# NOVA VOCE

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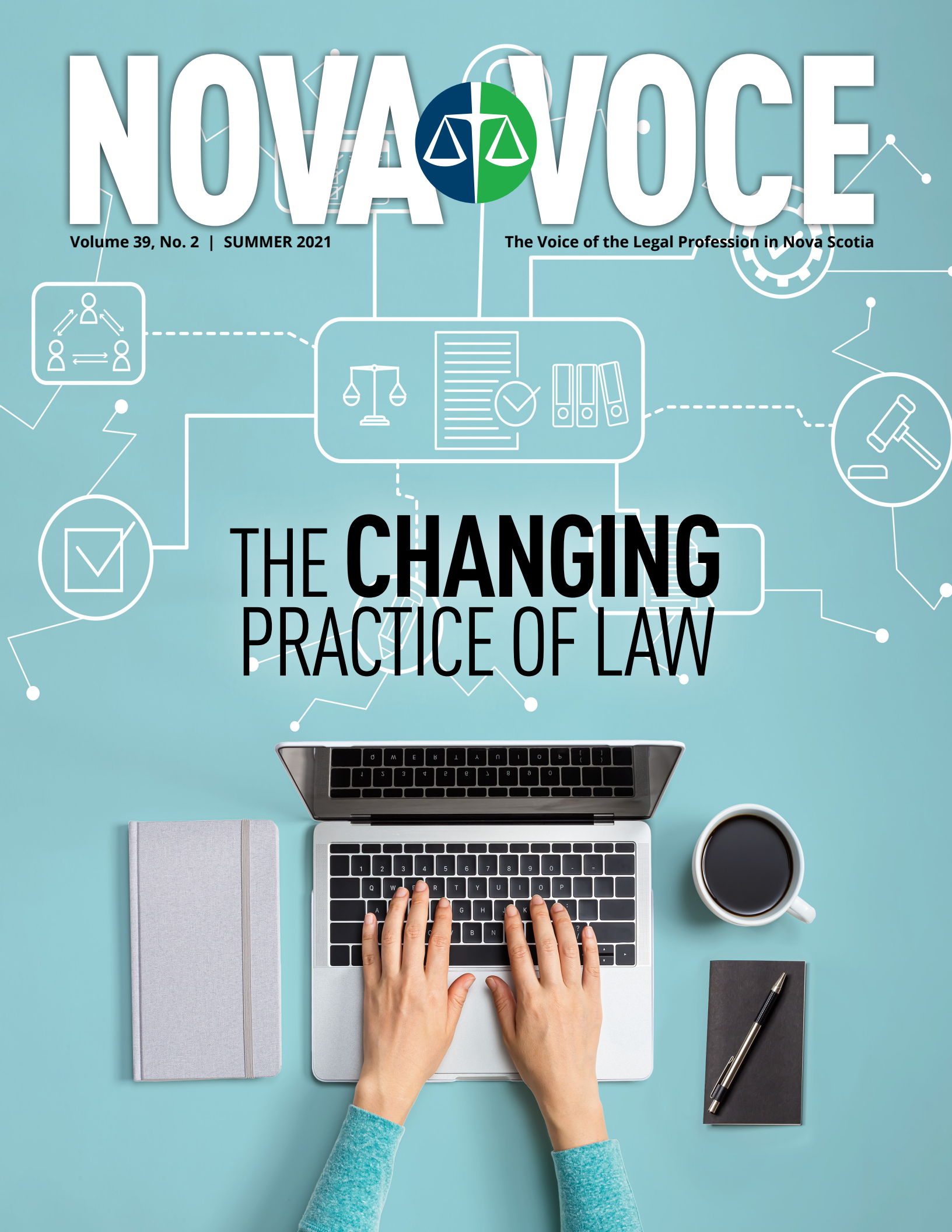
The Voice of the Legal Profession in Nova Scotia

# THE CHANGING PRACTICE OF LAW



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# THE CHANGING PRACTICE OF LAW **WHAT DOES IT MEAN TO YOU?**

**Agnes MacNeil, Department of Justice**

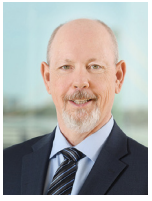
## PRESIDENT

The practice of law had been slowly evolving with the increasing use of technology, but the arrival of COVID significantly accelerated the pace. While technology for virtual meetings and screen-sharing was available through numerous commonly used software, the technology was not being fully utilized for the most part. Within a year, virtual meetings took over as a way of practice. Remote attendance at court hearings became common for date setting motions and case conferences, and even contested hearings where the parties were represented and cross-examination not needed. The use of electronic signatures became commonplace. Certainly, we were on the path to incorporate these changes into practice, but necessity made them happen.

Many lawyers (me included) discovered a better, healthier work-life balance with working from home. I think many of us never stopped to think about the amount of time we spend getting ready to come into the office and commuting back and forth. On the other hand, when we started to return to the office, it was like a reunion, although a somewhat surreal one when people appeared with long hair and beards. I was surprised that so many people wanted to return to the office when it was safe to come back. Most people missed the camaraderie found in the office, the ability to stop by someone's office to discuss a file, and the separation of work from home.

Going forward, the technology that allowed virtual hearings, mediations and discoveries will likely continue and grow, now that people have seen they can work. While many wanted to return to the office, the ability to work remotely some of the time has a lot of appeal and will likely be part of the future way of practicing. What will be most interesting to watch is whether the technology will allow the provision of legal services in rural areas which are under-served, which would provide a concrete increase in access to justice.

## VICE PRESIDENT



**Terry Sheppard, BoyneClarke**

The legal profession has certainly changed and become more diverse in the decades since I graduated law school. We were told that our law school class was the first one where the number of men and women equaled one another. Since then, the number of women has eclipsed men. More importantly, no longer are women relegated to certain practice areas, or government and in-house counsel positions, but are throughout the legal profession including the top echelons

of civil litigators, for example. Most importantly, it is no longer the exception to be before a female judge in this province. On the Supreme Court, of the full-time judges, there are 19 men and 17 women. On the Provincial court, women outnumber the men 16 to 12.

The future of the legal profession will undoubtedly be a "post-gender" one where this limited, binary dialogue about the two genders will be out of fashion. Already, legal organizations, including our own Court of Appeal, encourage people to identify their pronouns with many moving away from he/him and she/her and opting for they/them. In June, our Court of Appeal announced that many Justices prefer to be addressed in a gender-neutral fashion ("Justice"), rather than "My Lord/My Lady". Many superior courts across the country have taken this a step farther and directed that judges be addressed in a gender neutral fashion. For my own part, I have not addressed a Supreme Court justice as "My Lord" or "My Lady" in a long time and not one of them has ever questioned it.

I am very proud of the work CBA-NS has done over many years to educate the community, the courts and the legal profession on issues of gender equality and issues affecting the 2SLGBTIQ+ community.

## TREASURER

**Kathleen McManus, Department of Justice**

When I reflect on my legal practice of over two decades, I am always struck with how many aspects have changed. Notably, the increased pace caused by electronic communications, which has given rise to an expectation of immediate response. These changes came about by evolution in a reasonably gentle pace. In due course, I believe the pandemic will be regarded as starting a revolution. It has caused rapid and dramatic changes in every aspect of society, as we sought ways to adapt. While unsettling and exhausting, I have also found the change exciting and promising. I had no time to panic over all the new video and electronic technology, as I had to learn the basics as quickly as possible. Forgetting to unmute in a video call still challenges me and I suspect it always will!

Virtual technology permits a new level of flexibility, and thus accommodation, to be introduced into the legal profession and the administration of justice. Now, the possibility of hybrid work arrangements supports a better work-life balance, meeting family needs or medical needs, while pursuing a legal career. The ability to conduct virtual mediations, negotiations, hearings and court proceedings provides an important tool for accommodation which will enhance access to justice and hopefully lower costs that can create a barrier for many. I never thought that I would participate in a court hearing, in full attire, from my home office and that it would be so effective. There is so much more change and opportunity than I can imagine. I know there is significant change coming to the profession. I know that the change will continue to overwhelm as I adapt, but ultimately the legal profession will be enhanced by it.

## PAST PRESIDENT

**Dan Wallace, McInnes Cooper**

While the practice of law has been consistently changing, the extent of that change is often not evident while it is occurring. It requires reflection, made possible during the dog days of summer, to recognize how our professional lives have changed. That change involves how we practice, of course, but also what we practice.

Upon reflection, I am reminded that much of my practice is currently in an area of law, class action litigation, that barely existed in Nova Scotia when I graduated with an LLB (as it then was) from Dalhousie Law School (as it then was) in 2005. The emergence of class actions, driven in large part by the creativity and ingenuity of determined lawyers, has provided greater access to justice to marginalized groups and meant that deserving litigants get their "day in court".

Class action law is, of course, just one example of an emerging legal practice area in Nova Scotia. One of the highlights of being involved with the CBA-NS has been listening to leading lawyers who have identified emerging opportunities to serve the public and move the substantive law forward. I can only imagine how my law school professors or classmates would have reacted in 2005 if someone predicted that law firms in Halifax would soon have practice groups for blockchain law or cannabis law! It is interesting, and inspiring, to think about what new substantive areas of law we will be practicing in 2030.

## ADVOCACY COMMITTEE CHAIR

One of my top lessons from the last year and a half has been to question everything.

In terms of where we work, I had always assumed the answer was simple: at the office or in the courtroom, of course. But

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CBA-NS would like to thank everyone who contributed to the magazine. If you would like to write for a future issue of Nova Voce, please reach out to Lindsay O'Reilly, Communications Committee Chair, at loreilly@wnns.ca.

**CHANGING PRACTICE OF LAW**

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Jennifer Taylor, Stewart McKelvey

working mainly from home has worked for me, and ever since March 2020 I've been grateful to have that option. Moving forward, I hope legal workplaces seriously consider remote and hybrid options for all employees (not just lawyers) without losing sight of inclusion efforts. We don't want a silver lining of the COVID era — the ability to work productively from outside the office — to turn into a way to create a lower tier of legal workers. Oh, and I also look forward to the day when e-filing becomes a permanent option with the Courts of Nova Scotia!

In terms of what we do, that too seems simple: we practice law. But the reignited movement for racial justice, and the recommitment to truth and reconciliation, must make us question what "law" is – where it comes from, who it benefits, who it excludes and harms. To give one harrowing example, Canada's genocidal system of residential 'schools' was technically, and sickeningly, legal: it was grounded in the *Indian Act* and regulations made thereunder, and supported by government policy. The *Indian Act* — which still exists! — was a validly enacted federal statute implemented by elected politicians (although at the time it was adopted, the First Nations people governed by the Act were prohibited from voting in federal elections). Despite its initial 'legality', we know this system was designed to destroy Indigenous families and communities, and that it has caused generations of trauma. Just because something is legal doesn't mean it is right, or just – a basic lesson that often gets minimized in our profession. This moment must awaken us to the fact that being a lawyer is not just about knowing "what" the law is; it's also about interrogating the "why". Why is the law the way it is? Who is it serving and who is it hurting? And how can we make it better?

## EQUITY COMMITTEE CHAIR

Matthew Moulton, Cox & Palmer

The legal profession is at a crossroads. Technology is pushing productivity, but it is also leaving many of us isolated and constantly tied to work. This has been exacerbated by the COVID-19 pandemic and the work-from-home model that is sure to be a mainstay for years to come.

In my last contribution as Equity Chair, I want to draw attention to the mental health challenges we face as a profession. As someone who has faced mental health challenges in the past, I know how daunting it can be to seek out help. Practicing law is rewarding, but also very challenging work. As lawyers, we need to make sure we are taking care of ourselves and each other. Reach out to someone who may be struggling and make sure to check on how your colleagues are doing, especially junior lawyers and articled clerks. If anyone is struggling, encourage them to avail of the various supports available, including the Nova Scotia Lawyers Assistance Program. Let's work together to make a more caring and inclusive profession.

## COMMUNICATIONS COMMITTEE CHAIR

Lindsay O'Reilly, Waterbuy Newton

I have learned that change can be stressful and refreshing at the same time – and that it is important to be flexible.

When I began working from home during the first lockdown in March 2020, I was not at all sure how it would work. I soon realized, however, that it was possible to do most aspects of my practice from my dining room. Working from home with small children was a challenge – these two little people wanted my attention all the time and needed food, activities and fresh air. My husband, a paramedic, continued working during the lockdown. When online schooling began for my daughter (who was in Grade One in 2020), it added another challenge.

My firm was supportive, but I still had obligations to my clients, to resolve urgent problems and keep up with ticking timelines. My carefully maintained "life compartments" were bleeding into each other and at times it felt overwhelming. There was no "leaving work at the office" anymore. However, as the weeks went by, we all fell into a routine. I began to appreciate that on my breaks, I could play with my kids, walk my dog, or get some housework done.

Truthfully, although working from home was often stressful (awkwardness is having your four-year-old suddenly become part of your Court video-conference) there are times that I now miss the extra time it allowed me to spend at home with my family. I miss jumping on the trampoline with the kids in between working on affidavits. When the second lock-down came in 2021, I felt much more prepared and it took less time to adapt. I knew what was possible and how far I could stretch. After the lockdowns ended and we returned to the office, we have continued our work with much less "in person" contact with clients and other legal professionals. Many clients (reasonably) have opted to continue discussing legal matters by phone or e-mail. The Courts have been quick to adopt new technologies to keep the public and legal community safe. In many cases, they are still operating largely by telephone and video conferencing. While we may miss face-to-face contact and the feeling

of litigating in an actual courtroom, there are some benefits to this "new normal." Rather than spending time travelling to various Court houses and waiting for my turn to speak, I can continue working in my office until my appointed call-in time. There is seldom any need to wear a suit these days (which saves on dry cleaning) and jurisdictional issues can be easier to resolve, as in many cases, neither party will be required to travel (everyone will be taking part by telephone or video).

How our working environment will continue to evolve from here, remains to be seen. However, if the past two years are any indication, it appears our legal system is capable of changing more quickly than we imagined and the people who make it work – judiciary, staff, legal professionals and others – are more flexible than we think. With that being said, however, everyone has their limits and we should continue to look out for our colleagues' mental health and support each other as best we can.

***Lindsay O'Reilly head shot photo credit: Nicola Davison***

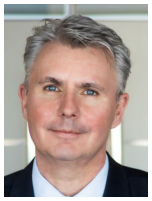
## YOUNG LAWYERS SECTION CHAIR

**Courtney Barbour, Torys Legal Service Centre**

I was called to the bar in 2016. As a millennial and young lawyer, I started practicing law by embracing change. That doesn't mean I do things differently just for the sake of it, or that I completely abandon the ways of old. For me, my practice changes incrementally by reflecting on what I've done each day. Was there something I could have done differently? Was I open and receptive to different ideas and perspectives of others? Can I grow from what I experienced that day? What have I learned that could be shared with a colleague to help them?

As I look forward to the future of law, I see many of the positives that have come from how we adapted to survive the pandemic. It pushed us as a profession to change and adapt where we may have been overly resistant before. We found new ways to connect through virtual meetings. We began to use virtual platforms for hearings and court appearances. We became more aware of the personal situations and life outside of work for our colleagues and clients. I hope we carry these things with us into the future and recognize their importance in improving access to justice, removing barriers to equity and advancement in our profession, and supporting one another in living healthy and fulfilling careers and personal lives.

