A2J Case Law from Nova Scotia

Contents

Methodology

Both Westlaw and CanLII were used to search Nova Scotia court decisions (appellate and non-appellate courts; tribunal cases were excluded). When entering the term "access to justice" in the search bar, Westlaw returned 219 cases (64 at the appellate level) and CanLII returned 191 cases (49 at the appellate level).

The term "access to justice" was searched in combination with the following terms (as well as variations on these terms) to determine if more on-point cases would be returned:
"access to the courts"
"access the civil justice system"
"right to appear in court"
"have your day in court"
"access to legal advice"
"equality of outcomes"
"access to counsel"

Only a few cases were returned with the addition of the above terms.

The Court of Appeal cases were reviewed first, followed by a review of cases from specific subject areas as classified by Westlaw (e.g., family, criminal, evidence).

This memo provides an overview of the 35 cases that have substantially discussed or defined access to justice under the following headings/areas of law:
family law;
criminal law;
vexatious litigants;
standing;
civil practice and procedure;
class actions;
constitutional law;
evidence;
professional negligence; and
costs.

The Appendix provides a table summarizing the key points from each case with respect to access to justice.

Family Law

Rules of Procedure

Tarlton v. Jackson

In *Tarlton v. Jackson*, 2014 NSSC 231, Tarlton applied to the Nova Scotia Supreme Court to terminate his child support obligations. The Court had to decide whether Rules 59.21 and 59.22 of *Nova Scotia Civil Procedure Rules* require an applicant who seeks to terminate child support to file any of the financial statements identified in Rule 59.22. In determining this, the Court engaged in a lengthy discussion about the principles of access to justice with respect to resolving family disputes. The Court commented as follows:

[3] This application presents an opportunity to comment on the need for our system of resolving family disputes to be expeditious, to be efficient, to be cost effective and to be timely. We are in an era when people are have increasing difficulty accessing justice, which often means cost effective and expeditious access to the Courts. This issue is raised in this situation. It is important to interpret the Rules governing the processes in this Court in a manner that lessens the burden on individuals because of the resulting costs, delay and hardship for families of both Applicants and Respondents and in particular, the children of these families.

[4] Much has been discussed in legal circles in Canada over the last year or two about the responsibility of all justice stakeholders to ensure better access to justice and the role to be played by Judges, administrative staff and lawyers in achieving this objective.

. . .

[8] It is important that we be mindful of the role, the important role that is played by the intake process and front line staff, lawyers and Judges in determining the extent to which we can achieve these objectives in the area of family law. Just as the absence of disclosure is often described as a "cancer" in family law; the requirements for unnecessary and burdensome disclosure and processes are obstacles to accessing justice. Therefore, when we read the Rules and consider an application, we must, as a Court and legal community, be mindful of opportunities to lessen the paper and process burden on individuals, a burden which can result in delay and costs. Eliminating unnecessary filing requirements and processes by the exercise of discretion is an early opportunity to improve access to justice.[1]

Forum Conveniens

Armoyan v. Armoyan

Armoyan v. Armoyan, 2013 NSCA 99, involved divorce proceedings in which the parties filed for divorce in different jurisdictions (the wife filed in Florida and the husband filed in Nova Scotia). The courts of both jurisdictions conducted proceedings to determine which was the convenient forum. The Florida process reached a conclusion with an order for child support and spousal support in the divorce judgement. The Supreme Court of Nova Scotia (Family Division) determined that Nova Scotia was the convenient forum. Ms. Armoyan appealed that ruling.

In determining the jurisdictional/*forum non conveniens* issue, the Nova Scotia Court of Appeal followed the principles of comparative fairness and efficiency, in that the governing objective of the court was to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient.[2] In the Court's view, "access to justice is central to the fair and efficient administration of justice."[3]

Despite the earlier Florida ruling regarding child support and spousal support, Mr. Armoyan argued that "Florida's slate should be wiped clean, and everyone should start again in Nova Scotia."[4] In response, the Court discussed the different situations of the parties, in that Mr. Armoyan has "the multi-million dollar capital" to pay for ongoing litigation, and Ms. Armoyan is "in financial tatters, with no resources for a replay." The Court stated as follows:

[1] The Court also quoted at length the Supreme Court of Canada's case *Hryniak v. Mauldin*, 2014 SCC 7, which discussed the courts' role with respect to access to justice, specifically using summary judgment as a tool for enhancing access to justice because it "can provide a cheaper, faster alternative to a full trial."
[2] 2013, NSCA 99, para. 273.
[3] Ibid., para. CCLXXXIV.
[4] Ibid., para. CCLXXXVII.

Had Mr. Armoyan complied with his Florida court-ordered interim support payments and with the Florida Court's orders that he reimburse Ms. Armoyan's costs, then the significance of this factor might recede somewhat. But that is not his position. Having bled Ms. Armoyan financially with litigious shenanigans, he seeks to disregard the resultant costs awards against him and the Interim Support Order, then take advantage of the financial disparity in a fresh proceeding.

In my view, a consideration of how these circumstances affect access to justice is essential to the analysis of comparative fairness and efficiency under the *forum non conveniens* principles, s. 12 of the *CJPTA*, and Justice LeBel's comments in *Van Breda*.

. . .

Saying that Ms. Armoyan made her Florida bed and must lie in it does not, in my respectful view, address the impact on access to justice, and comparative fairness and efficiency, that has resulted from Mr. Armoyan's campaign of attrition.[5]

Simmons v. Ferguson

In *Simmons v. Ferguson*, 2018 NSSC 262, both parties filed for divorce in different jurisdictions (the wife filed in Quebec and the husband filed in Nova Scotia). The Supreme Court of Nova Scotia (Family Division) had to determine if it had the jurisdiction to order a person living in Quebec to pay child support for children living in Nova Scotia. In considering this, the Court stated as follows:

[37] The case for a Court to assume jurisdiction and to deal with the child support issue when a prospective payor lives in another jurisdiction is strengthened when the Court is required to deal with the custody issue pertaining to the subject child(ren). The clear direction of the Supreme Court is that Courts must do more to facilitate access to Justice for Canadian families.[6]

The Court went on to quote from the Supreme Court of Canada's decision in *Hryniak v. Mauldin*, 2014 SCC 7 in which the Supreme Court directed lower courts as follows:

[1] Karakatsanis J. — Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

[5] Ibid., paras. CCLXXXVIII-CCXCI.
[6] 2018 NSSC 262, para. 37.

[2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.[7]

Child Protection
Children's Aid Society of Inverness/Richmond v. C.S.L.
Children's Aid Society of Inverness/Richmond v. C.S.L., 2009 NSSC 207, involved an application from the Children's Aid Society of Inverness/Richmond ("the agency") for permanent care of a child who had been taken into care of the agency due to the mother's drug problems. The paternal grandmother made an application seeking custody of the child. The Supreme Court of Nova Scotia (Family Division) dismissed the agency's application and granted the grandmother's application for custody.

The Court found that the agency made an error in its processes by not considering placing the child with relatives. The Court also found that the grandmother was denied access to justice because of her inability to retain private counsel in the matter and afford Legal Aid. The grandmother also had difficulty in putting forward a plan for custody as her first language was French and had difficulty hearing. In discussing the imbalance between the situation of the parties, the Court commented as follows:

[367] There are individuals who come before the Court who are well equipped, well knowledgeable of how to access services and obtain assistance in an unending fashion and there are others who defer without question to the agency and the Court's authority. In this instance, E.R. deferred to the sophisticated process and what she perceived to be the authority of the agency to demand that she comply with the Court's requirement to file a plan.

