NOVA SCOTIA LAW NEWS

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From the Nova Scotia Court of Appeal

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This is the last issue of the *Nova Scotia Law News*. The Nova Scotia Barristers' Society – Library & Information Services is changing its role and as a result, the publishing portion of the Library has been reduced. *Law News Online* and the online quantum tables (PID, Sentencing and Notice Periods) will no longer be maintained. Watch *InForum* for tips on how to find similar information using other sources. Also, check the second-last page for a history of the *NSLN*. The back page of this issue of *NSLN* provides the names of the many volunteers who have contributed during the 38 years of this journal. I would like to personally thank them for their time and expertise. Some of these individuals have volunteered for over 20 years.

The staff is also to be commended. Jennifer Haimes was the employee who moved decisions from reviewers to digesters to the Internet and ensured that we met our deadlines. Susan Jones and Lisa Woo Shue pitched in and helped whenever we needed them. Michelle Morgan-Coole and Shawna Denney have provided advice to me and written the digests for *NSLN* and the annotations for the *Annotated NS Civil Procedure Rules* for several years. – *Barbara Campbell*

Digests and Decisions

The Law News is prepared under the direction of the Director of Library & Information Services. All circulated and some uncirculated Nova Scotia decisions are included. Only decisions of precedent value have been digested.

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Susan Jones, Information Services Librarian
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We extend our thanks and appreciation to the following reviewers for their contributions to this issue: Randall Balcome; M. Jean Beeler QC; David Curtis QC; Kim A. Johnson; John Kulik QC; Stanley MacDonald QC; Matthew J. D. Moir; Scott C. Norton QC; Michael O'Hara; Joshua J. Santimaw

Digesters for this issue: Michelle Morgan-Coole and Shawna Denney

Decisions received between October 13, 2011 – February 21, 2012.

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■ ADMINISTRATIVE LAW

ADMINISTRATIVE LAW – Boards and tribunals – appeal from Nova Scotia Utility and Review Board dismissed *Wilson v. Nova Scotia (Attorney General),* C.A. No. 353659, MacDonald, M. C.J., February 7, 2012. 2012 NSCA 14; **S640/17** ■

ADMINISTRATIVE LAW – Boards and tribunals – judicial review, *Income Assistance Act*, overpayment *Nova Scotia (Department of Community Services) v. Cleary,* Hfx. No. 352457, Rosinski, J., December 6, 2011. 2011 NSSC 451; **S639/6** ■

ADMINISTRATIVE LAW – Boards of inquiry – jurisdiction *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission),* C.A. No. 352666, Saunders, J.A., January 25, 2012. 2012 NSCA 11; **S640/12** ■

ADMINISTRATIVE LAW – Freedom of information – appeal dismissed *Coates v. Capital District Health Authority,* C.A. No. 344161, Beveridge, J.A., January 20, 2012. 2012 NSCA 4; **S640/7** ■

ADMINISTRATIVE LAW – Freedom of information – motion to eliminate need to provide notice to third party *Kirby v. Nova Scotia (Department of Transportation and Infrastructure Renewal),* Hfx. No. 352681, Moir, J., December 9, 2011. 2011 NSSC 458; **S639/13** ■

■ BARRISTERS AND SOLICITORS

BARRISTERS AND SOLICITORS – Negligence – standard of care *Meister v. Coyle,* C.A. No. 335866, Oland, J.A., December 20, 2011. 2011 NSCA 119; **S636/29** ■ The appellant was charged with dangerous driving in an accident that killed two people. At trial, his lawyer (the respondent) chose not to object to the admission of a flawed accident reconstruction video tendered by the Crown. His strategy was to undermine the Crown's case by pointing out the flaws through cross-examination. It did not work; the plaintiff was convicted. He retained a new lawyer and appealed; the appeal court ordered a new trial and the Crown dropped the charges. While the respondent's competence wasn't raised as an issue on appeal, the appeal court said he should have objected to the admission of the highly prejudicial evidence. The appellant sued the respondent in negligence and breach of contract. Each introduced conflicting opinions from criminal law experts to support their respective positions. The action was dismissed on the basis that the respondent did not breach the standard of care owed by a reasonably competent lawyer. In her reasons, the trial judge observed the expert evidence suggested the trial judge should have done more to intervene. The appellant appealed. *Held,* appeal dismissed, without costs. The trial judge's conclusion was based on a reasonable assessment of all of the evidence and didn't reflect any palpable and overriding errors. While her reasons suggest she may have misapprehended the appellant's expert, that misapprehension was not material to her line of reasoning. For the most part, she actually rejected the expert evidence, noting it was only useful to point out the diverse views on strategy in a criminal law trial. She did not err by finding the respondent's failed strategy did not amount to negligence. While the respondent may have admitted his strategy was an error in judgment, this doesn't necessarily mean it was negligent.

■ BUILDING CONTRACTS

BUILDING CONTRACTS – Breach of contract – standard of good workmanship, damages *Pinnacle Homes Construction Ltd. v. Halifax County Condominium Corp. No. 278,* Hfx. No. 338920, Robertson, J., February 29, 2012. 2012 NSSC 85; **S644/10** ■

■ CIVIL RIGHTS

CIVIL RIGHTS – Exclusion of evidence – seized property, detention *R. v. Farmakis et al.,* Ant. No. 316298, Duncan, J., March 10, 2011. 2011 NSSC 101; **S635/27** ■ While making a motor vehicle stop, the officer noted indicia that he felt was consistent with drug trafficking. He called for backup and waited to issue a speeding ticket until the second officer arrived. He then obtained the driver's consent to search the vehicle and advised him that if anything was found, he could be charged and that he could end the search at any time. The office, however, did not follow the standard wording to be used in such situations. While searching the vehicle, the officer noted the smell of fresh marijuana coming from the trunk, where he located, *inter alia*, a small locked suitcase smelling of marijuana. After advising the occupants that they were being detained for trafficking in a controlled substance and advising them of their *Charter* rights, the officer asked the driver if there were drugs in the suitcase. While pat down searches were being conducted, the passenger was observed throwing an object in the ditch. At this point, both occupants were arrested for possession of a controlled substance and the officer retrieved a small plastic dish with marijuana from the ditch. A search dog was called to the scene and identified the small suitcase as containing drugs. When it was opened, a large amount of cash, but no drugs, was found. After the accused were taken to the detachment, the vehicle was again searched and more items seized. The two accused were charged with possession of and transporting property obtained as a result of the commission of an offence. They applied to have the evidence seized by the police and the statement in response to the officer's question excluded. *Held,* the accused's statement is excluded from evidence but all real evidence seized is admissible; the accused's s. 9 and s. 10 *Charter* rights were violated but there was no violation of their s. 8 rights. Although the original detention was valid, the accused remained detained following the issuance of the ticket as any reasonable person in their circumstances would have understood that they were the subject of a focused investigation and not free to simply drive away. However, there was no authority to detain the accused at this point as they were being detained on a hunch, not on reasonable grounds, resulting in an arbitrary detention. Their s. 10(b) rights were violated because they were not advised of their right to counsel until the suitcase was found and the statement was elicited from one accused before they were provided with the opportunity to contact counsel. The consent to search the vehicle was validly obtained and the remaining searches of the vehicle and the accused were valid as incidental to arrest. The officer's conduct was neither blatant nor flagrant and the arbitrary detention was brief and minimally intrusive. However, the right to counsel is fundamental and the exclusion of the statement would not undermine the prosecution's ability to proceed with these serious charges.

CIVIL RIGHTS – Exclusion of evidence – statement to police *R. v. Chan,* CR. No. 334922, Wright, J., September 28, 2011. 2011 NSSC 350; **S637/6** ■ The accused, a suspect in a shooting, was arrested on unrelated charges. He was advised of the reasons for his arrest and spoke with counsel but no mention was made of the shooting. Knowing he would be held overnight on the unrelated charges, the police took the opportunity to search his apartment. He was held in an interrogation room for approximately eight hours while the search was conducted and it was only after this that he was advised that he was being investigated for the shooting. At that time, he was again given the police caution and asked if he wanted to re-contact a lawyer but he refused due to the late hour. Before questioning him about the shooting, the officers advised him that he could call duty counsel at any time. The Crown sought to have his statement admitted into evidence. *Held,* accused's statement admitted into evidence. Although his s. 10 rights had been violated, the breach was of a minor and inadvertent nature and had only marginally affected his right to make an informed choice as to whether to speak with the police.

CIVIL RIGHTS – Judicial review – breach of procedural fairness *Islam v. Nova Scotia (Human Rights Commission) et al.,* Hfx. No. 325019, McDougall, J., February 13, 2012. 2012 NSSC 67; **S643/14** ■

CIVIL RIGHTS – Right to be tried within a reasonable time – stay of proceedings *R. v. MacIntosh,* C.A.C. No. 338535; C.A.C. No. 333361, Beveridge, J.A., December 8, 2011. 2011 NSCA 111; **S636/23** ■ The defendant, charged with numerous counts of historic indecent assault and gross indecency, unsuccessfully sought a stay of proceedings on the basis of pre-charge and post-charge delay. When the first information was laid, he was living and working in India. The police contacted him by phone but he insisted he was never told there was a warrant, only that they were investigating an allegation of sexual assault. Extradition proceedings were commenced and he was advised his passport would not be renewed. He retained counsel to address this issue, who sought and received disclosure from the Crown. New allegations surfaced and the police investigation and extradition proceedings continued. He was eventually extradited and returned to Canada 10 years later. The defence sought seven adjournments as they sought extensive disclosure concerning the extradition process and the following year an unsuccessful application was brought to challenge the extradition. A preliminary inquiry was concluded and the accused was ordered to stand trial within a further year. He alleged that since his return to Canada, he had been held in solitary confinement and imprisoned for eight months and had received death threats and there was extensive publicity surrounding his situation. The court found the suggested prejudice was nebulous and the defendant was responsible for much of the delay. Although the pre-charge delay was considerable (25 years), the defendant had not shown that had the complainants come forward sooner, there would have been any evidence presently unavailable that would have been of benefit to him. The post-charge delay was close to 14 years but, within a year of the first charge being laid, he had been made aware that a criminal investigation was ongoing and yet made no effort to deal with the situation. Within three years of the charges being laid, he had received disclosure from the Crown and knew that extradition proceedings would be commenced and yet he still did nothing. This portion of the delay was partially, but significantly, attributable to the defendant, who, if he had desired a timely trial, could have voluntarily returned to the jurisdiction. The defendant was also found responsible for 11 months of the delay after he arrived in Canada. He was found guilty of several of the charges against two of the complainants and not guilty of other charges concerning those same complainants. Where convictions were entered, the court was impressed with the complainants' evidence, the details recalled

and the manner in which they testified. On those charges where the defendant was not convicted, the court found the events alleged just hadn't happened. The defendant appealed the denial of his stay application and his convictions. *Held,* appeal allowed. Convictions quashed and stay of proceedings entered. Although there was no error in the court's analysis of the pre-charge delay, the defendant's right to be tried within a reasonable time had been violated with respect to the post-charge delay. It was wrong to blame the defendant for the 14-year delay when it was the authorities' duty to bring him to trial. He did nothing to hide from or hinder the authorities and no explanation was ever offered for why it took so long to proceed with the extradition request or for the three-year delay between the time the extradition package was ready and when it was forwarded to India. Nor was it right to blame the 11-month delay following the extradition on the defendant. The police and Crown were aware of their disclosure obligations four years prior to the extradition request and yet none of the video or audio taped statements from the complainants were provided in a timely fashion. The judge also erred in accepting that it was "probable" the delay would affect the quality of some of the evidence without considering the impact on the defendant's ability to make full answer and defence. The defendant had suffered considerably upon his return to Canada and the incarceration, abuse and restrictive bail conditions were continued unnecessarily by the Crown's delay in fulfilling its disclosure obligations. Even if the charges were not stayed, the convictions could not stand. The trial judge erred in law in a number of ways (including failing to address the effect of its finding that the complainants had either lied, demonstrated a marked disregard for the truth or were patently unreliable with regard to some of their allegations in assessing the other allegations) and misapprehended the complainants' evidence. The test to review a verdict as being unreasonable has been expanded to encompass scrutinizing the logic of the judge's findings of fact and inferences drawn from the evidence.

CIVIL RIGHTS – Right to counsel – application in funded counsel for a *habeas corpus* situation *Bradley v. Canada (Correctional Service),* Amh. No. 357720, Bourgeois, J., December 6, 2011. 2011 NSSC 463; **S642/6** ■ The defendant brought a motion for state-funded counsel for help with a *habeas corpus* application in connection with his current detention in administrative segregation. He alleged that correctional services was hampering his efforts by, *inter alia*, refusing to disclose essential documents and provide him with access to the prison library. He testified that he suffered from dyslexia and believed a lawyer could advocate on his behalf to help him attain the necessary information. *Held,* application dismissed. There was no authority for court-appointed counsel in *habeas corpus* or prison disciplinary situations and there was nothing before the court establishing that the issues involved significant public interests or were sufficiently complex to warrant an order for publicly funded legal representation.

CIVIL RIGHTS – Unreasonable search and seizure – admissibility of evidence *R. v. L. (J.) and B. (F.),* No. 2286297; 2286298, Campbell, J.P.C., December 7, 2011. 2011 NSPC 91; **M25** ■ When a vehicle was pulled over for a traffic stop, both officers detected a strong smell of what they believed to be raw marijuana. The occupants were arrested, the vehicle was searched and a knapsack containing a ziplock bag holding 40 smaller ziplock bags of marijuana was found. The accused, who were charged with trafficking in marijuana, applied to have the evidence found inadmissible on the basis the search was unlawful. *Held,* application dismissed. Although the officers' decision was not technically correct and there were not reasonable grounds for the arrest, this was not the kind of breach that demanded a response that would have the very real effect of allowing someone to avoid prosecution for a serious offence. The manner in which the marijuana was stored, the absence of any loose marijuana, the total amount of the substance in the car, the lack of any recent specialized training of the officers involved, and the lack of any evidence other than odour tipped the balance to the conclusion there was not reasonable grounds for the arrests. However, the police acted in good faith, a complex body of case law on the issue was still being developed, and this was not a case of ignorance of *Charter* standards, but rather a failure to apply and appreciate the legal nuances. The detention itself was brief and not especially intrusive and none of the police actions could be interpreted as particularly demeaning. Further, the exclusion of the highly reliable evidence would be determinative of the matter.

CIVIL RIGHTS – Unreasonable search and seizure – validity of search warrant *R. v. Cater et al.,* No. 1997518 – 1997550, Derrick, J.P.C., December 20, 2011. 2011 NSPC 99; **M25** ■ The accused challenged the validity of a search warrant executed at their residence. They argued the Information to Obtain ("ITO") did not contain reasonable and probable grounds to believe that a firearm was located there and was not drafted with sufficient care so as to avoid misleading the justice of the peace. The ITO characterized the accused's son as a drug dealer and indicated that ambiguous intercepted calls between him and the accused included discussions about firearms, with the officer providing detailed reasons for this belief. The defence argued the inferences drawn by the officer were mere hunches and the conversations could not support a reasonable inference that the subject under discussion was a temporarily misplaced firearm. *Held,* the firearms seized are admissible at trial. It could reasonably be inferred a firearm was being discussed, thus providing reasonable and probable grounds for the issuing Justice to believe the accused were storing a firearm at their residence. There was nothing in the conversation to suggest that "Tracey" was a person and, in fact, was referred to as an "it". One of the accused referred to people having been "patted down", which supported a reasonable inference that it was not a missing person that had the parties so upset. And it was reasonable, from the level of concern expressed and the guarded references in the calls, for the Justice to be satisfied that what was discussed was a firearm that had been stored at the residence. The fact the accused had no criminal record was irrelevant as even the home of innocent third party custodians can be entered with a valid search warrant. Although the ITO did not substantiate the characterization of the son as a drug dealer, those references could be excised without damaging its ability to support reasonable inferences about the presence of a firearm at the residence. There was no basis to suggest the police were required to undertake any further investigation into the meaning and significance of the intercepts before seeking a search warrant.

CIVIL RIGHTS – Unreasonable search and seizure – warrantless search of a cellphone *R. v. Cater,* No. 1997518 – 1997550; 2035773 – 2035784, Derrick, J.P.C., January 13, 2012. 2012 NSPC 2; **M25** ■ Although the police intended to arrest the accused for weapons offences at a later time and not as part of a large "take down" operation, the decision was made to arrest him sooner after further wiretap evidence was reviewed. Before any arrests had been made, it had been decided that any cellphones found would be searched. The accused's phone was not tampered with until it was taken to

the technology lab, as the police did not want to risk damaging any evidence it contained. The accused challenged the validity of the search, in part, on the basis that the arrest was unlawful. The phone was not a "smart phone", but a fairly simple device and was not password-protected. *Held,* the evidence gathered from the phone is admissible; there was no violation of the accused's s. 8 rights. The officer's subjective belief in the accused's arrestability for weapons possession was objectively reasonable, as were the inferences drawn from the intercepts; the initial search and seizure of the phone while the accused was being processed qualified as a search incidental to arrest and the later forensic analysis of the phone was also incidental to arrest and conducted reasonably. Although a cursory search of the cell phone, incident to arrest, would have been permissible, such a search would have risked the loss of, or damage to, valuable evidence and to require a search warrant in order to access information contained in the phone but no search warrant to justify examining the contents by scrolling through the various options would mean that the necessity of obtaining a warrant would turn solely on whether the police chose to follow best practices in dealing with a phone's potential evidence. An elevated expectation of privacy might be established if there was a password on the phone.

■ COMPANY LAW

COMPANY LAW – Shareholder agreement – oppression remedy *Giffin v. Soontiens et al.,* Hfx. No. 292594, Moir, J., January 19, 2011. 2011 NSSC 403; **S637/15** ■ The plaintiff, a minority shareholder, signed a shareholder agreement with an exclusive agreement clause. While the agreement clearly treated him differently than the respondents, Soontiens and MacAlpine (the majority shareholders), he claimed the parties had an understanding that he would be treated equally before and after it was signed. When the majority shareholders started taking an unequal share of profits, he sought oppression remedies under the *Companies Act*, 3rd Schedule. In the midst of trial, the majority shareholders tried to prevent him from introducing evidence of oral discussions and draft agreements preceding the final agreement. They argued the exclusive agreement clause precluded him from introducing parole evidence. The court found the agreement was not ambiguous. *Held,* oppression remedies supercede contract law. Neither the parole evidence rule nor the exclusive agreement clause prevent the plaintiff from relying on all of the surrounding circumstances. The plaintiff is not trying to modify the agreement by introducing parole evidence, he's trying to avoid it and rely on law (oppression remedies) that is outside of the agreement. While an unambiguous agreement can be strong evidence, it's not determinative of whether or not he had a reasonable expectation he would be treated fairly despite the terms of the agreement.

COMPANY LAW – Shareholder agreement – oppression remedy *Giffin v. Soontiens et al.,* Hfx. No. 292594, Moir, J., October 31, 2011. 2011 NSSC 404; **S637/16** ■ The plaintiff and his cousins (the respondents and majority shareholders, Soontiens and MacAlpine) started their own electrical contracting company. The plaintiff was an experienced electrical contractor and estimator; Soontiens and MacAlpine handled the business side of things. Initially, all three invested a significant amount of time and work into the business. Although the plaintiff invested significantly less start up money, the evidence showed he was prepared to invest equally and was essentially tricked into not doing so. A shareholder agreement, executed after the business had already been running for some time, strongly favored Soontiens and MacAlpine. The plaintiff didn't participate in its drafting and signed it without obtaining independent advice. Initially, the parties were treated equally when it came to remuneration. They all chose to take very little money out of the company in order to allow it to grow. When it became profitable, Soontiens and MacAlpine started paying themselves a disproportionate share of the profits. The plaintiff argued he was promised equal treatment. He left the company and sued for oppression remedies. He also claimed a breach of fiduciary duties, promissory estoppel and misrepresentation. During the course of the trial, the court found the agreement's share distribution clauses to be ambiguous. Also during trial, the plaintiff was impeached with testimony he gave to the Labor Relations Board. *Held,* the plaintiff has proven oppression, but his other claims are dismissed. The impeachment evidence is of limited use; it only goes to credibility. While the court doesn't believe everything the plaintiff said, his evidence was accepted on many of the major points. When the ambiguities are resolved, the agreement isn't as one sided as it initially appeared. Despite the inequalities, the plaintiff had a reasonable expectation that he'd be treated equally. The parties each bore initial risk from the outset, and contributed an equal amount of work. The plaintiff was essential to company's success, especially in the first few years. By paying unequal dividends and trying to pass a unilateral amendment to the agreement, the majority shareholders acted oppressively. The fact the plaintiff didn't protest more or earlier is irrelevant here. Speculation over preventative steps aren't helpful in resolving a disagreement over reasonable expectations in a small, closely held company after a break-down of a personal relationship. The appropriate remedy is to value to company, and a related holding company, as of the day the plaintiff left. The respondents must buy him out according to market value of his shares on that date.

COMPANY LAW – Shareholder agreement – valuation datein the event of retirement, resignation or termination of employment *Giffin v. Soontiens et al.,* Hfx. No. 292594, Moir, J., February 13, 2012. 2012 NSSC 65; **S643/12** ■

■ CONTRACTS

CONTRACTS – Breach of contract – provider of support services to persons with disabilities *Kairos Community Development Inc. v. Nova Scotia (Community Services),* Hfx. No. 265555, Coady, J., December 30, 2011. 2011 NSSC 490; **S641/25** ■

CONTRACTS – Breach of contract – technical services, refurbishment of vessel *Chaulk Air Inc. v. Gencana Energy Solutions Inc. et al.,* Hfx. No. 343068, Wood, J., November 15, 2011; November 10, 2011 (orally). 2011 NSSC 422; **S638/11** ■ The plaintiff sued the defendants in relation to the refurbishment of a motor vessel. The plaintiff, Mr. Sampson, is an officer and shareholder of the defendant, Gencana. The plaintiff claimed he negligently misrepresented Gencana's ability to service their needs. Mr. Sampson moved for summary judgment on the evidence, and sought to have the personal claims against him dismissed. *Held,* motion granted in relation to some but not all of the claims against Mr. Sampson. While the *Civil Procedure Rules* (2008) require the responding party to put their best foot forward, this doesn't suggest a higher evidentiary burden. All that must be shown is some chance of success at trial. The parties appear to agree there were no personal representations made by Mr. Sampson in relation to Geneca's qualifications to provide the services set out in the technical proposal or its alleged failure to complete the

work. There is no evidence that, if such representations were made, the plaintiff relied on them to its detriment. There is no real chance of success on these claims; however, the representations made with respect to the shipyard's capabilities are capable of succeeding. The plaintiff clearly says it relied on Mr. Sampson's advice in this regard and whether they did is a question of fact best left for trial.

CONTRACTS – Interpretation – escalator clause *Dexter Construction Co. Ltd. v. Nova Scotia (Attorney General),* Hfx. No. 285919, Coughlan, J., November 30, 2011. 2011 NSSC 441; **S639/1** ■

■ CREDITOR AND DEBTOR

CREDITOR AND DEBTOR – Monies owing – accountant *Clarity Accounting & Business Solutions Inc. v. LHPM Industrial Poly Liner Inc.,* Claim No. 357334, Slone, Adjudicator, January 3, 2012. 2012 NSSM 8; **SmCl20/4** ■

CREDITOR AND DEBTOR – Monies owing – services *Verge v. Sparks,* Claim No. 371843, Slone, Adjudicator, February 20, 2012. 2012 NSSM 6; **SmCl20/2** ■

CREDITOR AND DEBTOR – Monies owing – unpaid invoices *Eastech Consultants Ltd. v. Silco Contracting Ltd. et al.,* Claim No. 10-329803, Casey, Adjudicator, September 27, 2010. 2010 NSSM 81; **SmCl19/26** ■

■ CRIMINAL LAW

CRIMINAL LAW – Animal cruelty – appeal *R. v. Benoit et al.,* C.A.C. No. 327751, Fichaud, J.A., November 1, 2011. 2011 NSCA 99; **S636/9** ■ Having previously been ordered off the defendants' property, SPCA officers had responded to current complaints by attending with police and a search warrant where they located several puppies in the garage lying in a box of feces and urine, all in apparent need of deworming, food, water and care. At this time, the defendants were extremely rude and aggressive, with the female defendant kicking one of the police officers. Based on their observations, the officers later returned with a second search warrant. When the defendant refused to respond, they broke open the lock to the garage and removed the puppies. The defendants claimed that they ran a puppy brokerage and not a puppy mill, the animals were well taken care of in the short time they had been in their care and they had relied on the owners' representations as to any treatment the animals had received or might require. Both defendants were found guilty of failing to relieve animals in distress pursuant to s. 11(2) of the *Animal Cruelty Prevention Act* and the female defendant was found guilty of wilfully obstructing and assaulting a peace officer. The expert evidence showed that the puppies were in distress from a physiological point of view when the cure was simple, inexpensive and very effective over a short time. The defendants unsuccessfully appealed, with the court finding that whatever the commercial arrangements between the puppies' owners and the defendants, the defendants clearly had *de facto* custody, possession and control of the animals. The evidence of the unsanitary conditions in which the puppies were kept should have been addressed immediately. Further, there was no violation of either of the defendants' *Charter* rights or any abuse of process. The defendants again appealed. *Held,* appeal dismissed. The issue of whether or not the animals were in distress raised a question of fact and the evidence supported the finding that the puppies were infested with parasites, resulting in distress and the finding that the defendants were in charge at the relevant time. Warning the defendants and giving them an opportunity to remedy the situation is not a condition precedent to laying a charge under s. 11(2) of the *Animal Cruelty Prevention Act*. There was no breach of s. 6 of the *Charter* because the *Animal Cruelty Prevention Act* is a law of general application and does not discriminate based on province of residence. Furthermore, there was no violation of s. 8 because the search and seizure were further to unchallenged warrants and the animals were seized from the garage, not the dwelling, which could be done without a warrant.