## MEMBER SERVICES COMMITTEE CHAIR



**Jason Cooke, Burchells LLP**

As an articled clerk, I was told by a senior lawyer that the only constant in practicing law was change. According to the senior lawyer, this meant that lawyers should be ready to even re-invent their practices every five to ten years. For a new clerk barely able to remember how the photocopier worked – never mind substantive law – this idea was frankly terrifying to me.

In the years since, I have witnessed that constant change and it is perhaps less terrifying than I expected, although this is mainly because such changes usually happen more gradually than abruptly.

When we talk about how practice changes, we often (quite rightly) focus on areas such as the impact of technology or significant shifts in substantive law. But the individual lawyer is not remaining static while change occurs around them.

The old adage is that lawyers in private practice are constituted of "finders", "minders", and "grinders". Perhaps the latter label is the most relatable to all of us regardless of vintage. Whether we stay in that role or not, virtually every lawyer starts their career as a grinder: extensive legal research, initial drafting of contracts, briefs, or facta, even wrestling with binding machines and printers after hours.

Given the demands of law school, being a grinder – albeit demanding, exhausting, and frustrating at times – was not unfamiliar or unexpected. However, I was far less clear on "finders" and in particular "minders".

Most lawyers in private practice find themselves increasingly as minders and less as grinders as they become less junior. I do not think I am alone that the transition was (and is) challenging. Although it is a lot of work to be the front-line person on a task, there is also tremendous satisfaction in creating a real legal "something" out of nothing. It aligns with what we were taught in school and what we expect from the job.

What I did not appreciate at all is that the task of a minder is less about a given file and really more about minding relationships. Those relationships include external ones such as with clients, other counsel, the Court, and the public. Equally important, in my view, is minding those internal relationships, including more junior lawyers, articled clerks, and support staff.

The curious thing is that law school, continuing education, or even mentoring rarely, if ever, touch on the skills and considerations necessary to be effective as a "minder". In my experience, it is really a trial- and-error process, with plenty on the "error" side in my case. I expect some more support in this area would be welcome by many in the CBA.

# REMOVING BARRIERS TO VIRTUAL COURT

THE HONOURABLE
CHRISTA M. **BROTHERS**
Justice of the Supreme Court of Nova Scotia

**The word "unprecedented" has taken on new meaning these past 18 months.**

Looking back now, it is hard to imagine that virtual court was not always an option available to court participants in Nova Scotia, or anywhere in the country, for that matter.

The pandemic made painfully obvious the shortfalls of the justice system when it comes to technology. A lack of resources, limited familiarity with platforms like Microsoft Teams and Zoom, and deep-rooted traditions in oral advocacy made it difficult for the Courts to adjust when COVID-19 prevented most hearings from being held in person.

Within a couple of weeks, the Judiciary had fast-tracked the adoption of processes and technology to deliver justice remotely. The Supreme Court was the first in this province to dip its toe in the water, piloting virtual court for judicial settlement conferences, pre-trial criminal conferences and some types of civil motions and applications at the Halifax Law Courts. The first virtual matters were heard and recorded on April 30, 2020.

> "We quickly realized that the changes we previously thought improbable were not just possible but, for some types of matters, preferable."

Training for judges, court staff and counsel took place on an accelerated schedule and by the summer of 2020, virtual court options were available for many appeal, criminal, civil and family matters across Nova Scotia.

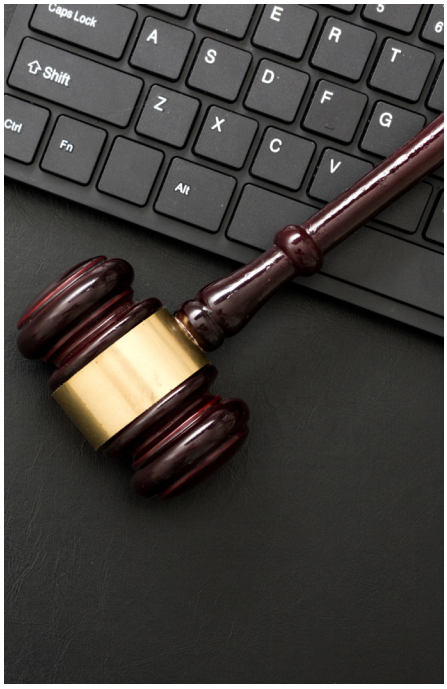
"We quickly realized that the changes we previously thought improbable were not just possible but, for some types of matters, preferable." Participating virtually provided greater access for individuals who had transportation or childcare issues, and saved time and money for lawyers and their clients who would otherwise have had to travel to the courthouse.

With these changes, the Courts had taken an important step toward much-needed modernization. In a strange way, this crisis presented opportunity.

But what many perceived as improved access to justice, others saw as barriers they had not previously encountered.

Some users — judges included — experienced issues with poor or no access to Internet, which affected the ability to hold court virtually. Self-represented individuals without computers, mobile devices or videoconferencing software had no way to participate remotely. And those individuals who could take part in virtual proceedings were often working from home while also juggling family obligations.

The situation was less than ideal. Patience, flexibility and perseverance got us through those early months.




Some challenges remain which the members of the All Courts Virtual Court Committee continue to wrestle with. In particular is the impact of virtual court proceedings on marginalized communities, an issue not unique to this province.

As a first step, the Committee helped organize a pilot project to enable self-represented individuals to participate in virtual Provincial Court proceedings in the Halifax region. This location was selected in part for its wide use of virtual court and the high number of self-represented individuals.

The All Courts Virtual Court Committee considered partnering with organizations

in the community, such as libraries and other public spaces, to provide access for court participants. But, in the end, it was agreed that to ensure the security, dignity, and privacy that court proceedings require, space would need to be identified within the courthouse.

The Judiciary and the Nova Scotia Department of Justice worked together to modify a space at the Spring Garden Road building to include the equipment needed to connect to virtual court. Processes are being finalized for sheriffs and court staff, and a system will be developed to book the space, similar to the process for supporting vulnerable witnesses.

The plan is to run the pilot for six months and evaluate its success for possible expansion to other courthouses. Space is already being considered as part of upcoming renovations at the Dartmouth Provincial Court and the Kentville Law Courts.

As noted in the CBA Task Force Report on Justice Issues Arising from COVID-19, there is no turning back now. An important shift has occurred with the pandemic and we cannot risk losing that momentum for further positive change in the justice system. That said, it is still too early to predict how virtual options will be used by the various Courts post-pandemic. Remote proceedings will likely play an important role in addressing the significant backlog in the trial courts; but otherwise, our next steps need to be carefully considered.

Feedback from the Bar and other court participants, including self-represented individuals, will be important. So too will be any plan produced by the province's Digital Task Force to modernize the Nova Scotia Courts. The Judiciary looks forward to reviewing both in the months to come.

# TACKLING SYSTEMIC RASICM THROUGH LEGAL AID CERTIFICATES

CHARLENE
**MOORE, QC**

Nova Scotia
Legal Aid

**Most of us in our lifetime will encounter some legal issue or challenge.** The ability to respond meaningfully to that challenge is dependent upon the resources available to us, including access to legal services. For the most vulnerable in our society, legal issues can snowball and the provision of publicly funded legal services becomes a necessity as their legal issues are often intertwined and compounded by poverty, racism, mental health, addictions, and trauma.

Nova Scotia Legal Aid's (NSLA) commitment to improving access to justice for the most vulnerable has included providing an array of services in criminal, family and social justice law, supported through innovation in technological support and non-lawyer services (court support workers, family support workers, social justice support workers and social workers). The provision of legal services in social justice extends from residential tenancies disputes and income assistance appeals to judicial reviews and representation before the Social Security Tribunal. The social justice umbrella extends to matters under the *Adult Capacity and Decision-Making Act* to elder and disability law issues.

NSLA is committed to providing more culturally responsive services to Indigenous and African Nova Scotian clients who are over-represented in the criminal and Child Protection systems in this Province. This includes providing culturally responsive services to Indigenous and African Nova Scotian clients through education of our

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**LEGAL AID CERTIFICATES**

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staff and bringing cultural impact to the forefront of legal issues. Our efforts in this regard include the hiring of Crystal Hill as our Indigenous Social Worker and Charnell Brooks as our African Nova Scotian Support Worker; the creation of the Indigenous Justice Initiative and the Equity, Racial and Diversity Committees; education around self-identification and improving race-based data collection; engaging in a diversity and equity audit; committing to the development of trauma informed practices for staff and clients and playing a leadership role in bringing national attention to the necessity of cultural impact assessments in criminal proceedings.

NSLA supports a more holistic approach to justice that recognizes that earlier intervention in Child Protection matters produces better outcomes for our clients and diverts more matters from court. This is why we created the Child Protection Practice Group in Halifax and why we have a continued commitment to restorative justice and participation in Wellness Courts across the Province, including the Domestic Violence Courts in Sydney and Halifax.

To improve services for our clients, NSLA has recommended modernization of our financial eligibility framework to reflect low-income measures and improvements to our private certificate tariff system, to better support and engage the private bar to provide legal services on certificate matters.

NSLA's vision of improving access to justice through working in collaboration with community and justice partners recognizes the important work the private bar does in supporting Legal Aid through the acceptance of legal services principally for certificate clients. Certificate lawyers also play a significant role in providing culturally responsive services to our clients. NSLA is committed to modernizing our private tariff certificate system, providing mentorship and free in-house educational opportunities along with the services of our research co-ordinator.

Last year, 217 members of the private bar across the province accepted certificate work. Five years ago, we had 240 private lawyers accept certificates. There are fewer lawyers in rural parts of the province accepting certificates and the pool of experienced family and criminal lawyers for complex criminal matters and Child Protection matters is also decreasing. It has become particularly challenging in Halifax to find lawyers to accept family and Child Protection matters. It is important that there is a robust list of junior and senior members of the private bar across the province to accept certificates to ensure that the most vulnerable receive representation in the justice system.

> "It is important that there is a robust list of junior and senior members of the private bar across the province to accept certificates to ensure that the most vulnerable receive representation in the justice system."

Most of the private bar who accept Legal Aid certificates work are sole practitioners or work in small- to medium-sized firms. Although we recognize the challenges and are working hard to address the barriers that taking certificates can pose as a result of the hourly rate and tariff hours, taking Legal Aid certificates or acting as a mentor to junior lawyers can be a substantive way of addressing issues of systemic racism and the historical wrongs that Indigenous and African Nova Scotian people have faced.

Overall, NSLA is committed to improving access to justice for the most vulnerable Nova Scotians. The current Strategic Plan contains both client and system goals and is reflective of the organization's vision to be trusted advocates providing access to justice for the diverse people we serve in partnership with our communities.

## DID YOU KNOW?

The private bar handles approximately 20% of Legal Aid full-service cases, primarily where Legal Aid staff lawyers are conflicted out of representation. This includes Certificate Lawyers who provide full or limited retainer legal representation to qualified Legal Aid clients, and After Hours Telephone Duty Counsel (AHTDC) who provide advice to people under arrest or being detained by a peace officer via telephone after normal business hours and on holidays. Tariff rates are set by the Province and vary depending on the type of matter and the lawyer's years of experience.

Nova Scotia Legal Aid values the involvement of the private bar in providing legal services to those most vulnerable and historically disadvantaged Nova Scotians. In return, NSLA offers support to private bar lawyers taking Legal Aid cases or who are on the AHTDC Roster by providing access to the NSLA Researcher and in-house professional development. If you are interested in accepting Legal Aid Certificates, check out the NSLA website at ***https://www.nslegalaid.ca/information-for-lawyers/accepting-certificates/***.

# THE CHANGING FACE OF ARTICLING: PERSPECTIVES ON THE NEW PRACTICE READINESS EDUCATION PROGRAM

***A Student's Perspective – submitted by a Nova Scotia Articling Student***

I am a 2021 call and a member of the first cohort in Nova Scotia to complete the PREP program run by the Canadian Centre for Professional Legal Education ("CPLED"), in lieu of the traditional bar exam. Initially, this was a welcome initiative for articling candidates, who were excited at the prospect of a practical experience rather than cramming for another exam. In many aspects, however, the program failed to deliver on its promises.

PREP is completed in stages, simultaneously with articling. First, candidates must pass a certification test for two of Microsoft Word, PowerPoint, Excel, and Adobe PDF. Next is 100+ hours of online modules, with topics ranging from practical skills like legal writing and the basics of trust accounting, to soft skills like client management. Candidates then participate in a week-long workshop (held virtually during the pandemic) which reviews these modules and the marking criteria for assignments they will see later on.

The most time-consuming stage is the virtual law firm, where candidates participate in three "rotations" of business law, criminal law, and family/real estate law. Candidates are assigned work by a partner at the fictional "PREP LLP" which must be completed by set deadlines on top of their ordinary articling work. Lastly, there is the capstone assessment, where students are evaluated on a week's worth of assessments. Only your results in the capstone assessment are determinate of whether you pass the course and can be called to the bar.

Overall, the program often came off as disorganized, with inconsistent and unclear materials, expectations, and

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**PREP**

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communications. Lawyers from around the country assessed our work, but appeared to provide conflicting scores and feedback. Cultural competency education felt more like a box-ticking exercise than something meaningful. Responses from CPLED staff to candidates' questions sometimes came off as patronizing and disrespectful. Students were often reminded that CPLED policies allowed for penalties up to expulsion, as a consequence for posting about the program on social media.

One of the greatest sources of frustration was the timing of the capstone assessment. Previously, if you failed the summer sitting of the bar exam, you could write again in the winter and be called on time with your cohort. Under the standard June-to-June schedule, the PREP capstone assessment occurs in mid-to-late March. Results are released in mid-May, two to four weeks before the bar call ceremony. This year, students who were unsuccessful in the capstone assessment were given an opportunity to rewrite the week after the Nova Scotia bar call ceremony. Instead of having a timely opportunity to join their peers in the profession, these candidates, who spent nine months working through the PREP program, cannot be called until the next ceremony in November. It is unclear what is supposed to happen with those candidates' employment in the meantime, their articles having finished May 31.

"One of the greatest sources of frustration was the timing of the capstone assessment. Previously, if you failed the summer sitting of the bar exam, you could write again in the winter and be called on time with your cohort. Under the standard June-to-June schedule, the PREP capstone assessment occurs in mid-to-late March."

This is not to say there is no merit to the program. The idea of replacing the outdated bar exam model with a practical approach is admirable. Some aspects of the PREP program were educational and helpful, such as the simulated trust accounting exercise and tips on plain language writing. Overall, however, the program left many candidates feeling confused, unsupported, and unnecessarily stressed. If I might speak on behalf of the members of the 2020-2021 cohort, we sincerely hope that the NSBS and CPLED seriously consider the feedback provided by candidates and take steps to improve the program for future classes.

"My impression of the new system is that it is a far more structured and standardized one. It requires a much more significant time commitment from the clerk with the programming that is involved."