[368] The Court has to be vigilant to address disabilities or vulnerabilities that are evident to ensure that all persons, including those made vulnerable by disabilities, have and appear to have access to justice.[8]

Criminal Law

Application for Habeas Corpus
Richards v. Springhill Institution

[7] Ibid., para. 38, quoting from *Hryniak v. Mauldin*, 2014 SCC 7, paras. 1-2.
[8] 2009 NSSC 207, paras. 367-368.

Richards v. Springhill Institution, 2014 NSSC 120, involved an application by Springhill Institution to dismiss a prison inmate's application for *habeas corpus* because the court lacked territorial competence to hear it. At the time of his application, the inmate was in involuntary segregation and his security classification had been increased from medium to maximum.

In considering the application, the Supreme Court of Nova Scotia considered a number of overarching legal principles, including that "the significance of the interest at stake here demands a speedy resolution process. Access to justice, particularly from an inmate's perspective is tied to the timeliness of the potential relief."[9] Later in the decision, the Court commented that "the respondent's position in challenging territorial jurisdiction seems counter-productive to the principle of ensuring efficient and expedited access to justice for such a serious remedy as *habeas corpus*."[10] The Court ruled that such applications must not be slowed down by an inflexible approach by the Courts:

[58] The desirability of avoiding conflicting decisions in different courts and enforcement concerns is not an issue. The fair and efficient working of the Canadian legal system as a whole is an important factor, particularly given the fact we are dealing with a *habeas corpus* application. Such applications require timely access to justice; not an inflexible approach by the Courts. Courts are not to stand in the way of the enforcement of such an important remedy, neither should the Respondents. Courts are mandated to ensure timely access to justice in these matters.[11]

The Court ultimately dismissed the respondent's application. On appeal (2015 NSCA 40), the Nova Scotia Court of Appeal upheld the lower court's decision and commented that "this case is fundamentally about ensuring access to justice" and that the lower court's decision "would ensure timely access to justice" for the prisoner.[12]

Procedures for Testifying in Court

R. v. S.D.L.

In *R. v. S.D.L.*, 2017 NSCA 58, the accused appealed a conviction involving the sexual touching of his son, challenging the trial judge's decision to allow key Crown witnesses to testify against him by way of video link (as provided for under s. 714.1 of the *Criminal Code*), as opposed to face-to-face in the court room.

The Nova Scotia Court of Appeal allowed the appeal and ordered a new trial. In its decision, the Court proposed a number of guiding principles for Nova Scotia trial judges when considering s. 714.1 applications , including the following:

[9] 2014 NSSC 120, para. 41.
[10] Ibid., para. 48.
[11] Ibid., para. 58.
[12] 2015 NSCA 40, paras. 221 and 227.

1. As long as it does not negatively impact trial fairness or the open courts principle, testimony by way of video link should be permitted. As the case law suggests, in appropriate circumstances, it can enhance access to justice.[13]

Civil Law

Vexatious Litigants
Tupper v. Nova Scotia (Attorney General)
Tupper v. Nova Scotia (Attorney General), 2015 NSCA 92, involved a case in which a man had been found 75 percent liable and ordered to pay damages after hitting a pedestrian 30 years ago. He launched multiple proceedings and appeals against this order as a self-represented litigant. In one decision, the Nova Scotia Supreme Court declared Mr. Tupper to be a vexatious litigant and restrained him from pursing any related litigation without first obtaining leave of the Court. Mr. Tupper appealed that decision. The Nova Scotia Court of Appeal dismissed Mr. Tupper's appeal.

In its decision, the Court quoted from the Action Committee on Access to Justice in Civil and Family Matter's *Access to Civil & Family Justice: A Roadmap for Change* report, as well as the Canadian Bar Association's Access to Justice Committee report, *Reaching Equal Justice: An Invitation to Envision and Act*, both of which highlight the challenges self-represented litigants face in receiving meaningful access to justice.[14]

In considering the principles espoused in these reports as well as from Supreme Court of Canada decisions, the Court of Appeal stated as follows:

[47] Motivated by this leadership, courts throughout the country are working with their respective bars and justice departments to promote initiatives that enhance access to justice. Assistance for legitimate self-representatives is a central theme.

[48] From this emerges a third related principle: one that draws us back to the challenges with vexatious litigants. In our desire to help, Courts cannot accommodate to the point of tolerating abuse. As noted, in our adversarial system, abuse by one party directly prejudices the opposing party and erodes the public's confidence in the system generally. So courts can simply not tolerate abuse by any party.

[13] 2017 NSCA 58, para. 32.
[14] 2015 NSCA 92, paras. 44-45.

[49] Therefore, in the end, it all comes down to this final principle. Courts must strive to strike that appropriate balance between maximum accommodation for legitimate self-represented litigants and minimum prejudice to the opposing party and the system generally.[15]

H. (V.G.) v. H. (P.L.)

In *H. (V.G.) v. H. (P.L.)*, 2009 NSSC 272, VGH applied to the Supreme Court of Nova Scotia to rescind an order by Justice Kennedy to pay $10,000 to the Prothonotary as security for costs pursuant to s. 42.01(1) of the Civil Procedure Rules. Justice Kennedy made the order following the applicant's ninth application to the court to reduce or terminate his child support obligations, on the basis that the application was vexatious.

In rejecting the application, the Court reviewed the law on vexatious litigants. It quoted from the Manitoba case *Winkler v. Winkler*, wherein the judge commented that "it is difficult to think of a more fundamental human right than the right to access our justice system. No one should have that right restricted except for the clearest and most compelling of reasons."[16] It also quoted from the Law Reform Commission of Nova Scotia's Final Report of April 2006 on vexatious litigants: "Canadian courts agree that access to justice is a fundamental right in our society. Restricting that right will only be done in exceptional circumstances."[17]

Cram v. Nova Veterinary Clinic

In *Cram v. Nova Veterinary Clinic*, 2016 NSSC 181, the plaintiff brought a civil action against a veterinarian, a veterinarian clinic, and the veterinary medical association after his complaint about the veterinarian to the association had been dismissed. The defendants sought an order to dismiss the claims and to prevent the plaintiff from taking further actions or proceedings against them without leave of the court.

In granting the defendants' request, the court considered the principles of access to justice and the importance of making court processes more user friendly and available to the public, as well as the limitations on access to the courts:

[11] Access to justice is an important issue. Courts are becoming increasingly aware of the importance of making court process more available to the public through the use of more simplified and user friendly forms and procedures and plain language documents. A litigant does not have a right to unrestrained access to the justice system for the purpose of pursuing an agenda that has nothing to do with a legitimate cause of action and everything to do with trying to bring a world of hurt down upon other parties through the aggressive abuse of the process itself. The courts are available for the controlled and restrained resolution of legal disputes. They are not available for

[15] Ibid., paras. 47-49.
[16] 2009 NSSC 272, para. 32.
[17] Ibid., para. 38.

litigants who grind out legal proceedings for the purpose of inflicting maximum punishment on their adversaries.[18]

Standing

Canadian Elevator Industry Education Program (Trustees of) v. Nova Scotia (Elevators and Lifts Act)

Canadian Elevator Industry Education Program (Trustees of) v. Nova Scotia (Elevators and Lifts Act), 2016 NSCA 80, involved an appeal against a decision of a lower court to dismiss an application from the trustees of the Canadian Elevator Industry Education Program for judicial review. The trustees had sought judicial review of a decision of the province's Chief Inspector to authorize an alternative program for non-unionized workers for certification of mechanics working on elevators. The lower court had dismissed the application for judicial review because the trustees lacked standing.