CRIMINAL LAW – *Animal Protection Act* – permit animals to be in distress *R. v. Jackson,* No. 2271453, Gabriel, J.P.C., June 2, 2011. 2011 NSPC 108; **M25** ■

CRIMINAL LAW – Appeals – admissibility of statements recorded in 911 call *R. v. Boone,* Syd. No. 348848, Duncan, J., December 14, 2011. 2011 NSSC 465; **S639/19** ■ The defendant was found guilty of assaulting his wife on the basis of her out-of-court, unsworn statements recorded in a 911 phone call, which included some conversation between the parties and were admitted on the basis of the spontaneous utterances exception to the hearsay rule. At trial, she testified to being extremely drunk at the time and recalling very little of what occurred that night. The defendant denied the assault allegation, did not recall saying certain things that were recorded in the call and denied the truth of any statements that might inculpate him. Although he acknowledged a fight with his wife, he testified that she passed out and hit her head as she fell. No voir dire was held to determine the admissibility of the statements and the first time the Crown suggested they should be admitted for the truth of their contents was in its summation. The defendant appealed on the basis the statements should not have been admitted into evidence. *Held,* appeal allowed. Conviction quashed. The trial judge erred in failing to hold a voir dire, resulting in the defence suffering substantial prejudice from not having the opportunity to examine witnesses or adduce evidence on the issue. Because the Crown failed to apply to have the statements admitted and adduce the necessary evidence from the 911 operator to prove the circumstances and accuracy of the recording, the trial judge did not have an adequate evidentiary basis upon which to determine the recording's accuracy or the threshold reliability of the statements. Further, at the close of the Crown's case, he specifically and unreservedly indicated the statements were not admissible for the truth of their contents, resulting in the defence being misled.

CRIMINAL LAW – Appeals – fresh evidence *R. v. Dugas,* C.A.C. No. 362840, Fichaud, J.A., March 9, 2012. 2012 NSCA 27; **S640/29** ■

CRIMINAL LAW – Appeals – ineffective representation of counsel *R. v. Gogan,* C.A.C. No. 346923, Saunders, J.A., November 25, 2011. 2011 NSCA 105; **S636/15** ■ The defendant appealed his sentence on the basis that his lawyer had failed to follow his instructions, resulting in him being sentenced to a federal institution, as opposed to a provincial jail and asked that the sentenced be reduced so that it could be served in a provincial facility. *Held,* appeal dismissed. This was not a case of ineffective assistance of counsel as defence counsel had provided the defendant with good advice throughout and he had consistently maintained he preferred to

receive a penitentiary sentence. The defendant had a lengthy record, was very familiar with "the system" and was present in court when all submissions were made. He was present when his lawyer stated that he preferred to be incarcerated federally in the event that his sentencing submissions were rejected and had never once wavered in his instructions to counsel or signalled that he had changed his mind.

CRIMINAL LAW – Appeals – reasonableness of verdict, admission of videotaped evidence, cross-examination and sentence *R. v. Veinot,* C.A.C. No. 348354, MacDonald, M. C.J., December 29, 2011. 2011 NSCA 120; **S640/2** ■ The defendant appealed his conviction for arson and the sentence of three years' imprisonment. The individual who set the fire told the police the defendant hired him to do so (as he had a score to settle) and drove him to the scene. However, he refused to testify at the trial, claiming he could not remember anything, despite having given three detailed videotaped confessions, all implicating the defendant. On appeal, the defendant attacked the arsonist's reliability due to mental illness and asserted that the trial judge underestimated his bad character. He also challenged the admissibility of the statements for the truth of their contents and asserted the trial judge erred in allowing the Crown to cross-examine its own witness. *Held,* appeal dismissed. The trial judge did not err in admitting the statements. The videotaped statements represented a logical and consistent account of the events, including the defendant's involvement and the reenactment was particularly detailed, candid and spontaneous, representing a very solid foundation to support the verdict despite the declarant's mental problems. Further, the judge's reasons showed he was alive to the inherent risks of accepting the arsonist's evidence. The probative value of the video reenactment outweighed its prejudicial effects as it showed the arsonist having a great deal of difficulty trying to find the residence despite his obvious intention to cooperate with the police, corroborating his assertion that he was driven there by the defendant and it belied the defence assertion that he was incoherent and unreliable. Although the Crown's cross-examination strayed beyond the reaches of s. 9(2) of the *Canada Evidence Act*, the defence did not object and received the benefit of the full-blown cross-examination.

CRIMINAL LAW – Appeals – sexual interference and invitation to sexual touching, misapprehension of evidence, application of law, sentence *R. v. H. (T.E.),* C.A.C. No. 341395, Hamilton, J.A., December 15, 2011. 2011 NSCA 117; **S636/27** ■ The defendant appealed his convictions for sexual interference and invitation to sexual touching involving a person under the age of 16 in connection with a teenage boy, whom he had taken, along with his sister, on two occasions to a secluded public swimming hole. The trial judge generally rejected his evidence concerning sexual contact with the complainant, specifically rejecting his explanation of three different incidents as incapable of belief. The defendant argued that she had failed to give proper effect to evidence that the swimming hole was in a public place and the area where oral sex allegedly occurred could be seen from the beach where the sister was waiting and erred in failing to consider his denial of any oral sex. He argued she failed to give proper effect to the complainant's deportment during cross-examination and failed to properly apply the test set out in *R. v. W.(D.)* (1991) (SCC). It was also argued that the reasons were insufficient and the fact that consecutive, rather than concurrent, sentences were imposed was appealed. *Held,* appeals from conviction and sentence dismissed. Although the swimming hole was a public place, it was clear only these three individuals were present at the time and the sister had testified the defendant and her brother were out of sight for 20 to 30 minutes. The trial judge specifically referenced the complainant's testimony concerning the oral sex accusation and concluded it took place as he testified and there was no reason to doubt her statement that she considered all of the evidence. The question the complainant refused to answer had nothing to do with the essential elements of the offences and the judge's reasons referred to his behaviour during cross-examination, indicating she considered it in reaching her conclusion. The clear rejection of the defendant's testimony satisfied the first and second steps of *W.(D.)* and although the judge did not specifically state that she considered whether the defendant's evidence raised a reasonable doubt, the convictions, themselves, raised that inference. The court considered the decision in *R. v. R.E.M.* (2008) (SCC) and found the judge's reasons, in context, revealed the basis for her verdict and the evidentiary record provided a basis for her to find that oral sex occurred, despite the public nature of the area and the sister's presence. The reasons also gave some indication as to why she disbelieved the defendant, with the record providing additional factors that might explain her rejection of his testimony. In regard to the sentence appeal, the offences occurred on two separate days, with the activity on the second day being far more serious and the judge specifically considered the totality principle.

CRIMINAL LAW – Assault – appeal of conviction dismissed *R. v. Stailing,* Amh. No. 350360, Bourgeois, J., October 24, 2011. 2011 NSSC 391; **S637/14** ■ Relying on the decision in *R. v. Jolivet* (2000) (SCC), the defendant appealed his assault conviction on the basis the judge had erred by not giving consideration to whether the Crown's failure to call the investigating officer to corroborate the complainant's evidence should give rise to an adverse inference. *Held,* appeal dismissed. There was nothing in either the evidence presented on behalf of the Crown or in the Crown's submissions that would give rise to a necessity that the trial judge consider whether an adverse inference would be appropriate. In *Jolivet*, the Crown had repeatedly stated during the course of a jury trial that corroborative evidence would be called but a review of the transcript failed to show that any such suggestion had been made here.

CRIMINAL LAW – Assault of minor – conditional discharge *R. v. Jones,* No. 2291404; 2294277; 2294279; 2294282, Derrick, J.P.C., November 29, 2011. 2011 NSPC 92; **M25** ■ A forensic psychiatric assessment determined the defendant was only criminally responsible for two of the assault charges against his young daughter (one being with a weapon), resisting arrest and failing to attend court and not criminally responsible for the remaining charges. The psychiatrist could not say when, exactly, the defendant's delusions had developed to the point that he adamantly believed he was Jesus Christ, rendering, his actions unassailable and infallible, it was clear they had by the time he committed the final two assaults on his daughter. The defendant had spent close to seven months on remand and the Crown sought a sentence of one day of custody on each charge, deemed served by his attendance in court. The defendant's immigration status could be adversely affected by his convictions but the Crown did not want a precedent set of a conditional discharge for an assault of a child with a weapon. *Held,* defendant granted a 12-month conditional discharge. Given the current state of his mental health, this would not send the wrong message and a sentence of one day in custody would not help him acquire an understanding that his actions were wrong. The defendant's mental illness was relevant both to the current offences and his previous criminal record as, but for his illness, these offences

probably would not have occurred. Since the previous offences had been committed as his mental disorder progressed, that criminal record was not considered an aggravating factor. The court also considered the jeopardy he faced in the context of his immigration status and recognized that he was still profoundly mentally ill.

CRIMINAL LAW – Assault – reliability of prior inconsistent statement *R. v. Bishop,* No. 2222955; 2231875; 2275765; 2275766; 2275767; 2275768; 2275769; 2275770; 2275771; 2275772; 2275773; 2275774; 2275775; 2275776; 2275777; 2275778; 2275779; 2367827, Whalen, J.P.C., September 29, 2011. 2011 NSPC 95; **M25** ■ The complainant contacted her father the morning after an alleged assault by her boyfriend. She was visibly upset and had a very deep cut on her hand. The police were called and, although initially hesitant, a statement was given. Everyone who had contact with her around this time agreed she did not appear to be intoxicated or under the influence of any drug. At trial, she testified she could not remember what happened, she lied to her father and the police, and she did not recall giving the statement because she was on drugs. At issue was whether the court could accept her prior inconsistent statement for the truth of its contents. *Held,* complainant's statement admitted for the truth of its contents. Accused found guilty on 14 charges related to the assault. The statement was not disjointed, but was logical and flowed from start to finish outlining a sequence of events, containing sufficient detail to suggest a certain level of knowledge of the event. The various exhibits referenced in the statement were also consistent with her narrative. Although the accused denied the assault, portions of his statement also lent credence to her version of events.

CRIMINAL LAW – Bail – pending appeal dismissed *R. v. Delorey,* C.A.C. No. 352181, Farrar, J.A., January 18, 2012. 2012 NSCA 5; **S640/6** ■

CRIMINAL LAW – Breathalyzer – as soon as practicable *R. v. Miller,* No. 2132864; 2132865, Tufts, J.P.C., December 22, 2011. 2011 NSPC 97; **M25** ■ The accused was charged with driving with a blood-alcohol level over the legal limit. After a breath sample demand was made, the officer waited for a tow truck to arrive because the vehicle was not the accused's. They then proceeded to the police detachment, where the officer called for a breath technician, even though he was a qualified technician himself, as RCMP policy was to have the local police provide such technicians. When no one arrived after 28 minutes, the arresting officer performed the breath analysis. Although the first sample was received within 74 minutes from the accused having care and control of the vehicle, relying on the decision in *R. v. Trempe* (1992), the defence challenged whether the breath samples were taken as soon as practicable. *Held,* accused found not guilty. Although the certificate is admissible, there is no evidence extrapolating the blood-alcohol content at the time of the testing to the time of care or control. The practice of waiting for the local police was not practicable in the circumstances. The officer could have called for a breath technician to meet them while they were still at the scene and although the court would be quite willing to make a reasonable inference to find the practice of having the local police provide a breath technician was reasonable, no evidence was led allowing it to make any inferences.

CRIMINAL LAW – Dangerous driving – appeal, speed and condition of tires *R. v. Delorey,* C.A.C. No. 352181, Hamilton, J.A., February 23, 2012. 2012 NSCA 21; **S640/23** ■

CRIMINAL LAW – Evidence – admissibility of cellphone contents *R. v. Hiscoe,* No. 2215503, Tufts, J.P.C., November 17, 2011. 2011 NSPC 84; **M25** ■ When the police arrested the accused, who was charged with possession for the purposes of trafficking, they seized his cellphone, which was on the car seat next to him. They immediately checked the text messages and, later that day, wrote out their contents. A month later, a "data dump" was performed on the phone. The accused applied to have all the evidence obtained from the phone excluded at trial. *Held,* application allowed in part. The evidence obtained from the initial text messages is admissible. The evidence obtained from the data dump is inadmissible. Although the police were authorized to seize the phone incident to arrest to determine whether there was any information in it related to the accused's drug activities, the data dump occurred almost a month later and no attempt was made to minimize or focus the search to the locations in the phone where the prospects of obtaining relevant evidence was reasonable. As such, the search was beyond the scope of a search incident to arrest. Although the police were simply following an accepted practice in retrieving the full contents of the phone, it is not enough to have innocent or honest intentions if their actions are deliberate and intentional. The court conducted an extensive review of both Canadian and American case law.

CRIMINAL LAW – Evidence – plea negotiation privilege *R. v. Cater et al.,* No. 1997518 – 1997550; 2035773 – 2035784, Derrick, J.P.C., October 24, 2011. 2011 NSPC 75; **M25** ■ The accused attempted to enter details concerning his unsuccessful plea negotiations into evidence in an application for a stay of proceedings on the basis of abuse of process. *Held,* plea negotiations are subject to a "class privilege" in order to foster frank and full discussion between counsel, and given that the evidentiary threshold required for a review of prosecutorial discretion had not been met, there were no grounds to justify removing the privilege over the objection of the Crown. This was not a case of the Crown repudiating a concluded plea agreement and not all aspects of prosecutorial discretion are subject to review under the *Charter* without evidence of prosecutorial misconduct, improper motive or bad faith.

CRIMINAL LAW – Evidence – principled exception to hearsay rule *R. v. Ord,* Hfx. No. 352400, McDougall, J., January 10, 2012. 2012 NSSC 13; **S641/21** ■ The defendant appealed his assault conviction on the basis that the trial judge had erred in admitting the complainant's statement to the police (given two weeks after the alleged assault) into evidence. At trial, the complainant (the defendant's former girlfriend) testified that she could not recall much about the evening or the events that led to the laying of the charges. The defendant argued that the trial judge had effectively reversed the onus of proof with respect to admissibility and failed to apply the principled approach by relying on factors that did not necessarily provide the requisite circumstantial guarantees of trustworthiness. *Held,* appeal dismissed; it was clear from her reasons that the trial judge was well versed in the law pertaining to the admissibility of prior inconsistent statements and based on the evidence given in the voir dire, she found that the Crown had established both necessity and reliability. In regard to threshold reliability, she not only dealt with the factors that caused her to be satisfied but also with the various concerns raised by defence counsel in his submissions and made it perfectly clear that the burden to satisfy the requirements of the principled approach to the hearsay rule rested on the Crown.

CRIMINAL LAW – Extortion and forcible confinement – appeal of conviction and sentence *R. v. Shea et al.,* C.A.C. No. 324385; 324542; 328759, Farrar, J.A., December 2, 2011. 2011 NSCA 107; **S636/17** ■ The first defendant suspected the complainant had stolen his vehicle and enlisted the help of the second defendant in finding it. They went to the complainant's home with the intention of forcing him to disclose its location. While there, their telephone conversations with the complainant's brother and a friend were intercepted by the police. During these conversations, the first defendant stated he had the complainant right there (the inference being that he was holding him until the vehicle was returned) and the complainant told his friend the defendants were "strapped" (the evidence at trial indicated this meant they were carrying weapons). The conversations also confirmed the defendants' motive behind their presence at the home. There was evidence the complainant had been assaulted and the police found various weapons near the residence and on the route the defendants took to flee the scene. They appealed both their convictions and sentences (custody totalling six-and-one-half years) for two counts of extortion and forcible confinement, arguing the trial judge had inappropriately used hearsay evidence and erred in finding the verdict was the only rational conclusion arising from the evidence. The third defendant appealed her conviction for being an accessory after the fact on the basis the trial judge had erred in applying the law of wilful blindness to attribute specific knowledge of the extortion to her. *Held,* all appeals against conviction and sentence dismissed. There was ample evidence for the trial judge to draw the inferences that the defendants were armed and had forcibly confined the complainant for the purposes of having him disclose the location of the vehicle and that the complainant's movements were restricted by the defendants. He was also justified in concluding that the defendants used violence and threats of violence to induce the complainant to give them the car. The defendants' argument that the trial judge failed to consider other reasonable inferences was simply an attempt to argue that individual pieces of evidence were not sufficient to establish their guilt, which ignored the totality of the evidence. The trial judge did not err in admitting the impugned hearsay statement on the basis that it was part of the *res gestae*. It was between the victims of an extortion, the complainant was the conduit by which the defendant tried to extort the return of the vehicle from his brother and it was clear that the defendant wanted the brother to know the complainant was being held as ransom for the car. No one was aware the police were recording the conversation and there was no reason to fabricate. Given the threatening and stressful nature of the crime of extortion and unlawful confinement and the ability of wiretap intercepts to capture a crime in progress, intercepts of victims to extortion were a text book case for the application of the *res gestae* exception to the hearsay rule. In addition to the third defendant's post-offence conduct in assisting the first defendant attempt to evade the police, there was also evidence of her prior conduct, where she was heard to say the vehicle had been removed and later could be heard assisting the first defendant in his attempts to find the area where they believed the car was located. All of this led the trial judge to conclude that, if she did not have actual knowledge of the events that occurred at the complainant's residence, it was because she had not asked.

CRIMINAL LAW – Failure to provide necessities of life – guilty *R. v. Maloney et al.,* CR. Am. No. 346625, MacAdam, J., December 22, 2011. 2011 NSSC 477; **S639/28** ■ The accused parents were charged with aggravated assault and failing to provide the necessities of life with regard to their 25-day-old infant. They both denied harming the child in any way and the mother testified that when he seemed to have something in his nose and was stuffed up one morning she took him to the hospital, where he had a seizure. It was later discovered he suffered a skull fracture, subdural hemorrhage, bruising and retinal hemorrhages, all consistent with shaken baby syndrome. The parents suggested the injuries resulted from the strange circumstances of his birth, where the doctor pushed his head back inside the mother and later, his head struck a steel pan (which the doctor denied) or that their four-year-old highly active and hyper son could have hurt the infant, although they never left him alone with the baby, except to turn their back momentarily. *Held,* both accused found not guilty of aggravated assault, but guilty of failing to provide the necessities of life to the infant. Although it was clear some of the injuries were no more than three days old, there was no evidence of either accused having ever directly caused physical injury and, in view of the possibility the injuries were caused by the older child, the Crown did not prove either accused inflicted the trauma on the infant. However, given the injuries suffered, it was clear the infant denied the necessities of life, as this included protection from harm for an infant less than 30 days old. Accepting the accuseds' statements that they never injured the infant, the only conclusion was that the older child did so, and given the evidence as to that child's personality and character, he should not have been left alone with an infant of this age. The injuries inflicted did not occurr during a momentary lapse of attention, as that would have been immediately apparent. The statement that the injuries were caused by the older child amounted to an admission that they failed in their duty to protect the infant as their failure to ensure the older child did not have unsupervised access to him constituted a marked departure from the standard of care expected of a reasonably prudent person.

CRIMINAL LAW – Intervenors – former lawyer, ground for appeal trial counsel's representation ineffective *R. v. Ross,* C.A.C. 356611, Fichaud, J.A., January 23, 2012. 2012 NSCA 8; **S640/10** ■ The defendant's former lawyer applied for intervenor status in a criminal appeal in which the defendant alleged ineffective assistance of counsel. *Held,* application granted; the applicant may intervene, subject to the conditions that the intervention be limited to the issue of whether his representation was ineffective or incompetent and he is not permitted to address whether a miscarriage of justice has occurred or add new issues to the appeal. Clearly the applicant had a direct interest in the appeal, as his conduct and professional competence as a lawyer were under attack; the intervention would not delay the appeal and could potentially assist the court; there would be no prejudice to the other parties; and, if the intervention were not allowed, Crown counsel would have to explore the confidences between the defendant and trial counsel, review otherwise privileged documents and likely interview the applicant about matters of trial strategy, advice and instructions. It was no answer for the defendant to submit that he had waived privilege, as he was seeking a new trial and this could result in the Crown being armed with full knowledge of the applicant's trial strategy, the defendant's admissions and instructions to his trial counsel and counsel's advice. Further, concern about inexpedient access to confidential information might inhibit either the Crown's enquiries of the applicant or the applicant's disclosure to the Crown, leaving the Court of Appeal without access to the best information to assess the defendant's allegations.

CRIMINAL LAW – Mental disorder – lack of criminal responsibility *R. v. Jones,* No. 2292404; 2294273 – 2294282,

Derrick, J.P.C., November 2, 2011. 2011 NSPC 77; **M25** ■ The self-represented defendant was convicted of assaulting and threatening his wife, three counts of assaulting 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 but justified his actions as being grounded in spiritual principles and had repeatedly claimed to be Jesus Christ. No evidence, however, was led or submission made that he was not criminally responsible for his actions. The court appointed an amicus curiae and ordered a forensic psychiatric assessment to determine whether the defendant met the criteria for exemption from criminal responsibility under s. 16(1) of the *Criminal Code*. *Held,* defendant found criminally responsible for two of the assault charges against his daughter and for resisting arrest, but not criminally responsible for the remaining charges. The psychiatric evidence showed that although he was aware of his actions and knew the difference between right and wrong, he adamantly believed that he was Jesus Christ and, thus, his actions were unassailable and infallible. Although the psychiatrist could not say when, exactly, the defendant's delusions had developed to that point, it was clear they had by the time he committed the final two assaults on his daughter. Although the court could not speculate as to his mental condition at the time of the other assaults, it would be relevant in determining a proper sentence for those charges. There was no evidence that the defendant had resisted arrest due to his delusional beliefs.

CRIMINAL LAW – Multiple counts – of assault, harrassement, mischief, damage to property, breach of recognizance *R v. Frank,* No. 2244882-88; 2277992-95; 2287846-53; 2287856-59, Derrick, J.P.C., August 12, 2011. 2011 NSPC 107; **M25** ■

CRIMINAL LAW – Procedure – GAROFOLI application *R. v. Cater,* No. 1997518 – 1997550; 2035773 – 2035784, Derrick, J.P.C., November 21, 2011. 2011 NSPC 100; **M25** ■

CRIMINAL LAW – Procedure – motion to sever counts denied *R. v. Chan,* CR. No. 334922, Wright, J., December 7, 2011; September 28, 2011 (orally). 2011 NSSC 455; **S639/10** ■ The accused, who was charged with 21 counts under one indictment relating to events on two separate dates, applied to have the counts severed. First, on the basis of the dates of the occurrences and, secondly, to separate the so-called "status offences" based on a pre-existing firearm prohibition order. It was argued the Crown had combined all the counts into one indictment to improve its evidentiary position with regard to the unproven connection of possession of the gun on the two separate dates and to be able to cross-examine the accused on the events of both days should he choose to only testify on the events of one day. The Crown argued that expert evidence showing a match between the gun used in the shooting on the first date and that found by the arresting officers on the second date showed a temporal and continuity nexus between the two events. The accused's videotaped statement to the police was also a common piece of evidence to both dates. *Held,* application for severance dismissed. The most significant issue was the possibility of the accused being subject to cross-examination for events of both days if he chose to testify only concerning the events of one day but his position that he had no association with the gun and that it was not in his possession on either day indicated that his decision on whether to testify would most likely be the same in relation to both sets of counts and, given that there was no jury involved, there was no risk of improper inferences being drawn. The Crown should not be limited in the presentation of its evidence through a severance of counts because of the tenuous nexus between the two events.

