide a breath sample, the officer should have asked a more questions to seek clarification of exactly what the she meant by her responses or presented her with the breathalyzer and asked her to blow into the mouthpiece.

CRIMINAL LAW – Charge to jury – to include honest but mistaken belief in consent *R. v. A. (W.H.),* C.R.A.T. No. 336695, Rosinski, J., June 13, 2011. 2011 NSSC 232; **S630/28** ■ At issue in a sexual assault trial was whether the judge should leave the defence of honest but mistaken belief in consent with the jury. The accused had not testified but relied on the complainant's testimony that despite the accused doing a number of things earlier in the day which made her feel uncomfortable, she had not left his home but had instead decided to stay overnight. *Held,* the defence of honest but mistaken belief in consent will not be left with the jury as it had no air of reality. Almost all of the defence suggestions were patently without merit as a basis for the position that there was an air of reality to the proposed defence as they wrongly presumed that the accused was entitled to rely on the complainant's failure to vociferously and expressly reject his repeated sexual overtures as a basis for his belief that she later consented to sexual intercourse. There was no evidence that she responded favourably at any time to any of the accused's sexual overtures, which were neither proximate in time nor otherwise logically tied to the relevant incidents.

CRIMINAL LAW – Criminal harassment – not guilty *R. v. Blohm,* No. 2057186, Whalen, J.P.C., June 30, 2011. 2011 NSPC 51; **M24** ■

CRIMINAL LAW – Dangerous driving – causing bodily harm, guilty *R. v. Delorey,* C.R. Ant. No. 312887, McDougall, J., June 15, 2011. 2011 NSSC 234; **S630/9** ■ The accused was charged with dangerous driving causing bodily harm and dangerous driving causing death after his vehicle left the road on a curve, travelled 54 metres, most of it airborne, and struck and severed a power pole. Passengers

in the vehicle gave evidence that the accused had been spinning the tires on the vehicle and doing "donuts" prior to the accident and was driving well over 100 km/hour in an 80 km/hr zone when the accident occurred. The evidence also showed that the accused had been drinking prior to the accident, the road was wet and the evidence showed that the tires on his rental vehicle would not have passed a safety inspection. *Held,* accused found guilty on both counts; his operation of the vehicle was a marked departure from the norm and a reasonable person in his position would have been aware of the risks involved. Based on the evidence of speed, weather and road conditions; the fact that the vehicle was fully loaded with five adult passengers and the presence of alcohol in his blood, it was objectively clear that the accused had driven the vehicle in a manner that was dangerous to the public and although he was entitled to have confidence in the reliability of the rental vehicle, including the condition of its tires, this did not explain why he had decided to drive at an excessive rate of speed, after having consumed alcohol, in rainy weather conditions on wet asphalt. Although there was no duty on the accused to check the condition of the tires, he should have known that the manner in which he was driving would cause wear and tear and he ought to have been concerned about his rough handling of the vehicle.

CRIMINAL LAW – Defences – duress, appeal dismissed *R. v. Ryan,* C.A.C. No. 327746, MacDonald, M. C.J., March 29, 2011. 301 N.S.R. (2d) 255; 2011 NSCA 30; **S626/2** ■ The accused, who had been charged with counselling an undercover police officer to murder her husband, was found not guilty on the basis of the common law defence of duress. The evidence showed that her husband was manipulative, controlling and abusive and had sought to control her actions in every possible way, even threatening to kill her and their child on several occasions. Her fear of violence was justified and she had tried at various times to involve the police and use every other avenue available to resolve her concerns, without success. The husband's efforts to torment her had increased once they had separated and, at the time the undercover officer contacted her, offering to assist in eliminating her husband, the accused was in a vulnerable state, with an intense fear of her husband, feeling helpless and threatened with annihilation. The Crown appealed. *Held,* appeal dismissed; the trial judge had not erred in considering the defence of duress or in finding that it had an air of reality; although normally used when one person coerces a second person to do harm to a third, the defence also extended to the unique facts of this case and there were strong factual findings to support the conclusion that once the accused had raised an air of reality for the defence, the Crown had failed to disprove its existence beyond a reasonable doubt. None of the *Criminal Code* provisions relating to self-defence applied and it would be unjust to deny the accused a defence simply because her circumstances did not fit into the traditional parameters of the enumerated defences. The defence of duress targets actions that are morally involuntary and where the accused sees no reasonable avenue of escape but to commit the offence charged and the question was not whether the accused's plight met the standard of the "reasonable man" or the medical label of "battered wife syndrome", but was about the accused's unique experience.

CRIMINAL LAW – Directed verdict – appeal dismissed, circumstantial evidence *R. v. Beals,* C.A.C. No. 334813, Saunders, J.A., May 12, 2011. 302 N.S.R. (2d) 358; 2011 NSCA 42; **S626/14** ■ Responding to a grease fire in an unoccupied apartment, firefighters found a loaded handgun, drugs and assorted paraphernalia. The police were called, a search warrant obtained and a number of items were seized, including three forms of identification that tied the accused to the premises. Both the lessee of the apartment and the accused were charged with possession of cocaine for the purposes of trafficking. At the end of the Crown's case, the accused successfully applied for a directed verdict. The Crown appealed. *Held,* appeal dismissed; the test to be applied on a motion for a directed verdict is the same as that of a judge at a preliminary inquiry, meaning that, to a limited extent, the evidence must be weighed and, in this case, the trial judge understood and respected the judicial restraints attached to this analysis and did not err by sliding into the jury's exclusive preserve. The Crown's case against the accused was entirely circumstantial with no direct evidence to establish constructive possession, meaning that the trier would ultimately be asked to draw inferences as to the essential elements of proof of knowledge and control.

CRIMINAL LAW – Disclosure – vantage point of police surveillance *R. v. Carvery,* C.R.H. No. 343275, Robertson, J., July 22, 2011; May 16, 2011 (orally). 2011 NSSC 283; **S633/10** ■ Although a great deal of disclosure had already been made, the accused applied for further disclosure in relation to the vantage point where the police had observed an alleged drug transaction (including information as to the height of the observation post and the distance and angle of elevation between the observation post and the suspects), arguing that in light of the conflicting testimony of two officers as to what was observed and the light conditions at the time, further particulars were required. *Held,* application for disclosure dismissed; the significant disclosure already provided afforded the accused the opportunity to make full answer and defence and further clarification of these matters and the reasons for any inconsistencies in the officers' testimony could be sought during cross-examination.

CRIMINAL LAW – Evidence – admissibility, burden of proof *R. v. Murphy,* C.A.C. No. 313182, Farrar, J.A., June 9, 2011. 2011 NSCA 54; **S626/26** ■ The accused was acquitted of 32 charges alleging break, enter and theft or possession of property obtained by criminal offences. The Crown appealed, arguing that the trial judge had erred by requiring it to prove continuity of certain critical exhibits beyond a reasonable doubt. It also argued that the trial judge had erred in failing to allow witnesses to view pictures and a video for the purposes of authenticating the evidence. *Held,* appeal allowed; acquittal set aside; new trial ordered; the respondent acknowledged that the trial judge had made numerous errors with respect to the admissibility of evidence; this evidence was critical to the Crown's case and, if admitted, might reasonably be expected to have affected the verdict. The trial judge erred in failing to allow the video to be accessed for the purpose of testifying to its authenticity, integrity and accuracy and compounded this error by concluding that the issue was one of continuity and equating this to admissibility. He also erred in ruling that the continuity of the CD containing the pictures had to be proven beyond a reasonable doubt in order to be admissible as only the elements of the alleged offence must be proven to that standard. He again compounded his error by confusing the concepts of continuity and admissibility of the pictures and precluded himself from considering critical evidence. It was clear that the trial judge had, by his comments, ruled the exhibit log inadmissible unless it was proven in its entirety as opposed to simply disregarding any portion of the exhibit that was irrelevant to the charges against the accused, once again creating an artificial impediment to the introduction of an exhibit.

CRIMINAL LAW – Exclusion of evidence – voir dire, cellular telephone text message *R. v. Zahrebelny,* No. 2058489, Chisholm, J.P.C., September 13, 2010. 299 N.S.R. (2d) 27; 2010 NSPC 91;

M23 ■ Two cell phones, along with marijuana and other items, were seized during a search of the accused's residence. Believing these phones might contain information that could provide evidence in relation the offence of possession of marijuana for the purposes of trafficking, the officer delivered them to the police lab, where a CD of the text messages was created. The defence argued that although the seizure of the phones was lawful, the removal of information was a warrantless and unlawful search. *Held,* application to exclude the information found in the cell phones dismissed; although the search of the contents of the phones was not authorized by the wording of the warrant alone, the officer had reasonable grounds to believe that the phones' contents would afford evidence of the trafficking offence, which gave him the authority to search the cell phones to gather evidence relating to that offence. The power to search a cell phone incident to its lawful seizure under s. 489(1)(c) is limited to that which is directly connected to the reasonable grounds upon which the device is seized.

CRIMINAL LAW – Jury trials – impartiality of jurors *R. v. A. (W.H.),* C.R.A.T. No. 336695, Rosinski, J., April 29, 2011. 2011 NSSC 165; **S630/8** ■ The black male accused was charged with the sexual assault of a white teenage girl. He applied for permission to challenge every potential juror on the basis that they might not be impartial as to the outcome of the trial and requested that he be allowed to ask all potential jurors four specific questions in that regard. *Held,* the appearance of fairness required that the challenge for cause be permitted but it is restricted to only one question, which is reframed to ask whether the juror's ability to judge the evidence without bias, prejudice or partiality would be affected by the fact that the person charged was a black male and the complainant was a white female. There was a realistic potential for partiality (racial prejudice) in the case at bar and allowing a challenge for cause was appropriate given that the concern over racial prejudice is increased where the accused is a mature black male and the complainant is an adolescent white female. Although the court was unaware of any studies regarding the existence of a widespread prejudice in the relevant community per se, the presence of widespread racial prejudice against African Canadians in Nova Scotia has been well documented.

CRIMINAL LAW – Murder – self-defence, aquittal *R. v. Colley,* Cr.H. No. 330640, Coady, J., April 6, 2011. 302 N.S.R. (2d) 109; 2011 NSSC 135; **S627/10** ■ It was alleged that after the accused borrowed a shotgun from a friend, he came into contact with a vehicle that turned around and followed him until he turned around and started back toward the other vehicle. When the vehicles pulled up beside one another, the accused fired a shot into the second vehicle. The driver leaned forward and only the back of his head was grazed by the shot but the passenger was hit in the head and died immediately. The accused then returned the shotgun to his friend and went home, where he was arrested and charged with both second-degree murder and attempted murder. He admitted to firing the fatal shot but stated that the second vehicle had blocked him and the occupants were shouting at him, making him fearful for his life as they had previously tried to burn down his garage and had threatened to kill him when he would not get involved in the drug trade. The evidence showed that one of the men had phoned and texted the accused repeatedly over a four-day period and that drug dealers had previously tried to kill him by tampering with his vehicle. *Held,* accused acquitted on both counts; the Crown had failed to discount self-defence beyond a reasonable doubt. The accused took the shotgun to protect or scare off intruders at his garage and when he was cornered, he believed that there were no alternatives aside from the gun. The threats made to the accused gave an "air of reality" to his claim of self-defence and the court found that the prior actions of these men (the accused had previously been assaulted by one or both of them) and their community had left him afraid for his life. The manner in which the men followed him and then brought his vehicle to a stop brought his apprehension to a level of imminent threat and fear of death or grievous bodily harm as he viewed them as violent criminals fully capable of carrying out their threats.

CRIMINAL LAW – National Parole Board – jurisdiction of Provincial Superior Court to hear *habeas corpus* application *Wilson v. Canada (Attorney General),* Amh. No. 342924, Wright, J., April 13, 2011; April 8, 2011 (orally). 302 N.S.R. (2d) 138; 2011 NSSC 143; **S627/22** ■ When the applicant, an inmate in a federal institution, was unsuccessful in both his application for day parole and his appeal of that decision, he filed a *habeus corpus* application, seeking to have the appeal decision set aside. No reported cases were found where a provincial superior court had assumed jurisdiction on a *habeus corpus* application from an appeal decision of the National Parole Board (NPB) denying parole. *Held,* application for *habeus corpus* dismissed; although the court had concurrent jurisdiction on a *habeus corpus* application with that of the Federal Court on a judicial review from a decision of the NPB, it declined to exercise its jurisdiction. The statutory parole review regime combined with the right of judicial review to the Federal Court formed a complete and comprehensive statutory framework ideally suited to adjudicate on parole matters and, although labelled a *habeus corpus* application, this matter had, in substance, many hallmarks of a judicial review application where the applicant sought to set aside the decision of an independent federal tribunal. The clear legislative intent in the *Federal Courts Act* is to confer exclusive jurisdiction on the Federal Court when it comes to judicial review applications from such federal bodies.

CRIMINAL LAW – Notice for judicial review – subject matter not appropriate, review struck *R. v. Cummings,* Hfx. No. 350339, Coughlan, J., August 24, 2011; June 29, 2011 (orally). 2011 NSSC 324; **S634/17** ■

CRIMINAL LAW – Possession for the purpose of traffacking – crack cocaine *R. v. Coleman,* No. 2074546, Gabriel, J.P.C., March 21, 2011. 2011 NSPC 18; **M23** ■ The accused was charged with possession of cocaine for the purposes of trafficking after the police executed a search warrant at his residence. When the officers entered the home, the accused was standing in the dining room, a few feet away from the stove, which he was facing while holding a $100 bill in his hand. Although two other individuals were also in the vicinity of the stove, on top of which was an uncovered pot containing a prescription pill bottle with nine rocks of individually wrapped cocaine, the accused was closest to it. Although no drug paraphernalia was found on him, some was found on one of the other individuals and a digital scale and cash in a kitchen cupboard, along with a machete and brass knuckles found in the accused's bedroom were seized. *Held,* accused found guilty as charged; the only reasonable inference was that he possessed the individually-wrapped rocks of cocaine and did so for the purposes of trafficking. Although no one piece of circumstantial evidence was conclusive and each, individually, could be explained away, when each piece was viewed within the totality of all the other evidence, it became part of the raw material from which an inference of guilt could be drawn.

CRIMINAL LAW – Possession for the purpose of trafficking *R. v.*

Miller, No. 2219978, Derrick, J.P.C., July 29, 2011. 2011 NSPC 44; **M24** ■

CRIMINAL LAW – Possession for the purpose of trafficking – *mens rea* *R. v. Zahrebelny,* No. 2058489, Chisholm, J.P.C., October 5, 2010. 2010 NSPC 92; **M23** ■ The sole issue was whether the accused had the *mens rea* required to be found guilty of possession of marijuana for the purposes of trafficking. Along with other items, two cell phones had been seized during a search of his residence, from which a series of short text messages were recovered. The other items seized only provided conclusive evidence of possession for personal use and the Crown relied on the evidence of the text messages to prove possession for the purposes of trafficking. The defence argued that the messages could have been unsolicited; may not have been opened, read or responded to; or may not have been about drugs and, even if they were, the court should not draw an inference regarding the accused's intention from the statements of others. *Held,* accused found guilty of simple possession; although it was highly likely that he possessed the marijuana for the purposes of trafficking, the court was not convinced of that beyond a reasonable doubt. The fact that he phoned some of the individuals very shortly after receiving their messages showed that they were known to him and he had opened, read and responded to those particular messages but, although convinced that the messages referenced the cost of marijuana, the court was unable to determine whether they referred to an implied offer to buy at a certain price or were simply an inquiry as to whether a particular price was fair and, even assuming the former, without knowing how the accused responded to the messages, the court was not convinced that he had an intention to sell marijuana.

CRIMINAL LAW – Possession for the purpose of trafficking – not guilty *R. v. Dennis,* No. 1915703, Whalen, J.P.C., October 16, 2009. 2009 NSPC 80; **M24** ■ The accused was charged with possession for the purpose of trafficking after drugs and paraphernalia were found hidden in a vehicle in which he was a passenger. The drugs were found in the trunk, inside the console between the two front seats and in the roof lining immediately above the seat where the accused had been sitting; however, nothing was found on his person and there was no fingerprint evidence. The Crown sought to admit similar fact evidence regarding a similar incident involving the accused. *Held,* accused found not guilty; application to admit similar fact evidence allowed. The sole issue to be decided was that of possession and although the accused had been stopped twice as a passenger in a vehicle containing drugs, no drugs were ever found on him, all the drugs had been hidden and none of his fingerprints had been found on anything seized.

CRIMINAL LAW – Possession of proceeds of crime – guilty *R. v. MacKeigan,* No. 1973769; 1973670; 1973771, Gabriel, J.P.C., April 18, 2011. 2011 NSPC 37; **M24** ■ The accused was charged with two counts of possession of property, knowing that it was obtained, directly or indirectly, as a result of the commission of an offence (one of the counts relating to a specific motor vehicle) after her boyfriend was convicted of significant drug trafficking offences following a police sting operation. The majority of the evidence against her came from an undercover police officer who had befriended the accused as part of the investigation. The accused had advised the officer that the first time she had tried to purchase the motor vehicle, she was unable to get financing but she was successful when she returned with her boyfriend, who had made the significant down payment required ($10,000, made up of a large amount of relatively small denominations). She had also advised that her boyfriend operated a car-cleaning business only because it looked good on the books. The registration documents for the vehicle (which were in the accused's name) were found at the boyfriend's property. *Held,* accused found guilty of possession of the motor vehicle knowing that it was obtained, directly or indirectly, as a result of the commission of an offence; acquittal entered on second count. The evidence was overwhelming that the boyfriend had supplied the cash deposit for the vehicle and the only reasonable inferences were that the funds had been obtained from the commission of an offence and the accused was aware of this; she not only knew that dealing drugs was practically all her boyfriend had ever done but she had told the officer that for real customers to patronize his legitimate business was a rare event, she was well familiar with his network of suppliers and associates and her statement to the police was replete with phrases like "it was better not to ask" and "the less I knew, the better". If the court had not concluded that the accused had actual knowledge the funds were so tainted, it would have concluded that she was wilfully blind on the point.

CRIMINAL LAW – Procedure – application to sever certain counts in multiple count indictment *R. v. A. (W.H.),* C.R. Ant. No. 336695, Rosinski, J., April 21, 2011. 2011 NSSC 156; **S630/2** ■ After electing a jury trial on two counts of sexual assault and two counts of breaching an undertaking, the accused applied to have the sexual assault charges heard separately from the breach charges. He argued that he wanted to testify on the breach charges but not necessarily on the sexual assault charges, and a jury might find the sheer number of charges and the multiple breach charges arising from an undertaking suggestive that he was one to ignore court orders, cumulatively affecting his right to a fair trial. *Held,* application for severance granted; the potential prejudice to the accused's right to a fair trial (the freedom to decide to testify on only some of the charges and the danger of impermissible "propensity to commit crime" reasoning on the part of the jury) was greater than the insignificant concern about the multiplicity of proceedings.

CRIMINAL LAW – Procedure – cross-examination of witness by self-represented accused *R. v. J. (D.C.),* No. 2292404; 2294273; 2294274; 2294275; 2294276; 2294277; 2294278; 2294279; 2294280; 2294281; 2294282, Derrick, J.P.C., May 24, 2011. 2011 NSPC 3; **M23** ■ The Crown applied to have counsel appointed for cross-examination of the accused's wife and two young children (aged three and six) on the trial of assault charges against the youngest child and the wife. The self-represented accused argued that he had to conduct the cross-examinations himself in order to bring out the truth and because he knew the children better than anyone else. *Held,* application to appoint counsel to conduct the cross-examinations granted; the accused is free to cross-examine any other Crown witnesses. The evidence showed that the accused's cross-examination of the youngest child could perpetuate the violence she had already been exposed to and further traumatize her; the older child would be too scared to tell the truth if cross-examined by the accused; and, due to the power dynamic involved, the wife was intimidated and apprehensive and was the type of vulnerable witness these provisions were designed to protect.

CRIMINAL LAW – Procedure – effect of Crown election on appeal of sentence *R. v. F. (R.V.),* C.A.C. No. 341847, Beveridge, J.A., July 27, 2011. 2011 NSCA 71; **S631/12** ■ A young person applied for leave to appeal his sentence of 14 months' imprisonment for a hybrid offence on the basis that, absent an express election by the Crown to proceed by indictment, he should have been sentenced based on a summary conviction process. *Held,* application for leave to appeal dismissed; in

the circumstances, the Court of Appeal was without jurisdiction to hear this appeal. S. 37(7) of the *Youth Criminal Justice Act* ("YCJA") is clear that when the Crown does not make an election; the process is deemed to be summary for the purposes of appeal, meaning that the right of appeal is to the summary conviction appeal court. The simple fact that the trial judge determined that the proceedings were indictable was not sufficient to find that an election had been made and the trial judge's decision, based on s. 34(1)(a) of the *Interpretation Act*, could not confer jurisdiction on the Court of Appeal in light of the clear specific statutory direction set out in s. 37(7) of the YCJA.

CRIMINAL LAW – Procedure – mistrial *R. v. A. (W.H.),* C.R.A.T. No. 336695, Rosinski, J., April 29, 2011. 2011 NSSC 167; **S630/19** ■ The accused applied for a mistrial on the basis that the jurors had a clear view of him wearing leg shackles during the process of jury selection, arguing that although the court had not ordered that he be so shackled, any jurors who had seen him would be likely to consider him "guilty" as a result. *Held,* application for mistrial dismissed; although there had been a lengthy opportunity to observe the accused in shackles, any actual or perceived unfairness arising therefrom could be cured by an explicit instruction to the jury, particularly since they would see that he was not restrained during the remainder of the trial.

CRIMINAL LAW – Procedure – motion to extend time to file appeal dismissed *R. v. Mercier,* C.A.C. No. 334444, Bryson, J.A., June 9, 2011. 2011 NSCA 58; **S626/30** ■ The defendant missed the time to file an appeal of his conviction and unsuccessfully applied for an extension of time to file that appeal. Through no fault of his own, he was late in pursuing a motion for leave to review that decision and now brought a motion for leave to extend time to have his motion for leave to review heard by the Chief Justice. The Crown argued that the Court of Appeal had no jurisdiction to review the decision in question as the *Criminal Code* did not allow for such an appeal or review and that the defendant's proposed grounds of appeal lacked merit. *Held,* motion dismissed; assuming, without deciding, that the court had jurisdiction to entertain the motion, there was no merit to the defendant's request for a review and, thus, no basis for extending time to allow for it. Ultimately, the question is whether justice requires that an extension of time be granted and any analysis of the merits of the appeal must take into account the criteria that the Chief Judge applies when deciding whether to grant leave for review under Rule 90.38.

CRIMINAL LAW – Procedure – restraining accused at trial *R. v. A. (W.H.),* C.R.A.T. No. 336695, Rosinski, J., April 29, 2011. 2011 NSSC 166; **S630/10** ■ The accused applied for a direction that he not be restrained by leg shackles in the presence of the jury and that he be permitted to sit at the counsel table on the basis that the jurors who might see the shackles would consider him "guilty". Although there had not been any problems with the accused's behaviour in the courthouse, the Crown argued that he should be in shackles and not allowed to sit at the counsel table based on his previous record of violence and the very close quarters of this particular courtroom. *Held,* absent a change in circumstance, the accused will not be shackled in the courtroom or in the view of the jurors and will continue to sit at a counsel table; however, the sheriffs will be present when he is in the courtroom. Although there was a legitimate safety concern given the accused's extensive criminal record and the physical proximity, a reasonable person could be inclined to conclude that he was dangerous or a serious escape risk if they saw him flanked by sheriffs and in shackles and such a belief would be hard to erase from a juror's mind.