In dismissing the appeal, the Court agreed with the lower court that the trustees lacked standing and that they raised no serious justiciable issue: the program was no longer offered, so no one other than the parties would be affected. The Court considered the issue as an access to justice matter:

[65] In the broadest sense, this is an access to justice issue. Entertaining marginal cases plainly compromises access to justice for more meritorious claims.

[66] It is not an economical use of judicial resources to persist in an application directly affecting only five people regarding a programme no longer offered, challenging a discretionary decision whose questioned legality is confined to the reasonableness of the Chief Inspector's decision. That is especially so in a case like this in which an unexercised right of appeal can be made by those "directly aggrieved."[19]

Civil Practice and Procedure

Blunden Construction Ltd. v. Fougere

In *Blunden Construction Ltd. v. Fougere*, 2014 NSCA 52, a motion judge dismissed the defendant's motion for summary judgment from an action alleging that the defendant failed to contain hazardous dust during construction of an elevator hoistway that allegedly caused the plaintiff's lung condition. The defendant appealed.

When considering the summary judgment rules, the Nova Scotia Court of Appeal commented that the process for summary judgment is a measure to provide access to justice that is simplified, proportionate, less expensive, just and fair:

[18] 2016, NSSC, 181, para. 11.
[19] 2016 NSCA 80, paras. 65-66.

[7] We recognize of course the guidance provided by Justice Karakatsanis in her reasons concerning the importance of interpreting summary judgment rules "broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims." She spoke of the values and principles that underlie our civil justice system and raised a clarion call for a shift in culture to provide alternative adjudicative measures to the conventional trial model; and invoke procedures which will provide access to justice that is simplified, proportionate, less expensive, just and fair. A process for summary judgment is one such measure designed to streamline technical and often cumbersome rules, and enable judges to dispose of appropriate cases, summarily.

. . .

[9] Justice Karakatsanis cautioned that while such motions can save time and expense, their application can also produce the opposite effect by slowing the pace and adding to the cost of litigation and in that way denying or delaying a responding party's access to justice.[20]

Nova Scotia v. Roué

In *Nova Scotia v. Roué*, 2013 NSCA 94, descendants of the designer of the Bluenose launched an application against the Province claiming that they held copyright interests and moral rights to the design drawings. They advanced their claim by way of Rule 5.07 "application in court" under the Civil Procedure Rules. In response, the Province filed a motion to change the application into a traditional action. The Supreme Court of Nova Scotia dismissed this motion. The Province appealed.

In considering the appeal, the Court of Appeal noted that Rule 5.07 can enhance access to justice as it provides courts with the flexibility to design a process that reflects the dynamics of the dispute. The Court stated as follows:

[47] I acknowledge that, if time and cost were only incidental factors, then what the appellants characterize as these procedural safeguards for trial fairness might occupy their fullest scope. But time and cost clearly do pertain to the overall objective of access to justice. The motions judge's job under Rule 6.02 ["motion to convert"] is to achieve a balance that shortens time and lessens cost, while ensuring that the proceeding at hand maintains the essential attributes of a fair fact-finding process.

. . .

[51] In short, Rule 5.07, in appropriate circumstances, can go a long way to enhance access to justice. It embraces both flexibility and proportionality by allowing the Court to custom design a

[20] 2014 NSCA 52, paras. 7 and 9.

process that fairly reflects the dynamics of each particular dispute, with the added ability to recalibrate as circumstances demand [Rule 5.09(3)].[21]

Parkwoodland Management Ltd. v. MacDonald

In *Parkwoodland Management Ltd. v. MacDonald*, 2009 NSSC 168, the plaintiff brought an application for specific performance of an agreement of purchase and sale of land. At the hearing for directions from the court, the parties agreed to attend a settlement conference to try and resolve the matter. The plaintiff filed its materials for the settlement conference but the respondents did not and the conference was cancelled. Then applicant sought its costs for the cancelled settlement conference.

In deciding the matter of costs, the Nova Scotia Supreme Court considered the benefits of settlement conferences, stating that they can assist in providing access to justice:

[20] Settlement conferences are a way to resolve issues between parties in a court action. Lengthy trials are now tying up court rooms and Judges. Thus, the use of settlement conferences plays an integral and important role in the trial process. They allow easier access to justice and they also save the parties in some cases significant costs. They also allow the parties participation and thus they can feel they have played an active role in resolving the issues in contest between them.[22]

Kings County (Municipality) v. Berwick (Town)

In *Kings County (Municipality) v. Berwick (Town)*, 2009 NSSC 398, a municipality made an application to the court seeking a declaration that its funding from the school board be determined by reference to its share of uniform assessment and not by its share of student enrollment amongst the municipalities in the school board. The respondent municipalities made a motion to convert the application into an action pursuant to Civil Procedure Rule 6.

In considering the motion, the court reviewed the applicable Civil Procedure Rules. With respect to Rule 6.02(6), which provides that "the relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding," the court stated as follows:

[45] *Rule 6.02(6)*. This final enumerated factor speaks of the relative costs and delay of an action or of an application as circumstances to be considered. I do not need to quote from the speeches of the Chief Justice of Canada found on the Supreme Court of Canada's web page, and in the national press, to the effect that one of the serious problems in the justice system in this country is access to justice, caused by delay and cost. The cost of litigation is such that disputes that can be resolved by focussed hearings should be resolved by focussed hearings, and by procedures that

[21] 2013 NSCA 94, paras. 47 and 51.
[22] 2009 NSSC 168, para. 20.

balance the issues with reasonable costs. This should be of concern to everyone in the justice system.[23]

National Bank Financial Ltd. v. Potter

In *National Bank Financial Ltd. v. Potter*, 2008 NSSC 135, the plaintiff bank commenced an action in civil conspiracy and fraudulent misrepresentation against its former employee. During the proceedings, the plaintiff brought an application to amend its statement of claim, cross-claim, counterclaims and third party claims to remove any material fact allegations that its former employee participated in alleged conspiracy to manipulate stock prices.

The court dismissed the application, ruling that prejudice would be created by pleading amendments that would likely result in the defendants becoming incapable of presenting their case in an effective manner. In considering the application, the court considered the defendant's argument that allowing the motion would create access to justice issues:

[64] Potter claims that the proposed amendments, made six and a half years after its litigation was commenced, create a major access to justice issue for uninsured and/or self-represented individuals. The ambiguity, as to how the conspiracy and fraud were committed and the roles of the respective wrongdoers, leaves the respondents without fair notice of the particulars of the watered-down version of the conspiracy and this will lead to a year of demands for particulars and amendments to other pleadings in the six actions involved. Potter suggests that only after these are completed can the litigation, including his estimate of 200 days of discovery, and 100 days of trial, continue.

[65] The delay that would be caused by the proposed amendment is not a serious problem for a large institutional litigant but is a serious financial and personal strain on the many parties who are not in NBFL's league. Payment of costs between parties who are not in the same league cannot overcome the prejudice caused by the serious imbalance.[24]

Lockhart v. New Minas (Village)

In *Lockhart v. New Minas (Village)*, 2005 NSSC 93, the plaintiff brought an action against the defendant village claiming defamation and wrongful dismissal. The defendant applied pursuant to Rule 5.03(1) of the Rules of Court to sever the defamation claim from the wrongful dismissal claim.