CRIMINAL LAW – Release pending appeal – application dismissed, public interest *R. v. Dugas,* C.A.C. No. 362840, Oland, J.A., December 2, 2011. 2011 NSCA 109; **S636/19** ■ The defendant applied for release pending the appeal of his conviction for break and enter into a dwelling house. He had 25 prior convictions (eight of which were for breaching court orders) and was currently awaiting trial on other charges, including flight from the police. He had lived with his father, who had agreed to be a surety, most of his life and proposed to reside with him pending the appeal. *Held,* application for release pending appeal denied. Although the court was satisfied the appeal was not frivolous and the defendant would surrender himself into custody, his release would not be in the public interest as he could not be trusted to comply with the terms of any order on his own and could not be well supervised during the entire period until the appeal was heard. The defendant had a considerable criminal record and had shown a cavalier attitude with regard to breaching earlier court orders. Furthermore, the father had little influence over him and, due to of his work obligations, would not always be present. His recent conviction for possession, the evidence regarding his drug and alcohol use and the fact that he had been drinking when the current offence was committed indicated he lacked self-control.

CRIMINAL LAW – Robbery – not guilty *R. v. Langille-Buell,* No. 2335764, Atwood, J.P.C., December 16, 2011. 2011 NSPC 109; **M26** ■

CRIMINAL LAW – Sentence – appeal for trafficking in cocaine, deportation order *R. v. Jamieson,* C.A.C. No. 352641, Saunders, J.A., December 22, 2011. 2011 NSCA 122; **S636/31** ■ The defendant pleaded guilty to two counts of trafficking in cocaine and, on the basis of a joint recommendation, was sentenced to two years' imprisonment. By operation of the *Immigration and Refugee Protection Act*, he was ordered deported on the basis of the convictions and, because the sentence involved federal time, he was prevented from appealing the deportation order. Having served his time, he now appealed the sentence on the basis it was unduly harsh given the unintended consequences of the disposition. The court was erroneously been informed that the defendant was a Canadian citizen when he was actually a permanent resident. *Held,* appeal allowed. Sentence varied to two years less two days. Although the sentence imposed was "fit" and it was impossible to speculate on what the judge would have done had she known the true state of affairs, a sentence must be proportional and the effect on the immigration appeal process was a relevant factor with enormous consequences for the defendant, which the court failed to consider.

CRIMINAL LAW – Sentence – appeal of sentence for robbery, totality principle *R. v. O'Brien (No.2),* C.A.C. No. 310964, Fichaud, J.A., December 6, 2011. 2011 NSCA 112; **S636/20** ■ The defendant, who was convicted of robbery, disguise with intent and possession of a weapon, was sentenced to a total of six-and-one-half years imprisonment. This was to be served consecutive to the term he was already serving for unrelated offences. He had a record of approximately 70 convictions for break and enter and robbery. He appealed his sentence on the basis that it violated the totality principle. *Held,* appeal dismissed. To consider the totality between the current sentence and his existing sentence would effectively turn the defendant's prior record into a mitigating instead of an aggravating

factor. Per Beveridge, J.A. (dissenting), an appropriate sentence was four years for the robbery, consecutive to the sentences currently being served. The trial judge failed to show any appreciation this was part of a string of offences committed in the same time period as those for which he was currently incarcerated or that a sentence of six-and-one-half years would amount to an effective sentence of 12.5 years imprisonment. The offences for which the defendant was already serving time were not prior to the present offences and, thus, could never be an aggravating factor.

CRIMINAL LAW – Sentence – appeal of sentence for sexual assault of a minor *R. v. W. (J.M.),* C.A.C. No. 339020, MacDonald, M. C.J., January 25, 2012. 2012 NSCA 9; **S640/11** ■

CRIMINAL LAW – Sentencing – attempted murder *R. v. Beals,* No. 2129346, Derrick, J.P.C., December 1, 2011. 2011 NSPC 93; **M25** ■ The defendant pled guilty to attempted murder following a shooting in a barber shop during business hours. The Crown argued the charge should be treated as an unsuccessful first-degree murder as the defendant had planned to shoot the complainant when he arrived at the shop. *Held,* defendant sentenced to 13.5 years' imprisonment. The fact the complainant had not suffered any permanent, disabling injuries did not qualify as a mitigating factor and aggravating factors included the defendant's criminal record, the proximity of other people and the use of a handgun. The court was not satisfied that the defendant was lying in wait for the complainant with a premeditated plan to kill him. His demeanour established that he was expecting the complainant but was not sufficient to draw the inference that he planned to shoot him upon his arrival.

CRIMINAL LAW – Sentencing – breaches of undertakings, recognizances and probation *R. v. Frank,* No. 2244882-88; 2277993; 2277995-96; 2287846-53; 2287856; 2287858, Derrick, J.P.C., January 24, 2012. 2012 NSPC 5; **M25** ■

CRIMINAL LAW – Sentencing – conspiracy to commit murder and attempted murder *R. v. Murphy,* C.R.H. No. 329528, Coady, J., October 27, 2011. 2011 NSSC 410; **S638/1** ■ The co-defendant was advised by his girlfriend that the complainant, a rival gang member, was at a hospital. He advised two friends of this and then proceeded to the hospital himself. The defendant was with him when this occurred and at one point took the phone to direct the two friends to the complainant's exact location in front of the hospital. Upon their arrival at the hospital, the co-defendant instructed his friends to "blaze" the parked vehicle the complainant was in and one of them shot the complainant. Both defendants were found guilty of conspiracy to commit murder and attempted murder. Although there was no evidence the defendant was involved prior to his co-defendant receiving the phone call and he insisted that he had no idea what was going on, it was impossible to believe he sat in the middle of a time bomb oblivious to its existence. He had been under strict house arrest conditions for over two-and-a-half years. *Held,* defendant sentenced to five years concurrent on each charge. He was not in the same category as his co-defendants, but was basically a good person who had allowed himself to fall in with the wrong crowd and rehabilitation was a significant factor to be considered. Aggravating factors included that this was a botched first-degree murder, the incident occurred outside a busy hospital while there were a number of similar shootings in the community and the defendant's criminal record arose while he was getting involved with street gangs. However, his active involvement was brief and not anticipated, his remorse was genuine and his clean bail time strongly favoured his rehabilitation.

CRIMINAL LAW – Sentencing – conspiracy to commit murder and attempted murder *R. v. LeBlanc,* C.R.H. No. 329528, Coady, J., September 22, 2011. 2011 NSSC 412; **S638/2** ■ The defendant was advised by his girlfriend that the complainant, a rival gang member, was at a hospital. He advised two friends of this and then proceeded to the hospital himself. Upon his arrival at the hospital, he instructed his friends to "blaze" the parked vehicle the complainant was in and one of them shot the complainant. He was convicted of conspiracy to commit murder and attempted murder. The Crown had proven the existence of the conspiracy and that the defendant had driven the conspiracy. There was ample evidence he was both an aider and an abetter to the shooting in that he not only directed his friends to the location but also encouraged them to shoot the complainant. The defendant was currently serving a 16-year sentence for another charge. *Held,* defendant sentenced to 10 years on each charge, concurrent, to be served consecutive to his current prison term. But for the totality principle, the sentence would have been 15 years for the attempted murder and 10 years concurrent for the conspiracy to commit murder. Aggravating circumstances included that this was a botched first-degree murder; there was a very high degree of moral culpability; the incident occurred outside a busy hospital while there were a number of similar shootings in the community; the complainant was injured and was required to enter witness protection; and the defendant's considerable criminal record for violence, drugs and weapons, including attempted murder.

CRIMINAL LAW – Sentencing – impaired driving, curative discharge *R. v. MacKenzie,* No. 2153877; 2153879; 2163597, MacQuarrie, J.P.C., January 16, 2012. 2012 NSPC 4; **M25** ■ The defendant pled guilty to driving while disqualified, impaired driving and driving without insurance. He sought a curative discharge in relation to the impaired driving charge. He had five prior convictions for either failing the breathalyzer or refusing to take a breathalyzer test. *Held,* curative discharge entered with respect to the impaired driving charge and defendant sentenced to two years' probation and a 10-year driving prohibition on this charge, ordered to pay a $500 fine and sentenced to two years' probation for driving while disqualified and ordered to pay a $1,000 fine for driving without insurance; there was a very reasonable prospect that he would be successful in his recovery and to incarcerate him now and remove the available treatment would be counterproductive and not in the public interest. The defendant had gone without alcohol for 18 months and the evidence from the addictions worker showed that he was highly motivated and had admitted and accepted that he was an alcoholic. He had completed a 28-day addiction program, along with other programs, continued regular sessions with his addictions counsellor, regularly attended AA meetings and had sold his car shortly after this last offence.

CRIMINAL LAW – Sentencing – multiple firearm offences *R. v. Chan,* CR. No. 334922, Wright, J., January 5, 2012; December 16, 2011 (orally). 2011 NSSC 471; **S641/9** ■ The defendant was convicted of discharging a firearm with intent to endanger a person's life, assault, two counts of possession of a restricted firearm with ammunition, two counts of possession of a weapon obtained by the commission of an offence, two counts of possession of a weapon contrary to court order, resisting a peace officer and carrying a concealed weapon following a shooting at a barbershop. He had fired

three rounds, two of which pierced the wall of the shop, entering an adjacent store. The defendant had a lengthy criminal record, including assault with a weapon, aggravated assault, assaulting a police officer and various firearms offences. *Held,* defendant sentenced to 11 years' imprisonment. The defendant had a lengthy criminal record, containing both violent and weapons-related offences and had shown brazen and reckless behaviour in firing a handgun in the direction of the victim three times without any regard to the safety of bystanders.

CRIMINAL LAW – Sentencing – possession of cocaine for the purpose of trafficking *R. v. Marriott,* CR. No. 330428, Wright, J., January 6, 2012. 2012 NSSC 16; **S641/26** ■

CRIMINAL LAW – Sentencing – robbery, availability of conditional sentence with personal injury offence *R. v. Griffin,* C.A.C. No. 334772, Bryson, J.A., November 22, 2011. 2011 NSCA 103; **S636/13** ■ The defendant pleaded guilty to robbing a store with a knife, which she tapped on the counter while demanding the cash, and was given a conditional sentence of two years less a day and two years' probation. The Crown appealed the sentence on the basis she had committed an act of violence, making it a personal injury offence for which a conditional sentence was not available. The defendant argued that not all threats rise to a use of violence. *Held,* appeal allowed. Sentence of 16 months' imprisonment followed by 20 months' probation imposed. Robbery with the use of a knife constitutes violence and is a personal injury offence for which a conditional sentence is not available. The fact that the defendant did not direct the knife toward the attendant or say any words threatening violence was irrelevant; the display of the knife in the circumstances (with the wearing of a disguise and the demand for money) all constituted a threat of violence.

CRIMINAL LAW – Sentencing – sexual assault *R. v. Hutchinson,* C.R.H. No. 328502, Coughlan, J., December 14, 2011; December 2, 2011 (orally). 2011 NSSC 462; **S639/17** ■

CRIMINAL LAW – Sentencing – sexual assault and sexual interference *R. v. H. (J.A.),* C.R.H. No. 329525, McDougall, J., January 5, 2012; November 18, 2011 (orally). 2011 NSSC 434; **S641/8** ■ The defendant was convicted of sexual interference with regard to his 11-year-old daughter after he put his hand down the front of her pyjamas, touching her stomach, the upper part of her thigh and her vagina. *Held,* defendant sentenced to six months' imprisonment and 18 months' probation (which included terms preventing him from being alone with a child under the age of 16 years, attending places where children are likely to be present or using a computer system to communicate with a person under the age of 16 years). Aggravating factors included the abuse of a person under the age of 18, the abuse of a position of trust and his attempt to intimidate the child and her grandfather. Given that this was his first sexual assault related offence and there was no evidence that he was at risk to reoffend, the court chose not to grant a s. 161 order, other than in the terms of probation.

CRIMINAL LAW – Sentencing – theft over $5,000 and fraud *R. v. Lee,* No. 2119017 – 2119019, Derrick, J.P.C., November 10, 2011. 2011 NSPC 81; **M25** ■ The defendant, a longtime, trusted employee and assistant manager of a spa, was convicted of theft over $5,000 and two counts of fraud after over $70,000 was taken from the business. Although there was medical evidence of some chronic health problems, the defendant had lied, both during the trial and for the pre-sentence report, by testifying she had developed stomach and ovarian cancer while working for her employer. *Held,* defendant sentenced to 10 months' imprisonment and 12 months' probation and restitution order issued. It was hard to imagine a conditional sentence being granted when the offender admitted to having lied at trial about a matter that re-emerged for consideration at sentencing. The defendant had exploited opportunities for misallocating money and backdating accounts by taking advantage of the trust placed in her and the offences were not spontaneous, single transactions but occurred over an extended period. Aggravating factors included the abuse of a position of trust; the duration of the dishonest activities; the fact that she stole from a small, vulnerable business; the impact on her employers' financial security; the amount stolen; and the planning and premeditation involved. Her lack of a criminal record was not a mitigating factor.

CRIMINAL LAW – Sentencing – trafficking in a controlled drug, lawyer smuggling substance into a jail *R. v. Calder,* C.R.H. No. 316393, Coady, J., June 17, 2011. 2011 NSSC 312; **S637/19** ■ The accused, a practising defence lawyer and former Crown attorney, was convicted of one count of trafficking in Dilaudid, one count of possession of Dilaudid for the purposes of trafficking and one count of possession of marijuana for the purposes of trafficking after she handed a "prison package" containing dilaudid wrapped in tobacco to her client in the correctional centre. A subsequent search of her office had located two bubble wrap envelopes with similar containers, which she alleged had shown up unbidden in her mailbox. Thinking they contained only tobacco, she had delivered them to her client due to the guilt she felt from her inability to represent him at a recent bail hearing. The court found that although she was not a conventional trafficker and the packages had been delivered to her without her knowledge, as a practising criminal lawyer and regular visitor to the correctional facility, she was well aware of the protocol surrounding professional visits and it was inconceivable that she would not be alert to the very real likelihood that the package contained drugs. Although the court accepted the expert evidence that the accused was suffering from major depressive and personality disorders that may have impacted her resolve and dimmed her view of the consequences, that did not equate to a lack of intent. *Held,* defendant sentenced to 30 months' imprisonment for trafficking in Dilaudid; 30 months' imprisonment for possession of Dilaudid for the purposes of trafficking, concurrent; and three months' imprisonment for possession of marijuana for the purposes of trafficking, concurrent. Aggravating factors included the fact that she was a practising lawyer who used her position of trust to smuggle drugs into a correctional facility and that Dilaudid is comparable to crack cocaine.

CRIMINAL LAW – Sentencing – uttering threats, assault, possession of property obtained by crime, conditional sentence *R. v. Tanner,* No. 1474441; 1474444; 2335728; 2360093; 2360095; 2404114; 2404116, Whalen, J.P.C., January 17, 2012. 2012 NSPC 13; **M26** ■

CRIMINAL LAW – Sexual assault – consent *R. v. Hutchinson,* C.R.H. No. 328502, Coughlan, J., November 16, 2011; September 28, 2011 (orally). 2011 NSSC 361; **S641/27** ■ The accused was charged with aggravated sexual assault after he intentionally sabotaged condoms in order to get the complainant pregnant. The ensuing pregnancy resulted in the complainant suffering medical

consequences following an abortion. *Held,* accused found not guilty of aggravated assault, but guilty of sexual assault; although a sexual assault had been proven as there was no voluntary agreement on the part of the complainant to sexual intercourse without a condom and the accused intended to engage in sexual intercourse, knowing she would not consent to intercourse without contraception, no evidence had been led as to how frequently pregnancy or abortion results in death to the mother, meaning that it had not been established that the accused's actions had endangered the complainant's life.

CRIMINAL LAW – Sexual assault – credibility, lack of evidence *R. v. Dill,* No. 2115406; 2115407; 2115408; 2114962; 2114963; 2114964; 2114965; 2114966; 2168870; 2115405; 2177661; 2177662, Atwood, J.P.C., December 12, 2011. 2011 NSPC 96; **M25** ■

CRIMINAL LAW – Sexual assault – sexual interference, guilty *R. v. H. (J.A.),* C.R.H. No. 329525, McDougall, J., January 5, 2012; October 3, 2011 (orally). 2011 NSSC 433; **S641/7** ■

CRIMINAL LAW – Stay of proceedings – application for abuse of process and arbitrary detention dismissed *R. v. Cater,* No. 1997518 – 1997550; 2035773 – 2035784, Derrick, J.P.C., November 23, 2011. 2011 NSPC 90; **M25** ■ The accused, who was charged with numerous weapons offences, applied for a stay of proceedings on the basis of abuse of process. He alleged he had been the target of relentless police harassment for years and argued that because the present charges never should have been laid, his denial of bail and bail revocation flowing from those charges constituted an arbitrary detention. *Held,* application for stay of proceedings dismissed. There was no evidence of any conduct that could be characterized as an abuse of process and the allegation of arbitrary detention could not stand because the accused had been accorded due process by virtue of a bail hearing. There was no evidence the police had concocted an allegation that the accused was involved in drug trafficking activities and then deceitfully used that to support a wiretap application or that the accused had been the subject of an ad hominem prosecution. The accused had been targeted based on confidential information implicating him in drug trafficking activities and there was no evidence the police had misled the authorizing justice to obtain a search warrant or that he had been targeted without reasonable and probable grounds.

CRIMINAL LAW – Stay of proceedings – unreasonable delay in bringing accused to trial *R. v. Cater et al.,* No. 1997518 – 1997550; 2035773 – 2035784, Derrick, J.P.C., November 10, 2011. 2011 NSPC 80; **M25** ■ The accused, who was charged with numerous weapons offences, applied for a stay of proceedings due to a violation of his right to be tried within a reasonable time. Due to several factors (including the complexity of the case, disclosure issues, the accused's wish to have all matters heard together in one preliminary inquiry and the fact that he was twice forced to find new counsel), the length of delay from the time of the charge to the date of the trial was 38.5 months. *Held,* application for stay dismissed. There was nothing to suggest the Crown had failed to act diligently in providing disclosure (the wiretap evidence was connected to other ongoing investigations and required review before it could be disclosed). Some of the delay resulted from the accused's own choices (despite having initial disclosure, he chose not to enter a plea until he received complete disclosure and put the matter of election over in order to see if the Crown would agree to the consolidation of the two preliminary inquiries). In a case sufficiently complicated that it required three weeks for two preliminary inquiries, a delay of nine months from the setting-down to the start of the preliminaries was not unreasonable, and the court and the parties had responded quickly when the accused's counsel was appointed to the bench. Although the accused was entitled to act as he had, he could not exercise that autonomy and then complain the resulting delay violated his constitutional rights. Although he had been under strict house arrest (with no exemptions for work or attending to personal needs) for 28 months, it was his responsibility to apply for a variation of the conditions if he was prejudiced by the restrictions.

CRIMINAL LAW – Tampering with a witness – failure to keep the peace and be of good behaviour *R. v. Jefferson,* No. 2294386, Batiot, J.P.C., January 18, 2012; December 20, 2011. 2012 NSPC 3; **M25** ■

CRIMINAL LAW – Trafficking in a controlled substance – appeal of conviction and sentence *R. v. Calder,* C.A.C. No. 347492, Hamilton, J.A., January 11, 2012. 2012 NSCA 3; **S640/5** ■ The accused, a practising defence lawyer and former Crown attorney, was convicted of one count of trafficking in Dilaudid, one count of possession of Dilaudid for the purposes of trafficking and one count of possession of marijuana for the purposes of trafficking after she handed a "prison package" containing dilaudid wrapped in tobacco to her client in the correctional centre. A subsequent search of her office had located two bubble wrap envelopes with similar containers, which she alleged had shown up unbidden in her mailbox. Thinking they contained only tobacco, she had delivered them to her client due to the guilt she felt from her inability to represent him at a recent bail hearing. Although the court accepted the expert evidence that the accused was suffering from major depressive and personality disorders that may have impacted her resolve and dimmed her view of the consequences, that did not equate to a lack of intent. She was sentenced to 30 months' imprisonment for trafficking in Dilaudid; 30 months' imprisonment for possession of Dilaudid for the purposes of trafficking, concurrent; and three months' imprisonment for possession of marijuana for the purposes of trafficking, concurrent. Aggravating factors were that a practising lawyer had used her position of trust to smuggle drugs, comparable to crack cocaine, into a correctional facility. She appealed both her conviction and sentence, arguing that the trial judge had misapprehended the purpose of her doctor's evidence as being related to intent rather than knowledge; failed to consider the doctor's evidence that her testimony, as to her thought processes, was consistent with someone suffering from a major depressive disorder; and there was an irreconcilable conflict between the judge accepting that she was not fit to practise law at the relevant time and his finding that it was inconceivable that she would not be alert to the possibility that the packages contained drugs. She also argued that the trial judge had erred in failing to appreciate the magnitude of her psychiatric disorders and by determining that the convictions called for a sentence of more than two years, precluding a conditional sentence. *Held,* appeals of conviction and sentence dismissed. In this case, proof of knowledge and proof intent were the same thing, as whether or not the defendant knew that the prison packages contained illegal drugs was central to determining whether she had the intent necessary to convict. The fact that the trial judge did not specifically refer to the doctor's evidence that the defendant's testimony was consistent with someone suffering from a major depressive disorder did not mean that he had not considered it and given the reasons he gave for rejecting

her testimony that she did not know the packages contained illegal drugs, it was not surprising that the doctor's evidence had not raised a reasonable doubt on that issue. There was nothing inherently contradictory in the two findings as the fact that the defendant should not have been practising law at the time in no way deprived her of the knowledge and experience associated with practising criminal law over an extended period. There was no merit to the argument that the judge had not appreciated the magnitude of her disorder (he had referred to the doctor's opinions in reaching his verdicts, specifically accepting his diagnosis and had referred to the defendant's psychiatric condition several times in his sentencing decision, concluding that it was a mitigating factor) and it was open to him to find that her psychiatric condition did not diminish her responsibility for her actions. The judge recognized that a sentence of less than two years was a possibility for a trafficking offence but found that the defendant had taken advantage of her privileged position as a lawyer to traffic in a controlled substance, comparable to cocaine, in a prison.

CRIMINAL LAW – Weapons offences – possession for dangerous purpose, concealment, careless use *R. v. MacLeod,* No. 2265084; 2265085; 2265086; 2265087; 2265088, Whalen, J.P.C., November 30, 2011. 2011 NSPC 105; **M25** ■

CRIMINAL LAW – Young offender – sentencing, deferred custody and supervision order *R. v. D. (R.J.),* No. 2311230; 2314259; 2314260; 2314261; 2314639; 2314641; 2322487; 2342220, Campbell, J.P.C., November 10, 2011. 2011 NSPC 78; **M25** ■ At issue was whether a deferred custody and supervision order ("DCSO") could be imposed on a youth who pleaded guilty to several breaches of a probation order arising out of several convictions on different charges. The defence argued that a DCSO could not be imposed because custodial sentences were only allowed when a youth had failed to comply with more than one non-custodial sentence. *Held,* youth sentenced to 30-day DCSO, followed by 11 months of probation. When determining whether a DCSO can be imposed under s. 39(1)(b), the court is not limited to those breaches for which findings of guilt have already been made but can consider the breaches that are before it and a youth's failure to comply with a probation order that is a consolidation of sentences for different matters will constitute a breach of more than one sentence. Although there is a presumption against the use of custody, the legislation should not be interpreted in a way that encourages form over substance and the availability of custody should not depend on whether all the offences were consolidated in one probation order or were, perhaps just by chance, dealt with on two days with two orders. The court declined to follow the approach of the British Columbia Court of Appeal.

