NOVA SCOTIA LAW NEWS

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From the Nova Scotia Court of Appeal

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Decisions received between July 11, 2011 and December 12, 2011.

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■ ADMINISTRATIVE LAW

ADMINISTRATIVE LAW - Boards and tribunals - judicial review of decision of Assistance Appeal Board decision declining to fund equipment to grow medical marijuana as a "special need" *Riley v. Nova Scotia (Minister of Community Services),* Amh. No. 346690, Bourgeois, J., October 21, 2011. 2011 NSSC 387; **S637/9** ■

ADMINISTRATIVE LAW - Boards and tribunals - jurisdiction of Nova Scotia Securities Commission to discover investigators *Nova Scotia (Securities Commission) v. Potter et al.,* Hfx. No. 334479, Rosinski, J., June 16, 2011. 305 N.S.R. (2d) 104; 2011 NSSC 239; **S630/29** ■ The court was asked to adjudicate on procedural matters arising from a proceeding currently before the Securities Commission, which had stalled at the discovery stage. Specifically, the applicants sought a declaration that certain questions posed on discovery were irrelevant (a finding already made by the Securities Commissioner) and that requiring them to answer those questions would result in the disclosure of privileged information and lead to a breach of the *Securities Act* (a matter the Commissioner indicated should be referred to the court). After refusing a request for an adjournment (made by two of the respondents), the court was required to determine whether it has the jurisdiction to grant the declaratory relief being sought; and whether an *in camera* hearing should be held to decide whether there has or will be a potential violation of the Act if the questions are answered. *Held,* the Commission has the jurisdiction to control its own processes; however, the court does have jurisdiction to decide the question the Commissioner has indicated he would like the court to answer. After fully exploring the limits of a court's authority to grant declaratory relief, the court noted it would have been preferable for the Commissioner to make this decision and it appears he would have had common-law authority to hold an *in camera* hearing to fully explore it. A court's inherent jurisdiction cannot be relied on where the Act clearly allows these matters to be addressed within the statutory framework, but the interests of justice favour the court making a finding on the privilege issue in this case. While the request for an *in camera* hearing is not a request for a publication ban, many of the same considerations apply. Here it was appropriate to hold the *in camera* hearing. After a consideration of all the evidence, the court is prepared to issue a declaration that requiring staff to answer the questions posed on discovery will not result in a breach of the Act.

ADMINISTRATIVE LAW - Judicial review - Assistance Appeal Board *Nova Scotia (Department of Community Services) v. McIntyre,* Syd. No. 348131, Bourgeois, J., October 31, 2011. 2011 NSSC 401; **S638/22** ■

■ BANKRUPTCY

BANKRUPTCY - Application to lift stay - granted *CIBC Mortgages Inc. v. Touchie et al.,* Hfx. No. 342933, Hood, J., June 30, 2011. 305 N.S.R. (2d) 228; 2011 NSSC 228; **S632/2** ■The defendants' mortgage to the plaintiff was never recorded. They defaulted on the mortgage and executed another mortgage with another lender, which was recorded. When the defendants declared bankruptcy, the plaintiff applied to have the stay imposed under the *Bankruptcy and Insolvency Act* lifted, arguing that the defendants had breached their fiduciary duty to the plaintiff and the first mortgage had been fraudulently obtained. *Held,* application to lift stay granted; although the mortgage was not fraudulently obtained, a court could conclude

that the defendants owed a fiduciary duty to the plaintiff, in which case the mortgage would survive bankruptcy.

BANKRUPTCY - Limitation defence - disallowed *Drum Head Estates Ltd. v. Chapin Estate,* C.A. No. 342923, Hamilton, J.A., October 18, 2011. 2011 NSCA 93; **S636/5** ■

■ BARRISTERS AND SOLICITORS

BARRISTERS AND SOLICITORS - Conflict of interest - between lawyer and client *Nova Scotia Barristers' Society v. Colpitts,* Hfx. No. 174729, September 15, 2011. 2011 NSBS 2; **HP2/6** ■

BARRISTERS AND SOLICITORS - Procedure - disclosure of expert's correspondence *Nova Scotia Barristers' Society v. Jacquard,* November 22, 2011. 2011 NSBS 3; **HP2/7** ■

■ BUILDING CONTRACTS

BUILDING CONTRACTS - Breach of contract - damages, deficiencies *Connolly et al. v. Greater Homes Inc.,* Hfx. No. 235624, Wright, J., August 17, 2011. 2011 NSSC 291; **S634/10** ■ The plaintiffs entered into a contract with the defendant for the construction of a new home. After taking possession, they experienced a litany of deficiencies in the construction of the home, some major and some minor. The most serious deficiency was the construction of the stone wall facade on the front of the house, which resulted in water infiltration and mould contamination, the magnitude of which was not fully discovered for approximately four years. The plaintiffs retained several experts to develop a remediation plan for the home, much of which had yet to be carried out. The defendant disclaimed any responsibility in the matter. *Held,* judgment for the plaintiff in the amount of $307,263 (which included a betterment allowance reduction of $10,000); the defendant had breached the building contract in several respects by failing to construct the house in a good and workmanlike manner and comply with the National Building Code. On the facts of this case, the proper approach to the measure of damages was the recovery of the costs of remediation even though those costs exceeded the diminution in the value of the property. The defendant had failed to prove that the plaintiffs had failed to mitigate, either by excluding it from carrying out the necessary remedial work or by failing to act in a timely way on the advice of their expert about possible water damage from leaks around the masonry wall. Nor was there any onus on the plaintiffs to incur further debt to carry out all the necessary remedial work prior to the outcome of the trial. The remedial work would not increase the asset value of the property over what it would have been had the contract been properly performed but certain aspects of the work would produce a benefit to the plaintiffs in that the future need for replacement or maintenance of those items would be deferred.

BUILDING CONTRACTS - Breach of contract - monies owing *Dennis Lively Construction & Backhoe Services Ltd. v. Beaver Bank Children's Learning Centre Ltd.,* Claim No. 341627, Slone, Adjudicator, August 31, 2011. 2011 NSSM 53; **SmCl19/9** ■

■ CIVIL RIGHTS

CIVIL RIGHTS - Right to be tried within a reasonable time - 32.5 months from charge to trial, young offender *R. v. R. (R.D.),* C.A.C. No. 334403, Beveridge, J.A., September 27, 2011. 2011 NSCA 86; **S631/29** ■ The youth was convicted of robbery in a trial held 32 months after the charges were laid. Although he argued that the delay was excessive and there was a special guarantee for young persons to have trials earlier than adult accused, the trial judge declined to decide that issue but examined the time periods, found no prejudice to the youth and concluded that his right to be tried within a reasonable time had not been infringed. The youth appealed. *Held,* appeal dismissed; young persons do not have a special guarantee that differs in substance from an adult to a trial within a reasonable period of time, although they may suffer from additional prejudice should their trial be delayed. The trial judge had examined the lengthy delay from the charge to the end of trial and her finding that the youth had not been prejudiced by the delays, many of which were attributable to his own conduct, was not challenged on appeal.

CIVIL RIGHTS - Right to disclosure - stay as remedy for breach *R. v. MacKenzie,* No. 1667088; 1667089; 1667090; 1667091, Whalen, J.P.C., July 8, 2011. 2011 NSPC 58; **M24** ■ The accused was charged with failing to file income tax returns for four years. Following the receipt of Crown disclosure, defence counsel wrote to the Crown requesting confirmation that what was sent was "full and complete" disclosure but no reply was received. When the matter proceeded to trial, following numerous adjournments (requested by both parties), it became apparent that the Crown's sole witness had personal "diary notes" that had not been disclosed, which she had used to check to see if returns had been received. When the Crown closed its case, the defence elected not to call evidence, but applied for a stay of proceedings on the basis of a breach of ability to make full answer and defence, arguing that irreparable harm had been done to the accused because the potential documents that would have been relevant to the trial only came to light during cross-examination, three years had passed since the charge was laid and the Crown had stated it had made full disclosure. The Crown argued that the diary notes had come to light before the Crown's case was closed, with no request by the defence to adjourn and receive disclosure. *Held,* motion for stay of proceedings denied; production of diary notes ordered; the trial will be reopened so the accused may further cross-examine the Crown witness and, at the close of the Crown's case, decide if he wishes to call evidence; the court was not convinced that the outcome of the trial would have been different had the notes been previously disclosed or that this was one of those clearest cases where a stay should be granted. Although the accused's right to disclosure had been violated, there was no improper motive on the part of the Crown and once counsel became aware of the notes, a copy was immediately disclosed to the defence. There is a due diligence requirement on the part of the defence to request disclosure from the Crown on an ongoing basis and the defence is never entitled to assume, at any point, that all relevant information has been disclosed. Significantly, there was no indication that when defence counsel failed to receive a response to his letter seeking confirmation of full disclosure, he had followed up with the Crown and when the notes came to light during cross-examination, counsel had failed to request that production be ordered and the trial adjourned to allow him to review same. There was no evidence that the Crown witness, having time to reflect on what was said, would modify her testimony and a large part of the delay in bringing the matter to trial could be attributed to the accused.

CIVIL RIGHTS - Right to disclosure - stay as remedy for breach of rights *R. v. Fitzgerald,* No. 2050132, Whalen, J.P.C., November

23, 2010. 2010 NSPC 74; **M24** ■ During his testimony, an officer referred to an audio statement taken from the accused, which had not previously been disclosed to either the Crown or the defence. Upon the Crown giving an undertaking to provide the statement to defence counsel, the accused agreed to continue the trial on the understanding that any motions arising from the statement and any future cross-examination would be unaffected by the choice to proceed that day. When the officer later made reference to a second report that the Crown did not have in its file, the trial was adjourned to enable the Crown to determine if there were any other outstanding disclosure issues. In the meantime, the accused filed a notice alleging a breach of the accused's s. 7 *Charter* rights and seeking a stay of proceedings. The Crown indicated that a complete copy of all reports had now been disclosed to the defence, as had a copy of the accused's statement but the defence argued that the failure to disclose the statement had affected the cross-examination already done by giving the witnesses an opportunity to adjust their testimony and insulate it against effective cross-examination. *Held,* application for stay dismissed; this was a case of late disclosure, not non-disclosure and the accused had not taken any irrevocable step that might have been handled differently with timely disclosure; nor was there any evidence that the prosecution had been conducted in an unfair or vexatious manner or that this conduct was likely to continue. The accused was facing serious charges and not completing the trial would bring the administration of justice into disrepute.

CIVIL RIGHTS - Unreasonable search and seizure - admissability of evidence *R. v. Routledge,* No. 2085086; 2085087, Whalen, J.P.C., June 10, 2011. 305 N.S.R. (2d) 90; 2011 NSPC 49; **M24** ■ The police had obtained two warrants with between dates for execution to search two properties believed to be associated with the accused. Both warrants were executed on the date issued, which was one day prior to the between dates. In addition, the property where the police believed the accused resided was actually his mother's home and the property the police thought belonged to his mother belonged to his wife. Further, the baby barn mentioned in the information to obtain one of the warrants was located at the other residence. The accused argued that the searches violated his right to be free from unreasonable search and seizure. The Crown conceded the warrants were defective but argued that the evidence seized should not be excluded. *Held,* application to exclude evidence dismissed; this was not a situation where the information to obtain was insufficient or there was a failure to specify items, set a time or state a place; separate warrants had been obtained for each residence and there was no evidence that the police had made a conscious effort to ignore the time limits set out in the warrants; the evidence already existed and the accused was not compelled to provide any information or self-incriminating evidence; and there was no bad faith on the part of the police. S. 8 of the *Charter* protects a person's reasonable expectation of privacy, not property, and although there is a high expectation of privacy in a residence, the impact of the breach was not on the high end of the scale. The information set out that the accused was selling, hiding and storing drugs and residing at or going between the two addresses; whether he owned these residences was irrelevant as the key fact was that he had been associated with both residences over a lengthy period. The police information as to ownership may have been erroneous but they were relying on information that they thought was accurate and the fact that the baby barn was at the second address was not so erroneous that the test for issuing a warrant was not met.

CIVIL RIGHTS - Unreasonable search and seizure - appeal allowed, new trial ordered, dog sniff case *R. v. Chehil,* C.A.C. No. 339413, MacDonald, M. C.J., September 16, 2011. 2011 NSCA 82; **S631/23** ■ When the police checked the passenger manifest for an incoming flight from Vancouver, they identified the accused as being the near-to-last passenger to purchase a ticket, which was one way and paid in cash. Based on this information, a drug-detection dog sniffed his checked bag and when the dog indicated the presence of drugs, the accused was arrested and the suitcase opened, resulting in a charge of possession of cocaine for the purposes of trafficking. Although the Crown argued that the accused had a low or no expectation of privacy because he had checked his bag with the airline, knowing it would be subject to a search prior to being put aboard the aircraft, the evidence was excluded on the basis that his *Charter* rights had been violated and he had been subject to an unreasonable search when the bag was sniffed by the police dog. The entire basis for the officer's decision to have the luggage searched consisted of nothing more than noting the information on the passenger manifest but only the purchase of a ticket at the last minute could be viewed as suspicious. The police cannot rely on speculation, intuition, hunches or educated guesses in using drug sniffer dogs as such does not amount to reasonable suspicion. The court also expressed concerns with the reliability of the drug sniffer dog (given the fact that it had also indicated an adjacent cooler, which contained no drugs) and the legitimacy of the dog's purported accuracy rating. The Crown appealed. *Held,* appeal allowed and new trial ordered; there was no breach of the accused's *Charter* rights. Although it was clear that the trial judge understood the appropriate test for reasonable suspicion, he erred in his conclusion that the police lacked the requisite reasonable suspicion in the circumstances as there was ample uncontested evidence to justify a reasonable expectation that the accused was engaged in criminal activity and although each of the relied upon factors, considered in isolation, offered an innocent explanation, it is the constellation of factors that must be considered. The fact that the police could have take additional steps to buttress their grounds for suspicion is not relevant; the question is whether they did enough to establish a reasonable suspicion, which they had. The trial judge's concern about the reliability of the dog was misplaced and ignored the fact that the dog was trained to detect the smell of drugs, not drugs themselves. The dog's handler had offered expert evidence explaining both why the dog had indicated the cooler and the justification for the dog's accuracy rating and there was no basis for the judge to reject his opinion.

■ CONTRACTS

CONTRACTS - Bailment - duty of diligence in care and preservation of property, damages *Jackman v. Cape Breton Exhibition,* Claim No. 352256, Ripley, Adjudicator, September 26, 2011. 2011 NSSM 50; **SmCl19/6** ■

CONTRACTS - Bailment - duty of diligence in care and preservation of property, damages *Collins v. Cape Breton Richmond Federation of Agriculture,* Claim No. 351874, Ripley, Adjudicator, September 26, 2011. 2011 NSSM 51; **SmCl19/7** ■

CONTRACTS - Breach of contract - delivery of material *Turner v. O'Neil,* Claim No. 351903, Slone, Adjudicator, September 20, 2011. 2011 NSSM 56; **SmCl19/12** ■

CONTRACTS - *Direct Sellers Licensing Act* - applicability *Camelot*

Homes Inc. v. Cochrane, Claim No. 347619, O'Hara, Adjudicator, October 3, 2011. 2011 NSSM 57; **SmCl19/13** ■

CONTRACTS - *Direct Sellers Licensing Act* - applicability *Camelot Homes Inc. v. Robertson,* Claim No. 347618, O'Hara, Adjudicator, October 3, 2011. 2011 NSSM 58; **SmCl19/14**

■ COURTS

COURTS - Bias - application for recusal *Truckair v. Canada (Attorney General),* Syd. No. 346310, Bourgeois, J., October 28, 2011. 2011 NSSC 398; **S637/11** ■ The applicant, who was charged with offences under the *Fisheries Act*, brought a *Charter* application in relation to evidence seized pursuant to a search warrant. The Crown responded by challenging the provincial court's jurisdiction to hear the application. The provincial court judge made comments that suggested he favoured the Crown's argument before the matter was heard on its merits, or the applicant had any opportunity to respond. The applicant's lawyer asked the judge to recuse himself. After the judge refused to do so, the applicant sought an order of *certiori* setting aside his decision and an order of *mandamus* requiring the matter to be referred to another judge. *Held,* application granted. A reasonable person viewing the judge's comments together, in context, would conclude it was more likely than not he was predisposed to decide the issue in favour of the respondent; his mind was not perfectly open. The fact no final decision was made is not determinative; an inclination or predisposition can be enough to give rise to a reasonable apprehension of bias. It is relevant the comments in questions relate to the potential outcome on the jurisdiction issue and on the merits. They go to the very heart of what the judge was being asked to decide. The judge's subsequent comments, after he was asked to recuse himself, do not serve to alleviate the apprehension of bias.