In rejecting the application, the court considered that requiring the plaintiff to have to go through two sets of pre-trial proceedings would lengthen proceedings for her and create duplication of

[23] 2009 NSSC 398, para. 45.
[24] 2008 NSSC 135, paras. 64-65.

effort and costs. The court also considered the different financial positions of the parties and the responsibility of the courts to ensure access to justice in a cost effective way.

Access to justice — costs

[44] Granger, J., in *Foley*, stated that employers are better able financially to withstand the financial strain of litigation, and, to require an employee to finance two separate trials would be unfair and in most cases preclude the employee making a legitimate claim. This Court would add to that, that when the defendant has an insurer backing it, that financial imbalance is magnified significantly.

[45] In this case, in response to questions by Mr. Parish, Ms. Lockhart confirmed that she is not employed. She confirmed that the action was commenced pursuant to a contingent fee agreement and stated that to date she had paid $1,800.00 to her lawyer, which, the Court concludes must relate to disbursements. No defence has been filed, no interrogatories have been made or answered, no discoveries have been held, and no pre-trial preparation or trials have been held. On the basis of this, it is reasonable to infer that Ms. Lockhart may not be able to pursue a legitimate claim to its final conclusion. In her circumstances, financing a single lawsuit against such powerful defendants will be difficult; financing two lawsuits, could be devastating.

[46] A fairness concern is the inability of the average Canadian to access the civil justice system because of its complexities, delays and costs. The facts of this case appear to fit squarely within those that are put forward by proponents of change to our civil justice system. Ordinary persons have a right to have legitimate legal claims determined by an objective third party in an efficient and cost effective way. This fairness issue weighs heavily for the plaintiff and against the defendant, for whom (backed by an insurer) cost is not a barrier, and complexity and delay can be a tactical tool.[25]

Class Actions

Many cases from Nova Scotia that discuss access to justice deal with cost awards and certification of classes in class proceedings. This is because the Supreme Court of Canada in *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69, provided that there are three goals of class actions: judicial economy, behaviour medication, and access to justice. Nova Scotia's *Class Proceedings Act* also explicitly states that when a court is awarding costs in respect to a class action case, the court may consider whether "a cost award would further judicial economy, access to justice or behaviour modification."[26] Accordingly, judicial analyses with respect to certification of classes and cost awards in class actions generally involve a discussion with respect to access to justice.

Canada (Attorney General) v. MacQueen

[25] 2005 NSSC 93, paras. 44 to 46.
[26] *Class Proceedings Act,* S.N.S. 2007, c. 28, s. 40(1)(b).

In *Canada (Attorney General) v. MacQueen*, 2014 NSCA 96, plaintiff landowners and residents brought a class action law suit against a steel company, the Crown, and the provincial government. The defendants successfully appealed a court decision to have the action certified as a class action. The Crown and province sought costs for the numerous motions and appeals with respect to the certification decision.

In determining the cost award, the Nova Scotia Court of Appeal referenced the Nova Scotia *Class Proceedings Act* (CPA), which, at s. 40(2)(b), provides that when awarding costs under the Act, the court may consider whether "a cost award would further judicial economy, access to justice or behaviour modification." The Court also quoted from *Morris Estate v. Nova Scotia (Attorney General)*, 2012 NSSC 386, which it claimed was the first Nova Scotian case to address s. 40 of the CPA: "Access to justice by way of a class proceeding makes it possible for persons who feel aggrieved to come together and seek relief when the amounts involved make it otherwise financially unjustifiable."[27] After reviewing a number of other cases that addressed cost awards and access to justice concerns, the court stated as follows:

[38] The access to justice issue is much broader than the individual circumstances of the respondents. As noted by the Alberta Court of Appeal, third parties who might be willing to undertake the costs of a potentially meritorious represented action, would be unwilling to do so if they ran the risk of crippling costs awarded against them.

[39] In practice, representative plaintiffs are almost invariably funded by some outside party with an ability to absorb the costs. If such arrangements were to alleviate the access to justice concern, this factor in the analysis would, in effect, become illusionary. I do not see it as such. It remains an appropriate and relevant factor in determining a costs award.[28]

Murray v. East Coast Forensic Hospital (Supreme Court Decision)

In *Murray v. East Coast Forensic Hospital*, 2015 NSSC 61, patients at a forensic psychiatric hospital brought action against the hospital for breach of s. 8 of the *Charter* as they claimed they were strip searched for the purpose of looking for illicit drugs. The plaintiffs sought certification as a class action.

In considering whether to certify the action as a class action, the Nova Scotia Supreme Court considered whether the action would satisfy the requirements under the *Class Proceedings Act* (CPA). The CPA provides that a court must certify a proceeding as a class proceeding if, among other things, the court considers the class proceeding to be the preferable procedure for the fair and efficient resolution of the dispute. In the court's opinion, this analysis must include a

[27] 2014, NSCA 96, para. 19, quoting 2012 NSSC 386 at para 25.
[28] Ibid., paras. 38-39.

consideration of the three main advantages of class actions in appropriate circumstances: judicial economy, access to justice, and behaviour modification.

With respect to the access to justice analysis, the court stated as follows:

[102] In relation to access to justice, the plaintiff submits that this is an issue of primordial importance. The proposed class members here come from a marginalized and disadvantaged group in society, i.e. the mentally ill. It is also acknowledged that damage awards might be relatively small. The plaintiff submits that it is unlikely that any of these claims will advance independently. Certification of this class action allows these class members to access the courts.

[103] I agree that access to justice is a significant consideration in the present case. Such has been recognized as an important goal of class proceedings (See *Hollick*, supra). I recognize that significant barriers exist here that affect the possibility of each potential plaintiff advancing an individual claim. These proposed plaintiffs are/were individuals with diagnosed psychiatric illnesses; they had been involved in the criminal justice system and ordered to be treated at the ECFH. Some of these proposed class members may still be housed and treated at the ECFH.[29]

In the end, the court granted the application and certified the proceeding as a class action pursuant to the CPA.

Capital District Health Authority v. Murray (Court of Appeal Decision)
In *Capital District Health Authority v. Murray*, 2017 NSCA 28, the forensic psychiatric hospital appealed the Nova Scotia Supreme Court's decision (noted above) to certify the action against the hospital as a class action under the CPA.

In considering the appeal, the Nova Scotia Court of Appeal noted that the objectives of "access to justice, judicial economy and behaviour modification" should guide judges' exercise of discretion on certification and other procedural aspects of case management.[30] The Court quoted from the Supreme Court of Canada's decision in *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69:

[26] A class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered: *Hollick*, at para. 33. To determine whether both of these elements are present, it may be helpful to address a series of questions. These questions must not be considered in isolation or in a specific order, but should inform the overall comparative analysis. …

(1) What Are the Barriers to Access to Justice?

[29] 2015 NSSC 61, paras. 102-103.
[30] 2017 NSCA 28, para. 35.