CRIMINAL LAW – Release pending appeal – allowed *R. v. Calder,* C.A.C. No. 348354, Farrar, J.A., June 27, 2011. 2011 NSCA 62; **S631/3** ■ The defendant lawyer applied for interim release pending appeal of her convictions for trafficking in a controlled substance. The Crown argued that even if she could show that the appeal was not frivolous, the grounds of appeal were weak, which was relevant to the question of whether the detention was necessary in the public interest. *Held,* application for interim release allowed, provided the defendant and her surety enter into a recognizance in the amount of $5,000 and she abide by a curfew. The strength of the appeal is but one factor bearing on the public interest and the grounds were not so weak that public confidence in the administration of justice would be shaken if bail was granted. The defendant had no prior criminal record, was not a threat to reoffend and every indication was that she would comply with the conditions of release.

CRIMINAL LAW – Robbery, assault, confinement and uttering threats – reasonable doubt *R. v. M. (M.),* No. 2261626; 2261628; 2261630; 2261632; 2261634; 2261636; 2261638; 2261640; 2261642; 2261644; 2261646; 2261648; 2261650; 2261652; 2261654; 2261656; 2261658; 2261660; 2261662, Campbell, J.P.C., April 19, 2011. 2011 NSPC 27; **M24** ■ The female driver, the accused and two other men were in a vehicle that was stopped on suspicion of being involved in a robbery. A gun and many of the stolen items were found in the vehicle and all the occupants were charged with a number of offences, including robbery. The accused denied being in the area where the robbery occurred but alleged that they had stopped and picked up the two other men. While at the police station, he pulled a ring that had been reported stolen out of his pants and placed it on his finger. At his trial, one of the other men testified that he had pled guilty to the robbery; the driver testified that she had driven directly from her home to where the vehicle was stopped by the police, without stopping; and the complainant testified that he had been lured to the driver's house, where he was ambushed by her and three men, robbed and threatened. Although his descriptions matched the two other males in the vehicle, he positively stated that the accused was not the third person. *Held,* accused found not guilty on all charges; the Crown had not proven that he was involved in the robbery or that he should have known there was a gun or stolen property in the car. Although the circumstances in which the accused was taken into custody were more than suspicious, the fact that the complainant had clearly seen the robbers but had made a positive non-identification created an inconsistency that raised a reasonable doubt.

CRIMINAL LAW – Second-degree murder – parole ineligibility *R. v. Gowen,* Ken. No. 339306, Hood, J., June 23, 2011; June 7, 2011 (orally). 2011 NSSC 249; **S632/18** ■

CRIMINAL LAW – Sentence appeal – attempted murder, parole eligibility *R. v. LeBlanc,* C.A.C. No. 337601, Fichaud, J.A., June 28, 2011. 2011 NSCA 60; **S631/2** ■ The defendant appealed his sentence of 16 years' imprisonment, with no parole eligibility until one-half of the sentence was served on a charge of attempted murder after he planned and executed an attempted "hit" on a member of a rival gang. The offence occurred in a residential area with a day care and schools nearby, when many people were out on the street. *Held,* order delaying parole eligibility set aside; appeal otherwise dismissed. The judge had not overemphasized denunciation and deterrence and had not erred either in allowing credit for remand at a one-to-one ratio or in applying the remand credit before pronouncing the ultimate term of incarceration. However, he had erred in failing to alert defence

counsel to the fact that he was considering imposing a term on parole eligibility after the Crown had expressly declined to raise the topic.

CRIMINAL LAW – Sentence – appeal of sentence for common assault *R. v. D'Eon,* Yar. No. 329125, LeBlanc, J., August 29, 2011. 2011 NSSC 330; **S634/22** ■

CRIMINAL LAW – Sentence – appeal of sentence for impaired driving *R. v. Naugle,* C.A.C. No. 325168, Beveridge, J.A., April 1, 2011. 302 N.S.R. (2d) 68; 2011 NSCA 33; **S626/5** ■ Twenty-seven days after being released from a lengthy period of incarceration for related offences, the defendant fled after driving a car into a parked occupied motor vehicle. He was sentenced to five years on a charge of impaired driving, three years consecutive for driving while prohibited, and six months consecutive for leaving the scene of an accident. He appealed his sentence on the basis that the trial judge had erred by imposing consecutive sentences that exceeded the maximum for the most serious offence and that the total sentence of eight-and-one-half years was manifestly excessive. He had 68 prior convictions, 22 of which were for alcohol-related driving offences and 14 of which were for driving while disqualified. *Held,* appeal dismissed; there was no error in principle in imposing consecutive sentences for these offences as each offence protected different societal interests and the judge had taken into account proportionality and totality in arriving at the total sentence, which was justified on the basis of the defendant's persistent refusal to make sincere efforts to pursue rehabilitation or refrain from the highly dangerous acts of driving while impaired and prohibited from doing so. This was not a typical alcohol-related driving offender; all previous attempts to rehabilitate him had failed and he had persisted in highly dangerous criminal conduct.

CRIMINAL LAW – Sentencing – accessory after the fact to murder *R. v. Gowen,* Ken. No. 339308, Hood, J., June 28, 2011; June 9, 2011 (orally). 2011 NSSC 259; **S632/26** ■ The defendant pled guilty to being an accessory after the fact to murder after he helped his brother create an alibi, gave him advice on how to dispose of the murder weapon and tried to arrange to deal with a bag left at the scene. *Held,* defendant sentenced to three years' imprisonment; the court declined to issue a DNA order. Although he knew that there would be an altercation between his brother and the deceased, the defendant did not know the details of the altercation, was never at the scene and had no involvement such as in other cases where offenders were directly involved in hiding the body or weapons; nor did he have an extensive criminal record. A significant mitigating factor was the early guilty plea and there were no aggravating factors present.

CRIMINAL LAW – Sentencing – arson *R. v. Tucker,* No. 2274077; 2312737; 2312738, Atwood, J.P.C., August 8, 2011. 2011 NSPC 46; **M24** ■

CRIMINAL LAW – Sentencing – assault using, or threatening to use, a weapon *R. v. Dann,* C.R.H. No. 328414, Coughlan, J., July 13, 2011; May 18, 2011 (orally). 2011 NSSC 275; **S633/23** ■

CRIMINAL LAW – Sentencing – breach of probation and possession of controlled substance *R. v. Dean,* No. 2248070; 2265145; 2267370; 2274081; 2274082; 2282155, Atwood, J.P.C., July 6, 2011; July 5, 2011 (orally). 2011 NSPC 40; **M24** ■

CRIMINAL LAW – Sentencing – conspiracy to commit murder *R. v. Belisle-Taylor,* Cr. No. 326639, Duncan, J., April 20, 2011; April 8, 2011 (orally). 302 N.S.R. (2d) 146; 2011 NSSC 159; **S628/7** ■ The defendant pled guilty to conspiracy to commit first-degree murder after police surveillance intercepted various telephone calls disclosing that three individuals were planning to kill a fourth. The defendant, who had a lengthy criminal record and was on probation at the time of the offence, drove around with the intended shooter, took him where he needed to go and was then to aid him in his escape. The Crown argued that the aggravating circumstances of the offence should impact on the calculation of pretrial custody (655 days). *Held,* defendant sentenced to ten years' imprisonment, with credit for time served on remand of 30 months. Although the evidence was clear that the defendant had participated in the planning of the murder and was prepared to participate to further that conspiracy, the plea was based on agreed facts that did not include an allegation that he was the shooter.

CRIMINAL LAW – Sentencing – firearms offences *R. v. Hill,* No. 2089492; 2089494; 2089496; 2089498; 2089500; 2089502, Hoskins, J.P.C., February 11, 2011. 2011 NSPC 28; **M24** ■ The defendant pled guilty to possession of a firearm while occupying a motor vehicle and possession of a firearm while prohibited after a search of his vehicle located an unloaded revolver, an unknown white powdered substance and a digital scale. Although he was on parole at the time, already subject to a lifetime firearms' prohibition and had nine prior convictions for, *inter alia*, possession of stolen property, conspiracy to traffic in cocaine and various breaches of court orders and recognizances, the pre-sentence report was generally positive. *Held,* defendant sentenced to 12 months' imprisonment; second lifetime firearms' prohibition order imposed. The fact that the defendant was already subject to a firearms' prohibition and the combination of drugs and firearms were particularly aggravating and although possession of an illicit substance did not form part of the charges, it was appropriate to consider it for contextual purposes. The sentence would have been higher had the gun been loaded or if there was readily accessible ammunition. Considering the nature and number of previous offences and that he was on parole at the time, there was a substantial risk that he would reoffend were he given a conditional sentence.

CRIMINAL LAW – Sentencing – for conviction of operating a motor vehicle while disqualified, possession of a prohibited weapon and breach of probation order *R. v. Billard,* No. 2275754; 2275756; 2275761, Derrick, J.P.C., June 10, 2011. 2011 NSPC 31; **M24** ■ The defendant pled guilty to operating a motor vehicle while disqualified, possession of a prohibited weapon (a knife) and breach of probation after he ran into a parkade; drove a vehicle to the exit; and reversed the vehicle, striking an officer standing behind him. He explained that he was at a bar with friends, one of whom was very intoxicated, and had ran to the parkade to move her car to a level closer to the entrance. He also indicated that he couldn't leave the parkade because he didn't have the parking ticket and when he struck the officer, he was simply backing up. He had a significant record as a youth, including numerous counts of car theft, taking a motor vehicle without consent, possession of stolen property, breach of an undertaking and criminal negligence causing death and one recent conviction for driving while disqualified. *Held,* defendant sentenced to a total of nine months' imprisonment, followed by eight months' probation. This was a unique situation in that the defendant was not a mature offender with a significant prior record and although he showed a continued disregard for the court order prohibiting him from driving and his prior record and the fact that he had violated the driving prohibition quite early in the term of the order for the second time were aggravating factors, his actions were materially different from those in the past and the importance of rehabilitation could not be forgotten.

CRIMINAL LAW – Sentencing – for dangerous operation of a motor vehicle causing death *R. v. Delorey,* C.R. Ant. 312887, McDougall, J., August 10, 2011. 2011 NSSC 319; **S634/4** ■

CRIMINAL LAW – Sentencing – home invasion and arson *R. v. Fitzgerald,* No. 2050132, Whalen, J.P.C., November 23, 2010. 2010 NSPC 73; **M24** ■

CRIMINAL LAW – Sentencing – incest, eligibility for conditional sentence *R. v. W. (M.J.),* No. 2206590, Atwood, J.P.C., May 31, 2011. 2011 NSPC 33; **M24** ■ The 21-year-old defendant was convicted of incest after he had sexual intercourse on three occasions with his 15-year-old half-sister. The Crown argued that the charge constituted a "serious personal injury offence", making the defendant ineligible for a conditional sentence. It also argued that he was in a position of trust toward his half-sister. *Held,* defendant sentenced to 18 months' imprisonment, to be served in the community, with one year of house arrest. The defendant was not in a position of trust as the complainant had consented to the intercourse and there was no relationship of authority between them and no evidence that he exploited any vulnerability on her part. Nor was this a "serious personal injury offence" as there was no evidence that his conduct endangered or was likely to endanger the life or safety of any person or was likely to inflict severe psychological damage upon any person.

CRIMINAL LAW – Sentencing – indecent assault, gross indecency *R. v. MacIntosh,* C.R.P.H. No. 339509, Kennedy, C.J., January 31, 2011. 2011 NSSC 341; **S634/31** ■

CRIMINAL LAW – Sentencing – manslaughter *R. v. Benson,* Pt.H. No. 311961, Bourgeois, J., April 5, 2011; February 2, 2011 (orally). 300 N.S.R. (2d) 186; 2011 NSSC 137; **S627/20** ■ The aboriginal defendant pled guilty to manslaughter after a group of individuals attended at the home of a 70-year-old man, kicked in the door and entered the residence, assaulting the man and stealing alcohol and his wallet. The defendant had no previous criminal record and there was no suggestion that he participated in the physical assault, although he was given some money from the wallet. The defendant testified that he was not aware of any plan to rob or assault the victim and it was felt that his involvement in this offence was out of character but he had been involved in the regular consumption of marijuana prior to the offence as he tried to deal with the ramifications of childhood abuse and a friend's unexpected death. *Held,* defendant sentenced to three-and-one-half years' imprisonment; reduced from four years due to factors relating to his Aboriginal heritage. Although he may not have instigated the situation, he had the opportunity to leave after the door was broken down but chose to enter the house, assist in the removal of beer and accept $20 from the victim's wallet.

CRIMINAL LAW – Sentencing – manslaughter *R. v. Hickey,* C.R.H. No. 314673, Cacchione, J., May 17, 2011; May 13, 2011 (orally). 2011 NSSC 186; **S628/22** ■ When the defendant entered a bar with his employer, the victim made some teasing comments about the employer, angering the defendant. When the remarks were repeated, the defendant became more upset, feeling the comments reflected badly on him. He later punched the victim once in the head with such force that it not only broke several facial bones but also sheared axons in his brain. Although the defendant performed first aid and called 911, the victim died. The jury rejected his justification of self-defence and found him guilty of manslaughter. *Held,* defendant sentenced to three-and-one-half years' imprisonment; he had acted recklessly in embarking on a dangerous course of action that carried a foreseeable risk of harm. Aggravating factors included the defendant responding to a verbal dispute that was none of his business with violence when he knew the victim had been drinking, the degree of force used and the continued notion that his action was justified.

CRIMINAL LAW – Sentencing – possession of cocaine, cannabis marijuana and ecstacy for the purpose of trafficking, possession of firearms *R. v. Lloyd,* No. 1851573; 1851575; 1851576; 2327884; 2327885; 2327886; 2331190; 2331191; 2331192; 2331193; 2331194; 2331195; 2331833, Atwood, J.P.C., July 27, 2011. 2011 NSPC 45; **M24** ■

CRIMINAL LAW – Sentencing – possession of crack cocaine for the purpose of trafficking *R. v. C. (L.),* No. 2223688; 2223690, Derrick, J.P.C., June 22, 2011. 2011 NSPC 35; **M24** ■ The defendant pled guilty to possession of cocaine for the purposes of trafficking and breach of a recognizance. Although he had three prior convictions for trafficking as a youth and his previous probation order had just ended, this was his first offence as an adult. *Held,* defendant sentenced to 30 months' imprisonment and granted 1.5:1 credit for the nine-and-one-half months spent on remand; this sentence acknowledged his choice to continue drug trafficking despite the court's strong and pointed warning of the consequences and the fact that he had only just finished his last youth sentence but ensured he would have the opportunity, before too long, to return to the community. There was nothing to disentitle him from the 1.5:1 remand credit as he had not been dragging out his remand to manipulate the system and, although the most significant delays were in his control, he should not be penalized for exploring a legal option, even if the likelihood of success might have been remote.

CRIMINAL LAW – Sexual assault – guilty *R. v. L. (E.R.),* C.R.H. No. 330641, Kennedy, C.J., August 29, 2011; July 29, 2011 (orally). 2011 NSSC 329; **S634/21** ■

CRIMINAL LAW – Sexual assault – minors, indecent assault, gross indecency *R. v. MacIntosh,* C.R.P.H. No. 339509, Kennedy, C.J., September 8, 2011; January 31, 2011 (orally). 2011 NSSC 340; **S634/30** ■

CRIMINAL LAW – Sexual assault – not guilty *R. v. M. (W.),* S.Y.D.J.C. No. 335121, Edwards, J., March 23, 2011; March 14, 2011 (orally). 2011 NSSC 118; **S625/22** ■ The 15-year-old complainant alleged that she had been sexually assaulted while staying overnight with the accused and his wife at their cottage. The assault occurred after a night of heavy drinking by all the parties and in the same bed where the accused's wife was sleeping/passed out. The accused denied any sexual contact. *Held,* accused found not guilty; although his evidence did not raise a reasonable doubt and the complainant's evidence was compelling, it was also problematic to the extent that it precluded a finding of guilt. She had returned to the accused's cottage the day after the alleged assault, knowing he would probably be home alone; had rated herself as extremely drunk on the night in question; and although she disclosed three to eight months after the event, she was unable to specify even the month in which the alleged assault occurred.

CRIMINAL LAW – Sexual assault – not guilty, complainant's recollection problematic *R. v. Francis et al.,* S.Y.D.J.C. No. 302487, Edwards, J., April 7, 2011. 2011 NSSC 140; **S627/16** ■ The first two accused were charged with sexual assault and the third accused

was charged as a party for videotaping the encounter and threatening to put it on the Internet. The complainant had been drinking heavily, with only a vague recollection of what had happened and there was conflicting evidence from a number of witnesses as to how drunk she really was. She testified the accused were driving her home when they stopped at a trailer, where she fell asleep fully clothed. When she woke up, she was naked and one of the accused had his penis in her vagina. When she told him to stop, the second accused grabbed her hair and stuck his penis in her mouth, at which point she gave up fighting and blacked out. The third accused alleged that the complainant had agreed to come to the trailer to see him if he would arrange a ride for her, which he had, and that they had consensual sex when she first arrived, following which she had sex with the other two accused, which he recorded on his phone. *Held,* all three accused found not guilty; the complainant's evidence was problematic, as she was unable to determine exactly what had occurred and although the accused's evidence was not accepted, it did raise a reasonable doubt. The court believed the third accused's version of how and why the complainant came to the trailer and that they had consensual sex but could not determine with any certainty what had happened after that. In any event, with regard to the third accused, the court was not satisfied that his actions in videotaping and threatening to put the matter on the Internet constituted aiding and abetting.

CRIMINAL LAW – Strict liability offences – defence of due diligence and officially induced error *R. v. Prest,* Ken. No. 345579, Moir, J., June 21, 2011. 2011 NSSC 244; **S630/17** ■ The defendant appealed his conviction for driving while suspended, relying on the failure of the Registrar of Motor Vehicles to deliver him a notice of suspension as founding a defence of due diligence and relying on advice given by a prosecutor to found a defence of officially induced error. The trial judge had found that the defendant had not received a notice of suspension and believed his licence was still in effect but convicted him on the basis that the suspension occurred by operation of law (following his guilty plea on a charge of driving without insurance) and ignorance of the law is no excuse. *Held,* conviction reversed and acquittal entered; the defendant had established both a due diligence defence and an officially induced error defence to the charge of driving while suspended. The decisions in *R. v. MacDougall* (1982) (SCC) and *R. v. Lowe* (1991) (CA) were binding on the court and, with the exception of s. 278, all the mandatory suspension provisions in the *Motor Vehicle Act* were triggered by an event that happened as a matter of fact, not law, which the driver will not necessarily know of. S. 205 contains no language suggesting that the legislation does the suspending and although, unlike other mandatory suspension provisions (except s. 278), taken literally, the conviction is the fact that triggers the Registrar's obligation to suspend the licence, the section cannot be given such a literal interpretation as the Registrar's obligation cannot arise until he is made aware of the conviction. The suspension turned on two events; namely, someone reporting the conviction to the Registrar and the Registrar acting as he was obligated to do, meaning that it did not occur by operation of law alone. As to the defence of officially induced error, the defendant believed in mistaken facts and that mistake was reasonable as it was based on an answer given by the prosecutor. He was not enquiring about the mechanics of a licence suspension but had asked about the effect of a conviction for driving without insurance on his licence and her response would lead a reasonable person to conclude that the power to suspend was with the judge (which was wrong) and the Crown was not going to ask the judge to do so in this case.

CRIMINAL LAW – Summary conviction appeal – dismissal for want of prosecution *R. v. Reddick,* Pic. No. 336979, Cacchione, J., March 7, 2011. 301 N.S.R. (2d) 73; 2011 NSSC 95; **S625/13** ■ Following an adjournment of the trial at the Crown's request, the accused had been sentenced to federal time in relation to other matters. The Crown then unsuccessfully applied for a second adjournment on the basis that the transport order required to transport him to court had been received too late. The court found that to proceed with the trial in the accused's absence would constitute an abuse of process and issued a stay of proceedings as no satisfactory explanation had not been offered for the Crown's failure to provide the required two-weeks' notice for the transport order. The requirement for significant advance notice of federal prisoner attendance was well known and, contrary to the Crown's assertions, the other justice officials involved had acted diligently once the order was received. The Crown appealed. *Held,* appeal allowed; stay of proceedings reversed; charges against the accused dismissed for want of prosecution. Although the trial judge had not erred in refusing to grant an adjournment, he had failed to provide any explanation as to why a lesser remedy was not appropriate in the circumstances. The transportation issue was entirely a result of the Crown's lack of diligence in obtaining a s. 527 order in a timely fashion and to say that the accused would not have been prejudiced by the granting of an adjournment because he was already in custody on another matter was simply an attempt to deflect attention from the Crown's responsibility in the matter. Nor did the court err in making an application for *Charter* relief on its own motion.

CRIMINAL LAW – Summary conviction appeal – for driving while disqualified allowed and conviction set aside *R. v. Ranni,* Syd. No. 344620, Bourgeois, J., June 1, 2011. 2011 NSSC 209; **S629/17** ■ The defendant appealed his conviction for driving while disqualified on the basis that the prohibition order incorrectly specified the penalty on indictment as imprisonment for two years as opposed to imprisonment for five years. The Crown argued that it was only necessary for the defendant to be informed that imprisonment in a federal facility was a possibility. *Held,* appeal allowed; conviction set aside. Being "informed" means being accurately advised (and not misled) as to the details of the significant penal exposure that might arise in the event the order was breached and there is a substantial distinction between a two-year and five-year maximum term of imprisonment. The fact that the Crown had advised the defendant that it would be proceeding summarily did nothing to retroactively correct the misleading information in the prohibition order.

CRIMINAL LAW – Summary conviction appeal – sentence for assault causing bodily harm *R. v. Chickness,* C.R.A. No. 336301, Scaravelli, J., June 10, 2011. 2011 NSSC 225; **S630/1** ■ The defendant, who had an extensive prior record, was convicted and sentenced on charges of assault causing bodily harm and possession of a weapon dangerous to the public peace after he swiped a knife across the complainant's face during an altercation. The Crown appealed the sentence, acknowledging that the court had erred in law by imposing sentences that exceeded the statutorily allowable maximums. *Held,* appeal allowed; defendant sentenced to a 15-month conditional sentence on the charge of assault causing bodily harm and three months concurrent on the charge of possession of a weapon, followed by 18 months' probation. Although the attack was unprovoked, there was no evidence of premeditation and the defendant had complied with conditional sentences on two previous occasions.

CRIMINAL LAW – Theft over $5,000 – acquitted *R. v. Crowe,* No. 1577836; 1577837; 1577838; 1577839, Gabriel, J.P.C., April 19, 2011. 2011 NSPC 19; **M23** ■ The accused, known to be a heavy drug user, was charged with two counts of theft and two counts of possession of stolen property after several items were stolen from his mother's home. He had returned home early in the morning and spoken briefly with his stepfather, who then went upstairs to shower, leaving him alone. When the stepfather returned, the accused and the property were gone. There were no signs of forced entry but the mother often left the back door, which had been kicked in several times, unlocked and keys to this door, which constantly went missing, hung on a hook in the home. The accused denied taking the items when confronted by his mother over the phone and when she threatened to call the police if he didn't come home, he moved out of the area to live with his father, not returning for five years. *Held,* accused acquitted on all counts; although anyone would be suspicious of his involvement in the disappearance of the property (he had a drug habit and no obvious means of support), it was not sufficient for the Crown to show that he had "probably" committed the offences. There was no witness who saw the accused take the items from the home nor any evidence that he was ever seen in possession of the stolen property. It could not be stated with any certainty when the property went missing given that the stepfather was completely unsure when he had last seen the missing items. There was also uncertainty around whether the back door was locked on the day in question, whether it could be opened with minimal force even when locked, the plethora of missing keys and evidence with respect to other break and enters in the area around that time. The court was not prepared to infer that the accused had not returned home for five years due to a "guilty mind" when his actions could be explained by other factors.