***A Principal's Perspective***

The new bar admission or articling program has eliminated the traditional bar examination and mandatory three-week skills course component taken in person in Halifax, and has replaced it with a new Bar Admission Program currently consisting of two components, namely the Practice Readiness Education Program (PREP) and the Cultural Competence Workshop. The Bar Society has partnered with the Canadian Centre for Professional Legal Education (CPLED) to deliver the PREP. PREP will help articled clerks gain practical legal knowledge and competencies in lawyer skills, practice management, professional ethics, and the personal attributes needed to successfully practice law in Canada using a consistent, integrated approach that combines interactive, transactional learning and simulation within distinct phases.

My impression of the new system is that it is a far more structured and standardized one. It requires a much more significant time commitment from the clerk with the programming that is involved. In that way, the new system relies less on individual firms to ensure a clerk becomes competent (although obviously the NSBS still monitors a clerk's experience with a firm) and attempts, through voluminous educational programs and modules, to do this directly.

The time commitment required by the clerk to complete this program is far more extensive than anything under the previous regime. To the extent this takes away from a clerk's time with the firm, and the traditional method of articling, I feel that the fruitfulness of that depends on the quality of that particular clerk's articling experience. Finally, I feel that the new program ensures clerks receive a more universal experience with respect to key areas of education, while also removing the significant stress associated with the traditional bar exam.

Liam Gillis, Sampson McPhee Lawyers

*Liam Gillis is a partner with the law firm of Sampson McPhee Lawyers. He originally joined the firm in 2015, after articling with a large regional law firm in Halifax. Liam is in a unique position to comment on the new articling program, having gone through the more traditional articling pathway himself in recent years.*

***Continuous Improvement of PREP – Dr. Kara Mitchelmore, CPLED CEO***

The Canadian Centre for Professional Legal Education (CPLED) launched its new Bar admission program, the Practice Readiness Education Program (PREP) in June 2020 to over 800 students in Alberta, Manitoba, Nova Scotia, and Saskatchewan. PREP is a competency-based skills program focusing on areas such as practice management, professional ethics, communication, trust accounting, and cultural awareness. The program does not focus on substantive law as students have already concentrated on Canadian substantive law during their Canadian common law degree or while obtaining their Certificate of Qualification from the Federation of Law Societies of Canada. The PREP June 2020 intake was completed by students over nine months entirely online due to the global COVID-19 pandemic.

Once students complete their PREP studies, their final results are released to them and their law societies approximately six weeks after the final Capstone assessment has concluded for the intake. CPLED regularly communicates with its participating law societies[1] to determine timelines for final results while working to maintain the integrity and essential learning objectives of PREP for Bar admission.

CPLED is devoted to collecting feedback from its stakeholders to ensure the program continues to improve and evolve. The feedback received contains valuable information CPLED can then use to make adjustments and improvements to PREP. CPLED collects feedback from its students and external contractors throughout the program through formal post-phase surveys, emails, focus groups and phone calls.

Investing the time to ask all stakeholders questions and learn about their experience with PREP is extremely important to CPLED and something they take very seriously. Continued learning is key to improving.

To complement the student and external contractor feedback collected CPLED invited Principals and firm contacts involved with the June 2020 PREP intake to engage with the CPLED management team in collaborative conversations during the summer of 2021. This initiative was well received and CPLED is committed to engaging with this stakeholder group regularly regarding future program intakes.

CPLED has initiated the following actions to enhance PREP and its processes:

- Hired an Equity, Diversity and Inclusion (EDI) consultant, to review PREP content and provide recommendations.
- Created additional assessment guidelines for Assessors[2].
- Reviewed online navigation of PREP content to better organize materials and create clarity on assignment instructions.
- Hired additional staff.
- Implemented mandatory customer service training for all employees.
- Implemented mandatory EDI training for all employees.
- Implemented a new communication strategy for students.
- Is piloting a new delivery model of PREP, Accelerated PREP[3].

A report summarizing the initiatives CPLED is working on to enhance PREP, while staying committed to the learning objectives mandated by participating law societies, will be released in the fall of 2021 on the CPLED website.

CPLED will continue to seek regular feedback from its stakeholders to support initiatives that improve the PREP experience for students while regularly communicating the program time commitments and emphasizing the importance PREP has on preparing students for their future legal careers.

***Update from NSBS***

In order to avoid creating barriers, the Nova Scotia Barrister's Society added an additional call to the bar in August so that the students who had to do the supplemental exam could be called within one week of getting their results. Under the previous regime, students who didn't write the bar exam until January or who rewrote in January and were unsuccessful would not be able to rewrite until July and they would not get their results until October. PREP reflects a much speedier process for students to be called to the Bar.

1 CPLED participating law societies are the Law Society of Alberta, Law Society of Manitoba, Law Society of Saskatchewan and the Nova Scotia Barristers' Society.
2 Assessors are lawyers with at least five years of experience who are in good standing with a CPLED participating law society. They are external contractors who virtually assess student assignments and they receive an honorarium for this work. Their role is to provide students with objective and unbiased assessments of their work in preparation for their Capstone assessment.
3 ***https://cpled.ca/students/accelerated-prep-alberta-2021/***

# THE LONG ROAD TO **RECONCILIATION**

LINDSAY **O'REILLY**
Waterbury Newton

*based on an interview with*

NAIOMI **METALLIC**
Schulich School of Law

**New Offerings** ***by Tracey Metallic, a Mi'gmaq artist born and raised on the shores of the Restigouche River.***

**On May 28, 2021, when it was announced that the remains of 215 children had been found with ground-penetrating radar, buried in unmarked graves near the site of the Kamloops Indian Residential School (lands of the Tk'emlúps te Secwépemc First Nation), Canadians were faced anew with an unsettling truth.** This time, the evidence – the small, quiet bodies put in the earth so long ago – would not allow Canadians to look away. For the survivors and their families, the news was a confirmation of what they had been saying all along.

Naiomi Metallic, a Halifax lawyer and law professor originally from the Listuguj Mi'gmaq First Nation in Quebec (the Gespegewagi district of Mi'kma'ki), notes that the news may be "re-traumatizing" for some of Canada's Indigenous peoples.

"It is almost like peeling back a scab," she says. "There is a wound there."

Metallic is working to help heal that wound – a wound that belongs both to First Nations people and to Canada as a whole. After a decade of practicing aboriginal law as an associate at Burchells LLP in Halifax, Metallic made the move to academia in 2016, continuing her work for Indigenous people "through teaching, writing, and speaking about issues facing Indigenous peoples in Canada and how the law can be a tool for reconciliation." Metallic was appointed as Dalhousie's inaugural Chancellor's Chair in Aboriginal Law and Policy in 2016.

Metallic notes that the deaths of Indigenous children at Canada's Residential Schools is not "new news." The Truth and Reconciliation Commission heard testimony from close to 7,000 Residential School survivors and other witnesses over five years, from 2010 to 2015. Its six-volume report, released in December 2015, estimates that about 6,000 Indigenous children died while attending Canada's Residential Schools – though the actual number of deaths is unknown.

From the 19th century until the 1990s, more than 150,000 Indigenous children were forced to attend state-funded "Residential Schools," in a campaign to forcibly assimilate them. Physical and sexual abuse were rampant at the schools. Children already suffering the trauma of being separated from their families and communities were beaten if they spoke their native languages. They were malnourished and lived in cramped quarters that lacked adequate ventilation and heating. Between 1948 and 1952, indigenous children in Residential Schools were used as subjects for scientific experiments in nutrition, to learn about the physical effects of prolonged deprivation of essential nutrients. Some children drowned or froze to death during attempts to run away from the schools and return to their families. Many died of diseases such as

tuberculosis, at rates much higher than those in the general population of Canada at that time.

In 1907, an early whistle blower, Dr. Peter Bryce, submitted his Report on the "Indian Schools" of Manitoba and the Northwest Territories. He drew attention to the unusually high death rates among children in attendance, writing, "of a total of 1,537 pupils reported upon, nearly 25 per cent are dead, of one school with an absolutely accurate statement, 69 per cent of ex-pupils are dead, and that everywhere the almost invariable cause of death given is tuberculosis."

Bryce's report blamed poor ventilation and neglect for the high death rates. Healthy children were routinely kept in close quarters with sick ones, facilitating transmission of disease. He called for an overhaul of how children were treated at Residential Schools. He was subsequently told that his reports were no longer required. His research funding was eventually cut off. He later wrote a pamphlet called *The Story of a National Crime*, outlining the indifference of the Canadian government towards the sickness and deaths of Indigenous children.

"When the first discovery at Kamloops came out, my first thought was, 'this is the tip of the iceberg,'" says Metallic. "'We are going to see more discoveries.'"

Sure enough, more disturbing news followed, as searchers used the same ground-penetrating radar technology to search other former Residential school sites. On June 24, 2021, the Cowessess First Nation announced that it had found an estimated 751 unmarked graves near the site of the former Catholic-run Marieval Residential School in Saskatchewan. On June 30, 2021, the Lower Kootenay Band announced having discovered the remains of an estimated 182 people at a site south of the former Catholic-run St. Eugene's Mission School near Cranbrook, British Columbia.

Our nation, jarred, entered a state of mourning. Flags flew at half-mast. Canada Day celebrations were replaced with a day of quiet reflection. There was a renewed call for further investigations and measures to hold the Catholic and Anglican churches – which had largely run the schools – and government accountable for the damage done – to truly find a way to truth and reconciliation.

***Kamloops Indian Residential School (lands of the Tk'emlúps te Secwépemc First Nation)***

"We pay attention to something when it is brought to light in the news cycle and then we forget about it. This recent news is awakening the Canadian consciousness in a way that maybe did not happen even through the Truth and Reconciliation reports."

"We pay attention to something when it is brought to light in the news cycle and then we forget about it," Metallic says. "This recent news is awakening the Canadian consciousness in a way that maybe did not happen even through the Truth and Reconciliation reports."

The last Residential School in Canada closed in 1996. There are an estimated 80,000 Residential School Survivors still alive today.

The Canadian Residential Schools were rooted in Canadian law (mainly through the *Indian Act*) and enforced by Canadian law makers and legal professionals. We might ask, then, what is the legacy of the lawyers responsible for counselling the government of that time? Or of those who actually drafted the *Indian Act* (which still exists today) and its amended forms? What is the legacy and responsibility of the Courts that enforced its provisions? It could be said that they were simply "doing their jobs" and operating within the laws of that time. And

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**RECONCILIATION**

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yet, their doing so helped to enable one of the darkest chapters in Canadian history.

"One of the things I often say to students is, if we look to the past and everything that had to do with the Residential Schools, the churches ran it but lawyers were probably advising the churches," Metallic says. "They were advising the government on its policies and drafting the parts of the *Indian Act* that allowed for the taking away of children without their parents' consent and making it illegal for their parents to oppose that."

***Naiomi Metallic, Assistant Professor, Schulich School of Law***

"Churches ran it but lawyers were probably advising the churches. They were advising the government on its policies and drafting the parts of the *Indian Act* that allowed for the taking away of children without their parents' consent."

"My point to my students is that lawyers play a role in so many decisions that happen. In order to learn from the past and move forward, we need to train our future lawyers so they make decisions that will not knowingly or inadvertently cause harm to Indigenous people."

The Truth and Reconciliation Commission, in 2015, issued 94 Calls to Action to "redress the legacy of Residential Schools and advance the process of Canadian reconciliation." The Calls to Action are divided into the following categories: Legacy, Child Welfare, Education, Language and Culture, Health – and Justice.

**Call to Action 27 states:**

*27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.*

**Call to Action 28 states:**

*28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and antiracism.*

The Commission, therefore, did not overlook the role that our legal system and individual lawyers played in creating the horror of the Residential Schools—or the responsibility those in legal professions today now have to avoid repeating the past.

## TRUTH AND RECONCILIATION TOOLS AVAILABLE THROUGH THE CBA

The CBA has recently created and made available a ***Truth and Reconciliation Toolkit*** for legal professionals seeking more information on this subject.

The CBA's first Indigenous president, Brad Regehr, says he is proud of the work this organization is doing to further reconciliation efforts on behalf of the profession.

"There is still much work to be done. The CBA created this toolkit as another way to help you do this work. Whether you are just beginning your reconciliation journey or already on your way, these resources can help you learn to be a better ally, engage with Indigenous advisors and recruit and retain Indigenous talent. We hope this toolkit will inspire you as you move forward on this path of reconciliation," he says.

In terms of continuing legal education, the CBA continues to offer a five-module course called ***"The Path - Your Journey Through Indigenous Canada."*** The modules are made up of videos and quizzes that focus on the First Nations, Inuit and Métis peoples of Canada, the history of Indigenous peoples and their relationship with European settlers, the British Crown and the Dominion of Canada.

Metallic, as the Chair of the Dalhousie Schulich School of Law's Truth and Reconciliation Committee and in an effort to fulfill Call to Action 28, has undertaken a number of initiatives at the law school, to teach students about the history and legacies of colonialism and Residential Schools in Canada.

"In order to learn from the past and move forward, we need to train our future lawyers so they make decisions that will not knowingly or inadvertently cause harm to Indigenous people."

In her first year at the Schulich School of Law, Metallic organized Blanket Exercises for all of the first-year law students. Over the course of a couple of hours, the exercise aims to expose participants to a taste of the colonialism that Indigenous peoples have experienced over the past 500 years. The exercise has students – taking on the role of Canada's Indigenous peoples – stand on blankets that represent the lands of pre-contact Canada or Turtle Island. As the exercise goes on, students are dispossessed from those lands by Europeans (played by volunteer Mi'kmaq lawyers, students and elders) who push or take away parts of the blankets. Some students are handed different coloured cards: some that result in the student having to leave their blanket because they represent one of the thousands who died of communicable diseases like smallpox. Other students receive cards that say they have been sent to Residential Schools or have suffered other fates that Canada's Indigenous peoples had experienced. By the end of the exercise, those few students still standing are crowded onto a tiny piece of their original blanket – with a much better understanding of Canada's colonial history.

Students take part in a talking circle exercise afterwards, to help in processing their reactions to the experience. Metallic notes that even the students who were aware of Canada's history of colonialism told her the exercise was eye-opening.

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## THE *INDIAN ACT* AND RESIDENTIAL SCHOOLS

The *Indian Act* was created and came into power on April 12, 1876, consolidating a number of earlier laws aimed at controlling and assimilating Indigenous peoples into Euro-Canadian culture.

An "Indian" was defined as "any male person of Indian blood." Women who married non-Indigenous men lost their status. Any Indigenous person who became a doctor, lawyer or clergyman also lost their status.

In 1883, Sir John A. MacDonald authorized the creation of the Residential School System, after telling the House of Commons:

*"When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write, his habits and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men."*

"The *Indian Act* was a piece of colonial legislation by which, in the name of 'protection,' one group of people ruled and controlled another."

(Source: Truth and Reconciliation Executive Summary).

In 1883/84, the federal government established three large residential schools in Western Canada, with the aim to "kill the Indian in the child." As noted in the Truth and Reconciliation Final report at pp 60-62, under "Compelling attendance," even though attendance was not mandatory at first, there were ways to pressure parents to send their children to Residential School. Indian Agents had significant power and many Indigenous families were living in conditions of poverty and neglect on reserves. Tactics such as withholding rations could be used to coerce families into sending their children to the schools.

In 1884, the *Indian Act* banned Indigenous peoples from conducting spiritual ceremonies such as the West Coast Potlatch and the Prairie "Thirst Dance" or "Sun Dance." In that same year, a pass system was created, restricting Indigenous peoples from leaving their reserves without permission.

