IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Nova Scotia Real Estate Commission v. Lorway, 2006 NSSC 76

Date: 20060313
Docket: SH 247204
Registry: Halifax

Between:

The Nova Scotia Real Estate Commission,
a body corporate

Plaintiff

v.

Charles Lorway, Q.C. and Duncan MacEachern, carrying on business as a partnership under the firm name and style of Lorway MacEachern

Defendant

The Nova Scotia Barristers' Society, a body corporate

Intervenor

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	In Chambers on February 7, 2006, in Halifax, Nova Scotia
Written Decision:	March 13, 2006
Counsel:	Alan J. Stern, Q.C., for the plaintiff Tony Mozvik, for the defendants Raymond F. Larkin, Q.C. for the Intervenor

By the Court:

[1] The Nova Scotia Real Estate Commission seeks an interim injunction against Lorway MacEachern and its partners, Charles Lorway and Duncan MacEachern to enjoin the firm, its partners, associates and employees from trading in real estate without a license pursuant to the *Real Estate Trading Act*, S.N.S.1996, c.28.

[2] The defendants say they fall within an exception set out in the *Act* and are therefore not in breach of the *Act*.

[3] The Nova Scotia Barristers' Society is an Intervenor in this matter.

ISSUE - Should an interim injunction be granted?

FACTS

[4] Lorway MacEachern is a law firm in Sydney, Nova Scotia. Its partners are Charles Lorway and Duncan MacEachern. The affidavit of Duncan MacEachern sets out in paragraphs 18, 19, 20 and 45 the services it provides to vendors of real property. The fee agreement the firm enters into with its clients in this regard is Schedule "G" to his affidavit.

[5] On May 25, 2004, Douglas Dixon, Registrar of the Nova Scotia Real Estate Commission, wrote a letter (Exhibit I, Affidavit of Duncan MacEachern) to Charles Lorway and Duncan MacEachern. He said in part:

> This letter is to request your immediate response regarding what I consider to be unlicensed trading in real estate being carried out by your firm.
>
> It has been brought to my attention that Lorway MacEachern has initiated the practice of listing and advertising real estate for clients, see attached photo.

[6] He then referred to the definition of trading in the *Act* and quoted the section of the *Act* requiring a license. He referred to the firm not being licensed and said:

> ... I direct you to cease your trading activities immediately until such time as you have obtained a Nova Scotia Real Estate License.

[7] He concluded in the last paragraph of that letter:

> Failure by you to abide by this direction will result in the Commission commencing with immediate legal action.

[8] Charles Lorway replied on June 16, 2004 (Exhibit J, Affidavit of Duncan MacEachern) saying in para. 2:

> ... Our firm's position is that our activities in real estate, 'in the course and as part of that person's practice as a Barrister or Solicitor' is outside the jurisdiction of the Real Estate Commission by virtue of the exemption set out in Section 3 (d) of the Real Estate Trading Act.

He copied his letter to the Nova Scotia Barristers' Society.

[9] Douglas Dixon wrote again to Charles Lorway on June 16, 2004 (also Exhibit J) saying he was referring the matter to the Commission's lawyer.

[10] Although the next letter from Douglas Dixon is not written until November 22, 2004 (Exhibit L, Affidavit of Duncan MacEachern), Douglas Dixon says two things explain the delay: first Charles Lorway was a member of the Real Estate Commission and that created an awkward situation and, secondly, he met with Charles Lorway in the summer of 2004.

[11] In the November 22, 2004 letter (Exhibit L, Affidavit of Duncan MacEachern), Douglas Dixon said that the Section 3(d) exception "... does not allow a lawyer to offer brokerage services over and above their legal practice." He requested that Lorway MacEachern notify the Commission by the end of November that it will cease "brokerage activities". He continued in para. 3:

> ... Failure to do so will result in the Commission pursuing its legal remedies.

[12] Charles Lorway's reply (also at Exhibit L) dated December 2, 2004 said:

> The position of our Firm is that we are operating under the exemption in Section 3(d) of the **Real Estate Trading Act**. We are seeking direction from our Bar Society in this matter and will further respond upon hearing from the Society.

> Until that time we will continue to act in what we perceive to be our clients' best interest, and continue to assist and counsel them in the sale of their properties.

[13] Thereafter followed a letter from Alan J. Stern, Q.C. (Exhibit M, Affidavit of Duncan MacEachern) dated December 9, 2004 in which he said at paras. 2-4:

> Our client's position is that your activities significantly exceed what is permissible under the exemption in section 3(d) of the *Real Estate Trading Act*. That exemption clearly applies only to trading done 'in the course and as part of that person's practice as a barrister or solicitor'. Portions of your web site more clearly resemble what might be found on a real estate broker's web site and other advertising you do (e.g. Maritime Merchant) certainly reflects a business with a primary focus on real estate sales.
>
> We are writing to request that you voluntarily cease and desist from these activities and confirm to me that you have done so.
>
> I would ask you to respond within the next 10 days concerning your position. If you are not prepared to comply with this request, then we are instructed to commence a proceeding against you.

[14] Duncan H. MacEachern replied to Alan Stern in a letter dated December 15, 2004 (Exhibit N to his Affidavit) and said in para. 3 of that letter:

> I would appreciate if you could be more specific with regard to the portion of the Web Site which you believe goes beyond trading of real estate in the part of a person's practice as a barrister and solicitor. At no time do any of our staff or lawyers hold themselves out to be real estate agents. I would be interested in determining whether or not you have access to any documentation which would suggest we are holding ourselves out as either real estate agents or real estate brokers.

And in para. 5 he said:

> In closing, if you can specifically direct my attention to offending representations made in the Maritime Merchant or the Web Site which you are of a view should be addressed or amended, I would be pleased to review your comments and take the appropriate action if such alleged representations are of a concern to the Barristers' Society.

[15] Douglas Dixon testified on cross-examination that, although he may have seen that letter, he did not respond to those points.