[27] The sorts of barriers to access to justice may vary according to the nature of the claim and the make-up of the proposed class. They may relate to either or both of the procedural and substantive aspects of access to justice. The most common barrier is an economic one, which arises when an individual cannot bring forward a claim because of the high cost that litigation would entail in comparison to the modest value of the claim. However, barriers are not limited to economic ones: they can also be psychological or social in nature. …[31]

Downton v. Organigram Holdings Inc.
In *Downton v. Organigram Holdings Inc.*, 2019 NSSC 4, the plaintiff moved for an order certifying her action with respect to recalled medical cannabis as a class proceeding pursuant to Nova Scotia's *Class Proceedings Act* (CPA).

In considering whether to certify the action as a class action, the Supreme Court of Nova Scotia considered the goals of class proceedings as laid down by the Supreme Court of Canada in *AIC Limited v. Fischer*, 2013 SCC 69: judicial economy, behaviour modification and access to justice. Quoting *Fischer*, the Court stated that it must consider the following questions in order to determine whether a class proceeding will facilitate access to justice:
What are the barriers to justice?
What is the potential of the class proceedings to address those barriers?
What are the alternatives to class proceedings?
To what extent do the alternatives address the relevant barriers to access to justice?
How do the two proceedings compare?[32]

In completing its analysis on access to justice, the court stated as follows:

[315] I find that a class proceeding will assist individual class members to have access to justice in a way that requiring each member to separately litigate what could be financially modest claims requiring the expense of generating expert evidence would not. The alternatives proposed by Organigram (individual claims and its refund and credit program) do not address barriers to justice that individual claim members may experience.[33]

Constitutional Law

Pleau v. Nova Scotia (Prothonotary)

[31] Ibid., para. 108, quoting from 2013 SCC 69 at paras. 26-27.
[32] 2019 NSSC 4, para. 303.
[33] Ibid., para. 315.

In *Pleau v. Nova Scotia (Prothonotary)*, 1998 CanLII 12462, the plaintiff brought an action challenging court fees created through a regulation under the *Costs & Fees Act*. The plaintiff claimed that the fees were invalid for a number of reasons, including that they violated the *Charter*.

In response to the plaintiff's claim that the fees are unconstitutional because they deny or hinder access to the courts, the Supreme Court of Nova Scotia stated as follows with respect to access to justice:

Access to justice is neither a service nor a commodity. It is a constitutional right of all citizens; any impediments must be strictly scrutinized. Regardless of whether the impediment takes the form of a tax, a fee, an allowance, or some other form, it will, and must fail if its effect is to unduly "impede, impair or delay access to the courts."

Expert Evidence

Abbott and Haliburton Company v. WBLI Chartered Accountants

Abbott and Haliburton Company v. WBLI Chartered Accountants, 2013 NSCA 66, involved an action by store owners for professional negligence against accountants. The accountants moved for summary judgment. To defend their motion, the store owners commissioned an expert report from an accountant. The defendants moved to have this report expunged from the record claiming the accountant was impartial. The lower court agreed and ruled the evidence as inadmissible. The store owners appealed this ruling.

In considering the appeal, the Court of Appeal took note of the amount of money it costs parties to hire expert witnesses and that this expense can be a hindrance for people in finding affordable access to justice. The court stated as follows:

[151] Access to justice is impeded by the high cost of litigation. That high cost is not just made up of legal fees. Litigants frequently need to adduce expert opinion evidence. Experts cost money, often a lot.

[152] The approach of the motions judge, endorsed by the Chief Justice, would undoubtedly add to the cost of litigation, furthering inhibiting access to justice for all but rich and institutional litigants. A simple example will demonstrate.

[153] A couple decide on retirement to build their dream home. A structural engineer designs the roof. A reputable builder follows the plans and erects just what they wanted. Within a year serious leaks develop.

[154] The couple hire a local engineer, Mr. Smith, who is a partner in a national engineering firm, to investigate. I will call the firm ABC Engineering. Mr. Smith forms the opinion that the

roof design is flawed. It cannot be properly repaired and is in risk of collapsing. He advises the couple that whoever designed the roof was negligent.

[155] Mr. Smith designs a new roof and oversees construction. The couple can ill afford these additional expenses. The couple ask the original structural engineer for compensation. He denies liability. The couple have little choice. They turn to the courts for justice.

[156] Wanting the best qualified expert, they hire Ms. Jones, one of the partners in the Toronto office of ABC. She duly prepares an expert's report setting out her qualifications and opinion that the initial roof was negligently designed and that the roof should have been designed in line with the replacement roof. Perhaps some might fear that her opinion might be discounted because of her relationship with Mr. Smith, but that should go to weight not admissibility.

[157] According to the analysis adopted by the motions judge, and endorsed by my colleague, Ms. Jones would be disqualified as an expert witness because she would lack the appearance of independence as she would be constrained from voicing a contrary view than that of Mr. Smith. To do so might open herself, and her partners, to what the motions judge said was "the prospect of liability" (para. 101).

[158] Carrying this to its logical conclusion, the couple needing affordable access to justice could not even use Mr. Smith as an expert since he too would expose himself and his partners to a hypothetical risk of liability. The unfortunate couple would then be faced with the prospect of abandoning their litigation or incurring the additional cost of another expert – however impartial, objective and probative the actual opinions of Mr. Smith and Ms. Jones.[34]

Professional Negligence

Osif v. College of Physicians and Surgeons of Nova Scotia

In *Osif v. College of Physicians and Surgeons of Nova Scotia*, 2008 NSCA 113, the College of Physicians and Surgeons of Nova Scotia applied for the sealing of the appeal book and for a publication ban on the names of patients and their family members identified during the hearing of a complaint about a physician's practices.

In deciding whether to grant the publication ban, to court had to weigh the salutary effects of keeping the patients' information confidential with the negative impact on the open court principle and open access to justice. The court stated as follows:

[33] Balanced against that salutary effect is the negative impact on the open court principle and open access to justice. Granting the order and ban would deny the public and the media access to the content of the appeal book and the exhibits, and prevent the disclosure of the identities of third

[34] 2013 NSCA 66, paras. 151-158.

party patients and family members which appear there and which may be provided in open court. There would be a limitation to the right to free expression and to the core value of the search for the truth to that extent only. There is no restriction to the court room or to the hearing. The other core values underlying freedom of express which are identified in *Sierra Club* at ¶ 75, namely, the promotion of self-fulfilment of individuals by allowing them to develop the rights and ideas as they see fit, and ensuring open participation in the political process, are not impeded. Nor would there be any adverse effect on the right to a fair trial or to the efficacy of the administration of justice.[35]

Costs

A number of cases from Nova Scotia have considered Civil Procedure Rule 77.04, which permits a plaintiff to apply for relief from liability for costs because of a lack of finances. The Rule states as follows:

77.04 (1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.

MacBurnie v. Halterm Container Terminal Limited Partnership

In *MacBurnie v. Halterm Container Terminal Limited Partnership*, 2011 NSSC 322, the Court considered Rule 77.04 and laid out the following principles:

[6] Costs are an important element of the litigation process. The purposes of costs can be summarized as follows (see Orkin on *The Law of Costs* (2 ed.) Vol. I at page 2-1):
(a) As partial indemnity or, in some limited circumstances, full indemnity to the successful party for the legal costs it incurred;
(b) To encourage settlement;
(c) To deter frivolous actions or motions;
(d) To discourage unnecessary steps that unduly prolong the litigation; and
(e) To facilitate access to justice.

[7] These purposes are undermined when a party has an exemption from costs exposure. In the words of Justice Gruchy in *Rafuse v. Zinck's Bus Co*. (1992), 1992 CanLII 4552 (NS SC), 122 N.S.R. (2d) 183 (when considering the predecessor Rule 5.17 under our 1972 Rules), "... when a party has such an exemption, it becomes a very significant tool. A party with such an exemption may then pursue an adversary with financial immunity."