In 1920, under the amended *Indian Act*, it became mandatory for every Indigenous child to attend a Residential School and illegal for them to attend any other educational institution. Children were removed from their parents by force as young as age three or four and were sometimes never seen again. In Indigenous communities, families mourned for children who were taken and never returned. Those who survived Residential School were left to grapple with the abuse they had suffered and witnessed—all while facing the horror that their own children and grandchildren would be taken away, to attend the same institutions.

The Truth and Reconciliation Commission noted in 2015 that "The *Indian Act* was a piece of colonial legislation by which, in the name of 'protection,' one group of people ruled and controlled another."

**RECONCILIATION**

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"I had a student from Newfoundland, who was very upset from learning this history, who said she went home, called her mother and said, 'did you know about this? Why didn't you tell me?'"

In September 2017, Metallic's second year as a professor, the Schulich School of Law launched Aboriginal and Indigenous Law in Context (AILC): a two-credit, mandatory course with intensive components in both the fall and winter terms. The program is supported by community visits (reserve and urban), and guest speakers to teach students about both the challenges Mi'kmaq people face, as well as their accomplishments in the face of adversity, and aspirations for the future.

Metallic oversaw the creation of supports for her law school colleagues who wished to add more Indigenous content into their classes, such as research assistance and setting up a database of resources. She and her colleagues have sought to increase the number of courses in Aboriginal and Indigenous law—including a course teaching about the legal traditions of Indigenous peoples and methods for members of the legal profession to learn about and work with these laws. She points out that, even if students do not end up working directly with Indigenous peoples, it is still important for them to be able to view the work they do through the lens of how it may affect Indigenous communities.

Metallic's next major goal is to develop and sustain an Indigenous Law and Governance lodge at the Schulich School of Law (an "Lnuwey Tpludaqann Wikuom")

"There are so many examples, but if you are working for any sort of company that is doing resource development, that could raise duty to consult issues as well as Aboriginal rights infringement issues. If you are working for a municipality, similar kinds of issues could come up. Even things to do with the School Board and education can impact on Indigenous people," she says.

Metallic notes that legal professionals already in the workforce have their own Call to Action: 27.

"For some folks, they need the basic '101' of understanding the history of colonialism and how it continues to operate today," she says.

"They might also benefit from learning, 'here are the 13 Mi'kmaq communities of Nova Scotia, here are the organizations that serve them and work for them, here is what they do, here is who to contact when you have a question about this or that."

As Metallic begins her second five-year term as Dalhousie's Chancellor's Chair in Aboriginal Law and Policy, she is joined by two more Indigenous faculty members who will also be part of the Schulich School of Law's Truth and Reconciliation Committee.

Metallic's next major goal is to develop and sustain an Indigenous Law and Governance lodge at the Schulich School of Law (an "Lnuwey Tpludaqann Wikuom"). The goal would be to create a hub at Dalhousie for supporting Indigenous communities in the Atlantic Region in the revitalization and use of their own laws and governance traditions. Educating students and members of the legal community about respecting and supporting Indigenous peoples' own legal orders and governance would also be part of this. She notes that, although there is progress being made, there is still a long road ahead to achieve the goals of truth and reconciliation. To truly make amends to those small ones, who lay hidden in the ground for so long.

"Reconciliation and decolonization are a long game, but it is important that people do not forget," Metallic says. "It has been five years since the Truth and Reconciliation Commission Report. Some places have done a lot of work but there is still much work to be done. This includes in the legal profession."

This year, for the first time, The National Day for Truth and Reconciliation will be observed on September 30th. The day, which was created following the discoveries of graves at former residential schools this past summer, is meant to honour Residential School victims and survivors and encourage reflection upon the intergenerational harm caused to Indigenous peoples by Canada's colonial history and discriminatory laws and practices.

## WAYS TO HELP

For those who would like to donate, the following are local Indigenous organizations that are charities:

The **Mi'kmaw Native Friendship Centre** in Halifax aims "to improve the lives of aboriginal peoples living in an urban environment through social and cultural programing." The Centre is currently fundraising for a new building. More information can be found at: ***http://mymnfc.com/*** or by calling 902-420-1576.

**Mi'kmaqwey Debert** is currently fundraising to build a new cultural center. More information can be found at: ***https://www.mikmaweydebert.ca/***.

The **Ulnooweg Community Foundation** is aimed at raising funds to empower Indigenous communities and youth. It also helped supply funds to vulnerable communities and individuals during the COVID-19 pandemic. More information can be found at: ***http://ulnoowegfoundation.ca/about/***.

# RECENT LEGISLATION AND CASE SUMMARIES

LINDSAY **O'REILLY**

Waterbury Newton

EMILY **ROEDING**

Canadian Bar Association – Nova Scotia Branch

### ***Calucci v Calucci*, 2021 SCC-24**

This recent decision, delivered in June 2021, delved into the issue of retroactive child support variation and clarified the obligation of child support payors to uphold their financial duty to their children.

According to background information, the Calucci parents divorced in 1996 and the mother was given sole custody of their two children, with the father required to pay monthly child support. In 1998, the father requested a reduction in the child support amount, however provided no financial disclosure to prove his case and the matter was not resolved. The father made no voluntary payments between 1998 and 2016, and only limited payments were made via maintenance enforcement, resulting in approximately $170,000 owing in retroactive child support.

In 2016, the father brought a motion to retroactively reduce his child support obligations. The motion judge agreed, reducing the father's arrears significantly to $41,642. The mother appealed this decision and the Ontario Court of Appeal sided with her, at which time the father then appealed to the Supreme Court of Canada.

The Supreme Court unanimously dismissed the father's appeal and upheld the Ontario Court of Appeal's decision to reinstate the $170,000 in retroactive child support. The decision, written by Justice Sheilah Martin, states in part "any framework for decreased child support must account for the informational asymmetry between the parties and the resulting need for full and frank disclosure of the payor's income." Justice Martin continued, "payors should not be better off from a legal standpoint if they do not pay the child support the law says they owe. Nor should payors receive any sort of benefit or advantage from failing to disclose their real financial situation or providing disclosure on the eve of the hearing."

Through this decision, the SCC provided a framework for child support variation cases to move forward in a fashion that puts the child first, rather than assuming the payor's interests are paramount.

### ***NS Intimate Images and Cyber-Protection Act helps protect cyber-bullied parents***

The anti-cyberbullying law inspired by teenager Rehtaeh Parsons has helped the parents of a missing Nova Scotia toddler find relief from their own online attackers.

Parsons died in 2013 at the age of 17, having hung herself and fallen into a coma after enduring intense online harassment from

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**RECENT LEGISLATION**

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her peers. The bullying Parsons experienced included online sharing of images showing an alleged sexual assault against Parsons when she was 15. Parson's suicide inspired anti-cyberbullying legislation, meant to help victims sue those who harass them online. The most recent incarnation of this legislation, the *Intimate Images and Cyber-Protection Act*, was enacted in 2018.

In February 2021, Jason Ehler and Ashley Brown, of Truro, Nova Scotia, took legal action under the *Act* in an effort to shut down a Facebook group devoted to discussing theories relating to their son Dylan's disappearance.

Three-year-old Dylan Ehler went missing on May 6, 2020, while playing in his grandmother's yard in Truro. After a six-day search, only the little boy's boots were found. A Facebook group was created shortly after Dylan went missing, administered by Tom Hurley and April Diane Moulton. It grew to approximately 17,000 members and had discussions that ranged from calling Ehler and Brown negligent to theorizing that they were actively involved in their son's disappearance.

The parties appeared before Justice Jeffrey Hunt in the Nova Scotia Supreme Court on March 2, 2021. Ehler and Brown sought a Court Order to shut down the Facebook group related to their son and prohibit the future creation of other, similar groups about Dylan. They also sought damages in relation to the mental suffering the group had caused them. The matter was set to return to Court on August 3, 2021, however the parties ultimately reached a settlement by the end of July 2021, which involved the Facebook group related to Dylan being permanently shut down.

> "When consumer protection is the intended outcome of a regulatory regime, it should be assumed the regime will be in plain language, easy to understand and supports a simple claims process. The APPR, which was intended to accomplish enhanced passenger rights, accomplishes none of these things."

***Flight Compensation in Small Claims Court***

It appears that regulations meant to protect Canadian air travelers may need an overhaul if they are to have any meaningful effect. That was the message delivered in a scathing decision by Small Claims Court adjudicator Darrell Pink, dated July 4, 2021 *(Geddes v. Air Canada, 2021 NSSM 27).*

In 2019, the Government of Canada directed the Canadian Transportation Agency to create rules to govern air passenger rights. This was part of an effort to protect travelers and 'level the playing field' in disputes between airlines and their passengers. These new rules were enacted through the *Air Passenger Protection Regulations ('APPR')*, annexed under the *Canada Transportation Act. Geddes v. Air Canada* was the first case that called on a Nova Scotia Court to consider these new regulations in an adversarial context.

When passenger Darrell Geddes's Air Canada flight from Halifax to Orlando, Florida arrived five hours late in January 2021, he requested a refund for the flight but was offered only a meal voucher. Geddes sought compensation in the Small Claims Court under the *APPR*, s.19(1)(a)(i), which states:

> Compensation for delay or cancellation
>
> 19 (1) If paragraph 12(2)(d) or (3)(d) applies to a carrier, it must provide the following minimum compensation:
>
> (a) in the case of a large carrier,
>
> 1. $400, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by three hours or more, but less than six hours.

Geddes was ultimately unsuccessful after about a year and a half of litigation. Air Canada's expert witness – who was in charge of repairs for the aircraft Geddes travelled in – gave evidence that there were a number of unusually time-consuming repairs needed before Geddes' flight. These repairs led to flight delays, for safety reasons, beyond Air Canada's control. Geddes did not, or could not, provide the Court with sufficient expert evidence to show that Air Canada could have managed to complete the work in time for his flight to leave on schedule.

Despite finding against Geddes, Pink strongly criticized the APPR itself. "When consumer protection is the intended outcome of a regulatory regime, it should be assumed the regime will be in plain language, easy to understand and supports a simple claims process. The APPR, which was intended to accomplish enhanced passenger rights, accomplishes none of these," he wrote in his decision.

"The language is complex and legalistic; one needs detailed or specific knowledge to invoke the claims system; and the process to seek compensation, once invoked, does not lend itself to quick resolution. This case illustrates that complexity, as lengthy pre-hearing processes involved the issuance of subpoenas to obtain detailed records from the Defendant about aircraft fleet information, maintenance records and other matters to support the Claim."

Pink noted that few people would be willing to go to the great lengths Geddes did to seek a few hundred dollars in compensation—and that many simply could not afford the time and money necessary to do so.

"Close to 1,000 pages of paper were exchanged, in a $400.00 claim," he observed. Geddes has appealed the Small Claims Court verdict.

# 10 WAYS CANADA'S **CONSUMER PRIVACY PROTECTION ACT** WILL IMPACT PRIVACY PRACTICES

SARAH
**ANDERSON DYKEMA**
McInnes Cooper

DAVID
**FRASER**
McInnes Cooper

*Note from the authors: Although Bill C-11/the Digital Charter was an important part of the federal Liberal platform in the 2019 election, no progress was made on the bill once it was tabled in Parliament. There is now a general consensus that it is in need of an update, so Bill C-11 gives us a sense of what to expect after the next election.*

**On November 17, 2020, the federal government proposed dramatic changes to how Canada will enforce privacy law, ushering in a new legal regime to protect individuals' personal information – and to regulate organizations' privacy practices.** *Bill C-11: the Digital Charter Implementation Act* creates the *Consumer Privacy Protection Act (CPPA)* to replace the federal *Personal Information Protection and Electronic Documents Act (PIPEDA)*, and codify in law organizations' obligations respecting the collection, use and disclosure of personal information rather than merely rely on the Canadian Standards Association Model Code. The federal government says it estimates 18 months for the CPPA to go through the legislative process and become law, though this is always difficult to gauge. It might be derailed by, for example, the federal election or the ongoing COVID-19 Pandemic – but it might not.

It's still early days, but if the CPPA (or some form of it) passes, it will take organizations time to put the necessary compliance processes in place. Here are 10 ways the CPPA will impact organizations' Canadian privacy practices.

It's still early days, but if the CPPA (or some form of it) passes, it will take organizations time to put the necessary compliance processes in place.

1. **Big Penalties**. There will be significant penalties for non-compliance with the CPPA. It authorizes administrative monetary penalties and fines of up to 5% of global revenue or $25 million, whichever is higher, for the most serious offences. Currently, PIPEDA only authorizes penalties for breach of the *Digital Privacy Act*, and those are markedly lower than those under the CPPA: the maximum fine for breaching the *Digital Privacy Act* is $100,000 per violation (though if there were multiple violations, which would not be uncommon, the fines could add up).

2. **Privacy Commissioner Powers.** In a move away from the traditional ombudsman model, the CPPA gives the federal Privacy Commissioner broad power to make orders against organizations and to recommend penalties to a new "Personal Information and Data Protection Tribunal". Under PIPEDA, the Privacy Commissioner only has the power to make recommendations to a breaching organization.

3. **New Tribunal.** A new "Personal Information and Data Protection Tribunal" will determine and levy any penalties – which will have the effect of a court order – and hear appeals from orders of the Privacy Commissioner.

4. **Global Application.** The new law takes an expansive approach to applicability, expressly applying to all personal information an organization collects, uses or discloses, including interprovincially or internationally. This reflects the increased digitization and globalization of the global economy, which knows no border, and which the COVID-19 pandemic has accelerated.

5. **New Right of Action.** It creates a new privacy breach legal claim. Where the Privacy Commissioner determines that an organization has violated an individual's privacy under the CPPA, and the Personal Information and Data Protection Tribunal upholds that finding, that individual can

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**CONSUMER PRIVACY PROTECTION ACT**
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sue the organization (within two years) for compensation for the violation.

6. **Data Portability & Deletion.** It provides for new individual rights of data portability and deletion. Consumers can require an organization to transfer their data to another organization (subject to regulations that aren't yet available), likely to be a boon to open banking. Individuals can also require that an organization delete the personal information it's collected about them, subject to some limitations, in what appears to be a limited form of the "right to erasure".

7. **Algorithmic Transparency**. It requires algorithmic transparency. Consumers would now have the right to require an organization to explain how an automated decision-making system made a prediction, recommendation or decision.

8. **Consent Exceptions.** It "simplifies" consent requirements for organizations by making some (potentially broad) exceptions to when an organization must obtain an individual's consent to the collection, use or disclosure of the individual's personal information, such as where the use of personal information is core to the delivery of a product or service. This could impact, for example, the information an organization must communicate in a privacy policy.

9. **Data De-Identification.** It makes new rules around the de-identification of data – including allowing for organizations to use an individual's personal information without their consent in order to de-identify their data, but appears to limit other uses of de-identified data. Under certain circumstances, organizations can also disclose de-identified data to public entities for socially beneficial purposes.

10. **Codes of Practice.** It introduces the concept of "Codes of Practice". The CPPA allows private organizations to establish a "code" and internal certification programs for complying with the law that the Privacy Commissioner will approve. Once approved, the "code" will effectively establish the organization's legal compliance obligations.