[16] Duncan MacEachern says in para. 32 of his affidavit:

> ... Despite the inquiries directed to Alan Stern, no response has been made with regard to the alleged actions which we had undertaken, or representations we had made, for which his client believed offended the Real Estate Trading Act. Despite the request for specific direction as to the offending nature of the ads or website, no specifics have been provided to me in regard to the inquiries as set out in my correspondence of December 15th, 2004. ...

[17] On Saturday, April 30, 2005, an advertisement appeared in the Cape Breton Post (Exhibit K, 1st Affidavit of Douglas Dixon) listing six other Sydney law firms or sole practitioners in addition to Lorway MacEachern. The ad says:

> Before you decide to sell your home, we invite our clients to discuss the significant advantages associated with selling your home through an independently owned and operated Law Firm.

[18] This action was commenced on May 25, 2005. The interim injunction application was filed on the same day. It was originally scheduled to be heard on November 3, 2005, however, on November 25 Ray Larkin (on behalf of the Nova Scotia Barristers' Society) wrote to say that the plaintiff and defendant had consented to the Nova Scotia Barristers' Society being an Intervenor. A consent order was issued on December 1, 2005 and the application was accordingly adjourned to February 7, 2006.

[19] Both Douglas Dixon and Duncan MacEachern were cross-examined on their affidavits. The Nova Scotia Real Estate Commission also filed an affidavit of Erin O'Brien Edmonds setting out in detail:

> 4. ...what is done in the usual course of and as part of my practice with regard to services provided to property clients.

[20] Lorway MacEachern filed an Affidavit of Michael Whalley, Q.C., age 84, retired lawyer, formerly practising in Sydney. In his affidavit, he said in paras. 6, 7, 8 and 14:

6. **THAT** from the late 1940's until the late 1950's many individuals in Industrial Cape Breton prior to selling a home would use the services of me and other lawyers in assisting them in the sale of their property;

7. **THAT** in the 1940's and 1950's, as a practising lawyer, I sold properties on behalf of clients;

8. **THAT** when retained by clients during the 1940's and 1950's, myself and other local lawyers provided the following services in exchange for a commission in the range of up to six (6%) percent:

(a) The preparation of the Deed of Conveyance; Adjustments and documentation and Affidavits required for the purposes of conveying the property to a purchaser;

(b) The preparation of the Agreement of Purchase and Sale, including negotiations with the intended purchaser of the property and preparation of the mortgage in the cases when the vendors took back a mortgage;

(c) The advertising of the property which in many cases consisted of no more than spreading of the word to other lawyers, advising them that a property was for sale and that if they knew of any potential purchasers they should have them contact my office;

(d) The lawyer representing the purchaser would then be entitled to charge legal fees for certification of title and fees associated with negotiation of the Agreement of Purchase and Sale generally in the vicinity of two (2%);

14. **THAT** myself and other lawyers in the Sydney area, in the early 1960's eased out of the sale of property on behalf of clients as a result of other requirements in our practice which included an increase demand in Mortgage work.

He was not cross-examined on his affidavit and no affidavit or evidence was before me to contradict the affidavit of Mr. Whalley.

[21] Douglas Dixon testified that his concern, as Registrar of the Commission, was that Lorway MacEachern was advertising, listing and showing properties which activities he considered to be brokerage activities. He referred to the ads,

signs and website of Lorway MacEachern. He denied that it was the ad in the Cape Breton Post saying six other firms were offering to engage in the same activities as Lorway MacEachern that precipitated the legal action commenced approximately three weeks later.

[22] Douglas Dixon's supplemental affidavit sets out the indices for the courses a person must take to become a real estate sales person and to become a broker. A sales license can be obtained by passing an exam after a three week course in person or a six month correspondence course. A sales person does not need to have any minimum educational qualifications to apply but the pass mark on the three hour exam, which is mostly multiple choice, is 70 percent. A person must be licensed as a sales person for three years before applying for a broker's license which is granted after taking a six day course and passing an exam.

[23] Also in his supplemental affidavit Douglas Dixon refers to the fees to be paid annually and the requirements for renewal of licenses which includes nine hours of classroom time in continuing education. Douglas Dixon said on cross-examination there are approximately 1,650 licensed realtors in Nova Scotia and, in the past 10 years, about eight to ten have lost their licenses.

[24] There is no dispute about what Lorway MacEachern does: there are "screen shots" of pages from its website, photos of its signs and copies of ads it has run in a publication called Maritime Merchant. Lorway MacEachern says the firm has sold seven properties since it began providing what it refers to as "a bundle of services" to its vendor clients.

[25] In Exhibit "G" to the Affidavit of Duncan MacEachern, he provides a copy of the agreement his clients enter into. Clause 2 of that agreement provides:

> 2. THAT your retainer with Lorway MacEachern (hereinafter known as L.M.) will include:
>
> (a) Obtaining a land title search of property and conversion of the property to an LRA designation;
>
> (b) Examining the title, and advising the Client(s) on encumbrances, covenants, mortgages, easements and rights-of-way, which may effect (sic) title;

(c) Obtaining an assessment from the relevant Municipal Authority and obtaining an appraisal from a certified land Appraiser;

(d) The preparation, display and distribution of sale particulars;

(e) The placing and removal of a 'for sale' sign;

(f) **Newspaper Advertisement**

(i) Advertising your property for sale in the Maritime Merchant;

(ii) Advertisements in the Cape Breton Post will attract additional disbursements and would not be incurred without your prior written consent.

(g) Undertaking reasonable efforts to obtain a sale for the subject property;

(h) Reviewing and providing legal advice on offers of purchase;

(i) Drafting a contract of Purchase and Sale, where appropriate;

(j) Procuring the report of a Certified Building Inspector;

(k) Paying out and discharging any financial encumbrances on title from the proceeds of the sale;

(l) Advising you with respect to all steps in the closing process;

(m) Providing complete legal services involved in representing you on the sale of the property, including preparation of Deeds, Release of Mortgage documents, HST Certificates, Urea Formaldehyde Foam Insulation (UFFI) Certificates, calculating and preparing the Statement of Adjustments at the Closing of the transaction, attending property with prospective purchasers, etc.;

(n) Reporting in full to Clients(s) at the close of the transaction.