CRIMINAL LAW – Theft over $5,000 – guilty, credibility *R. v. Lee,* No. 2119017; 2119018; 2119019, Derrick, J.P.C., May 18, 2011. 2011 NSPC 26; **M23** ■ The accused was a long-time, trusted employee and assistant manager of a spa. Despite the business expanding rapidly, a cash flow problem was noted and, after the accused left her employment, a forensic audit was conducted. The audit showed that a considerable amount of money had not made it into the business' bank account; certain client accounts had not been credited with payments from their insurer, while the accounts of the accused and her relatives had received comparable amounts of money; and a number of accounts, mainly those of the accused and her relatives, had been favourably adjusted through a corrective procedure known as "back dating". There was approximately $70,000 that could not be accounted for. The accused was charged with theft over $5,000 and fraud. At issue was the identity of the person(s) responsible. *Held,* accused found guilty on both counts as this was the only reasonable inference to be drawn from the evidence; although other employees had access to the lock box, the accused was the best situated to steal the money as she was expected to do the deposits and take them to the bank, giving her the best access to the funds with the least risk; the insurance allocations were also the accused's responsibility and anomalies in these allocations clearly showed similar amounts only going into her account and those of her family members, for which no explanation was offered; nor could the accused explain the back dating of accounts connected to her. The accused had prepared all but one of the deposits involved in the theft allegation and although a significant amount of cash had went missing on this one other occasion, the court found that the money had previously been taken by the accused. The accused's testimony, which was contrary to that of the other witnesses, that she had never been shown how to do bank deposits or reconciliations and that, generally, she did not go to the bank to make deposits was not believed. She had contradicted herself on various matters, including the circumstances under which she made bank deposits and, in her police interviews, she had essentially admitted to the charges.

CRIMINAL LAW – Uttering death threat – guilty *R. v. Moulton,* No. 2219032; 2219033; 2219034; 2219035, Williams, J.P.C., July 15, 2011. 2011 NSPC 48; **M24** ■

■ DAMAGE AWARDS

DAMAGE AWARDS – Personal injuries – pre-existing condition *Awalt v. Blanchard,* Hfx. No. 285106, Coady, J., March 16, 2011. 2011 NSSC 111; **S625/17** ■ The plaintiff personal care worker suffered a whiplash, resulting in neck and shoulder pain. Although she returned to work after one week, the pain increased with the number of days worked and she required help with activities she could formerly do on her own. A year later she developed increased shoulder pain along with a burning and tingling in her arm. A diagnosis of shoulder A/C joint pain tendinitis was made, with flare-ups being caused by lifting activities at work. She underwent surgery which helped but did not completely resolve the problem. The defendant challenged causation between the accident and the shoulder surgery, arguing that it was caused by the accumulated physical demands of her employment. The defendant's medical expert opined that although the accident had caused a whiplash injury with discomfort into the shoulder, since no "ripping or tearing" of the shoulder had been detected at the time and the severe pain which eventually developed was not present, the current injury could not have been associated with the accident. *Held,* general damages of $2,500 awarded; the tearing and fraying in the plaintiff's shoulder was caused by a series of injuries incurred at work over a number of years. The plaintiff suffered a mild to moderate whiplash but her years of employment as a personal care worker involved heavy lifting, resulting in previous injuries and although it was clear that many doctors accepted that all of her injuries were caused by the accident, none of the medical evidence established the necessary causal link between the injury sustained in the accident and the shoulder surgery.

DAMAGE AWARDS – Personal injuries – pre-existing condition, crumbling skull *Urbenz-Jacks v. Ploudre et al.,* Hfx. No. 230586, LeBlanc, J., July 8, 2011. 2011 NSSC 278; **S632/14** ■ The plaintiff was previously injured in two separate motor vehicle accidents and was still experiencing discomfort, fatigue and headaches when she was involved in a third accident. She complained of headaches, neck and back pain, pressure in her head, nausea and vomiting, confusion, irritability and an inability to concentrate and learn new tasks for close to eight years after the last accident. She was only working four days per week prior to the third accident but found even this was too much after the accident and eventually stopped working altogether. *Held,* general damages of $52,000 assessed (the starting point of $75,000 was reduced by 30 per cent on account of contingencies); $17,000 awarded for cost of future care. The plaintiff was an example of a crumbling skull as her pre-existing conditions were not stable and she was still suffering debilitating effects from the previous car accidents, which were accelerated by the current accident. She had suffered a lumbar sprain and developed a myofascial pain syndrome in the neck and the accident had also aggravated her pre-existing headaches and TMJ issues, with the pain interfering with her sleep and most likely being the cause of her mental difficulties. As she had not suffered a total loss of earning capacity, this claim was addressed as part of the general damage award.

DAMAGE AWARDS – Personal injuries – traumatic brain injury, causation *Hayward v. Young,* Hfx. No. 244134, Robertson, J., July 18, 2011. 2011 NSSC 294; **S633/3** ■ The plaintiff suffered soft tissue injuries to his shoulder, neck and upper back in a motor vehicle accident. The plaintiff also alleged that he had suffered a traumatic brain injury in the accident. Three years after the accident, an MRI revealed some residual scarring to the inferior frontal lobe. *Held,* plaintiff awarded $120,000 for general damages and $10,000 for cost of future care; no award made for loss of future income or loss of valuable services. There was insufficient medical evidence to establish that the plaintiff had suffered anything other than serious soft tissue injuries that developed into chronic pain as a result of the accident and it was noted that he had managed to work continuously at a job where his responsibilities had increased following the accident, despite suffering chronic pain, depressive episodes, substance abuse and a second motor vehicle accident. The chronic pain was most likely the main cause of the depressive episodes and there were other plausible explanations (stress, medications, alcohol abuse and dramatic changes in his work and family situation) to account for his complaints of memory loss, lack of concentration and decrease in executive functioning. The soft tissue injuries were assessed at the high end of the *Smith v. Stubbert* range.

■ EMPLOYMENT LAW

EMPLOYMENT LAW – Defamation – prejudgment interest *Nichol v. Royal Canadian Legion, Branch 138 Ashby,* Syd. No. 284735, Bourgeois, J., June 1, 2011. 2011 NSSC 210; **S629/18** ■ The plaintiff was awarded $45,000 in a defamation action and sought prejudgment interest on that amount from the date of the cause of action, even though the relevant events had occurred seven years ago and the action was not commenced until four years later. *Held,* prejudgment interest limited to a four-year period; costs in the amount of $13,250 awarded. The matter should not have taken seven years to advance to trial and the fact that the parties were involved in a dispute before the Labour Standards Tribunal until shortly before the action was commenced did not account for the extent of the delay.

EMPLOYMENT LAW – Wrongful dismissal – defamation *Nichol v. Royal Canadian Legion, Branch 138 Ashby,* Syd. No. 284735, Bourgeois, J., April 12, 2011. 302 N.S.R. (2d) 208; 2011 NSSC 144; **S627/27** ■ The plaintiff was a long-standing member and former employee of the defendant. He worked the bar for over 11 years, and was fired (along with other bartenders) after an investigation revealed they were selling drinks at happy hour prices outside of the designated happy hour time. After he was fired, the defendant: stated to Human Resources Development Canada (HRDC) that he was let go due to "wilful misconduct or criminal conduct", resulting in a denial of his EI benefits; wrote a letter to HRDC stating his conduct "may be considered fraudulent"; and said, through an agent at a member's meeting, that bar staff had been involved in the "misappropriation of funds". The plaintiff argued these statements were all defamatory and felt he should be compensated for the resulting impact on his life. *Held,* the second and third statements are defamatory, and neither excused by the defence of justification nor qualified privilege. After discussing the law on defamation and the facts in great detail, the court awards the plaintiff $45,000 in general damages, recognizing his own actions (picketing, talking to the media) and the impact on his life. There will be no award of aggravated damages. There was no actual malice, nor was the defendant's conduct so malicious or high-handed as to justify an award of punitive damages. Using the phrase "may" in relation to fraud doesn't mitigate the imputation of criminal conduct. While the defendant was obligated to respond to HRDC's inquiries, the reference to fraud was unnecessary and exceeded the scope of qualified privilege. Although the plaintiff wasn't mentioned by name at the membership meeting, everyone present would have reasonably believed the comments being made pertained to him. The words "misappropriation of funds" were used with the defendant's full knowledge, the speaker's intent is irrelevant; the words "misappropriation of funds" are capable, in their natural and ordinary meaning, of being defamatory.

■ EVIDENCE

EVIDENCE – Admissibility – 911 emergency calls *R. v. Hamilton,* C.R.H. No. 336711, Rosinski, J., July 27, 2011. 2011 NSSC 305; **S633/15** ■ The accused was charged with assault causing bodily harm, uttering threats and wilful damage of property following an altercation with a taxi driver. A voir dire was held to determine the admissibility of the 911 emergency call made by the complainant, with the Crown arguing for admissibility on the basis of the "excited utterances" or *res gestae* exception to the hearsay rule. The evidence showed that the alleged crimes were complete before the complainant began speaking to the 911 operator. *Held,* evidence of 911 calls not admissible; although the calls were capable of being *res gestae* and admissible for the truth of their contents because the complainant was still under the ongoing stress of very recent traumatic events, the probative value (being very limited as it tended to be in the nature of a prior consistent statement and the complainant was available to testify to the events in question and for cross-examination) was significantly outweighed by the possible prejudice to the accused's fair trial rights.

EVIDENCE – Pretrial motion – to exclude expert evidence *Anderson v. Queen Elizabeth II Health Sciences Centre et al.,* Hfx. No. 155158, Bourgeois, J., June 8, 2011. 2011 NSSC 226; **S629/30** ■ Liability was hotly contested in this medical negligence case. The defendants agreed there were three possible causes for the plaintiff's injury. Both sides to the dispute would be relying on medical expert evidence. The plaintiff filed a report outlining a medical expert's opinion on the relative probabilities of the three theories of causation. The defendants sought to have the report excluded, claiming the use of epidemiological evidence in this case was inappropriate and inadmissible. They argued the expert, by expressing his opinion, was trying to usurp the court's function by determining causation. *Held,* motion dismissed. The report in question is both relevant/reliable and necessary. It is not a novel use of epidemiological evidence, nor will it usurp the court's role as ultimate decision maker. It is one piece of evidence that will only be weighed after the defendants are given an opportunity to challenge it at trial. It is premature to decide it's inadmissible. This is a medically complex case, and the report may help the court understand the other medical evidence as it relates to the competing theories on causation.

■ FAMILY LAW

FAMILY LAW – Child in need of protective services – permanent care and custody order *Nova Scotia (Minister of Community Services) v. H. (A.) et al.,* No. 068399; 069644, Haley, J., June 23, 2011. 2011 NSSC 255; **S633/25** ■

FAMILY LAW – Common-law relationship – child support, division of property, unjust enrichment *Beaton v. MacNeil,* S.F.S.N.M.C.A. No. 65736, Wilson, J., July 28, 2011. 2011 NSSC 302; **S633/19** ■ The parties had two children; one now an adult, the other aged ten. Historically, the father was the primary income

earner and the mother cared for the home and children. She eventually worked outside the home part time. There was some question as to whether theirs was a common-law relationship. The father cited (in part) several breakups and the fact they declared as single on income tax returns until a Canadian Revenue Agency (CRA) audit in 2008. They had acquired several assets, including the family home and two lots. The purchase of these properties was financed by the father (mostly from personal injury settlements, a job severance payout and workers' compensation benefits) but they were registered in the mother's name alone. She declared bankruptcy in 2008. The trustee determined she was the sole owner of the home and one lot. The father contacted the trustee and disputed the mother's interest in the lot. When she was discharged, she repurchased these properties from the trustee at fair market value. The father retained the third lot. He agreed the mother was entitled to the family home, but each claimed an interest in the other property retained by the other party based on constructive and/or resulting trusts. There was also an issue regarding retroactive support for the now adult child. *Held,* the father established an interest in the lot retained by the mother, based both on a "money purchase resulting trust" and a constructive trust/unjust enrichment. When she made the assignment in bankruptcy, the mother wasn't aware this lot was in her name nor did she believe she owned it. Since she was holding the lot in trust for the father, it wasn't divisible by her creditors. As a superior court, the court has and will exercise the authority to rescind the sale and direct the trustee to return the full purchase price to the mother. *In obiter*, the court observed the father had a similar interest in the family home but, by failing to pursue it, was not entitled to relief (which could have been a return of the $19,000 he paid towards the purchase plus a share in any increase in the home's value). The fact the mother was able to retain what was the father's interest in the family home is relevant to the claim for a share of the property retained by the father. While she contributed to the family by caring for the children and home, she has not been deprived since she has retained the home (and its contents), which has significant equity even satisfying her obligation to her creditors. Retroactive child support will be paid for the period of time following separation that the eldest child was a dependant.

FAMILY LAW – Common-law relationsip – separation, effect of cohabitation agreement *Harrington v. Coombs,* S.F.H.P.A. No. 071113, Dellapinna, J., January 28, 2011. 297 N.S.R. (2d) 175; 2011 NSSC 34; **S623/12** ■ The mother insisted the parties move in together immediately before the father was deployed for a tour of military duty. In response, he insisted they sign a cohabitation agreement. At the time, they didn't contemplate having children. She chose not to get independent legal advice. A few years later they had two children. They sold the father's home and used the equity to buy first one and then another home, refinancing more than once. The father sought an order requiring the home to be sold, and an unequal division of assets. The mother, who had primary care and continued to live in the house, sought an equal division of property, including a division of the father's pension, and spousal support. She insisted the cohabitation agreement shouldn't be enforced because circumstances had changed so drastically since it was signed. She had stayed at home with the children for some time and had suffered from postpartum depression, but was now working. *Held,* the cohabitation agreement is valid. It's not unusual for things to change over the course of a relationship. The agreement wasn't unconscionable. The mother failed to show the negotiation process was flawed due to an imbalance in power/control. She presented the father with an ultimatum, prompting him to suggest the agreement. She read it and had a chance to obtain advice; any pressure she felt was self imposed. There was no evidence of improper conduct, compulsion, cheating or coercion by the father. It's not true she gained nothing from the agreement their living arrangement allowed her to work part time, and for a time not at all, and to continue her studies. The home should be sold, but the mother will have 30 days to obtain financing to buy out the father's (equal) share of equity. *In obiter*, even if the cohabitation agreement had been overturned, this is not a case where the father's pension should be divided. While the mother cared for the children, there's no evidence she contributed to the father's career. He wasn't unjustly enriched by her contributions to the household. He was the primary income earner and contributed equally if not more. Any chores she performed were offset by his paying of the expenses. No spousal support is warranted on the facts, even if the waiver of support in the cohabitation agreement is invalid. The mother's net income, after taking into account child support, actually exceeds the father's. Even if she were entitled, the father has insufficient ability to pay.

FAMILY LAW – Costs – application to vary custody, child support and property division *Smith v. Smith,* No. 1201-64292, Jollimore, J., July 25, 2011. 2011 NSSC 304; **S633/14** ■

FAMILY LAW – Costs – contempt and variation applications *Armour v. Sorhaindo,* S.F.H.O.T.H. No. 042647, Legere-Sers, J., January 20, 2011. 2011 NSSC 33; **S623/6** ■ The parties have two children. The father earns well in excess of $200,000 per annum, but still failed to pay child support as ordered. The mother applied to vary (increase) support and collect arrears based on several changes in circumstance. She lost her (well-paying) job just before trial. The respondent cares for two young(er) children with his new partner, and has historically incurred high access costs to ensure regular contact with his eldest children. The parties reached a settlement on the quantum of arrears and ongoing support just before trial. Their agreement essentially gave the mother what she was seeking at trial, and so she felt she was the successful party. The late settlement didn't avoid much prep time, since the parties still had to file affidavits and briefs. The mother sought a finding of contempt based on the father's failure to secure and supply timely proof of life insurance as ordered, as well as costs in relation to the contempt and variation applications. She claimed her legal costs were over $13,000, and wanted reimbursement for travel and hotel costs. She also asked the court to set a schedule for repayment of the arrears. The father asked for extra time to repay, citing: high access costs; obligations to his new family; and an outstanding tax bill. *Held,* costs of $2,000, plus disbursements awarded to the mother in relation to the variation application. Her request for reimbursement on the travel and hotel costs are disallowed for lack of evidence. There was only just over an hour and a half of court time; the mother made no concessions, and her costs are deductible. There's no evidence to allow the court to discern how much of the mother's legal fees relate to the contempt issue, and how much relate to the variation application. The mother has shown the respondent was in contempt of court by failing to exercise due diligence or take reasonable measures to ensure compliance with the insurance requirement(s). There was no need to prove intent; the order was breached. Absent significant evidence compliance wasn't possible for reasons outside his control, there's no good excuse for the breach. Costs are the appropriate remedy; $1,500 awarded to the mother in relation to the father's contempt. He will have seven months to repay the arrears. Relevant to this determination is that it's critical these children maintain regular contact with their father.

FAMILY LAW – Custody, access and child support – variation *Rose v. Rose,* S.F.H.M.C.A. No. 064836, Gass, J., July 19, 2011. 2011 NSSC 295; **S633/17** ■

FAMILY LAW – Custody, access and child support – variation *Pretty v. Pretty,* No. 1206-5188, Forgeron, J., July 18, 2011; July 8, 2011 (orally). 2011 NSSC 296; **S633/26** ■

FAMILY LAW – Custody and access – mobility, primary caregiver relocating *Sherman v. Rafuse,* F.N.G.C.F.S.A. No. 39746, Wilson, A.C.J.F.C., May 31, 2011. 2011 NSFC 16; **FC38** ■ The father applied for custody of the parties' six-year-old daughter. The mother sought the court's permission to move the child to Alberta, where she had recently secured work as a corrections officer. Although the child was in the mother's sole custody most of her life, she had spent periods of time living with other caregivers (including three months living with her father) while her mother pursued her education, and was now living with her maternal grandmother pending the resolution of this dispute. She exercised weekend access with the father, who had two older children from a prior relationship and two younger children from his current relationship. The mother had been living in Alberta long enough to secure a residence and had a comprehensive plan in place should the child be permitted to move. She agreed to return to Nova Scotia if permission for the move was denied. *Held,* the mother will be permitted to relocate the child. Her decision to accept employment in Alberta constitutes a material change in circumstances. For the most part, the child has been in her care, save for a few periods related to the mother's need to finish her schooling and settle in her new job. She has a good plan for access, and the child has established a good relationship with the father that can be maintained via Skype, phone calls and extended summer visits. Requiring the mother to sacrifice a stable and rewarding (personally and financially) career to remain in Nova Scotia doesn't benefit the child in the long run.

FAMILY LAW – Custody and child support – variation *K. (C.N.) v. A. (A.E.),* No. 04Y035494, Comeau, J.F.C., April 20, 2011. 2011 NSFC 9; **FC38** ■ The current order gave the mother primary care of the parties' two children (ages 13 and 10). The eldest child had been living with the father for several months, and had changed schools. He sought primary care of her, and to reduce his child support payments. The mother initially agreed to the change in custodial arrangements, but the child's marks dropped and she wasn't following the mother's rules. There were issues raised about the father's drug use and parenting choices (allowing unrestricted access to the Internet, permitting contact with unsavoury individuals) and the way he treated the mother in front of the children. Child support was such a contentious issue for him that the mother said she didn't care about getting any, she just wanted the kids to live with her. An assessment report supported her plan but indicated both children wanted to spend more time with their father. The assessor found the mother was better equipped to effectively deal with schooling issues and discipline. The father didn't testify, but his new spouse did. *Held,* custody to the mother, with access to the father of three consecutive three-day weekends per month. The court found the parties' disagreement over parenting arrangements sufficient to establish a change in circumstance. The eldest child will return to the mother's home immediately. While this will require her to change schools, she will be returning to her former school and is capable of making the change. Joint custody is unworkable because of the conflict. The mother's parenting style is more conservative and she is better able to ensure the children's needs vis-a-vis schooling and discipline are met. Since the mother agrees, and because it is such a contentious issue for the father, no child support will be payable. Instead, the father will ensure the children's financial needs are met when they are with him.

FAMILY LAW – Custody and child support – variation, mobility *Walsh v. Musolino,* S.F.H.M.C.A. No. 059813, Legere-Sers, J., July 21, 2011. 2011 NSSC 289; **S633/9** ■ The parties never lived together. They could not agree on parenting arrangements for their three-year-old daughter. Since she was born, the father was away significant periods of time as a result of his military job. The order allowed for regular access to the father when he was home, and said the mother would not relocate without his permission. The mother, who had a child from a previous relationship with a serious medical condition, moved almost two hours away from the Halifax Regional Municipality (HRM) shortly after the father returned from a tour in Afghanistan. All of her supports and family were either in HRM or Mount Uniacke. She claimed the father agreed to the move. He felt it seriously impacted his access to the child and sought her return the HRM. *Held,* the child will be returned to the HRM or Mount Uniacke. The father did not agree to the move and it appeared the mother moved for selfish reasons. It was not in the best interests of either child to live so far away from the father, and other (including medical) supports. If the mother refuses to move, this could lead the court to reconsider the father's alternative request for a shared parenting arrangement.

FAMILY LAW – Custody – religious upbringing, summer access, custody and access assessment *MacLean v. Boylan,* S.F.H.M.C.A. No. 032826, Jollimore, J., May 4, 2011. 2011 NSSC 314; **S633/31** ■ The father, a Roman Catholic, and the mother, a member of the United Church, agreed their child could participate in both churches but that any decision as to which church to join would be left for the child to make when she is old enough. Their parenting agreement provided that all major decisions would be shared and, in the event of disagreement, they could ask the court to decide. The father wanted their now almost seven-year-old child to participate in ceremonies that would result in her becoming a member of his church. He pointed to the fact the child, who attended religious classes with her peers at the church, would be disappointed if all of her friends got to participate while she could not. The mother felt it was inappropriate to have the child take such steps while she is still too young to appreciate what they mean. The father asked the court to decide this issue and to vary the agreement to allow him additional access. He also sought to have the court order a custody and access assessment, with a psychological component. The current agreement had the child spending almost equal time with each parent, with frequent exchanges and stays of short duration. It provided for a review. The evidence showed the child has an exceptionally close bond with her mother. *Held,* father's applications are all dismissed. The parties agreed the child would determine her own religion when she is old enough. She is not old enough. While there is a social component to the ceremonies in question, and the child is undoubtedly going to be disappointed, that is not sufficient reason for the court to overturn a decision the parents made together when the agreement was executed. The court provided some direction as to how the impact of this decision on the child could be lessened if they so choose. After reviewing access, the court finds it is in the child's best interests to keep the current arrangements in place. The father's objectives (visiting extended family, etc.) can be achieved without any changes being made. His proposed changes are not in the child's best interests but rather to accommodate his work schedule. The court declines to order a custody and access assessment. The father doesn't seek to dramatically vary the child's parenting arrangements or to move from supervised to unsupervised access. He hasn't met the burden of proving such an assessment is needed (i.e., that a professional opinion is needed or is likely to provide the court with information otherwise unavailable because it falls within the assessor's specialized knowledge).

FAMILY LAW – Custody – shared custody and mobility *M. (D.M.) v. M. (T.C.),* No. 1205-002847, Scaravelli, J., June 28, 2011. 2011 NSSC 261; **S632/1** ■ The parties had lived in New Glasgow with their three children (now ages 18, 14 and 11). The 18-year-old was now living and attending school in Ontario. Since separation, the children were in a shared custody arrangement (50/50 split), which was modified temporarily to allow the father to work in Ontario for a short period of time. When the mother's partner (an RCMP officer) was transferred, she sought the court's permission to relocate the two younger children to Fall River. The father wanted them to stay in New Glasgow. He proposed liberal access for the mother, offered to contribute to her access costs and agreed to forgo any claim for child support. *Held,* considering the factors in *Gordon v. Goertz*, the move is not in the children's best interests. While each is a good parent and has something to offer the children, the move is not to further the children's interests but rather to allow the mother to be with her partner. The children are heavily involved in their school and community (including church and sporting activities). Their extended family all live in New Glasgow. They can still maintain a meaningful relationship with the mother; the father's plan is in their best interests.