*An earlier version of this article was published on the McInnes Cooper website.*

# UNIFYING THE **FAMILY COURT**

DAMIEN PATRICK **BARRY**
Louisbourg Seafoods Group

*with*
LINDSAY **O'REILLY**
Waterbury Newton

**After decades of planning and preparation, the roll-out of a province-wide Unified Family Court system is one step closer to becoming a reality.** On April 6, 2021, Justice Jean M. Dewolfe and Justice Lloyd I. Berliner were appointed to the Nova Scotia Supreme Court's Family Division, presiding in Kentville. This follows the previous appointments, on March 9, 2020, of Justice Michelle K. Christenson (presiding in Yarmouth and Digby); Justice Pamela Marche, Q.C. (presiding in Sydney); Justice Paul Morris (presiding in Pictou); and Justice Raymond A. Morse, presiding in Truro (since retired, as of August 13, 2021). The newest appointments in Kentville represent further progress towards increasing consistency and access to Justice for family proceedings in Nova Scotia.

Until recently, Nova Scotia's Unified Family Courts existed only in Halifax, Port Hawkesbury and Sydney. Outside of these centres, most family law matters were heard in two separate courts: Family Court for parenting and support orders and child welfare matters, and the Supreme Court for property and divorce. Each of these Courts operated under its own separate set of rules and required separate proceedings. A separated couple, for example, might address parenting time and child support issues in a Family Court proceeding but would then be required to file a separate application (or petition for divorce) with the Supreme Court, to deal with division of their matrimonial property. This added complexity and confusion to family matters, particularly for self-represented litigants in rural areas of the province, who were often

> "Having two levels of court deal with family law issues can create confusion, delays and higher legal expenses. Having a Unified Family Court makes the process clearer and less stressful for everyone, while also offering a wider range of programs and support services for couples and families."
>
> *– Chief Justice Deborah K. Smith*

left without access to specialized family law services available in the Supreme Court Family Division.

"Having two levels of court deal with family law issues can create confusion, delays and higher legal expenses," says The Hon. Deborah K. Smith, Chief Justice of the Supreme Court of Nova Scotia. "Having a Unified Family Court makes the process clearer and less stressful for everyone, while also offering a wider range of programs and support services for couples and families. This can help people resolve their issues more efficiently."

***Deborah K. Smith, Chief Justice of the Supreme Court of Nova Scotia***

***Lawrence I. O'Neil, Associate Chief Justice of the Supreme Court (Family Division)***

***Justice Jean M. DeWolfe***

***Justice Lloyd I. Berliner***

As far back as 1974, the Law Reform Commission of Canada recommended the Unified Family Court model be implemented to deal with the shortcomings of the traditional approach used in family law. The Unified Family Court model was originally piloted in four jurisdictions: Hamilton, Ontario in 1977; Saskatoon, Saskatchewan in 1978; Fredericton, New Brunswick in 1979; and St. John's, Newfoundland (also in 1979). The Unified Family Court model in those jurisdictions became permanent. The model was subsequently introduced in Nova Scotia, Prince Edward Island, and Manitoba. It was not until 2019, however, that the Department of Justice announced it would be making changes to the *Judicature Act* to ensure family law matters are heard by one court throughout the province of Nova Scotia.

> "I want to thank court staff in all locations for their work to prepare for these changes and to ensure Nova Scotians continue to have access to family law services throughout the transition. I know the team at the Bridgewater courthouse is eager to move forward with the new model as well."
>
> *– Associate Chief Justice Lawrence I. O'Neil*

Previously, the *Judicature Act* limited the total number of federally appointed Supreme Court judges to 40, of which 17 were Supreme Court Family Division judges. Amendments, first announced on March 8, 2019, as part of Bill 105, allow for 24 judges in the Family Division. Funding for the additional Supreme Court Family Division judges comes from the federal government. This initiative was outlined in the *Budget Implementation Act*, 2017, No.1 and included in the 2018 federal budget with the aim of expanding the Unified Family Court model throughout all of Nova Scotia as well as Newfoundland and Labrador.

Kentville Family Court – the most recent jurisdiction in this province to adopt the unified model—has now fully transitioned to a Supreme Court Family Division site. Justice Jean M. Dewolfe, who presided as a judge of Kentville's Family Court before being appointed a Justice of the Supreme Court Family Division, describes the change as a positive one. She says that, in addition to allowing for "one-step" services for family law matters, the Unified Family Court also allows the former Family Court and Supreme Court in Kentville to pool resources, consolidating and enhancing staffing focused on family law.

"There are benefits to being part of the larger Supreme Court Family Division system, with its established processes for efficiently and effectively addressing family issues," Justice Dewolfe says.

"One of the benefits I have noticed is an increased capacity for judicial settlement conferences as a result of the Family Division system. On a personal level, I greatly appreciate the enhanced judicial education opportunities which Family Division offers."

Chief Justice Smith notes that the Unified Family Court has now expanded to all areas of the province except Bridgewater. "The Supreme Court looks forward to getting its full complement of Unified Family

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**FAMILY COURT**

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Court judges so this specialized court and enhanced services can be made available to all Nova Scotians," she says.

The Supreme Court Family Division provides a number of services for self-represented litigants, including one-on-one support at the Family Law Information Centre; a mandatory Parent Information Program for all parties who have an application before the Court related to parenting; and an alternative dispute resolution process where parties meet with a conciliator to see if their issues may be resolved, or at least narrowed, before proceeding to a formal court appearance.

This transition comes with some inevitable growing pains for legal professionals used to operating outside of the traditional three Unified Family Court centres. For many areas, the Unified Family Court's arrival has ushered in new forms, practices and procedures, among other changes. However, this model's adoption on a province-wide basis has the potential to help increase access to justice and reduce conflict and stress in the lives of parents and children across this province— which makes the adjustment worthwhile.

The Hon. Lawrence I. O'Neil, Associate Chief Justice of the Supreme Court (Family Division) notes that the Unified Family Court has been well-received in all the communities it has expanded to so far.

"I know the team at the Bridgewater courthouse is eager to move forward with the new model as well," he says. "This successful rollout is due, in large part, to the ongoing collaboration between the Judiciary and the Nova Scotia Department of Justice. I want to thank court staff in all locations for their work to prepare for these changes and to ensure Nova Scotians continue to have access to family law services throughout the transition."

# NEWLAW
# WHAT IT IS AND WHAT IT MEANS FOR THE PROFESSION

HUGO **CYR**

Former Dean and Professor at the Université du Québec à Montreal

PASCALE **PAGEAU**

Founding President of Delegatus

**Interviewed by Jane Elise Bates, Canadian Bar Association**

***What is NewLaw?***

*Pascale:* NewLaw is a global trend in which we see the emergence of new business models for the delivery of legal services. It moves away from traditional models by using innovative business models, processes and technologies that focus on the client's needs. By starting from the client's point of view, NewLaw becomes an invitation to review existing delivery models and make the delivery of legal services more efficient.

*Jane:* So, what we are seeing in NewLaw is consistent with many other technology-focused professions which put UX (user experience) at the core of their operations?

*Hugo:* Absolutely. NewLaw is applying design thinking to the law. For example, when paired with the clear law movement, it can make the law more accessible to the public and help to communicate legal issues in ways that are understandable for all. As NewLaw examines client needs, rather than selling a standard solution, this means that lawyers must have the skills to be able to build a process to solve their client's legal issues.

***And how does this differ from the traditional Big Law model?***

*Hugo:* George Beaton proposed that the Big Law business model is comprised of six elements: attracting and developing

top talent; leveraging the work of full-time lawyers within the firm; competition to motivate lawyers to become equity partners; restriction on the number of equity partners that can exist; structuring the firm in the form of a partnership; and fees determined according to high hourly rates. The components of the Big Law model create incentives for profit, but not necessarily productivity. NewLaw looks at this approach differently and focuses primarily on the first element – efficiency and training the best legal talent. It then examines the needs of the client and structures an offering to meet those needs. It moves away from the concept of "build something and they will come" by encouraging part-time workers, alternative legal structures (e.g., cooperatives and organizations), and alternative fee arrangements which focus on giving more value to the client than it costs.

> By starting from the client's point of view, NewLaw becomes an invitation to review existing delivery models and make the delivery of legal services more efficient.

### *What are the benefits of NewLaw?*

*Pascale:* The benefits are for everyone. The user experience becomes the focus, to the benefit of the client. For lawyers, it allows them to face competition, stay relevant and to transform and adapt for the future of the legal profession. The human-centric culture of NewLaw also improves collaboration and allows work to be done in a more empathic manner.

*Jane:* This shift has been seen in other countries, like Australia and the UK, where law firms continue to lose talent to NewLaw providers who encourage a better work/life balance.

*Hugo:* NewLaw allows work to be structured in a way that gives lawyers freedom to work their way without the pressure of billable hours. It opens up possibilities for lawyers to contribute to something greater than themselves – to know that they are making an impact.

### *Is there any downside to NewLaw?*

*Hugo:* One of the greatest challenges in developing the new generation of lawyers is to encourage new ways of thinking. This particularly becomes a challenge when lawyers trained in traditional models are responsible for mentoring those new to the profession.

*Pascale:* The downside of any disruptive model is that people need to adapt. Not only will lawyers need to adapt their skills, but also their mindset.

*Hugo:* The change is inevitable and it is coming. Those that are change resistant and not prepared to adapt have the potential to be left behind. NewLaw requires a lot of re-thinking of traditional models which rely on a partnership structure, which may not be a priority for those within the partnership as the return on investment is longer term.

*Pascale:* There is a misunderstanding within the legal profession that NewLaw requires a significant investment in technology. This is not the case – the new players that have managed to corner the market are those that are prepared to shift ways of working strategically.

### *How have law societies responded to NewLaw in Canada from a regulatory perspective?*

*Hugo:* Law societies have been prudent in responding to NewLaw; however, many now recognise and permit multidisciplinary practices. Some restrictions still exist in terms of alternative legal service provider models seen in other jurisdictions (e.g., co-op legal services or publicly listed law firms).

*Jane:* The Nova Scotia Barrister's Society gave approval for 'multi-disciplinary practices' in January 2021, subject to final approval of the necessary amendments to the Regulations and Code of Professional Conduct.

### *What are some of the examples of NewLaw seen in Atlantic Canada?*

*Hugo:* Torys LLP has established a Legal Service Centre in Halifax that is doing contract management and high-volume work. Stewart McKelvey has a Chief Innovation Officer who is focussed on looking at ways to innovate and offer improved efficiencies to clients, while McInnes Cooper has established MC Advisory to offer business expertise paired with legal advice. Some local firms, including North Star Immigration Law, have embraced characteristics of NewLaw such as charging flat rate fees.

*Jane:* Halifax has not yet seen legal contracting and staffing services increase in popularity, unlike many other provinces and overseas. The Big Four accounting firms are also recruiting locally to build their legal teams.

### *What impact do you think that the COVID-19 pandemic has had on NewLaw?*

*Pascale:* The pandemic has been eye-opening for the profession. There is now an understanding that things can be done differently and the business model can be adapted. The pandemic has shown that bricks and mortar are not necessary to deliver top notch legal services and they can be done virtually. It presents an opportunity to redesign the way we practice law.

*Hugo:* It unsettled expectations and inertia bias – people were forced to examine the way they worked as the pandemic prevented existing ways of practice. It presented an opportunity for saving money by examining productivity improvements. A similar boost to NewLaw was seen during the 2008 financial crisis, where clients did not have

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**NEWLAW**

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money and were demanding more for less.

***What can Canada learn from other countries that have been faster to deploy NewLaw?***

*Hugo:* It is possible, it is necessary and it is coming!

*Pascale:* We don't need to be the early adopters as we have already passed that phase. The storm is coming, so we need to get ready.

*Hugo:* The legal profession in Canada has to learn from others' experiences and be more agile in its way of doing things. We are lucky as we can see what others have done and learn from their experiences. But we must be willing to widen the scope beyond our own backyard – there are some great blogs and other places where we can gather information about what is coming. However, one of the challenges is that there is not a body in Canada that gathers information on what technology is available and the trends.

***What professional skills should lawyers look to develop as part of NewLaw?***

*Hugo:* There are four blocks of skills that lawyers should have as a minimum: legal knowledge; business acumen; be technology savvy; and be human-centric.

*Pascale:* Building these skills will assist lawyers to have a common language with other specialists, and allow the combination of legal skills with project management, design thinking, and business best practices to make the delivery of legal services more efficient. Collaboration within the legal team and with clients is essential.

*Hugo:* A friend talks about the 'augmented lawyer' – lawyers need to broaden their skill sets to include soft skills and the four blocks of skills mentioned. Lawyers also need to trust experts in other fields (because they cannot know everything), but be able to speak a common language.

***What opportunities are there for NewLaw to positively contribute to access to justice?***

*Pascale:* Technology allows things to be done faster, cheaper, and more efficiently. The rise of automation (e.g., smart contracts), artificial intelligence (e.g., e-discovery, contract review, due diligence, and legal research) and online legal services (e.g., chat-bots, subscription plans, template drafting) allows for efficiencies so that lawyers can better serve clients and access markets previously underserved.

*Hugo:* By removing some of the red tape associated with traditional models, NewLaw allows lawyers to profit by focussing on one or two specific legal issues that are scalable. For example, Estateably offers a platform to lawyers to assist to settle estates following the death of someone.

*Jane:* DoNotPay is another good example of how technology has helped to address legal issues that people do not usually seek the services of a lawyer for – e.g., appealing parking tickets, obtaining flight compensation, warranty claims, demand letters, etc.

*Hugo:* Technology allows demand and supply to meet in instances where it may not have been possible before.

## KNOW THE NEWLAW LINGO

NewLaw has seen the rise of Alternative Legal Service Providers (ALSP) which are seen to offer clients' cost-savings, specialist expertise and ability to increase legal support without additional headcount. Here are some examples:

| ALSP | DESCRIPTION | EXAMPLES | |
|---|---|---|---|
| Legal Process Outsourcing (LPO) | Firm-owned legal services units located in lower-cost regions or outsourcing legal work to independent LPOs (e.g., legal research, due-diligence, e-discovery, litigation and investigation support, document review) | Torys Legal Service Centre (Halifax)<br>Legalwise | |
| Managed Services Providers | In-house legal team functions are contracted to a third party (typically ongoing work) | Pangea3 (previously owned by Thomson Reuters and now by EY)<br>UnitedLex | |
| Contracting and Staffing Services | Lawyers contracted to government, organizations and firms on a temporary basis | Axiom<br>Delegatus | Flex Legal<br>Simplex Légal |
| Big 4 | Expansion of existing business models by accounting and audit firms to incorporate legal services | Deloitte<br>EY | KPMG<br>PwC |

# IT'S NOT EASY BEING GREEN. **OR IS IT?**

JANE ELISE **BATES**

Canadian Bar Association – Nova Scotia Branch

**On August 9, 2021, the Intergovernmental Panel on Climate Change released its latest findings to the United Nations.** Approved by leading climate scientists from 195 member states, the report warns that "within a decade, global warming could push temperatures to 1.5 degrees Celsius above pre-industrial levels" – a 'code red for humanity'.

"Within a decade, global warming could push temperatures to 1.5 degrees Celsius above pre-industrial levels" – a 'code red for humanity'.