[26] The Affidavit of Darrel Pink, Executive Director of the Nova Scotia Barristers' Society, states that the practice of law is governed by the *Legal Profession Act* and its regulations. His affidavit also refers to the mandatory professional liability claims program of the Lawyers' Insurance Association of

Nova Scotia, the Professional Standards for Real Property Transactions in Nova Scotia and the *Legal Ethics and Professional Conduct Handbook*. The above are all exhibits to his affidavit. In para. 21 of his affidavit he says:

> 21. Overall, the Society, in keeping with its mandate to uphold and protect the public interest in the practice of law, administers a comprehensive regulatory regime that governs the activities of lawyers including those who engage on behalf of clients in matters of the acquisition and disposition of real property and business premises.

He also says in para. 25:

> 25. In the event that an interim injunction is not granted until the trial of this matter, the Society will endeavor to protect the public interest in respect of the activities of the Defendants by applying to them and to their activities the comprehensive scheme of regulation, standards and discipline provided under the *Legal Profession Act* and regulations.

The Statutes

[27] *The Real Estate Trading Act* defines trade or trading in s. 2 (y) as follows:

> (y) 'trade' or 'trading' includes a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for sale, exchange, option, lease, rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt.

[28] Section 3 of the *Act* sets out exceptions as follows:

> **3** This Act does not apply to
>
> (a) any person not ordinarily trading in real estate who acquires real estate or disposes of real estate owned by that person or in which that person has a substantial interest, or an official or employee of any such person engaged in so acquiring or disposing of real estate;
>
> (b) any

(i) assignee, custodian, liquidator, receiver, sheriff, trustee or other person in the course of acting pursuant to a statute or pursuant to a court order,

(ii) administrator of an estate, or

(iii) executor or trustee selling under the terms of a will, marriage settlement or deed of trust;

(c) any bank, trust, loan or insurance company or a credit union and the subject-matter of the trading is real estate owned by or pledged to it;

(ca) any person who is licensed by the Public Accountants Board of the Province of Nova Scotia and whose licence is in good standing and the trading is in the course and as part of that person's practice as a public accountant;

(d) any person who is a member in good standing of the Nova Scotia Barristers' Society and the trading is in the course and as part of that person's practice as a barrister or solicitor; or

(e) any person or persons, any activity or activities or any class or classes of a person or class or classes of activity that are excluded from the application of this Act by the regulations. 1996, c. 28, s. 3; 2001, c. 50, s. 2.

[29] Section 4(1) provides for licensing as follows:

4 (1) No person shall trade in real estate or hold out as being available to trade in real estate unless that person is licensed to do so, but only to the extent that the person is permitted to do so by the licence and subject to any restrictions, terms and conditions contained in the licence or under which the licence was issued.

[30] Sections 16 and 17 deal with discipline and s. 43 sets out penalties for breach of the *Act*. No summary conviction proceeding has been undertaken.

[31] The *Real Estate Agents' Licensing Act* was enacted in 1957. It defined "trade" or "trading" in almost identical words to those in the present *Act*. In s. 12 it provided for exemptions from licensing in wording which is similar to that in the present *Act*. Section 12 (d) provided as follows:

> (d) any person who is practising as a barrister or solicitor of the Supreme Court and is a member in good standing of the Nova Scotia Barristers' Society when the trade is made in the course of and part of his practice;

[32] Between the date of that *Act* and the present *Act*, chartered accountants were also exempted from the provisions of the *Act.*

[33] The *Legal Profession Act*, 1996, c. 28, provides in s. 16(1)

> 16 (1) The practice of law is the application of legal principles and judgement with regard to the circumstances or objectives of a person that requires the knowledge and skill of a person trained in the law, and includes any of the following conduct on behalf of another:
>
> (a) giving advice or counsel to persons about the persons legal rights or responsibilities or to the legal rights or responsibilities of others;
>
> (b) selecting, drafting or completing legal documents or agreements that affect the legal rights or responsibilities of a person;
>
> (c) representing a person before an adjudicative body including, but not limited to, preparing or filing documents or conducting discovery;
>
> (d) negotiating legal rights or responsibilities on behalf of a person.

[34] The *Barristers and Solicitors Act*, R.S.N.S. 1954, c. 19, as it was in 1957 when the *Real Estate Agents' Licensing Act* was enacted, provided:

> **4** ...
>
> (2) The carrying on of the practice or profession of a barrister includes for all purposes of this Act the doing by any person for fee, gain, or reward, direct or indirect, of any of the following things, that is to say:

(a) drawing or preparing a deed, mortgage, release, assignment or testamentary document;

(b) drawing or preparing any document relating to the incorporation, organization, re-organization, or winding up of a corporation;

(c) drawing or preparing any document to be used in proceedings in any court in the Province;

(d) appearing in or before any court, public board, or commission on behalf of another person.

[35] *The Interpretation Act*, R.S.N.S. 1989 c. 235 provides:

9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

(a) the occasion and necessity for the enactment;

(b) the circumstances existing at the time it was passed;

(c) the mischief to be remedied;

(d) the object to be attained;

(e) the former law, including other enactments upon the same or similar subjects;

(f) the consequences of a particular interpretation; and

(g) the history of legislation on the subject.

[36] Section 15A (2) of the *Real Estate Trading Act, supra*, provides for injunctions in the following words:

> **(2)** Where a person who is not licensed pursuant to this Act does or attempts to do anything contrary to this Act or the regulations, the Commission may apply to the Supreme Court of Nova Scotia for an injunction to restrain that person from doing or attempting to do anything contrary to this Act or the regulations.