■ DAMAGE AWARDS

DAMAGE AWARDS – Personal injuries – torn meniscus *Roscoe v. Halifax (Regional Municipality),* Hfx. No. 307889, Muise, J., December 29, 2011. 2011 NSSC 485; **S642/8** ■

■ DAMAGES

DAMAGES – Assessment – recovery of overhead costs *Nova Scotia (Attorney General) v. Jacques Home Town Dry Cleaners,* Hfx. No. 343066, Robertson, J., February 16, 2012. 2012 NSSC 42; **S643/21** ■

DAMAGES – Duty of care – of casino for gambling addiction, appeal dismissed *Burrell v. Metropolitan Entertainment Group et al.,* C.A. No. 339865, Fichaud, J.A., December 2, 2011. 2011 NSCA 108; **S636/18** ■ The appellant is a gambling addict who lost over $500,000 at the respondent casino from 2000 to 2003. He was well known at the casino during that time. In 2004, he notified them of his addiction and asked to be banned. He was served with a *Protection of Property Act* order requiring him to stay away and subsequently only gained access once; he was immediately evicted when he tried to cash in his winnings. He eventually sued, claiming the respondents negligently allowed him to gamble after they knew or reasonably should have known he was addicted to gambling. His claim was dismissed after the respondents successfully moved for summary judgment on the pleadings (see Rule 13.03 of the *Civil Procedure Rules* (2008)). He appealed. *Held,* appeal dismissed. The chambers judge correctly interpreted and applied the law before deciding to dismiss the claim. The *Gaming Control Act* (Act) is the relevant legislation. There is no duty of care arising on these facts as a result of a breach of the statute. Looking at the case law, the appellant's individual responsibility for his choices weighs into the analysis of whether there is sufficient proximity between his harm and the respondents' conduct. The casino (created and governed by statute) does not owe a common-law duty of care to the appellant to stop him from engaging in conduct of his choosing. His losses occurred before he asked to be excluded. The premise for legal sanctions in the Act is missing. Even if there is a *prima facie* duty of care, the government has made a policy decision (embodied in the Act) to promote gambling to the general public and any consequences complained of are the direct and natural consequences of that policy decision. The court can not interfere with such a policy decision via tort law.

DAMAGES – Fire insurance – replacement cost versus cost to repair *Morash v. Purdy,* C.A. No. 339400, Farrar, J.A., December 22, 2011. 2011 NSCA 123; **S640/1** ■

DAMAGES – Limitation period – Montreal Convention, pursuant to *Carriage of Air Act* *Lemieux v. Halifax International Airport et al.,* Hfx. No. 347469, Hood, J., November 22, 2011; September 14, 2011 (orally). 2011 NSSC 396; **S638/21** ■ The plaintiff, who fell on the tarmac while boarding an international flight, brought a suit against both the airport and the airline. The airline applied for summary judgment on the basis the suit was outside the limitation period prescribed in the Montreal Convention. The plaintiff countered that the limitation period could be extended under provincial legislation. *Held,* extension of provincial limitation Act did not extend to the Montreal Convention. The plaintiff's action was outside the two-year limitation period.

DAMAGES – Motor vehicle accident – liability, crusher dust in detour zone *Naugler v. J.R. Eisener Contracting Ltd.,* Claim No. 10-334211, Casey, Adjudicator, October 29, 2010. 2010 NSSM 82; **SmCl19/27** ■

DAMAGES – Tailor – hemming pants *Beals v. Katies Tailors,* Claim No. 10-331323, Casey, Adjudicator, August 27, 2012. 2010 NSSM 80; **SmCl19/25** ■

■ EMPLOYMENT LAW

EMPLOYMENT LAW – Hiring – duty of procedural fairness

Burke v. Cape Breton (Regional Municipality) et al., Syd. No. 346500, Murray, J., December 12, 2011. 2011 NSSC 457; **S639/21** ■ The applicant participated in the hiring process for a position as a firefighter with the respondent municipality (CBRM).This was the second time he tried for the job, and he was eliminated from the competition before completing the required polygraph because his second pre-polygraph questionnaire answers didn't match the one he completed in the first round of hiring. Specifically, he hadn't disclosed hard drug use that was disclosed on the previous questionnaire. The applicant claimed he made a mistake filling out the second questionnaire because he was rushed, stressed about giving precisely the same answers he'd given the time before and due to explanations the previous polygraph tester had given. CBRM said he lied and disqualified himself. He applied for an order declaring CBRM's hiring process was conducted contrary to the principals of procedural fairness and contrary to its contractual obligations. Earlier, the court had granted an interlocutory injunction requiring CBRM to keep one position open pending the final resolution. Subsequently, CBRM offered the applicant a chance to complete the polygraph and to explain the impugned questionnaire to the hiring committee. He passed the polygraph. At the time of trial, he still hadn't heard if he would be hired for the position. *Held,* CBRM didn't owe a free standing duty of fairness to the applicant during the screening process. There is no authority to support such a duty being imposed in an employment hiring situation. An employer needs broad discretion to make the right decision, especially when the position is one that requires a significant level of trust. Based on the wording of their hiring policy, CBRM did have a duty to fairly base their decision on the criteria they set out in that policy. In this case, by allowing the plaintiff to complete the second polygraph and meet with the committee to explain himself, the CBRM met their duty. The court can't order CBRM to hire the plaintiff. Ultimately, it is up to the municipality to decide whether the plaintiff has the honesty and integrity the job requires.

EMPLOYMENT LAW – *Occupational Health and Safety Act* – offences, asbestos *R. v. Della Valle,* No. 2202580, Ross, J.P.C., September 14, 2011. 2011 NSPC 67; **M25** ■ The defendant was in a quasi-management position with the Cape Breton Island Housing Authority (CBIHA) when he became aware (by happenstance) of the presence of asbestos in several units that were owned by CBIHA and occupied by tenants. He had a report outlining the steps that should be taken to protect both maintenance workers and tenants. He discussed the report with two maintenance supervisors, and gave them a copy. He didn't alert his boss (the director). He assumed his concerns would be acted on, and conducted no follow-up to ensure they were. When the director learned of the asbestos six months later, she discovered that no precautions had been taken as a result of the report. Eventually, the two maintenance supervisors and the defendant were charged under s. 17 of the *Occupational Health and Safety Act* for failing to take every reasonable precaution to protect the health and safety of employees and "other persons" (the tenants). One of the maintenance supervisors had already pled guilty and accepted responsibility. The defendant pled not guilty. *Held,* the defendant is guilty beyond a reasonable doubt. The charge at issue stems from a breach of a very general statutory duty requiring "reasonable" conduct. Once the actus reus has been proven, a defendant can't defend on the basis of having taken "all reasonable" steps, since the court has already decided otherwise. The only way the defendant here could successfully argue a due diligence defence, would be if he had made a material "mistake of fact"; but, he had not. While someone else already accepted responsibility for what happened, more than one person can be held responsible. The defendant's job description required him to promote health and safety in the workplace. In this case, the "workplace" is also occupied by residential tenants. Responsibility for health and safety in the workplace, while diffuse, ultimately must rest on individual shoulders. A reasonable and prudent person in the defendant's position ought to have: brought the matter to the attention of CBIHA's occupational health and safety committee; alerted the director; and followed up with the maintenance supervisors. The duty to act arises when there is a potential health hazard. There's no need to conclusively prove harm or an actual risk of harm, only a perceived risk of harm. Asbestos clearly meets the test.

EMPLOYMENT LAW – Wrongful dismissal – constructive dismissal *Gillis v. Sobeys Group Inc.,* Tru. No. 311446, Coady, J., November 30, 2011. 2011 NSSC 443; **S638/31** ■ The plaintiff sued the defendant for what she felt was a wrongful dismissal after 29 years with the company. A former store manager, for several years she worked at head office as a food experience manager making over $75,000 per year (including a bonus). The defendant decided to eliminate that position as part of a restructuring plan. There was evidence to suggest their decision made good business sense, but it wasn't the strategy recommended by an internal group looking into ways for the company to save money. The defendant never raised the plaintiff's performance as an issue until they told her the position was being cut; she was then warned in relation to what they claimed were failures to act in a timely and accountable manner. The defendant maintained the performances issues had nothing to do with the elimination of her position and they offered her two options: a job as an assistant store manager at $54,000 per year, plus bonus, or to continue at head office in a position earning significantly less. *Held,* action dismissed. An objective and reasonable person would not find this situation amounted to a constructive dismissal. Had the plaintiff set aside her emotions long enough to investigate the assistant store manager position, she would have realized it resulted in a slightly lower but comparable income, with a good chance of advancement to store manage. The evidence was that people often leave head office to work in stores. The defendants offered a one-time payout of $23,000, which would have put her at her old salary level for at least a year. Even if there was a constructive dismissal, the plaintiff's failure to accept the assistant store manager position is a full defence. She offered no evidence of humiliation or embarrassment other than to point to the fact she had already been a store manager. While it was unfortunate the defendant decided to address the performance issues at the same time as the job change (and their doing so likely led the plaintiff to disregard what was a viable option), the court finds the defendant genuinely wanted to continue employing the plaintiff.

■ EVIDENCE

EVIDENCE – Procedure – order of presenting evidence in multi-party litigation *National Bank Financial Ltd. v. Potter et al.,* Hfx. No. 206439; Hfx. No. 174293; Hfx. No. 208293; Hfx. No. 216059; Hfx. No. 227347; Hfx. No. 246337; Hfx. No. 278010, Warner, J., November 4, 2011. 2011 NSSC 407; **S637/31** ■ The parties in this multi-party, multi-issue, complex litigation couldn't agree on how the evidence should be presented. Some felt each party should take turns and present all of their evidence at once, while others felt evidence should be tailored with the issues and various onuses at play in mind.

Held, it is appropriate for the court, in this case, to issue a detailed order setting out the order in which each party shall present their evidence at trial. Normally an order for the presentation of evidence should avoid the need to have witnesses testify more than once. This case is unique and requires a more nuanced approach than courts are normally comfortable with. It would be unfair to require either side to put forward all of their evidence in relation to all of the allegations that may be advanced by a party who will be presenting evidence later. Instead, the court crafted an issue-based approach in an attempt to ensure fairness without significantly compromising efficiency.

■ FAMILY LAW

FAMILY LAW – Access and spousal support – variation, application to vary corollary relief judgment dismissed, no change in circumstances *Kenny v. Kenny,* No. 1201-063135, Beaton, J., November 18, 2011. 2011 NSSC 428; **S638/25** ■ The father applied to vary the parties' Corollary Relief Judgment (CRJ) to increase his time with his pre-teen daughter, and to terminate the wife's spousal support. He pointed to the following changes in circumstance: the mother moved (seven kilometers away, remaining within the HRM) resulting in a much lower rent payment, they agreed to change the Monday morning transportation arrangement, the child now spent more time with her horse (away from both parents), and the mother failed to adhere to the term of the CRJ requiring her to disclose her work schedule. *Held,* application dismissed. There are no uncontemplated, material change(s) in circumstance(s) warranting a change to the CRJ. The mother's move was a short distance, within the same community and didn't result in the child changing schools. While it saved her significantly on rent, this was a reasonable choice to reorganize her financial affairs in an effort to make ends meet. The child's decision to spend more time on her hobby was a natural part of her development. The court addressed the fact flexibility would be required as the child aged when the CRJ was issued. An agreement to vary a term of the order isn't a material change in circumstances, nor was the mother's failure to abide by it. Even if there had been a material change in circumstances, increasing the father's access is not in the child's best interests. As she ages, she will want to spend more time away from her parents. This impacts the mother, too. This was a lengthy, traditional marriage, the father earns significantly more than the mother, who needs ongoing support to relieve the economic hardship from the end of the marriage. The CRJ was only 14 months old when the father filed the variation application. The timing suggests an attempt to relitigate the original decision on quantum and entitlement.

FAMILY LAW – Access – variation *M. (C.) v. M. (K.),* F.L.B.M.C.A. No. 053616, Dyer, J., October 3, 2011. 2011 NSFC 24; **FC38** ■

FAMILY LAW – Appeals – application to adduce fresh evidence rejected, appeal dismissed *Snow v. Parsons,* C.A. No. 348448, Oland, J.A., February 7, 2012; February 6, 2012 (orally). 2012 NSCA 16; **S640/18** ■

FAMILY LAW – Application for stay pending appeal – dismissed, child support *St-Jules v. St-Jules,* C.A. No. 348221, Fichaud, J.A., February 13, 2012. 2012 NSCA 17; **S640/19** ■

FAMILY LAW – Child in need of protection – permanent care and custody order *Nova Scotia (Minister of Community Services) v. R. (J.L.) and D. (S.J.),* F.A.N.C.F.S.A. No. 073062, Comeau, J.F.C., December 6, 2011. 2011 NSFC 28; **FC38** ■

FAMILY LAW – Child in need of protective services – permanent care and custody order *Nova Scotia (Minister of Community Services) v. M. (J.) and S. (D.),* S.F.S.N.C.F.S.A. No. 070478, Forgeron, J., January 11, 2012. 2012 NSSC 19; **S642/3** ■

FAMILY LAW – Child in need of protective services – permanent care with no access *Nova Scotia (Minister of Community Services) v. M. (G.) et al.,* F.S.B.C.F.S.A. No. 073328, Comeau, J.F.C., January 23, 2012. 2012 NSFC 1; **FC38** ■

FAMILY LAW – Common-law relationship – division of business assets and debts, joint venture *Tabensky v. Campbell,* S.F.P.A.M.P.A.Y. No. 065415, Legere-Sers, J., January 25, 2012. 2012 NSSC 39; **S642/21** ■

FAMILY LAW – Constructive trust – unjust enrichment *Carroll v. Richardson,* S.F.H.M.C.A. No. 069321, Gass, J., January 11, 2012. 2012 NSSC 18; **S642/2** ■

FAMILY LAW – Costs – divorce *MacPhee v. MacPhee,* No. 1201-063942, Beaton, J., January 30, 2012. 2012 NSSC 43; **S643/9** ■

FAMILY LAW – Costs – lack of disclosure, failure to respond to an offer to settle and overall conduct *Darlington v. Moore,* S.F.H.M.C.A. No. 68167, Lynch, J., November 17, 2011. 2011 NSSC 425; **S638/20**. ■ The mother was primarily successful at trial and awarded almost $600,000 in property, pension and retroactive child and spousal support. The father (a police officer) failed to provide complete financial disclosure or participate fully in the proceedings and acted contrary to court orders. He was disrespectful and acted inappropriately in court. He failed to respond to a settlement offer for less than the mother was awarded at trial. He did not appear to make submissions on costs. *Held,* the father must pay the mother $60,000 in costs, plus disbursements. Her actual legal fees were almost $61,000, not including disbursements or HST. She is entitled to a substantial contribution to this expense. The father's conduct throughout substantially increased her costs and it is appropriate that she be awarded costs at the high end of the scale.

FAMILY LAW – Custody and access – application to vary primary care *Pudsey v. Pudsey,* No. 1204-004616; SKD. No. 054107, Moir, J., December 1, 2011; November 22, 2011 (orally). 2011 NSSC 444; **S639/2** ■ The father applied for custody of his two children (ages eight and 10). While they had lived with their mother since the parties separated eight years ago, she seemed unable to get them to school regularly. One of the children has a learning disability and the impact of missing school is severe. The mother was also restricting the daughter's access by constantly guilting the daughter to stay home with her. The father lives in a different community about half an hour away from the mother's house. A move will mean the children have to change schools. *Held,* application adjourned to give the mother a chance to adequately address the concerns. The court lacks full confidence that will happen. It is essential the children stop missing school. If moving to live with their father is the only way this will happen, so be it. Unfortunately, the children will suffer by being forced to move away from the community they have lived in their whole lives. Temporarily, the father will have more access. Even if the children are sick, they must go unless the father agrees otherwise.

He is capable of being responsible for their health while they're in his care. The father and the daughter get counselling to help them communicate. Custody will be reviewed near the end of the school year. If the children are moving to live with the father, this will give them the summer to adjust to the change.

FAMILY LAW – Custody and access – interim application *Yonis v. Garado,* S.F.H.M.C.A. No. 072415, Beaton, J., December 8, 2011; August 3, 2011 (orally). 2011 NSSC 454; **S639/20** ■ The parties are refugees from Ethiopia, but each from different tribal ethnic backgrounds; the mother is Harari, while the father is Oromo. Their children (now ages nine, five and almost two) were being raised in Halifax, which has a good sized Oromo population, when the mother brought them to visit her family in Edmonton. She liked it there and decided to stay. She claimed the father was aware she intended to move before she left, but the evidence did not support her claim. More than 13 months had passed since the children had any contact with the father (other than brief phone calls). He applied to have them returned to live with him in Halifax. He had a concrete plan for how he would care for them. The mother felt they were better off in Edmonton, in large part because there are more Ethiopians (including a large Harari population) there. She said she'd return to Halifax if the court ordered the children to return, but cautioned she'd be miserable here. In Edmonton, the children lived with their mother and her brother. The evidence showed they had settled in well. The mother didn't work and received social assistance benefits. *Held,* application granted. The children will return to live in Halifax and father will have custody, at least on an interim basis, while the mother figures out her next course of action. There will be a review in eight to 10 weeks, at which point the mother can present her plan to the court. Both parents are capable of parenting. It's in the children's best interests to return to the community where they've spent the majority of their lives and to have more contact with their father. The move to Edmonton hasn't benefitted them to such an extent that it can be said living there is quantitatively or qualitatively better than living in Halifax and having a relationship with their father. The lack of a Harari community in Halifax isn't a sufficient reason to endorse the mother's unilateral decision to move and to reduce the children's time with their father. There is also concern the mother has not and won't foster a meaningful long distance relationship with the father.

FAMILY LAW – Custody and access – mobility and retroactive maintenance *Smith v. Wilkens,* S.F.H.M.C.A. No. 057870, Jollimore, J., November 23, 2011. 2011 NSSC 432; **S638/23** ■ The mother sought the court's permission to relocate to Montreal with the parties' almost five-year-old daughter. The father, who had the care of two older children from another relationship, resisted the move and asked for shared parenting. Most of the mother's extended family live in Montreal and the child had been there on several extended visits. The mother offered the father generous access if the child moves, including one week per month until school starts. She agreed to help facilitate access by providing some transportation or a place for the father and/or his family to stay in Montreal. The father's parents were fairly involved with the child. The evidence showed they often exercised the father's access in his place. A parental capacity assessment identified the mother as the child's primary attachment; the father was a secondary attachment. The assessor recommended the child remain primarily with the mother, but in Nova Scotia. She based her conclusion on a study that says relocation has a negative long-term impact on a child's relationship with the long-distance parent. The mother also sought to impute income to the father and retroactive child maintenance. *Held,* the mother will have primary care and is allowed to move with the child. There will be no retroactive child maintenance. The father is to have significant access in the time leading up to and following the move. The mother will have to help facilitate access once per month as well as phone access and weekly skype calls. Income of $30,000 per year is imputed to the father, but he won't have to pay child support given the high costs he will encounter exercising his monthly access. The court must consider each child's needs and can't rely on a study that recommends against relocation on the basis of factors that aren't necessarily applicable here. This child is best off with her mother. She has few attachments to the community (other than to her father, half-siblings and his parents) and has been exercising less access to her father than she will have after the move. In this sense, the move will result in maximum contact with each parent.

FAMILY LAW – Custody and access – sole custody, discretionary access, retroactive child support *Christmas v. McDonald,* No. 65457, Forgeron, J., December 22, 2011. 2011 NSSC 480; **S639/25** ■

FAMILY LAW – Custody – joint custody reinstated *T. (D.M.) v. L. (C.R.),* No. C, Comeau, J.F.C., October 7, 2011. 2011 NSFC 22; **FC38** ■ The parties shared custody of their five-year-old daughter until the mother became involved in a same-sex relationship. Concerned with the possibility of domestic violence and drug and alcohol use, the father was able to restrict the mother to supervised access. The mother's partner was now working out of province and, while they continued to have a relationship, the father's concerns had been alleviated. A parenting assessment recommended a return to shared custody. The father wanted primary care. There was also an issue over which school the child should attend. *Held,* there will be a return to shared custody as per the assessor's recommendations. There has been a change in circumstances in that the child is now ready to attend school. The child will attend the school chosen by the father. The mother has already attended this school with the child for an orientation session. While she indicated a preference for the school closer to her home, she had done nothing to convince the court it would be a better choice. Given that education is a provincial matter, the court can only assume the schools are equally suitable.

FAMILY LAW – Custody – mobility, change in circumstances *Bellefontaine v. Slawter,* S.F.H.M.C.A. No. 049254, Williams, J., November 17, 2011. 2011 NSSC 427; **S638/15** ■ The mother applied to vary the parties' consent order to allow her to move to British Columbia with their two children (ages five and three). She is Caucasian and the father and his family are African-Canadian. The order provided for a shared custody arrangement, but was not being followed. The father tended only to see the children when they were with his mother. He suffered from numerous health problems, including severe diabetes and possibly dementia, and historically the parties' relationship was an unhealthy one. The mother was able to distance herself from the father with the support of her parents, who were now relocating to British Columbia. She proposed to cover the cost of airfare for two access visits per year, but the reality was that it would be her parents who paid. *Held,* the order is varied to allow the mother to move with the children provided the grandparents agree to be added as parties to the proceeding so that their obligation to share access costs can be enforced. The evidence shows both parents need help parenting. The mother has help from her parents. The father is unable to look after himself. While it's important to maintain the

children's ties with his mother (the paternal grandmother), they need the stability offered by their mother's plan.

FAMILY LAW – Custody – parenting plan *Hammond v. Nelson,* H.F.D.M.C.A. No. 68746, Dellapinna, J., January 20, 2012. 2012 NSSC 27; **S642/12** ■ The parties dated for a short time and never lived together. Despite this, both had significant involvement in their now two-and-a-half-year-old child's life. The mother had primary care, but agreed to significant access. The father applied for shared custody (on a three-day rotation). Each had new partners who were supportive and involved in parenting the child. The mother works a flexible day job, while the father (who lives 30 minutes away) started a new job working nights. His partner would be available when he was not. The mother sought to reduce the father's access because she felt the child was having a hard time transitioning between homes. *Held,* application for shared custody dismissed. It's not in the child's best interests at this time in her life, primarily due to the parties' communication troubles. Imposing shared custody could result in increased conflict. Also relevant is the distance between homes and the father's work schedule. The father's plan would increase the number of transitions, which could prove difficult for this child who needs stability. The parties will continue to share joint custody; with primary care to the mother and significant access to the father (five overnights every two weeks).

FAMILY LAW – Custody – shared parenting, parental deficits *M. (A.) v. Y. (A.),* No. 77542, Forgeron, J., January 17, 2012. 2012 NSSC 25; **S642/10** ■ The parties have a nine-month-old child. Both have a history of substance abuse and conflict with each other. The father has untreated anger management issues, and the mother has untreated mental health issues. Child protection authorities were involved but closed their investigation. The father, who has custody of one child from a previous relationship and weekend access with two others, applied to continue the interim shared custody arrangement. The mother opposed his application. *Held,* interim shared custody will continue pending a final resolution. Neither parent is ideal; neither has presented a superior plan. Each have parenting deficits, but are able to meet the child's basic needs when not under the influence of drugs or alcohol. Shared parenting reduces transitions, which reduces the potential for conflict. There will be random drug/alcohol testing in response to complaints by either party. The father is ordered to undergo anger management counseling and the mother is ordered to seek treatment for her mental health problems. Each must participate in an education program on the impact of family violence, and a parental capacity assessment with a psychological component.

FAMILY LAW – Custody – sole custody to father *Brooks v. Soto,* S.F.H.M.C.A. No. 067661, Williams, J., January 23, 2012; December 15, 2011 (orally). 2011 NSSC 498; **S642/20** ■

FAMILY LAW – Division of assets – family corporation *Dobson v. Meldrum,* S.AM. No. 1202-001711; 055546, Murphy, J., January 30, 2012; January 26, 2012 (orally). 2012 NSSC 41; **S642/24** ■

FAMILY LAW – Division of assets – sale of home *Harrington v. Coombs,* S.F.H.P.A. No. 071113, Dellapinna, J., January 30, 2012. 2012 NSSC 47; **S642/26** ■

FAMILY LAW – Divorce – child support and arrears, extraordinary expenses, imputation of income *Kelly v. Anthis,* No. 48664, Haley, J., January 19, 2012. 2011 NSSC 496; **S643/31** ■

FAMILY LAW – Divorce – custody and access, child and spousal support, matrimonial property *Gagnon v. Gagnon,* No. 1201-064264; S.F.H.D. No. 068425, MacDonald, B. J., December 30, 2011. 2011 NSSC 486; **S641/16** ■ The parties were married almost nine years and have two children, ages eight and 10. The mother was highly critical of the father's ability to parent, and opposed his application for shared custody. She accused him of abusive behavior, using drugs/abusing alcohol, and claimed he did not help parent when they lived together. The level of conflict between the two was high. Each lived with new partners. They both filed expense statements showing significant monthly deficits but, since they had declared bankruptcy, there was no evidence of how they were meeting the shortfall. The mother sought a share of the father's pension, including his pre-marriage contributions, spousal support and child support. She worked through most of the marriage, but earned a lot less than the father did. *Held,* interim shared parenting, with a review in eight months. This is not an ideal arrangement, but the alternatives will leave the children worse off. The father was more credible; the mother's allegations are unsubstantiated. While he's contributed to the conflict in the past, he is making an effort while the mother and her partner are not. The mother will have the final say on health related matters, and the father will have the final say on the choice of childcare and helping with homework (because he is francophone and better able to help). If the mother is unable to learn how to work with the father, the court will consider awarding him custody. On review, the court will consider the parties' ability to communicate and cooperate, including whether or not they are able to agree about extracurricular activities for the children. The father will pay child support in the set-off amount. While he has twice her income, the mother hasn't proven the set-off amount is insufficient to enable her to meet the children's needs while they're with her. It's impossible to have a deficit without disclosing the debt instruments used to support debt accumulation. Her partner is either meeting her shortfall or her expenses are overstated. It would be unfair and unconscionable to award her half of the pre-marriage pension contributions based on the length of the marriage and the fact she wasn't economically dependant on the father. She's not entitled to spousal support. Even if she was, the father has no ability to pay given his obligations to the children.