FAMILY LAW – Custody – shared parenting *Gibney v. Conohan,* S.F.S.N.M.C.A. No. 067852, O'Neil, J., July 6, 2011. 2011 NSSC 268; **S633/28** ■ The parties, two successful lawyers working as partners in the same small firm, couldn't agree on parenting arrangements for their two children (ages nine and seven). Their marriage ended (in 2009) as a result of the father's infidelity. The mother imposed a post-separation parenting arrangement that saw the children in her primary care. She sought to continue this arrangement, at least in the interim, arguing it best reflected the pre-separation reality and that the status quo should be maintained. The father bought a home in the same neighbourhood as the mother and sought a change to shared parenting on a week on/week off basis. Each felt the other was a good parent, but the mother felt she was a better and more child-focused parent. The evidence showed the father was more willing to facilitate contact with her than she with him. *Held,* discussing at length the factors to consider when making such an order, the court ordered shared parenting to commence immediately on a week on/week off basis, with mid-week access for the parent not having care of the children that week. There was no special provision outlined for holiday access, although summer access was addressed. Both parents are good parents and their parenting styles are more similar than the mother realizes. Both plans are strong plans, but the father's plan is in the child's best interests. While the mother is concerned that the parties are unable to communicate, this isn't necessarily a bar to a shared parenting arrangement. At any rate, the change to shared custody should alleviate stress and improve their relationship. It will reduce transitions. The parties have shown they can work together as law partners and there is no reason they can't work together as parents with the same civility they use at work. While the father was distracted near the end of their marriage, and may have participated less with the children, that is no longer the case, nor was it historically. A shared parenting arrangement will allow each parent to develop a routine, although their routines may be different. Of relevance is the fact a change in the parenting arrangement will allow the mother more freedom to pursue her career while the children are not in her care. While this is an interim order, the overriding principle is always the best interests of the children. The court discussed the concept of "status quo" as it relates to interim hearings at great length. The evidence shows the mother prolonged matters. Over two years have passed since the parties separated. While it was an interim hearing, the court had extensive and detailed evidence upon which to base its decision.

FAMILY LAW – Custody – shared parenting schedule *Murphy v. Hancock,* S.F.H.M.C.A. No. 055370, O'Neil, J., May 25, 2011. 2011 NSSC 197; **S629/19** ■ The parties were in a shared parenting arrangement with mid-week transitions. They both agreed it was too disruptive for their two elementary school aged children. The mother sought primary care with weekend access for the father. The father wanted a week-on/week-off shared parenting arrangement. The mother agreed to try it for a month, but felt it wasn't in the children's best interests. She criticized the father's parenting skills and argued the parties couldn't communicate well enough for shared parenting to work. *Held,* shared parenting based on the father's proposal, with a short mid-week visit for the parent not having parenting time that week. Child support will be in the set-off amount based on the parties' incomes in the preceding year. There has been a change in circumstances. Both parents are good, child-focused parents. While they may not enjoy communicating, recent events show they are able to do so at an acceptable level for effective parenting. The mother's plan would result in a drastic reduction of the father's parenting time. The father's plan continues maximum contact with both parents but eliminates the stress of midweek transitions and reduces conflict between the parties. It is in the children's best interests. The 12 factors outlined in *Hackey* [2009] are helpful. The routines the parents implement during their parenting weeks need not be identical. There is a value to children learning from different approaches, and the court rejects the notion that it will be presumptively disruptive or stressful for children to experience different ways of parenting.

FAMILY LAW – Custody – variation *S. (G.) v. H. (C.),* F.L.B.M.C.A. No. 051601, Dyer, J.F.C., August 15, 2011. 2011 NSFC 19; **FC38** ■

FAMILY LAW – Division of assets – based on two marriages to same parties *Saunderson v. Lang,* S.F.H.D. No. 071417; 1201-064761, Williams, J., June 8, 2011. 2011 NSSC 282; **S632/17** ■

FAMILY LAW – Divorce – application for interim child support, whether private school education an extrordinary expense *Gordinier-Regan v. Regan,* No. 1201-065135, Jollimore, J., July 19, 2011. 2011 NSSC 297; **S633/7** ■ This interim hearing was confined to the question of whether or not private school tuition for the 2011/2012 school year amounts to an extraordinary expense under the Federal Child Support Guidelines and whether and in what amount the father should be required to contribute to the cost. The children are six and seven. Both attended private schools since pre-primary. The parties separated over a year ago. Since then, the children were moving for the second time and the mother had returned to work at a demanding job. There was some evidence both children have experienced anxiety and difficulty adjusting to the separation. The father felt his 2011 bonus (of $119,000) should not be taken into account, given it is an uncertainty (both in terms of amount, and whether there will be one at all in subsequent years). *Held,* the father will contribute a proportionate share (84 per cent) of the private school tuition for both children, and the mother will be responsible for ancillary costs (uniforms, school trips). The expense is necessary, reasonable and extraordinary. The children require stability given all of the other changes they have experienced. This is an interim application, and the status quo is in the children's best interests. In the context of the parties' means and pre-separation spending pattern, the expense is reasonable. It is not one the mother can reasonably afford on her own. It is appropriate to take into account the father's 2011 bonus in setting his 2011 income. This is an interim hearing concerning a narrow, time-limited issue and the contribution should based on what the father has actually earned.

FAMILY LAW – Divorce – change of name, custody, child support *L. (T.L.) v. L. (R.W.),* S.K.D. No. 068500; 1204-005176, Duncan, J., July 7, 2011. 2011 NSSC 277; **S632/20** ■ The parties were together for over 17 years, more than 15 of which they were married. Their daughter (age 16) lives with the mother, and the son (age 14) lives with the father. The son's relationship with the mother has been a difficult one and he refuses to exercise access with her. The issues before the court included access, child support (ongoing and retroactive), extracurricular expenses (including the cost of horseback riding and maintaining horses for both children) and spousal support for the mother. The mother felt income should be imputed to the father based on what she felt was his underemployment. The evidence showed his income went down by about $8,000 per year after separation. *Held,* there will be defined periods of access for each child and the father will encourage the son to attend his visits. Should things not improve, the parties may have to involve a professional counsellor. The evidence shows the father's decision to be more available for his son is directly responsible for the reduction in his income; he's not underemployed without a valid excuse. Child support (retroactive and ongoing) will be paid in the set off amount based on the parties' actual incomes. The court looked closely at the Federal Child Support Guideline, s. 7 expenses at issue in this case. The mother will have to contribute a proportionate share to extracurricular and health related costs, including the cost of having the children participate in horse shows, but she will not have to contribute to the cost of maintaining the horses or the extra transportation costs incurred by the husband in this regard. These costs are necessary but they are not reasonable in light of the parties' respective incomes; however, the fact the husband will continue to pay them is relevant when considering spousal support. The mother is entitled to spousal support on a compensatory basis. She retrained during the marriage, is getting closer to self sufficiency and young (age 39), which gives her many working years left before retirement. Given the parties' respective means and needs, only nominal support is warranted. The father will pay at a rate of $100 per month for one year, at which time the payments will end unless the court orders otherwise.

FAMILY LAW – Divorce – division of property and matrimonial debt *Bennett v. Bennett,* No. 1217-00587, Legere-Sers, J., July 15, 2011; October 22, 2010 (orally). 2010 NSSC 444; **S633/30** ■

FAMILY LAW – Divorce file – request for order to seal granted *Foster-Jacques v. Jacques,* No. 1201-64463; S.H.F.D. No. 069582, MacDonald, B. J., July 13, 2011. 2011 NSSC 290; **S632/29** ■ In response to a media request to view the contents of their court file, the parties sought to have the court seal the file pursuant to the authority of Rule 59.60 of the *Civil Procedure Rules* (2008). They did not ask to exclude the public from the hearing, nor did they seek a publication ban. *Held,* the file will be sealed. Rule 59.60 does not provide any guidance as to when it would be appropriate to seal a file, but Rule 85.04(1) does. It seems the principles in the Supreme Court of Canada decisions of *Dagenais* (and related cases) apply here. These cases suggest a confidentiality order should only be granted when necessary to prevent a serious risk to an important interest; there are no less intrusive measures available; and the benefits outweigh the costs (including the effect on the right to free expression and the open court principle). Personal embarrassment or damage to a party's reputation isn't enough. Here the important public interest is the protection of personal identifiers (eg. SIN's, addresses, bank account numbers and other personal information required on court documents). Having these identifiers accessible to members of the public can result in identity theft, which is a real and serious concern. The court is able to take judicial notice of the fact society values the prevention of identity theft (and that it exists in the first place). There are no less intrusive measures to prevent access to this personal information that aren't cumbersome and costly for the parties and court administration staff. The salutary effects of a sealing order outweigh its deleterious effects, especially since the public will still be permitted to access the court hearing and any decision that is rendered at its conclusion. The open court principle was crafted at a time when the internet was not a public source of information and manipulation.

FAMILY LAW – Divorce – long-term marriage, separation agreement set aside *Baker v. Baker,* No. 1210-001034, MacLellan, J., June 23, 2011; March 24, 2011 (orally). 2011 NSSC 272; **S632/6** ■

FAMILY LAW – Divorce – matrimonial home, unequal division of assets and debts, employment pensions, spousal support *Poirier v. Poirier,* S.F.S.N.D. No. 1206-5796, Wilson, J., May 2, 2011. 2011 NSSC 170; **S628/12** ■ The divorcing parties were married for 33 years. At the time of separation, the husband was 57 and the wife 54. They couldn't agree on the division of assets (including pensions) or debts. The husband was receiving pension income (both employment pension and a DVA disability pension). The wife was working, making over $55,000 a year, and contributing to a pension. After separation, the wife kept the home; she agreed to remortgage the home, pay the husband $12,000 and take on various significant matrimonial debts. The evidence showed the husband had a gambling problem that consumed family resources and that the wife had voluntarily helped support the younger son, including co-sign a student loan for him. She wanted an unequal division of property, contribution by the husband to various debts (the classification of which was in issue) and an equal division of pensions, with any amounts owed by the husband to her set off against his share of her pension. The husband felt each should keep their own pension, and asked for spousal support in the event a division was ordered. His statement of income showed he had a monthly surplus, and room to cut back. *Held,* an unequal division of property in favour of the wife, recognizing the husband's gambling was a drain on resources and resulted in higher family debt; the wife's prior $12,000 payment was an equalization payment and will be taken into account; her obligation to pay the son's student loan is not a matrimonial debt; the employment pensions will be divided equally; the DVA disability pension will not be divided and is not a matrimonial asset; the husband has not established a need for spousal support and so none awarded at this time.

FAMILY LAW – Divorce – matrimonial property, division of assets and debts, child support *Hurst v. Gill,* No. 1207-00321; 059939, Bourgeois, J., October 8, 2010. 2010 NSSC 366; **S622/30** ■ The parties lived together for almost 20 years, 13 of which they were married. They had one child; a daughter, now 15, who lived primarily with the wife, who was a physiotherapist with her own clinic. The extent of the husband's participation in setting up and running the clinic was in issue; he said he helped build and operate it on an almost equal basis. The wife said he performed administrative duties, not managerial ones. While he was never paid for his work, the evidence was this was at his insistence and done in an effort to minimize his income so he wouldn't have to pay child support for his two children from a previous relationship. The husband continued to live in the home after it was sold. In lieu of rent, he had given the new owner most of the home's contents. He had no income, and spent most of his time trying to start a music career. The mother supported him in this pursuit during their relationship. He claimed health problems, but the evidence showed he had skills and an

ability to earn income. The wife sought child support from him, and he spousal support from her. Also at issue was the division of assets, including: whether the husband was entitled to a share of the wife's clinic; and whether a rather large post-separation judgment arising from the father's unpaid, divorce-related legal fees (which was registered against the home before it was sold) should be deducted from the gross proceeds of sale held in trust. The wife argued the judgment should be paid out of the husband's share only, with the likely result being the judgment would remain partially unsatisfied. *Held,* the husband is not entitled to a share of the wife's business assets: the wife's evidence is more credible; his contributions to the clinic were not as significant as he suggested. He chose not to draw an income to purposely avoid paying child support for a number of years. The court can't be seen to encourage the avoidance of support obligations. Where this is a factor, courts should either drastically reduce the amount that would otherwise have been ordered or dismiss the claim entirely. At a minimum, the court should consider whether it's appropriate to impose an obligation to notify the children or parent that should or would have received support. Although he didn't get paid for his work, he benefitted from a lifestyle almost entirely supported by the clinic and was compensated for his efforts through expenditures made in lieu of a salary. Even if this wasn't the case, payments made towards the his music career entirely set off any gains enjoyed by the wife as a result of his work at the clinic. After determining the value of various contested assets/debts (including personal items, CRA debts and medical bills), the court found it appropriate to divide them equally. The wife is entitled to her share of proceeds from the sale of the home, as a well as an equalization payment to be taken from the husband's proceeds of sale in priority to the judgment relating to the husband's unpaid legal fees. It would be fundamentally unfair to allow a lawyer of one spouse to find themselves in a better security position than the other spouse who deserves the encumbered asset. Here, the lawyer was aware of the husband's financial situation and that the wife would likely be entitled to more than half of the proceeds of sale from the home. She was never notified of the hearing to collect the fees, despite the effect a judgment could potentially have on her interest in the home, nor was the Small Claims Court fully aware of the situation. Section 8(1)(c) of the *Matrimonial Property Act* requires that both spouses be permitted to make submissions to the court considering an order of disposition/encumbrance, and the court itself must be fully aware that such an order will have a potentially unfair result. Exceptional circumstances warrant the use of the court's equitable powers. The husband is intentionally underemployed and deemed to earn $25,000 per annum. The wife is entitled to deduct the table amount of support for one child from the spousal support she will pay to the husband. The husband's need for spousal support purposes is also determined on the assumption that he should be earning $25,000 per annum. Costs in a symbolic amount of $5,000 awarded to the wife due to the fact she was primarily successful on the two issues that consumed most of the court's time and because of the husband's conduct (failing to abide by the terms of an interim order and prolonging the sale of the home, stretching the wife well beyond her financial limits).

FAMILY LAW – Divorce – request for sealing order *Foster-Jacques v. Jacques,* No. 1201-064463; S.F.H.D. No. 069582, MacDonald, B. J., May 4, 2011. 302 N.S.R. (2d) 329; 2011 NSSC 174; **S628/16** ■ The parties to this divorce proceeding jointly sought an order sealing the contents of their file to prevent the media from viewing it. Neither gave notice to the media of their application. *Held,* Rules 85.04 and 85.05 apply to a motion for a sealing order in the family division. This is not an appropriate case to exercise the discretion to deny notice to the media.

FAMILY LAW – Divorce – spousal and child support, special expenses *Calder v. Calder,* No. 1201-064532, Williams, J., September 1, 2011. 2011 NSSC 328; **S634/24**

FAMILY LAW – Divorce – variation of separation agreement re custody, child support, property division *Smith v. Smith,* No. 1201-64292, Jollimore, J., July 28, 2011; June 23, 2011 (orally). 2011 NSSC 269; **S633/16** ■

FAMILY LAW – Matrimonial property – matrimonial assets, division and spousal support *Waldick v. Waldick,* S.H. No. 1201-063005; S.F.H.D. No. 060872, Ferguson, J., July 7, 2011. 2011 NSSC 257; **S633/1** ■

FAMILY LAW – Matrimonial property – separation agreement *Campbell v. Campbell,* Pic. No. 1205-002980; S.P.D. No. 069741, Kennedy, C.J., July 14, 2011. 2011 NSSC 293; **S633/24** ■

FAMILY LAW – Matrimonial property – unequal division of assets and debts, retroactive spousal support *Fleckney v. Fleckney,* No. 1201-064526, Beaton, J., June 27, 2011. 2011 NSSC 253; **S632/7** ■ The parties' 25-year marriage produced two children, now adults. Both worked throughout the marriage, although the wife's income was always secondary to the husband's – a firefighter who now earns about $83,000 per year. The wife retrained several years ago and was now a real estate agent earning an average of $61,000 per year. She sought an unequal division of property. The parties could not agree on the market value of the matrimonial home (which was and would be retained by the husband), nor whether disposition costs should be taken into account when dividing it, since none would be incurred. The wife accused the husband of hiding money before separation. There were also issues regarding an income tax refund,$2,000 owed to them by a member of the husband's family, an inheritance received by the wife before separation and the wife's entitlement to spousal support. *Held,* property will be divided equally. In determining the home's equity, the mortgage owing at the time of separation will be used. The current fair market value was arrived at by using the mid point between the appraisal values given by the parties' respective experts. Disposition costs (e.g., legal fees, real estate commission) will be subtracted before the equity is calculated, as is the usual practice, despite the fact the home is not actually being disposed of. The wife failed to prove the husband was squirrelling away money prior to separation. The tax return was a matrimonial asset. The husband will pay her $1,000 representing her share of the account receivable from his family member. The wife's inheritance was used for family purposes two to three years before separation. It forms part of the matrimonial asset pool. As for spousal support, the wife is entitled to some level of support, although she is very close to achieving self-sufficiency. Her income potential increased over the course of the marriage and has no cap, while the husband's does. Her income fluctuates and is not a certainty, but looking at the last few years it has tended to increase each year. Support of $1,000 per month will be paid for three years, at which time the wife will have the burden of showing it should continue. This arrangement allows the relative circumstances of the parties to equalize over time, while ensuring there is no undue reliance placed on the support. The goal is to enable the wife to achieve a financial footing and lifestyle closer to that which she enjoyed while the parties were married.

FAMILY LAW – Procedure – costs *Burchill v. Savoie,* No. 1201-061267; S.F.H.D. No. 50075, O'Neil, A.C.J., July 6, 2011. 2011 NSSC 236; **S632/30** ■

FAMILY LAW – Procedure – expert witness recalled *Nova Scotia (Minister of Community Services) v. R. (J.) and D. (S.),* F.A.N. C.F.S.A. No. 073062, Comeau, J.F.C., May 25, 2011; May 24, 2011 (orally). 2011 NSFC 13; **FC38** ■ The Minister called an assessor to testify as an expert in this child protection proceeding. The expert indicated that he was still in the process of completing his report in relation to the mother's boyfriend. If implemented, the mother's plan would result in her boyfriend having daily contact with the children. After the witness finished testifying, but before closing its case, counsel for the Minister asked for the court's permission to recall and examine the expert in relation to the assessment of the mother's boyfriend. *Held,* the *Civil Procedure Rules* (2008) (Rule 51.14(1)) allows for a witness to be recalled. The Ontario decision of *Griffi v. Lee* (2007) outlines when this might be appropriate. Here, the best interests of the children (which is court's paramount concern) warrants recalling the witness. This is a third party, independent witness and one cannot speculate his evidence will cause irreparable prejudice to the opposing party. Questions on recall will be limited to items related to the assessment of the mother's boyfriend.

■ FISH AND GAME

FISH AND GAME – Atlantic Fishery Regulations – application for stay of sentence (licence suspension) pending appeal *R v. Harnish,* Bwt. No. 347913, Rosinski, J., May 11, 2011. 2011 NSSC 183; **S632/10** ■ The defendant applied for a stay pending appeal of only that portion of his sentence that suspended his lobster licence for three weeks. He argued that he was financially responsible for two children and had a high debt load and the licence suspension would be dramatic and significant as his boat gear and traps were already in the water, meaning he would be unable to support his children and his family would suffer irreparable financial harm if the conviction or sentence were overturned on appeal. *Held,* entire sentence stayed pending appeal; although the mere filing of a notice of appeal, without any supporting affidavits, or the conviction and sentencing decisions did not provide the court with any basis to assess whether there were "arguable issues" raised in the appeal, the court accepted that the balance of convenience favoured the defendant and granted the stay on the basis of exceptional circumstances. Although both the conviction and sentencing decisions should be filed in such an application, there had been limited time for the defendant to obtain these transcripts and the previous case law had not clearly identified these obligations.

FISH AND GAME – *Wildlife Act* – ownership of exotic non-indigenous wild animal *Palmer v. Nova Scotia (Natural Resources),* Hfx. No. 347345, McDougall, J., June 24, 2011; June 20, 2011 (orally). 2011 NSSC 248; **S630/31** ■ The applicants applied for an order returning a turtle they had found and dropped off at the Nova Scotia Museum to have the species identified; at which time, they had clearly indicated that they wanted the turtle returned, "if possible". The Department of Natural Resources ordered the euthanization of the turtle on the basis that it was a non-indigenous species and such turtles could harbour disease or transfer harmful organisms, impacting human health, native species or ecosystems. *Held,* application dismissed; in order to safeguard the viability of the indigenous turtle species in this province, the turtle cannot be returned to the applicants. The *Wildlife Act* is clear and unequivocal in vesting all wildlife in the province in Her Majesty in right of the Province and the turtle is "wildlife" as defined in the Act, its temporary removal from the wild not altering its usual status of being "wild in nature".

■ INJUNCTIONS

INJUNCTIONS – Interlocutory injunction – hiring process, duty of fairness *Burke v. Cape Breton (Regional Municipality) et al.,* Syd. No. 346500, Murray, J., April 28, 2011. 302 N.S.R. (2d) 297; 2011 NSSC 169; **S628/11** ■ The applicant participated in the hiring process for a position as a firefighter with the respondent municipality (CBRM).This was the second time he tried for the job, and he was eliminated from the competition before completing the required polygraph because (he said) he made a mistake filling out a questionnaire. CBRM said he lied and disqualified himself. He applied for an order declaring CBRM's hiring process was conducted contrary to the principals of procedural fairness and contrary to its contractual obligations. He sought an interlocutory order preventing CBRM from finalizing the job competition and hiring new firefighters pending a determination of his application on the merits. *Held,* motion granted; there will be an interlocutory, partial freeze on hiring. CBRM will be allowed to fill four out of five available positions, which reasonably takes into account the fact firefighting is an essential service. It could be argued CBRM owed the applicant a duty of fairness. There is a serious question to be tried. Even though a court can't force CBRM to hire him, the applicant will still suffer irreparable harm if the relief isn't granted. The balance of convenience requires that a balance be struck between the potential loss to the applicant and CBRM's need to have a full complement of firefighters.

■ INSURANCE

INSURANCE – Liability insurance – duty to defend *Meridian Construction Inc. et al. v. Royal & Sun Alliance Insurance Co. of Canada,* Hfx. No. 336785, Hood, J., May 10, 2011. 2011 NSSC 177; **S628/19** ■ Two subcontractors were hired to install the plumbing system for a nursing home. When a leak was discovered in the cold water line, they rigged a temporary fix for the problem but over the weekend, the temporary fix ruptured, resulting in significant property damage. The owner of the nursing home sued the two subcontractors for breach of contract and negligence, alleging, *inter alia*, that they initially installed a faulty pipe or negligently installed that pipe, by installing a temporary fix when they knew that it was unstable and unlikely to last, and by failing to monitor the pipe over the weekend. The subcontractors applied for an order that the insurer of a builders' risk policy had a duty to defend them against the claims. The insurer argued that there was no coverage because the policy had expired a few days prior to the initial leak occurring. *Held,* application granted; the pleadings covered the period both before and after the policy expired and, as there was a mere possibility that a claim under the policy might succeed, there was a duty to defend. Although the damage occurred when the temporary fix ruptured, the court could conclude that the loss occurred when the pipe was first installed, either because the pipe itself was faulty or it was installed in a negligent manner.