Most legal workplaces are now making conscious efforts to reduce their carbon footprint and use natural resources sustainably. Here are some tips on how you and your workplace can 'go green':

- Implement a Paperless Office policy – review legal documents electronically, take notes on a laptop or tablet with a stylus, switch to electronic statements and invoices, and introduce digital signatures.
- Cut electricity consumption – turn off computers, monitors, and printers when not in use, switch off office lights when leaving the office, embrace renewable energy sources and reduce the air-conditioning / heating temperature in offices.
- Reduce and reuse supplies – reduce reliance on single use items (paper towels, disposable plates and cutlery, plastic cups, bottled water, straws, and disposable masks) and increase usage of insulated water bottles and coffee mugs.
- Embrace the natural office – incorporate plants, neutral paint colours and natural lighting into the office to improve air quality and mental alertness.
- Recycle – have recycling containers available and ensure that rubbish is sorted into the appropriate waste, organics, and recycling categories.
- Promote sustainable procurement – buy recycled paper, refillable ink cartridges, green cleaning products, LED lighting and energy efficient electronics, and implement policies to support businesses that have sustainable products and practices.
- Re-think travel – decrease emissions from work-related travel by leveraging technology for virtual meetings, offering work from home policies, and encouraging walking, biking, carpooling, or taking public transport to the office.

This transformation process will be most effective when your environmental management system is supported by management, incorporated into your organization's strategy, aligned with internal processes, clearly communicated and incentivised, and measured with metrics.

## CBA RESOURCE ALERT!

CBA has developed a voluntary environmental initiative that aims to encourage its members to implement environmental practices, with the goal of improving the environmental performance of legal practices across Canada. The CBA Law Office Sustainability Challenge provides simple, straightforward, and effective ways for legal workplaces to go green, resulting in cost savings, employee benefits and corporate social responsibility outcomes. This voluntary initiative has been designed to be scalable to support organizations of varying sizes, capacity, and existing progress on environmental practices. Check it out at: ***https://www.cba.org/getattachment/Sections/Environmental-Energy-and-Resources-Law/Resources/Resources/2014/CBA-Law-Office-Sustainability-Challenge/lawOfficeSustainability.pdf.***

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# MANDATORY VACCINATIONS IN THE WORKPLACE: HUMAN RIGHTS CONSIDERATIONS

ALEX
**WARSHICK**
McInnes Cooper

**As of August 20, 2021, 81.5% of eligible Canadians had received their first dose and 70% of eligible Canadians had been fully vaccinated against COVID-19.** In Nova Scotia, about 69% of eligible Nova Scotians had been fully vaccinated, with 77% having received at least one dose of vaccine. Of course, considerable media coverage has focused on those hold-outs who are hesitant or refusing to be vaccinated. This has taken on additional significance in the face of the spread of new variants of the disease and a continued push to re-open and return to life without public health restrictions.

To date, neither the federal government nor any provincial government has mandated vaccination for the general population. Instead, the push for vaccination has fallen to the workplace—and not without some unease. The landscape changed, though, as the federal government announced its intention to make vaccination mandatory for federal public service employees and employees in federally regulated industries—albeit without a timeline for implementation, or further detail on its policy, and an election a month away. Nonetheless, this announcement should give employers some encouragement to begin implementing vaccination policies of their own.

In the meantime, as the public waits to see the shape and form of the federal government's vaccination mandate, and as provinces re-open and restrictions are loosened, including the end of mandatory masking in some provinces, responsibility continues to fall on workplaces. This leaves employers to develop their own rules around vaccination in order to ensure a safe return to work for all – and many are now facing the decision of whether to make vaccination mandatory.

> The push for vaccination has fallen to the workplace– and not without some unease.

Pursuant to the Nova Scotia *Occupational Health and Safety Act*, employers have an obligation to take all reasonable precautions to ensure the health and safety of persons in their workplace. In present circumstances, one such measure may include requiring employees to become vaccinated – though there are many factors that have to be considered.

In the non-unionized workplace, employers are generally free to implement new policies as long as they do not give rise to a material change in an essential term or condition of employment, and subject to compliance with applicable laws (like the Nova Scotia *Human Rights Act*).

In the unionized workplace, employers are generally permitted to introduce new policies during the term of a collective agreement, as long as the policy does not conflict with the collective agreement and satisfies various other factors (for example, it must be reasonable with adequate notice given prior to implementation).

In either case, there is an expectation that polices be reasonable in light of the needs of the business. In the case of mandatory vaccination, requiring employees to be vaccinated could be considered a reasonable policy in response to pressing health and safety considerations, particularly in businesses where employees work with vulnerable populations (such as in healthcare).

However, a policy that provides for alternatives to vaccination would stand a better chance of being upheld as reasonable if challenged than one that does not (such as allowing unvaccinated employees to continue working from home; providing alternative work assignments during the pandemic; use of additional PPE; continued mask-wearing; and maintaining social distancing).

Indeed, there may be circumstances where an employee is unable to vaccinate for medical reasons, or for some other reason that may be protected under human rights legislation. For example, some employees may refuse vaccination on the grounds of religion, disability, or even potentially political belief, all of which are among those characteristics protected under provincial

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**MANDATORY VACCINATIONS**

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human rights legislation. The *Human Rights Act* also enumerates "irrational fear of contracting an illness or disease" as a protected characteristic and the Nova Scotia Human Rights Commission released a bulletin noting this ground's application in the COVID-19 context. Some holdouts might attempt to use this ground as justification against getting vaccinated, foreseeably in the context of an irrational fear of contracting COVID-19 (or some other medical problem) through an mRNA-injection. However, there are no reported decisions finding discrimination based on this ground, and the original legislative debate around its inclusion in the *Human Rights Act* suggests instead that this ground is meant to protect those with an illness or disease from discrimination based on another's irrational fear of contraction and not those with the irrational fear. Fear, misunderstanding, and reliance on misinformation are not likely to entitle an employee to human rights accommodation for failure to abide by an employer's vaccination policy.

In such cases where an employee refuses to vaccinate based on a protected characteristic, a discriminatory policy may still be enforceable if there's a bona fide occupational requirement for such a policy. In any case, employers will be required to accommodate certain employees to the point of undue hardship. Practically, this means any vaccination policy must contemplate alternatives and accommodations for those who cannot or will not vaccinate in certain circumstances.

While there's still uncertainty around COVID-19 and mandatory vaccinations, it is clear that workplaces are once again on the front-line against this virus and the public health crisis it has created. Absent government intervention, employers, employees, and unions will have to continue working together to find the solution that best protects the health and safety of workers in Nova Scotia.

# TREATY RIGHTS IN 2021

## THE HEATED DEBATE OVER INDIGENOUS FISHING RIGHTS IN NOVA SCOTIA CONTINUES

***Photo credit: Andrew Vaughan/The Canadian Press***

DEREK **SIMON**

Burchells LLP

**Canada is a country that prides itself on its commitment to the rule of law.** However, when it comes to the recognition and implementation of Indigenous rights, that commitment is threadbare. This is apparent in the Crown's failure, almost 22 years after the *Marshall* decisions were rendered by the Supreme Court of Canada, to implement those decisions, and to protect Mi'kmaw fishers seeking to exercise their *Marshall* rights.

In the *Marshall* decisions, the Supreme Court of Canada confirmed what the

Mi'kmaq had long known: that the *Peace and Friendship Treaties of 1760-61* affirmed a Mi'kmaw right to fish in order to earn a moderate livelihood. In response, the federal government put in place agreements that allowed First Nations to acquire existing licenses, which were then regulated under the *Fisheries Act* and the existing Aboriginal Communal License regulations. Despite the fact that existing fisheries laws were found to infringe the treaty rights, the fundamental legal structure of the fishery remained unchanged, and rights holders were accommodated as license holders. This was intended as an interim solution until a more permanent solution to implementing the treaty right could be found, and tables were set up to try and negotiate a long-term solution. Unfortunately, 22 years later, no such solution has been found, and while all parties appear to agree that the right has not been implemented, there appears to be no plan to move forward or to address the ongoing infringement of Mi'kmaw rights.

While all parties appear to agree that the right has not been implemented, there appears to be no plan to move forward or to address the ongoing infringement of Mi'kmaw rights.

This is due in part to the Department of Fisheries and Oceans (DFO) position that new access can only be provided to Indigenous fishers by buying access back from existing fishers, and that the treaty fishery must be implemented as a commercial fishery under the same DFO rules that were found to have infringed the treaty right in *Marshall*. This approach is based on political considerations rather than the law, and it fails to recognize that a constitutionally protected treaty right is unique and cannot simply be equated to a commercial license.

Nova Scotia has become a study in the turmoil that occurs when the rule of law is not upheld, and when court decisions and constitutionally protected rights are ignored due to political considerations. Last October, Nova Scotia saw a rise in violence targeting Indigenous individuals, specifically members of the Sipekne'katik First Nation who launched a new Moderate Livelihood Fishery (MLF). During this period, settler fishers and the DFO targeted the equipment of the Sipekne'katik fishers, as well as any individual who assisted them. Reports surfaced that local police and RCMP did not intervene in at least some of the acts of violence, which in turn led to an injunction and increased tensions.

There have been other MLFs launched since October 2020, yet these are still frequently met with violence and the destruction of equipment by the DFO or settler fishers. Notably, Sipekne'katik has postponed the return of the MLF indefinitely because of concerns for their fishers' safety and the resources it will take to replace all the equipment destroyed. In response to the MLF issue, Potlotek First Nation has launched suits against the Nova Scotia and Federal governments, to ensure their MLF rights are not infringed. Despite the recognition by many of the RCMP and DFO's failure to uphold the law, the Minister of Fisheries and Oceans has announced increased enforcement efforts targeted, not at the perpetrators of the violence, but at Mi'kmaw Treaty fishers.

The Minister of Fisheries and Oceans has announced increased enforcement efforts targeted, not at the perpetrators of the violence, but at Mi'kmaw Treaty fishers.

It is rather unbelievable that such acts of violence can occur and even be tolerated when the highest court in the land has recognized the treaty right to earn a moderate livelihood. The blame for this, in part, seems to be in the colonial approach in which an entrenched treaty right and a settler's license at the pleasure of a Minister have been deemed equivalent.

The legal system assigns different levels of rights, licenses and privileges for a reason. No one is above the law, and it is vital that those who enforce the law know what the law actually is. The treaty rights of Indigenous Nations are constitutionally protected, making them part of the highest law of the land. Licenses, of course, carry privileges which must also be respected. However, colonialism has resulted in the skewed idea that a license to fish is of equal or even greater weight and importance to a treaty right.

The Court in *Marshall* did opine that economic and regional fairness, and recognition of the historical participation in the fishery by non-aboriginal groups, were purposes that could justify the infringement of the right. Nowhere did they say that they could be used as an excuse to avoid implementing the right altogether, and it is unclear how upholding the status quo could meet the infringement justification test, as it does not minimally impair the treaty right.

A rule of law cannot be upheld when one does not appreciate the rights that ought to be upheld and how they relate to the rest of the legal system. This author speculates that this colonial protection of a license over a legally recognized treaty right has contributed to an acceptance of the violence against Indigenous nations involved in MLFs.

The present situation requires clarification, action and understanding for all parties. However, none of this will be possible, at least in a meaningful way, if the rule of law is not upheld and the rights, licenses and privileges of parties are respected for what they are, not what colonialism says they are.

# OWLS HEAD:
# AN OPPORTUNITY TO EXPAND THE DUTY OF PROCEDURAL FAIRNESS

***Photo Credit: Simon Pont***

JAMIE
**SIMPSON**
Juniper Law

**It's fair to say that few of us had heard of Owls Head Provincial Park before investigative reporter Michael Gorman's December 18, 2019, article for the CBC.** Mr. Gorman revealed that the Department of Lands and Forestry had secretly negotiated the Park's sale for golf courses and luxury residential units to Lighthouse Links Development Company. The sale hadn't been finalized (a conditional letter of offer was signed the same day the story broke); however, the Treasury and Policy Board (T&PB, a committee of the Executive Council) had quietly removed the Park from the Province's Parks and Protected Areas Plan some nine months earlier, on March 13, 2019, at the request of the Departments of Lands and Forestry and Environment.

As details emerged, the public learned that the Park, which had been known as a park for some forty years, was not actually designated as a park by regulation under the *Provincial Parks Act*. Lands and Forestry had thought it was an official Park too, according to documents in the record. As it happens, roughly half of Nova Scotia's 200-odd named provincial parks, including Herring Cove Provincial Park and Pomquet Beach Provincial Park, are likewise not official parks and at the same potential risk as Owls Head.

The sale price for Owls Head Provincial Park was set at $306 per acre, for a little more than 700 acres and some 7.6 kilometres of coastline (total price $216,000). As explained in a property valuation report prepared for Lighthouse Links Development Company, the price was based on the land being undevelopable, despite the land being sold

for development. As well, we learned that Lighthouse Links did not submit a business plan for the project to either the Department of Lands and Forestry or the T&PB, despite being asked several times to do so. The Company claimed it needed to build two roads across the Owls Head lands before it could provide a business plan.

I was retained by retired Lands and Forestry biologist Bob Bancroft and the Eastern Shore Forest Watch Association, who were appalled that the province failed to let Nova Scotians know about the pending delisting of Owls Head Provincial Park in order to sell it for development. But for Mr. Gorman's article, the public may have found out about the deal only when Lighthouse Links began its 'public engagement' about the golf courses and residential developments as stipulated in the Letter of Offer for the sale of the land. My clients and I felt that it was rightly the province's role to consult the public, and to do so before Owls Head was removed from the Parks and Protected Areas Plan, given that the plan was based on extensive public consultation and that Owls Head had been represented to the public as a Park for some four decades.

I argued that the Minister and the T&PB's decisions with respect to the delisting and letter of offer were unreasonable given that no business plan had been received and there had, apparently, been no on-the-ground assessment of the ecological value of the Crown lands (at least, nothing as such appeared in the record). I also argued that it was time to expand the duty of procedural fairness to include the public in certain circumstances, specifically where public land with identified public value is considered for alienation. Such procedural fairness, under the title of the public trust doctrine, is part of the common law in some states of the USA.

> The sale price for Owls Head Provincial Park was set at $306 per acre, for a little more than 700 acres and some 7.6 kilometres of coastline (total price $216,000). As explained in a property valuation report prepared for Lighthouse Links Development Company, the price was based on the land being undevelopable, despite the land being sold for development.

In her decision released July 30, 2021, Justice Brothers acknowledged that "[i]f Owls Head had been formally designated as a provincial park, as was represented to the public, any change to its status as protected land would have required an order-in-council, and would therefore have been public knowledge." Justice Brothers commented further that "[u]ltimately, the government's own misrepresentation of the status of the lands shielded its actions from scrutiny and allowed purportedly protected lands to be considered for sale, out of the public eye."

Yet, unfortunately in my view, Justice Brothers held that an expansion of procedural fairness is not for the courts to decide, but instead must come from the legislature. Justice Brothers held that the appropriate place to deal with the Owls Head issue is at the ballet box, not the court. Respectfully, I disagree. A once-every-four-years trip to the ballot box is too blunt a tool to adequately address the Owls Head Provincial Park injustice. Procedural fairness, in my view, is squarely in the wheelhouse of the courts.