FAMILY LAW – Divorce – interim spousal support, imputing income *Richards v. Richards,* C.A. No. 341497, Bryson, J.A., January 20, 2012. 2012 NSCA 7; **S640/9** ■ The parties were the only directors of two successful, family-owned companies. Historically, the companies paid dividends into a family trust from which the parties funded their lavish lifestyle. The husband controlled the businesses' day-to-day operations, but both parties had to agree in order to release dividends. After separation, the husband was anxious to finalize matters. When the wife refused to accept his settlement offers, he responded by refusing to authorize further dividend payments. He stopped drawing a salary. The result was neither party had money coming in. The wife applied for interim spousal support. The chambers judge refused her request, finding her failure to respond to the settlement offers meant she failed to establish need. She appealed. *Held,* appeal allowed. The chambers judge erred in principle by considering the wife's refusal to settle in the context of an application for support, and by failing to impute income to the husband. The wife is entitled to support, and is clearly in need. Her refusal to accept the offers isn't relevant to determining entitlement

or need, but it may eventually be relevant to a decision on final costs. The husband unilaterally changed the status quo by refusing to authorize further dividend payments. Income is imputed to him in an amount equal to the sum previously paid to both through the trust. He can pay himself a reasonable salary; the wife's application waives any objection she could otherwise make to his doing so under the shareholder's agreement.

FAMILY LAW – Divorce – joint custody, parenting plan and division of assets *Parsons v. Parsons,* No. 1206-006019, Forgeron, J., September 15, 2011. 2011 NSSC 347; **S635/14** ■ The parties have two children, ages nine and four. The youngest has special needs. While they cooperated well after separation, the mother started to curtail the father's access when it became apparent reconciliation was no longer an option. She unilaterally moved the children from Cape Breton to the Annapolis Valley. The father reluctantly allowed them to remain there for the school year because the mother had terminated services for the son in Cape Breton and it would take several months to restart them. The mother sought the court's permission to stay in the Valley. She agreed to joint custody, but wanted the final say on major decisions. She felt she was better suited to be the primary parent. The father, who lived with a new partner, wanted shared custody. *Held,* the mother must return the children to Cape Breton, where they can maintain a relationship with both of their parents and extended family. The parties will share custody on a schedule that sees the children with the father three days per week. Neither will pay child support. Neither will have the final say. The court found the father credible, while the mother was not. Both are good parents, but the mother's insistence on controlling the father's relationship with the children is getting in the way of her ability to recognize their needs. Maximum contact with both parents will be accomplished by a shared parenting arrangement. History shows the parties were able to communicate in the past. The court orders counseling for both with the goal of improving communication in the future. The pre-separation status quo is relevant. There will be few adjustments for the children to return to Cape Breton. The services available to the youngest child are comparable.

FAMILY LAW – Procedure – costs *Harris v. Harris,* No. 1201-064495; S.F.H.D. No. 069818, MacDonald, B. J., November 10, 2011. 2011 NSSC 418; **S638/12** ■ The husband successfully asked the court to declare an agreement he made with the wife valid and binding. While this dispute was being resolved, the parties' TD investment fund was frozen with a net resulting loss of $166,465.00. He sought costs equal to the amount of the loss, arguing it was an appropriate way to "do justice between the parties" since the loss was "part of [his] expenses of litigation" (see Rules 77.01(1) and 77.02 of the *Civil Procedure Rules* (2008)). The wife claimed she was too poor to pay costs, but provided no evidence to that effect. *Held,* costs of $6,000 plus disbursements to the husband. The loss on the investment fund is not what costs are designed to compensate. It's a request for damages. Costs are meant to relate to the actual legal costs one incurs litigating a dispute. The new *Civil Procedure Rules* (2008) don't change the case law on this. While the Rules (2008) don't specifically refer to costs of an application (as opposed to a motion), Tariff C is appropriate, multiplied by three since the matter involved significant preparation, was unreasonably prolonged by the wife, took almost one day to hear and resulted in a decision that finalized all outstanding issues.

FAMILY LAW – Procedure – costs *Dawson v. Dawson,* No. 1204-005160, Warner, J., January 23, 2012. 2012 NSSC 36; **S642/16** ■ The four-day divorce trial was resolved mostly in favour of the mother. Much time was spent addressing the father's failed bid for shared custody. The property division involved significant assets. The mother was forced to register the Corollary Relief Judgment (CRJ) before costs were dealt with, because the father declared bankruptcy. She indicated her intention to deal with costs before registering the order. She sought $6,000 in costs. The father argued the matter was concluded when the order was taken out, precluding the court from awarding costs now. *Held,* costs of $6,000 awarded to the mother. The *Civil Procedure Rules* (2008) allow a court to amend an order to include a request for costs (see Rule 78.08(b)). The relief was requested, but not adjudicated, before the CRJ was issued. This wasn't a surprise request. Costs were claimed by both parties prior to trial. The father isn't prejudiced by the fact the claim wasn't dealt with before the CRJ was issued. The mother's claim is reasonable. Using the amount involved and Tariff A would result in a higher award. She was substantially successful and won on the issues that occupied most of the trial time.

FAMILY LAW – Procedure – motion for cross-examination of out of court *Armoyan v. Armoyan,* H.F.D. No. 1201-065036; S.F.H.C.I.V. No. 070342; S.F.H.M.C.A. No. 068981, Campbell, J., December 2, 2011. 2011 NSSC 448; **S639/12** ■ The wife challenged the court's jurisdiction to hear this protracted cross-border family law dispute. The jurisdiction hearing was started two months earlier, but adjourned to later dates. The husband moved by correspondence for an order permitting two witnesses to be cross-examined (along with any necessary redirect) out of court. The witnesses cancelled plans to travel to the Middle East in order to be available for the original hearing dates. The adjourned dates conflicted with their rescheduled travel plans. They were available for numerous dates between now and then. The wife felt the lack of a judge to rule objections would make it difficult. She also complained she was entitled to hear the testimony and it would be too expensive for her to fly here twice. *Held,* motion granted. The *Civil Procedure Rules* (2008) contemplate and approve of this process in the right circumstances. While there is nothing in Rule 23.09 to guide the court on when such an order is appropriate, Rule 56.03 (on commission evidence) provides guidance. Relevant factors include the convenience of the witness; the chances they won't be available to testify in court; and the apparent importance of their testimony. It would be unreasonable to expect these witnesses to cancel their travel plans again. They are available now. Given the leeway afforded on cross-examination, it's unlikely there will be many objections. The husband's lawyer will be reluctant to trigger a motion for a ruling on an objection, if one is even made. If necessary, a ruling can be made on objections at the hearing based on a transcript. There is insufficient evidence to prove the wife can't travel to Nova Scotia twice. It's her choice to attend or not. If this motion isn't granted, there is likely to be more delay to allow the witnesses to testify after their return. The testimony here does not have to be videotaped because viewing it would add time to the process and cause delay. A transcript is sufficient. There is no need for a commissioner to be appointed because no direct evidence is being given.

FAMILY LAW – Procedures – disclosure issues *G. (T.) v. Nova Scotia (Minister of Community Services) et al.,* S.F.H.C.I.V. No. 076405, Williams, J., August 26, 2011. 2011 NSSC 356; **S642/30** ■

FAMILY LAW – Spousal and child support – imputed income, business assets *Jon v. Jon,* No. 1201-064066, O'Neil, A.C.J., November 10, 2011. 2011 NSSC 419; **S638/19** ■ The parties, married for 23 years, owned a company that operated two restaurants. Unbeknownst to the mother, the father diluted the parties' shares in the company. He opened a third restaurant on his own. He travelled frequently, for long stints, to Asia for what he maintained were business reasons. The evidence suggested it was for personal reasons. At issue was the father's income (from all sources) for support purposes; whether the restaurants are business or matrimonial assets; and whether the father should continue to contribute to private school tuition for one of the two children. He filed limited and incomplete financial information. *Held,* the father is imputed to have income of $151,000 per year, which includes his stated income, plus $50,000 of imputed, undeclared income, grossed up to take into account the lack of taxes paid on it. The restaurants are business assets, but the court can't deal with their division until the father files comprehensive financial records, bank records, and a record of his travel out of the country. He is ordered to do so within a specified time and then the matter will return to court. The father will pay guideline support plus half of the child's private school tuition as it's a reasonable and necessary expense. The mother is entitled to compensatory and non-compensatory support at the lower end of the range suggested by the Spousal Support Guidelines ($2,500 per month). The father was not credible and much of his testimony on financial matters was inconsistent and unreasonable. He has far more business acumen than he cares to let on. It appears his actions have been motivated by the desire to minimize the mother's interests in (and influence on) the restaurants. The mother will have the final say on decisions concerning the children. It's often more practical for one parent to have the final say when the other is frequently away.

■ INCOME TAX

INCOME TAX – Appeals – reassessment *R. v. Ocean Nutrition Canada Ltd.,* Hfx. No. 354692, Robertson, J., December 1, 2011. 2011 NSSC 493; **S642/1** ■

■ INJUNCTIONS

INJUNCTIONS – Procedure – *ex partes* or *inter partes* *Raymond v. Brauer,* C.A. No. 375964, Fichaud, J.A., February 24, 2012. 2012 NSCA 22; **S640/24** ■

■ INSURANCE

INSURANCE – Disability insurance – long-term disability benefits, costs *Inglis v. Nova Scotia Public Service Long Term Disability Trust Fund,* Hfx. No. 203247, McDougall, J., January 10, 2012. 2012 NSSC 11; **S641/19** ■

■ LANDLORD AND TENANT

LANDLORD AND TENANT – Commercial lease – accord and satisfaction of lease *Action Management Inc. v. Archibald,* S.P.H. No. 291925, Murray, J., September 29, 2011. 2011 NSSC 358; **S637/30** ■ The defendant, Ms. Archibald, operated her business from premises she leased from the plaintiff landlord. She owed several months' rent. The landlord's agent told her (by email) that, provided she make a satisfactory cash offer and allow the landlord to negotiate privately with a new tenant (a woman she hoped would buy her business), she would be released from her obligations under the lease. She took this to include the arrears and any other amounts potentially due. She met with the agent and the landlord, and made a lump sum payment of $11,200. She continued to occupy the premises for several months in an effort to sell her business. There was no demand made for further rent, but the landlord eventually sued to enforce the lease, seeking both the initial arrears as well as amounts owing up to the end of the term, plus interest ($82,837). Neither the landlord nor his agent could recall reaching a settlement and pointed to the "no implied surrender or waiver" clause in the lease. The defendant argued there was accord and satisfaction and thus no amounts owing. At issue was whether: there was a disclaimer, surrender and/or abandonment of the lease; there was an accord and satisfaction between the parties; and there were any monies owing to the landlord. *Held,* on balance, there was no surrender or abandonment of the lease. While the landlord made no further demand for rent after the defendant paid him the lump sum, he didn't clearly elect in writing that he was not treating the lease as being in existence. Communication between the parties could have been better. Had the defendant moved out or returned the keys earlier, the finding might have been different. The defendant met the heavy onus of proving accord and satisfaction. She gave detailed and credible evidence that the landlord expressly accepted her part payment as full payment, and that he intended to do so. The email asked her to make an agreeable offer and the offer she made was accepted. She gave consideration above and beyond her obligations under the lease by (in part) agreeing to allow the landlord to privately negotiate a lease with a potential new tenant. The defendant owes the landlord rent for the time she occupied the premises after the settlement was reached. Remaining there was not a condition of the accord and satisfaction. She was, for six months, in effect a tenant at will and she owes the landlord rent for that time, plus prejudgment interest of five per cent.

LANDLORD AND TENANT – Commercial property – monies owing and damages *M-C Holistic Healing Centre Ltd. v. Goldstein et al.,* Claim No. 351675, Slone, Adjudicator, February 10, 2012. 2012 NSSM 7; **SmCl20/3** ■

LANDLORD AND TENANT – Residential tenancies – appeal allowed in part *McIntyre v. Omers Realty,* Hfx. No. 349060A; S.C.C.H. No. 340123, Wood, J., January 23, 2012. 2012 NSSC 35; **S642/23** ■

LANDLORD AND TENANT – Residential tenancies – appeal, purchase deposit, rental increase, damage to property *Chater v. Nickerson,* S.C.C.H. No. 368640, Parker, Adjudicator, February 27, 2012. 2012 NSSM 4; **SmCl19/31** ■

LANDLORD AND TENANT – Residential tenancies – appeal, safety of premises, return of rental fees *Cote et al. v. Armsworthy,* S.A.T. No. 338464, Kennedy, C.J., January 10, 2012. 2012 NSSC 15; **S641/22** ■ Four students, who were renting units in the same building, vacated the premises when what was believed to be mould was found inside a wall. The landlord applied to the Residential Tenancies Board for the remainder of the rent owing on the leases and the students applied for a finding that the leases were void, having later discovered that the landlord never had an occupancy permit for the premises. The Board dismissed the landlord's claim for unpaid rent, finding a breach of one of the statutory conditions and ordered him to repay all the rent previously paid. The landlord appealed to

the Small Claims Court, where the adjudicator found that the leases were "illegal and subject to forfeiture" and the landlord had no valid claim for rent after the premises were vacated. However, he found that, notwithstanding the illegality of the leases and the landlord's failure to satisfy minimum fire, building and safety standards, the tenants were not entitled to recover the rent monies already paid as the premises were "not unfit for occupancy" and the landlord had incurred expenses, including utilities, which were included in the rents. The students appealed, at which time they agreed to the landlord retaining his demonstrable costs related to the period of occupancy. *Held,* appeal allowed. The landlord will return the rents paid under the leases, less any demonstrable costs with regard to heating and utilities during the period of occupancy. The evidence showed that the premises were not fit for occupancy during the time the students resided there and, having found that the landlord was in breach of the statutory condition in not keeping the premises in a good state of repair and not complying with laws respecting health, safety and housing standards, the adjudicator contradicted himself in later finding that the premises were "not unfit for habitation". To allow the landlord to retain the rents paid, under these void leases, for premises that were subsequently determined to have safety issues would disregard statutory obligations in place to ensure the safety of unsuspecting tenants.

LANDLORD AND TENANT – Residential tenancies – notice to quit *MacCulloch v. Wells,* Claim No. 358024, Slone, Adjudicator, November 16, 2011. 2011 NSSM 59; **SmCl19/15** ■ The respondent tenant lived in one of the appellant landlord's rental units for almost three years under a month-to-month lease. Their relationship was strained due, in part, to a dispute over whether the tenant was allowed to have cats despite a lease saying she could not. Other tenants complained about the cats and claimed she left security doors open so the cats could come and go. The landlord felt she was abusive and belligerent. The tenant complained to HRM about what she alleged were safety infractions in her unit and the rest of the building. Bylaw officers ordered to the landlord to fix several things, only one of which was identified in the tenant's original complaint. The landlord served her with an eviction notice, which she appealed. The residential tenancies officer agreed with the tenant that she was evicted in retaliation for her complaint to HRM, which violated s. 20 of the *Residential Tenancies Act*. The landlord appealed to the Small Claims Court. *Held,* appeal allowed. The tenant will have two months to vacate the unit. Adjudicator Slone found the landlord more credible. Triers of fact must be careful not to let tenants use s. 20 as a device to establish early tenure. It's a discretionary provision. A decision maker "may" choose to overturn the eviction notice if they find it was retaliatory in nature. The parties chose to be in a month-to-month leasing relationship. The landlord has some freedom to choose who he wants to live in his buildings. While the tenant's complaint to HRM may have been a factor in the landlord's decision, it wasn't the only (or even a paramount) factor that led to her eviction. The parties are in serious conflict. While there was some retaliation, the eviction notice was not primarily retaliation and it's not appropriate to uphold it given all the circumstances.

LANDLORD AND TENANT – Residential tenancies – repair of driveway *Killam Properties Ltd. v. Patriquin,* Claim No. 340137, Parker, Adjudicator, January 3, 2012. 2012 NSSM 1; **SmCl19/22** ■

LANDLORD AND TENANT – Residential tenancies – termination of tenancy *Murphy v. Julien et al.,* Claim No. 370671, Slone, Adjudicator, December 22, 2011. 2011 NSSM 60; **SmCl19/16** ■

■ MAINTENANCE

MAINTENANCE – Child support – application to vary retroactively dismissed *Fillmore v. Graves,* S.F.H.M.C.A. No. 031740, Jollimore, J., November 12, 2011; October 31, 2011 (orally). 2011 NSSC 417; **S638/10** ■ The father, who was trying to start his own business, applied to retroactively reduce his child maintenance payments. The mother resisted the application and asked the court to impute income to the father for the purpose of ongoing maintenance. The father had raised the issue of variation numerous times over the years, but never followed through and filed an application with supporting financial disclosure until now. The mother had no idea his income had declined over the years. *Held,* ongoing maintenance will be paid based on an imputed income of $30,000 per year. The father's decision to invest in his future and start a business doesn't give sufficient priority to his current obligations to his son. The mother is doing her best, but the child's financial needs aren't being totally met even at the current level of support. While the father may not have made these choices with the intention of avoiding his child maintenance obligations, the relevant question is whether he intends to be in his current situation. Given the circumstances, including the child's financial situation, his choices are not reasonable. Looking at the father's (lack of) reasons for the delay, the lack of blameworthy conduct on the mother's part and the child's needs both now and historically, it is not appropriate to retroactively reduce child maintenance. To do so would result in hardship to the child.

MAINTENANCE – Child support – arrears, variation, conciliation record *Gordon v. Mevold,* No. 1201-49933; S.F.H.D. No. 024564, Jollimore, J., January 12, 2012; January 10, 2012 (orally). 2012 NSSC 17; **S643/15** ■

MAINTENANCE – Child support – provisional retroactive variation orders, death of payor, no provision for child *Bisbee v. Bisbee,* No. 1201-060118, Legere-Sers, J., December 28, 2011. 2011 NSSC 470; **S641/2** ■

MAINTENANCE – Child support – retroactive support *MacDonald v. Pink,* S.F.N.S.F. No. 006545, Forgeron, J., November 15, 2011. 2011 NSSC 421; **S638/13** ■ The father had no involvement with the parties' 11-year-old daughter, and paid minimal child support based on an income (set in 2001) of $14,900. The evidence showed his income was actually higher at the time. The mother sought to impute income to him and increase child support retroactively, and also wanted him to contribute to various expenses, such as sewing and dance lessons, under s. 7 of the Guidelines. The father dropped out of university many years ago, spent some time overseas teaching English as a second language, and had just recently graduated from law school. He claimed health and educational needs led to his lack of employment. He was granted several adjournments to allow him to meet his various disclosure obligations, but didn't present any reliable evidence to support his health claims. *Held,* income of $25,000 per year imputed to the father for the period of 2006 to 2009. Child support varied retroactively. The mother proved on balance that (during that time-frame) the father was intentionally underemployed. This underemployment wasn't due to reasonable (or

proven) health or educational needs. Retroactive support is warranted. The mother had a reasonable excuse for delaying her application (she didn't have the father's contact information and was working two jobs while trying to raise the child by herself). The father engaged in blameworthy conduct by consistently failing to disclose his financial information or be mindful of his obligation to meet his child's needs. The mother will spend all of the retroactive award directly meeting the child's needs. The father has an ability to pay. His income will increase as he starts to practise law. He has no debts other than to family members. He must pay the retroactive amount within 60 days. Of the s. 7 expenses claimed, the father is only required to contribute to health costs. The dance and sewing lessons are certainly reasonable and necessary, especially since they help fill the void left by her absent father, but the mother doesn't pass the proportionality test. She spends less than six per cent of her net income on the child's extracurricular activities, which isn't extraordinary in the circumstance.

MAINTENANCE – Child support – retroactive support and extraordinary expenses *MacCulloch v. MacCulloch,* C.A. No. 347774, Farrar, J.A., January 25, 2012. 2012 NSCA 10; **S640/13** ■

MAINTENANCE – Child support – retroactive variation and arrears, prospective obligations *G. (J.D.) v. B. (J.A.),* S.F.H.M.C.A. No. 014656, Jollimore, J., February 22, 2012. 2012 NSSC 20; **S643/29** ■

MAINTENANCE – Child support – shared parenting arrangement *McNally v. Marsh,* S.F.S.N.M.C.A. No. 0061382, Wilson, J., October 24, 2011. 2011 NSSC 392; **S637/3** ■ The parties agreed to share custody of their two children (ages three and eight) but couldn't agree on child support. The father earns over $66,000 per year, while the mother earns $52,500. *Held,* the father will pay child support of $450 per month, which is about $260 more than the simple set off amount. The court looked at a total of the parties' various child related expenses (adjusted slightly to ensure they're reasonable) and determined the share of those expenses that should be paid by each parent, based on their respective incomes. A contribution of $433 would allow the mother to meet the children's reasonable needs while in her care.

MAINTENANCE – Child support – variation *Bury v. Beaton,* S.F.S.N.M.C.A. No. 009442, Wilson, J., January 24, 2012. 2012 NSSC 37; **S642/17** ■

MAINTENANCE – Interim spousal and child support – retroactive support deferred *Brake v. Brake,* No. 1201-065174, Legere-Sers, J., November 25, 2011. 2011 NSSC 440; **S638/30** ■ The parties were together 16 years and had three children when the father abruptly left in 2010. It was a traditional marriage. For over 10 years the mother was a full-time mom to the kids (now ages 15, 12 and eight) while the family continuously relocated to allow the husband to pursue his career. He now earns more than $200,000 per year (a significant portion of which is paid as an annual bonus), while the mother (who runs a home-based daycare) earns about $20,000. After separation, the father declared bankruptcy. The mother's ability to keep the home and continue running her business was in jeopardy. While they agreed on custody and access (sole custody to the mother, every second weekend and one night a week for the father) and child support of $3,142 per month, they couldn't reach an agreement on interim spousal support. The father conceded the mother was entitled, but argued he couldn't afford to pay. He felt his bonus shouldn't be taken into account since it wasn't guaranteed. *Held,* the father will pay spousal support of $3,000 per month; the mid-range suggested by the Spousal Support Guidelines. The father has earned consistent amounts over the last three years and there is no evidence this year is different. His income for calculating spousal support includes the bonus, and it's up to the father to reorganize his financial affairs so as to ensure financial stability for his children. The separation was abrupt and the mother has urgent needs during this transition. The father's actions are directly responsible for the financial mess the mother is in. This is an interim award made at a time of highest need and can be revisited later.

MAINTENANCE – Spousal and child support – terminated *Price v. McCulloch,* No. 1210-000656; S.A.T.D. No. 020385, MacDonald, B. J., September 28, 2011. 2011 NSSC 357; **S635/15** ■ The father applied to terminate child and spousal support. At the time (in 2007), the child was 20, living on her own and using income from substantial investments (made in her name and administered by the father) to support herself. The mother filed very little financial information concerning the child's financial situation/needs. The parties' corollary relief judgment stated the mother was entitled to compensatory spousal support on the basis of her parenting obligations and that the father would be entitled to apply to terminate when the child moved out. The mother was an artist. At the time the original spousal support award was made, the court said it was appropriate for her to continue in this line of work while she was caring for the child because it provided her with the necessary flexibility to meet her daughter's needs. She had not retrained since the child moved out and only recently started looking for ways to increase her self-sufficiency. She had a modest budget, but didn't make nearly enough to support herself. The parties were married for 10 years and the husband had paid spousal support for 10 years. *Held,* child support terminated as of 2007. The mother failed to prove the daughter continued to be a dependant child after she started to access the income from her investments. Spousal support is terminated as of now, and not as of the date the application was made. The corollary relief tied the mother's entitlement to compensatory support to her child care obligations. Thus, her entitlement to compensatory support ended when her daughter moved out. She had made virtually no effort to become self-sufficient in the more than three years that have since passed. This was a mid-length marriage; the general rule is that a payor is not obligated to pay support for more years than the parties were married. She is no longer entitled to non-compensatory support based on her need, despite the father's ability to pay.