■ CREDITOR AND DEBTOR

CREDITOR AND DEBTOR - *Companies' Creditor Arrangement Act* - motion to lift stay of receivership order dismissed *Scanwood Canada Ltd. (Re),* Hfx. No. 342377, Hood, J., July 27, 2011; June 2, 2011 (orally). 2011 NSSC 189; **S634/8** ■

CREDITOR AND DEBTOR - *Companies' Creditors Arrangement Act* - approval of plan *Scanwood Canada Ltd. (Re),* Hfx. No. 342377, Hood, J., July 27, 2011; February 25, 2011 (orally). 305 N.S.R. (2d) 26; 2011 NSSC 188; **S634/7** ■

CREDITOR AND DEBTOR - *Companies' Creditors Arrangement Act* - effective date of initial order *Scanwood Canada Ltd. (Re),* Hfx. No. 342377, Hood, J., July 27, 2011; February 25, 2011 (orally). 2011 NSSC 187; **S634/6** ■

CREDITOR AND DEBTOR - *Companies' Creditors Arrangement Act* - extension of protection denied *Scanwood Canada Ltd. (Re),* Hfx. No. 342377, Hood, J., July 27, 2011; April 18, 2011 (orally). 305 N.S.R. (2d) 30; 2011 NSSC 306; **S634/11** ■

CREDITOR AND DEBTOR - Promissory note - effect of mutual release *Sloke Foods Ltd. v. Frederick,* Claim No. 347333, Slone, Adjudicator, June 20, 2011. 2011 NSSM 45; **SmCl18/31** ■

■ CRIMINAL LAW

CRIMINAL LAW - Appeals - appeal of conviction for robbery dismissed *R. v. Ogden,* C.A.C. No. 335103, Saunders, J.A., September 27, 2011. 2011 NSCA 89; **S631/28** ■ The defendant, who was in a very small apartment with two other individuals, got up from the couch and proceeded through a doorway behind the complainant, purportedly to use the bathroom. A few minutes later, the complainant found something wrapped around his neck and he was choked until he passed out. When he regained consciousness, he was lying on the floor with the defendant crouched over him. She left without saying a word and he later discovered that money was missing from his wallet, which he found under his back. The defendant was convicted of robbery when the complainant maintained that the third person in the room never left his sight and was still seated directly in front of him when he felt something being tightened around his throat. Although the third person's testimony supported the complainant's evidence, the defendant alleged that while she was in the bathroom, she heard a commotion and when she came out she saw the complainant lying on the floor and the other individual stated that she "had the money" as she ran out the door. Not knowing what to do, she crouched over the complainant and lifted his head to see if he was okay. When he came to and said he was going to call the police, she ran because she was afraid of having her parole revoked. She appealed the conviction on the basis that the trial judge had erred in treating the conflicting Crown and defence evidence as a credibility contest. *Held,* appeal dismissed; it was clear that the trial judge had accepted the complainant's evidence as to what had occurred along with the other witness' evidence as to who had strangled him and rejected the defendant's testimony and denials of responsibility. Although he did not specifically refer to the principles in *R. v. Wry* (1991) (SCC), the court was satisfied he recognized their importance and did not fall into the trap of simply comparing the Crown and defence positions without assessing the whole of the evidence. The complainant never wavered in his evidence that the other individual had never left his sight and was still seated directly in front of him when he felt something being tightened around his throat, which was supported by the other individual's testimony.

CRIMINAL LAW - Appeals - failure of judge to give Vetrovec warning, appeal dismissed *Toomey v. Nova Scotia (Attorney General),* Pic. No. 329510, Murray, J., October 13, 2011; October 12, 2011 (orally). 2011 NSSC 374; **S638/7** ■

CRIMINAL LAW - Appeals - second-degree murder, conviction and sentence *R. v. Ward,* C.A.C. No. 325820, Saunders, J.A., September 8, 2011. 2011 NSCA 78; **S631/19** ■ An argument ensued during a house party, involving the defendant, his brother, the deceased and another friend. After the deceased physically attacked the defendant and gouged his eye, his brother and the friend got the deceased off him and he left, only to return and jump on the deceased and strike him on the head with a beer bottle. When the deceased did not defend himself, the defendant and his friend went outside. The defendant's brother came out five to 10 minutes later, stating that the deceased was going crazy, and the three men armed themselves with various objects, including a baseball bat, and went back inside. The defendant rushed upstairs, where another argument ensued with the deceased. He came back downstairs, took the baseball bat from his friend and returned upstairs. The friend heard a loud metallic crack and a thud, after which the defendant and his

brother came downstairs, where the defendant dropped the bat and stated something to the effect of "It's over." He told the friend that the deceased was dead and they had to find something to wrap him up and bury him in. The defendant's stepfather was called and when he arrived he saw the defendant holding the bat with blood on it and blood of the back of one of his hands. In the hours following the incident, the defendant gave varying accounts of what had happened. The defendant and his brother were jointly charged with second-degree murder and various weapons offences but only the defendant was convicted of all three charges and sentenced to life imprisonment, with no possibility of parole for 16 years. He appealed both the convictions and sentence, arguing, *inter alia*, that the trial judge had erred in admitting the contents of the phone conversation between his brother and his stepfather and in failing to properly instruct the jury with respect to narrative evidence and provocation. *Held,* appeal against conviction dismissed; appeal against sentence allowed; period of parole ineligibility reduced to 13.5 years; although the trial judge did not err in either his characterization of this vicious attack or the emphasis he placed on the aggravating factors, there was nothing on the facts of the case to take parole eligibility out of the acceptable range of 12 to 15 years. Looked at in isolation, the testimony as to the contents of the phone call was troublesome but this was a joint trial, in which it was common for one accused to say something that implicated a co-accused. Also, the trial judge, finding the statement to be proper narrative, had instructed the jury, both mid-trial and in his charge, that the statement was only admissible against the brother, not the defendant. Nothing the trial judge said could have confused the jury to suppose that the statement could be used against the defendant, or for anything other than narrative purposes and it was unnecessary for him to repeat his mid-trial instructions that the statement could not be used for the truth of its contents in his final charge. The deceased suffered skull fractures and internal brain hemorrhaging and there was strong circumstantial evidence that the defendant had struck him on the head with a baseball bat and caused the injuries that led to his death. To suggest the brother had struck the deceased on the head with the bat would be speculation and, even if he had, the defendant had admitted to others that he had done so as well. The jury also had evidence of the defendant's post-offence conduct in leaving the scene to try to avoid arrest. Even if the evidence satisfied the first part of the test on provocation, the defendant faced an insurmountable hurdle when confronted with the significant delay between the apparent assault he suffered at the hands of the deceased and his vicious response to that assault.

CRIMINAL LAW - Appeals - sexual interference and sexual assault *R. v. W. (G.A.),* C.R.A. Yar. No. 323562, LeBlanc, J., October 20, 2011. 2011 NSSC 383; **S637/1** ■

CRIMINAL LAW - Arson - circumstantial evidence *R. v. Boucher,* C.R.Y. No. 348127, MacAdam, J., October 18, 2011. 2011 NSSC 364; **S635/22** ■ The accused was charged with arson for a fraudulent purpose after a fire damaged his restaurant. The only issue was whether it had been proven beyond a reasonable doubt that the accused had set the fire as there was no direct evidence linking him to the fire. *Held,* accused found not guilty; the evidence linking him to the fire was entirely circumstantial and although he might have set the fire, it could not be said that the circumstances were only consistent with his guilt and not with any other conclusion. The Crown had established that the accused owned the restaurant and had experienced some frustration in getting the business going but there was only limited evidence to support the suggestion that it was a financial albatross. The court could not speculate on whether there were other keys, all the windows and doors had been locked or entry could have been made through a crawlspace at the back of the building. Motive and opportunity alone, absent evidence of exclusive opportunity, are not by themselves a sufficient basis to justify a conviction.

CRIMINAL LAW - Assault and uttering threats - guilty *R. v. Nguyen,* No. 1943095; 1943096; 1943097, Whalen, J.P.C., October 14, 2011. 2011 NSPC 74; **M25** ■

CRIMINAL LAW - Assault, assault with a weapon, resisting arrest - religious freedom *R. v. Jones,* No. 2292404; 2294273; 2294274; 2294275; 2294276; 2294277; 2294278; 2294279; 2294280; 2294281; 2294282, Derrick, J.P.C., August 8, 2011. 306 N.S.R. (2d) 309; 2011 NSPC 47; **M24** ■ The self-represented accused was charged with assaulting and threatening his wife, three counts of assault against his young daughter, one count of assault with a weapon against the child and resisting arrest and failing to attend court. He did not dispute using physical force against the child but justified his actions as being grounded in spiritual principles and thus protected on the basis of his constitutional right to freedom of religion. He admitted striking his wife but contended this was self-defence because she had previously held a knife to his chest, which she would not have done if she had followed biblical edicts. *Held,* accused found guilty on all counts; there was no basis for a claim of self-defence as the wife had put the knife down before she was struck and there was no evidence of a struggle prior to the accused striking her; the accused had repeatedly struck his young child's legs with a plastic broom handle and had left extensive bruising when he struck her face; and the facts of the case took his actions well outside the scope of s. 43 of the *Criminal Code*, as many of his assaults were motivated by anger and frustration and the force used was far more than minor and trifling. Although the accused was free to believe what he wanted, he could not act in accordance with those beliefs if doing so constituted a criminal offence.

CRIMINAL LAW - Bail - pending appeal dismissed *R. v. Publicover,* C.A.C. No. 348345, Saunders, J.A., September 15, 2011. 2011 NSCA 83; **S631/24** ■

CRIMINAL LAW - Bail review hearing - denied *R. v. Gowen,* Ken. No. 339306; 339308, Warner, J., January 6, 2011; December 31, 2010 (orally). 2010 NSSC 471; **S634/5** ■ Two brothers were charged with first-degree murder and one was also charged with being an accessory after the fact for helping his brother escape. Both brothers applied for judicial interim release, proposing that they be released on a recognizance with their parents, who proposed to work flexible hours so that one could be at home at all times, as sureties. One brother had a criminal record for possession of a narcotic, had been living in his own apartment and had lost his employment following his arrest. The other, who also had a criminal record (for assault causing bodily harm) and was no longer employed, had been residing with his parents both when he had committed the assault causing bodily harm and at the time of the current events. *Held,* both applications for judicial interim release denied; the court was satisfied that detention was necessary on all three grounds. Based on the strength of the Crown's case and the potential length of incarceration (25 years to life), combined with the lack of evidence of any strong ties between either accused and the community, and

the fact that there was some evidence that the brothers had already discussed trying to avoid jail, the court was satisfied that detention was likely necessary to ensure their attendance at trial. The evidence led to an inference that the brothers would do whatever was necessary to cover up evidence, influence witnesses and interfere with the police investigation. The court was not confident that the parents could or would do anything to stop them from doing whatever they thought was necessary to escape liability or prevent them from communicating with one another about the circumstances surrounding the charges.

CRIMINAL LAW - Evidence - admissibility of cell phone contents *R. v. Dorey,* No. 617025, Tufts, J.P.C., November 17, 2011. 2011 NSPC 85; **M25** ■

CRIMINAL LAW - Evidence - admissibility of character evidence *R. v. J. (C.),* C.A.C. No. 331605, Fichaud, J.A., September 7, 2011. 2011 NSCA 77; **S631/18** ■ During the defendant's trial for various sexual offences against his step-daughter, Crown witnesses introduced evidence that he had, on various occasions, watched and recorded pornography and engaged in telephone sex. As part of finding the defendant guilty, the trial judge cited this evidence to assist in his finding that the defendant was untruthful. The defendant appealed on the basis that the trial judge had erred in considering inadmissible character evidence. *Held,* appeal allowed; convictions overturned; the Crown may proceed with a new trial. The evidence of the phone sex was inadmissible as it had no relevance to any "live issue" at trial, other than the forbidden topic of the defendant's propensity, and the trial judge had erred by using this improper evidence in his reasoning that led to the convictions. Although the evidence concerning the prior viewing of televised pornography had some relevance to a live issue (it being alleged that the impugned encounter had taken place while the defendant was watching pornography), there was no acknowledgment by the Crown, defence or judge that there was any process to be followed before such evidence could be admitted; nor did the judge's decision acknowledge that process or attempt to perform the functions that he was called upon to perform. The Court of Appeal could not now perform this balancing exercise and retroactively determine whether the probative value of the prior incidents exceeded their prejudice, as there needed to be a new trial due to the improper admission of the phone sex evidence. The trial judge should be free to perform his analysis without advance fettering by the Court of Appeal and, if the balancing exercise was performed now, the defendant's option to admit the fact related to the live issue and thereby exclude the evidence would be lost. Given that the trial judge's decision expressly relied entirely on the impugned propensity evidence to question the defendant's credibility and then convicted him on the basis that his denial of the assault was not credible, the court could not excuse the legal errors under s. 686(1)(b)(iii) and substitute its own finding of credibility, nor could it be said that there was no reasonable possibility that the verdict would have been different had the error not been made.

CRIMINAL LAW - Evidence - admissibility of supplementary occurence report, hearsay *R. v. Lunn,* No. 2039559; 2039560; 2039561, Whalen, J.P.C., April 18, 2011. 2011 NSPC 73; **M25** ■ The accused was charged with three counts of trafficking following an undercover operation. The undercover officer who purchased drugs from the accused had, on each occasion, turned them over to a second officer, who then passed them on to other officers. As the officer who ultimately received the evidence was gravely ill and unavailable to testify, the Crown sought have the supplementary occurrence report that had been prepared as proof of the continuity of the drug exhibits tendered as an exhibit and testified to by a different officer in the chain of possession. It was argued that the test of necessity was met due to the officer's medical condition and the test of reliability was met because the supplementary occurrence report was a routine document filled out as part of a drug investigation to track the continuity of the drug exhibits. *Held,* accused found not guilty on all charges; without the supplementary occurrence report (which had been excluded from evidence), the Crown had been unable to prove that the substances purchased from the accused were the "drugs" set out in the three counts in the information. Quoting extensively from the Law of Evidence, it was held that when it came to the Crown's burden to prove admissibility, the court could not rely on the submissions of counsel alone; there must be some record consisting of either documentary or *viva voce* evidence for the court to examine.

CRIMINAL LAW - Evidence - admissibility of videotaped statement *R. v. Downing,* C.R.H. No. 323686, Robertson, J., April 5, 2011; November 5, 2010 (orally). 2010 NSSC 482; **S635/1** ■ The accused had been held in an interview room for approximately 13 hours, during which time he had been questioned for approximately three-and-three-quarter hours. He had also left the room several times to use the washroom and speak with counsel. He challenged the admissibility of his videotaped statement on the basis that he was cold and tired to the point of oppression when he gave the statement, having been awake for over 28 hours prior to entering the interview room. The Crown called an expert on sleep disorders, who viewed and commented on the 13 hours of taped evidence. *Held,* application to exclude statement dismissed; the accused's degree of tiredness never achieved the threshold of oppression. Although the court accepted that the accused was tired, he appeared remarkably alert and attentive during questioning, showing no impairment of sustained attention and never suggesting that he was too tired to go on or needed sleep. The periods when he was left alone in the room were spent resting, napping or even sleeping and there were several occasions that afforded him slightly longer periods of rest. When the accused's behaviour was considered in light of the expert evidence, it was obvious that the naps and rest he received were restorative and the simple fact that every time the police entered the room, the accused was resting did not mean that they ought to have known he required sleep and should have halted the interview. Judging from the accused's own actions, the court found that the room was not oppressively cold but only cool and noted that after the accused was provided with a jacket, as requested, he did not ask for any additional clothes or blankets and the interviewing officers did not appear uncomfortable in their suit coats.

CRIMINAL LAW - Evidence - identification *R. v. Downey et al.,* No. 2343166 - 2343198, Williams, J.P.C., August 3, 2011. 2011 NSPC 57; **M24** ■

CRIMINAL LAW - Evidence - production of document to accused, victim impact statement *R. v. Smith,* No. 2207032; 2207033; 2207034, Whalen, J.P.C., August 3, 2011. 2011 NSPC 59; **M24** ■ The accused was charged with two counts of assault and one count of uttering threats against the complainant, who supplied a victim impact statement to the clerk of the court. Prior to trial, defence counsel requested a copy of the statement because, based

on a conversation with the Crown, she felt there might be some relevant evidence in it relating to the accused's *Charter* rights that had not been disclosed in the complainant's statement to the police. The court found that the victim impact statement had been prepared prematurely and not in compliance with s. 722.2(1) and since no finding of guilt had yet been made, the document was a third party record that could not be released without application being made. The Crown opposed the defence's application for production on the basis that the document contained private information. *Held,* only the comments relating to the alleged assault will be disclosed to the accused, as the remaining comments conformed to the Code and outlined the psychological and emotional impact on the complainant. There appeared to be a connection between the statements in issue and the accused's ability to make full answer and defence as the statements went to the heart of the assault charge and were likely to be relevant to an issue at trial.