[37] The *Judicature Act*, R.S.N.S. 1989, c.240, s. 43(9) provides that an injunction may be granted where the court concludes it is "just and convenient". *Civil Procedure Rule 43.01(4)* provides for interim or interlocutory injunctions.

Analysis

[38] The law with respect to the granting of interim injunctions is not in dispute. Both parties and the Intervenor agree that the three part test set out in *R.J.R. MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 applies. In para. 48 the court said:

> 48 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

1. <u>Strength of the Plaintiff's Case</u>

[39] The first part of the test is to make a preliminary assessment of the merits to determine if there is a serious issue to be tried. In para. 49, the court, *in R.J.R. MacDonald,* said:

> 49 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a 'strong *prima facie* case' on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that 'the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried'. The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard.

In paras. 54 and 55 the court said:

> 54 What then are the indicators of 'a serious question to be tried'? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. ...
>
> 55 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[40] In para. 56, the court referred to exceptions as follows:

> 56 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action.

The second exception referred to is not relevant to this case.

[41] However, the court said in para. 61 there might be a third exception:

> 61 The suggestion has been made in the private law context that a third exception to the *American Cyanamid* 'serious question to be tried' standard should be recognized in cases where the factual record is largely settled prior to the application being made.

[42] Counsel for the Intervenor urges me to conclude that one or both of the above two exceptions exist in this case. Mr. Larkin submits that the ruling on this application will finally determine the matter. He also says the facts are not substantially in dispute.

[43] Mr. Stern, for the plaintiff, says the plaintiff can meet the test even if it must establish a *prima facie* case. The defendants say there may be additional facts which are relevant to a final determination which will only come out at trial. They say there are other lawyers selling real estate and therefore the facts are not finally established.

[44] In my view, the ruling I make on this application is not the sort of final determination of the issue contemplated by the exception referred to in *R.J.R. MacDonald*. As the court said in that case in para. 56:

> ... This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.

Later in that paragraph, the court refers to picketing as a further example.

[45] In cases where the facts are not substantially in dispute, there may be a further exception. That, however, was not decided *in R.J.R. MacDonald*. All the court there said in para. 61 was:

> To the extent that this exception exists at all, it should not be applied in *Charter* cases.

[46] In this case, what Lorway MacEachern is doing is not in dispute. The issue here is one of statutory interpretation and, where there are two possible interpretations, the court must, in my view, look beyond what is being done now. Where the historical context of the original act is relevant, the court must be

satisfied it has the full factual picture. I am not satisfied in this case that all the relevant facts are now known.

[47] As I will elaborate on below in discussing the issue of irreparable harm, I conclude that a *prima facie* case must be established by the plaintiff and that has not been done. Therefore, even if this case fell within one of the *R.J.R. MacDonald* exceptions, the injunction application would fail. In any event, I conclude that the exceptions do not apply and a serious issue to be tried has been made out.

2. Irreparable Harm

[48] The second part of the test is referred to in paras. 62-64 of *R.J.R. MacDonald* as follows:

> 62 Beetz J. determined in *Metropolitan Stores*, at p. 128, that '[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm'. The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.
>
> 63 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> 64 'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. ...

[49] Mr. Stern, for the plaintiff, says that, in a case like this, irreparable harm should be presumed. No evidence was led by the plaintiff to show the existence of actual harm to the plaintiff. The plaintiff says that is unnecessary.

[50] In my view, it is clear that a refusal to grant the interim injunction will not so adversely affect the plaintiff's interest that the harm cannot be remedied upon a successful outcome at trial. The evidence is clear that Lorway MacEachern has sold seven properties and evidence is available with respect to the sale price. The harm can be quantified, if necessary. Nor is there any indication that the successful plaintiff could not collect damages from the defendant if it is successful at trial.

[51] In support of its position, the plaintiff refers to Sharpe on Injunctions and Specific Performance at pp. 3-6 and 3-7. There Justice Sharpe says:

> 3.150 The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship an injunction would impose upon the defendant. It seems clear that where the Attorney General sues to restrain breach of a statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse on discretionary grounds. In one case, it was held that 'the general rule no longer operates, the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land'. In another case, Devlin J. held that although the court retains a discretion, once the Attorney General has determined that injunctive relief is the most appropriate mode of enforcing the law, 'this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances'.

[52] In *Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press*, [2000] N.S.J. No. 139, Edwards, J., at para. 12, quoted from an earlier addition of *Injunctions and Specific Performance (Canada Law Book Inc. 1999)*:

> 12 It has also been held that where the Attorney General sues to restrain a breach of the law, actual damage need not be shown, on the theory that Parliament is taken to have declared the harm injurious and the public is injured automatically by any breach of the law. Injunctions have not infrequently been

> granted to restrain activity which, although it appeared to have been entirely beneficial to the community, was strictly illegal.
>
> Similar principles apply where a public authority sues to restrain a breach or compel compliance of the statutory or regulatory standard. The courts naturally incline towards enforcing public rights, but do retain a discretion, where an injunction would cause undue hardship to the defendant.

[53] He continued in para. 13:

> 13 This treatment of the irreparable harm requirement that is normally attributed to injunctions, is supported by the Alberta case of *Alberta (Attorney General) v. Lees*, [1932] 3 W.W.R. 533 (Alta. T.D.). This case involved the unauthorized practice of denistry *(sic)* and the authority of the profession's governing body to seek an injunction to prevent unauthorized persons from practising dentistry. Justice McGillivray found that since the overall intent of the Act was the preservation of the public's interests, there was no need to determine, on a case by base (sic) basis, that the unauthorized practice of dentistry was detrimental to the public. At page 451. Justice McGillivray writes:
>
> > This part of the case has given me some concern in so much as it has not been affirmatively shown that the work done by those defendants has led to any harm to members of the public. I have come to the conclusion, however, that in such an Act as the one under consideration the prohibitions are for the protection of the public at large so that loss of health or life itself may not be suffered as a consequence of unqualified persons practising dentistry and that proof of non-observance of the statutory provisions constitutes proof of public risk and danger.