MAINTENANCE – Spousal and child support – termination date for spousal support and extraordinary expenses *Eisnor v. Eisnor,* No. 43398, Forgeron, J., December 23, 2011. 2011 NSSC 482; **S639/31** ■

MAINTENANCE – Spousal and support – matrimonial debt *Fraser v. Fraser,* No. 1206-005828, O'Neil, A.C.J., November 9, 2011. 2011 NSSC 411; **S638/17** ■ The parties separated after a 16-year marriage. Their three children (ages 17, 14 and nine) live primarily with the father, who earns about $170,000 per year. The mother earns about $35,000 per year. The father was servicing most of the matrimonial debt and did not seek child support from the mother. The mother sought interim spousal support. *Held,* the mother will pay table child support based on her income ($685 per month),

and the father will pay her interim spousal support of $1,400 per month, which is less than the range suggested by the spousal support guidelines in recognition of the fact he is servicing most of the parties' debts. She is entitled to spousal support on both a compensatory and non-compensatory basis. The parties were mutually dependent and responsible for each other throughout the marriage and the mother contributed substantially to the father's career by assuming responsibility for the bulk of the domestic responsibilities. The father's financial obligations won't increase substantially as a result of this decision, given the tax implications from the spousal support award.

MAINTENANCE – Spousal support – application for interim spousal support *Rochon v. McCready,* No. 73316, Forgeron, J., January 12, 2012. 2012 NSSC 9; **S641/30** ■ The parties dated off and on for several years. Their marriage lasted less than one year. They had no children. The wife, who lives with her new partner, applied for interim spousal support. She claimed: she gave up a good job to move to Cape Breton; there was a pattern of dependancy; she contributed to the husband's career advancement while they were dating; and that they agreed she would attend university but the husband didn't follow through. The wife had attended a training program mostly paid for by the husband and his employer. She sold her $20,000 engagement ring and was now attending university. *Held,* application dismissed. The wife isn't entitled to support on a compensatory or non compensatory basis. There's no contractual basis, express or implied, for granting support. The husband's evidence was more credible. The parties were financially independent while dating and during their short marriage. While the wife earns nothing and the husband has a good job, this income disparity alone doesn't result in entitlement. The wife got money from selling the ring. She's made no effort to find work. It was her decision to stay in Cape Breton and attend university. Her needs could be met if she made a diligent effort to return to the work force. She's living with a new partner in a home that's much nicer than the one she lived in during the marriage.

MAINTENANCE – Spousal support – variation, termination *Barnes v. Barnes,* S.F.H.M.C.A. No. 059649, Jollimore, J., January 18, 2012. 2012 NSSC 21; **S642/9** ■ The parties were married and lived together for 20 years. They registered a separation agreement with the court pursuant to s. 52(1) of the *Maintenance and Custody Act* in 2008. It required the husband to pay spousal maintenance based on an income of $50,000 per year. He was also (as a result of a subsequent agreement) required to compensate the wife for his share of their debts. In the three years since the agreement was signed, his income was closer to $30,000 per year. He applied to terminate spousal support, claiming: reduction in his income; increase in his expenses (including a requirement to pay child support for his two-year-old); and his contribution to the debts were all material changes in circumstance justifying a termination of support. He unilaterally stopped payments. *Held,* the husband's substantial and consistent reduction in income is a material change in circumstance. A variation under this Act should, in the context of the changed circumstances, consider the objectives outlined in s. 4 recognize the impact of the marriage on each spouse, ensure each is left in a position that satisfies their reasonable needs, promote self- sufficiency and recognize the potential impact of children's needs. It is relevant the parties agreed to indefinite support. The wife's circumstances have not changed much; she still has a need and continues to bear the financial impact of the relationship. She can not afford an apartment without a boarder; she is not self sufficient. In recognition of his reduced income, the husband's payments are reduced from $300 to $225 per month. This takes into account his obligation to his young daughter, the extent of which is unclear on the evidence.

■ MORTGAGES

MORTGAGES – Foreclosure – effect of agreement *Co-operative Trust Co. v. Morin,* Ken. No. 297802, Haliburton, J., February 21, 2012. 2012 NSSC 78; **S644/2** ■

MORTGAGES – Foreclosure – interest of spouse of mortgagor *Toronto-Dominion Bank v. Dufault,* Hfx. No. 345709, Duncan, J., December 6, 2011. 2011 NSSC 453; **S639/18** ■ Mr. Dufault defaulted on a mortgage secured by a piece of land jointly owned by him and his wife. When TD moved to foreclose on an *ex parte* basis, it learned Ms. Dufault only signed the mortgage as a releasor. TD claimed the parties were under a mistaken belief that title was only in Mr. Dufault's name. At issue was whether Ms. Dufault could be said to have entered into an equitable mortgage of her interest in favour of TD. *Held,* motion dismissed. TD failed to prove Ms. Dufault intended to mortgage her interest in the lands and they have no right to foreclose against her interest. It's clear the parties always acted as if Mr. Dufault was the only mortgagor. The mortgage refers to Ms. Dufault as a releasor, but fails to describe what she was releasing. Mr. Dufault was the only one to sign the renewal statement in January, 2010. The evidence could support an inference that he intended to borrow against his interest only. There's no evidence the parties were mistaken about title. To find so would be speculative at best.

MORTGAGES – Foreclosure – misrepresentation of security *Bank of Montreal v. Partington et al.,* Hfx. No. 327073, Moir, J., January 5, 2012. 2012 NSSC 7; **S641/14** ■ The defendants got independent legal advice before signing personal guarantees (secured by a mortgage on their home and nearby lands) to secure a loan for their son-in-law. They met with the banker and, before handing over the guarantee, asked for two assurances. One, that the loan was only to pay out an older loan, and two that if their son-in-law sold his lobster licence, the proceeds would be applied against it. They claim the banker gave those assurances, but did not follow through. When the son-in-law and his business defaulted on the loan and declared bankruptcy, the bank sued to enforce the personal guarantees. It then moved for a partial summary judgement allowing it to foreclose against some of the lands to pay off the company's portion of the debt. *Held,* motion dismissed. While the bank has proven it has a valid claim, the defendants have shown there is a genuine issue for trial. The exclusive agreement clause (which would preclude the use of parole evidence) in the guarantee won't apply if there was no contract to begin with. Although the guarantee and mortgage documents were signed earlier, they weren't part of an enforceable contract until they were given to the banker. If there was a material misrepresentation by the banker that induced the defendants to hand over the guarantee, there is no valid contract (guarantee or mortgage) for the court to enforce. Pursuant to Rule 13.07 of the *Civil Procedure Rules* (2008), the court gave very detailed directions for the trial, including the order in which evidence will be presented, a direction that the plaintiffs won't be discovered, framing the issue that is to be decided, and what documents can be introduced without proof.

MORTGAGES – *Money Lenders Act* – interpretation *Ferguson v. Amiro,* Hfx. No. 342741, Muise, J., November 17, 2011. 2011

NSSC 416; **S638/28** ■ The defendants were having financial troubles when they decided to get a second mortgage on their home to pay outstanding debts the evidence suggests were in collections. The plaintiff agreed to give them a mortgage for a 12-month term at a 43 per cent interest rate, during which time the defendants were required to make interest-only payments. At the end of the term, the plaintiff told them the mortgage would eventually have to be renewed and that they could continue making the interest-only payments. Several months later, the plaintiff presented a new mortgage and demanded a $5,000 mortgage renewal fee. The defendants stopped making payments and the plaintiff moved to foreclose on the mortgage. The defendants sought to have the foreclosure discontinued and an order, under s. 4 of the *Money Lenders Act*, disallowing charges they felt were unauthorized and/or excessive. The plaintiff agreed the court should consider the enforceability of the contested charges. *Held,* the *Money Lenders Act* doesn't provide relief in this situation. In order for s. 4 of that Act to apply, the loan charges and interest rate must equal or exceed the criminal interest (60 per cent). The *Unconscionable Transactions Relief Act* may have helped, but it was not pleaded. The *Judicature Act*, s. 42, does not apply because the mortgage term has expired; the foreclosure can't be dismissed. The court considered the enforceability of the charges because the parties agreed it should be considered. Any charges not explicitly provided for in the mortgage (including those at Schedule A, which was attached to the mortgage but not signed by the defendants) are disallowed. The default proceedings fee ($1,500 in the event the matter proceeds to court) was mentioned in the mortgage but is disallowed because it's more akin to a penalty than a genuine pre-estimate of damages. The mortgage renewal fee is disallowed because it was not agreed upon and there was no renewal. The pre-payment interest penalty is disallowed because the term of the mortgage expired and the plaintiff initiated a foreclosure. Solicitor-client fees, although referenced in the mortgage, are disallowed because the plaintiff's unfounded claims and excessive charges were oppressive and constitute special circumstances. The court believes the defendants would have agreed to payout the mortgage if the disallowed charges weren't claimed.

■ MUNICIPAL LAW

MUNICIPAL LAW – Community safety orders – appeal dismissed *Dixon et al. v. Nova Scotia (Director of Public Safety),* C.A. No. 343192, Bryson, J.A., January 5, 2012. 2012 NSCA 2; **S640/4** ■ A judge issued an order under the *Safer Communities and Neighbourhoods Act*, S.N.S. 2006, c. 6, requiring the appellants to vacate their property for 70 days on the grounds they were habitually using property for the possession, use and sale of illicit drugs (cocaine) and adversely affecting the safety and security of the community. They appealed, arguing the judge improperly interpreted the terms "habitually used" and "reasonable inference", and that he misinterpreted the Act when he decided a safety order was needed. They felt it was inappropriate for the judge to rely on anonymous disclosures. *Held,* appellant's appeal dismissed, and they must pay costs of $2,000 (including HST and disbursements) to the respondents. The chambers judge was correct when he decided the property was being habitually used for illegal activity. "Habitual use" can be reasonably inferred from the evidence and need not be daily, continual or permanent. Occasional activity implying ongoing conduct is enough to constitute "habitual" in this context. For policy reasons, the Act specifically allows people to make allegations anonymously. This is a necessary component of the Act, which is designed to encourage concerned citizens to come forward with their concerns and to prevent them from becoming the victims of retribution. The Act doesn't alter the *Civil Procedure Rules* (2008) as they relate to hearsay evidence. Generally, anonymous information isn't admissible for the truth of its contents. In this case, the hearsay evidence must be looked at in a wider context. The anonymous allegations were numerous, extended over many months and were reported to at least three different officers. They must be considered along with all of the other corroborative evidence, including the drug convictions, the plaintiffs' connections to and meetings with known drug dealers/users some of who frequented the property, police observations and the plaintiffs' own admission(s). While the investigator's affidavit lacks detail, this is a small community and more detail would leave complainants relatively vulnerable given the lack of policing resources.

MUNICIPAL LAW – Town land – boundary dispute *John Ross & Sons Ltd. v. Truro (Town of),* S.T. No. 349261, Scanlan, J., November 7, 2011. 2011 NSSC 409; **S638/9** ■ For many years, a recycling company's trucks had travelled a gravel road that, in some places, crossed over town land. The town applied for an order prohibiting the company from entering its lands and the company applied for an order prohibiting the town from erecting a fence that would prevent it from entering the town lands. Although earlier court proceedings had ended with a consent order, which, on its face, prohibited the company from trespassing on the town land, the company took the position that it was only after the order was signed that it became aware of the wording, which would effectively shut down its operations. *Held,* the town is prohibited from erecting a fence that would prevent the company from continuing its business. The court was not convinced that either party, especially the company, had it in their mind that the consent order would prevent the company from continuing to load their box cars and found that to summarily rely on that order to prevent the matter from being fully dealt with on its merits would be contrary to the spirit and intent of the earlier negotiations and the proper administration of justice. The court also expressed concern that the town might be specifically targeting this business, which was operating in accordance with all provincial and municipal regulations, due to the political mission of some councillors. The issue of whether the town was committing the tort of public misfeasance was worthy of a full inquiry.

■ NEGLIGENCE

NEGLIGENCE – Appeal – new trial ordered *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd. et al.,* C.A. No. 274238, Saunders, J.A., October 20, 2011. 2011 NSCA 97; **S636/7** ■

■ PRACTICE

PRACTICE – Appeal Book – request to waive requirement for a transcript *Ocean v. Economical Mutual Insurance Co. et al.,* C.A. No. 351488, Oland, J.A., November 25, 2011. 2011 NSCA 106; **S636/16** ■ The self-represented appellant asked the appeal court to relieve her of her obligation to file transcripts of the 25-day liability trial that found her 20 per cent contributorily negligent. She argued there was "hard evidence" on file to support her allegations that the trial court relied on false evidence; failed to properly consider irrefutable evidence; has an unfair bias against her; has a biased relationship with varies parties, corporations and government bodies; refused her reasonable request to present certain evidence; and wrongly denied

what she called an 'abuse of process application'. She filed an affidavit stating she was in serious financial trouble, but didn't supply any supporting documents. She also claimed it would cost over $11,000 to get a transcript made, but didn't file proof of the actual cost. *Held,* motion denied. This is not an appropriate situation in which to waive the requirement for a transcript. The trial was long and complex. Many of the appeal grounds can only be determined after the appeal court has carefully gone through a transcript of the trial. A recording won't work. It's too inefficient for the court to listen to the entire trial. A complete record is essential to consider allegations of bias. In order to claim impecuniosity you have to prove it with documents like tax returns, business records, bank statements, etc.

PRACTICE – Appeals – application to amend notice of appeal and stay pending appeal *Molloy v. Molloy,* C.A. No. 371180, Fichaud, J.A., March 12, 2012. 2012 NSCA 28; **S640/30** ■

PRACTICE – Appeals – date set for filing of factum and appeal book, waiver of notice *New Scotland Soccer Academy v. Nova Scotia (Labour Standards Tribunal) et al.,* C.A. No. 354453, Saunders, J.A., September 22, 2011. 2011 NSCA 88; **S631/27** ■ The appellant used to employ the defendant, Mr. Krause. After she dismissed him, he made a complaint to the respondent tribunal. He also brought an action in the Supreme Court, which he eventually failed to pursue. The tribunal initially deferred to the Supreme Court action but, when it became apparent it wasn't going to continue, heard the matter and found in favour of Mr. Krause. On an internal appeal, they reduced the award by half based on the appellant's submissions. The appellant now sought to appeal the tribunal's decision on the basis that it lost jurisdiction when it decided to suspend the file and defer to the Supreme Court action. She asked the court to set a date for her appeal to be heard, despite the fact that she couldn't locate and serve Mr. Krause. She believed he lived in France, and documented her efforts to locate him through family, his former lawyer and the Internet. *Held,* motion granted. The appeal will be set for a hearing and the requirements that Mr. Krause be served with notice of the hearing and the factum are waived. The appellant has exhausted all reasonable means to locate Mr. Krause that are available to her. A copy of this decision will be sent to his former lawyer. It is relevant the appellant is only appealing on a narrow issue of jurisdiction and not the quantum awarded. It is unlikely Mr. Krause would want to participate and make submissions. The court finds he has chosen not to participate.

PRACTICE – Appeals – extension of time to file appeal *Travis v. Peters,* S.C.C.H. No. 375283, Parker, Adjudicator, November 4, 2011. 2011 NSSM 67; **SmCl19/30** ■

PRACTICE – Appeals – extension of time to file appeal *M. (J.) v. Nova Scotia (Minister of Community Services),* C.A. No. 384102, Fichaud, J.A., March 12, 2012. 2012 NSCA 29; **S640/31** ■

PRACTICE – Appeals – security for costs *Lienaux v. Campbell et al.,* C.A. No. 352526, Saunders, J.A., October 12, 2011. 2011 NSCA 94; **S636/3** ■ This exceptionally acrimonious litigation has consumed many of the parties for over 20 years. The latest proceeding was an appeal of the dismissal of various motions brought by the self-represented plaintiff (a lawyer) and four other individuals. The defendants sought to have the plaintiff post security for costs in the amount of $20,000. There was a long history of the plaintiff having failed to pay orders for costs. The evidence was that he was essentially judgment proof. The plaintiff argued he was in a precarious financial situation and that his appeal had merit. *Held,* motion granted; the plaintiff must post $20,000 in security for costs of the appeal by the end of the month. If not, the defendants can have his appeal dismissed without further notice to him. Based on the record, any reasonable and suitably informed observer would characterize this as a case where there are special circumstances warranting an order for security. The plaintiff hasn't proven he is impecunious, or that a requirement for security will stifle his appeal. Even if the court believed he was impecunious and that an order for security would bar him from proceeding, security would still be warranted on the facts of this case. The history here is extraordinary and unparalleled such that it justifies an award for security regardless. In terms of quantum, the cost award from the last unsuccessful appeal is an appropriate sum.

PRACTICE – Application – motion to reopen decision to refuse consolidation *Jeffrie v. Hendriksen et al.,* Hfx. No. 346079; Hfx. No. 354159, Rosinski, J., December 12, 2011. 2011 NSSC 460; **S639/15** ■ The applicant (Jeffrie) filed an application in court over a shareholder dispute with the respondents (collectively referenced as "Hendriksen"). He, among other things, claimed oppression remedies. Hendriksen made an unsuccessful motion to convert the application to an action so he could bring a counter-claim. When that didn't work, he filed his own application in court alleging that Jeffrie wrongfully interfered with the company's economic interests, and seeking an injunction and accounting for damages. Hendriksen moved to consolidate the two applications, but his motion was denied on the basis that general convenience and expense favored maintaining the status quo. The motions judge directed the parties to file an order within a month. They didn't follow through. Before the order was taken out, Hendriksen sought the court's leave to allow him to file new evidence and reopen the motion. He claimed there were material changes in circumstance. The motion for leave was made by correspondence (see the *Civil Procedure Rules* (2008), Rule 27.01(1)(g)) The issue was a narrow one: in what circumstances can and should a court grant leave to reopen a consolidation motion? *Held,* leave denied. While the court has the discretion to grant leave to reopen the matter (whether under Rule 82.22(2) or its inherent jurisdiction), this is not an appropriate case to do so. The test requires a material change in circumstances and a balancing of the risk of procedural and substantive injustice to each party. The more advanced litigation becomes, the more compelling the reasons to reopen will have to be. The alleged material changes in circumstance are insufficient. The core issues have remained the same. The oppression remedies, by their nature, require a speedy determination and Jeffrie could suffer substantial injustice if the matters are combined. There's no compelling evidence that proceeding separately unfairly prejudices Hendriksen. The court gave a detailed written decision denying the motion to consolidate; finalizing the order should have been easy. Rules 78.04(2) and (3) apply. Jeffrie should have submitted his draft order to Hendriksen within ten days of the decision. Hendriksen should have responded within five days. Both parties delayed. Had they not done so, the order would have been finalized and issued before Hendriksen asked for leave to reopen the matter.

PRACTICE – Case management – direction from the court *Halifax (Regional Municiaplity Pension Committee) v. State Street Global Advisors Ltd. et al.,* Hfx. No. 309063, Duncan, J., December 1, 2011. 2011 NSSC 447; **S639/9** ■

PRACTICE – Change in venue – factors considered *Nelson v. Queripel,* Ken. No. 189394, Moir, J., December 22, 2011. 2011 NSSC 478; **S639/29** ■ The plaintiff was injured 13 years ago in a car accident. She filed this claim nine years ago. The defendant asked to have trial dates set. The plaintiff responded with a motion to change the trial venue from Kentville (where she filed her claim) to Halifax and asked the court to hold off on setting trial dates. The plaintiff's lawyer is located in Wolfville. The defendant's lawyer is in Halifax, but willing to travel to Kentville. Save for a few witnesses in Halifax, most of the other witnesses live in neither Kentville nor Halifax. The evidence was that a trial in Kentville could be set for the Fall of 2012, while a trial in Halifax could not happen until at least the Fall of 2013. *Held,* motions dismissed. The new *Civil Procedure Rules* (2008), Rule 47.04 on transfers changes the test. There is no longer a need to show that a "great preponderance of convenience" favours a transfer. Litigation is different now. Plaintiffs no longer have exclusive control over their claims. The relative importance of time and place has changed. The new Rules allow for trials to be moved around, and for witnesses to testify by teleconference; they also impose strict deadlines and impose restrictions on adjournment. On a motion under Rule 47.04, a judge must consider all relevant circumstances and exercise the discretion in the way the judge determines will best do justice. There's been too much delay and the matter should be heard in Kentville where it can be heard sooner. There's no evidence to suggest witnesses living in Halifax will be inconvenienced by travelling to Kentville. While there may be some advantage to having the trial in Halifax, that advantage is outweighed by the cost of further delay.

PRACTICE – Class action proceedings – cause of action alleging breach of *Charter* *Morrison (Estate of) v. Nova Scotia (Attorney General),* Hfx. No. 230887, MacAdam, J., December 22, 2011. 2011 NSSC 479; **S639/30** ■ The Appeal Court referred this class action back to the certification judge for a determination of whether the plaintiffs' *Charter* claims (under s. 7 and 15(1)) meet the test for certification and are viable causes of action. The plaintiffs and class members are a group of private-pay nursing home patients and their spouses who are upset over the province's decision to change the way nursing homes admit patients. Before the change, private-pay patients could contract directly with a nursing home and bypass the public system. After the change, they were forced to participate in the same process as public-pay patients (ie, undergo a financial assessment and be put on a "first come, first served" waiting list). Also at issue was the disparity between non-nursing home patients requiring health care (whose costs are paid by the province) and nursing home patients (whose health care costs are included in the nursing home's daily premium and paid privately by those who can afford to do so). The statements of claim had already been amended more than once and there was some agreement that further amendments were needed to outline the remedies sought in relation to the breaches claimed by the plaintiffs. The defendants argued strongly against certification in relation to both *Charter* claims. *Held,* the s. 7 claim doesn't meet the test for certification, but the s. 15(1) claim does. The plaintiffs failed to provide a basis upon which the court can conclude their life, liberty or security of the person were violated or jeopardized by the new nursing-home placement system. The requirements they faced were faced by all nursing home applicants. There is a viable claim in relation to s. 15(1). Age and/or disability (enumerated grounds that are protected by the *Charter*) have forced the plaintiffs into a system under which they were required to pay their own health care costs that others (outside of the system) aren't required to pay. While the amended statement of claim could use more detail and will be amended, it's sufficient as is for the purpose of deciding if the plaintiffs have met the onus of establishing a potential cause of action for a breach of s. 15.

PRACTICE – Consolidation – actions against principal and guarantors, resulting amendments *Bank of Montreal v. Ross,* Hfx. No. 332478, LeBlanc, J., October 6, 2011. 2011 NSSC 359; **S635/16** ■ The plaintiff (BMO) sued the defendants to enforce promissory notes they signed to secure their company's debt. The defendants claimed BMO wrongfully prevented them from obtaining financing and improperly instigated receivership proceedings. They sought to consolidate this action with BMO's related action against their company and to amend their defence to include portions of the defence in the corporate action. Instead of making a motion for the court's permission to amend their pleadings, they relied on the chambers judge's authority to do so in the context of a consolidation motion. BMO moved for summary judgment on the pleadings and/or evidence, and to have the defence dismissed. The defendants argued BMO made improper representations at the hearing of the receivership motion. While their lawyer attended, he had minimal notice. BMO also asked for a judgment in relation to an admission of fact the defendants now said was a typographical error and sought to withdraw. *Held,* the motion to amend the defence is granted. A judge hearing a motion to consolidate can give directions on any necessary amendments, but the moving party still must clarify how consolidation will impact the pleadings. While that was not done here, it is in the interests of justice for the court to exercise its discretion to abridge the time required for a motion to amend. There was no bad faith on the defendants' part, and the proposed amendments won't prejudice BMO. The motion to consolidate is granted: both actions have progressed to a similar stage, and involve the same lawyers and witnesses. BMO's motion for summary judgment on the pleadings is granted. The portions of the defence and counterclaim that impugn the appointment and actions of the receiver, and those that criticize the reasonableness of calling in the debt are struck. There is no basis in law for the defence and counterclaim even when all the facts pleaded are assumed to be true. While the attack on the appointment of a receiver isn't an issue of *res judicata* (because the decision on receivership was an interim, not final, decision and was made *ex parte*) or estoppel by conduct, it would be an abuse of process (see the *Civil Procedure Rules* (2008), Rule 88) to allow them to make allegations they could and should have made many months ago in the context of the receivership proceedings. They never raised an issue at that time, nor did they appeal the receivership order.