[35] 2008 NSCA 113, para. 33.

[8] Justice Gruchy concluded in that case that the exercise of judicial discretion in awarding costs was best left to the trial judge after the case had been fully exposed and the relative merits of both sides evaluated.

[9] Because of the imbalance that a costs immunity order would create, the court should exercise its discretion to grant such an order only as an extraordinary remedy where it is fully satisfied that to deny costs immunity would effectively deny the applicant's access to justice. That is to say, the two criteria specified in Rule 77.04 should be stringently applied and only where there is a comprehensive body of evidence adduced in support.

[10] Those two criteria are:
(1) That the party cannot afford to pay costs, and
(2) The risk of an award of costs is a serious impediment to litigating a claim.

[11] In my view, the stringent application of these criteria requires that the court be satisfied that without an order granting immunity from costs, the applicant would not be able to pursue the claim because of impecuniosity and the action would have to be abandoned. This in turn requires that the court have a full picture of the applicant's financial situation, a requirement articulated and applied by the Ontario Superior Court of Justice in *Farlow v. Hospital for Sick Children*, [2009] O.J. No. 4847, 2009 CarswellOnt 7124.

Many courts have quoted from *MacBurnie* when asked to consider Rule 77.04.[36]

Hatfield v. Intact Insurance Co.
In *Hatfield v. Intact Insurance Co.*, 2014 NSSC 288, the plaintiff commenced an action against an insurance company alleging that the company carried out remediation of her property following an oil spill without her consent and that is was responsible for damage to her property. Various proceedings had been brought as a result. The plaintiff, whose sources of income were social assistance and the Canada Pension disability benefits, applied for immunity from costs pursuant to Civil Procedure Rule 77.04.

In considering relief under Rule 77.04, the court quoted from *MacBurnie* and stated as follows:

[26] Another broad theme is the requirement to balance the legitimate interests and barriers of the parties in advancing the proceeding. In such cases, the goal of access to justice for an impoverished or impecunious litigant must be balanced with fundamental purposes served by having parties subject to the cost consequences in any proceeding.

. . .

[36] See, for example, *Walsh v. Atlantic Lottery Corp.*, 2014 NSSC 157.

[30] There is a final theme emerging from the decisions on *Rule* 77.04. It becomes evident as judges attempt to balance access to justice with the impact of cost consequences. It involves recognition that financial position of the party may be considered as part of the final cost assessment in a proceeding.[37]

Canadian Residential Inspection of Services Ltd. v. Swan

Canadian Residential Inspection of Services Ltd. v. Swan, 2013 NSSC 226, involved a costs decision following a six-day trial and oral decision regarding a franchise agreement. In considering the defendant's application for immunity from costs under Rule 77.04, the court stated as follows:

[28] I adopt entirely the analysis of my colleague Justice Wright in *MacBurnie v. Halterm Container Terminal Ltd. Partnership*, 2011 NSSC 322 (N.S. S.C. [In Chambers]). Justice Wright notes that costs are an important element of the litigation process. Their purpose is to indemnify a successful party, to encourage settlement, to stop frivolous actions, to discourage unnecessary steps and to facilitate access to justice. These purposes are undermined when a party has an exemption from costs exposure.

[29] Because of the imbalance that a cost immunity order would create, the Court should exercise its discretion to grant such an order only as an extraordinary remedy where it is fully satisfied that to deny costs immunity would effectively deny the applicant's access to justice. That is to say, the two criteria specified in *Rule 77.04* should be stringently applied and where there is a comprehensive body of evidence adduced in support.[38]

Big X Holdings Inc. v. Royal Bank of Canada

In *Big X Holdings Inc. v. Royal Bank of Canada*, 2015 NSSC 350, the plaintiff brought an action in negligence against the defendant bank. The action was unsuccessful and the bank claimed over $500,000 in costs for the trial.

In considering the costs award, the court made the following comments regarding the tension between cost awards and access to justice:

[6] Costs follow the result. In assessing the amount to be recovered a court has to consider the purposes of costs awards and the tension that exists between costs awards and access to justice. It is fair that a successful litigant should be at least partially indemnified for the costs of the litigation. The successful defendant did not ask to be involved and had to spend money on legal fees to be eventually vindicated. On the other side, a plaintiff should not be discouraged from advancing a

[37] 2014 NSSC 288, paras. 26 and 30.
[38] 2013 NSSC 226, paras. 28-29.

"legally sound position" because of the legal fees involved. In that sense the awarding of costs helps to make the legal system at least somewhat more accessible.

[7] Costs awards can also serve the purpose of deterring people from pursuing actions that are doomed to failure or from putting up defences that are frivolous. Costs awards are designed to act as a "disincentive to those who might be tempted to harass others with meritless claims". Parties are encouraged by the prospect of a costs award to make reasonable settlement offers and to refrain from taking unnecessary steps in the litigation. They serve a "winnowing function" to discourage doubtful cases or defences.

[8] Those purposes exist in some tension with each other. Costs are intended to both make the system more accessible and at the same time, to make it less accessible. Compensation of successful parties can serve as a disincentive to frivolous litigants but can also go a step further to act as a disincentive to public interest litigation or to scare off those who would otherwise pursue valid claims but who cannot afford the risk. Arguably, an aggressive interpretation and application of costs, by raising the stakes, favours litigants with deeper pockets who can better afford the risk. The threat of an enhanced award of costs against an individual litigant is often a strong incentive to settle. It is less of an incentive to large corporate or government entities.[39]

Ellph.com Solutions Inv. v. Aliant Inc.

In *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316, the plaintiffs brought an action against the defendant alleging it engaged in bad faith tactics when it terminated an agreement with the plaintiffs on the basis of deficiencies. The defendant brought a motion for security for costs of up to $1.5 million pursuant to Civil Procedure Rule 45.02. In considering Rule 45.02, the court considered the principles involving in providing access to justice:

[21] The need remains for a balance between access to justice and artificial insolation from an award of costs. On the more detailed principles:

Rule 45.02 provides a broad discretion. The limit on discretion commented on by Justice Goodfellow in *Flewelling v. Scotia Island Property Ltd.*, 2009 NSSC 94 (N.S. S.C.) at para. 19 is not severe. The judge has a free hand to do what is just, so long as the defendant files a defence, shows undue difficulty, and either shows that security would not be unfair, see Rule 45.02(1), or establishes special grounds under Rule 45.02(4).

The new rule does not change the principle that the court should be reluctant to order security for costs if the plaintiff establishes that doing so will prevent the claim from going forward.

[39] 2015 NSSC 350, paras. 6-8.

The principles that courts should avoid security for costs being used as a means test for access to justice and that the discretion should not be used to exclude persons of modest means from court are reinforced by the ground prescribed by Rule 45.02(1)(c).[40]

Trinity Western University v. Nova Scotia Barristers' Society

In *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 100, Trinity Western successfully applied for judicial review of a decision of the Nova Scotia Barristers' Society (NSBS) that found the University's policies to be discriminatory. The University claimed that it should receive its full costs of the judicial review.

In determining costs, the court considered if there were any access to justice issues, including the financial position of the parties:

[34] Access to justice is a "highly valued social good in itself". Costs and the risk of costs should not discourage advocacy groups from participating. The Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band* established that courts should consider the power to award costs to be an "instrument of policy". It should be used in a way that "helps to insure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole."