[54] In para. 14, Edwards, J. quoted from *Assn. of Optometrists (Manitoba) v. 3437613 Manitoba Ltd.* (1997), 124 Man. R. (2d) 61 as follows:

> ... It is my view, therefore, that when the Court finds that an individual is providing a service(s) for which he/she is not licensed or not qualified to provide, the result ought not to be case by case analysis by the Court, with a view to determining whether public safety is met. Rather, the individual in breach should be enjoined from continuing to provide the service, leaving him/her to satisfy

> either the licensing body or the Legislature as to the requisite skill level and to the legitimacy of the service and/or equipment in question, in the public interest.

[55] He continued in para. 15:

> 15 Because of the overriding public interest in such matters, a case by case analysis for harm is not required. Indeed, it is sufficient that the appropriate authority, and the applicable legislation, dictate that the activities protested against are contrary to the public interest, and to the proper functioning of the regulatory body.

He then in para. 16 quoted the passage from Justice Sharpe which I quoted above.

[56] In *College of Chiropractors (Nova Scotia) v. Kohoot*, 2001 N.S.S.C. 136, 197 N.S.R. (2d) 183, 616 A.P.R. 183, the defendant Kohoot had established a clinic and advertised himself as "doctor of chiropractic". He was not licensed as a chiropractor in Nova Scotia and the plaintiff sought an interim injunction to prevent him working as a chiropractor until trial. He was also charged with practising chiropractic without a license and a trial date had been set for some three to four months hence.

[57] In his decision granting the injunction, Coughlan, J. said in paras. 11 and 12:

> 11 The Board is authorized to do a number of things set out in the **Act**, including any matter necessary or advisable to carry out effectively the intent and purpose of the **Act**. The **Act** also establishes the Nova Scotia Chiropractic Association which has as its objects to: (a) promote and improve the proficiency of chiropractors in all matters relating to the practice of chiropractic; (b) protect the public from untrained and unqualified persons acting as chiropractors; and (c) advance chiropractic.
>
> 12 The Board and the Association have the statutory duty to protect the public in matters relating to the practice of chiropractic. ...

[58] In para. 13, he quoted from Roscoe, J.A. in *Shackleton v. Board of Examiners in Psychology (Nova Scotia)* (1991), 103 N.S.R. (2d) 426 (N.S.T.D.) at 429 where she quoted from *Metropolitan Stores (MTS) Ltd. et al v. Manitoba Food and Commercial Workers, Local 832 and Labour Board (Man.)*, [1987] 1 S.C.R. 110, 73 N.R. 341, 46 Man.R. (2d) 241 as follows:

> ... the judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffer irreparable harm...

And goes on to refer to an English case (that is Beetz, J.) *Smith v. Inner London Education Authority*, [1978] 1 All E.R. 411:

> He [the motion judge] only considered the balance of convenience as between the plaintiffs and the authority, but I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed ..

[59] In granting the injunction, Coughlan, J. said in paras. 15 and 16:

> 15 The Board commenced action for an interim and permanent injunction on July 5, 2001. The delay in the Board bringing the action for injunctive relief weighs against there being urgency in the need for an interlocutory injunction.
>
> 16 However, on balancing the foregoing, I considered the following: the nature of the activities being carried on - dealing with the human spine, the possibility of someone suffering injury, the fact Mr. Kohoot does not have liability insurance, the public interest the Association and Board are statutorily obliged to protect.

[60] In *Nova Scotia (Dispensing Opticians Board) v. Campbell* (1999), 177 N.S.R. (2d) 373, 542 A.P.R. 373, the Board sought an interlocutory injunction

against Campbell who, although previously licensed and practising as an optician, had for some time failed to pay the fees and complete the continuing education required. He therefore lost his license. In para. 12, Kelly, J. said:

> 12 The second aspect of the application, that is to determine whether irreparable harm would occur with an injunction is not granted, is more problematic in this situation. Mr. Campbell has stated to the court that he has done no harm and that there is no evidence that he has done actual harm to patients by the manner in which has conducted his practice. This may be so and although there was some limited evidence in that respect, I do not feel that there is sufficient evidence for me to determine that he would cause considerable harm. I find that the harm that may be caused by a deliberate breach of this governing statutes for the professional activity relates to the clear evidence that Mr. Campbell will continue to flout the law in this respect until he is properly determined to have the necessary skills by way of a re-examination. ...

He granted the injunction.

[61] The plaintiff says the purpose of the predecessor *Act*, the *Real Estate Brokers' Licensing Act*, R.S.N.S. 1967, c.260, was clearly to protect the public as is the purpose of the present *Act*. The previous *Act* was dealt with by Gruchy, J. in *Cleary et al v. Martin* (1990), 14 R.P.R. (2d) 87, 102 N.S.R. (2d) 102, 272 A.P.R. 102.

[62] In that case, Cleary had entered a franchising agreement with an Ontario home marketing consulting company. According to the case headnote, "The company provided commercial advice and a do-it-yourself package to homeowners seeking to sell their homes", but did not act as intermediary between the vendor and purchaser. Cleary applied for and was denied a license as a direct seller. The issue was whether what he was proposing was "trading" in real estate under the *Real Estate Brokers' Licensing Act*. Gruchy, J. said of the *Act* in para. 18:

> 18 ... It was clearly passed for the protection of the public. That protection was, I suggest, from unscrupulous or unqualified persons entering into a field where the public could be seriously financially harmed. That statute sets up a means whereby the public, hopefully, will be afforded a degree of protection. It sets conditions for the licensing of salesmen, establishes an advisory board,

> methods of suspending salesmen and requirements for the bonding of salesmen. In particular, the statute establishes a real estate assurance fund to respond to judgments against agents resulting from fraud or breach of trust.

[63] In para. 20, he contrasted the protections in the *Act* with what Cleary proposed:

> ... The result is, therefore, that the Peartree scheme may well lead to the homeowner being encouraged to sell his home by inexpert sales staff with no recourse and without the protection afforded by the Act.