PRACTICE – Costs – adverse findings of credibility *Lubin v. Lubin,* No. 1201-064422; S.F.H.D. No. 069303, MacDonald, J., March 6, 2012. 2012 NSSC 93; **S644/25** ■

PRACTICE – Costs – amount involved, expert fees *Meister v. Coyle,* Hfx. No. 177464, Smith, A.C.J., August 10, 2010. 2010 NSSC 320; **S641/6** ■ The plaintiff sued his former lawyer (the defendant) in negligence and breach of contract for what the court found amounted to no more than an error in judgment. Costs (under the *Civil Procedure Rules* (1972)) were in issue, including whether the plaintiff should be required to contribute to the defendant's expert's fees of over $11,000. The plaintiff had rejected an offer to settle before trial. There was disagreement over the "amount involved" for the

purpose of fixing costs. The plaintiff had initially sought damages of between $100,000 and $250,000. *Held,* costs of $8,050 (the amount calculated under Tariff A based on an amount involved of $30,000 plus $1,800 to take into account the defendant's failure to accept the settlement offer) plus disbursements awarded to the defendant. The plaintiff must pay $7,500 towards the cost of the defendant's expert and the full cost of the discovery transcripts. While the expert's opinion wasn't accepted, it was used by the court to highlight the fact that reasonably competent professionals can and do have different opinions on strategy. The plaintiff's claim at trial was unrealistic. There was very little evidence on damages and it's reasonable to fix $30,000 as the amount involved.

PRACTICE – Costs – appeal dismissed *Wadden v. National Bank Financial Ltd.,* C.A. No. 355940, Hamilton, J.A., January 31, 2012. 2012 NSCA 15; **S640/16** ■

PRACTICE – Costs – discontinued proceeding *Weir v. National Bank of Canada et al.,* Hfx. No. 329610, Wright, J., December 7, 2011. 2011 NSSC 430; **S639/11** ■ The applicant discontinued his application for judicial review shortly after the motion for directions was heard. He immediately brought a new proceeding by way of a Notice of Application in Court seeking relief under the same statute. The respondents sought costs in relation to the discontinued judicial review application. *Held,* lump sum costs of $500 awarded to the respondent. It's helpful to use Tariff C as a benchmark of what the costs might have been had the matter gone to a chambers hearing or what they would be based on the time spent in court for the motions hearing. The figure arrived at in each instance is relatively similar and comparable to the costs awarded.

PRACTICE – Costs – government lawyers, prehearing conduct *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General),* Hfx. No. 184701, Duncan, J., November 21, 2011. 2011 NSSC 429; **S638/29** ■ The plaintiff's claim was dismissed after a 27-day trial on liability issues. Damages were not assessed. Without hearing submissions, the trial judge ordered the parties to bear their own costs due to the defendant's pre-litigation conduct. The defendants appealed the costs decision. The appeal court felt the trial judge failed to give sufficient reasons for refusing to award costs to the successful party. The matter was remitted to the trial judge for a re-determination (and full consideration) of the appropriate cost award. Also at issue was how the defendant's legal costs should be calculated because they were government employed, salaried lawyers. The defendant argued reasonable costs should be determined using the hourly rate for a private lawyer with a comparable level of experience. In this case $400 per hour over more than 1,200 hours for the senior lawyer on the file. Even though costs were being freshly considered, the trial was completed in 2008. The *Civil Procedure Rules* (1972) applied. *Held,* total costs of $105,000 awarded to the defendant ($140,000 minus 25 per cent to reflect the defendant's pre-litigation conduct); which is a substantial contribution to the defendant's reasonable costs. The use of a private lawyer's hourly rate isn't a fair reflection of the costs incurred by the government who employs in house counsel. A private lawyer's rate is intended to include things that aren't part of a government's overhead. A cost calculation based on the assumption that costs awarded at the plaintiff's unsuccessful appeal on the liability finding (here, $22,500) are 40 per cent of reasonable trial costs results in an award that is too low. Although the appeal court ruled the defendant's conduct was insufficient to justify a failure to consider costs, they didn't limit the court's discretion to consider the defendant's conduct when actually deciding costs. It is one of many factors that can be taken into account.

PRACTICE – Costs – jurisdiction of Small Claims Court to hear taxation, similar action started in the Supreme Court *McInnes Cooper v. Advanced Glazing Technologies Ltd.,* S.C.C.H. No. 347147, Parker, Adjudicator, January 3, 2012. 2012 NSSM 2; **SmCl19/23** ■ At the applicant law firm's request, the Small Claims Court taxed their account. The respondent didn't appear at the taxation, but later asked to be heard. While there's no apparent authority to set aside a taxation, the applicant agreed and the adjudicator ordered that the matter be returned to a new adjudicator. At the rehearing, the respondent moved to have the taxation stayed, in part because it had subsequently filed a Supreme Court action claiming the law firm breached its fiduciary duties and asking to have the invoices declared null and void. The respondent argued the Small Claims Court doesn't have jurisdiction to decide matters involving claims for breach of fiduciary duties. *Held,* the court has jurisdiction to hear taxation matters that involve equitable notions, including alleged breaches of a solicitor's fiduciary duties to a client; however, to avoid multiple proceedings, it's best to refuse to hear this matter. Adjudicator Parker pointed out that, since the Supreme Court is now already dealing with these issues, it's unnecessary to have the matter proceed in two courts. Once that court renders a decision, it can choose to tax the account itself or refer it back to an adjudicator.

PRACTICE – Costs – lump sum or tariff, trial on liability only *MacDonald v. Holland's Carriers Ltd.,* Hfx. No. 263296, Pickup, J., November 25, 2011. 2011 NSSC 436; **S638/26** ■ The plaintiffs won the trial on liability. To date, their total legal costs for the liability issue, damages (which have not been litigated yet), and pretrial motions are $56,700. The parties could not agree on the appropriate quantum of costs. The plaintiffs felt using Tariff A, Scale 2 would result in too low of an award. They asked for a larger lump sum. *Held,* the plaintiffs are awarded costs of $13,500 (an amount calculated using Tariff A, Scale 2) plus disbursements. The fees submitted by counsel for the plaintiffs to justify a higher award include legal services for an issue not yet litigated (damages) and time spent on pretrial motions, including one that resulted in a finding of contempt against one plaintiff.

PRACTICE – Costs – security for costs *Ocean v. Economical Mutual Insurance Co. et al.,* Hfx. No. 190673, Smith, A.C.J., November 10, 2011. 2011 NSSC 408; **S638/8** ■ The self-represented plaintiff was injured several years ago in a motor vehicle accident caused by an uninsured driver. Over the years, her claim had grown to include a claim of negligence and bad faith against her own insurer. She felt the insurance companies and courts were part of a global conspiracy to prevent individuals like her from achieving true justice. Her claims were trifurcated into: a liability hearing on the accident; a liability hearing on the negligence/bad faith claim; and a hearing to quantify damages. The first 25-day liability trial (concerning the accident itself) resulted in a finding mostly in favour of the plaintiff, who was found to have been 20 per cent contributorily negligent. Both she and the insurer appealed the court's decision on liability and were waiting for their appeal(s) to be heard. In the meantime, the insurer moved for an order requiring the plaintiff to post security for costs in relation to the upcoming trial on the claims of negligence and bad faith. She didn't respond or appear and filed a letter stating she refused to participate in any lower court proceedings pending the

outcome of the appeal. There was some information to suggest she was struggling financially. The insurer wanted security of $100,000. She already owed them $1,000 in costs in relation to her failed attempt to prevent the insurer from amending their defence. *Held,* the plaintiff has five months to post $10,000 as security for costs. The law on impecuniosity is the same under the new *Civil Procedure Rules* (2008); the plaintiff would have had to file evidence of financial hardship to rely on it as a defence. This is a unique case in that the plaintiff is refusing to participate at this point. Costs may be very low at the end of the day if she continues to do so. The sum sought by the insurer is far too high. Estimating a cost award prior to trial can be hard. Even if $100,000 was a reasonable estimate of potential costs, the court would be reluctant to force an individual to come up with such a staggering sum for a debt they have not yet incurred.

PRACTICE – Costs – solicitor and client costs *Ackermann v. Kings Mutual Insurance Co.,* Tru. No. 230417, LeBlanc, J., January 3, 2012. 2012 NSSC 3; **S641/5** ■ The plaintiffs sued when the respondent insurer refused to provide coverage for damage sustained by their barn in a hurricane. They were wholly successful. The jury found the defendant conducted a partial investigation and ignored relevant information. They awarded $320,000 in damages, including $55,000 in punitive damages. Costs were in issue. The plaintiffs felt the defendant's conduct entitled them to solicitor and client costs. There was also disagreement over post-judgment interest. *Held,* costs of $54,975 awarded on a party and party basis under Tariff A of the 1989 Tariff ($29,975 as the Tariff amount, plus an additional $25,000 to reflect the fact the Tariff amount is too low). The statement of claim was issued about two weeks before the 2004 Tariff came into effect. The cost award represents about 30 per cent of the plaintiffs' actual costs. This isn't an appropriate case for solicitor and client costs. A punitive damage award neither precludes nor suggests an award of solicitor and client costs. The defendant's conduct in this case wasn't sufficiently egregious and misleading to warrant such costs. Post-judgment interest of five per cent is awarded as of the date of the Order was issued (as opposed to the date of the jury's decision).

PRACTICE – Costs – when application for injunction discontinued *Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.,* Hfx. No. 347087, Duncan, J., November 16, 2011. 2011 NSSC 423; **S638/14** ■ The union sought an interim injunction to maintain the status quo pending a resolution of the dispute. Things were resolved by arbitration and the union discontinued its application for the injunction over a month before it was set to be heard. The respondents sought costs for having been made to respond to the application and asked for a lump sum award of $20,000, or a slightly lesser amount as calculated under Tariff F. They also sought costs for this motion. *Held,* a lump sum of $3,500, plus disbursements and $750 in costs for this motion, awarded to the respondent forthwith. The outcome of the arbitration was mixed; the application for the injunction wasn't frivolous or vexatious. The applicant discontinued the application at an early stage. While the respondent needed to begin preparations, the evidence doesn't support the amount claimed, which is substantially greater than one might reasonably expect even if the matter had proceeded to a hearing. Tariff F doesn't apply because it is difficult to set an amount involved. Tariff C is more applicable, given the nature of the dispute. While a significant sum of money was concerned, the injunction wasn't designed to do any more than to preserve the status quo pending a final decision.

PRACTICE – Costs – where application discontinued *Moore v. Moore,* Ken. No. 348513, Warner, J., October 14, 2011. 2011 NSSC 376; **S635/21** ■ The parties were divorced in Germany. The husband brought this application for what he claimed was his share of their home in Nova Scotia. The wife resisted the application, arguing our court had no jurisdiction to hear it since all of their property (including the Nova Scotia home) was taken into account in the division of property ordered by the German court. The husband didn't file an affidavit or brief in response to the jurisdiction issue and, on the day before it was set to be heard, withdrew his application. The wife said she would only agree to the discontinuance on the condition that the husband agree not to bring a similar application in the future. The husband refused to agree. In the end, the court found it was without any authority to impose a condition on the discontinuance. The wife sought solicitor and client costs. *Held,* costs are to be determined under Tariff F. The amount involved is fixed at half of the value assigned to the Nova Scotia property by the German court. Although, given the husband's unreasonable conduct (i.e., in bringing the application in the first place and by withdrawing it on the eve of the interlocutory motion) the award should be at the higher end of the range suggested by that tariff ($18,300); to award anything in excess of the amount the wife actually paid ($6,175) would be unjust. The husband will pay costs in the amount actually incurred by the wife.

PRACTICE – Default judgment – application to set aside *Bank of Nova Scotia v. Howes,* Hfx. No. 351842, Edwards, J., February 8, 2012. 2012 NSSC 60; **S643/17** ■

PRACTICE – Disclosure – expert's time logs and advice on strategy *Skinner et al. v. Dalrymple et al.,* S.P. No. 188801, LeBlanc, J., December 12, 2011. 2011 NSSC 461; **S639/16** ■ The plaintiffs moved to compel the production of the defendant's expert's file materials, including: time log entries detailing who did the work, materials relating to a letter that modified his original report and materials related to the expert's advice on matters not related to his report (for example, advice on how best to cross-examine the plaintiff's expert). They maintained all were relevant to whether the expert's report was sufficiently independent. *Held,* motions denied. Whether these otherwise confidential materials should be disclosed depends on whether they formed part of the foundation of the expert's opinion and report; or they were considered by or provided to the expert before she prepared the report. If so, they must be disclosed. The test isn't met here. There is no authority to support the claim for the time logs; they aren't documents that form the basis of the opinion or report. Any materials relating to advice or strategy are protected by litigation privilege so long as they don't relate to the foundation of the expert's own opinion. It would be too inefficient, and contrary to the purpose of *Civil Procedure Rules* (2008), to expect parties to retain one expert to provide an opinion and one to advise them on cross-examination.

PRACTICE – Discovery – relief from implied undertaking rule *Nassar v. Capital District Health Authority et al.,* Hfx. No. 216958, Wright, J., December 20, 2011; October 5, 2011 (orally). 2011 NSSC 464; **S639/22** ■ The parties have been involved in a long and protracted dispute over what the plaintiff alleges are systemic problems within the Capital District Health Authority (CDHA) and medical research groups at Dalhousie University (Dal). The claim is based on what the plaintiff feels was an abusive or wrongful exercise

of public authority. Extensive disclosure convinced him the problems were ongoing and should be addressed immediately. His lawyer wrote two lawyers for CDHA and Dal, enclosing copies of documents that were disclosed through the litigation process, and insisting that investigations be opened by the boards that oversee each institution. After concerns were raised (because the disclosed document should be protected by the implied undertaking rule), the plaintiff brought this motion asking the court to grant him relief from the rule. *Held,* motion dismissed. The ultimate question is whether the plaintiff has demonstrated a superior public interest that trumps the implied undertaking rule. This claim is first and foremost a private, personal matter. There is no evidence that a superior public interest will be served by disclosing these documents. There will ultimately be a full adjudication on the merits of all the allegations. As an aside, senior officials at Dal and CDHA are well aware of the allegations.

PRACTICE – Expert's report – physician's narrative, late delivery *Shaw v. J.D. Irving Ltd.,* Pic. No. 274457, Scaravelli, J., December 29, 2011. 2011 NSSC 487; **S641/1** ■ The plaintiff filed his medical records, including a letter from his doctor to another treating doctor, which contained an opinion on causation. The defendant moved to have the court redact the portion of the letter containing the opinion, arguing the *Civil Procedure Rules* (2008) (see Rule 55.14) were not intended to allow physician narrative opinion evidence on causation and further that the opinion was equivocal. The defendant also sought to have an expert report that was filed late declared inadmissible. *Held,* motion to redact the portion of the letter containing the opinion is denied: the doctor's notes were made during the course of treatment and not in the context of litigation. The notes contain sufficient information to support the opinion. Whether a causal connection has been established by this evidence is for the court to determine at trial. Motion to declare the late filed report inadmissible is granted: It's unacceptable that the report, which relates to causation, was only delivered to the defendant 10 weeks before trial. To admit it would circumvent the rules on expert reports.

PRACTICE – *Habeas corpus* – characterization of application as civil or criminal *Wilson v. Correctional Service Canada,* C.A. No., Saunders, J.A., December 9, 2011. 2011 NSCA 116; **S636/26** ■

PRACTICE – Judgments and orders – claim dismissed *Boudreau v. Stroud,* Claim No. 357768, Slone, Adjudicator, February 14, 2012. 2012 NSSM 10; **SmCl20/6** ■

PRACTICE – Limitation of actions – discoverability principle *C. (A.B.) v. Nova Scotia (Attorney General),* Hfx. No. 262658, MacAdam, J., December 23, 2011. 2011 NSSC 475; **S641/10** ■

PRACTICE – Limitation of actions – discoverability principle *C. (H.) v. Nova Scotia (Attorney General),* Tru. No. 285348, Scanlan, J., January 17, 2012; December 13, 2011 (orally). 2011 NSSC 494; **S642/19** ■

PRACTICE – Notice – calculation of time *Scotia Mortage Corp. v. Chalmers,* Hfx. No. 330446, Smith, A.C.J., October 4, 2011; September 27, 2011 (orally). 2011 NSSC 339; **S635/12** ■ Rule 72.11(3) of the *Civil Procedure Rules* (2008) says the effective date of a default judgment is 15 days after the date of sale by public auction if, as happened in this case, the mortgagee purchases the property. The court was asked to interpret Rule 94.02(1) to ascertain whether Saturdays and Sundays are included when calculating that 15-day period and to determine if the notice of motion was filed in time (ie., within six months of the effective date of the default judgment, as per Rule 72.12(1)(a)). *Held,* on the facts, the notice of motion was filed in time. Rule 94.02(1) provides that any rules that "permit or require" something to be done in a certain "number of days" are to be calculated without including Saturdays, Sundays or a weekday the Prothonotary's office is closed. Rule 72.11(3) doesn't permit or require something to be done in a number of days and Saturdays, Sundays and holidays are thus included in calculation of the 15 day period. While there may be case law that suggests courts have done otherwise in the past, none of those cases specifically addressed this issue and so this court is not bound by them. Six months from the date of judgment (the filing deadline for the notice of motion) was a Sunday and the following day was Easter Monday. The *Interpretation Act*, s. 19(k), provides that where a time limit falls on a Saturday or holiday (including Sundays), the time limit is extended to the next business day. While that Act doesn't specifically reference Easter Monday, the court accepts this was a holiday within the meaning of the Act. The notice of motion, having been filed the day after the holiday, was filed in time.

PRACTICE – Pierringer agreement – disclosure of settlement amounts *Ameron International Corp. et al. v. Sable Offshore Energy Inc. et al.,* C.A. No. 347078, Farrar, J.A., December 22, 2011. 2011 NSCA 121; **S636/30** ■ A number of parties settled with the plaintiffs to the main action (Sable). After their Pierringer agreements were approved by the court, the non-settling defendants moved to have the settlement amounts disclosed. Sable acknowledged it was possible the amounts paid could go to reduce the amounts otherwise payable by the appellant. The parties agreed the old *Civil Procedure Rules* (1972) applied. The chambers judge found that, while the settlement amounts are relevant (according to the broad test for relevance under the old Rules) to the eventual determination of damages, they needn't be disclosed at this stage of the litigation. The appellant (one of the non-settling parties) appealed, arguing the settlement amounts were not only relevant but also necessary to know the case it has to answer. No one challenged the chamber's judge's finding that the amounts are relevant. The narrow dispute was over whether they should be disclosed before trial (as the appellants suggested) or after. *Held,* appeal allowed, with costs of $2,500 plus disbursements payable to the appellants. The amounts will be disclosed to the non-settling parties, but not the judge; admissibility at trial is a matter for the trial judge to decide. The chambers judge erred in principle by failing to take into account the appellant's fundamental right to know the potential case it has to answer. It is necessary to know the potential value of the claim: it forms an important part of pre-trial preparation, including decisions about disclosure and settlement. Since Sable admitted the settlement amounts could potentially reduce the damages otherwise payable by the appellants, it is clear they are relevant to the amount of the claim and, hence, the case to be met.

PRACTICE – Production of documents – relevance, privilege (waiver), volume of documents *Halifax (Regional Municipality Pension Committee) v. State Street Global Advisors Ltd. et al.,* Hfx. No. 309063, Duncan, J., September 30, 2011. 2011 NSSC 355; **S639/7** ■ The plaintiff pension committee invested a substantial sum of money with the defendants who placed it with a prime-broker that eventually went into receivership. The money was frozen and the committee was now unable to access any of it. They sued the defendants, claiming: the

investment scheme was not sufficiently explained to them, and they weren't aware of the risks or told the prime-broker would have absolute control over the money. The defendants are an enormous international corporation. The plaintiff is a small organization, comprised of a small committee of voting members who are not involved in day-to-day management and a CEO who (along with a staff of five) makes the day-to-day decisions. Both parties made motions for disclosure, including electronic disclosure, and asked the court to set parameters, including the breadth of search terms to be used to locate electronic disclosure. In part, the defendants felt the plaintiff failed to meet its disclosure obligations by simply circulating a basic questionnaire asking committee members to search their computers for relevant information. Also at issue was the scope of the defendant's obligation to disclose; they felt, given their size and complex operational structure, an overly broad disclosure requirement could cost astronomical sums and yield an overwhelming number of irrelevant documents; and whether the plaintiffs waived privilege over a legal memorandum (prepared by their lawyers for them) by sending it to the defendant during negotiations and before the deal closed. The defendants felt the plaintiff waived privilege not only in relation to the memorandum, but also in respect of the supporting documents that were used to prepare it. *Held,* the court gave detailed directions with respect to every category of disclosure sought and also discussed the *Civil Procedure Rules* (2008) as they relate to a determination relevance. The defendants will only have to search for relevant disclosure from the custodians/decision makers involved with the fund in question. Custodians/decision makers will include, but are not limited to, the defendants' most senior management who had oversight of the decision to hire and retain the prime-broker. Requiring the defendants to broaden the search to everyone would be disproportionately costly and burdensome in light of the likely probative value of the information. The plaintiff's questionnaire was insufficient. While the plaintiff is free to choose this method, the questionnaire needs to be more comprehensive and include: broader search terms; explicit direction regarding the need to search deleted files and emails; and an offer of technical assistance if needed. Also while the plaintiff waived privilege over the memorandum, their waiver can't be presumed to (implicitly) extend to all of the supporting documents; however, by claiming the defendants never gave them details about the investment scheme, the plaintiffs have put matters addressed in the memorandum in issue. There are sufficient facts here to question whether there are inconsistencies between portions of the opinion outlined in the memorandum and the plaintiff's claim(s). The supporting documents can only be compelled if the memorandum is either unclear or misleading taken on its own. In order to assess if this is the case, the plaintiff must disclose the documents to the court and the court will decide.

PRACTICE – Production – relevance, privilege *Halifax (Regional Municipality Pension Committee) v. State Street Global Advisors Ltd.,* Hfx. No. 309063, Duncan, J., January 5, 2012. 2012 NSSC 6; **S641/17** ■

PRACTICE – Publication ban – interim injunction to preserve status quo by implementing publication ban *Raymond v. Brauer,* C.A. No. 375964, Fichaud, J.A., March 14, 2012. 2012 NSCA 30; **S645/1** ■

PRACTICE – Publication ban – pseudonym *C. (A.B.) v. Nova Scotia (Attorney General),* Hfx. No. 262658, MacAdam, J., December 23, 2011. 2011 NSSC 476; **S641/11** ■

PRACTICE – Small Claims Court – jurisdiction where existing action in Supreme Court *Tibert et al. v. Carter et al.,* S.C.C.H. No. 357711, Parker, Adjudicator, December 14, 2011. 2011 NSSM 66; **SmCl19/24** ■

PRACTICE – Summary judgment – arguable issue to be tried *Wilson v. BMO Nesbitt Burns Inc.,* Hfx. No. 321705, MacAdam, J., October 17, 2011. 2011 NSSC 373; **S635/20** ■ The plaintiff investment advisor left her former employer to work for the defendant. On her first day, she was presented with and signed a letter of employment, and a promissory note and loan agreement in relation to a $100,000 loan. The promissory note included a provision for immediate repayment upon termination. As long as she continued to work for the defendant, she would get a $20,000 bonus each year on the anniversary date of her employment, which would be applied to the balance of the loan. The letter of employment also referenced an "asset gathering bonus" should she meet specific targets. The plaintiff worked for the defendants almost 19 months before she was terminated. The defendant did not allege cause, and made an offer to pay money in lieu of reasonable notice. The plaintiff sued and the defendant counterclaimed for repayment of the loan. In her defence, the plaintiff raised three arguments: estoppel; the fact she did not obtain legal advice before signing the documents in question; and set-off. The defendant moved for summary judgment (on the evidence) in relation to their counterclaim. The plaintiff argued the defendant was required to deduct or off-set any monies it owed to her before it was entitled to a judgment on its counterclaim. *Held,* motion granted. The plaintiff failed to establish her defence to the counterclaim has a real chance of success. The estoppel argument won't succeed. The plaintiff could have asked for an opportunity to obtain legal advice before signing the documents. She admitted that, had she read them, she would have understood them. There was no coercion. This defence has no real chance of success. The fact that damages can't be determined doesn't mean summary judgment can't be entered on the question of liability. A court can grant summary judgment on some issues even if there are other issues that remain for trial. Here, the amount of the judgment can't be determined until the other issues, including whether the plaintiff is entitled to a credit against the outstanding loan, have been decided.