CRIMINAL LAW - Expert evidence - invalid approved screening device demand *R. v. Spin,* C.A.C. No. 339874, Beveridge, J.A., September 15, 2011. 2011 NSCA 80; **S631/22** ■ The defendant was convicted of operating a motor vehicle with a blood-alcohol level ("BAL") over the legal limit and causing an accident resulting in bodily harm. He was checked by emergency crews following a head-on collision and then went to his mother's residence nearby. Although the statement later taken by the police, pursuant to the *Motor Vehicle Act*, was excluded at trial on the basis that it had been compelled by statute, while taking the statement, the officer smelled alcohol coming from the defendant and questioned him as to whether he had been drinking that day, when he had his last drink and whether he had anything to drink since the accident. The officer decided to make an approved screening device demand, but finished taking the statement before either making an informal demand (according to the defendant) or the defendant volunteering to take the test (according to the officer). The time between the officer formulating reasonable suspicion to when the demand was actually given was 22 minutes, after which the defendant had to be transported back to the accident scene to locate a device. Six minutes after a fail result was registered, the officer informed the defendant of his right to counsel. The defendant responded "Not right now" and they proceeded to the detachment. The officer stated that he again enquired whether the defendant wanted to contact counsel, which offer was refused but the defendant denied that offer was made. It was only after the defendant failed the breathalyzer and was placed in a cell and questioned that he asked to call a lawyer. When the officer replied that calling a lawyer would not get him home any faster, he called his wife instead. There was some evidence from the defendant's friend that the defendant might have consumed alcohol within 30 minutes of the accident, but the court found that evidence was biased and dismissed it. Although the court was not prepared to find that the defendant had engaged in bolus drinking prior to the accident and had a reasonable doubt as to whether his ability to operate a motor vehicle was impaired by alcohol, it nonetheless found that, in light of the absence of evidence that the defendant had consumed the large quantities of alcohol necessary to bring his BAL to below the legal limit at the relevant time, it was satisfied beyond a reasonable doubt that the defendant's BAL was over the legal limit. The court also found that although the defendant's s. 8 rights had been breached [the demand was not in compliance with s. 254(2)], the breathalyzer results should not be excluded from evidence. No breach of the defendant's s. 10(b) rights were found on the basis that he was not detained until after he left his mother's residence and was in the police car. The defendant appealed the conviction on the basis that the trial judge had erred in failing to find a breach of his right to counsel. He also argued that, even if the breath results were admissible, the trial judge erred in how he dealt with the issue of bolus drinking and in relying on opinion evidence to establish that his BAL was over the legal limit. *Held,* appeal allowed; convictions quashed; new trial ordered; the trial judge erred in not finding at least one violation of the defendant's right to counsel (which the Crown now conceded); however, the court could not carry out the necessary s. 24 analysis because the factual record was incomplete. The trial judge had declined to definitively resolve certain key factual issues, such as the defendant's assertion that, while at his mother's residence, he felt compelled to go with the officer; when and how the approved screening device demand was formally made (if events had unfolded as the defendant alleged, he had been detained much earlier in circumstances where he had easy access to a phone); whether the officer had followed up on the defendant's equivocal response given in the police car; and what had actually occurred at the detachment. There was no error in how the trial judge handled the issue of bolus drinking; he utilized the opinion of the expert most favourable to the defendant and, not finding that there had been bolus drinking, refused to speculate that the defendant had drunk such a large volume of alcohol so shortly before driving that his BAL at the time of the accident was at or below the legal limit. The defendant had stuck to the agreed statement of facts that no alcohol was consumed shortly before driving and the evidence of his friend, at its best, only raised the possibility of the consumption of alcohol in the half hour before driving.

CRIMINAL LAW - Guilty plea - application to withdraw dismissed *R. v. L. (F.),* No. 1912581; 1912582, Chisholm, J.P.C., February 24, 2011. 2011 NSPC 8; **M24** ■ The defendant entered into a plea agreement to a charge of sexually assaulting his young son but, shortly before the sentencing hearing, he applied to withdraw his guilty plea on the basis that he had not been fully informed of the nature of the allegations, partly due to a communication issue (English was not his first language) and partly because he had not viewed the video of his son's statement to the police prior to the plea. He did not accept the Crown's version of the incident and had not fully understood the effect and consequences of his plea, especially its effect on his ability to have contact with his son. The defendant argued that he thought the charge was based upon an incident where he had touched his son's penis for the purpose of showing him how to clean it as opposed to the Crown's assertion that he had masturbated his son and himself while viewing pornography. *Held,* application to withdraw guilty plea dismissed; the defendant's evidence regarding his knowledge of the facts alleged by the Crown in relation to the sexual assault was inconsistent and the court was not convinced that either his failure to see the video of his son's statement or a language/communication issue had prevented him from having a full understanding of the specific allegation of the sexual assault. The defendant's motivation for pleading guilty did not alter his knowledge and understanding of the nature of the allegation nor his understanding that he was, by his plea, admitting to that allegation.

CRIMINAL LAW - Guilty plea - leave to withdraw plea dismissed *R. v. L. (F.),* C.A.C. No. 348207, Saunders, J.A., September 29, 2011. 2011 NSCA 91; **S636/1** ■ The defendant entered into a plea agreement on a charge of sexually assaulting his young son but, shortly before the sentencing hearing, he unsuccessfully applied to withdraw

his guilty plea on the basis that he had not been fully informed of the nature of the allegations, partly due to a communication issue (English was not his first language) and partly because he had not viewed the video of his son's statement to the police prior to the plea. He did not accept the Crown's version of the incident and had not fully understood the effect and consequences of his plea, especially its effect on his ability to have contact with his son. The defendant argued that he thought the charge was based upon an incident where he had touched his son's penis for the purpose of showing him how to clean it as opposed to the Crown's assertion that he had masturbated his son and himself while viewing pornography. The court found the defendant's evidence regarding his knowledge of the facts alleged by the Crown in relation to the sexual assault to be inconsistent and was not convinced that either his failure to see the video of his son's statement or a language/communication issue had prevented him from having a full understanding of the specific allegation of the sexual assault. The defendant's motivation for pleading guilty did not alter his knowledge and understanding of the nature of the allegation nor his understanding that he was, by his plea, admitting to that allegation. The defendant appealed. *Held,* appeal dismissed; the defendant's credibility was at issue and after having had the benefit of a full hearing, including cross-examination on detailed affidavits and comprehensive written and oral submissions, the court's reasons were clear, cogent and fully supported on the record. It was open to the judge to find that the defendant's explanations were not credible and that he had failed to satisfy the heavy burden of demonstrating that when he entered the plea he failed to fully appreciate the allegations that led to the charge. Although he could have challenged the facts relied upon by the Crown after losing his motion to withdraw his plea, the defendant had made no attempt to put the Crown to the strict proof of its facts, but accepted the facts stated at the sentencing hearing as the basis for the sexual assault charge.

CRIMINAL LAW - Home invasion - appeal from conviction for aggravated assault and assault with a weapon *R. v. Roach,* C.A.C. No. 339422, Saunders, J.A., October 17, 2011. 2011 NSCA 95; **S636/4** ■ The defendant was convicted of various charges, including aggravated assault and assault with a weapon, following a home invasion. The complainant testified that after allowing his son's friend and two other individuals to enter his home, one of the individuals (the defendant) demanded that he drink alcohol and threatened to torture him. He forced the complainant to go in the kitchen on three occasions, where he heated a knife and spoons on the stove and, on one occasion, rubbed the heated knife on the complainant's arm, leaving burn marks. The complainant also testified that the defendant had followed him for the entire time he was in the home (approximately three hours). The police believed the complainant, an admitted alcoholic, to be intoxicated when they arrived, as his speech was "erratic" and "stuttering". Although the complainant was initially uncooperative, he identified the defendant from a photo lineup the following day. The defence argued that there was no credible evidence linking the defendant to the home invasion but the court found that despite the complainant being an alcoholic and poor historian, having admitted memory problems and being in shock when the police arrived, he had good reason to be interested and attentive while confined under circumstances that afforded him an excellent opportunity to remember and recognize his assailant. The 24-hour delay was not a serious impediment to the identification of the defendant and, although police policy had not been completely followed, the photo lineup was not unfair and the video showed that identification of the defendant was spontaneous and emphatic. The court accepted the complainant's evidence that he had not been drinking prior to the defendant's arrival and found that although the alcohol he later drank might have affected his recollection of some events, it had not significantly impaired his recollection of the actual assaults, threats and confinement. The defendant appealed. *Held,* appeal dismissed; the trial judge's decision was replete with cautions, self-instruction and other references that clearly demonstrated his awareness of the problems in the Crown's evidence and he made no error in admitting or evaluating the evidence that ultimately led him to conclude that the defendant was the assailant.

CRIMINAL LAW - Impaired driving - appeal *R. v. Francis,* C.A.C. No. 338339, Fichaud, J.A., December 9, 2011. 2011 NSCA 113; **S636/25** ■

CRIMINAL LAW - Impaired driving - not guilty, reasonable doubt *R. v. MacInnis,* No. 2252040; 2252041, Atwood, J.P.C., October 4, 2011. 2011 NSPC 70; **M25** ■

CRIMINAL LAW - Joint recommendation - restitution paid directly to victim for dental work, appeal allowed *R. v. Lawrence,* C.A.C. No. 347403, Saunders, J.A., September 19, 2011. 2011 NSCA 84; **S631/25** ■ The defendant was convicted of aggravated assault and sentenced to 90 days' imprisonment and 18 months' probation. A term of his probation required him to make restitution to the complainant for his dental expenses. When he failed to make such restitution by the date specified, he was charged with and pled guilty to breach of probation. A joint sentencing recommendation was presented to the court for a one-day sentence based on time served, followed by three years' probation, with a term stipulating that he would be required to pay $100 per month for the duration of the probation. The trial judge rejected the joint recommendation and, without giving counsel the opportunity to make further representations, ordered the defendant to serve three years' probation and pay a fine of $3,600 at the rate of $100 per month, meaning that, unless he sued the defendant, the complainant might never be reimbursed for his dental expenses as the amount of restitution would now be paid, in the form of a fine, to the state. The defendant appealed and the Crown conceded that the appeal should be allowed. *Held,* appeal allowed; the defendant will serve three years' probation, with a term requiring him to make restitution to the complainant by paying the full amount to the clerk of the court within 90 days of the expiry of the probation order; the order that the defendant pay a fine is revoked. The trial judge erred in refusing to accept a perfectly reasonable and appropriate joint recommendation without allowing counsel the opportunity to make further representations, as must be done whenever a judge chooses to depart from a joint sentencing submission that accompanies a negotiated admission of guilt.

CRIMINAL LAW - Manslaughter - not guilty *R. v. Campbell,* No. 2001562; 2001563; 2001564; 2001565; 2001566, Whalen, J.P.C., September 8, 2011. 2011 NSPC 61; **M24** ■ The accused and his spouse were visiting their neighbours. All the parties were drinking and after some other individuals arrived, the accused got into an altercation with one of them, resulting in the female neighbour asking him to leave. As he was leaving, the male neighbour, who had been sleeping on the couch, woke up and brought out his gun. The accused turned around and rushed the neighbour, causing him to fall backwards and strike his head. He then struck the neighbour

in the face with the gun. After taking his family home, he returned to the neighbour's house, arguably to see if he was okay, where he tried unsuccessfully to get inside, damaging the door to the residence in the process. The neighbour, whose blood-alcohol level was very high, died as a result of a dislodged denture sliding down his throat and blocking the airway. The accused, who was charged with manslaughter, conveying and uttering threats, and mischief for damaging a motor vehicle and the door to the deceased's house, pled self-defence. The female neighbour alleged that the deceased was only using the gun as a cane and was not trying to scare the accused. *Held,* accused found not guilty of manslaughter, but guilty of the remaining charges. The essential question was not whether the accused was being assaulted, but whether he reasonably believed he was being assaulted. After hearing the word "gun", the accused had turned and, seeing the deceased pointing a gun at him, it was reasonable for him to believe that the deceased was assaulting him. The accused had not provoked the assault (as between himself and the deceased) and there was no indication that the deceased had been at all involved in (or was even aware of) the altercation between the accused and the other individual. Nor was the court convinced that the accused intended to cause serious bodily harm to the deceased; his only intention was to disarm the deceased and although he was angry, it was not with the deceased, with whom he was friends and neighbours.

CRIMINAL LAW - Motor vehicle offences - driving past stopped school bus *R. v. MacKinnon,* S. No. 4445096, Atwood, J.P.C., November 18, 2011. 2011 NSPC 87; **M25** ■

CRIMINAL LAW - Multiple offences - summary offences, uttering death threats, breaching probation and assault *R. v. W. (S.B.),* No. 2367404; 2367405; 2367367; 2367368; 2367369; 2367370; 2367728; 2367729; 2367734, Atwood, J.P.C., November 10, 2011. 2011 NSPC 82; **M25** ■

CRIMINAL LAW - Procedure - assignment of counsel *R. v. W. (J.),* C.A.C. No. 339020, Fichaud, J.A., September 2, 2011. 2011 NSCA 76; **S631/17** ■ The accused pled guilty to one count of sexual exploitation with regards to the teenage daughter of his common law spouse. His later application to withdraw the guilty plea (alleging he had only pled guilty so his bail would not be revoked and he could continue to work to support his pregnant spouse and family) was dismissed. He now appealed that decision and, when his request for legal aid was denied, he applied for an order assigning counsel for the appeal. *Held,* application dismissed; the interests of justice did not require the defendant to have legal assistance. This would not be a complex appeal and did not involve difficult legal issues or matters of complex evidence to be extracted from lengthy appeal books. The appeal would depend on basic facts, such as what was in the defendant's mind when he pled guilty and his reasons for deciding to withdraw the plea and the absence of counsel would not handicap either his access to that evidence or his expression of it to the court.

CRIMINAL LAW - Procedure - Crown disclosure *R. v. Cater et al.,* No. 1997518 - 1997550; 2035773 - 2035784, Derrick, J.P.C., November 17, 2011. 2011 NSPC 86; **M25** ■

CRIMINAL LAW - Procedure - Garofoli application *R. v. Cater,* No. 19975118 - 1997550; 2035773 - 2035784, Derrick, J.P.C., November 22, 2011. 2011 NSPC 89; **M25** ■

CRIMINAL LAW - Procedure - right of respondent to present evidence on motion after hearing applicant's evidence, appeal dismissed *R. v. Deveau,* C.A.C. No. 342885, Fichaud, J.A., September 22, 2011. 2011 NSCA 85; **S631/26** ■ The accused, who was charged with having a blood-alcohol content over the legal limit, applied to have the Crown's evidence excluded on the basis that her *Charter* rights had been violated. Following a dispute as to which side was required to first call evidence at the voir dire, the defence presented its evidence and then objected to the Crown's decision to call evidence on the basis that it had failed to give notice for the "can-says" of their witnesses. The Crown had, however, provided a disclosure package and "can-says" of the police officers who would testify to the charges and took the position that it could decide whether or not to call evidence after hearing the defence's evidence. The judge held that the Crown's failure to file a brief before the motion precluded it from calling evidence. The Crown successfully appealed and the accused now appealed that decision. *Held,* appeal dismissed; the trial court erred in law in denying the Crown the opportunity to call evidence in response to the accused's evidence. The Crown was entitled to take the position that it would decide whether or not to call evidence on the motion after it heard the accused's evidence as there is no authority for the proposition that a respondent to a motion must file a pre-motion brief committing it to particular evidence prior to hearing the applicant's evidence.