[64] I conclude that the *Real Estate Trading Act*, *supra*, is one which falls within the types of cases referred to by Justice Sharpe in his text. It is an *Act* where the legislature has declared the harm of trading in real estate without a license to be injurious and that the public is injured automatically by any breach of the law (paraphrasing Justice Sharpe at p. 3-6 quoted above).

[65] However, the Intervenor says that where irreparable harm is to be presumed because of the nature of the statute, there must be a clear breach of statute or a strong *prima facie* case of breach.

[66] The plaintiff says that even if it must establish a *prima facie* case, it has done so. It refers to a number of authorities in this regard.

[67] First, it refers to *Lewis v. Real Estate Institute of New Zealand Inc*., [1995] 3 N.Z.L.R. 385, 1995 N.Z.L.R. There the lawyers operated what was known as a "property centre". Several things distinguish that case from this. In no particular order, they are:

1. The Real Estate Agents Act did not use the word "trade" or "trading";
2. The Law Society of New Zealand took no part in the trial;
3. The lawyers operated the centre as a stand alone centre and did not require the clients to even use their legal conveyancing services to close the transaction;

4. The evidence of the lawyers who testified disclosed a different history in the practice of law than does the evidence before me;

5. The property centre did an appraisal and gave advice about “sale price and selling methods”.

I therefore conclude that the *Lewis* decision is not helpful.

[68] The plaintiff also referred to a number of Quebec decisions, several of which were decided by Judge de Pokomándy of the Criminal and Penal Division of the Court of Quebec and several of which involved the same accused person, Jean-Pierre Hudon.

[69] First of all, it must be noted they are criminal cases from the Quebec equivalent of Nova Scotia’s Provincial Court. They are not binding upon me but would be persuasive only. In *Association des Courtiers et Agents Immobiliers du Quebec v. Jean-Pierre Hudon*, No. 650-61-002355-034, there is no indication that Hudon did the same activities as Lorway MacEachern do as set out in their agreement, Exhibit G. In fact, one of the witnesses in that case was adamant that his objective was only to have Hudon sell his land. Paragraph 10 of that decision says as follows:

> [10] Turbide was adamant that he did not entrust Jean-Pierre Hudon with any mandate besides that of selling the land and, although he sent him all the documents and deeds of ownership for the immovables, he did not ask him to investigate or study the deeds in anticipation of the sale.

[70] *Association des Courtiers et Agents Immobiliers du Quebec v. Laurent St. Pierre*, Nos. 650-61-002391-039 and 650-61-002392-037 was decided on the same day as the above case. In para. 16 of that decision, de Pokomándy, J.C.Q. says:

> [16] Jocelyne Bouchard received no other bill or statement of account for the work that Jean-Pierre Hudon or Laurent St. Pierre may have done. In fact, she never gave them any other mandate besides the exclusive sales mandate for six months.

[71] Furthermore, the history of the legislation in Quebec is quite different from that in Nova Scotia. This is clear from the decision of *Jean-Pierre Hudon v. Association des Courtiers et Agents Immobiliers du Quebec*, Nos. 650-36-000150-041 and 650-36-000151-049. The exemption had previously been granted to "practising advocats and notaries" and had been amended to exempt only "advocats and notaries who, in the course of their practice, engage in a transaction mentioned in s. 1."

[72] In that regard, the limited scope of the work of notaries should be noted. In the decision at tab 5 (the lower court decision), the duties in the *Notarial Act* (R.S.Q., c. N-2) are set out in para. 49. Section 2 of that *Act* provides:

> **2.** (1) Notaries are legal practitioners and public officers whose chief duty is to draw up and execute deeds and contracts to which the parties are bound or desire to give the character of authenticity attached to acts of the public authority and to assure the date thereof.
>
> Duties.
>
> (2) Their duties shall also include the preservation of the deposit of the deeds executed by them en minute, the giving of communication thereof and the issuing of authentic copies thereof or extracts therefrom.
>
> ...

[73] Section 8 of the *Act* provides:

> **8.** Professional services for which a notary may charge fees shall include travelling, attendances, interviews, written or oral consultations and examination of deeds and documents; notaries are also entitled to commissions for the negotiation or renewal of loans, for the sale of debts and for the sale or purchase of immoveables; they are also entitled to the commissions usually paid by brokers to their agents for purchases and sales of securities made by them on behalf of their clients.

In my view, these differences distinguish the Quebec situation from that in Nova Scotia.

[74] Mr. Stern, for the plaintiff, also provided two American cases: one from Florida and one from Connecticut. These cases too are not binding upon me.

[75] In *Tobin v. Charles J. Courshon and William J. Goldworn*, No. 32422, Supreme Court of Florida, 155 So. 2d 785; 1963 Fla. LEXIS 2648; 99 A..R.2d 1147, the Florida Supreme Court in 1963 concluded:

> The narrow avenue through which the lawyer, not licensed as a real estate broker or salesman, may enter the ambit of the real estate broker or salesman is the one of duty owned by him in the relationship of client and attorney.

[76] The exemption in the real estate licensing law referred to a lawyer "acting ... as an attorney at law within the scope of his duties as such ...". The court, however, said:

> We are not advised by the complaint that there was any connection whatever between the activity undertaken by the respondents and any professional services they were furnishing as attorneys to the purchaser of the property, who was not even obligated to pay for whatever work they performed but who, according to the averments of the complaint, 'authorized' them 'in carrying out ... said retainer, to obtain compensation or their services ... by commission to be paid ... by the seller [not the purported client], or by participation and sharing of such commission with any real estate broker cooperating in such sale with plaintiffs [respondents]' if the property located was eventually purchased.

In my view, this is a situation closer to that in *Lewis, supra,* than in the present situation.