PRACTICE – Summary judgment – claim lacking in substance and detail *Kennedy v. Hewlett Packard (CANADA) Co.,* Syd. No. 354720, Murray, J., December 7, 2011. 2011 NSSC 502; **S642/28** ■

PRACTICE – Summary judgment – defamation *Robertson v. McCormick,* Hfx. No. 313736, McDougall, J., January 5, 2012. 2012 NSSC 4; **S641/13** ■ After the defendant (a principal) told the self-represented plaintiff (a substitute teacher at her school) he wouldn't be retained for the second semester, he brought an action claiming she defamed him. He didn't know the actual words that were used, but felt the court should infer they were defamatory given the result (losing his job). The defendant denied making any defamatory remarks and argued that, even if she had, the defences of qualified privilege and fair applied. She sought summary judgment either on the pleadings or on the evidence. *Held,* motions granted; the court found summary judgment warranted both on the basis of the (insufficient) pleadings and the evidence. While failing to plead the exact words that you are alleging to be defamatory isn't fatal, the statements alleged in the claim do no more than relay the plaintiff's version of what he believes was said. The failure to extend or continue a substitute's assignment

can't be regarded as an act of defamatory communication. In the alternative, the plaintiff's evidence doesn't raise a genuine issue. The bulk of his claim deals with his concerns over employment conditions and his upset over having been let go. None of this helps substantiate a defamation claim. Even if the plaintiff was able to show his claim had a real chance of success, the defences of qualified privilege and fair comment could succeed. Even the plaintiff said he didn't think the defendant felt any malice towards him until he brought this claim.

PRACTICE – Summary judgment – genuine issue for trial *Cameron Seafoods (2005) Ltd. v. Jumelet et al.,* S.K. No. 310467, MacAdam, J., October 13, 2011. 2011 NSSC 365; **S635/19** ■ The respondent, Jumelet, was an officer, director and employee of the plaintiff lobster fishing company (Cameron). He took a position with a competitor, the respondent BMC. Cameron sued Jumelet and his wife, Weijer, for breaching their fiduciary duties to Cameron and claimed against BMC on the basis of vicarious liability. Cameron moved for summary judgment on the pleadings on the question of Jumelet's liability. *Held,* motion granted. Jumelet is liable for having breached his fiduciary duties to Cameron. As an officer and director, he clearly held a duty to act in Cameron's best interests. The court rejects the argument that he was only a fiduciary in a "purely technical sense" because he held the position at the pleasure and will of Mr. Cameron. He breached his fiduciary duties on three occasions by lending assistance and giving confidential information to a potential competitor while he was Cameron's second-in-command. Any assistance he provided after he was terminated is not a breach, regardless of whether he had officially tendered his resignation from the board or not, given the reality that he only held these positions at Mr. Cameron's will. None of the impugned activities are in dispute and so there are no material facts requiring trial. The court did not embark on a separate discussion regarding Jumulet's proposed defences although they are referenced (and rejected) throughout the decision.

PRACTICE – Summary judgment – no cause of action *Symington v. Halifax (Regional Municipality) et al.,* Hfx. No. 214598, Robertson, J., December 22, 2011. 2011 NSSC 474; **S639/27** ■ The plaintiff (a police officer) was off work on medical leave (physical injury and stress) when he was the subject of a five-week police investigation into whether or not he was committing fraud by occasionally doing other work while collecting sick benefits. The plaintiff sued, alleging malicious procurement of a search warrant, malicious prosecution, defamation, negligence and intentional infliction of mental suffering. Following a motion by the defendants, the court struck the plaintiff's claim for failing to disclose a cause of action. On appeal, the appeal court found the essential character of the matter was police discipline, which must be arbitrated according to the relevant collective agreement, but they also found he should be allowed to pursue his claim of malicious prosecution. His new statement of claim still contained allegations that were disallowed. The defendants moved to have portions of the claim struck as an abuse of process under the *Civil Procedure Rules* (2008), and to have the remaining claims struck on the basis that: either the pleadings are insufficient (Rule 13.03) and/or the evidence discloses no viable cause of action (Rule 13.04). *Held,* motions granted. The appeal court was only asked to decide whether the chambers judge was correct in striking the claims on the basis that they were under the exclusive jurisdiction of the collective agreement or should be dismissed for issue estoppel or abuse of process. While that court said the plaintiff could proceed with his cause of action based on malicious prosecution, that is not a defence to these motions. The appeal court meant that the plaintiff could go on to have that claim considered on its merits. The pleadings lack sufficient detail. Bare assertions of a hostile work environment don't meet the threshold. Proceedings weren't initiated. This was only a short investigation that was concluded without charges being laid. On the evidence, there is no genuine issue for trial. It can't be said the investigating officer's conduct fell short of a reasonable standard.

PRACTICE – Summary judgment – no real chance of success *Keddy v. Blue Cross Life Insurance Co. of Canada,* Hfx. No. 323543, Wood, J., January 3, 2012. 2012 NSSC 1; **S641/12** ■ The defendant applied for summary judgment, alleging that the plaintiff was not totally disabled within the terms of a long-term disability policy. The plaintiff had continued to work up until the termination of his employment but his doctor later diagnosed carpel tunnel syndrome and gave the opinion that he had been disabled despite continuing to work. The plaintiff argued that a person could be performing their job functions and still be disabled if they did so contrary to common care, prudence and medical advice. *Held,* application for summary judgment granted; although the plaintiff suffered from carpel tunnel syndrome, his own evidence conceded that he had continued to perform all of his job functions, albeit with significant difficulty and, therefore, he was not disabled within the terms of the policy. The court relied on the decision in *Paul Revere Life Insurance Co. v. Sucharov* (1983) (SCC) in finding that the assessment of disability claims needs to be approached in a holistic fashion and not broken down into an analysis of the insured's ability to perform segmented duties.

■ REAL PROPERTY

REAL PROPERTY – Easements – application for injunction dismissed *Cobalt Investments Ltd. v. Panko,* Hfx. No. 346645, Wood, J., January 20, 2012. 2012 NSSC 34; **S642/14** ■

REAL PROPERTY – Easements – right of way, driveway *Thompson et al. v. Bauld et al.,* Hfx. No. 349594, Coady, J., February 15, 2012. 2012 NSSC 72; **S643/30** ■

REAL PROPERTY – Quieting of title – request for certificate of title to water lot adjoining the property in original application, costs *Creighton v. Nova Scotia (Attorney General),* Bwt. No. 220834, Pickup, J., November 25, 2011. 2011 NSSC 437; **S638/27** ■ The court found the plaintiff had good title to the disputed lands. The defendant, Car-Con, was granted a certificate of title to a remaining portion of land that was not being claimed by the plaintiff. The parties couldn't agree on costs. The plaintiff wanted solicitor-client costs, or a significant lump sum award. His actual fees totaled $133,992, including HST. He also claimed several disputed disbursements, including his travel/food/hotel costs, his lawyers' travel/food/hotel costs, expert fees of over $14,000, an amount for Quicklaw searches and reimbursement for $8,300 spent repairing damage to the lot. The defendant argued costs should be party-and-party costs calculated using the 2004 Tariffs. *Held,* lump sum costs of $50,000 awarded to the plaintiff. Costs calculated under Tariff A would be $30,250, which isn't a substantial contribution to the plaintiff's actual costs; $50,000 is reasonable. The following aren't properly claimed as "disbursements": travel/food/hotel costs for the lawyers when the plaintiff chose to use out-of-town lawyers, the plaintiff's travel/food/hotel costs to attend the trial, and Quicklaw charges (which are now presumed to be a part of a lawyer's regular monthly overhead). The

cost to repair the damage to the lot isn't a recoverable disbursement; it could only be recovered as part of a damage claim.

REAL PROPERTY – Right of way – express grant or prescriptive rights not proven *Shea v. Bowser,* Hfx. No. 348548, Rosinski, J., December 5, 2011. 2011 NSSC 450; **S639/5** ■

REAL PROPERTY – Trespass – no damages, cutting trees out of necessity *Compton v. Hurley et al.,* Claim No. 333425, Slone, Adjudicator, October 5, 2011. 2011 NSSM 61; **SmCl19/17** ■ The claimant paid $40,000 in 2005 for land located adjacent to the defendants' home. She lives elsewhere, but claimed she visited the land several times over the years. Last year, she considered selling it. A friend offered her $45,000, sight unseen. When he went to see the lot, he found there was less of a tree cover blocking the road than he thought there would be. The lot was less appealing to him, so he reduced his offer to $35,000 to take into account the fact a privacy fence would cost $10,000. The claimant accused the defendants of cutting the trees and sued for trespass, seeking $25,000 in damages for what she claimed was the decrease in her land's value. She brought a real estate agent who testified the land was now worth around $30,000. The defendants entered evidence to show the trees were scraggly, and many had blown over. They said the trees were a hazard to the power lines and there was some suggestion NS Power might have cut some down. *Held,* claim dismissed. There were some credibility issues with the claimant's evidence. Credibility isn't just truth telling; it's also the capacity to be accurate, fair and balanced in one's recall. While there was a technical trespass onto the land, the claimant didn't suffer the damages she claimed. There is no reliable, admissible evidence confirming the lot's present market value. The verbal offers to pay were made by a friend. The real estate agent who testified for the claimant wasn't qualified as an expert and her opinion can't be relied on. The court took judicial notice that several local wind events have caused trees in the area to break and/or fall over. The evidence doesn't appear to support the assertion the scraggly trees provided great privacy cover. The cost of a privacy fence hasn't been justified. The wood was softwood and had little value as firewood so it's highly unlikely the defendants profited from cutting it up.

■ SALE OF LAND

SALE OF LAND – Agreement of purchase and sale – condition unfulfilled *MacInnis v. Arab,* Claim No. 353530, Slone, Adjudicator, October 5, 2011. 2011 NSSM 64; **SmCl19/20** ■ The claimant bought a house from the defendant in December 2010. As a condition of sale, the defendant agreed to build a fence and modify decks before June 1, 2011. The parties agreed to a hold back of $10,000 (an amount both said was suggested by their lawyers and real estate agents). Their agreement was silent on the consequences of default and failed to say that time was of the essence. The claimant heard nothing from the defendant until May 28. The defendant failed to start the work as promised more than once and the claimant brought this claim (seeking a return of the hold back) in the middle of June. At issue was whether: time was (implicitly) of the essence; the claimant waived his right to performance by June 1; and a refund of the hold back is an appropriate remedy. The claimant asked for $402.50 in costs, which is the amount he spent having his lawyer write letters to try and resolve the matter. *Held,* claim allowed, the claimant is entitled to a return of the hold back. It's very unusual to have such a relationship continued beyond closing in this manner. The defendant, who has experience buying and selling houses, should have known the claimant expected the work to be completed according to the time-line in the agreement. Five months was enough time to allow for unanticipated events and weather that could delay completion. The defendant had no reasonable excuse for failing to complete; he repudiated the contract. There's no clear evidence the claimant waived his entitlement to strict performance. At most he allowed a short extension, which he was under no legal obligation to do. It's appropriate to refund the $10,000 hold back. To suggest another remedy would potentially prolong this relationship and lead to further conflict. The Small Claims Court Regulations specifically preclude awarding agent or barrister's fees, and this includes legal costs incurred prior to the claim being filed.

SALE OF LAND – Negligent misrepresentation – septic system *Oderkirk et al. v. Crittenden,* Claim No. 354169, Slone, Adjudicator, October 12, 2011. 2011 NSSM 65; **SmCl19/21** ■

SALE OF LAND – Property Condition Disclosure Statement – well *Crann v. Hiscock,* Claim No. 357442, Slone, Adjudicator, January 3, 2012. 2012 NSSM 9; **SmCl20/5** ■

■ TORTS

TORTS – Repair services – repairs not approved *Burnside Truck Centre v. O'Quinn,* Claim No. 353280, Slone, Adjudicator, November 16, 2011. 2011 NSSM 63; **SmCl19/19** ■

■ TRADE REGULATION

TRADE REGULATION – Validity of legislation – Dairy Industry Act regulations *Taylor et al. v. Dairy Farmers of Nova Scotia et al.,* C.A. No. 342854, Fichaud, J.A., January 4, 2012. 2012 NSCA 1; **S640/3** ■ The *Dairy Industry Act* authorized regulations that governed the "terms and conditions on which the transfer [of production quotas] may take place", but did not expressly mention price. The appellant dairy farmers had unsuccessfully sought an order that a regulation prescribing a cap on the price for the transfer of production quotas between dairy farmers was *ultra vires*. They now appealed to the Court of Appeal. *Held,* appeal dismissed; from an analysis of the plain meaning, statutory context and legislative objective of the enabling legislation, the regulation is *intra vires*; the price to be paid for quota is one of the "terms and conditions" of transfer within the enabling provisions of the *Dairy Industry Act*. The enactment of the regulation was fully consistent with both the legislative objective of promoting supply management in the industry and the Board's powers over production. Looking at the legislative context, the purpose of the *Dairy Industry Act* is for producers to regulate the production of raw milk and the cap on quota was critical to this regulation.

■ WILLS AND ESTATES

WILLS AND ESTATES – Claim against estate – insolvent estate *Boutilier Estate v. Capital One Bank et al.,* Hfx. No. 344682, Coughlan, J., December 6, 2011. 2011 NSSC 439; **S639/14**

Before his death, the testator entered into a separation agreement that required him to keep his ex-wife as sole beneficiary of his DND supplementary death benefit (worth $30,000 at the time). The agreement provided that, if he failed to do so and died, the wife would

be entitled to a judgment of no less than $30,000 against his estate. At the time of his death, the value of the benefit was $5,000. The self-represented ex-wife didn't secure a judgment, but she applied to prove she is a creditor of the estate as required by s. 63 of the *Probate Act*. *Held,* the estate owes the ex-wife a debt of $30,000. She is the only creditor who has proven her claim and the estate will be divided in accordance with s. 83(3) of the Act.

WILLS AND ESTATES – Costs – proof in solumn form *Van Kippersluis v. Van Kippersluis Estate,* Ken No. 12441; Ken No. 349015, Warner, J., October 31, 2011. 2011 NSSC 399; **S637/12** ■ When the applicant unsuccessfully applied for proof of the will in solemn form, his application under the *Testator's Family Maintenance Act* was deferred to a later date. The estate had provided extensive disclosure prior to the hearing and the applicant declined the opportunity to interview or discover the lawyer who had taken the instructions and prepared the will. The hearing, originally scheduled for four days, took seven days, with much of the evidence presented relating to the other application. The applicant claimed costs out of the estate and the estate claimed costs from the applicant. *Held,* both cost requests dismissed. Although the initial filing for proof in solemn form was reasonable, based on the extensive disclosure provided and the offer to examine the lawyer (whose evidence on the first day of trial was credible and virtually determinative of the issue), it was unreasonable for the applicant to proceed to a hearing, let alone one lengthened to seven days for evidence not relevant to the application. The applicant did not appear to have the means to pay a costs order, his personal legal costs would eat up his gift from the estate and it was more appropriate to consider the estate's costs in defending this application as a factor in the *Testator's Family Maintenance Act* application.

WILLS AND ESTATES – Procedure – costs *Jollimore Estate v. Nova Scotia (Public Achives),* Hfx. No. 335260, Coughlan, J., January 3, 2012. 2012 NSSC 8; **S641/15** ■ The testatrix, Roberta Jollimore, was killed by her son, Gregory Jollimore, who then took his own life. Ms. Jollimore's will left her estate to her son, unless he predeceased her, in which case it was to go the Public Archives. The court decided the son was sane when he killed his mother and therefore neither he nor his estate could benefit from her estate. Several extended family members felt the will's triggering condition for the gift to the archives (the son's prior death) was not met because he died after her. They argued they should each be entitled to a share of the estate according to the laws of intestacy. The court found in favour of the Archives. Costs were in issue. The Archives argued some costs should be paid from the son's estate since his wrongdoing caused this mess. *Held,* the estate's personal representative and the lawyer for the son's estate are awarded solicitor and client costs from Ms. Jollimore's estate. This application was necessary in order to have the court determine the cause of her death, whether the son's estate could benefit from her estate, and whether an intestacy occurred as a result of the will's wording. It was reasonable for the potential heirs to make the arguments they did. They will have their costs paid by the estate on a party and party basis, in an amount to be agreed upon or determined by the court. The court declined to require the son's estate to pay costs. It may be that the Archives will bring a separate action against his estate.

WILLS AND ESTATES – Wills – effect of divorce *Hayward v. Hayward,* C.A. No. 334009, Oland, J.A., December 20, 2011. 2011 NSCA 118; **S636/28** ■ The testator made a will in 1995, naming the applicant (his then wife) executor and sole beneficiary, and the respondent, Michael Hayward (their son) as alternate. The testator and the applicant divorced in 2004, and their Corollary Relief Judgment incorporated a separation agreement with standard clauses professing to release all rights to each other's estates. They both obtained independent legal advice before signing the agreement and the testator understood that, according to the law at the time, the will would continue to stand despite the various releases. He didn't make a new will and the parties remained good friends. He died in 2008, a few weeks after the *Wills Act* was changed (in part) to allow a court to declare a 'writing' a valid will (see s.8A) and reversing the presumption on divorce (see s. 19A). Under the new s.19A, a divorce now means a will must be construed as if the ex-spouse died first unless "contrary intention appears by the will or a separation agreement". The son was granted administration of the estate, based on the will and divorce documents. The applicant successfully applied to have him removed and herself appointed sole executor and beneficiary; the son appealed on his own behalf and on behalf of the estate. At issue was (in part) whether the judge erred by finding that s. 19A didn't apply and failing to consider the separation agreement under s. 8A. *Held,* for different reasons, appeal allowed; all parties' solicitor and client costs will be paid out of the estate since these were novel issues. The court considered the amendments to the Act and relevant case law in detail. There was some disagreement over the applicable standards of review. Oland, JA found s. 19A, on its face, clearly demonstrates a legislative intent that it operate retroactively. The judge was wrong to find otherwise. The presumption against interference with vested rights doesn't apply because no right was vested until the moment of the testator's death. There's nothing in the separation agreement that indicates a 'contrary intention'. There's nothing in s. 8A to preclude an inquiry if the writing in question doesn't explicitly reference the prior will. The judge erred by failing to consider whether the separation agreement was a writing that embodied the testator's intentions. Beveridge, J.A., concurring in result, found there is no need to decide whether s. 19A operates retroactively. It deals with the current consequences of a prior event. The Act was changed before the testator's death and no longer assumes a divorced person intends to benefit an ex spouse unless they clearly indicate otherwise. The testator is presumed to know the law in effect at the time of his death. Whether this was in fact the case doesn't matter. The law says he didn't intend for his ex-wife to continue as his executor/beneficiary and there is no evidence to support a contrary intention. The judge considered the separation agreement and made no error by failing to find s. 8A applied. Fichaud, J.A., concurring in result, found s. 19A is about the construction of wills. Wills are construed at the time of death. There's no need to apply the section retroactively. It applies to the testator's will because it was construed after the provision came into effect. The appeal should have been allowed under s. 8A, also. The separation agreement contains a release of each other's estates. The reference to 'estate' should be taken to includes a testamentary estate after death, which includes a will. The applicant signed an agreement forsaking any interest in the testator's estate and then brought an application to share in and administer it. The separation agreement was evidence of the testator's intentions.

WILLS AND ESTATES – Wills – writing not in compliance with formal requirements *Thompson v. McKenney Estate,* Yar. No. 330966, Coady, J., December 29, 2011. 2011 NSSC 488; **S641/3** ■ The testator's will left one dollar to each of his two surviving adult children, and the remainder of his meager estate (worth approximately $3,000) to one of his only friends, Mr. Harris. His daughter (the applicant) challenged the will, and tried to have the court declare a note purported

to be signed by him and written according to his instructions a "writing" pursuant to s. 8A of the *Wills Act*. She wrote the note while she visited him in hospital after he suffered a stroke. Hospital records suggested there were serious concerns about the testator's capacity at the time he signed the note. *Held,* application dismissed on the basis that the note is not a valid will. It doesn't represent the testator's true intentions based on the evidence of his relationships with both the applicant and Mr. Harris. The court also noted the testator was not sufficiently competent to make a will when it was written.

■ WORKERS' COMPENSATION

WORKERS' COMPENSATION – Appeals – interpretation of "accident" *Halifax (Regional Municipality) v. Hoelke et al.,* C.A. No. 326354, Farrar, J.A., October 21, 2011. 2011 NSCA 96; **S636/6** ■ The respondent, Hoelke, had worked as a bus driver for the appellant municipality (HRM) for almost 20 years when he was diagnosed with a precancerous skin condition on the left side of his face. He filed an accident report (with supporting medical evidence), claiming it was caused by exposure to sun while working. On appeal, the Workers' Compensation Appeal Tribunal (WCAT) agreed his condition was a "personal injury by accident arising out of or in the course of his employment"and hence compensable under the *Worker's Compensation Act* (Act). HRM appealed, pointing out his condition had never caused him to miss work or lose income. At issue was whether WCAT erred in its interpretation of 'accident' or in its overall finding. *Held,* appeal dismissed. The court was able to follow WCAT's line of reasoning on causation, and the overall finding was within a reasonable range of outcomes. While WCAT did not spell out whether they decided Hoelke's condition was an 'occupational disease' or a 'disablement', it's implicit in their decision they felt it was the latter. While 'disablement' isn't defined, the Act is clearly intended to deal with the mechanisms of injury (ie, how an injury occurred) and not its effects. It's irrelevant Hoelke didn't miss work or lose income as a result of his condition. What matters is that the medical evidence supports his claim that the condition was caused by his working environment.

Nova Scotia Law News marks the end of an era

Susan Jones
Information Services Librarian

This is the final edition of *Nova Scotia Law News*. The Nova Scotia Barristers' Society has produced this publication for lawyers in the province for the past 38 years.

The idea took root in 1973 when the Continuing Legal Education Committee recommended to Bar Council, as it was then called, that a small publication be produced for the membership. The original vision was to provide information on recent developments in the law, information on statutory changes and briefs of unreported decisions. That small publication was *Nova Scotia Law News* and the first issue was released in June 1974.

For the past 15 years, *Nova Scotia Law News* has been prepared under the direction of Barbara Campbell, Director of Library & Information Services (L&IS). Since 2003, it has been distributed as a removable insert in the *Society Record*. This changed in 2011, when the publication of the then-quarterly *Society Record* was reduced to two issues per year. Since then, *Nova Scotia Law News* remained quarterly, with two editions in print format and all four editions published on the Society's website at http://nsbs.org/nova-scotia-law-news.

As in its early days, the major portion of today's publication is devoted to recent reported and unreported decisions, including digests of decisions of precedential value. In addition to decisions, *Nova Scotia Law News* has often included articles of interest and brief notes on recently passed legislation. Personal injury and sentencing tables were added in 2002 and case comments on topical decisions began to appear on a regular basis in 2005.

To assist lawyers in using *Nova Scotia Law News*, an index to its decisions – called *Nova Scotia Current Law* – was created. The subscription-based index organizes the decisions by case name, subject and statutes considered. The Society's collection of indexes dates back to 1967 and is very useful when looking for county court cases as well as older, unreported decisions.

The work involved in obtaining decisions from the courts for *Nova Scotia Law News*, and including value-added material to those decisions such as subject headings and digests, enabled L&IS to create a database of the decisions in 1997. It was launched and made available to the membership in 2000 as *Law News Online*. This online, searchable database includes the digests that appear in *Nova Scotia Law News*, as well as the full text of decisions.

Since 2002, the decisions appearing in *Nova Scotia Law News* and *Law News Online* have also been included in *InForum*, the Society's biweekly, electronic newsletter sent to lawyers, the judiciary and other subscribers via email. Reviewing the decisions listed in *InForum* is an excellent way to keep up with what has been released from the courts over the preceding two weeks. (See http://nsbs.org/inforum.)

What lawyers may not realize is that without the collection of decisions amassed through the publication of *Nova Scotia Law News*, many decisions from this province would not be available electronically through sources like CanLII, LexisNexis Quicklaw, and Westlaw Canada's LawSource.

Nova Scotia Law News – and its various related components developed over the years – would not have been possible without the hard work and dedication of the staff at Library & Information Services and *NSLN* digesters. And no history of *Nova Scotia Law News* would be complete without mentioning the contributions of a large roster of volunteers, who review every decision, subject heading and digest. The names of those individuals are listed here in this last edition, on the following page.

WITH THANKS

After 38 years, this month marks the end of the *Nova Scotia Law News.* The longevity of this publication is due in large part to a tireless roster of volunteers who reviewed every subject heading and digest appearing in these pages. Library & Information Services would like to thank the following volunteers, past and present, who gave so generously of their time and expertise.

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