■ LANDLORD AND TENANT

LANDLORD AND TENANT – Appeal – from Small Claims Court *MacCormick v. Tomlik,* S.C.P. No. 329510, Murray, J., June 13, 2011. 2011 NSSC 233; **S630/24** ■ The landlord appealed a residential tenancy officer's decision to the Small Claims Court on the basis that he was not served with notice of the hearing. The Small Claims proceeding was adjourned three times, the first time because file materials were missing, the second time because the landlord's lawyer was not made aware of the hearing date and the third time

because it was late and the matter had to be set over for completion on another date. On the fourth hearing date, the tenant's key witness was unable to appear, but the tenant presented and closed his case without making any objection(s). When the Small Claims adjudicator found in favour of the landlord, the tenant appealed, arguing: delay in the proceedings, a denial of procedural fairness and a lack of common sense on the part of the adjudicator. There was also an issue with respect to missing documents and a question about whether or not the adjudicator had reviewed all of the residential tenancy officer's file materials. *Held,* appeal dismissed. The adjudicator's summary of reasons show he carefully considered all of the evidence but rejected the tenant's evidence for sound reasons. He references the officer's decision and it appears he had the file available to him for review. While the tenant was unable to have his key witness testify, he had several options open to him, including to request an adjournment and/or subpoena the witness. While a failure to apply common sense would amount to an error of law, the adjudicator didn't fail to apply it here. His conclusions were squarely based on credibility findings he was entitled to make and which favoured the landlord. His decision should be accorded due deference and allowed to stand.

LANDLORD AND TENANT – Appeal – from Small Claims Court, landlord and tenant relationship *Connors v. Mood Estate,* Hfx. No. 346027, MacDonald, S. J., July 11, 2011. 2011 NSSC 287; **S632/25** ■ Ms. Mood died before her application to terminate the appellant's tenancy could be heard. Her estate reached a mediated settlement with him, which it asked the Director of Residential Tenancies to enforce. The appellant appealed the Director's order to the Small Claims Court. The adjudicator found in favour of the estate and ordered the appellant to vacate the premises and pay rental arrears. The appellant appealed, arguing he and Ms. Mood were in a common-law relationship, not a landlord/tenant relationship. He maintained the adjudicator had no jurisdiction over the dispute because it concerned a potential interest in the estate, an excluded subject matter under s.10(b) of the *Small Claims Court Act*. He alleged the adjudicator erred in law by failing to consider s.10(b) and provided what he felt were insufficient reasons for his decision. *Held,* appeal dismissed. The adjudicator had jurisdiction. He found, as a matter of fact, there was a landlord/tenant relationship. Although he didn't specifically address s.10(b), it can be assumed he rejected the notion this was an estate issue when he found there was a landlord/tenant relationship. Although he didn't review all of the testimony, the adjudicator's reasons were sufficiently accountable to permit a meaningful appeal. There was no breach of natural justice. Both parties were effectively represented by counsel.

LANDLORD AND TENANT – Commercial lease – balance of rent following termination of lease *Bump Baby & Beyond Inc. et al. v. Liu et al.,* Claim No. 348208, Slone, Adjudicator, June 29, 2011. 2011 NSSM 46; **SmCl19/1** ■

LANDLORD AND TENANT – Costs – when proceeding dismissed for lack of jurisdiction *Corfu Investments Ltd. v. Oickle,* Hfx. No. 298682, Rosinski, J., June 7, 2011. 2011 NSSC 223; **S629/28** ■ The plaintiff sued two tenants for negligently setting a fire in its residential premises, one of whom filed a defence pleading that the court had no jurisdiction as the matter was in the exclusive jurisdiction of the *Residential Tenancies Act*. When the plaintiff applied for summary judgment, she specifically alerted it on two occasions to her argument that the Supreme Court of Canada had stated that the provincial superior court had no jurisdiction to consider matters that fall under the *Residential Tenancies Act*. The court agreed with the defendant and dismissed the summary judgment application. Costs were now at issue. *Held,* defendant awarded costs of $2,000; the successful party had twice alerted the plaintiff to its precise legal argument and this was significant, whether or not it constituted an offer of settlement. The matter was legally complex in the sense that it was an intricate issue without direct precedent requiring extraordinary preparation time and a full three hours of argument in Chambers.

LANDLORD AND TENANT – Jurisdiction – of Small Claims Court *Ross v. Elliott,* Hfx. No. 344363A, Murray, J., July 19, 2011. 2011 NSSC 298; **S633/8** ■

LANDLORD AND TENANT – Residential tenancies – appeal *Larder v. Russell,* Claim No. 349547, O'Hara, Adjudicator, July 12, 2011. 2011 NSSM 41; **SmCl18/27** ■ The applicant was dating the respondent's son. The respondent asked her to occupy his home while he moved to British Columbia for several months. There was no rent to be paid, but the applicant was to pay for utilities. After a dispute with the respondent's son, the applicant was asked to leave the home and, when she resisted, eventually was forced to do so by police. She brought an application to the Residential Tenancy Board claiming damages related to what she felt was a wrongful termination of her tenancy. The residential tenancy officer found there was no landlord/tenant relationship because there was no rent paid or agreed to be paid. He dismissed her application, finding he had no jurisdiction to hear it. She appealed, arguing: her occupation of the premises in the respondent's absence benefitted him and thus could be considered consideration akin to rent; and/or paying the utilities amounted to rent. *Held,* appeal dismissed. The tenancy officer had no jurisdiction to hear the application. While there was some benefit to the respondent in having the premises occupied in his absence, this is not enough to meet the definition of "rent" in the *Residential Tenancies Act*. Similarly, paying money to a wholly unrelated third party (e.g. paying the utilities) does not constitute "rent" within the meaning of the Act. The case law suggests that rent is consideration paid to the landlord.

LANDLORD AND TENANT – Residential tenancies – appeal *Robinson v. Rygiel,* Claim No. 349051, Slone, Adjudicator, June 27, 2011. 2011 NSSM 47; **SmCl19/2** ■

■ MAINTENANCE

MAINTENANCE – Child support – application by child *L. (W.) v. W. (S.) and L. (T.),* F.L.B.M.C.A. No. 070192, Dyer, J.F.C., December 7, 2010. 2010 NSFC 31; **FC38** ■ The 16-year-old child, WL, lived with his grandmother and sought support from his parents, the respondents. The father agreed to pay. When the mother moved out of the grandmother's house after a dispute, WL insisted on staying until his mother found better accommodations. As time went on, their relationship deteriorated. The mother continued to receive child support from his father, but paid some of his expenses and continued to hope he would move back in with her. WL refused to accept his mother's conditions that he stop using drugs and attend school. At his grandmother's house, he had total freedom. By late 2009, the mother contacted the maintenance enforcement program (MEP) to tell them WL was no longer living with her. There was no evidence filed to document WL's financial needs, or to demonstrate the grandmother was unable to meet them. At the time of the hearing, the mother had virtually no income. *Held,* application dismissed. A support obligation is not absolute. The issue is whether the mother has/had a "lawful excuse" (see s. 8(a) of the *Maintenance and Custody*

Act) for not supporting her son when she had the ability to do so. While the authorities shy away from considering a child's conduct or attributing fault, parents have a right to avail themselves of any possible defence. While WL can't be forced to return to his mother's home, it's reasonable for her insist his drug use and lifestyle issues are serious concerns that won't be addressed if he stays in his grandmother's care. It's obvious his physical needs are being met by his grandmother, but his emotional and educational needs are not. WL is old enough to appreciate that until he engages in services and supports to address the key issues raised by the mother (e.g., drug use, counselling, education), she is not obligated to pay support – even if her income increases to a level where she would otherwise be required to pay. This decision applies retroactively. The delay in asking for support was unreasonable, and the mother didn't engage in blameworthy conduct, has limited income and is supporting two other children. She acted reasonably by notifying maintenance enforcement when she did and shouldn't be penalized for the delay since she continued to hope WL would return to her care and spend money on WL. Any payments she received in error after she notified MEP were accepted in good faith and will be applied against arrears owed by WL's father.

MAINTENANCE – Child support – application to terminate *Dow v. Dow,* S.F.P.A.D. No. 070520, Legere-Sers, J., June 14, 2011. 2011 NSSC 229; **S633/5** ■

MAINTENANCE – Child support – application to terminate *Tofflemire v. LePage,* S.F.H.D. No. 075066, MacDonald, B. J., June 29, 2011. 2011 NSSC 262; **S633/13** ■

MAINTENANCE – Child support – application to vary not allowed, shared parenting agreement *Murphy v. Hancock,* S.F.H.M.C.A. No. 055370, O'Neil, A.C.J., July 6, 2011. 2011 NSSC 247; **S632/31** ■

MAINTENANCE – Child support – calculation *Hanrahan-Cox v. Cox,* No. 1204-003921; S.K.D. No. 036896, MacDonald, B. J., June 27, 2011. 2011 NSSC 256; **S630/30** ■

MAINTENANCE – Child support – change in circumstances, appeal dismissed *Smith v. Helppi,* C.A. No. 337900, Oland, J.A., July 12, 2011. 2011 NSCA 65; **S631/6** ■

MAINTENANCE – Child support – variation, intentionally underemployed *Hoeg v. Buckler,* STD. No. 031276, Coady, J., June 6 , 2011. 2011 NSSC 221; **S632/12** ■ The parties' teenaged children were now in the father's primary care. A previous order had deemed the mother's income to be $32,000 per annum. She didn't work and supported herself and her four-year-old son by drawing on capital from investments made after she received a large inheritance. Her income was not taxable income. She argued the court could not force her to work and that it was in her young son's best interests that she remain home with him. She refused to disclose the name of his father or to seek child support for him. She claimed undue hardship and did not want to contribute to extracurricular costs for the children who were the subject of this proceeding. *Held,* there is no undue hardship. The mother made choices concerning her employment, assets and child support for her young son that reflect her interests and needs and not those of her teenaged children. It is appropriate to impute income to her based on her underemployment. If she chooses not to work, she will have to draw from her investments. Circumstances haven't changed since the court first imputed income to her, but the figure should be raised slightly (to $35,000) to allow for increases in the cost of living. Because the mother has no desire to support extracurricular activities for the children, and since the father has chosen to enrol the children in many activities, the mother will be required to contribute a proportionate share of the costs up to a cap of $4,000 per year. The father won't have to seek her permission before enrolling the children, but he will be required to submit proof of expenses totalling up to $4,000 and the mother will pay her share on a quarterly basis (in advance). She must pay costs of $1,000 to the father in relation to this proceeding.

MAINTENANCE – Child support – variation, maintenance, undue hardship, section 7 expenses *MacDonald v. Seguin,* S.F.H.F. No. 13113, Jollimore, J., September 6, 2011. 2011 NSSC 337; **S634/28** ■

MAINTENANCE – Child support – whether severence pay to be included in income *DeWolfe v. McMillan,* No. 1201-061704, Gass, J., July 21, 2011. 2011 NSSC 301; **S633/18** ■ The mother received a portion of the father's severance pay as per the terms of their Corollary Relief Judgment. At issue was whether the father's share (which he had to declare as income for tax purposes) should be taken into account when calculating his income for child support purposes. *Held,* it isn't be fair to take into account the father's share of severance for child support purposes. Although the principle against "double dipping" doesn't apply to child support, and there are times when non-recurring income should be counted for child support purposes, this isn't a situation where it would be fair to do so. While it's technically income, it's not a bonus or something that results in a change to the father's lifestyle. It's been invested to provide some security for him in the future when it may be used to replace or supplement his income.

MAINTENANCE – Common-law relationship – interim spousal support *McQuaker v. Crawford,* S.F.H.M.C.A. No. 074806, Gass, J., July 11, 2011; May 16, 2011 (orally). 2011 NSSC 286; **S633/6** ■

MAINTENANCE – Interim child and spousal maintenance – shared parenting *Muise v. Fox,* S.F.H. M.C.A. No. 075135, Jollimore, J., June 30, 2011. 2011 NSSC 258; **S632/3** ■ The parties agreed to share custody of their two children. They could not agree on interim child or spousal support. The mother was in receipt of social assistance and provided child care, even during the father's parenting time. The father, who earns over $66,000 per year, felt her HST and Child Tax Benefit (CCTB) payments should be included when determining her income for child support purposes. *Held,* the HST and CCTB are not income and are not to be taken into account when determining the set-off amount in a shared custody situation. It is relevant when considering the parties' respective resources and the children's needs under s.9(c) of the Child Maintenance Guidelines. The set-off amount is, in this case, insufficient to meet the children's needs. The father will pay slightly more than the set-off amount on an interim basis (at a rate of $900 per month). The father will pay interim spousal support in the amount of $300 per month, which amount is lower than it would otherwise be to reflect the priority that must be given to child support. If child support is lowered, spousal support may increase.

■ MECHANICS' LIENS

MECHANICS' LIENS – Registration – motion to vacate due to late registration *Allterrain Contracting Inc. v. Rockwork Construction Ltd.,* Hfx. No. 344331, Moir, J., June 2, 2011. 2011 NSSC 212; **S629/21** ■ The parties entered into a verbal, lump sum contract. The applicant asked the court to declare the respondent's lien expired because it

was filed more than 60 days after completion. They argued any work done by the respondent after what they felt was the completion date amounted to nothing more than repair for deficiencies. *Held,* application dismissed, with costs of $1,500 plus disbursements to the respondent. There was no term for completion by a specific date. The contract was for services only because the required materials were incidental to the service and consumed when it was rendered. The concept of substantial completion is not relevant here. This wasn't a case of repair, let alone repair after completion. The contract wasn't complete when the alleged "repairs" were carried out.

■ MORTGAGES

MORTGAGES – Foreclosure – deficiency judgment, time limitation *First National Financial Corp. v. Raynard,* S.Y. No. 318254, LeBlanc, J., June 3, 2011; May 27, 2011 (orally). 2011 NSSC 205; **S629/23** ■ The applicant moved to extend the time for filing a notice of motion for assessment of a deficiency judgment. The 60-day filing deadline was inadvertently missed because the applicant's former lawyer misread the relevant rule. The error wasn't caught until the limitation period had already expired. *Held,* motion dismissed. The misreading of a clearly worded rule is not a reasonable excuse for delay. Ignorance of the law does not prevent a limitation period from running. Our appeal court has held the discoverability rule doesn't apply when the facts are known but the law is not. Applying this to the limitation period for deficiency judgments makes sound policy sense.

■ MUNICIPAL LAW

MUNICIPAL LAW – Land use bylaw – unrecorded agreement *Polycorp Properties Ltd. v. Halifax (Regional Municipality),* Hfx. No. 327941; Hfx. No. 335820, Warner, J., June 20, 2011. 2011 NSSC 241; **S630/15** ■ Polycorp bought a parcel of vacant land with a view to developing it. They relied on a zoning confirmation letter from Halifax Regional Municipality (HRM) that confirmed the land was zoned R3, and did not refer to any other restrictions on development. HRM later tried to assert that an agreement entered into in 1970 with a previous owner was a development agreement restricting future use. The agreement said the land in question was to be used for an open recreation space in connection with the Ocean Towers apartments. It was never registered, nor was the land developed in accordance with the ancillary landscaping plan. HRM maintained the agreement was binding on Polycorp and precluded the proposed development. HRM made an application, heard together with Polycorp's application, for an order directing the de facto consolidation of two lots to create the property void for having failed to comply with the requirements of the *Municipal Governments Act*. HRM joined the previous owners and the Registrar General as respondents. The solicitor who consolidated the lots was given intervenor status. *Held,* the property is subject to the Land Use By-Laws and not the unrecorded agreement. Neither the 1970 agreement, enacted under s.538A of the *City Charter*, nor the Agreement to Convey created restrictions on future development or use. It expired after the Ocean Towers development was completed in 1973. Even if this was not the case, HRM is estopped from refusing to issue a development permit. Polycorp acted reasonably in relying on the zoning confirmation letter, which did not point out any restrictions on use other than the R3 zoning. While the consolidation that created the property in question did not technically meet the requirements of the Act, the court can and does use its discretion to confirm the consolidation. HRM seriously complicated the proceeding by bringing their application. The amount involved for the purpose of setting costs is the full purchase price. If Polycorp had failed, the property would have been useless to them. HRM is liable for costs to Polycorp in the amount of $88,875 plus HST and disbursements. HRM is also liable for costs to Ocean Towers, Causeway and the Registrar General in the amount of $20,000 (plus HST and disbursements) each. It would be artificial to assign an amount involved in determining these costs, but rather the court took into account the respondents' forced participation and the complexity, importance and effort involved.

■ NEGLIGENCE

NEGLIGENCE – Motor vehicle – apportionment of liability *MacDonald et al. v. Holland's Carriers Ltd. et al.,* Hfx. No. 263296, Pickup, J., March 31, 2011. 301 N.S.R. (2d) 331; 2011 NSSC 130; **S627/7** ■ The defendant driver was driving a log trailer unit on the highway when a rear stake on the side of the log trailer came loose and crashed into the windshield of the plaintiff's vehicle, causing it to roll a number of times, injuring the occupants. The plaintiffs sued the driver and owner of the logging vehicle, as well as the manufacturer and retailer, arguing, *inter alia*, that the driver and owner had the onus of showing they were not negligent by virtue of the reverse onus provision in s. 248 of the *Motor Vehicle Act*. *Held,* action allowed against the vehicle's owner; action against the manufacturer and retailer dismissed; s. 248 of the *Motor Vehicle Act* is inapplicable where an accident is occasioned by the presence of more than one motor vehicle on the highway. The owner and driver of the logging vehicle owed a duty of care to the plaintiffs to reasonably maintain the trailer and although the evidence indicated that the owner was very safety conscious, the maintenance system was obviously inadequate as demonstrated by the very fact that the safety chain failure had occurred. It should have been obvious to a reasonable person that the stakes and safety chains could not be properly inspected without taking the stakes out and inspecting them and the failure to remove them on a regular basis and ensure the chains would properly perform their required purpose constituted negligence. The manufacturer of the vehicle was not liable as there was insufficient evidence to conclude that the log trailer was defective. The retailer did not have a duty to warn that the stakes could not be allowed to bottom out and, even if it did, this fact was generally known to the owner. Nor was the retailer liable under the *Sale of Goods Act* as there was no latent defect and the owner was experienced in the logging business and had not relied on the retailer's advice, but had conducted its own inspections.

NEGLIGENCE – Motor vehicle – apportionment of liability *Ocean v. Economical Mutual Insurance Co. et al.,* Hfx. No. 190673, Smith, A.C.J., May 31, 2011. 2011 NSSC 202; **S629/15** ■ Seeing no traffic approaching, the plaintiff pulled her vehicle out of a parking lot at night in an area where there were blind turns to both the left and right. When she was one-quarter of the way through the other lane of traffic, she saw lights coming around a turn and quickly completed the turn into her lane, where she was struck by the defendant's oncoming vehicle. The defendant, who was uninsured, testified that when he came around the curve, he saw the plaintiff's vehicle hesitate and, thinking she was going to stop, he decided to veer around her to the left. When she, too, pulled into the left lane, it was too late for him to turn back to the right. *Held,* liability apportioned 80 per cent to the defendant and 20 per cent to the plaintiff; the plaintiff's insurer is liable to pay the plaintiff the amount she is entitled to recover from the defendant as damages for personal injury up to a maximum of $200,000. Although the defendant was not negligent in the manner in which he responded once he saw the plaintiff's vehicle and his decision to swerve to the left to avoid a collision was reasonable, he was traveling well in excess

of the posted speed limit and this speed contributed significantly to the cause of the accident. There was no evidence that the plaintiff had failed to keep a proper lookout prior to pulling onto the road, nor was she negligent in failing to back her vehicle into the parking lot or in deciding to proceed into her own lane rather than stop where she was. However, her decision to exit from the south end of the parking lot contributed to the accident and was negligent, given that she was familiar with the area and knew that, due to the two blind curves, it was safest to exit from the middle of the parking lot.

NEGLIGENCE – Occupier's liability – slip and fall on sidewalk, construction area *Mielke v. Harbour Ridge Apartment Suites Ltd.,* Hfx. No. 275515, Rosinski, J., August 15, 2011. 2011 NSSC 313; **S634/2** ■

NEGLIGENCE – Standard of care – veterinarian *McNeil v. Weste,* Claim No. 351247, Slone, Adjudicator, August 17, 2011. 2011 NSSM 42; **SmCl18/28** ■

■ OCCUPATIONAL HEALTH AND SAFETY

OCCUPATIONAL HEALTH AND SAFETY – Judicial review – panel's decision set aside *Canadian Union of Public Employees, Local 2434 v. Port Hawkesbury (Town of) et al.,* C.A. No. 335584, Fichaud, J.A., March 18, 2011. 301 N.S.R. (2d) 123; 2011 NSCA 28; **S621/31** ■ The appellant, Mr. Reynolds, works for the respondent town. He was suspended after raising safety concerns with his supervisor. He filed a grievance with the appellant union (over the suspension) and a complaint with the respondent department (alleging violations of the *Occupational Health and Safety Act* (OHSA)). The union missed a time limit in the collective agreement's grievance procedure and so the arbitrator dismissed the complaint on that basis. The department declined to investigate, claiming they had no statutory authority to proceed because the arbitrator had "seized jurisdiction". This decision was appealed and upheld by the Director and the Occupational Health and Safety Panel. The union applied for leave to review the panel's decision. *Held,* leave granted, review allowed and costs of $2,000 plus disbursements awarded to the union. The panel's decision was both incorrect (the applicable standard) and unreasonable. Despite its expertise, the panel misinterpreted the meaning of the relevant section (s.46(1)(d)(ii)) of the OHSA. The arbitrator did not seize jurisdiction over, nor address, the merits of the complaint. The Act's wording, its objects and statutory context/legislative scheme support this conclusion.

■ PARTNERSHIP

PARTNERSHIP – Dissolution – application for stay pending arbitration refused *Beacon Securities Ltd. v. 2125395 Ontario Inc. et al.,* Hfx. No. 344735, Moir, J., May 20, 2011. 2011 NSSC 207; **S629/13** ■ When one of the partners applied for dissolution of the partnership, the others moved for a stay on the basis that the issues must be determined by arbitration. *Held,* application for stay dismissed; the agreement contained no provision for the termination or dissolution of the parties' relationship *vis-à-vis* a division and dissolution under the *Partnership Act* and no other similar remedy was available to the parties through arbitration. Although the first question to be determined was whether, in fact, a partnership existed, the determination of that question provided no remedy and the court must take a practical approach, focused on the remedy, when faced with the question of deference to arbitration. The fact that a prerequisite to the remedy sought might overlap a mixed question of law and fact that could arise on arbitration was not a reason to preclude possible access to the remedy.

■ PERSONAL PROPERTY SECURITY

PERSONAL PROPERTY SECURITY – Priorities – security agreements *MacPhee Chevrolet Buick GMC Cadillac Ltd. v. S.W.S. Fuels Ltd. et al.,* C.A. No. 333521, Fichaud, J.A., April 19, 2011. 302 N.S.R. (2d) 196; 2011 NSCA 35; **S626/7** ■ Some time after the debtor leased a vehicle, it entered into a general security agreement with the plaintiff, which purported to secure the same truck. The lessee later transferred title to the truck to a second company, which entered into a new lease with the debtor. When the debtor defaulted under the general security agreement, the plaintiff sought to realize on the truck and the court found that although the debtor took possession of the vehicle within the 15 days prescribed in s. 35(1)(a) of the *Personal Property Security Act*, the plaintiff should take priority over the lessee by virtue of fairness. The lessee appealed. *Held,* appeal dismissed; although the trial judge erred in finding that the debtor had obtained possession of the vehicle within the 15 days prescribed in s. 35(1)(a) and the appellant's lease was a purchase money security interest, the debtor had possession of the truck continuously for several years prior to the registration of this lease, meaning that the appellant did not have super-priority under s. 35(1)(a). It could not be said that when the appellant replaced the original lessor, the debtor constructively lost possession of the vehicle and although the situation might have been different had the lease been assigned to the appellant, this was not the case. Applying the legislative objective, the truck was not an after-acquired vehicle, but rather an earlier-acquired asset.