[77] In *Andrew Lance v. Ronald Lyman*, 549853, 1999 Conn. Super. LEXIS 1942, the Superior Court of Connecticut concluded that a lawyer could collect a commission in a co-brokerage agreement because he fell within the exemption in

the Connecticut statute which licensed real estate agents and brokers. The exemption referred to "any service rendered by any attorney-at-law in the performance of his duties as such attorney-at-law." The decision refers to the complaint stating that the plaintiff "was an individual attorney-at-law of the State of New York who was representing [the buyer]." However, the decision goes on to say those are the only circumstances in which he would fall within the exemption. I therefore do not find it helpful.

[78] The plaintiff further submits I should read into the exception one of the following words: "necessary", "incidental" or "occasional" or that I should read in the phrase "pre-existing solicitor client relationship."

For the reasons which follow, I cannot conclude it is appropriate to do so.

[79] The Intervenor says the breach is neither clear nor does the plaintiff have a strong *prima facie* case. The Intervenor does not take a position on the issue of whether the defendants are within the exception in s. 3(d) of the *Act* but submits that irreparable harm has not been established by the plaintiff and an interim injunction should not be granted.

[80] The Intervenor rests its position on the interpretation of the *Act* and says that the plaintiff cannot establish a clear breach or strong *prima facie* case based upon the interpretation of the exception in s. 3(d).

[81] The Intervenor also points out that the definition of "trade" or "trading" is and has always been very broad, whether under the present *Act* or its 1957 predecessor. It says that the conduct referred to in the definition is also conduct which is within the practice of law defined in the *Legal Profession Act, supra,* or its predecessor, the *Barristers and Solicitors Act, supra*. The Intervenor submits that applying the rules of statutory construction to the interpretation of s. 3(d) should satisfy me that the interim injunction should not be granted.

Interpretation

[82] The modern approach to statutory interpretation is to consider the words in their total context. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, the Supreme Court of Canada referred to Sullivan and Driedger on the Construction of Statutes, 3rd ed. 1994 and quoted from it as follows at para. 21:

> 21 Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[83] The court continued in para. 22:

> 22 I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, which provides that every Act 'shall be deemed to be remedial' and directs that every Act shall 'receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit'.

[84] In *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, the court repeated the above quote from Driedger and continued in para. 27:

> 27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article 'Statute Interpretation in a Nutshell' (1938), 16 Can. Bar Rev. 1, at p. 6, 'words, like people, take their colour from their surroundings'. This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such instance, the application of Driedger's principle gives rise to what was described in R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as 'the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter.

[85] In para. 28 the court said:

> 28 Other principles of interpretation – such as the strict construction of penal statutes and the 'Charter values' presumption – only receive application where there is ambiguity as to the meaning of a provision.

[86] The court then went on in paras. 29 and 30 to discuss ambiguity as follows:

> 29 What, then, in law is an ambiguity? To answer, an ambiguity must be 'real'. ... The words of the provision must be 'reasonably capable of more than one meaning'. ... By necessity, however, one must consider the 'entire context' of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, at para. 14, is apposite: 'It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids' to which I would add, 'including other principles of interpretation'.
>
> 30 For this reason, ambiguity cannot reside in the mere fact that several courts – or, for that matter, several doctrinal writers – have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the 'higher score', it is not appropriate to take a one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning' (Willlis, supra, at pp. 4-5).

[87] The first step therefore in interpretation is to consider the words in their grammatical and ordinary sense. The difficulty comes in interpreting the words "in the course and as part of that person's practice as a barrister and solicitor".

[88] The Intervenor urges me to consider the interpretation of the first part of the above, that is, the words "in the course" from cases in the employment law context. The Intervenor submits that Canadian courts have given a broad meaning to the words "in the course of employment" interpreting it as "a natural incident or directly related" or "referable to" or "directly related or intimately involved".

[89] However, that is only part of the exception. The trading must be not only in the course of but also "part of" the practice. That has always been part of the exception.

[90] In my view, considering only the ordinary and grammatical sense of the words, the meaning is not clear. It could mean in the broadest sense of the words or in the narrowest. Looking at the words in their total context is the next step in the interpretation process.

[91] An important part of the context is the legislative history of the provision. It is not disputed that before 1957 real estate agents were not regulated in Nova Scotia. In that year, the *Real Estate Agents Licensing Act*, S.N.S. 1957, c.6 was enacted. As stated above, the definition of "trading" was virtually the same as the present definition. The exemptions in s. 12 included one not significantly different for barristers and solicitors than the present exception in s. 3(d).

[92] The *Act*, however, was much simpler: it provided for a licensing system without any provision for education and training and little like today's disciplinary process. The only financial provision was the requirement for a bond which could be forfeited for fraud or in the event of an agent's bankruptcy.

[93] The other exemptions from the licensing requirement in 1957 were for those acting pursuant to statute or court order or "an administrator of an estate or any executor or trustee selling under the terms of any will, marriage settlement or deed of trust;", a bank or a loan, trust or insurance company and anyone in effect selling their own property. Lawyers were not exempted generally but only when practising and in good standing with the Bar Society and "when the trade is made in the course of and as part of his practice".

[94] This limited exemption for lawyers, in my view, applied only if the lawyer was governed by the existing Barristers and Solicitors Act. That *Act*, as it had for many years, governed the profession by providing that only those with proper

training and of good character could be admitted to the profession. The *Act* also set out disciplinary procedures.

[95] Mr. Whalley's evidence of what was done to buy and sell real estate in the 1940's and 1950's is uncontradicted. This, in my view, is also a relevant part of the context in which the 1957 *Act* was passed. Lawyers, at least in industrial Cape Breton, before 1957, traded in real estate by engaging in more than the types of activities set out in Ms. O'Brien Edmonds' affidavit. Furthermore, Mr. Whalley's affidavit states that, after 1957, that practice did not change even when some real estate agents began to work in the area. He said that, for various reasons, he and other lawyers "eased out of the sale of property" in the early 1960's.

[96] It would not be surprising if the practice of law in other communities in Nova Scotia varied little from the practice in Sydney which, around that time, became a city and was, therefore, one of Nova Scotia's larger communities.