> A once-every-four-years trip to the ballot box is too blunt a tool to adequately address the Owls Head Provincial Park injustice. Procedural fairness, in my view, is squarely in the wheelhouse of the courts.

The purpose of judicial review, I believe, is an attempt to mitigate the power imbalance between citizens and government – between those who are impacted by government decisions and those who make them. In the Owls Head matter, those impacted are the Nova Scotians who care about our parks and protected areas, and who care specifically about the globally rare ecosystem, wildlife habitat, and public coastline protected by Owls Head Provincial Park. Shouldn't these citizens be entitled to notice and an opportunity to comment on the proposed delisting of Owls Head and sale for development, just as if an individual had been significantly impacted by a government decision? The Owls Head case was an opportunity to open the door in Canada to the procedural fairness aspect of the public trust doctrine; an opportunity to recognize government's inherent responsibility to make decisions about public lands with identified public values in an open and transparent manner.

***Photo Credit: Simon Pont***

A recognized common law expectation of procedural fairness in such circumstances would help government decision-makers benefit from a robust exploration of the issue at hand, reduce the power imbalance between citizens and a government secretly dealing with wealthy elite, and not leave the public with the sole remedy of voting out the politicians responsible whenever the next election rolls around.

# FREE SPEECH V PUBLIC HEALTH

VICTOR
**RYAN**

Department of Justice (Canada)

**As infection rates go down and vaccination rates go up, Nova Scotia's third wave of the COVID-19 pandemic appears to have crested.** However, a recent chambers appearance in the Nova Scotia Court of Appeal may mean that the legal wrangling over a controversial pandemic-related injunction is only just beginning.

On July 22, 2021, Nasha Nijhawan and Jaime Burnet appeared in chambers before the Nova Scotia Court of Appeal to represent the Canadian Civil Liberties Association (CCLA) in its request for an extension of time to challenge an already-discharged injunction. The CCLA is seeking to clarify the law in relation to injunctions in Nova Scotia, and with the Court of Appeal's decision reserved, it is still unclear whether this fight will continue.

### *The Injunction*

On May 14, 2021, Justice Norton of the Supreme Court of Nova Scotia issued a quia timet injunction restraining the organization, promotion, and attendance of any "Illegal Public Gatherings" anywhere in the Province of Nova Scotia. The injunction was sought by the Attorney General of Nova Scotia on an ex parte basis in response to news that anti-mask rallies were being planned for the following Saturday in Halifax and Barrington, Nova Scotia.

The decision, indexed as 2021 NSSC 170, was based on the evidence put forward by the Attorney General, including an affidavit from Chief Medical Officer of Health Dr. Strang. The Court ultimately applied a version of the *RJR-MacDonald* test for interlocutory injunctions with some modifications to account for the anticipatory nature of the alleged harm, and found that the public interest in maintaining the integrity of Nova Scotia's public health orders was greater than the public interest in permitting the planned anti-mask rallies to proceed.

The unusual nature of a quia timet, or pre-emptive, injunction and the broad scope of its terms attracted the attention of the CCLA.

The unusual nature of a quia timet, or pre-emptive, injunction and the broad scope of its terms attracted the attention of the CCLA. In accordance with the terms of the injunction itself, the CCLA sought public interest standing and an opportunity to set aside or vary the injunction. The Court granted the CCLA standing by consent, but before the re-hearing of the ex parte injunction could be heard Justice Gatchalian granted a motion from the Attorney General to discharge the injunction.

Given the discharge, the Attorney General took the position that any dispute regarding the injunction was moot. However, the CCLA was not deterred, claiming that the COVID-19 pandemic remained ongoing, that the injunction raised serious issues of law and Charter compliance, and the interests of justice favoured a re-hearing of the injunction in the adversarial context. Justice Chipman ultimately determined (in a decision indexed as 2021 NSSC 217) that this particular dispute was moot, and any valid arguments regarding the breadth and scope of similar injunctions was better left

to a future court.

That decision has led the CCLA to seek the Court of Appeal's permission to challenge the original injunction decision of Justice Norton, in order to continue combatting what it sees as a heavy-handed injunction built on shaky legal ground.

***Continuing Challenges***

The anti-mask rallies, the subsequent injunction, and the judicial consideration of these steps have attracted great interest from the media and the legal community. The dispute is often framed as a clash of tensions, with the need to protect public health on one side combatting our individual rights and liberties on the other. For Benjamin Perryman, co-counsel for the CCLA in this matter, that dichotomy is not necessarily central to the CCLA's position.

> "I think the case is about what you need to get an injunction on an emergency basis, and whether that is different for the Attorney General as a litigant. The second big issue is to what extent do you have to consider Charter rights,"

"I think the case is about what you need to get an injunction on an emergency basis, and whether that is different for the Attorney General as a litigant. The second big issue is to what extent do you have to consider Charter rights," said Perryman. "[The law] doesn't mean Charter rights have to trump public safety in the context of a pandemic, but it does mean that there needs to be sufficient consideration given to those constitutional rights."

Perryman clarified that the importance of the injunction decision goes far beyond the COVID-19 pandemic, and may have lasting impacts.

"The CCLA says that to get an injunction in Canada, you need one of three things: you either need a cause of action, an express statutory authority, or you need to show that discernable persons are flouting the law and have not stopped," Perryman stated. "You cannot get a remedy without a rights violation."

With respect to the COVID-19 injunction, Perryman says "…breadth is an issue, but a bigger issue is what scaffolding is necessary to obtain an injunction, and does a lower standard apply to the Attorney General than any other litigant?"

The COVID-19 pandemic has certainly brought the proper scope and application of a pre-emptive injunction to light, and the use of a quia timet injunction has implications across a variety of legal practices. Ultimately, it remains to be seen whether the Court of Appeal will permit these arguments to proceed, or leave this interesting dispute for another day.

# AFFORDABLE HOUSING IN A TIME OF SKYROCKETING HOME VALUES

KYLE **PECK**
McInnes Cooper

***Skyrocketing real estate prices in Nova Scotia***

Whether you are living in Nova Scotia, doing business here, or looking to move to the province, you have likely heard about the skyrocketing real estate prices – a topic that seems to weave its way into countless casual conversations. Since 2020 alone, the average price of houses across the province has increased by approximately 30 percent[1]. Similarly, Halifax had the highest monthly rent increase in all of Canada in July, 2021.[2] This rapid increase in prices poses significant issues for Nova Scotia property renters as well as their property owner and developer counterparts. This article compares and contrasts the challenges facing these two distinct – yet interrelated – groups, particularly with respect to the new rental policies implemented by the Nova Scotia Government in response to the COVID-19 pandemic.

***Rights and obligations of property owners and developers***

There are three main ways in which rapidly increasing real estate prices have impacted the rights and obligations of property owners and developers.

**Rent Increase Cap.** First, the Government of Nova Scotia has prohibited landlords from increasing residential rental prices any more than two percent annually for existing tenants. This directive is retroactive to September 1, 2020, and

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**AFFORDABLE HOUSING**

*CONTINUED FROM PREVIOUS PAGE*

remains in effect until Nova Scotia lifts the current state of emergency, or until February 1, 2022 – whichever comes first. Consequently, many property owners and developers who increased tenants' rent by more than two percent on or after September 1, 2020, must reimburse that tenant the difference between the initial and increased price. For new tenants, the cap does not apply to the initial rent, but it does apply to all subsequent rent increases.[3]

**Increased barriers to eviction.** Second, the *Residential Tenancy Act* offers numerous barriers to evicting a tenant. These barriers have been heightened since the onset of the COVID-19 pandemic. Namely, the Government has introduced a "renoviction" ban. This prevents property owners and developers from obtaining an eviction order under the guise of it being required to perform renovations. Like the rent cap, this directive is effective until February 1, 2022, or until the province lifts the state of emergency – whichever comes first.

Since 2020 alone, the average price of houses across the province has increased by approximately 30 percent. Similarly, Halifax had the highest monthly rent increase in all of Canada in July, 2021.[2]

Property owners and developers are permitted to evict tenants if they were already granted an eviction order from the Residential Tenancies Program. They can also evict tenants in accordance with the *Residential Tenancies Act*, for reasons such as rental arrears, abuse of the property owner's rules, or the fact that the property owners would like to move back into the unit themselves.[4]

**Complications in Selling Rented Property.** Third, if a property owner wishes to sell their property, they are limited by the corresponding obligations that they owe to their tenants. Specifically, in the case of periodic leases, they can only evict tenants of the property if the purchaser, or a family member of the purchaser, swears in good faith their intention to occupy the premises. In this case, the property owner or developer must provide tenants with at least two months' notice before a tenant is required to vacate. There are strict notice requirements associated with this process. Indeed, the landlord must provide this notice using the Government of Nova Scotia's Form DR2.[5] In the case of a fixed-term lease, the tenancy cannot be ended before the date specified in the lease agreement.[6]

The measures outlined above pose significant issues for property owners and developers attempting to sell into a hot real estate market or maximize rental profits to offset rising costs associated with owning and operating real property. For example, a property owner that is experiencing

1 Alicia Draus, "Red hot housing market in Nova Scotia becoming election issue for first-time buyers", Global News (22 July 2021), online: ***https://globalnews.ca/news/8052581/sellers-market-halifax-house-prices/***

2 Rentals.ca, "Rentals.ca July 2021 Rent Report", online: ***https://rentals.ca/national-rent-report***

3 Government of Nova Scotia, "Introducing Protection for Renters and a New Nova Scotia Affordable Housing Commission" (27 November 2020), online (pdf): ***https://novascotia.ca/coronavirus/docs/Introducing-Protection-for-Renters-and-a-New-Affordable-Housing-Commission.pdf***

4 Government of Nova Scotia, "Introducing Protection for Renters and a New Nova Scotia Affordable Housing Commission" (27 November 2020), online (pdf): ***https://novascotia.ca/coronavirus/docs/Introducing-Protection-for-Renters-and-a-New-Affordable-Housing-Commission.pdf***

financial hardship and needs to sell their rental property must wait at least two months to adhere, with proper notice requirements, despite being able to sell in a number of weeks.

### *Renter's rights*

The skyrocketing real estate market is also affecting renters. COVID-19 has both influenced these rising prices and illuminated problems that can arise for renters when dramatic shifts in the market occur.

**Increasing rent.** Aside from the rent cap discussed above, rent can only be increased once every 12 months and not within the first 12 months of the lease. Moreover, proper written notice must be given to the renter within the proper timeframe: for yearly/monthly leases, property owners must provide four months' notice before the anniversary date of the lease; and for fixed term, the rental increases should be included in the details in the original lease. These rules regarding frequency and notice requirements for rental increases have been in place for quite a while in Nova Scotia. On the other hand, until recently, these limitations did not extend to the amount that rent could be increased. This changed when the Government introduced the rent cap noted above in response to the COVID-19 pandemic. This measure is temporary for the time being and it is unclear if similar rules will be permanently instituted in the future.

**Removing Amenities.** As noted above, it can be challenging for property owners to raise rents or evict tenants to adjust prices to match fair market rates. One tactic to avoid this issue might be to remove "amenities" such as utilities that were originally included in the lease or snow removal and lawn care. However, the *Residential Tenancy Act* addresses this issue and provides that any removal of amenities is to be treated like a rent increase. This means that there must be notice and such changes can only occur once every 12 months. This has helped protect renters in the event that a property owner attempts to indirectly increase rental profits.

Another issue renters face is when a property owner neglects to fix or repair elements within the rented premises in an attempt to encourage renters to terminate the lease on their own accord. However, the *Residential Tenancy Act* places a positive obligation on property owners to keep the rented premises in a good state of repair.

**Families particularly effected.** Advocates from affordable housing awareness groups have warned that families are increasingly becoming the face of the "housing crisis." These awareness groups argue that their experience and data show single-family units are the types of rentals being eliminated as the vacancy rate shrinks. Property owners are increasingly incentivized by increased property values to sell their single-family homes rather than keep the property as a rental unit. This limits the availability of single-family homes for rent and makes families who are renting homes of this kind particularly vulnerable.

Advocates from affordable housing awareness groups have warned that families are increasingly becoming the face of the "housing crisis."

Overall, the upward trend of soaring property values and increased rental prices, alongside the COVID-19 pandemic, has spurred unprecedented Government intervention. This intervention has drastically changed the rules of the game. It is important that property owners and developers are keenly aware of these new rules to ensure that they do not inadvertently run afoul of these new policies. Similarly, it is vital that renters educate themselves with respect to these new rules to ensure that they are well informed and able to protect themselves from unfair rental practices.

5 Government of Nova Scotia, "Landlord's Notice to Quit: Purchaser to Occupy Residential Premises – Sale of Residential Premises (Form DR2)" (n.d.), online: ***https://beta.novascotia.ca/landlords-notice-quit-purchaser-occupy-residential-premises-sale-residential-premises-form-dr2***

6 *Residential Tenancies Act* R.S.N.S. 1989, c. 401, s. 10AA (2). *[RTA]*

7 Nicole Seguin, "The downside to the real estate boom in Nova Scotia", CBC News (20 April 2021), online ***https://www.cbc.ca/news/canada/nova-scotia/real-estate-boom-evictions-tenants-landlords-nova-scotia-1.5993233***

# ALLYSHIP IN DIFFICULT TIMES

ANNELISE **HARNANA**

Stewart McKelvey,
*Summer Student*

LEVI **PARSCHE**

Stewart McKelvey,
*Summer Student*

**Four members of a Muslim family in London, Ontario were killed and a child left seriously injured in what authorities are calling a "premeditated" vehicle attack on Sunday, June 6, 2021 against the Afzaal family.** Police have identified the attack as a hate motivated, anti-Muslim crime. This devastating tragedy is a reminder of the Islamophobia faced by Muslims, and the harmful effects it can have on these individuals. Individuals of the Muslim faith seeking support or counselling may wish to consult the following resources:

• **Naseeha:** This organisation offers free, confidential, counselling to Muslim youth and adults across North America. Their Helpline can be reached at ***https://naseeha.org/contact-us/*** or 1 (866) 672 3342

• **AMALA Muslim Youth Helpline:** This hotline provides counselling for Muslim youth. They can be reached at ***https://amala.mas-ssf.org/*** or 855-95-AMALA.

To any individuals who have been impacted by these recent events – either directly or indirectly, we are thinking of you and we stand with you and any Muslim communities impacted. This was the Afzaals' home and they should have been safe here.

While this event may be shocking to many of us, white nationalist violence and Islamophobic beliefs have been brewing in Canada for far too long. Between 2012 and 2015, hate crimes against Muslim individuals in Canada has grown by 253 percent. In 2017, a Quebec mosque was attacked and 6 people were killed following their evening prayer. In 2020, a volunteer caretaker at a Toronto mosque was killed in yet another Islamophobic attack. There have been numerous other reports of violence against Muslims in Canada. Statistics Canada indicated that in the year 2019, there were 191 police-reported hate crimes against Muslims, fifteen more than the year before.[1] Since not all crimes are reported to police, the number of hate crimes that took place may be even higher.

It is important to remember however, that Islamophobia and harms against Muslim people do not exist solely in these moments of overt terrorism and violence. They exist in micro moments – in our daily interactions, our silence when it comes to the treatment of Muslim people, and our refusal to take action to hold our friends and communities accountable when they do harm. We encourage you to take a moment to reflect, to listen to the voices of Muslim people and communities and to take action to promote anti-Islamophobia in your personal and professional lives.