■ PRACTICE

PRACTICE – Actions – consolidation *Shane v. Allen et al.,* Hfx. No. 316695, Moir, J., June 22, 2011; July 8, 2011 (orally). 2011 NSSC 285; **S632/24** ■ The plaintiffs moved to consolidate at least some of the issues raised by nine separate actions, to permit the consolidated hearing to refer to one plaintiff and the rest as "et al" and for trial dates. There was no indication of whether jury trials would be required. *Held,* motions dismissed. It is premature to decide whether there should be consolidation of some or all of the issues raised by these actions. If any of the cases are to be tried by a jury, it would preclude separating the liability and damage issues. The court also lacks sufficient information about the claims to make a reasonable assessment of which issues could be tried in common and which could not. Even if consolidation had been granted, the court would not allow "et al" to be used to refer to the numerous plaintiffs. The *Civil Procedure Rules*, (2008) provides for naming individual parties even in cases in which there are hundreds of parties. It is premature to set trial dates. The only way this can be done before discoveries are completed is through a case management judge.

PRACTICE – Appeal – application for stay of order to produce documents *Halifax (Regional Municipality) et al. v. Casey et al.,* C.A. No. 351747, Fichaud, J.A., July 18, 2011. 2011 NSCA 69; **S631/10** ■ The court ordered the appellants to disclose any documents relevant to the dispute in advance of the hearing of their summary judgment motion (on the evidence – *Civil Procedure Rules* (2008), Rule 13.04). They applied for a stay of this decision, arguing that forcing them to disclose at this point wouldn't be fair since they were disputing the court's authority to hear the matter in the first place. They maintained the claim was covered by a collective agreement and subject to arbitration. *Held,* motion for a stay dismissed, with costs of $500 payable to the respondent, Mr. Casey. The tests for a stay under these new Rules remains essentially the same as under the old *Civil Procedure Rules* (1972). Under the first stage, the parties seeking the

stay must show they: have an arguable appeal; will suffer irreparable harm if the stay is not granted; and should be favoured under a balance of convenience test. At the second stage, the court must consider if there are exceptional circumstances warranting a stay. In this case the summary judgement motion was made by the appellants on the evidence not the pleadings. They filed a defence on the merits and in it didn't raise the collective agreement or challenge the court's authority to hear the matter, but rather sought to put the respondent, Mr. Casey, to the test of strictly proving each allegation. The case law on summary judgment requires the responding party to put their best foot forward. Proper disclosure is necessary for him to respond to their motion. Had the appellants pleaded the collective agreement and made a motion for summary judgment on the pleadings (Rule 13.03) different considerations might apply. As it stands, the appeal is not an arguable appeal. There is no evidence of irreparable harm. The disclosure relates directly to Mr. Casey and his employment. Even if the matter must be arbitrated, the collective agreement still requires them to disclose prior to the arbitration. If a particular document is or should be subject to privilege, the appellants can seek to have it excluded on that basis. Since there is no evidence of irreparable harm, there are no conveniences to balance. Similarly, there are no exceptional circumstances warranting a stay. The appellants have not rebutted the presumption of full disclosure in Rule 14.08(1).

PRACTICE – Appeals – adding party as respondent rather than intervenor *Specter v. Nova Scotia (Minister of Fisheries and Aquaculture),* Hfx. No. 350371, Rosinski, J., June 30, 2011. 2011 NSSC 266; **S632/4** ■ Kelly Cove obtained licences from the Minister of Fisheries. The appellants appealed the decision as "aggrieved person(s)". Kelly Cove sought to be added as a respondent. The appellants argued it should only be granted intervenor status, pointing to the impact on their potential liability for future costs if Kelly Cove was named a respondent as opposed to an intervenor. *Held,* Kelly Cove will be added as a respondent to this statutory appeal. Even if the *Civil Procedure Rules* (2008) do not require their addition as parties (the court believes they do), this is an appropriate situation to use the court's discretion to add them: the Minister consents to the addition; Rule 35 presumes the effective administration of justice requires interested persons to be added as parties (Rule 35.08) and even allows for persons with peripheral interests to be added (Rule 35.09); Kelly Cove has a tangible interest in the outcome that equals or exceeds that of the appellants; the case law supports a liberal interpretation of party status; and a concern over liability for costs is insufficient reason to relegate Kelly Cove to intervenor status. The concerns over costs can be addressed under Rule 77.

PRACTICE – Appeals – extension of time to file application for leave *Allen v. Nova Scotia (Workers' Compensation Appeals Tribunal) et al.,* C.A. No. 350108, Beveridge, J.A., July 26, 2011. 2011 NSCA 72; **S631/13** ■ The self-represented plaintiff said he suffered from work-related stress, but his claim for workers' compensation benefits was denied and his subsequent appeal to the tribunal dismissed. After missing the statutory deadline, he moved for an extension of time to seek leave to appeal the tribunal's decision to the Supreme Court. He argued he should be given a chance to better present his case because, by choosing to represent himself, he had done himself a great disservice at the original hearing and appeal. *Held,* motion dismissed. Assuming the court has jurisdiction to grant an extension, it declines to do so. The plaintiff: had no *bona fide* intention to appeal within the prescribed time period; has no reasonable excuse for failing to file in time; and his appeal is entirely without merit. *In obiter*, the court observed that it appears there is a lack of authority in the *Civil Procedure Rules* (2008) for a court to extend the time for filing beyond the 30-day limit imposed by the *Workers' Compensation Act*. Rule 90.13 clearly states a legislative appeal must be made within the deadline provided for in the relevant legislation. Granting an extension of time to file an application for leave is pointless if the appeal is doomed to failure.

PRACTICE – Appeals – security for costs *Sable Mary Seismic Inc. et al. v. Geophysical Services Inc.,* C.A. No. 325703, Beveridge, J.A., May 10, 2011. 2011 NSCA 40; **S626/12** ■ The respondent obtained judgments against the appellants totalling over $2.7 million. Despite significant efforts, they had been unable to collect almost anything. The appellants claimed impecuniosity but offered no evidence other than to point to the size of the judgment against them and their inability to pay it. They had recently brought a motion seeking the court's permission to borrow significant sums to pay ongoing legal fees. The appellant, Mr. Kimball, didn't file any financial information. The respondent wanted security of $100,000, just under 40 per cent of the cost award at trial. *Held,* the appellants must deposit $35,000 in security for costs – a reasonable, conservative estimate for costs. It's unlikely the 40 per cent rule will be applied. The appellants have access to significant financial resources. There is no evidence, or even an assertion, that they have no resources available to them. An order requiring them to post security won't prevent or delay them from proceeding with what is an arguable appeal.

PRACTICE – Application – conversion to action *Jeffrie v. Hendriksen,* Hfx. No. 346079, Pickup, J., July 14, 2011. 2011 NSSC 292; **S633/2** ■ The applicant and respondents are involved in a shareholder dispute. The applicant claims he invoked a shotgun clause in the shareholder agreement to trigger a buyout of his shares. He brought an application alleging he reached an agreement with the respondents they failed to honour. The respondents deny an agreement was reached and sought to have the application converted to an action under Rule 6.02(1) of the *Civil Procedure Rules* (2008). In support of their motion, they pointed to the fact they would like to counterclaim against the applicant for conduct they allege amounts to breach of fiduciary duties and interference with the company's economic interests. They felt that, since the application route doesn't allow for counterclaims, it would be more efficient to proceed by way of an action. The applicant says the case is simple, conflicting evidence can be addressed through cross-examination and the fact there has been an oppression remedy claimed illustrates the urgency of the matters raised in the application. *Held,* motion dismissed. At this stage, it appears the matter should proceed by way of an application. The very nature of an oppression remedy requires that it be dealt with expeditiously. The presumptions in favour of an application (Rule 6.02(3)) exist. The applicant's substantive rights are at risk and he is thus entitled to a speedy resolution of the dispute. The presumptions in favour of an action (Rule 6.02(4)) have not been substantiated. The respondents are not asking for a jury trial. The suggestion there may be impeachment witnesses called is mere speculation at this point. The fact that impeachment is theoretically possible is insufficient reason to convert an application to an action. Rule 6.02(4)(b) shouldn't be construed that narrowly. If further information comes to light, and impeachment becomes a real concern, the respondents can ask to have the matter revisited. The factors in favour of an application (Rule 6.02(5)) exist: given the nature of the dispute and the fact this is a closely held company, the parties should be able to quickly ascertain who their witnesses will be; the matter can be ready to be heard relatively quickly; the length and content of the hearing can be easily predicted; and credibility issues can be addressed

through cross-examination. The fact the respondents wish to file a counterclaim is insufficient reason to convert to an action. While the proposed counterclaim raises different issues, the applicant is willing to have the matters heard together – to the extent that the evidence on each overlaps. In this way, the application process provides ample flexibility to allow a combined hearing on at least some issues without having to convert the proceeding to an action.

PRACTICE – Class action proceedings – need to establish validity of each cause of action pleaded *Nova Scotia (Attorney General) v. Morrison Estate,* C.A. No. 341235, Farrar, J.A., July 15, 2011. 2011 NSCA 68; **S631/9** ■ The chambers judge certified the class and claims after finding the *Class Proceedings Act* only requires the plaintiffs to prove there is one sustainable cause of action to meet the threshold for certification under s.7(1)(a). The Art Gallery of Nova Scotia appealed, arguing the chambers judge erred in his interpretation of that section. It argued the chambers judge should have determined whether there was a cause of action in relation to each claim asserted in the pleadings. Specifically, they felt the chambers judge erred in certifying the claims for breaches of ss.7 and 15 of the *Charter*. *Held,* appeal allowed. The chambers judge erred in his interpretation of s.7(1)(a). While a plain reading of the section can support his interpretation, using the principles of statutory interpretation leads to a different result. Reading s.7 as a whole, and considering the object of the Act (to be construed by looking at s.7), the legislature's intent is clear. The Act requires the certification judge to determine whether there is a cause of action in relation to each claim. The purpose of a class proceeding is to offer parties and the judicial system an efficient, cost effective means to resolve common disputes. It wouldn't be efficient to allow clearly unsustainable claims to be certified and require defendants to seek to have the court dismiss the frivolous claims through additional motions made either before or after the certification hearing. The matter will be remitted to the chambers judge to determine whether there are sustainable causes of action in relation to each of the *Charter* claims that should be certified.

PRACTICE – Class proceedings – certification *Crooks et al. v. CIBC World Markets Inc.,* Hfx. No. 322441, Moir, J., May 11, 2011. 2011 NSSC 181; **S628/20** ■ The plaintiffs were three out of approximately 100 of the defendant's clients who suffered losses because of a calculation error for which the defendant admitted responsibility. The plaintiffs felt the defendant's approach to compensation for the error was not only inadequate but also wrongful. The defendant argued many of the "common issues" put forward by the plaintiffs require fact finding about individual losses and the rest was insufficient to make a class action suit the preferable route. They chose not to file a defence until the question of certification was resolved. *Held,* certification granted. Looking at s. 7(1) of the *Class Proceedings Act*: the statement of claim discloses causes of action that are not open to being set aside by summary judgment; there is an identifiable class; there are several common issues that predominate; the plaintiffs are adequate representatives and have a workable plan for proceeding. It is relevant that: the assessment of damages isn't the only source of important issues; the major issue on damages applies across the board; and the proposed issues that don't affect all class members may be ripe for subclassification. There is a practical advantage for the public in conserving judicial resources, for the members of the class by sharing the expense of having common issues decided, and for the defendant by avoiding multiple proceedings. Though the advantages of this proceeding as a class action may be less than with other kinds of class actions, it remains a more fair and efficient route than the alternative (individual suits). In identifying the common issues, the court reframed some and introduced others.

PRACTICE – Costs – departure from tariffs *Langille v. Bernier et al.,* Hfx. No. 191895, Bourgeois, J., June 1, 2011. 2011 NSSC 179; **S629/16** ■ The plaintiff's personal injury claim was dismissed, with damages provisionally assessed at $18,000. The defendants argued the amount involved should be the full amount claimed at trial ($115,000) and that the current tariffs applied. The plaintiff argued the 1989 tariffs should apply because the accident happened in 2001 and the claim was filed in 2003, before the new tariffs came into effect. *Held,* costs of $16,000 each, plus disbursements to the defendants, Bernier and the Camerons; costs of $20,000 plus disbursements to the defendants, the Giles, in recognition of their offer to settle; and $20,000 collectively, to the remaining defendants. The current tariffs apply. There is ample authority to support the court's decision either way, but here the application of the 1989 tariffs would be inappropriate to reach an assessment of costs that is reflective of the current costs of litigation. None of the defendants provided the court with information on the actual costs involved which makes it difficult to ascertain whether the amount awarded constitutes a substantial contribution to their costs.

PRACTICE – Costs – effect of offer to settle *Boutilier v. Pearcey et al.,* Syd. No. 203307, MacAdam, J., July 29, 2011. 2011 NSSC 307; **S633/21** ■ The plaintiff was awarded far less than the $1 million she claimed in damages. The jury assessed her losses at just under $150,000 – less than the defendant offered to settle for before trial, but more than they argued should be awarded at trial. The plaintiff took the position each party was successful to a degree and that no costs should be awarded. She had offered to settle for a similar amount many months earlier, but her offer was eventually withdrawn and her subsequent offers were for significantly higher amounts. The jury's award made no provision for prejudgment interest, and there was an issue as to whether it should be deemed to include a $14,000 advance made to the plaintiff prior to the trial (which wasn't before the jury). The parties agreed the 1989 Tariffs applied, but couldn't agree on whether the *Civil Procedure Rules* (2008) or *Civil Procedure Rules* (1972) governed. There was also an issue as to whether the defendant's out-of-town counsel could recover travel expenses as well as concerns over the conduct of the trial. Midway through the trial, the defendant's expert changed his opinion on the plaintiff's long-term prognosis, as a result of new information disclosed (in a less-than-timely fashion) by the plaintiff. *Held,* the *Civil Procedure Rules* (2008) apply to steps taken in this proceeding after their implementation, including this claim for costs (Rule 92.02), although both sets of Rules would allow for a similar result. The defendant is the successful party, having regard to the fact the amount awarded was less than they offered to settle for shortly before trial. The court discussed how "all-inclusive" settlement offers should be examined. Travel expenses for the defendant's out-of-town counsel are not recoverable because there were competent local counsel available to conduct the trial. It is reasonable to expect the defendant's expert would have higher trial prep fees than the plaintiff's experts in this case, given the majority of the reports were authored by her experts. The conduct of the trial was an issue (late disclosure), and relevant to the ultimate cost award. A strict application of the 1989 tariffs results in costs that are too low and would not amount to a substantial contribution to actual costs incurred. A lump sum award of $60,000 (including disbursements) is appropriate in light of all the circumstances. The $14,000 advance should not be deducted from the jury's award.

PRACTICE – Costs – impecunious party *Hill v. Cobequid Housing Authority et al.,* Tru. No. 259625, MacAdam, J., June 6, 2011. 2011

NSSC 219; **S629/25** ■ The respondent successfully defended the plaintiff's claim for injuries sustained in a slip-and-fall accident and sought costs. The plaintiff had rejected a verbal settlement offer of $20,000, and insisted he would only settle for $89,651. Damages were provisionally assessed at $40,000 less $5,000 for failure to mitigate. The plaintiff had limited assets and lived on a small, fixed income. He argued costs should be nil in recognition of his impecuniosity, but didn't make a formal application under Rule 77.04 of the *Civil Procedure Rules* (2008). There was also an issue of whether costs can be recovered when the successful party has a government lawyer. *Held,* lump costs of $4,000 awarded. While financial considerations are not listed as one of the factors in Rule 77.07(2) the court is of the view they can still be taken into account. While the plaintiff didn't succeed, this wasn't a frivolous proceeding. The court's discretion to award costs extends to an award of costs in favour of the Crown when the lawyer is a Crown employee. Rule 77.04 wasn't in effect when this proceeding started; it's unnecessary to decide whether the plaintiff could have applied when it came into effect.

PRACTICE – Costs – party and party costs, non-monetary claim *Taylor et al. v. Dairy Farmers of Nova Scotia et al.,* Tru. No. 314398, Duncan, J., April 21, 2011. 302 N.S.R. (2d) 253; 2011 NSSC 160; **S628/5** ■ Costs were in issue after the applicants' motion was dismissed. There was disagreement over whether the claim was a non-monetary claim or not. The decision in question related to a projected loss of income, but also had significant overall economic impact on the dairy production industry as a whole. *Held,* the claim was a non-monetary claim. It was based on a challenge to regulations. The court had no authority to quantify a claim in damages; the case before it was solely one of legislative interpretation. This was a complicated proceeding that consumed just over two days of court time. The issues were very important both to the parties and on a wider scale. Applying the tariffs would result in too low of an award. Lump sum costs of $18,000 plus disbursements are warranted (representing just over half the respondent's actual legal costs).

PRACTICE – Costs – security for costs *Ellph.com Solutions Inc. et al. v. Aliant Inc. et al.,* Hfx. No. 259106, Moir, J., August 8, 2011. 2011 NSSC 316; **S633/29** ■ The plaintiffs are closely held, insolvent companies. They sued the defendant (a company with significant resources) for what they claim was a breach of contract that led to their insolvency. The defendants sought an order (under Rule 45.02 of the *Civil Procedure Rules* (2008)) requiring the plaintiffs' shareholders to post personal guarantees as security for costs. They estimated future costs in the range of one to one-and-a-half million dollars. *Held,* motion dismissed, with $2,000 in costs (for a half-day hearing) payable to the plaintiffs forthwith. The new Rules don't alter the court's discretion to do what is just. *Emmanuel v. Sampson Enterprises Ltd.* continues to apply. A factual inquiry must be made in order to ascertain what is fair. The circumstances of this case mean an order for security would preclude the plaintiffs from proceeding. This case concerns a contractual relationship. The defendants freely chose to contract with the plaintiffs and at no time sought to have the shareholders be personally liable should the contract fail. To do so now would be unfair and result in an end to the claim. The termination of the contract (the very issue being litigated) is the reason the plaintiff companies are insolvent. The shareholders have been using their limited personal resources to help fund the litigation. It is clear the defendants are intending to fully use their significant resources as this matter proceeds, as evidenced by their large estimate of what party and party costs will be at the end of the day.

PRACTICE – Costs – solicitor and client costs, ability of client to tax a paid account *MacDonald v. Mor-Town Developments Ltd.,* Hfx. No. 336735, LeBlanc, J., July 8, 2011. 2011 NSSC 281; **S632/16** ■ The respondent hired a new lawyer and applied to tax two bills from their former lawyer, the appellant. The first account had already been paid, but the adjudicator found he had jurisdiction to tax it. He found the appellant had handled the file reasonably well but that the account was overinflated and reduced it significantly. The second account was also reduced and the adjudicator's reasons raised credibility concerns *vis-à-vis* the appellant. The end result was that the adjudicator found the appellant owed the respondent almost $30,000. The appellant appealed, arguing: the adjudicator had no jurisdiction to tax an account that had already been paid (an error in law); the onus should not have been on him to show the second account was reasonable (an error in law); and a lack of procedural fairness. *Held,* appeal allowed: the *Legal Profession Act* does not confer jurisdiction on a small claims adjudicator to tax accounts that have already been paid; the onus should have been on the respondents to prove the accounts were unreasonable, since they were the ones seeking to have them taxed; and at a minimum, the duty of fairness requires that, before an adjudicator can make a negative credibility finding, the party concerned should be given (a) an opportunity to address those concerns and (b) sufficient reasons to allow them a chance to outline grounds of appeal. Even if the adjudicator did have jurisdiction, the breach of the appellant's right to fairness warrants remitting the matter to another adjudicator for a redetermination.

PRACTICE – Costs – Tariff F discussed *Braithwaite v. Bacich et al.,* Syd. No. 24155; 109562, Bourgeois, J., June 2, 2011. 2011 NSSC 213; **S632/11** ■

PRACTICE – Date assignment conference – motion to set date before all steps completed *Hains v Granat et al.,* SYD. No. 278803, Murray, J., April 8, 2011. 2011 NSSC 263; **S632/22** ■ The plaintiff was injured in a motor vehicle accident more than five years ago, and commenced this action almost four year ago. He moved to have the court set a date assignment conference. Although discoveries were not complete, the plaintiff argued the defendants were moving too slowly. He pointed to the fact neither they nor the third party had moved to have him discovered. The defendants argued there was an issue regarding whether the defendant, Rebecca Granat, was driving the vehicle with or without her mother's permission. She had yet to be discovered. *Held,* motion dismissed, with no costs awarded. While the motion has merit and would otherwise be granted, the issue of consent is a pivotal issue in this case. The administration of justice requires things move forward. The court set: a date by which discoveries must be completed; filing deadlines; and a return date to determine whether things have proceeded sufficiently for a date assignment conference to be set.

PRACTICE – Disclosure and production of documents – self-represented litigant *Leigh et al. v. Belfast Mini-Mills Ltd. et al.,* Hfx. No. 272748, Duncan, J., July 20, 2011. 2011 NSSC 300; **S633/11** ■

PRACTICE – Disclosure of documents – prior to summary judgment motion on jurisdiction *Casey v. Halifax (Regional Municipality) et al.,* Hfx. No. 258954, Rosinski, J., June 30, 2011. 2011 NSSC 267; **S632/5** ■ The plaintiff (a firefighter) and his now ex-wife (a police officer) were both employed by the Halifax Regional Municipality (HRM). In light of their deteriorating marital situation and at his wife's request, the plaintiff met with the defendant, Dr. MacGillivray, who was engaged through the police force's Employee Assistance Program (EAP). He was referred for a mental health assessment. Unsatisfied with the outcome

of that assessment, his wife contacted the defendant, Ms. Bonang, a nurse responsible for occupational health matters for certain HRM employees (not including the plaintiff). Ms. Bonang told the plaintiff's superiors she felt he was a "safety concern" and could not remain at work until he received a further health clearance. They disagreed and disputed her authority. The plaintiff sued, claiming intentional torts and negligence causing anxiety and mental suffering. He sought damages. The defendants brought a motion for summary judgment on the evidence, arguing the matter was covered by the relevant collective agreement(s) and could not be litigated in court. HRM and Ms. Bonang filed a defence on the merits, but refused to provide any disclosure. The plaintiff brought a motion to compel disclosure; Dr. MacGillivary supported his position. *Held,* disclosure ordered, with costs of $300 in the cause. It is not plain and obvious the court has no jurisdiction to hear this matter. It is not clear the plaintiff alleges a violation of the collective agreement, nor that the essential character of the dispute is governed expressly or implicitly by it. The collective agreement doesn't appear to allow for an effective redress (i.e., an award of damages). The *Civil Procedure Rules*, (2008) presume full disclosure. Refusing it at this stage would effectively mean deciding the summary judgment motion without the plaintiff having had the benefit of any disclosure. The defendants have not argued disclosure will result in inordinate costs, burden and delay. The plaintiff requires it to effectively advance his position and also to determine whether his statement of claim needs amending. Providing disclosure does not mean the defendants have attorned to the court's jurisdiction.