[35] The NSBS is not the same as an impecunious citizen advocacy group. There is no access to justice issue here. The NSBS does not represent a disadvantage or marginalized group seeking to have its voice heard in the judicial process. They are lawyers after all.

Doncaster v. Field

Doncaster v. Field, 2015 NSSC 310, involved divorce proceedings in which the wife brought a motion for security for costs under Civil Procedure Rule 45.02. In considering this motion, the court commented that "the high cost of legal representation can in some cases be an access to justice issue."[41]

Small Claims Court

Johnston v. Wawanesa Mutual Insurance Co.

In *Johnston v. Wawanesa Mutual Insurance*, 2013 NSSM 47, the plaintiff brought an action in small claims court against her insurer claiming she was owed income replacement benefits as a result of a motor vehicle accident. The insurer took the position that small claims court did not have the jurisdiction, which it claimed could total $260,000 if the plaintiff remained disabled.

[40] 2011 NSSC 316, para. 21.
[41] 2015 NSSC 310, para. 6.

In considering the defendant's position, the court discussed its role in providing greater access to justice:

[37] Just as the increased monetary jurisdiction informed Warner, J's analysis of the practice in this court, so too should it inform the court's willingness to accept jurisdiction in a case like this in the absence of a superior court order (or an action in that court) to the contrary.

[38] The fact that the Legislature has chosen to raise this court's jurisdiction to a level equal to if not greater than the average annual net disposable income of most Nova Scotians sends an important signal. It indicates a legislative intent to increase access to justice by providing the citizens of this province with an alternate forum for the resolution of disputes that, for them, represent major financial obligations or entitlements. It responds to the concerns that have long been voiced by no less an authority than the Chief Justice of Canada that access to justice has been put beyond the range of most because of the cost and delay associated with proceedings in the superior courts of this country:

"Hardest hit [by the cost of litigation] are average middle-class Canadians. ... Their options are grim: use up the family assets in litigation; become their own lawyers; or give up:" McLachlin, CJC, "The Challenges We Face," March 8, 2007

"Do we have adequate access to justice? It seems to me that the answer is no. We have wonderful justice for ... the wealthy. But the middle class and the poor may not be able to access our justice system:" McLachlin, CJC, U of T, Feb 2010.

[39] The importance of this court in asserting its jurisdiction in a proper case, rather than in deferring (as the defendant here would have me do) to that of the Supreme Court, cannot in my opinion be overstated, at least in the case of income replacement insurance. LTD policies of insurance, and WI benefits under Section B, are designed and intended to provide income replacement when an injured insured needs it most. An insured who has become disabled-and so unemployed-has an immediate and pressing need for income-income to pay for food, for shelter, for clothes, for debts. To say to those insureds that they should wait the two or three or four years necessary to have their claim heard in Supreme Court is to say that they should go deeply into debt, or into bankruptcy, or deny themselves and their dependents the necessities of civilized life. To tell them that they would have "more perfect" procedural justice by having their claim decided in Supreme Court is cold comfort indeed.[42]

Imperial Life Financial v. Langille

In *Imperial Life Financial v. Langille*, 1998 CanLII 1611, 1997 CarswellNS 518, the respondent brought an action in Small Claims Court against Imperial Life after it ceased paying her monthly

[42] 2013 NSSM 47, paras. 37-39.

disability benefits because it believed the respondent was no longer disabled. The respondent's claim exceeded the monetary jurisdiction of the small claims court, but the respondent was pursing the claim on a piecemeal basis. The company claimed that the case should not be heard in Small Claims Court.

In considering the company's argument, the court stated as follows:

[1] This application raises a very interesting access to justice issue. Can an insured's claim for disability benefits be prosecuted in Small Claims Court on a piecemeal basis so as not to exceed that Court's monetary jurisdiction?

. . .

[8] Our Small Claims Court serves an extremely useful purpose within the administration of civil justice in this province. It provides an informal and inexpensive forum for the resolution of claims within a limited monetary value. It provides access to justice for those who might not otherwise afford it.

[9] It makes perfect sense to have claims involving smaller amounts of money processed in an efficient manner without the expense of extensive pre-trial proceedings.

[10] That being said, one must not forget the benefits of our Supreme Court pretrial process. That process provides for liberal discovery procedures designed to enhance settlement and/or narrow the issues. Therefore, it too serves a very significant purpose within the administration of civil justice.[43]

Kemp v. Prescesky

In *Kemp v. Prescesky*, 2006 NSSC 122, the defendant appealed from a decision of a Small Claims Court adjudicator that had granted default judgment against him when he failed to show up to the hearing.

In considering the appeal, the Nova Scotia Supreme Court discussed the role of the Small Claims Court for providing access to justice to people who would not ordinarily be able to litigate their claims:

[11] As noted in the 1991 *Report of the Canadian Bar Association Task Force on Court Reform in Canada*, "nothing is more important to court reform than the enhancement of public respect for and confidence in the courts" (page 31); surveys cited in the report indicated that the overwhelming

[43] 1997 CarswellNS 518, paras. 1, 8-11.

majority of people believed that justice favoured the rich, was too complicated to understand, and too slow to bother with. The report recognized the importance of better access to justice, more efficiency, and the need for forums for dispute resolution without formal litigation, but without sacrificing a clear understanding of the role of courts, and that they be just and perceived to be just. "Nothing is more important to public order and the legitimacy of government than public confidence in the independence, impartiality and justice of the courts." (Page 46).

[12] The creation of the Small Claims Court in the manner it was set up was a progressive and important improvement to access to justice by ordinary people. Since 1980 the structure and rules of the Small Claims Court have not changed significantly, but the monetary limits have. In 1992 the limit of $3,000.00 was raised to $5,000.00; in 1999 the limit was raised to $10,000.00; in 2002 the limit was raised $15,000.00 and last year the Legislature passed a law to increase the limit to $25,000.00.[44]

Conflict of Laws

Forum Conveniens

Penny v. Bouch

In *Penny v. Bouch*, 2008 NSSC 378, the plaintiff launched an action in the Nova Scotia Supreme Court alleging medical malpractice against four physicians in Alberta who treated her during her pregnancy and against an Alberta hospital. The defendants filed an application for an order dismissing the action on the ground that the Supreme Court lacked the jurisdiction to hear the case in the absence of a real and substantial connection with the subject matter and the parties.

In considering the defendant's application, the court considered the financial position of the plaintiff and the difficulty should would have pursuing her action in Alberta:

[46] Ms. Penny's predicament, to which she has attested in her affidavit and in cross-examination, is that she is financially incapable of proceeding with this action in any place other than Nova Scotia. She has no assets and only limited resources at her disposal.

[47] Moreover, her son's medical disability is such that he requires constant care and attention and she feels that she would be unable to leave him to travel to Alberta for extended periods of time. At the same time, Caiden's condition makes his own mobility difficult and it is unlikely that he could accompany his mother if this litigation were moved to Alberta.

[44] 2006 NSSC 122, paras. 11-12.

[48] As to the costs of litigation, Ms. Penny has retained the services of the Wagner firm on a contingency fee basis and she is worried that she would not be able to find an equally competent lawyer in Alberta who would agree to represent her on such a contingency basis. Also, she cannot afford to pay the travel costs of the several Nova Scotia witnesses who would have to travel to Alberta to testify.