CRIMINAL LAW - Proceeds of crime - application to release assets to pay legal fees *R. v. Lynds,* S.K. No. 353388, Cacchione, J., October 31, 2011; October 25, 2011 (orally). 2011 NSSC 400; **S637/13** ■

CRIMINAL LAW - Sentence - appeal of sentence for common assault *R. v. MacIsaac,* CR. Ant. 344819, MacAdam, J., September 14, 2011. 2011 NSSC 345; **S635/5** ■ The court rejected the defence request for a conditional discharge and sentenced the defendant, who had pled guilty to two counts of assault causing bodily harm and one count of assault, to a total of six months' imprisonment, to be served under house arrest. The defendant appealed on the basis that the defence's inadvertent failure to forward five reference letters to the sentencing judge had resulted in a breach of natural justice. The assaults had occurred when the defendant university student had been drinking heavily and refused to leave a residence when requested. He punched one of the residents in the face, knocking him down a flight of stairs, where he continued to punch him in the head. When another resident attempted to stop him, he punched that person and a third resident in the mouth. The defence argued that the third resident was struck totally by accident and the defendant was immediately remorseful for hitting her. The sentencing judge found that although the defendant had no prior record, the assaults had occurred in another's residence, while the defendant was in the position of a trespasser and although there could be repercussions for his chosen career path and imprisonment might not be required for the purpose of specific deterrence, a conditional discharge would not be appropriate due to the need for general deterrence. *Held,* appeal dismissed; the record did not provide a basis to find a denial of natural justice and although the letters would have reinforced the positive aspects of the defendant's background, the court was not satisfied that they would have materially affected the conclusion as to whether a discharge would be "not contrary to the public interest". It was counsel's error that resulted in the letters not being received and the record did not show any act or omission by the trial judge that could

reasonably have given rise to a denial of natural justice. Although the sentencing judge was not privy to the letters, he had information before him as to the background and character of the defendant and had acknowledged that the defendant was a first-time offender with a positive pre-sentence report.

CRIMINAL LAW - Sentence - appeal of sentence for sexual assault *R. v. W. (E.M.),* C.A.C. No. 321590, Fichaud, J.A., September 28, 2011. 2011 NSCA 87; **S631/30** ■ The defendant was convicted of sexually assaulting his 10-year-old daughter following repeated incidents of fondling and digital penetration. He appealed his sentence of two years' imprisonment. *Held,* appeal dismissed; the sentencing judge did not overemphasize the sentencing principles that would elevate the term of incarceration and the two-year term was within the appropriate range given the circumstances of the offence and the offender; the term of incarceration could not be reduced below two years simply to enable a conditional sentence.

CRIMINAL LAW - Sentencing - appointment of *amicus curiae* *R. v. Jones,* No. 2292404; 2294274; 2294275; 2294276; 2294277; 2294279; 2294280; 2294281; 2294282, Derrick, J.P.C., August 8, 2011. 306 N.S.R. (2d) 325; 2011 NSPC 50; **M24** ■ The self-represented defendant had been convicted of assaulting and threatening his wife, three counts of assault against his young daughter, one count of assault with a weapon against the child and resisting arrest and failing to attend court. He insisted on representing himself with regard to his sentencing despite the fact that there were several aggravating factors present. His brother advised the court that the family was very concerned about the defendant's mental health issues, which were clouding his judgment and the delusions he was experiencing. *Held,* the court sought a list of senior counsel who were willing to serve as *amicus curiae* for the sentencing hearing and who could consider how the defendant's mental health issues should be addressed. The Crown was seeking a prison sentence and, in addition to not being legally trained, the defendant's mental health had been raised as a substantial concern by his family. The power of the court to appoint counsel also extends to appointing *amicus* counsel for the court's assistance where appropriate.

CRIMINAL LAW - Sentencing - attempted murder, joint recommendation *R. v. Marriott,* C.R.H. No. 329528, Coady, J., May 16, 2011. 2011 NSSC 414; **S638/4** ■

CRIMINAL LAW - Sentencing - conspiracy to commit murder *R. v. Smith,* C.R.H. No. 329528, Coady, J., May 18, 2011. 2011 NSSC 413; **S638/3** ■

CRIMINAL LAW - Sentencing - failure to stop at the scene of an accident *R. v. Young,* No. 2263592, Ross, J.P.C., September 22, 2011. 2011 NSPC 66; **M24** ■

CRIMINAL LAW - Sentencing - fraud exceeding $5,000 *R. v. Naugler,* No. 2201066; 2201070; 2201074, Derrick, J.P.C., October 4, 2011. 2011 NSPC 68; **M25** ■ The defendant bookkeeper for a non-profit association pled guilty to two counts of fraud over $5,000 and one count of uttering forged documents. Not only were there 34 instances where she had received an "extra" pay cheque in the amount of her full monthly salary, but she had also initiated a fraudulent scheme in which she unilaterally increased her employer's contribution to her pension and then provided the auditing firm with false documentation so her actions would not be detected. The defence argued that the defendant had been under a lot of stress with regard to a bitter family dispute, was suffering from clinical depression and was her elderly father's caregiver and the pre-sentence report observed that she had demonstrated remorse and had honestly planned on repaying her employer. She had also consented to a civil judgment being entered against her and had begun repayment through garnishment of her wages. The defence sought a conditional sentence. *Held,* defendant sentenced to eight months' imprisonment, followed by 12 months' probation; stand alone restitution order also issued; a conditional sentence was not appropriate in a situation where the defendant had perpetrated a significant and very deliberate fraud over many months against a vulnerable organization. Although the defendant argued that she was experiencing deepening personal stress and depression aggravated by several factors, including financial pressures, the evidence showed that even without the significant amounts of money garnered from the fraud, the family's bank account was in robust shape; the defendant had been receiving some compensation for caring for her father in her home and both she and her husband were employed and making good incomes; and the family had undertaken an extensive and opulent renovation of their home during the relevant time. Aggravating factors included the breach of trust, the amount of the fraud, the number of transactions involved and the duration over which they occurred and the additional steps taken to deceive the employer. Although the defendant's father would be affected by this decision, the impact on a third party could not be an influential factor.

CRIMINAL LAW - Sentencing - impaired driving *R. v. MacInnis,* No. 2332498, Atwood, J.P.C., November 29, 2011. 2011 NSPC 94; **M25** ■

CRIMINAL LAW - Sentencing - multiple driving convictions *R. v. Dubois,* No. 1868881; 1868885; 1868886; 1868887; 2101445, Atwood, J.P.C., August 12, 2011. 2011 NSPC 69; **M25**

CRIMINAL LAW - Sentencing - possession for the purpose of trafficking cannabis marijuana *R. v. Miller,* No. 2219978, Derrick, J.P.C., October 31, 2011. 2011 NSPC 76; **M25** ■

CRIMINAL LAW - Sentencing - sexual assault *R. v. A. (W.H.),* C.R.A.T. No. 336695, Rosinski, J., June 21, 2011; June 17, 2011 (orally). 305 N.S.R. (2d) 125; 2011 NSSC 246; **S634/16** ■ The defendant was convicted of two counts of sexual assault against his wife's 17-year-old cousin who had spent the night at their home. The first count involved a "groping" incident and the second count involved sexual intercourse. *Held,* defendant sentenced to five years' imprisonment; aggravating factors included the young age and vulnerability of the complainant, who was seeking a place of refuge; the provision of alcohol and marijuana to the complainant; the defendant's criminal record; the fact that he was on probation and awaiting sentencing on another matter at the time of the offences; the likelihood of the complainant suffering significant psychological trauma; and that no condom was used and this had not been an impulsive act.

CRIMINAL LAW - Sentencing - trafficking in cocaine *R. v. Pitts,* No. 2245450, Whalen, J.P.C., September 6, 2011. 2011 NSPC 60; **M24** ■

CRIMINAL LAW - Sentencing - trafficking in marijuana *R. v. Forrest,* No. 2149000; 2219794; 2219799; 2219801; 224241; 2228428, Whalen, J.P.C., July 14, 2011. 2011 NSPC 71; **M25**

CRIMINAL LAW - Sentencing - trafficking in substance, weapons trafficking, joint recommendation *R. v. Maltais,* C.R.H. No. 330050, Cacchione, J., October 13, 2011; September 6, 2011 (orally). 2011 NSSC 368; **S635/23**

CRIMINAL LAW - Young offender - change of plea denied *R. v. W. (K.),* No. 2057222, Campbell, J.P.C., July 11, 2011. 305 N.S.R. (2d) 332; 2011 NSPC 41; **M24** ■ The youth wanted to change his plea of guilty to being an accessory after the fact to an attempted murder to guilty of being an accessory after the fact to an aggravated assault, after the other individual involved was committed to stand trial on a charge of aggravated assault. He did not dispute his own actions but argued that the facts did not support the plea as it was entered and, thus, the s. 36 finding under the *Youth Criminal Justice Act* was made in error. *Held,* application to have the s. 36 finding reversed and plea changed denied. The issue was not whether the facts directly supported the charge but whether the facts supported the inferences necessary to the charge and this assessment had to be undertaken with a view to the legal context in which it was made. Although a case involving three stab wounds, with no evidence as to the depth of the wounds, the full extent of the victim's injuries or whether the wounds were potentially lethal might not allow an inference of attempted murder to be drawn in a preliminary enquiry, it was a sufficiently reasonable inference to be drawn in the context of a s. 36 finding. The court also looked at the tests to be applied when a youth backs away from the previously agreed upon facts before a s. 36 finding is made, a youth no longer accepts the facts after a s. 36 finding has been made or a youth asserts that a s. 36 finding was made based on a legal error.

CRIMINAL LAW - Young offender - sexual assault, not guilty *R. v. S. (S.),* No. 2207764; 2207765, Campbell, J.P.C., July 20, 2011. 2011 NSPC 42; **M24** ■ A 15-year-old was charged with sexually assaulting his seven-year-old neighbour. The accused had few friends in the area and they played in the playground and often made forts out of cardboard boxes. A neighbour considered the relationship strange and became very suspicious. The girl's mother explained that no one should touch her in the "bathing suit area" and every few weeks she would ask the girl whether the accused had touched her there, which she denied. When the neighbour's son saw the accused rub a plant up and down the girl's leg, the neighbour conveyed this and her opinion of their behaviour to the girl's mother. The father then asked the girl if anything was going on with the accused, to which she replied in the affirmative, telling her parents that he had put his hand down her pants. A few days prior to trial, her mother related for the first time that shortly before the girl's disclosure, she had found the accused lying on top of her, face to face, inside one of the cardboard enclosures. Although she asked them what they were doing, she made no effort to stop her daughter from playing with the accused. The accused admitted to spending a lot of time with the girl, including in enclosed places, but denied that any kind of sexual touching had ever taken place. *Held,* accused found not guilty; the circumstances surrounding the girl's disclosure raised the very real potential that her answers were the product of a sustained environment of open suspicion and the accused's consistent and straightforward denial in this context raised a reasonable doubt as to his guilt. The concern was not about technically leading questions but the sustained period during which the girl's parents had openly expressed specific worries and suspicions about the accused touching her sexually and had regularly asked her about this in the weeks prior to her disclosure. Further, the mother's evidence about the accused laying on top of the girl did not ring true, as, given her suspicions, it would have been impossible for her not to have interpreted the behaviour as sexual in nature and yet she made no effort to end her daughter's contact with him or speak to his parents. It was also troubling that she had made no mention of this incident either to the police or when interviewed by Crown counsel a few weeks prior to trial. If the incident had not occurred as recounted, the only reasonable inference was that it had been brought up to bolster the case against the accused, which raised reasonable concerns about whether the girl's disclosure was free from suggestions and other influences.

CRIMINAL LAW - Young offender - sexual assault, reasonable doubt of identification of accused *R. v. H. (C.),* No. 2287572, Campbell, J.P.C., July 25, 2011. 2011 NSPC 43; **M24** ■ The accused was charged with sexually assaulting the five-year-old girl his mother had babysat when he was a young teenager. He denied touching her in any way and testified that he was rarely home at that time, as he had been staying out with his friends and running the streets all night on a daily basis. He also alleged that when he was home, his mother was always close by and the girl was not even being babysat in the home at the time of the alleged events. *Held,* accused found not guilty; the accused's simple denial coupled with the fact that the complainant did not allege that she recalled the accused assaulting her, but only that she recalled an assault and she had identified him by eliminating the other young males in the home was sufficient to raise a reasonable doubt.

CRIMINAL LAW - Young offenders - appeal dismissed *R. v. A. (T.R.),* C.A.C. No. 350489, MacDonald, M. C.J., December 6, 2011. 2011 NSCA 115; **S636/24** ■

CRIMINAL LAW - Young Offenders - appeal of conviction dismissed *R. v. A. (T.R.),* Hfx. No.336232, Wright, J., May 20, 2011; May 11, 2011 (orally). 2011 NSSC 185; **S635/2** ■

■ DAMAGES

DAMAGES - Motor vehicle - warranty, full recovery *Wilmot v. Toyota Canada Inc. et al.,* S.C.C.H. No. 345283, Knudsen, Adjudicator, September 1, 2011. 2011 NSSM 48; **SmCl19/4** ■ The claimants sought to be compensated for the cost of repairing damage caused by a failed fitting to a cooling line that resulted in a leak that ruined their vehicle's radiator and transmission. They also sought to recover the cost of the rental car they used while their vehicle was being repaired. At issue was whether the deficiency was covered by the manufacturer's warranty and whether the defendant, O'Regans, was liable in negligence, breach of contract or otherwise, in relation to prior repairs done to the vehicle. The evidence showed the claimants performed all routine maintenance (oil changes, etc.) themselves. The defendants asserted this, and an earlier accident involving a different part of the vehicle, resulted in the damage in question. They also argued the warranty covered the power train (including the transmission) but not fittings and seals. *Held,* claim allowed in full, less ten per cent for contributory negligence (related to the claimants' actions, which exacerbated the damage). The language in the warranty

is sufficiently clear to allow for a full recovery. If not, the court would apply the *contra proferendum* rule to resolve any ambiguities in favor of the claimants. The fact the claimants performed their own routine maintenance was reasonable and did not void the warranty. O'Regan's is also liable for the failed fitting on the basis of consumer protection legislation (including the *Consumer Protection Act*), which, although not specifically pled, applies to every consumer transaction in the province. O'Regan's should be familiar with the legislation and their obligations under it. The fitting (which they supplied and replaced a year before it failed) was not durable for a reasonable period of time nor was it of merchantable quality.

DAMAGES - Personal injuries - brain injuries, appeal *Szendroi et al. v. Vogler,* C.A. No. 343734, Farrar, J., October 25, 2011. 2011 NSCA 98; **S636/8** ■

■ EASEMENTS

EASEMENTS - Prescriptive - easement - driveway *Myers et al. v. Bradstock,* Hfx. No. 343756, McDougall, J., September 19, 2011. 2011 NSSC 342; **S635/6** ■ The applicants sought a declaration confirming the existence of a prescriptive easement over the respondents' driveway, and an injunction requiring them to remove a fence preventing access to the right of way. *Held,* declaration and injunction granted. The court accepted the applicants' evidence that the right of way was used openly, continuously and notoriously by everyone accessing the property by car for over 50 years, without permission (express or implied) from the respondents, or their predecessors in title. Any efforts by the respondents to block access to the driveway are relatively recent. Less than 10 years has passed since title to the land was registered under the new land registry system and so the easement has not otherwise expired.

■ EMPLOYMENT LAW

EMPLOYMENT LAW - Costs - wrongful dismissal *Bent v. Atlantic Shopping Centres Ltd.,* S.T. No. 184818, Kennedy, C.J., May 24, 2011. 304 N.S.R. (2d) 206; 2011 NSSC 180; **S632/9** ■ After the court found that a reasonable amount of notice had been given in a wrongful dismissal action, the defendant argued to have the tariff costs supplemented by a lump sum award. The plaintiff countered that each party should bear their own costs because the defendant had denied that she was wrongfully dismissed and it was implicit in the court's finding that the amount of notice given was reasonable that there had been a wrongful dismissal. *Held,* the defendant will receive the tariff amount of costs, supplemented by a lump sum of $10,000; success was not mixed as the court had concluded that the plaintiff had not been wrongfully dismissed. The defendant had not pled just cause for dismissal and the paragraphs relied on by the plaintiff did not support the conclusion that there was an implicit pleading of just cause.