PRACTICE – Discovery – litigation privilege *Smith Estate v. Sears Canada Inc. et al.,* Hfx. No. 304304, Pickup, J., June 13, 2011. 2011 NSSC 231; **S630/5** ■ Ms. Smith's Electrolux dryer, which she purchased from Sears, caught fire. As she was in bankruptcy, the trustee was pursuing this action on her behalf. It sought disclosure of an expert's report that was prepared for Electrolux, who maintained the report was not relevant and/or was exempt from disclosure due to litigation privilege. Shortly after the fire, Sears put Electrolux on notice that they would be seeking compensation from them for any damages payable by Sears. When the litigation was eventually commenced, Sears and Electrolux retained the same law firm. *Held,* the report is relevant, despite the fact Electrolux did not intend to use it in court; but, it need not be disclosed because it is litigation privileged. Electrolux has met the burden of proving that, on balance, the report was requested for the dominant purpose of (reasonably) contemplated litigation. Privilege was not waived simply because it might have been shared with Sears. Where two parties share the same counsel, they can freely exchange privileged materials without waiving that privilege as it relates to outside parties.

PRACTICE – Discovery of documents – production of mental health records *Neville v. Livingston,* S.Y.D. No. 292400, Murray, J., June 23, 2011; June 22, 2011 (orally). 2011 NSSC 252; **S632/19** ■ The plaintiff was injured in a car accident. The defendant sought disclosure of his medical records, including his files from the local mental health clinic and a counsellor. They maintained the files were relevant, and that his family doctor's notes referenced a history of depression, anxiety and sleep problems, while hospital emergency room notes indicated the plaintiff was suffering from suicidal thoughts only months before the accident. The defendant maintained the files in question may be highly relevant to the plaintiff's ability to return to work after the accident. The plaintiff's lawyer had not seen the files, but argued they were not relevant. *Held,* motion granted with costs of $300 payable in the cause; the plaintiff's lawyer must obtain the files in question and disclose anything relevant or likely to lead to relevant information. The *Civil Procedure Rules*, (2008) presume full disclosure. It is up to the disclosing party to make a motion to limit disclosure or seek directions from the court, if it appears the information sought is not relevant protected by privilege, and/or confidential. A lawyer can't always know this without examining the materials in question.

PRACTICE – Discovery – privilege, relevancy, production of documents, redaction *Saturley et al. v. CIBC World Markets Inc. et al.,* Hfx. No. 305635; 322441, Moir, J., August 2, 2011; June 29, 2011(orally). 2011 NSSC 310; **S633/20** ■ The case management judge assigned to manage two separate but related actions (one a class action suit, the other a wrongful dismissal suit concerning many of the same facts) was faced with deciding several motions, including whether the notice to class members in the class action should include a statement of common issues; who should pay for the cost of notification; whether, in the other action, the defendant (when asked in discovery) must disclose what its counsel knows as a result of interviewing witnesses; and whether information can be redacted simply because it is irrelevant. *Held,* In this case, notice to class members should not include the statement of common issues. Doing so could mislead. There is no statutory requirement to include them. Where the issues are subject to possible amendments and/or further clarification, it's best not to include them. The costs are small and the defendant will be giving notice and should bear the cost of doing so. In this case, the discovery witness(es) should not be compelled to disclose what their counsel learned while interviewing witnesses. The court embarked on a detailed consideration of what, in this context, is and should be covered by litigation privilege. This is not a request for material facts, but rather one for evidence in the possession of the opposing party. The latter is excluded by virtue of litigation privilege. This ruling causes no injustice. There is nothing to preclude the each party from interviewing the witnesses, whose names are known to both sides. Information that is irrelevant can be redacted from materials that must be disclosed, providing that redaction doesn't distort the meaning of the documents or make it unnecessarily difficult to understand them.

PRACTICE – Discovery – production of documents, relevancy *Dexter Construction Co. Ltd. v. Nova Scotia (Attorney General),* Hfx. No. 285919, LeBlanc, J., March 4, 2011; February 18, 2011 (orally). 2011 NSSC 92; **S628/30** ■ The parties entered into four contracts whereby the defendants agreed to supply and place materials for a highway project. The contracts provided for an increase in price if the price of the materials increased between the time the contracts were executed and the time the materials were placed. The defendant later refused to pay, arguing the plaintiffs planned for a price increase when bidding for the tenders and that further compensation would result in overpayment. The defendant applied under Rule 14.12 of the *Civil Procedure Rules* (2008) to force the plaintiffs to disclose bid notes, take off sheets, estimates and related documents in their possession. The plaintiff argued the documents weren't relevant. *Held,* application dismissed. The Rules require that relevance be determined from the vantage point of a trial judge, based on the materials available presently on file. The pleadings in this proceeding are narrow in scope. It appears the issue before the trial judge will be the correct interpretation of the contract. There are no terms in the contract, nor in the pleadings or additional evidence, to show the plaintiff needs to prove it did or did not contemplate the possibility of price increases while preparing the tender documents. The individual prices used by the plaintiff are not relevant in this context.

PRACTICE – Dismissal for want of prosecution – delay *Braithwaite v. Bacich et al.,* Syd. No. 24155; 109562, Bourgeois, J., May 4, 2011. 2011 NSSC 176; **S628/18** ■ The plaintiff's claim concerned the termination of his long-term disability payments in 1996, and was filed in 1998. 18 months' delay was attributable to the defendant; the now unrepresented plaintiff was represented and/or assisted by counsel at various points in the proceeding, but had failed to disclose any documents, his list of documents, or expert reports. He felt the defendants could obtain the information directly from his doctors and asked to set trial dates several times. The defendant moved under Rule 82.18 of the *Civil Procedure Rules* (2008) to have the plaintiff's claim struck for delay. *Held,* motion granted; claim dismissed. The defendants established there was inordinate and inexcusable delay. While some delay can be attributable to not having a lawyer, self-represented litigants can't be forever excused from complying with fundamental obligations and basic, required procedures. The plaintiff was warned by the court that non-compliance could impact his right to proceed. Simply asking for trial dates isn't enough to show he was moving the matter forward in a meaningful way. The defendants are under no obligation to obtain what should have been disclosed by him.

PRACTICE – Judgments and orders – Anton Pillar order *Velsoft Training Materials Inc. et al. v. Global Courseware Inc. et al.,* Hfx. No. 341894, McDougall, J., July 6, 2011. 2011 NSSC 274; **S632/8** ■ The plaintiffs claimed the defendants breached their fiduciary duties by using company information to solicit customers while still employed by the plaintiff. They obtained an *ex parte* Anton Piller order to preserve primarily electronic evidence. The order was carried out in the least intrusive manner possible and the evidence was being held pending resolution of this motion, by the defendants, to have the order set aside. *Held,* order set aside. Because the initial motion was made on an *ex parte* basis, the court must take a fresh look, and is permitted to consider new evidence. The plaintiffs had a strong *prima facie* case; there was a likelihood the defendants possessed potentially incriminating information; and the loss of the materials sought to be protected by the order would potentially cause serious damage to their case; however, the plaintiffs failed to prove there was a real risk evidence would be destroyed before the discovery process was complete. The fact the claim concerned a potential breach of employment obligations/fiduciary duties is insufficient to show the defendants are the sort of people likely to destroy evidence.

PRACTICE – Judgments and orders – partial stay of execution *Szendroi et al. v. Vogler,* C.A. No. 343734, Bryson, J.A., May 3, 2011. 302 N.S.R. (2d) 323; 2011 NSCA 37; **S626/10** ■ After a five-day trial, the respondent (a United States resident, with a relatively low income and not many assets) was awarded over $450,000, including $150,00 in non pecuniary damages and $180,000 for diminished earning capacity. The appellants appealed both the non pecuniary damages and the award for loss of earning capacity. They applied for a partial stay, and proposed to pay $275,000 forthwith. The appeal was set to be heard in less than six months. *Held,* partial stay granted; the appellants will pay $275,000 to the respondent immediately, with the balance paid in trust to his lawyer. The appeal raises an arguable issue; there is a probability the appellants would find it difficult to collect amounts already paid if the appeal is successful; $275,000 is a significant amount of money, and a large percentage of the total award, the appeal is to be heard soon and the potential irreparable harm to the appellants outweighs any inconvenience to the respondent for being made to wait.

PRACTICE – Judicial review – motion to dismiss application, filing time requirements *Rockwood Community Assoc. Ltd. et al. v. Halifax (Regional Municipality) et al.,* Hfx. No. 337839, LeBlanc, J., March 4, 2011; February 14, 2011 (orally). 2011 NSSC 91; **S628/28** ■ The applicants were opposed to a development permit granted by Halifax Regional Municipality (HRM) to the respondent developer. They were made aware of the permit approval by their municipal councillor. They spent several months trying to gather information about the proposed development and/or persuade HRM to change its mind. Eventually, they brought this application for judicial review. HRM filed a motion seeking the dismissal of the application because it wasn't filed within the time frame imposed by Rule 7.05 of the *Civil Procedure Rules* (2008) (the earlier of: (1) 25 days after the decision is communicated to the person; and (b) six months after the day the decision is made). The applicants argued the decision was not communicated to them by HRM, and that the six-month limit should apply because they were not a party to the development application. Overall, they filed about four months late. *Held,* motion granted; the application for judicial review is dismissed. The 25-day limit applies to anyone, not just a party. "Communicated" does not mean the communication must come directly from the source, nor does it mean it must be in writing or personally served (or sent by registered mail). The plaintiffs were informed of the decision early on in the process. The applicants have not satisfied the test for an extension of time for filing their application. Seeking information and attending meetings during the relevant time frame does not amount to a continuing intention to seek judicial review. Granting an extension would impose serious prejudice on the respondent developer. There is no persuasive or appropriate reason for the delay.

PRACTICE – Jury trial – right to *Murphy v. New Ross Hardware Ltd.,* Ken. No. 294509, Moir, J., May 25, 2011. 302 N.S.R. (2d) 392; 2011 NSSC 199; **S629/7** ■ Shortly before an eight-day jury trial was set to start, the defendant moved under Rule 58.02(2) of the *Civil Procedure Rules* (2008) to convert the proceeding to an Action for Damages Under $100,000 (Rule 57). The case was started well before the new Rules came into effect. There was no dispute the damages involved were under $100,000. The benefit to proceeding under Rule 57 would be the fact it doesn't permit jury trials. The trial would be rescheduled to take place before a judge alone, and would likely require significantly less total trial time. *Held,* motion granted. The criteria in Rule 58.02(2) are met. In this context, the Rules deliberately override the otherwise statutory right to a jury trial. The guarantee to a jury trial in the *Judicature Act* is subject to the Rules and gives way to the expedited process allowed for in Rule 57. The principle of proportionality, and not a party's interest in a jury trial, is determinative. Had the claim been started after the new Rules came into effect, it would have ended up proceeding under Rule 57. This is a straightforward slip and fall case; the evidence on liability is uncomplicated and on damages, straightforward. A judge alone could likely hear the matter in four days. The expense of the jury trial would be out of proportion to the interests served by proceeding under Rule 57.

PRACTICE – Orders – authority of prothonotary *Parsons v. S. Cunard & Co. Ltd. et al.,* Hfx. No. 281593, Coughlan, J., May 19, 2011; April 5, 2011 (orally). 302 N.S.R. (2d) 395; 2011 NSSC 191; **S629/3** ■ The plaintiffs sued the defendants in negligence, claiming damages arising from an oil spill. At the date assignment conference, the parties said they did not need to amend the pleadings. Eventually the plaintiffs settled with the corporate defendant. The deputy prothonotary issued an order dismissing the plaintiffs' claim against the corporate defendant, without giving notice to the other defendant,

who didn't find out until some time later. The plaintiffs moved to amend the statement of claim in relation to the second defendant. The second defendant moved to set aside the dismissal order, and asked to amend her defence. She wanted to address any amendments to the statement of claim and intended to file a cross-claim against the corporate defendant. *Held,* dismissal order set aside. The prothonotary wasn't authorized to issue the order, as not everyone entitled to notice was notified. The second defendant was a person affected by the order and should have been made aware of it. The court sees fit to use its discretion to allow amendments to the pleadings, despite the fact the limitation period has expired. The material facts were the same, there was no bad faith on the plaintiffs' part, nor would there be any prejudice to the defendant that can't be compensated by costs. With the dismissal order overturned, it is open to the second defendant to join the corporate defendant by way of a cross-claim. Permitting this doesn't give rise to any prejudice that can't be compensated by costs.

PRACTICE – Proceedings – motion to convert application to action, stay pending class action *Matheson v. Wood World Markets/ Marches M,* Syd. No. 317830, LeBlanc, J., February 28, 2011. 2011 NSSC 85; **S628/27** ■ In related litigation, several plaintiffs were attempting to bring a class action proceeding against the defendant. The plaintiffs in this matter insisted they had no interest in joining the class action, and that they would opt out if named therein. The defendant sought to: have their application converted to an action under Rule 6.02 of the *Civil Procedure Rules* (2008), and have the proceeding stayed until a determination is made on whether the class action will be certified. *Held,* motions dismissed. The defendant failed to prove that an action would be the preferable route. The underlying application is mainly about the legal significance of, and quantum of damages arising from, agreed upon events. Important witnesses have been identified. There is no evidence the defendant can't be ready in a matter of months. The parties agree it will take a maximum of five days for the matter to be heard. If it becomes evident at a later date that things are more complicated than they appear to be, an application to convert to an action can be made then. A stay is not warranted. There is no reason to disbelieve the plaintiffs' stated intention not to participate in a class action suit. There is no evidence the defendant will suffer prejudice or injustice if the stay isn't granted. The possibility the plaintiffs may change their minds is not sufficient prejudice to warrant a stay.

PRACTICE – Publication ban – documents obtained under the *Freedom of Information and Protection of Privacy Act* *Leigh et al. v. Belfast Mini-Mills Ltd. et al.,* Hfx. No. 272748, Duncan, J., July 25, 2011. 2011 NSSC 303; **S633/12** ■ The plaintiffs moved to ban publication of the court's decision. They sought to have the motion for a publication ban argued through correspondence pursuant to Rule 27.01 of the *Civil Procedure Rules* (2008). The defendants responded to the merits of the motion for a ban, but took no position on whether the matter could proceed by correspondence. *Held,* the court finds it appropriate to exercise the discretion afforded by Rule 27.01(g) and hear the motion by correspondence. While an applicant seeking a publication ban usually has to give notice to the media and have the matter heard in open court, in this case the court feels it's appropriate to depart from the usual practice. Since the motion for the ban is dismissed, the public interest in an open and public justice system is preserved. This case has been bogged down by contentious and expensive proceedings. It is a case where the object of the Rules (see Rule 1.01) is best served by answering the motion in the fastest and most cost effective manner possible. The motion for the publication ban is dismissed. There is insufficient evidence to warrant a ban. The documents referenced in the decision at issue (which the plaintiffs intend to appeal to the Supreme Court of Canada) continue to be available to the public in the court's file. They have been discussed in various degrees in other decisions that aren't subject to a publication ban. Their decision to delay their appeal to the Supreme Court of Canada is insufficient reason to impose a ban. When they do appeal, there are other remedies available to them. The documents in question relate to a FOIPOP application and are otherwise matters of public record.

PRACTICE – Publication ban – jurisdiction, Court of Appeal Judge v. Court as a whole *B. (A.) and D. (C.) v. Bragg Communications Inc. et al.,* C.A. No. 330605, Beveridge, J.A., May 2, 2011. 302 N.S.R. (2d) 314; 2011 NSCA 38; **S626/9** ■ The applicant's appeal of a Supreme Court decision refusing her requests for a publication ban and permission to proceed anonymously was dismissed. It was clear she would be applying for leave to appeal the appeal court's decision to the SCC and their order contained a provision continuing a temporary ban/ anonymization order for a period of 60 days or "such further time as this Court or the [SCC]" orders. Before filing the application for leave, the applicant brought this motion before a judge of the appeal court, seeking an extension of the existing publication ban (soon set to expire) pending the ultimate disposition of the SCC appeal on the merits. *Held,* motion dismissed, without costs. An appeal court chambers judge, as opposed to a panel, has no jurisdiction to grant the requested relief. There are other means by which the relief can be sought. There is no apparent reason why the applicant delayed filing her leave application in the first place. Once she files, she can ask the SCC to grant the requested relief, or use the *Supreme Court Act*, s. 65.1 (2) to ask a supreme or appeal court to do so. Her delay in proceeding doesn't constitute a potential miscarriage of justice. The order clearly reserves jurisdiction to "this Court"(a panel thereof) as opposed to a judge of the court. While the *Civil Procedure Rules* (2008) allow for a motion to be made to the appeal court (see Rules 90.36 and/or 90.37(12)(d)) the motion was not made via this route, but rather to a chambers judge.

PRACTICE – Quick judgments – setting aside *Mullick v. International Exteriors [ATLA] Ltd. et al.,* S.C.C.H. No. 313682, Parker, Adjudicator, February 26, 2010. 2010 NSSM 9; **SmCl18/24** ■ The defendant applied to set aside a default judgment issued by the Small Claims Court. Their in-house counsel told the claimant's lawyer they wished to defend the claim on several basis. The lawyers left voice mail messages for each other, but weren't able to actually talk until after the default judgment was issued. As soon as it was, the defendant hired local counsel and, after discussions failed to lead to a resolution (three months), brought this application. *Held,* application allowed, default judgment will be set aside and the matter set for a hearing on the merits. While the Act doesn't require the defendant to show their defence has merit, it is preferable to require that they show there is at least a plausible defence before the adjudicator goes on to consider the requirements of s. 23(2). Here, that low threshold has been met. Moving on to the statutory test, the defendant has a reasonable excuse for failing to file their defense within the allowable time frame. It is clear the parties were trying to reach each other; it wasn't a case of lax practice. There was no unreasonable delay in bringing this application in the circumstances, given the parties were negotiating.

PRACTICE – Small Claims Court – jurisdiction to grant relief from execution order *Davison v. Canadian Artists Syndicate Inc.,* Claim No. 319192, Barnett, Adjudicator, April 26, 2011. 2011 NSSM 28; **SmCl18/13** ■ The applicant applied for relief from an execution order resulting from a small claims judgment in favour of the respondent.

She was concerned the respondent would garnish all of her commission income, leaving her destitute. At issue was the adjudicator's jurisdiction to grant the relief. *Held,* the Small Claims Court has the authority to grant relief from execution orders issued pursuant to a small claims judgment; the court has a necessarily incidental or implied jurisdiction to control its own processes. Many small claims litigants are self-represented and they should be allowed to access an inexpensive and informal process in relation to enforcement issues. However, the court's discretion in this regard should be exercised in a very cautious manner. Given s.3(1) of the Act, which provides that small claims orders can be enforced in the same manner as Supreme Court orders, it flows that the rules relating to minimum income, etc., would also apply. It's unnecessary to grant the relief requested, because the commission income falls within the definition of "wages" in Rule 79.08(3) of the *Civil Procedure Rules* (2008). The applicant will be allowed to keep the minimum income outlined therein before any monies are garnished.

PRACTICE – Summary judgment – cause of action, estoppel *Kasperson v. Halifax (Regional Municipality) et al.,* Hfx. No. 278759, LeBlanc, J., February 11, 2011. 2011 NSSC 65; **S628/26** ■ The applicants hired the third parties to help build their home. They were dissatisfied with the work and eventually terminated the (verbal) contract. After moving in, they discovered a number of serious deficiencies, none of which were picked by the defendant, Halifax Regional Municipality (HRM), during routine inspections. The third parties sued the applicants for unpaid work in the Small Claims Court. The applicants counterclaimed, alleging the third parties were negligent in constructing the home. They sought a stay of the small claims hearing, saying they intended to bring an action against the third parties and HRM in the Supreme Court. The small claims adjudicator refused to grant the stay. After the hearing, but before a decision was rendered, the applicants amended and limited their claim to deficiencies in the home's heating and plumbing issues. Damages were set at $25,000 (the maximum allowable), although it was noted actual damages were higher. In the meantime, the applicants brought this action against HRM (who joined the third parties) claiming HRM failed to exercise due diligence in performing the inspections. Together, HRM and the third parties moved under the *Civil Procedure Rules* (2008) for summary judgment on the evidence (Rule 13.04), claiming the action was res judicata and barred on the basis of issue and/or action estoppel. *Held,* motion for summary judgement granted, claim dismissed. Issue estoppel does not apply because the issue before the Small Claims Court (the third parties' contractual duties) and the issue before this court (HRM's negligence) are not the same. Cause of action estoppel does apply. The parties to the action are the same, or in privity with the parties to the small claims matter. The causes of action are not separate and distinct; the applicants could have named HRM in the small claims proceeding. In this case, the court will not use its discretion to allow the action to proceed. The plaintiffs were represented by counsel throughout, were fully aware of HRM's role in the construction of the home and had several options open to them (i.e., filing with the Supreme Court earlier, appealing the denial of their request for a stay, or pleading the full amount of damages and thus ousting the Small Claims Court's jurisdiction over the matter). They should not be permitted to split their case. Further, they are limited by the Small Claims Court's findings on damages and to recovering only $25,000.

PRACTICE – Summary judgment – claim by borrower against third party lending institution in negligence *Shane et al. v. Allen et al.,* Hfx. No. 316695; Pic. No. 300385; 306313, Murphy, J., May 31, 2011; July 20, 2010 (orally). 2010 NSSC 484; **S629/14** ■ AGF Trust Co. (AGF) brought motions for summary judgment on the pleadings (Rule 13.03 of the *Civil Procedure Rules* (2008)) in relation to three separate but related proceedings. AGF is a trust company that offers financial services, including loans, to investors. Members of the public don't apply to AGF directly, but rather through companies that deal in investments. AGF had a contract with Keybase, who used to employ Mr. Allen, a securities advisor. Mr. Allen completed loan applications on the plaintiffs' behalf in order to secure investment loans from AGF in the amount of $245,000 each. The plaintiffs all allege Mr. Allen misrepresented their net worth and assets and in some instances forged their signatures. They claimed against Mr. Allen and Keybase, but also against AGF, alleging AGF owed them a duty of care and was negligent in failing to exercise due diligence by verifying the contents of the applications. AGF argued they owed no duty of care and that the pleading disclosed no cause of action and were clearly unsustainable. *Held,* motion(s) for summary judgment granted. In the court's view, the principle that a lender doesn't owe a duty of care to borrowers extends beyond situations where the lender is advising on risk. There was no duty of care here and no actionable cause in negligence can be made out on the pleadings. The court specifically made no mention on the viability of any claims in contract. This was a relatively complicated motion. Tariff C applies and it is appropriate to award costs of $1,500 plus disbursements to AGF in relation to each of the three proceedings.

PRACTICE – Summary judgment – genuine issue of fact for trial *Cameron v. Maritime Barrel Racing Association et al.,* Tru. No. 315243, LeBlanc, J., March 4, 2011. 2011 NSSC 93; **S628/31** ■ The plaintiff sued, claiming the defendant association improperly disciplined him and injured his reputation. The disciplinary action was later rescinded. The association applied for summary judgment on the pleadings (Rule 13.03 of the *Civil Procedure Rules* (2008)), arguing the claim was moot and the court has no jurisdiction over their internal decision-making processes. *Held,* motion dismissed. After observing the motion perhaps should have been made on the evidence (Rule 13.04), the court found there are genuine issues of fact for trial; namely, whether and how widely the defendant communicated the reason for the plaintiff's withdrawl from the competition, what sort of duty of fairness they owed him and whether there is a basis to claim legally compensable damages. The association isn't a quasi-judicial administrative body and can't argue it owed no private duty to the plaintiff.