[49] As a single mother, Ms. Penny has no spousal assistance to lean on but rather relies on the support and assistance of her family members.

[50] Given the marginal financial resources at her disposal, and the personal care requirements and immobility of her son Caiden, this becomes an access to justice issue for the plaintiffs. The submission of their counsel was that if this case were to be moved to Alberta, the personal hardships of the plaintiffs may well be such that they are not able to proceed with the litigation at all.

Bartz v. Canadian Baptist Bible College Inc.
In *Bartz v. Canadian Baptist Bible College Inc.*, 2009 NSSC 115, the plaintiff brought an action in the Supreme Court of Nova Scotia against a bible college located in Manitoba as a result of injuries she sustained as a child at the college. The college applied to stay or transfer the action to Manitoba on the basis that Nova Scotia lacked jurisdiction or was not a convenient forum.

In dismissing the application, the Court considered the financial positions of the parties and that while the plaintiff lacked the financial means to carry out litigation in Manitoba, the defendants had the financial resources to defend the action in Nova Scotia. The Court stated as follows:

[51] A related but a distinct element of unfairness is the fact that the Plaintiff is without the financial means to carry out the litigation in Manitoba and there is no evidence that the Defendants are without the financial means to defend the action in Nova Scotia. This introduces the element of access to justice in a broader sense. The Plaintiff has been successful in retaining Nova Scotia counsel to undertake the proceeding on a contingent fee basis; this does not mean that the Plaintiff has a free ride. He is responsible for the expenses. The issues and number of potential witnesses outlined in the affidavits and submissions suggest that the trial of this matter will be both very lengthy and expensive.

. . .

[116] Further, the calling of additional opinion and lay witnesses by the Defendants may require the Plaintiff to obtain similar evidence (possibly expert evidence). These unknown possibilities

challenge the Court's initial assumption of a "short" liability trial, and the consequential ability of the Plaintiff to finance a liability trial in Manitoba. It infuses the "access to Justice" concern.[45]

[45] 2009 NSSC 115, paras. 51 and 116.

Appendix: Summary of Case Law

Case	Area of Law/Issue	Position on Access to Justice
Tarlton v. Jackson	Family	Courts must strive to ensure family disputes are expeditious, efficient, less burdensome, cost effective and timely
Armoyan v. Armoyan	Family	Comparative fairness and efficiency between parties with different financial means
Simmons v. Ferguson	Family	Courts must do more to facilitate access to justice for Canadian families by lessening the procedural burdens of conventional trials
Children's Aid Society of Inverness/Richmond v. C.S.L.	Family	Courts must be vigilant to address disabilities or vulnerabilities to ensure that all persons have and appear to have access to justice
Richards v. Springhill Institution	Criminal	Access to justice in a habeas corpus application is tied to the timeliness of the potential relief
R. v. S.D.L.	Criminal	Allowing a witness to testify by way of video link can enhance access to justice
Tupper v. Nova Scotia (Attorney General)	Vexatious Litigants	Assistance for self-represented litigants can enhance access to justice
H. (V.G.) v. H. (P.L.)	Vexatious Litigants	Access to the justice system is a human right that should not be taken away except for the clearest and most compelling of reasons
Cram v. Nova Veterinary Clinic	Vexatious Litigants	Court processes must be made more available to the public through the use of more simplified and user friendly procedures. A litigant does not have a right to unrestrained access to the justice system.
Canadian Elevator Industry Education Program (Trustee of) v. Nova Scotia (Elevators and Lifts Act)	Standing	Entertaining marginal cases compromises access to justice for more meritorious claims
Blunden Construction Ltd. v. Fougere	Civil Practice and Procedure	Courts should invoke procedures that will provide access to justice that is simplified, proportionate, less expensive, just and fair
Nova Scotia v. Roué	Civil Practice and Procedure	Court applications, as opposed to actions, can enhance access to justice as they provide courts with the flexibility to design a process that reflects the dynamics of each particular dispute
Parkwoodland Management Ltd. v. MacDonald	Civil Practice and Procedure	As lengthy trials are tying up court rooms and judges, settlement conferences allow easier access to justice and save parties costs
Kings County (Municipality) v. Berwick (Town)	Civil Practice and Procedure	One of the serious problems in the justice system in Canada is access to justice, caused by delay and cost

National Bank Financial Ltd. v. Potter	Civil Practice and Procedure	An access to justice analysis involves comparing fairness and efficiency between parties with different financial means
Lockhart v. New Minas (Village)	Civil Practice and Procedure	An access to justice analysis involves comparing fairness and efficiency between parties with different financial means
Canada (Attorney General) v. MacQueen	Class Actions	Class proceedings make it possible for persons who feel aggrieved to come together and seek relief when the amounts involved make it otherwise financially unjustifiable
Murray v. East Coast Forensic Hospital	Class Actions	Certification of a class involving marginalized and disadvantaged individuals will allow the members to access the court when they would not otherwise be able to do so
Downton v. Organigram Holdings Inc.	Class Actions	Class proceedings assist individual class members to have access to justice in a way that requiring each member to separately litigate would not
Pleau v. Nova Scotia (Prothonotary)	Constitutional Law	Access to justice is a constitutional right of all citizens; any impediments must be strictly scrutinized
Abbott and Haliburton Company v. WBLI Chartered Accountants	Expert Evidence	Access to justice can be impeded by the high cost of legal fees and expert witnesses
Osif v. College of Physicians and Surgeons of Nova Scotia	Professional Negligence	Open access to justice and open court principles must be protected to ensure freedom of expression
MacBurnie v. Halterm Container Terminal Limited Parnership	Costs	An order for immunity from costs should only be ordered when a court is satisfied that to deny costs immunity would effectively deny the applicant's access to justice
Hatfield v. Intact Insurance Co	Costs	The goal of access to justice for an impoverished or impecunious litigant must be balanced with fundamental purposes served by having parties subject to the cost consequences in any proceeding
Canadian Residential Inspection of Services Ltd. v. Swan	Costs	A cost immunity order should only be granted when the court is fully satisfied that to deny costs immunity would effectively deny the applicant's access to justice
Big X Holdings Inc. v. Royal Bank of Canada	Costs	A plaintiff should not be discouraged from advancing a "legally sound position" because of the legal fees involved. The awarding of costs helps to make the legal system at least somewhat more accessible.

Ellph.com Solutions Inv. v. Aliant Inc.	Costs	Courts should avoid security for costs being used as a means test for access to justice; the discretion should not be used to exclude persons of modest means from court
Trinity Western University v. Nova Scotia Barristers' Society	Costs	Cost awards help to insure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole
Doncaster v. Field	Costs	The high cost of legal representation can in some cases be an access to justice issue
Johnston v. Wawanesa Mutual Insurance Co.	Small Claims Court	The Small Claims Court provides Nova Scotians with an alternative forum for the resolution of disputes that represent major financial obligations or entitlements.
Imperial Life Financial v. Langille	Small Claims Court	Small Claims Court provides access to justice for those who might not otherwise afford it.
Kemp v. Prescesky	Small Claims Court	Small Claims Court provides access to justice for people who would not ordinarily be able to litigate their claims
Penny v. Bouch	Forum Conveniens	The financial position of the parties matter when the Court must decide whether to assume jurisdiction of the case (i.e., whether the parties would be able to pursue their case in another province)
Bartz v. Canadian Baptist Bible College Inc.	Forum Conveniens	The financial position of the parties matter when the Court must decide whether to assume jurisdiction of the case