EMPLOYMENT LAW - Wrongful dismissal - jurisdiction to hear matter of international organization *Northwest Atlantic Fisheries Organization v. Amaratunga,* C.A. No. 343395, MacDonald, M. C.J., August 23, 2011. 306 N.S.R. (2d) 380; 2011 NSCA 73; **S631/14** ■ The plaintiff was summarily dismissed from his 17-year employment as the deputy executive secretary of a fisheries organization. The employer, an international organization headquartered in Nova Scotia, unsuccessfully challenged the court's jurisdiction to hear his wrongful dismissal claim on the basis that its immunity from every form of legal process "to such extent as may be required for the performance of its functions" extended to any activity "related to" the functions of the organization. The court found that its sole source of immunity was the parliamentary Order-in-Council and, on the court's interpretation of that document, the employer was unable to prove that immunity from this legal process was required for the performance of its functions. This interpretation was based upon the principle that the Order-in-Council should be interpreted in a manner consistent with Canada's international obligations, which include recognition of the right of every person to a fair hearing of a competent, independent and impartial tribunal, and on the plain and ordinary meaning of the word "required". The employer appealed. *Held,* appeal allowed; the employer is immune from the present suit as the judge erred in limiting the immunity only to those cases where the impugned law would jeopardize the organization's ongoing operations and focusing only on the potential outcome of the suit (the payment of monetary entitlements), as opposed to how the actual court process might interfere with the organization's functions. The same rationale for parliamentary immunity (to preserve that body's autonomy as a legislative and deliberate body) applied here, meaning that the focus must be on the need of the international organization to operate autonomously and what is to be judged as "necessary" is the preservation of this autonomy to carry out its functions. In the employment context, the closer an aggrieved employee's tasks come to the organization's core function, the more likely its autonomy will be affected and the greater the likelihood that immunity will be required. In this case, the plaintiff was a high level employee who played an integral role in the organization's operations who was seeking both punitive damages and solicitor-client costs. Such a suit would inevitably put the organization's core operations under a microscope.

EMPLOYMENT LAW - Wrongful dismissal - notice period and failure to mitigate loss *Moores v. Samuel & Co. Apparel Ltd. et al.,* Claim No. 341855, O'Hara, Adjudicator, June 3, 2011. 2011 NSSM 39; **SmCl18/25** ■ The 54-year-old claimant, who had managed a women's clothing store for approximately five years, brought an action for wrongful dismissal. Although there was no allegation of just cause, the defendant argued that even though she had submitted 32 job applications, the claimant had failed to mitigate her damages by not applying to more women's clothing stores in the area. *Held,* considering both that she was in a management position in a retail environment and her age, the claimant is entitled to five months' notice; no failure to mitigate was proven.

EMPLOYMENT LAW - Wrongful dismissal - resignation vs. termination, notice period *Peters v. Eastlink,* Claim No. 343392, Slone, Adjudicator, June 20, 2011. 2011 NSSM 43; **SmCl18/29** ■ The 37-year-old plaintiff had worked in a managerial position for six-and-one-half years before he either resigned or was terminated. The manager of a small team of employees, he had been previously reprimanded for allowing one of the employees to bank overtime hours (required because his department was understaffed and his requests for additional people had been repeatedly ignored), which was contrary to company policy. Despite being told that she could no longer do this, the employee continued to work overtime, knowing she was not being paid for it, until she decided that she was not getting credit for her extra work and advised upper management of the situation. The plaintiff was called to a meeting of senior management and asked if there was anything he would like to offer

the company, which he understood to be his resignation. Knowing he was about to be terminated, he agreed to hand write a letter of resignation, without the benefit of any advice or even real time for reflection, having decided that a termination would look worse on his record than if he agreed to resign. He never attempted to rescind the resignation, even after obtaining legal advice some weeks later. *Held,* the plaintiff is awarded five months' notice; although management had the right to discipline him, it did not have the right to terminate him and, under the circumstances, the so-called bargain was so improvident that, notwithstanding the disclaimer contained in the letter of resignation, it was made under a form of duress and it would be unconscionable to enforce it as a resignation. This was not a case of insubordination or deliberate breach of policy and although the plaintiff clearly exercised poor judgment and bad management, this, in itself, is not grounds for termination except where clear warnings have been given and the manager is afforded an opportunity to improve. The plaintiff was trying to comply with the company's policy but lacked the managerial skill to stop her from putting in extra hours. The court adopted the one-month-per-year rule of thumb as a starting point and then examined the factors of length of service, character of employment, age and availability of other employment in order to determine the notice period, finding that higher notice periods of six months or more are reserved for higher management, workers with more specialized skills and older workers. The plaintiff was a relatively young man in a lower management job with minimal experience in employment relations.

■ FAMILY LAW

FAMILY LAW - Access and spousal support - father's access extended, mother's spousal support request denied *Bachmann v. Bachmann,* No. 1206-5978, MacLellan, J., October 25, 2011; June 13, 2011 (orally). 2011 NSSC 394; **S637/7** ■ The parties' eight-year-old daughter lived primarily with her aunt and maternal grandparents. The father, who worked in the Halifax Regional Municipality (HRM), maintained an apartment in Cape Breton so he could have access on his days off. The mother, who lived closer, saw the child frequently. Both paid child support. The father wanted overnight access, but the mother and aunt felt it would be too disruptive to the child's highly structured routine. Also at issue was the mother's entitlement to spousal support. The father earns $75,000 per year, while the mother works part-time, earning about $12,000. She pays minimal support, while the father pays significant support and high (but reasonable) access costs. While the parties lived together, the mother chose not to complete her studies for financial reasons. She was trained and had experience as a bookkeeper. There was no evidence she tried to find work outside of this field, or that she was interested in completing her degree or retraining; nor was there any evidence that her low income was in any way related to her duties as a parent or as a result of the marriage breakdown. Both parties had no debt as a result of having declared bankruptcy. *Held,* father's application for overnight access granted; mother's application for spousal support denied on the basis that she is not entitled. The mother chose to move to Cape Breton, which the court noted is an economically depressed area with fewer employment opportunities than can be found in the HRM. She made very little effort to find better or more work. She had virtually no child-rearing responsibilities. There was nothing (family obligations, disability, etc.) preventing her from working full time. She chose not to retrain or apply for jobs outside her field. While she may have chosen a lifestyle below that she enjoyed while married, there was no evidence of the marital lifestyle tendered, nor was there evidence of any increase in her costs as a result of the marriage breakdown. This was a short-term marriage. The mother has failed to meet her obligation to become self-sufficient.

FAMILY LAW - Access - variation of consent order *Marshall v. Walsh,* S.F.S.N.M.C.A. No. 024385, MacLellan, J., October 24, 2011. 2011 NSSC 388; **S637/2** ■

FAMILY LAW - Appeal - matrimonial property, division of assets, spousal support, priority of judgments *Gill v. Hurst,* C.A. No. 338209, Bryson, J.A., November 1, 2011. 2011 NSCA 100; **S636/10** ■ The parties' home was sold and over $130,000 remained in trust at the time of the divorce trial. Early on, the father had engaged the law firm of Wickwire Holm to act for him. After incurring over $65,000 in legal fees, he dismissed his lawyer and refused to pay the outstanding bill. The firm's account was taxed by a Small Claims Court adjudicator, who issued a judgment in favour of the firm. It was registered before the house sold. At trial, the judge found the parties' assets and debts should be divided equally, and that the husband should pay the wife $5,000 in costs. Since she had assumed the bulk of the parties' debt and he had cashed out most of their savings, the trial judge found the wife was entitled to an equalization payment of over $40,000, which was to be paid through an unequal division of the money held in trust. The trial judge rejected the law firm's argument that their judgment should be paid first, finding to do so would unfairly result in the wife paying a large portion of the husband's legal fees. She noted the wife was not notified of the taxation proceeding that resulted in the judgment, despite the fact the outcome had a direct bearing on her interest in the home. Using ss. 8(1) and 10(1)(d) of the *Matrimonial Property Act* (MPA), she found the firm's judgment attached only to the husband's share of the proceeds, which meant the firm would only get about one third of what they were owed. The husband appealed the trial judge's findings on a number of issues. The firm also appealed, arguing the trial judge erred by choosing to give priority to the wife's equalization payment over their registered judgment. *Held,* the husband's appeal(s) dismissed; but, a majority of the appeal court found the firm's appeal should be allowed. The parties owned the home as joint tenants. The presumption was that they each had an equal interest in the home and, after it sold, the proceeds from its sale. The wife had no proprietary interest in the husband's presumed share until the trial judge ordered otherwise, well after the judgment was registered. The court has no equitable discretion to rearrange existing property rights. The only authority to do so in this case comes from the MPA. Under the MPA, no right arises until the property is divided (ie., by order of the court). The husband did not "encumber" the home within the meaning of s.8(1) of the MPA; he actively contested the taxation. There are no principled reasons here to apply the discretion conferred by s.10(1); it is not a license to rearrange the property interests of third parties, absent a breach of the MPA, inequitable conduct or other wrongdoing. The fact the firm, by virtue of their involvement in the early stages of this matter, knew there was a chance the court might eventually order an unequal division is irrelevant where they have not acted in bad faith or misused confidential information. Lawyers should not be held in a different class than other creditors. While the wife had no notice of the small claims taxation, that is not relevant either.

FAMILY LAW - Child in need of protective services - appeal of permanent order dismissed *I. (L.) et al. v. Mi'kmaw Family and Children's Services of Nova Scotia et al.,* C.A. No. 351902, Oland, J.A.,

November 23, 2011. 2011 NSCA 104; **S636/14** ■

FAMILY LAW - Child in need of protective services - application by granparent to terminate permanent order granted *M. (C.) v. Nova Scotia (Minister of Community Services),* S.F.S.N.C.F.S.A. No. 63742, Wilson, J.P.C., November 18, 2011. 2011 NSSC 431; **S638/16** ■

FAMILY LAW - Child in need of protective services - application for permanent order dismissed *Nova Scotia (Minister of Community Services) v. C. (B.) et al.,* S.F.S.N.C.F.S.A. No. 66694, MacLellan, J., February 2, 2011; January 28, 2011 (orally). 2011 NSSC 321; **S637/28** ■

FAMILY LAW - Child in need of protective services - domestic violence, aggressive, physical discipline, lack of supervision and unfit living conditions *Nova Scotia (Minister of Community Services) v. B. (K.) and B. (J.),* F. No. 073241, Comeau, J.F.C., August 24, 2011. 2011 NSFC 20; **FC38** ■

FAMILY LAW - Child in need of protective services - interim order *Nova Scotia (Minister of Community Services) v. M. (D.) et al.,* F.L.B.C.F.S.A. No. 071548, Dyer, J.F.C., January 27, 2011; September 10, 2010 (orally). 2010 NSFC 34; **FC38** ■

FAMILY LAW - Child in need of protective services - permanent care and control *Nova Scotia (Ministerof Community Services) v. C. (B.) et al.,* S.F.S.N.C.F.S.A. No. 66694, MacLellan, J., August 25, 2011. 2011 NSSC 325; **S638/5** ■

FAMILY LAW - Child in need of protective services - permanent care and custody order *Nova Scotia (Minister of Community Services v. B. (R.) and R. (D.),* S.F.H.C.F.S.A. No. 068631; 073934, Campbell, J., October 12, 2011. 2011 NSSC 370; **S635/25** ■

FAMILY LAW - Child in need of protective services - permanent care and custody ordered *Mi'kmaw Family and Children's Services v. P. (V.) and P. (R.),* No. 072775, Haley, J., December 5, 2011. 2011 NSSC 449; **S639/4** ■

FAMILY LAW - Child in need of protective services - review of temporary care and supervision orders *Nova Scotia (Minister of Community Services) v. L. (N.),* No. 72248, Forgeron, J., October 13, 2011; September 29, 2011 (orally). 2011 NSSC 369; **S635/24**

FAMILY LAW - Costs - delayed / incomplete filing, disclosure, settlement offer *Simpkin v. Chalmers,* S.F.H.M.C.A. No. 71808, Legere-Sers, J., October 19, 2011. 2011 NSSC 372; **S635/29**

FAMILY LAW - Costs - mixed success, parties bear own costs *Hoopey v. MacDougall,* S.F.H.F. No. 031164, Gass, J., October 13, 2011. 2011 NSSC 362; **S635/28** ■

FAMILY LAW - Costs - motion to close court files *Foster-Jacques v. Jacques,* No. 1201-64463; S.H.F.D. No. 069582, MacDonald, B. J., November 1, 2011. 2011 NSSC 405; **S637/29** ■

FAMILY LAW - Custody and access - child support *Robar v. Warner,* F.L.B.M.C.A. No. 061871, Dyer, J.F.C., November 9, 2010. 2010 NSFC 28; **FC38** ■

FAMILY LAW - Custody and access - child support *Marchand v. Boudreau,* S.F.P.A.M.C.A. No. 068129, Legere-Sers, J., July 7, 2011. 2011 NSSC 276; **S637/17** ■

FAMILY LAW - Custody and access - interim parenting plan and support *Wellmann v. Moss,* S.F.H.M.C.A. No. 075674, Legere-Sers, J., October 5, 2011. 2011 NSSC 360; **S635/18** ■

FAMILY LAW - Custody and access - supervised access order *G. (M.J.) v. N. (A.W.),* F.L.B.M.C.A. No. 066043, Dyer, J.F.C., January 29, 2011. 2010 NSFC 1; **FC38** ■

FAMILY LAW - Custody and child support - variation *McKinnon v. Serroul,* Syd. No. 46788, MacLellan, J., October 20, 2011. 2011 NSSC 386; **S635/31** ■

FAMILY LAW - Custody - child support, intentional underemployment *Tibbo v. Creaser,* F.L.B.M.C.A. No. 052659, Dyer, J.F.C., August 3, 2010. 2010 NSFC 20; **FC38** ■ The mother, by consent, had primary care of the parties' three young children. She sought child support and to impute income to the father, who had a history of failing to meet his support obligations. He argued he took a lower paying job in order to be in a better position to seek primary care of the children. *Held,* income imputed to the father based on his intentional underemployment. The mother met the burden of proving he left his good paying job for reasons unrelated to the children. Although he claimed he intended to seek primary care, he had only recently agreed to the present parenting arrangements and had done nothing to pursue his claim since.

FAMILY LAW - Custody - interim custody and parenting arrangement *Hefter v. Hefter,* No. 1201-066519, Legere-Sers, J., October 24, 2011. 2011 NSSC 385; **S637/4** ■

FAMILY LAW - Custody - parallel parenting ordered *MacDonald v. MacDonald,* No. 63357, Haley, J., August 11, 2011. 2011 NSSC 317; **S634/18** ■ The parents each sought sole custody of their 14-year-old son. They were currently in an interim shared custody arrangement, but experienced a high level of conflict that had resulted in criminal charges against the father. The evidence showed the son was struggling socially and academically. He said he preferred to live primarily with his father, but wished to maintain some flexibility so he could spend a lot of time with each parent. *Held,* a parallel parenting arrangement ordered, and tailored to exploit each parents' strengths. The mother is better suited to ensure the child's school and medical needs are met and will be the sole decision maker in all related matters. The father is better suited to ensure the child's extracurricular needs are met and he will be the sole decision maker in such matters. Both parents love and can provide for their child. The child will live primarily with the mother during the school week, but have extensive access with the father, including each weekend.

FAMILY LAW - Custody - variation, joint changed to sole custody *Yates v. Boswell,* No. 1201-50455, Gass, J., Setember 19, 2011; March 16, 2010 (orally). 2010 NSSC 11; **S635/11** ■

FAMILY LAW - Interim hearing - parenting issues *M. (K.A.) v. M. (C.),* F.L.B.M.C.A. No. 053616, Dyer, J.F.C., August 10, 2007. 2007 NSFC 30; **FC38** ■

FAMILY LAW - Matrimonial property - matrimonial assets, division of debts and pension *Tomlik v. Tomlik,* No. 1201-064103, O'Neil, A.C.J., November 9, 2011. 2011 NSSC 415; **S638/18** ■

FAMILY LAW - Mobility - application dismissed *Taylor v. Wanless,* S.F.H.M.C.A. No. 060086, Jollimore, J., September 9, 2011. 2011 NSSC 336; **S634/29** ■ The mother lost her job and, instead of accepting a full severance package, took a package that gave her one year's salary and the ability to attend a master's program. At the conclusion of the program, she would be eligible for jobs that paid less than the one she left. She sought the court's permission to relocate the three children (ages eight, six and four) to British Columbia so she could live with her parents while completing her degree. The father, who was unemployed, disputed the move. The mother argued the father should simply move too, despite the fact he was currently in a shared custody arrangement with the mother of his teenaged son. *Held,* the mother cannot relocate with the children. Her plan is ill thought out. The move is not designed to provide for the children's immediate financial needs. The mother made decisions that have resulted in her inability to support the children. She has chosen not to work and to go back to school. Her choice may be motivated by the possibility of some long term benefit, but does nothing to address the children's current needs. A move would be disruptive and result in impossibly high access costs. The children are rooted in this community and their extracurricular, medical and emotional needs are all being met here. Their primary connections are to their parents, their older brother and their paternal grandmother. Most of these connections would be severed, or at least seriously impacted, by a move.