This action can include educating ourselves on Muslims and Islamophobia in Canada. By attempting to understand our Muslim colleagues, we can challenge harmful

1 ***https://www150.statcan.gc.ca/n1/daily-quotidien/210329/dq210329a-eng.htm***

assumptions that have been perpetuated by our media and institutions. Members of the legal profession in Nova Scotia may wish to consult the following educational resources:

- "An Employer's Guide to Islamic Religious Practices" prepared by the National Council of Canadian Muslims[2]
- Standing Committee on Canadian Heritage Report titled "Taking Action Against Systemic Racism and Religious Discrimination Including Islamophobia".[3]

Members of the profession can also show compassion by taking steps, big or small, to support Muslim colleagues. This may include accommodating dietary needs, by offering vegetarian, seafood or halal options at events where food is served, or providing private space in our offices where Muslims may go to pray if desired. However, we must also challenge our assumptions about how a Muslim individual practices their faith, as Muslims are not a homogeneous group, and Muslim individuals have varying levels of faith and/or practice. Standing up against hatred can also entail speaking up against harmful stereotypes and assumptions that may be propagated by individuals in our surroundings, and ensuring that we do not reinforce these stereotypes ourselves.

In considering what steps we, as legal professionals in Nova Scotia, can take to combat Islamophobia, it is helpful to look to other legal communities. In 2016, the Islamophobia Legal Assistance Hotline was launched by several legal professionals in Vancouver. The Hotline aims to provide free and confidential legal services and resources to individuals in British Columbia who have been impacted by Islamophobia. There is a substantial gap in access to these legal services and the Hotline works to ensure those individuals can access the legal help they need. Earlier this year in the UK, a different initiative was launched by members of the legal community. The Muslim Professionals Forum commenced an investigation into Islamophobia in the judicial system and legal profession of the UK in order to make recommendations on how to challenge the systemic Islamophobia in these systems. A similar investigation should be conducted in Canada and mandatory anti-Islamophobia training for legal professionals should be implemented. We must also use our privilege as legal professionals to call for action on the part of the federal government, and demand a federal investigation and report on systemic Islamophobia across Canada.

> It is important to remember however, that Islamophobia and harms against Muslim people do not exist solely in these moments of overt terrorism and violence. They exist in micro moments – in our daily interactions, our silence.

Not only do we have an obligation to make the profession more inclusive for our Muslim colleagues, but we must also put in the work to create inclusive, safe spaces for our Muslim clients. Ask yourself – what steps can I take, in my own practice and within my firm, to ensure the legal services I provide are culturally informed, safe and inclusive of Muslim individuals?

In writing this article, it is important to acknowledge our position as non-Muslim individuals, who do not experience Islamophobic treatment. As non-Muslim individuals, we must avoid placing the onus on our Muslim colleagues or clients to educate us about Islamophobia and how to implement anti-Islamophobic practices within our spaces. We must actively listen and believe the lived experiences shared with us by our Muslim colleagues and clients, and take action to amplify Muslim voices.

# 2021 HALIFAX PRIDE

A new event hosted by CBA-NS this year to recognize Halifax Pride Week was a panel discussion on the topic of 'Family Law and the 2SLGBTQ+ Community'. Open to both CBA members and non-member lawyers, this virtual event was also open to the general public as part of the CBA-NS's ongoing commitment to addressing systemic barriers to access to justice. Stacey Merrigan (Hicks LeMoine Law) and Terry Sheppard, QC (BOYNECLARKE LLP) offered information about recent precedent setting cases, including those involving legally recognized polyamorous parenting arrangements and the importance of gender affirmation (pronoun use, etc.) in the legal context. The panelists also provided an update on potential changes to the Nova Scotia *Parenting and Support Act* and gave participants suggestions on how to approach adoption and surrogacy relationships.

2 ***https://www.nccm.ca/wp-content/uploads/2014/03/NCCM-Employer-GUIDE-PF.pdf***
3 ***https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP9315686/chpcrp10/chpcrp10-e.pdf***

# MOVING TOWARDS A MORE **INCLUSIVE COURT**

MICHAEL J. **WOOD**

Chief Justice of Nova Scotia


***Nova Scotia Court of Appeals. Photo by Steve Bruce.***

**Courtrooms can be intimidating places. Important and very personal issues are often at stake.** This is particularly so at the Nova Scotia Court of Appeal where hearings involve as many as five judges, seated in a way that physically has them above counsel and the gallery. Despite this setup, we try to be as welcoming as possible and to create an atmosphere which enhances the ability of participants to present their case.

The judges of our Court recognize the importance of treating all persons with dignity and respect. This includes referring to them using their pronouns and titles. We hope counsel and parties understand they are welcome to indicate how they wish to be addressed; however, the Court has decided we should be more explicit in ensuring that this message is clearly communicated to everyone.

In the spring of 2021, the judges of the Court began a process to create a more inclusive environment for appeal proceedings by adopting a policy that welcomes participants to advise the presiding judges of their pronouns and titles. By taking this step, the Court hopes to avoid misgendering or otherwise misidentifying lawyers, clients, and others in court or in written decisions.

The Court's discussions were informed by similar initiatives in the British Columbia and Ontario Courts, as well as consultations with lawyers. These reinforced the judges' view that a formal public policy would further demonstrate our commitment to the principles of inclusivity and respect.

Through our discussions and consultations, we realized that it was important to ensure that any policy carried no obligation. No one should feel pressured to disclose their gender identity if they do not wish to. For this reason, our policy emphasizes that persons are welcome, but not obligated, to advise the Court of their pronouns and titles. They can choose the method of communication that is most comfortable for them — by email, letter or verbally to the Court Clerk.

Words matter and this includes how we refer to each other.

Along with our discussions concerning the appropriate pronouns for counsel and parties, the Court revisited a discussion about how judges should be addressed. The traditional approach was for male judges to be addressed as "My Lord" and female judges as "My Lady". More recently, many lawyers have been using the gender-neutral title "Justice". Information on the Courts' website was inconsistent concerning the issue.

The Court of Appeal has now clarified the terms which can be used to address judges. Many judges prefer the gender-neutral term "Justice"; however, unless otherwise directed, "My Lord" and "My Lady" are permitted. Individual judges may advise how they wish to be addressed.

Words matter and this includes how we refer to each other. The Nova Scotia Court of Appeal is committed to maintaining a welcoming atmosphere where people are treated with respect and dignity. Using proper modes of address can reduce unnecessary stress and anxiety and allow parties to present their arguments more effectively. We hope this will enhance the court experience for all participants.

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# THE RIGHT TO **DISCONNECT**

EMILY **ROEDING**

Canadian Bar Association – Nova Scotia Branch


**Technology, in particular digital technology, was a saving grace for office workers during the pandemic.** Working from home was only possible because decisions could be made via email, high speed internet meant meetings and proceedings could be held over Zoom or Skype, colleagues could stay connected instantly on their cell phones, and the number of programs available to schedule activities and virtually edit, sign and store documents grew by the day. Parents could complete many work activities at any hour of the day or night, helping (albeit to a small degree) with the juggle between paid work, childcare and home schooling.

But now that even more employees can be reached at home, regardless of the day or time, does that mean they should be?

The concept of protecting an employee's right to disconnect from work is not new. Twenty years ago, in October 2001, the Labour Chamber of the French Supreme Court released a decision that held "the employee is under no obligation either to accept working at home or to bring there his files and working tools." This was later affirmed by the Supreme Court with many private companies in France and other European countries opting to implement their own policies around how much time employees could spend in the office and using work devices after hours. For example, German automaker Daimler Chrysler famously introduced a software program in 2014 designed to allow employees to automatically delete incoming emails while they were on vacation. In 2016 the colloquially named 'El Khomi Law', which included many controversial changes to the labour standards, came into force in France and outlined procedures by which employers and employees must manage the use of digital technology to respect rest periods, leave and personal and family time.

Since implementation of France's legislative changes respecting the right to disconnect, other countries have followed suit. In Spain, both public and private sector employers are required to develop policies with employees (often done during collective bargaining negotiations in unionized environments) to clarify

their right to digital disconnection after set hours. Slovakia's Labour Code was amended to ensure employees exercising their right to disconnect could not be found to be in breach of their professional duties. The European Union is also considering categorizing the right to disconnect as a fundamental right, after Members of the European Parliament voted in favour of this concept in January 2021.

Closer to home, the Canadian government formed a Right to Disconnect Advisory Committee that began meeting in October 2020. In March of this year, the public was given an opportunity to provide feedback on the Committee's proposals that relate to federally regulated industries such as airlines and banks. With most Canadians employed in industries that are regulated provincially however, it remains to be seen if federal amendments would have any significant impact.

Naturally, despite an international interest in this concept, right to disconnect legislation is not without its critics. Questions arise, such as: how to define 'office hours' while recognizing employers may periodically require extended hours based on operational need (e.g. accountants and support staff during tax season)? There are also fears that such policies would disrupt or eliminate existing alternate work arrangements which could be seen as eroding employee's rights, instead of enhancing them.

> Now that even more employees can be reached at home, regardless of the day or time, does that mean they should be?

The increase in remote work and globalization of the workforce is also a big part of the conversation around the right to disconnect. If an organization operates in various time zones, for example Nova Scotia and the United Kingdom, would restricting the work hours of the Canadian employees put them at a disadvantage? Further, if there are enough 'loopholes' built into legislation to provide flexibility for employers (for example, allowing after hours communication in an 'emergency' without defining what constitutes an emergency) is there actually any point in enacting such laws in the first place?

Finally, it is unclear if any federal or provincial legislation would actually change the corporate culture that fuels the intrusion of work into what was once personal time. Even if an employee cannot be penalized for ignoring work emails after 7:00 pm, is the associate still logging billable hours at 10:00pm going to be lauded for such efforts? Is the 80-hour work week and responding to emails while on vacation (or not taking vacation at all) still going to be a badge of honour? In the legal profession, the answer is still undoubtedly 'yes', however the question remains – should it be?

# NEW LAWYER Q & A
# CHIKA CHIEKWE

***Called to the Bar:*** 2018

***Firm:*** Cox & Palmer (Halifax)

***Areas of Practice:*** Corporate Commercial, Wills and Estates and Commercial Real Property

***Describe your professional experience to date:***

When I started law school, I knew very little about the firms in Nova Scotia. I was fortunate to be hired as a first-year summer student at Cox & Palmer, where I continued as an articling student and now a practicing lawyer. I instantly knew Cox & Palmer was the right fit for me, even though, at the time, I was the only African Nova Scotian law student/lawyer. Fast forward a few years, Cox & Palmer has made some great strides in the right direction and continues to look for ways to strengthen its diversity and inclusivity. I have many allies at Cox & Palmer who have made my professional experience to date very positive, and I have been able to develop my voice as a Black female lawyer.

One of my favourite parts of my professional experience is interacting with my clients. I get to meet a lot of people I wouldn't meet otherwise – from wide ranging industries, cultures, and locations. As well as learning about the great things that are happening here in Nova Scotia and throughout the country, it is really fulfilling when clients express their appreciation for my assistance. I am continuously learning from my clients.

Although I may interact with some of my clients one on one, the majority of my practice involves working as a team, which the former athlete in me loves! I work closely with my assistant and our wills and estates paralegal who both make my practice very easy to manage; I can't thank them enough for all their hard work! As well, all my other colleagues in the firm are always there to lend a hand or give advice on my files.

As a corporate lawyer, in a private firm, you have to make an effort to do business development in order to obtain clients. Sometimes clients will come to you, but other times you also have to go to them. This can be challenging but it's also fun and rewarding! I have enjoyed this part of my professional experience as I have uncovered an entrepreneurial side of me that I did not know I had.

Lastly, I give a huge credit to my support systems; my

family, partner, friends, and colleagues, as I have leaned on them and will continue to lean on them as I continue to navigate this profession.

***Describe your current practice:***

I primarily practice corporate commercial focusing on mergers and acquisitions, corporate finance, securities, and not-for-profits. I also assist my clients with their wills and estates and real property transactions.

***Describe the unique qualities you bring to your practice:***

The unique qualities I bring to my practice are my experience as a Black woman, my diverse perspective, my outgoing personality, and my experience as a female athlete.

Although I may interact with some of my clients one on one, the majority of my practice involves working as a team, which the former athlete in me loves!

My parents are immigrants from Nigeria, and my siblings and I were born and grew up in Nova Scotia. Growing up we lived in a predominantly white neighbourhood, and it wasn't until high school when I was in a more diverse school environment. I learned quickly from my parents to stay true to myself, embrace all backgrounds and understand everyone has their own perspective. This has helped me in my practice, as some of my clients have specifically sought my assistance because I look like them or have a similar background. It has also helped in my understanding of my client's issues and aids in providing solutions or recommendations.

I am a people person and a social butterfly at heart. I enjoy meeting new people and getting to know them. As a result, I can pick up on other issues or topics, from my conversations with my clients, that my clients may not have initially thought to seek advice on.

Lastly, having played university basketball and overcoming multiple knee injuries, I became very determined and resilient. The practice of law is not easy. It is demanding, requires an investment of time and has its challenges. Sports has taught me how to manage and deal with each of those things and I continue to learn each day how to apply it within my practice.

***What other activities and volunteer pursuits occupy your time?***

I am currently a board member for four organizations: Canadian Association of Black Lawyers, Nova Scotia Chapter (CABL-NS), YWCA, Hope Blooms and Maritime Women's Basketball Association. I am Chair of the Nova Scotia Canadian Bar Association Securities Law Section and sit on the CBA Business Law Section Executive. I am also a committee member of Basketball Nova Scotia's Governance Committee and Nova Scotia's Golf Association's Diversity and Inclusion Committee. At my firm I am also on the Diversity & Inclusion Committee and the Recruitment Committee. When I am not volunteering, I am working out at the gym or spending time with my family, partner and or friends.

***What do you consider to be the greatest challenge facing young lawyers?***

I think the greatest challenge facing young lawyers is, depending on the individual, "work life balance" or "work life integration". These days there are so many opportunities and maintaining a certain level of "social/family life" or "non-work life" can be hard. It is easy to get caught up in work, as this profession can require a lot of hours and with social media it is just as easy to see what you may be missing out on.

***What word of wisdom do you have for new lawyers?***

You will be constantly learning in this career, so do not get discouraged if you are unsure of the answer, if some tasks take longer than others, or if you feel overwhelmed. It's ok! Just like anything new, you will get the hang of it, it will get easier and as new challenges present themselves (which they will), you will have a tool kit of experiences and colleagues to get you through. Most importantly, as this is a demanding profession, do not lose sight of prioritizing taking care of yourself, both mentally and physically.

***What are your goals for your career as you become a more seasoned lawyer?***

One of my main goals when I became a lawyer was to continuously give back to the community in any way I can. Whether that is by volunteering, taking on files or encouraging my firm to be involved in community events. Growing up, my parents always instilled in me the importance of giving back to the community and this was further reinforced when I played basketball.

As I become a seasoned lawyer, I hope to become a mentor for those aspiring to become lawyers or entering the profession, especially to African Nova Scotians/Black people. I also want to do everything I can to work towards making the profession more diverse and inclusive.

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