PRACTICE – Summary judgment on evidence – settlement agreement *Maritime Travel Inc. v. Boyle,* Hfx. No. 312635, Rosinski, J., August 11, 2011. 2011 NSSC 318; **S634/1** ■ The plaintiff, Maritime Travel, successfully sued Go Travel. Go Travel appealed. During negotiations pending the appeal, counsel reached an agreement that was later reduced to a consent order. The order required the respondent, Mr. Boyle, to pay two installments into trust on Go Travel's behalf. Mr. Boyle was not a party to the original proceeding. There was a question as to whether the lawyer for Go Travel had actual, apparent or implied authority to act for him. Mr. Boyle made one payment, but failed to make the second. Maritime sued and brought this summary judgment motion (on the evidence – Rule 13.04 of the *Civil Procedure Rules* (2008)). *Held,* motion dismissed. There are material facts in issue requiring trial; namely, whether Mr. Boyle was represented by counsel for Go Travel and whether counsel had actual or apparent authority to act on his behalf. The fact Mr. Boyle was named in the consent order isn't determinative, nor is the fact Mr. Boyle made the first payment contemplated by the order.

PRACTICE – Summary judgment – pleadings *Thompson v. Enterprise Cape Breton Corp.,* Syd. no. 339138, Murray, J., July 8, 2011. 2011 NSSC 280; **S632/15** ■ Historically, coalyard employees were allowed to obtain coal from their company providing they removed it themselves. The plaintiff earned money hauling coal for these employees. When the defendant assumed ownership of the coalyard, it refused to permit the plaintiff access to the yard. He brought this action, claiming economic loss and damage to his reputation. The defendant moved for summary judgment on the pleadings, claiming the statement of claim disclosed no reasonable cause of action since it did not refer to a contract (oral or otherwise) allowing the plaintiff access to the yard. They deferred filing a defence until the motion was decided. *Held,* application allowed in part. The claim relating to loss of reputation is unsustainable, but the claim for economic loss is not certain to fail. While the statement of claim is lacking sufficient detail at this time, it can be amended without the court's permission because pleadings have not closed yet. The proceeding is in an early stage. The argument that an amendment will not suffice is best left for trial. It is open to the defendant to make a demand for particulars or another motion for summary judgment at some point in the future when there is more information on hand to show the claim is weak. While economic loss can be reasonably inferred by their refusal to simply allow the plaintiff to enter the yard to collect coal when in the past he was permitted to do so, a loss of reputation cannot absent further detail(s) regarding actual damage to the plaintiff's reputation.

PRACTICE – Summary judgment – statement of claim unsustainable *Innocente v. Canada (Attorney General),* Hfx. No. 311509, Coady, J., May 12, 2011. 2011 NSSC 184; **S628/21** ■ The plaintiff wanted to sue the Attorney General for losses he claimed he suffered to property seized under a valid warrant and retained under a restraint order. He was found guilty and sentenced to seven years for various drug offences. His original statement of claim was challenged when the Attorney General brought an earlier motion for summary judgment. The court found the claim disclosed no cause of action and dismissed it without prejudge to the plaintiff's right to file an amended claim, which he did. The Attorney General brought this further motion under the *Civil Procedure Rules* (2008) for summary judgment on the pleadings, alleging the amended statement of claim disclosed no cause of action (Rule 13.03(1)) and/or was clearly unsustainable when read on its own (Rule 13.03(1)(c)). *Held,* motion granted on the basis of Rule 13.03(1)(c)); costs of $500 awarded to the Attorney General. While the claim discloses a possible cause of action based on the Attorney General's statutory undertakings, this alone doesn't decide the matter. The amendments add nothing by way of necessary detail to the statement of claim. The claim doesn't plead sufficient material facts to comply with the Rules on pleadings (see Rule 4.02).

PRACTICE – Summary judgment – whether material issue of fact for trial *Globex Foreign Exchange Corp. v. Launt et al.,* C.A. No. 332706, Farrar, J.A., July 15, 2011. 2011 NSCA 67; **S631/8** ■ The appellant sued the respondents, Mr. Launt and his company, Numberco. It alleged Numberco was simply an agent for Mr. Launt, who used a shell company to contract with them. Mr. Launt bought a successful a summary judgment motion (on the evidence – *Civil Procedure Rules* (2008), Rule 13.04) early on in the proceeding, which resulted in the claims against him being dismissed. The appellant appealed, alleging the chambers judge improperly made findings of fact by concluding there was no agency relationship between Mr. Launt and Numberco. *Held,* appeal granted by a majority of the court, which found the claims against Mr. Launt are best left for trial. The chambers judge failed in applying the first stage of the summary judgment test. She should have determined whether there were any genuine issues of material fact requiring trial. Instead she made a finding that no agency relationship existed based on the evidence before her. This was a finding of fact. The determination of whether an agency relationship exists requires a contextual analysis. A chambers judge deciding a summary judgment motion is not charged with determining matters of fact or mixed law and fact, which are in dispute, nor are they to determine credibility. The chambers judge here did all three. The fact in dispute here is not an incidental fact. That is not to say a party can never succeed on a summary judgment motion where agency is alleged and pleaded. In a dissenting opinion, Bryson, J.A. found the chambers judge made no error: she properly found Mr. Launt met the first part of the summary judgment test and that the appellant failed to meet the second part of the test by showing it had a reasonable chance of success on its claim of agency.

■ REAL PROPERTY

REAL PROPERTY – Declaration of title – interpretation of will and deed *Prest Bros. Ltd. v. Myers,* Hfx. No. 270674, Wright, J., May 5, 2011. 2011 NSSC 175; **S628/15** ■ The two remote woodlots in question were owned by a man who died around 1921. The testator's will made no specific mention of the lots. It contained specific bequests to each of his children and left one son all remaining "money". It further required that son to look after his mother (the testator's widow). The son, under the impression that he owned only a portion of the lots, eventually got quit claim deeds from some siblings and purported to convey by deed what he thought was his 5/8's interest in the lots. The plaintiff now owned whatever was conveyed by way of that deed. The defendant had spent time on the lots in question growing up. Before 1992, he used the land recreationally (hunting, fishing) and in a manner enjoyed by other members of the general public. He started paying the municipal taxes on the land in 1989, and it appeared that an error at the tax office may have resulted in two assessments being sent out each year – one to the plaintiff and one to the defendant. He built a camp on the land in 1992 and later put a trailer there. At issue was: whether the term "money" in the will should be interpreted as a residue clause, in effect conveying the lots to the son; the interpretation of the deed, and whether it conveyed the son's entire interest in the lots or only the 5/8's referenced therein; whether quit claim deeds obtained and registered by the defendant to bolster his competing claim for title were valid; and whether the defendant could establish a claim based on adverse possession. The plaintiff sought a declaration of rights over the property in relation to the defendant only, an injunction requiring him to remove his trailer from the land and preventing him from further trespassing. He also sought damages. *Held,* the court declares the plaintiff is the owner of a 5/8's interest in the lots in question, and grants an injunction requiring the defendant to permanently remove his property from the land. Nominal damages of $500 awarded. There will be no order requiring the defendant not to trespass; it's presumed he will comply with the order. Based on the language in the will, the testator's subjective intention that the son look after his mother, and the surrounding evidence, this was in effect a residue clause and "money" should be taken to include the lots, especially given the presumption against intestacy. Although the son didn't realize he owned the land outright, the deed should be given a literal interpretation based on the limiting language therein. The objective intention was that a 5/8's interest be conveyed and so that is what was conveyed. The defendant has no claim based on paper title. There is no claim based on adverse possession. His first act of possession was in 1989 when he started paying taxes on the land; he doesn't meet the statutory requirement

for 20 years of open and notorious use since the action was started in 2006.

REAL PROPERTY – Quieting title – superior paper title, constructive and adverse possession *Creighton v. Nova Scotia (Attorney General) et al.,* S.B.W. No. 220834, Pickup, J., March 31, 2011. 301 N.S.R. (2d) 360; 2011 NSSC 131; **S627/8** ■ The plaintiff brought an application under the *Quieting of Titles Act* concerning a portion of land and an accompanying water lot. The defendants, who claimed title to one of the lots and a portion of the other, argued that their pre-Confederation grant took precedence over the plaintiff's post-Confederation grant as the land was part of a public harbour (based on the fact that they required a federal permit to put a mooring in the harbour) and that the plaintiff's earliest root of title came out of a survey error. Each party brought forth expert evidence from surveyors but when the historical plans did not match exactly with the markings on the ground, the plaintiff's expert had used the lines that had been established on the ground. *Held,* the plaintiff not only had a superior chain of title to both lots (the defendant had no chain of title to the lot covered by water) but had also established both constructive and adverse possession of the lot for which the defendants had a chain of title. The recital in a previous deed relied upon by the defendants clearly showed that it did not convey the lands covered by water, meaning that their later confirmatory deed could not have conferred any title to that lot and it was clear from the wording of that later deed that it only purported to convey the water portion of the grant. The defendants offered no evidence to confirm that their pre-Confederation grant trumped a post-Confederation Crown grant and because the harbour was found to be not a public harbour (the relevant question was the use of the harbour at the time of Confederation, not which level of government required the granting of a permit), all provincial water grants, pre and post-Confederation, were considered valid. The court distinguished between constructive and adverse possession and noted that not only did the plaintiff have colour of title and occupy the disputed land as if it were his own, but there was very persuasive evidence that he and his predecessors in title had also constructively possessed both lots. A common use of such property would be to moor one's boat and the plaintiff and his predecessors had always openly claimed the lands and used them mainly to store their boats.

■ SALE OF LAND

SALE OF LAND – Agreement of purchase and sale – rule against perpetuities *Silver v. Fulton,* BWT. No. 294754, Coady, J., March 30, 2011. 2011 NSSC 127; **S630/12** ■ The defendant made recreational use of a parcel of land on the South Shore. When the land was sold, he was given a chance to buy it but could not afford to do so. He approached his employer, the applicant, who agreed to buy the land and allow him to continue using it. Their agreement was a verbal one, and they eventually disagreed on whether it amounted to an option to purchase at fair market value at a later date (as the plaintiff claimed) or a trust whereby the defendant could buy the land at the original purchase price. A jury found the agreement was an option to purchase at fair market value, and that the defendant expected it would be at least between 10 and 20 years before he could afford to do so. The question before the court was whether this agreement violated the rule against perpetuities and should be considered void. *Held,* the agreement violates the rule against perpetuities and is void. The rule against perpetuities applies because the agreement concerned an interest in land. It's not relevant whether the 21 years engaged by the rule starts running the day the agreement was made or when either party dies. Either way, there was no certainty the agreement would be completed, and the interest vested, within 21 years. Although the defendant urged the court to take a "wait and see" approach, there is no authority to support that approach.

■ TORTS

TORTS – Interference with economic relations – duty of care, standard of care, causation *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General),* C.A. No. 325779, Farrar, J.A., May 12, 2011. 302 N.S.R. (2d) 367; 2011 NSCA 43; **S626/15** ■ The plaintiff entered into a collective agreement with the existing unionized employees after it purchased a steel fabrication plant. When the plant failed to thrive and it was forced to shut down operations, it brought an action against two unions and the Province, alleging conspiracy, negligence, intentional interference with economic interests and abuse of public authority on the basis that the unions had abused the grievance process to harass and cause harm to its business interests and the unions and the Province had conspired to and abused the occupational health and safety provisions of the collective agreement and the Province's statutory regulatory power. The action against the union was diverted to arbitration and the action against the defendant was dismissed, with no negligence and no causal link between the plant closure and the defendant's actions being found. The department's *Occupational Health and Safety Act* ("OHSA") policies were internal documents, not mandatory requirements; the Act gave the defendant broad discretion; and its actions were neither arbitrary nor done with malice/bad faith. The defendant's primary purpose was to ensure compliance with good safety practices and it acted in a reasonably competent way, having regard to the nature and severity of risk, industry customs and relevant guidelines. The plaintiff appealed and the Attorney General cross-appealed, alleging that the trial judge had erred in finding any duty of care. *Held,* appeal dismissed; cross-appeal allowed. Although the trial judge erred in finding that the defendant owed a duty of care to the plaintiff, he did not err in his formulation of the standard of care nor in his determination that the actions of the defendant were not causative of the plaintiff's loss. The presence of a statutory immunity or limitation of liability clause goes right to the heart of whether or not a *prima facie* duty of care exists and to impose a duty of care in circumstances where a failure to take steps to enforce the provisions of the OHSA may have devastating consequences on both employers and workers could potentially give rise to a conflict with the overarching duty to maintain a safe work environment. The argument that the trial judge erred in finding that the standard of care was not breached failed to recognize the discretion given by the Act to the Department in carrying out its duties.

TORTS – Vicarious liability – appeal of damages for sexual assault *M. (L.M.) v. Nova Scotia (Attorney General),* C.A. No. 325126, MacDonald, M. C.J., May 31, 2011. 2011 NSCA 48; **S626/20** ■ The Province's employee had been found guilty of the historic sexual abuse of the teenage plaintiff when the employee was the plaintiff's parole officer. The plaintiff brought this action against the Province for damages on the basis of vicarious liability. The plaintiff's substance abuse had worsened after the assaults and he continued to suffer from nightmares, difficulty sleeping, paranoia and difficulty trusting others, difficulty with intimate relationships, withdrawal from friends and family and anxiety and panic attacks. Although he did not initially complete high school, he eventually obtained a General Education Diploma. He was awarded the sum of $125,000 for general damages and $250,000 for past and future loss of income. The plaintiff appealed the damage award and the Crown cross-appealed. *Held,* appeal allowed in part; cross-appeal dismissed; Province ordered to pay the plaintiff an additional $60,000 for the cost of future counselling. The trial

judge was keenly aware of the plaintiff's suffering as shown by her comprehensive analysis and the fact that she did not gloss over his injuries; she was also abundantly familiar with the devastating impact of the parole officer's abuse on his victims and the award was identical to that in *Nova Scotia v. B.M.G.* (2007) (N.S.C.A.) where the same perpetrator had assaulted boys of a similar age in similar circumstances. However, it was not useful to compare the award for loss of future income to that in *B.M.G.* as there is no range for this type of award; rather, it must be calculated based on the evidence presented for each individual claimant and a lack of medical evidence does not prevent a judge from making factual findings about what she believes is an appropriate amount. The fact that the calculation was particularly challenging in this case was all the more reason to rely on the trial judge who has witnessed and weighed the evidence first-hand. Although the trial judge acknowledged the plaintiff's plan to continue future counselling, it appeared that this piece of the claim had simply fallen between the cracks and, given the lengthy record of this litigation, the interests of justice demanded that the Court of Appeal deal with this portion of the claim.

■ TRUSTS

TRUSTS – Public trustee – interest rate *Laing Estate v. Nova Scotia (Attorney General),* C.A. No. 338186, Fichaud, J.A., July 7, 2011. 2011 NSCA 63; **S631/4** ■ When a beneficiary could not be located (in 1943), the executors paid his share of the estate to the Public Trustee, who (in 1994) paid the amount to the Minister of Finance under s. 28 of the *Public Trustee Act*. Eventually, the administrator of the (now deceased) beneficiary's estate applied to have the funds, plus interest, released. The court held that interest should be paid at a rate of prime minus three-and-a-half per cent, which it erroneously believed was the actual rate of interest earned by the Province. When the administrator appealed (arguing a higher rate of interest was warranted in light of a trustee's fiduciary duty to make prudent investment choices), it became apparent the actual rate of interest earned on the money was prime minus two per cent because it was deposited in the Province's general account and not its trusteed account (which earns less interest). *Held,* the original judge made a palpable and overriding error of fact. He was correct that interest should be paid based on the amount actually earned, but he was wrong in setting that amount at prime minus three-and-a-half per cent. Interest will be adjusted and paid at a rate of prime minus two per cent. A trustee cannot benefit and pocket the difference simply because it chose to use the general account instead of the trusteed account.

■ WILLS AND ESTATES

WILLS AND ESTATES – Consent order – interpretation of mortgage balance *MacNeil Estate v. Woodman,* S.F.S.N.O.T.H. No. 73217, Wilson, J., July 12, 2011. 2011 NSSC 288; **S632/21**

WILLS AND ESTATES – Procedure – costs *Davies v. Collins,* Hfx. No. 328880, Rosinski, J., June 8, 2011. 2011 NSSC 227; **S629/29** ■ After the deceased and the applicant were divorced, he moved to Trinidad where, on his deathbed, he remarried. Under the laws of Trinidad, a marriage *in extremis* did not revoke a party's prior will and since the ex-wife was the only beneficiary under the deceased's will, she commenced litigation in Trinidad to contest the grant of administration to the current wife. When this was unsuccessful, she applied in Nova Scotia for a declaration that the laws of Trinidad should be given effect under the *Wills Act*, which also proved unsuccessful. She now sought costs out of the estate but the current wife argued the applicant should pay her costs. *Held,* the applicant will pay the wife $4,000 (the Tariff C maximum multiplied by four); the applicant's motivations and her conduct of the litigation were sufficiently troubling to justify a departure from the presumptive costs award in estate matters. Although the question of whether a marriage *in extremis* would revoke a Nova Scotia will was not a vexatious or unreasonable matter to bring to court, the applicant had not made the court aware of the Minutes of Settlement, in which she had relinquished the right to be executrix of the will; had presented affidavits containing irrelevant material; and had failed to appeal the decision in Trinidad, seeking to litigate the matter afresh in this court, without advising the court of the "expert opinion" presented to the Trinidadian court.

WILLS AND ESTATES – Resulting trusts – undue influence *Campbell et al. v. MacRae Estate,* C.A. No. 334142, MacDonald, M. C.J., June 10, 2011. 2011 NSCA 57; **S626/29** ■ The plaintiff and her late husband had lived on the husband's family farm for close to 30 years after his parents had convinced him to quit his job, return to Nova Scotia and live with them. Over the years, he had worked the farm and substantially improved it. When his father died, his mother signed a deed making her and the son joint tenants, with the expectation that she would die first and the son would inherit the farm. However, the son died before the mother and, after the mother's death, the plaintiff successfully claimed a resulting trust in favour of her husband's estate. The court found that the plaintiff had rebutted the presumption of undue influence regarding the signing of the deed and had proven a resulting trust in favour of her husband. Although a dominant relationship existed between the son and the mother and the mother did not have independent legal advice when she signed the deed, the signing of the deed was entirely consistent with the statements she had made to others regarding the son's ownership of the farm. The mother fully understood the effect of the deed, which would have accomplished exactly what she intended if she had predeceased her son and it would be unjust and contrary to the mother's intention to deprive the son's estate of full ownership of the farm. The siblings appealed. *Held,* appeal dismissed; the judge's legal analysis was correct and he made no palpable or overriding errors of law. The trial judge had properly relied on the independent evidence of a neighbour to rebut the presumption of undue influence and had properly applied the law of resulting trust. The evidence supported his findings that the mother had never expected the son to predecease her and he had given up a good job to return home at his parents' request.

WILLS AND ESTATES – Solicitor and client – costs *Peach Estate (Re),* Syd. No. 21051, Murray, J., June 10, 2011. 2011 NSSC 230; **S629/31** ■ The court was required to decide costs in an estate matter involving the interpretation of a will. The parties to the litigation were three charities, who, along with the payor estate, were all in agreement that solicitor-client costs should be awarded to all parties. *Held,* solicitor-client costs awarded to all parties; exceptional circumstances existed in that the pivotal issue stemmed from the wording of the will, which made it reasonable for all three parties to intervene in the application, as all were potential recipients, depending on the interpretation, which was not obvious. The connection between each party and the language in the will was obvious and one of the parties, although unsuccessful, provided vital information and played an instructive role throughout the proceedings.

WILLS AND ESTATES – Wills – entitlement to estate *Jollimore Estate v. Nova Scotia (Public Archives) et al.,* Hfx. No. 335260,

Coughlan, J., July 20, 2011. 2011 NSSC 218; **S633/4** ■ Ms. Jollimore was killed by her son in a murder-suicide. Her will left everything to him but provided that, should he predecease her, the residue of the estate would go to the Public Archives. The evidence showed he survived her. The law is clear that a murderer cannot profit from his actions and so everyone agreed the gift to the son must fail. At issue was whether the reference to the son predeceasing her was intended to be a condition precedent. If so, Ms. Jollimore's surviving family members argued, the gift to the Archives fails and the residue should pass to them according to the laws of intestacy. *Held,* the gift to the Archives stands. Ms. Jollimore clearly intended that, should her son not be entitled to the estate (i.e., because he died first), it should go to the Archives. She could not be expected to have anticipated that he would kill her and disentitle himself that way. To find an intestacy would be to ignore Ms. Jollimore's wishes.

WILLS AND ESTATES – Wills – incorrect description of residual beneficiary, charity *Pictou County Genealogy & Heritage Society v. Darby Estate,* Hfx. No. 337157; Probate No. 56651, Coughlan, J., July 14, 2011; June 15, 2011 (orally). 2011 NSSC 271; **S632/28** ■ The testator left one fourth of his estate to the "Heritage Society" to be used to promote Scottish heritage in Pictou County. There was no such entity at the time his will was made, nor was there one now. A "Genealogy & Heritage Society" existed then and continues to exist. They applied for a motion declaring them to be the residual beneficiary of the gift. A distant relative felt the gift should pass to him based on the laws of intestacy. *Held,* the wording of the will was an error. The reference to the Heritage Society was a mistaken reference. The testator likely meant to refer to the Geneology & Heritage Society. If this isn't the case, the doctrine of cy-pres applies. The testator wished to help promote Scottish heritage in Pictou County. That is a charitable intent or purpose that can and must be given effect to.

WILLS AND ESTATES – Wills – writing not in compliance with formal requirements *Robitaille v. Robitaille Estate,* Hfx. No. 327095; Probate No. 58137, LeBlanc, J., May 27, 2011; June 3, 2010 (orally). 2011 NSSC 203; **S629/10** ■ The testatrix died a few weeks after instructing her lawyer to amend her will to include a second protective trust clause and to remove an replace an executor. The instructions were, in part, given over the phone and the lawyer made no inquiries as to her capacity. The testatrix became suddenly ill and signed the will in hospital without having it properly witnessed. The applicant applied to have the court declare her mother's draft will "a writing" that is valid and fully effective despite not having been properly executed. No one opposed the application. *Held,* application allowed. The revised will, or writing, represents a deliberate or fixed and final expression of the testatrix's intentions. While a protective trust clause such as this may raise a red flag in some circumstances, here it was identical to a provision in the prior will (although that one applied to another beneficiary). The beneficiary didn't contest the validity of the clause. The presumption of capacity should still apply in the context of a writing that doesn't comply with the formalities of execution. It's a rebuttable presumption that hasn't been overturned on the evidence here.

NOTICE

If you've wanted to do *pro bono* work but are afraid you'd be overwhelmed by the demand, help may be on its way...

The **Legal Information Society of Nova Scotia** (LISNS) has received funding to develop a ***pro bono* hub** for Nova Scotia. The aim of this three-year project is to develop a hub whereby lawyers will have opportunities to be involved in *pro bono* work in a way that best suits their circumstances and interests whether that be providing advice, making a presentation on preparing for court, mentoring or helping a community group develop policy.

"We will be seeking input from the legal community and the wider community on what kind of model will best work in Nova Scotia and to identify priority areas and target groups", says Maria Franks, LISNS Executive Director. "We don't want to duplicate services offered by legal aid or to provide services to those who can afford to pay for legal representation."

In 2009, the Law Foundation of Nova Scotia funded a study in Nova Scotia that produced a report called *Pro Bono in Nova Scotia: Current practice and future opportunities.* The study was the work of three former coordinators of the ***Pro Bono Students Canada*** program at Dalhousie Law School. Since that time, LISNS has been working with others on the idea of a *pro bono* project but up until now funding was not available.

The **Pro Bono Hub Project** is funded by the Access to Justice Fund administered by the Law Foundation of Ontario.

"There are many people out there who struggle with legal issues, who become frustrated and disillusioned with the system and could do with some legal advice," says Franks. "They fall between the cracks because they don't qualify for legal aid and don't have the resources to retain legal services. We hope to improve the situation for them with this project."

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