FAMILY LAW - Mobility - motion to stay dismissed *Slawter v. Bellefontaine,* C.A. No. 355688, Saunders, J.A., September 28, 2011. 2011 NSCA 90; **S631/31** ■

FAMILY LAW - Procedure - costs *MacLean v. Boylan,* S.F.H.M.C.A. No. 032826, Jollimore, J., November 8, 2011. 2011 NSSC 406; **S638/6** ■

FAMILY LAW - Procedure - costs, application to enforce separation agreement *Peach v. Melnick,* No. 1201-058389, O'Neil, A.C.J., October 20, 2011. 2011 NSSC 377; **S637/24** ■

FAMILY LAW - Procedure - costs, application to terminate spousal support *Shurson v. Burgess,* S.F.H.M.C.A. No. 040843, O'Neil, J., October 17, 2011. 2011 NSSC 344; **S637/23** ■

FAMILY LAW - Procedure - hearing location *Giffin v. Muise,* F.L.B.M.C.A. No. 068392, Dyer, J.F.C., April 21, 2010; April 12, 2010 (orally). 2010 NSFC 7; **FC38** ■

FAMILY LAW - Procedure - registrar's application to dismiss *Islam v. Sevgur,* C.A. No. 336980; 338493; 338817, Saunders, J.A., December 7, 2011. 2011 NSCA 114; **S636/21** ■

FAMILY LAW - *Res Judicata* - leave to appeal allowed, appeal dismissed *Armoyan v. Armoyan,* C.A. No. 351722, Bryson, J.A., December 6, 2011. 2011 NSCA 110; **S636/22**

■ FISH AND GAME

FISH AND GAME - *Fisheries Act* - defence of due diligence *R. v. Thompson,* No. 2123879; 2323880; 2123881, Atwood, J.P.C., July 7, 2011. 2011 NSPC 64; **M24** ■ Both accused were charged with off-loading a catch of fish without the supervision of a dockside observer and one accused was also charged with exceeding the maximum allowable catch. With regard to the common count, the evidence showed that the first accused had attempted to make contact with a dockside fishery monitor as he was proceeding to port and the second accused, who was following close behind, had relied on him in that regard. When they entered port and the second accused realized that the first accused had been unsuccessful, he made similar efforts to contact a monitor. It was only after waiting several hours and obtaining no cooperation from any monitor that the two accused decided they could wait no longer and off-loaded their catch. The Crown relied on an invoice setting out the weight of the quantity of fish delivered to a fisheries plant in regard to the second count, but the individual who recorded those figures was not the person who weighed the fish and was uncertain as to who had even relayed the weight to her. *Held,* both accused found not guilty on all counts; the defence of due diligence had been proven, in that they had both made exhaustive efforts to contact a dockside monitor and it was reasonable for the second accused to initially rely on the first accused to arrange for a monitor; the court assigned very little weight to the accuracy of the invoice. It was reasonable for the accused to assume and expect that businesses engaged in fishery monitoring would be ready to commence operations at the start of the commercial fishing season and there is no obligation on a fisherman to provide advance notice as to when he is going out so as to ensure that a monitor will be present upon his return to the wharf. It was clear that the dockside monitoring businesses that serviced the area were simply not ready for the startup of the fishery, notwithstanding the well-publicized date. The accused faced significant pressures in that they were forced to keep their engines running while waiting to off-load the catch and, given the warm temperatures, there was a real and substantial risk of their catch spoiling. They also had a buyer waiting to purchase and had they not off-loaded, they would have been forced to go to another wharf to locate another buyer while their catch continued to spoil.

■ GUARDIAN AND WARD

GUARDIAN AND WARD - Adult in need of protection - review and renewal of order *Nova Scotia (Minister of Health) v. R. (C.),* S.F.H.A.P.A. No. 034880, Dellapinna, J., July 19, 2011; March 9, 2011. 2011 NSSC 299; **S637/27** ■

■ INSURANCE

INSURANCE - Automobile insurance - express or implied consent of owner *Barrington et al. v. Dixon et al.,* Syd. No. 267902; 284659, LeBlanc, J., August 29, 2011. 2011 NSSC 331; **S634/23** ■ The court was asked to determine whether the defendant, Mr. Dixon, was driving his mother's car with or without her express or implied permission at the time of the accident. The evidence showed he had no licence and a history of driving offences, none of which involved the mother's vehicles. The keys were accessible and the mother had never expressly forbid him from driving. *Held,* Mr. Dixon was not driving with his mother's permission. Examining the legislative backdrop, case law and evidence, the court found on balance that a lack of implied consent

was established. Looking at the circumstances, an explicit direction not to drive isn't necessary to establish lack of consent, nor was the fact the keys were physically accessible determinative. Ms. Dixon had no reason to suspect her son would drive the vehicle.

■ LANDLORD AND TENANT

LANDLORD AND TENANT - Residential tenancies - appeal *Archibald v. Gerard,* S.C.C.H. No. 352637, Parker, Adjudicator, September 27, 2011. 2011 NSSM 49; **SmCl19/5** ■

LANDLORD AND TENANT - Residential tenancies - appeal from Small Claims Court *Killam Properties Inc. v. Patriquin,* Hfx. No. 348507A, McDougall, J., September 20, 2011; September 6, 2011 (orally). 2011 NSSC 338; **S635/8** ■ A small claims adjudicator determined he had jurisdiction to hear the respondent's application for a review of his rent increase. He adjourned the matter and asked that it return to him for a hearing on the merits. The appellant appealed. At issue was whether the appeal was properly before the court or premature. There was also an issue concerning the admissibility of an affidavit that wasn't before the adjudicator at the original proceeding. *Held,* appeal dismissed and matter returned for a continuation of the hearing on the merits before the same adjudicator. The court has no jurisdiction to hear an appeal on an interlocutory decision of this nature. There can be no appeal from the Small Claims Court until a final determination is made. Until this matter is decided on its merits, there has been no final determination. There are sound policy, as well as practical, reasons for this approach.

LANDLORD AND TENANT - Residential tenancies - appeal, rental rebate *Tynes v. Omers Realty,* Claim No. 352839, Slone, Adjudicator, August 29, 2011. 2011 NSSM 52; **SmCl19/8** ■ The tenant, who required access to the Internet for his work as an at-home customer service agent, experienced intermittent difficulties using the Internet service provided to his apartment. He ultimately sublet a room elsewhere that had reliable internet service from which to work after the landlord refused to rewire the Internet to his unit or move him to another unit. He appealed the Director's denial of a rental rebate in the amount of the sublet, which was two-thirds the cost of the rental unit. The speed of service offered by the only other provider in the area was only one-third of that offered by the first provider. *Held,* appeal allowed; landlord ordered to cover one-half the cost of the tenant's sublet. The landlord declined to fix a problem in a timely manner, resulting in the tenant being denied a vital service in this modern age and the alternative of using another provider would only have met some of the tenant's needs. Although the alternative the tenant chose (using an outside location to perform his work) was reasonable, the rebate should not be disproportionate to the value of the rental unit.

LANDLORD AND TENANT - Residential tenancies - appeal, rental rebate, parking tickets *McCrae v. Metlege,* Claim No. 347840, Slone, Adjudicator, September 16, 2011. 2011 NSSM 54; **SmCl19/10** ■

■ MAINTENANCE

MAINTENANCE - Child support - application to vary and retroactive support *VanderMeer v. Belajac,* F.A.N.I.S.O.S. No. 069791, Dyer, J.F.C., August 16, 2010. 2010 NSFC 21; **FC38** ■

MAINTENANCE - Child support - arrears, maintenance enforcement *Nova Scotia (Maintenance Enforcement) v. T. (S.C.),* F.L.B.M.C.A. No. 058777, Dyer, J.F.C., October 12, 2010. 2010 NSFC 25; **FC38** ■ The Director of Maintenance Enforcement applied for an order finding the respondent father in default of his child support obligations and requiring him to pay arrears by a specific date. The Director also sought an order for imprisonment if the father failed to meet the terms of the order. There was a long history of non-compliance and the father clearly had arranged his finances to minimize the chance(s) he would be made to pay. He lived rent-free in a home owned by his father and was either underemployed or under reporting his self-employment income. He had never made any voluntary supports payments; any money received by the mother was solely as a result of enforcement actions. The father argued there were valid reasons he was unable to meet his obligations. *Held,* the father must pay $5,000 towards the arrears within six months. There will be a review set to deal with ongoing payments and any additional arrears, and the father will be required to file complete financial disclosure in advance of the review. The court will not order imprisonment at this time. While the father's non-compliance has been frustrating for the mother, this case isn't so extreme as to (legally or practically) warrant an order for immediate imprisonment. The court took judicial notice of the reality of overcrowding at the Burnside Correctional Facility, which (combined with the lack of a local jail in Lunenburg County) would mean the father would likely spend little time in custody. Without some assurance that a custodial sentence will actually be carried out, the threat of imprisonment is not an incentive to comply. It sends the wrong message to the father and others in his position.

MAINTENANCE - Child support - variation, child of the marriage *Klavano v. Howell,* No. 1201-59903, Lynch, J., November 22, 2011. 2011 NSSC 435; **S638/24** ■

MAINTENANCE - Spousal support - application for support after an 11 year delay *Molloy v. Molloy,* S.F.P.A.F. No. 10373, Legere-Sers, J., October 26, 2011. 2011 NSSC 390; **S637/20** ■ The wife met the husband when she was 14 and working in his brother's home. He was 18 at the time. They got married when she was 16 and pregnant. She dropped out of high school and they had four children over the next eight years. The family moved frequently to accommodate the husband's career. The wife was a homemaker and did not start working part time until very late in the relationship. She had minimal training and experience. When they separated, almost 11 years ago, she obtained a child support order in relation to the one child still at home. The husband did not pay. She tried to eke out an existence for herself for over 10 years, but made only about $12,000 per year and struggled to meet even her basic needs. Eventually, she brought this application for spousal maintenance. The husband, who currently earns in the range of $45,000 per year, argued the wife's delay in applying should relieve him of any obligation to pay now. Neither party had petitioned for divorce and so the matter proceeded under the *Maintenance and Custody Act*. *Held,* ongoing spousal maintenance to the wife in the amount of $800 per month. She's entitled and her delay is not fatal to her claim. This was a long-term traditional marriage. She left high school, got married and started raising a family when she was young, inexperienced and living away from home. He was four years her senior, and she was an employee in his brother's home. Given the husband's refusal to pay the child support as ordered, it was reasonable for the wife to think it was pointless to get an order for spousal maintenance. There is some

evidence suggesting she was afraid of him. She has diligently tried to become self-sufficient and he has benefitted from the delay in that he's gone 10 years without having to pay the spousal maintenance his wife is (and was) clearly entitled to. It would prejudice the husband to order retroactive support; none granted.

MAINTENANCE - Spousal support - imputing income, division of assets, exchange rate for foreign income *Saunders v. Saunders,* C.A. No. 341628, Farrar, J.A., September 14, 2011. 2011 NSCA 81; **S631/21** ■ The husband appealed portions of the order requiring him to pay support based on his US income. He argued, in part, the judge erred by: using an exchange rate of 14 per cent and requiring him to pay indefinite spousal support of $9,100 per month. *Held,* appeal allowed in part. The trial judge did not err in calculating the exchange rate, but he did err by failing to include a provision to allow for a periodic review of the rate. He also erred in his calculation of the quantum of spousal support, although not by failing to include a termination date. The amount awarded was in excess of what was reasonable having regard to the parties' respective circumstances. The trial judge found the wife was underemployed and her needs overstated. It appears he either misapprehended her needs or failed to properly take them into account when deciding the appropriate level of support. He should have imputed more income to her, and was in error when he failed to give sufficient reasons as to why he chose not to. Spousal support is reduced to $7,500 and the husband will be credited for the $22,400 in overpayments. The judge committed no error by dividing the limited liability funds equally.

■ MORTGAGES

MORTGAGES - Foreclosure - common law right to foreclosure *Concentra Financial Services Assoc. v. Broussard,* Hfx. No. 346662, Duncan, J., August 31, 2011; August 9, 2011 (orally). 2011 NSSC 332; **S634/25** ■ The defendants defaulted on their mortgage. The plaintiff moved to foreclose. The court noted the mortgage did not contain a clause providing for foreclosure on default and invited the parties to make submissions on whether the court had jurisdiction to grant the relief sought. *Held,* the plaintiff may foreclose on the mortgage. In Nova Scotia, there is a common law right to foreclosure upon default (on interest or principle) as long as the mortgagee hasn't otherwise disabled themselves from collecting the principle. The fact the mortgage doesn't contain a specific provision expressly providing for this remedy is not fatal.

MORTGAGES - Foreclosure - deficiency judgments involving multiple parties *Toronto-Dominion Bank v. Stevens,* Hfx. No. 313164, Rosinski, J., September 14, 2011. 2011 NSSC 343; **S635/4** ■ The bank was unable to serve the mortgagor wife, but successfully obtained a deficiency judgment against the mortgagor husband. Shortly thereafter, the property was sold to a third party for a lower price than the bank paid at the sheriff's sale. The bank eventually brought a second motion, obtained an order for substituted service and served the wife, in the hopes of securing a deficiency judgment against her alone for a larger amount than originally obtained against the husband. At issue was whether a bank can obtain a second deficiency judgment against one joint tenant/spouse in an amount that is different/greater than the judgment already obtained against the other. *Held,* motion dismissed. As a matter of contract, the bank is limited to one deficiency judgment calculation only in this case because the mortgagors are jointly and severally liable. A proper interpretation of the *Civil Procedure Rules* (2008), the practice memorandum and existing case law leads the court to conclude recovery is limited to one deficiency judgment calculation per foreclosure. Even if this isn't the case, the court would invoke its equitable jurisdiction under the doctrines of issue estoppel and/or abuse of process to prevent such an outcome.

■ NEGLIGENCE

NEGLIGENCE - Liability - securing boat in anticipation of hurricane *Wolverine Motor Works Shipyard LLC v. Canadian Naval Memorial Trust,* Hfx. No. 226509, McDougall, J., July 29, 2011. 306 N.S.R. (2d) 260; 2011 NSSC 308; **S633/27** ■ The plaintiff sued the defendant for losses suffered to their ship (the Larinda) during Hurricane Juan, when it was hit by the Sackville (a much larger ship) and sank. The plaintiff argued the defendant failed to take reasonable precautions to secure the Sackville. They didn't have any qualified experts testify on their behalf. There was also some issue as to the value of the loss given that the Larinda was raised (at a cost of $100,000) and sold for salvage. The plaintiff argued the Larinda was under-insured and worth far in excess of the $250,000 it was insured for. It also claimed a loss of earnings. *Held,* action dismissed. The defendant's expert evidence shows they took reasonable precautions to secure the Sackville in light of the weather forecasted to occur. The hurricane was far more severe than could have been reasonably anticipated. Given the lack of expert evidence on seamanship from the plaintiff, it is impossible for the court to conclude the defendant failed to exercise the required level of diligence. While expert evidence isn't always necessary, in this case it's a concern. Without it, the plaintiff's case essentially amounts to a *res ipsa loquitor* argument. Even if it had established a *prima facie* case of negligence, the defendant's representatives proved they discharged adequate skill and diligence to establish the defense. In the event the court is wrong on liability, damages are provisionally assessed at the Larinda's insured value. The plaintiff failed to provide persuasive evidence the ship was under-insured, or that there was a substantial loss of earnings. The evidence shows the Larinda was a labour of love and not a money-making venture. If liability had been established, the defendant would have had to pay the cost of raising the ship less the amount paid for her on sale.

NEGLIGENCE - Motor vehicle - apportionment of liability, appeal allowed *White et al. v. MacDonald,* Syd. No. 330181, Murray, J., August 19, 2011. 2011 NSSC 323; **S634/13** ■

NEGLIGENCE - Motor vehicle - apportionment of liability, appeal allowed in part, remitted to Small Claims Court for assessment of damages *Ha's Driving School v. Zive,* Hfx. No. 343732A, Wright, J., August 17, 2011. 2011 NSSC 265; **S634/9** ■ When the plaintiff's vehicle attempted to pass to the right of a stopped van that was waiting to make a left turn into a parking lot, it was sideswiped by the defendant's vehicle as it exited the parking lot to turn left. The adjudicator found the plaintiff negligent for passing the stopped van on the right in an unsafe manner and dismissed the action. The plaintiff appealed. *Held,* appeal allowed; both parties were equally at fault; case remitted to the adjudicator to assess damages under that apportionment. Although the adjudicator was correct in finding the plaintiff negligent (knowing the van was stopped to turn into the parking lot, he ought not to have fully emerged from behind it without cautiously checking for other traffic), he erred in not addressing the further question of whether that

negligence was the sole cause of the collision. It was entirely foreseeable that another vehicle might emerge from behind the van and the defendant, by looking in only one direction, failed to discharge the heavy onus of ensuring that her entry onto the street could be made safely. Whether or not the driver of the van had gestured the defendant to go ahead and make her turn onto the street was irrelevant as the duty to see that a left turn can be made in safety cannot be delegated, but remains on the driver making the turn.

NEGLIGENCE - Standard of care - registered nurses *McIntosh v. Isaac Walton Killam-Grace Health Centre for Children, Women and Families,* Hfx. No. 264101, Muise, J., July 12, 2011. 305 N.S.R. (2d) 340; 2011 NSSC 260; **S633/22** ■ The plaintiff, who had been active and healthy until pregnancy-related complications surfaced, gave birth to her first child in 2000. After a prolonged period of pushing in an attempt to have a vaginal birth, the baby was delivered by caesarean section. About 10 days later, she noticed pain in her left hip for the first time ever. More than a year later, tests showed loose fragments within the hip and revealed a degenerative hip condition. Further deterioration resulted in eventual hip replacement surgery in 2007. She claimed the way her leg was handled by the student nurse assisting in the delivery of her first child was the cause of the damage and deterioration in her hip. She claimed the student was in breach of the standard of care required of a competent nurse. *Held,* action dismissed. The standard of care owed to the plaintiff was that expected of an average, competent registered nurse. The delivery in question happened over 10 years before trial. The court rejected the plaintiff's account of how her legs were handled in the delivery. The chart notes said things went well. The plaintiff failed to prove, on balance, that the damage and deterioration to the hip were caused by the student nurse's actions, or that sufficient force was applied to cause the damage in question. Had it been, more likely than not the plaintiff would have noticed hip pain almost immediately after delivery as opposed to 10 days later. A post-natal exam showed she had full range of motion in the hip 13 days after delivery. The expert evidence showed she had a pre-existing shallow hip socket and people with that condition are more likely to develop the kind of degeneration the plaintiff developed, even without any intervening event. The hip condition was more likely to have been as a result of degeneration than a trauma suffered during the delivery. The plaintiff has not met the "but for" test, and it is unnecessary to quantify damages.

■ PRACTICE

PRACTICE - Affidavits - propriety of contents *Milburn et al. v. GrowthWorks Canadian Fund Ltd. et al.,* S.Y.D. No. 296202, Murray, J., September 15, 2011. 2011 NSSC 346; **S635/7** ■ The court considered a motion to strike extensive portions from two affidavits (the second of which contained evidence from a party's solicitor) filed in relation to a motion to convert this proceeding from an application to an action. *Held,* the portions of the first affidavit that are irrelevant and/or contain argument and/or opinion are struck. The court considered what affidavits should and should not contain. As for a solicitor giving evidence, a motion to convert is a procedural matter and solicitors can file affidavits in procedural matter without compromising their position ethically (see Nova Scotia Barrister's Rules of Conduct 10.11) or otherwise. While a motion to convert considers substantive aspects of the claim(s), it is a motion to change the mode under which the claim is determined. In this sense it is procedural, although this may not be so in every single case.

PRACTICE - Appeals - jurisdiction, application for leave *Dixon et al. v. Nova Scotia (Director of Public Safety),* C.A. No. 343192, Bryson, J.A., August 31, 2011. 2011 NSCA 75; **S631/16** ■ The applicants were ordered to vacate their home pursuant to the authority of the *Safer Communities and Neighborhoods Act*, on the basis that it was being habitually used for the possession, use, consumption and sale of illicit drugs. The order was partially stayed pending an appeal. At issue was whether the applicants required an extension of time to bring a leave application under s. 21, and whether leave should be granted. There was some confusion as to whether the leave application could be heard by a single appeal court judge or whether it would have to be granted by the panel hearing the appeal, which resulted in some delay. *Held,* based on the rules of statutory interpretation, the leave application was made when it was filed and thus made in time. If not, the court would grant an extension based on: there being at least one ground that is clearly a question of law; the applicants' vigorous pursuit of the appeal within the timelines; the uncertainty over the court's general practice(s) and the novelty of the Act. Leave is granted in relation to all three grounds of appeal. Although there is some uncertainty over whether the third ground is a question of law, this is a matter than can be determined by the panel hearing the appeal. Simply because a full panel lacks the jurisdiction to hear a leave application doesn't mean they don't have the authority to dismiss a ground of appeal if they determine it is not a question of law properly before them.

PRACTICE - Appeals - motions to fix dates and for a stay, self-represented apellant *Moore v. Darlington,* C.A. No. 350840, Saunders, J.A., November 9, 2011. 2011 NSCA 101; **S636/11** ■

PRACTICE - Appeals - timeliness, standing *Specter v. Nova Scotia (Minister of Fisheries and Aquaculture) et al.,* Hfx. No. 350371, LeBlanc, J., September 1, 2011. 2011 NSSC 333; **S634/26** ■ The appellants lived very close to the respondent's fish farms. When they heard the respondent was seeking to amend their aquaculture licences, they were actively involved in trying to obtain information and express their concerns over the potential impact on their land. Eventually, they learned the Minister decided to grant the amendments. They appealed his decision. The Minister and the respondent brought preliminary motions to have the appeal summarily dismissed on the basis that it was filed late and the appellants lacked standing. *Held,* motions dismissed, the appeal will proceed. Under the common law, a statutory limit does not prohibit a late appeal for *certiorari* based on an excess (or absence) of jurisdiction if there is an arguable basis for the challenge and there has no been undue delay. In this case, it is arguable the Minister exceeded his jurisdiction. While the respondents were seeking an amendment to existing licences, they were proposing new locations. It can be said the Minister should have followed the procedures for granting new licences, which would have required him to consult with the public (including the appellants) before finalizing his decision. Given this matter concerns a decision that exceeded its statutory authority, the appeal is not late. *In obiter*, the court noted that if the appellants had made a motion to extend the time for filing, the court would have granted it (and has the jurisdiction to do so, see s.50 of the *Judicature Act* and Rule 94.03). While the appellant's delay was lengthy, their intention was to pursue the appeal and they have an arguable case. They were wrongly under the impression the time lines did not start to run until the details of the decision were communicated to them; but, absent a motion, the court does not have the authority to grant an extension on this

basis. As for standing, the key question is whether the appellants have an economic, commercial, legal, or personal interest in the decision that is sufficiently delineated from the concerns of the general public. They are clearly persons "aggrieved" by the decision. The decision might impact the value of their property and the use of the intertidal zone immediately adjacent to their land.

PRACTICE - Application for summary judgment on evidence - material fact in issue *2420188 Nova Scotia Ltd. et al. v. Hiltz,* C.A. No. 340604, Fichaud, J.A., August 23, 2011. 2011 NSCA 74; **S631/15** ■ The respondents bought land from the corporate appellant. They sued its principal, the appellant Mr. Alex, for breaching an alleged personal warranty to maintain a road. Mr. Alex's motion for summary judgment on the evidence was dismissed and he appealed. *Held,* a majority of the appeal court dismissed the appeal, with Beveridge, JA dissenting on the question of what constitutes a "material" fact. The majority held the motions judge did not err by finding Mr. Alex failed to satisfy the first part of the two-step summary judgment test. It is not appropriate to assess the merits of the arguments/evidence at the first stage of the test. There was a dispute of material fact. While the respondents agreed their contract was with the corporation, the question of whether there was an enforceable personal representation made by Mr. Alex should be left for trial. Conversely, Beveridge JA felt there were no truly material facts in dispute. Mr. Alex gave evidence that there was no contract between him and the respondents. They did not dispute his evidence. In the circumstances, there was no material, or key, fact requiring a trial.

PRACTICE - Applications - consolidation *Jeffrie v. Hendriksen et al.,* Hfx. No. 346079, Rosinski, J., September 20, 2011. 2011 NSSC 351; **S635/9** ■ The applicant and the respondent, Hendriksen, were Three Port's only shareholders. The applicant sued to enforce a buy-out agreement, and also alleged "oppression". The respondents countered by claiming he had wrongfully interfered with the company's economic interests, and sought an injunction and accounting for damages. After the respondents failed to convince the court to convert the application to an action so they could proceed by way of cross-claim, they moved to consolidate the two proceedings. *Held,* motion denied. While the applications overlap in some respects, they are not "inextricably intertwined". General convenience and expense favours not consolidating them. Consolidation won't allow the factual disputes to be resolved as effectively and efficiently as proceeding separately will. A consolidated proceeding could not be heard until at least 2013, which means the applicant would have to wait an extra year to have his application heard. This delay outweighs the proposed benefits. The witnesses in each case are somewhat distinct. Weight should be given to the parties' choices. The applicant chose to proceed by the quicker application route. The respondents, by virtue of their previous motion to convert the application to an action, have shown they would prefer to have things heard later. Without good reason, a court should not interfere with these choices.

PRACTICE - Costs - effect of accepted settlement offer *Gammell v. Sobeys Group Inc.,* Bwt. No. 192365, Stewart, J., July 13, 2011. 306 N.S.R. (2d) 61; 2011 NSSC 190; **S634/15** ■ The plaintiff was injured in a slip and fall accident in 1998. Liability and damages were in issue. The defendants offered to settle for $3,000 in 2007. The offer explicitly referenced a set off for any costs incurred by the defendant subsequent to the date of the offer. Days before the trial (in 2010), the plaintiff accepted the offer. The defendant maintained they should be awarded costs. The plaintiff disagreed. There was some question as to whether the *Civil Procedure Rules* (1972) or the *Civil Procedure Rules* (2008) applied. The defendants argued the newer Rules applied, and that Rule 10.08(2)(b) entitles them to costs. Also at issue were costs in relation to proceedings for an interprovincial subpeona, made necessary by the plaintiff's refusal to agree to admit a letter from her family doctor that was clearly relevant to the proceeding. *Held,* the old *Civil Procedure Rules* (1972) apply. The net result sees the plaintiff owing the defendant $5,921. The new Rules are not merely a codification of the usual practice under the old Rules; however, its in keeping with the object of the Rules and the purpose of settlement offers for the court to use its discretion to award the defendant costs in relation to work done subsequent to the offer. While the plaintiff is entitled to costs for the work done before the settlement offer ($1,500), the majority of the defendant's legal costs (about $20,000) were incurred after it was made. The plaintiff's attempts at negotiating made it clear she intended to drive up the defendant's costs if they refused to increase their offer. A lump sum of $6,500 plus disbursements is reasonable. As for the interprovincial subpeona, it was unreasonable for the plaintiff to refuse to consent to the admission of what was determined (at the motions hearing) to be a necessary letter. Absent her consent, there was no way to have it admitted without the motion. The defendant is owed costs of the motion in the amount of $2,500 plus disbursements.

PRACTICE - Costs - motion for immunity from costs *MacBurnie v. Halterm Container Terminal Limited Partnership,* Hfx. No. 341635, Wright, J., September 15, 2011; August 11, 2011. 306 N.S.R. (2d) 197; 2011 NSSC 322; **S635/3** ■ The plaintiff claimed he was wrongfully dismissed and sued his former employer, the defendant. After pleadings closed, he brought a motion pursuant to Rule 77.04 of the *Civil Procedure Rules* (2008) for an order that he be immune from costs in the proceeding. He filed some financial disclosure, claiming social assistance is only means of support. He was in a contingency fee arrangement with his lawyer, but there was nothing to suggest losing this motion would prevent him from continuing to proceed on that basis. *Held,* motion dismissed. There must be a comprehensive body of evidence adduced to support an order pursuant to this rule. The criteria that a party show they can't afford to pay costs and the risk of a cost award is a serious impediment to their ability to litigate, must be applied stringently. A strict application of these criteria requires the court to have a full picture of that party's financial situation, including (in this case) the applicant's employability.

PRACTICE - Costs - several motions, financial means to pay *Leigh et al. v. Belfast Mini-Mills Ltd. et al.,* Hfx. No. 272748, Duncan, J., August 16, 2011. 306 N.S.R. (2d) 190; 2011 NSSC 320; **S634/12** ■ The self-represented plaintiffs brought numerous unsuccessful motions. They were appealing the results of some. The defendants were primarily successful in the three motions they had brought. The total time spent in court (thus far) was two full days. Costs were in issue. The defendants sought costs payable forthwith. The plaintiffs, who had limited financial resources, felt none should be awarded until their appeal(s) were heard and attacked the personal and professional integrity of the defendant's counsel. *Held,* costs of $3,700 plus disbursements awarded to the defendants. The plaintiffs must pay almost $1,000 forthwith and the balance by the end of January, 2012. While they have limited resources, they have ignored warnings and refused to show restraint in pursuing arguments that

have little or no merit in law. Their conduct forced the defendant to incur significant costs to respond to unnecessary motions and to make the plaintiffs to comply with procedural rules. The plaintiffs must appreciate there are consequences to proceeding in this manner. If they have an issue with the cost award, they can appeal it.

PRACTICE - Costs - solicitor client costs *IForm Inc. v. Rossignol et al.,* Hfx. No. 333223, Hood, J., July 26, 2011; July 19, 2011 (orally). 2011 NSSC 273; **S637/26** ■ The court found the plaintiff's *lis pendens* invalid for lack of notice to the landowner, or that it should be discharged on the basis that there was no merit to the claim of constructive trust. The defendant, Real Rossignol, was involved in the interlocutory motion as a witness, but sought costs for having been made to testify. The other defendants sought solicitor and client costs. *Held,* costs of $750 in the cause to the defendant, Rossignol; costs to the other defendants as calculated under Tariff C. Solicitor and client costs were not warranted. The plaintiffs were entitled to bring their claim. Finding there was no merit to it is not the same as finding it was frivolous or vexatious. There were no grounds to conclude there was any "improper or negligent" conduct within the meaning of Rule 17.12(2) of the *Civil Procedure Rules* (2008).

PRACTICE - Expert's report - whether 1972 or 2008 Rules apply *Bernard v. Thibideau,* Hfx. No. 183869, Rosinski, J., October 25, 2011. 2011 NSSC 395; **S637/5** ■ This action concerns an accident that occurred in 2000. The originating notice was filed in 2005; the notice of trial in 2008. The plaintiff characterized 35 of its 52 witnesses as "experts". Most had filed their initial reports by early 2009, and they were prepared and delivered under Rule 31 of the *Civil Procedure Rules* (1972) pursuant to the authority of Rule 92.04(g) of the *Civil Procedure Rules* (2008), which deals with the transition from the old to the new Rules . At issue was whether the old Rules (1972) or the new Rules (2008) should apply to their testimony at the 2011 trial. The plaintiffs felt the old Rules, which would allow her to call her experts to give direct testimony at trial even if they were not required by the defendant to attend for cross-examination. She argued the new Rules would curtail her ability to conduct her case as she saw fit. The defendants felt the new Rules applied, arguing that, while the majority of the expert reports were"delivered" under the old Rules, subsequent steps had already been taken under the new Rules and using the old Rules would result in a longer trial. *Held,* on the facts of this case, the old Rules apply to the expert reports and expert testimony at trial. Applying the principles of statutory interpretation, the drafters of the new Rules are presumed to have intended that if the foundational outstanding step (i.e., delivery of the report) is regulated by the old Rules, the consequential steps (attendance and testimony at trial) should be too. The court chose not to use its discretion to override this conclusion as it was not in the interests of justice to do so in this case.

PRACTICE - Judgments and orders - application for contempt order dismissed *Howes v. Murphy,* No. 1201-062352, Gass, J., September 28, 2011; May 16, 2011 (orally). 2011 NSSC 354; **S635/13** ■

PRACTICE - Judicial review - amendment to notice of review *Nova Scotia (Department of Community Services) v. Hopkins,* Amh. No. 352463, Bourgeois, J., October 19, 2011; October 7, 2011 (orally). 2011 NSSC 382; **S637/10** ■ The applicant applied for judicial review of the Assistance Appeal Board's decision to grant benefits to the respondent to fund her purchase of equipment needed to grow medical marijuana. The notice of review did not contain a provision asking for a stay of the decision pending the review hearing. The applicant's lawyer said this was because he honestly believed the respondent would not try to enforce the decision until the matter was fully resolved. When it became apparent this was not the case, the applicant made this motion to amend the notice to include a request for a stay. The respondent alleged the applicant was acting in bad faith. *Held,* stay granted. The test for whether the amendment should be granted is the same as it was under the *Civil Procedure Rules* (1972): the applicant is not acting in bad faith and the amendment will not cause serious prejudice that can not be compensated by costs. While the original notice should have contained the request for the stay, allowances can and should be made for amendments in cases like this. There is a reasonable explanation for why the notice was drafted as it was. There is no serious prejudice to the applicant if the amendment/stay is granted. She has access to medical marijuana even if she can't start growing her own yet.

PRACTICE - Non-suit - lack of evidence of standard of care *Johansson v. General Motors of Canada Ltd.,* Hfx. No. 230488, Murphy, J., September 23, 2011; May 11, 2011 (orally). 2011 NSSC 352; **S635/10** ■ The plaintiff was seriously injured in a single motor vehicle accident after her vehicle failed to negotiate a turn. A few years later there was a recall on a part related to the vehicle's steering. She claimed against the defendant in negligence (not contract) and proceeded to trial. The defendant brought a non-suit motion at the close of her case, arguing there was no evidence upon which a properly instructed jury could find the claim should succeed. *Held,* motion granted; claim dismissed. The plaintiff established a *prima facie* case that the automobile was defective, the defect caused the accident, and that her injuries happened as a result; however, she failed to provide any evidence of the appropriate standard of care or the defendant's alleged breach of that standard. A product recall is insufficient proof of negligence, nor does it act to shift the burden of proof. The standard of care analysis is of fundamental importance in product liability cases. The *res ipsa* doctrine has been abolished. Some evidence must be led by the plaintiff on the standard of care issue. Failure to do so is not always fatal, but the limited exceptions do not apply here. Had they been pled, the *Motor Vehicle Safety Act* or *Sale of Goods Act* might have been relevant and helpful. Had she joined her husband (the vehicle's owner) she could have claimed concurrently in tort and contract. Similar causes of action are easier to prove in contract law because of the availability of consumer protection legislation.

PRACTICE - Pleadings - demand for particulars *Penwell v. Harwood et al.,* Hfx. No. 331663, Rosinski, J., July 29, 2011. 2011 NSSC 309; **S637/18** ■ The plaintiffs hired the defendants to help them plan for retirement. When the value of their investments plummeted and it became apparent their goals had not been reached, they brought this action claiming the defendants: were negligent; acted in bad faith; and breached their fiduciary duties. The defendants still had not filed a defence. They made a demand for particulars and, unsatisfied with the plaintiffs' answers, brought this motion to compel them to provide further particulars. *Held,* motion dismissed, with costs of $800 plus disbursements payable to the plaintiffs forthwith. Particulars should only be ordered when they are within the knowledge of the moving party and are necessary to allow the responding party to be in a position to answer properly. The defendants have not discharged the burden on them to show the particulars are necessary. They have reached the

stage where there is no reasonable basis to continue refusing to file a defence. They are in possession of most of the documentation and have a greater ability to organize and understanding the information. Their request for particulars is more of a demand for evidence. The plaintiffs have provided detailed answers to the original demand. There are sufficient facts pled to support their claims. Pleadings are to be concise and relate to material facts and the applicable law. Each case must be decided on its own merits. In this case, the statement of claim is sufficient as is. There is no need to force the plaintiffs to particularize each and every transaction they assert was negligent. A fiduciary relationship is presumed to exist given the nature of the relationship between the parties.

PRACTICE - Pleadings - striking pleadings for abuse of process, issue estoppel, *res judicata* *Can-Euro Investments Ltd. v. Industrial Alliance Insurance and Financial Services Inc.,* Hfx. No. 336961, Pickup, J., October 19, 2011. 2011 NSSC 381; **S635/30** ■ The plaintiff sued the defendant in relation to an attempted mortgage transaction that failed to close on two separate dates (May 16 and 29), seeking specific performance on the terms the parties originally agreed to in a commitment letter and/or to recoup fees. The question of whether the agreement should be enforced was heard and decided in favour of the defendant. The question of the return of fees was left for another day. The plaintiff later brought this action, seeking damages in relation to what it claimed was a breached agreement. It said this action arose from the failure of the mortgage to close on May 29, while the prior proceeding concerned May 16. The defendant sought to strike the plaintiff's statement of claim as an abuse of process. *Held,* defendant's motion granted; the plaintiff's claim is struck, without prejudice to the plaintiff to bring an action concerning the fees alone. This proceeding is *res judicata*; it has already been decided by a court of competent jurisdiction and the parties to the two proceedings are the same. The consent order that issued at the outset of the prior proceeding noted the parties agreed to have liability determined. Liability was determined in favour of the defendants. There is no suggestion, either in that order or the court's decision following the hearing, that any liability issues remained outstanding. Cause of action estoppel applies. The claims made by the plaintiff in the present proceeding arise out of the same failed transaction and the same commitment letter. At best, the present claim is nothing more than a new legal conception of facts previously litigated and which should have been raised at the prior hearing. To allow the claim to proceed would amount to an abuse of process by relitigation.

PRACTICE - Small Claims Court - denial of natural justice and error of law, appeal dismissed *Adams v. Crowe,* Hfx. No. 324509, McDougall, J., September 12, 2010; August 12, 2010 (orally). 2010 NSSC 324; **S634/14** ■

PRACTICE - Small Claims Court - grounds for appeal *Boone v. DC Drive Electronics Ltd.,* SC Am. No. 337239; Amh. No. 345563, Bourgeois, J., October 19, 2011. 2011 NSSC 380; **S637/8** ■

PRACTICE - Stay of proceedings - pending appeal *Armoyan v. Armoyan,* C.A. No. 351722, Saunders, J.A., October 13, 2011. 2011 NSCA 92; **S636/2** ■

PRACTICE - Summary judgment - issues of material fact *Poole v. Tibert et al.,* Hfx. No. 342548, MacAdam, J., October 18, 2011. 2011 NSSC 384; **S635/26** ■ The defendants claimed the parties agreed (orally) that, providing they bought the plaintiffs' boat, they would be given the option to purchase several fishing licences, including crab quota, for $200,000. They bought the boat, which was built by the plaintiff's now-deceased husband, without having it inspected. The parties eventually entered into a written agreement for the purchase of licences, minus the crab quota, for $200,000. The defendants made an initial payment and then refused to pay. The plaintiff brought this action, claiming special damages or a return of the licences. The defendants counterclaimed for inclusion of the crab quota (on the basis of the prior oral agreement), a return of the sum they claimed they overpaid for the boat and for the cost of necessary repairs made to it soon after purchase. The plaintiff brought this motion for summary judgment on the evidence in relation to the counterclaims. While the plaintiff acknowledged there was a dispute over to the existence of an oral agreement, but argued such an agreement would be irrelevant in law given the subsequent written agreement and the parol evidence rule. *Held,* motion dismissed. There are material matters of fact, or mixed law and fact, in dispute, including whether there was an oral agreement and whether the plaintiff made representations about the boat. Also in dispute is whether the parol evidence rule has any application if there was an oral agreement. These are not matters to be determined on a motion for summary judgment. There is no basis to conclude the defendants could or should be compensated for any amounts they paid in excess of the boat's fair market value; however, the plaintiff could conceivably be held liable for the cost of the repairs if it is found, at trial, that she made false representations about the boat's condition.

■ PROFESSIONAL OCCUPATIONS

PROFESSIONAL OCCUPATIONS - Accounting services - late tax filing *Burnside Physiotherapy Ltd. v. Prescott & Associates Certified General Accountant Inc.,* S.C.C.H. No.315131, Knudsen, Adjudicator, September 1, 2011. 2010 NSSM 79; **SmCl19/3** ■

PROFESSIONAL OCCUPATIONS - Nursing - judicial review of professional discipline panel *Robichaud v. College of Registered Nurses of Nova Scotia,* Yar. No. 343614, Muise, J., October 24, 2011. 2011 NSSC 379; **S637/25** ■

■ REAL PROPERTY

REAL PROPERTY - Boundary dispute - motion for contempt order *Pittson v. Murnaghan et al.,* Hfx. No. 236026, Duncan, J., October 31, 2011. 2011 NSSC 402; **S637/22** ■ The parties own adjoining properties and became embroiled in a boundary line dispute that was resolved by way of a consent order. The order provided, in part, for the defendants to execute a quit claim deed and boundary line agreement, and for the parties to exchange mutual releases. While the parties agreed on where the boundary fell on the ground, they could not agree on the legal description to be attached to the deed and agreement. There was some evidence the defendants were acting in good faith and the plaintiffs were being obstinate. The plaintiffs brought this motion to find the defendants in contempt for failing to have met the terms of the order. *Held,* a finding of contempt made only in relation to the defective release the defendants provided. When they became aware of its defects, they should have provided a release in the correct form immediately. No punishment will be imposed provided the release is properly executed and delivered within 30 days. In terms of the deed, it has not been shown beyond a

reasonable doubt that the defendants were in contempt. The plaintiff bears some responsibility for the fact it still has not been executed. The defendants clearly intended to comply and they spent time and money trying to resolve things. As for the boundary line agreement, the same holds true. The court provided direction, time-lines and retained jurisdiction to hear any issues arising from this decision.

REAL PROPERTY - Land titles - chain of title *3209292 Nova Scotia Ltd. v. MacDuff,* Hfx. No. 309982, Scaravelli, J., October 7, 2011. 2011 NSSC 363; **S635/17** ■ Both parties claimed ownership of an island. When the defendants learned of the plaintiff's interest in purchasing the land, they had commissioned a survey showing that they owned the land and had it registered in the land registration system. Despite evidence of its own survey and analysis of the chain of title to the island, the plaintiff was unsuccessful in having the Registrar reverse its decision. The plaintiff then commenced this action, claiming that the defendants had filed an erroneous survey with the Registrar and it had an unbroken chain of title to the island. The defendants argued that the island had been erroneously included in the survey purportedly commencing the plaintiff's chain of title and, that error having been recognized by the surveyor, the land was not included in subsequent land transfers. The plaintiff argued that the island in dispute was not the island claimed by the defendants, pointing out that the description of that island did not match the geography of the land in dispute. *Held,* judgment for the plaintiff; the plaintiff had the better chain of title as the defendants' chain of title did not match the physical geography of the island, but was for an island much smaller than that in dispute. There was an obvious internal inconsistency in the defendants' title abstract and although their surveyor claimed to have viewed the underlying source documents, he was unable to explain numerous discrepancies between his survey and the source documents. In contrast, the plaintiff's surveyor had surveyed the property conveyed in the plaintiff's chain of title and then overlaid that with the original survey and, on that basis, concluded that the island was included in the original grant.

■ SALE OF LAND

SALE OF LAND - Negligent misrepresentation - Property Conditional Disclosure Statement, water *Barbour et al. v. MacDonald et al.,* Claim No. 350734, Slone, Adjudicator, September 27, 2011. 2011 NSSM 55; **SmCl19/11** ■ The claimants purchased a home from the defendants, who had renovated and then rented out the property without ever residing there. The Property Condition Disclosure Statement (PCDS) indicated that they were unaware of any structural problems, unrepaired damage or leakage in the basement; that a sump pump had been installed to deal with previous leaks; and that there was a warranty from a watertight basement company for waterproofing in place. A few weeks after moving in, the claimants discovered significant amounts of water in the basement and learned that the previous renters had also experienced water in the basement, resulting in the defendants contacting the watertight basement company, who had installed a water dry membrane system along the walls. When the water problem continued, the defendants were advised that there was a drainage problem outside the house and a new drainage system should be installed when weather conditions allowed. After a second floor drain failed to alleviate the problem, it was recommended that a sump pump be reinstalled, which work was done by the defendants. There had been no obvious leaking in the period between the old sump pump being reinstalled and the PCDS being signed. *Held,* the defendants are liable for the claimants' damages; they had made a negligent misrepresentation to the claimants as their stated belief that the basement was waterproof was not reasonably held, lulling the claimants into a false sense of security. Although the PCDS only deals with the extent of the vendor's knowledge, it is that knowledge uniquely held by the vendor that is critical in situations like this where a problem that is intermittent and perhaps seasonal is concerned. The defendants knew, or ought to have known, that the repair was provisional at best and, given that previous efforts to solve the water problem had failed, should have been much more cautious about declaring the problem solved. The reference to the warranty was also an exaggeration as no reasonable person reading the warranty could conclude that anyone was warranting the basement as waterproof.

■ TRUSTS

TRUSTS - Real property - resulting trust *Mattinson v. Fanning,* Hfx. No. 348164, Coughlan, J., September 6, 2011; July 29, 2011 (orally). 2011 NSSC 334; **S634/27** ■ When the applicant was unable to obtain mortgage financing for her property, she transferred it to the respondent (a lawyer) who secured financing in his name. According to the applicant, the parties were in a romantic relationship and eventually lived together as common-law partners. Their relationship had since ended. The applicant now sought to reclaim title to the property and sell it to repay her debt to the respondent (owed pursuant to a promissory note) and move on. She applied for an order declaring the respondent was holding the property for her on the basis of a resulting or constructive trust. The respondent argued he had paid costs to maintain the property and was entitled to at least a share in it. *Held,* the respondent holds the property on a resulting trust. There is no documentary evidence to support the respondent's claim that he paid expenses related to maintaining the property. There was no common intention the respondent would acquire beneficial ownership. In the alternative, the court finds the property is also held on a constructive trust. The respondent has been unjustly enriched by obtaining title to the property. There is no juristic reason for the enrichment. The applicant owned the property for years before conveying it to the respondent, and the court accepts that she has been paying the costs of maintaining it. A monetary award would not be sufficient compensation. She is entitled to reclaim 100 per cent of the property.

■ WILLS AND ESTATES

WILLS AND ESTATES - Conflict of laws - validity and effect of marriage on will *Davies v. Collins,* C.A. No. 342419, Bryson, J.A., September 13, 2011. 2011 NSCA 79; **S631/20** ■ The deceased was officially domiciled in Nova Scotia but had lived with the respondent in Trinidad for many years and married her two days before his death. In Trinidad, this was considered a marriage *in extremis* (death-bed marriage) and, although recognized as valid, would not invalidate a prior will. Unsuccessful in her attempt to probate the deceased's will that had been executed prior to their divorce (due to prior existing proceedings in Trinidad brought by the respondent), the deceased's ex-wife applied for a declaration that, as a matter of law in Nova Scotia, the will had not been revoked by the marriage *in extremis* in Trinidad and therefore could be properly probated here. She unsuccessfully argued that the question of the effect of the marriage on the will should be characterized as a question of matrimonial rather than succession law, making the governing law that of

the intended matrimonial domicile (Trinidad) as opposed to the deceased's domicile (Nova Scotia). The court found that the marriage was a valid marriage that operated to invalidate the prior will as the question of whether or not a marriage revoked a prior will must be governed by the law of the deceased's domicile at the time of the marriage. The ex-wife appealed. *Held,* appeal dismissed; given that the parties agreed that the Trinidadian marriage should be recognized under Nova Scotia law and that the deceased was domiciled here at the time of the marriage, Nova Scotia law determined the effect of the marriage, resulting in the will's revocation. Revocation is governed by the deceased's place of domicile at the time of the marriage and the term "matrimonial domicile" is not used in a sense independent of the deceased's personal domicile. Neither accepting the validity of the Trinidadian marriage nor comity required Nova Scotia to recognize the Trinidadian consequences of non-revocation, which contravened both domestic law and the deceased's presumed intention.

WILLS AND ESTATES - Testamentary instrument - handwritten notes found in home *Komonen v. Fong et al.,* Hfx. No. 339024; Probate Court No. 58572, Smith, A.C.J., August 15, 2011. 306 N.S.R. (2d) 370; 2011 NSSC 315; **S634/3** ■ The testator had executed a will three years prior to his death but a printed will form was also found in his home, parts of which had been completed in pencil. A chapter from a book setting out the formalities involved in signing a will was also found. The testator's niece applied for an order determining the validity of the second will, which had been signed but not witnessed. *Held,* application to have the second will declared valid dismissed; ultimately, the court relied on entries in the deceased's diaries made after the dates written on the will form to ascertain his intention. The fact that the testator used a pre-printed will form as opposed to a blank piece of paper and the fact that the document was signed (albeit in pencil) and dated and referred to funeral arrangements all supported a conclusion that it embodied his testamentary intentions; however, the fact that the document had been completed in pencil, some portions had been left blank and it had not been witnessed supported a contrary conclusion.

WILLS AND ESTATES - Trusts - application to vary *Sprott Estate (Re),* Hfx. No. 343317, Kennedy, C.J., August 25, 2011. 2011 NSSC 327; **S634/20** ■ Dr. Sprott died and left half of his estate to the university, to be used to establish a scholarship fund for "outstanding" scholars between the ages of 35 and 45. The university brought an *ex parte* application to vary certain terms of the will, including to implement changes to the way the fund is administered so that it is in keeping with the hundreds of other funds already being administered by them. They also sought to change certain terms (including to vary the age range to simply read "under 45") with the goal of increasing the likelihood the scholarship will be awarded in any given year. *Held,* the court uses its inherent jurisdiction to grant the two amendments that address the "spirit of the trust" and the testator's wish that this money be used to establish awards for "outstanding" scholars. The amendment designed to increase the administrative efficiency is not granted.