[97] As quoted above, Gruchy, J. in *Cleary v. Martin, supra*, said in 1990 that the *Real Estate Brokers Licensing Act* was established for the protection of the public. In my view, the same can be said of the *Barristers and Solicitors Act* and the present *Legal Profession Act*. The requirements for licensing of real estate agents and brokers exclude those whose actions are governed otherwise than in the *Act* to protect the public interest. There is no issue of public interest when a person trades with respect to his or her own property. Those acting pursuant to court order or statute are regulated by the courts or by the relevant statute. Lawyers and accountants are regulated by their professional organizations. All can "trade" within the broad definition set out in the present and 1957 *Acts*.

[98] In *Bell Express Vu Limited Partnership v. Rex*, as quoted above, the Supreme Court of Canada said that the entire context of the statute must be considered before determining if it is truly susceptible of more than one interpretation. Two different meanings can be given to s. 3(d) depending upon whether the words "in the course and as part of" the person's practice as a barrister and solicitor are interpreted broadly or narrowly. A broad interpretation would include advertising and selling real estate as was done in industrial Cape Breton

before 1957 when the first *Act* was enacted. A narrow interpretation would limit it to the types of activities set out in the O'Brien Edmonds Affidavit.

[99] The Intervenor submits that the presumptions of legislative intent assist in determining the meaning of s. 3(d). It submits that one of those presumptions is that a statute creating a professional monopoly must be strictly applied so that anything such a statute does not clearly prohibit may be done by non-members.

[100] The leading case on this is *Pauze v. Gauvin*, [1954] S.C.R. 15, the key provision of which was translated into English and adopted in *Laporte v. College of Pharmacists of Quebec*, [1976] 1 S.C.R. 101. Justice de Grandpré said in the latter at p. 2 of the **Quicklaw** version:

> This question must be considered in the light of the principle laid down by this Court in Pauze v. Gauvin [1954] S.C.R. 15.] In particular I adopt the following passage from the reasons of Taschereau J., as he then was (at p. 18):
>
> > [TRANSLATION] The statutes creating these professional monopolies, sanctioned by law, access to which is controlled and which protect their members in good standing who meet the required conditions against any competition, must however be strictly applied. Anything which is not clearly prohibited may be done with impunity by anyone not a member of these closed associations.

[101] That principle was adopted in Nova Scotia in *R. v. Nomm*, [1983] N.S.J. No. 154 in para. 15. It was referred to again in *R. v. K.W. Robb & Associates Ltd.*, [1991] 101 N.S.R. (2d) 216 (N.S.C.A.) in the context of the *Engineering Profession Act*, R.S.N.S. 1989, c. 148.

[102] The Intervenor also submits that part of the context of a statute is a consideration of related statutes. In Sullivan and Driedger on the Construction of Statutes, the authors say at p. 323:

> The context of a legislative provision includes not only the immediate context and the rest of the Act in which the provision appears but also any other legislation that

> may cast light on the meaning or effect of the words. Traditionally, the category of related legislation is said to consist of statutes in *pari materia*, that is, statutes enacted by the same legislature and relating to the same subject. In practice, however, the courts do not limit themselves in this way. They look to the whole of the statute book produced by the enacting legislature and to legislation enacted by other jurisdictions as well. They determine on a case-by-case basis what relations exist between the words to be interpreted and the words of other legislative texts, what inferences may be drawn from these relations and what weight should attach to these inferences.

[103] In *Bell Express Vu Limited Partnership v. Rex, supra*, the court looked at two related statutes: the *Broadcasting Act*, S.C. 1991, c. 11, ss. 2(1) and *Radiocommunication Act*, R.S.C. 1985, c. R-2, ss. 2. The court, in para. 46, referred to two previous decisions, saying it agreed with the following quote:

> ... The provisions of each statute must accordingly be read in the context of the other and consideration must be given to each statute's roll (sic) in the overall scheme.

[104] The related statutes to the *Real Estate Trading Act* are the *Legal Profession Act* and its predecessor, The *Barristers and Solicitors Act*. I agree with the submission of the Intervenor that both of the latter and the *Real Estate Trading Act* and its predecessor defined key terms very broadly. As Mr. Larkin pointed out, and as I have said above, "trading" is broad enough to encompass activity defined as part of the practice of law in the *Legal Profession Act*.

[105] After a consideration of all of the above submissions and the authorities in support, I conclude that the definition "in the course and part of the practice" must be given a broad interpretation. The words standing alone are not entirely clear and, when I look at the entire context within which those words exist, I cannot conclude that they should be interpreted as narrowly as the plaintiff suggests.

[106] Accordingly, the plaintiff has not proven a clear breach or *prima facie* case which is required if irreparable harm is to be presumed. The application therefore fails on this part of the three part test. The application is dismissed.

3. Balance of Convenience

[107] However, I will also deal with the issue of balance of convenience. It is usually very closely related to the issue of irreparable harm. If I were required to move to this part of the test, I would also conclude that the application should be dismissed. In my view, the balance of convenience clearly favours the defendants.

[108] The defendants are a law firm and its partners are members in good standing of the Nova Scotia Barristers' Society. They are practising insured members. The purpose of the *Real Estate Trading Act*, *supra*, is to protect the public. In my view, the public is protected by virtue of the lawyers being regulated by the *Legal Profession Act* which includes, among other things, a requirement for insurance.

[109] In the affidavit of Darrel Pink, para. 14, he says:

> 14. In performing activities involving the acquisition or disposition of real property or businesses with premises, lawyers in Nova Scotia are subject to a comprehensive set of ethical rules and professional standards which are established and administered under the *Legal Profession Act* and the regulations pursuant to the *Legal Profession Act*.

[110] He also says in the opening sentence in para. 15:

> 15. All lawyers practicing (sic) in Nova Scotia are obliged to comply with the ethical standards contained in the rules, guiding principles and commentaries of Legal Ethics and Professional Conduct (1990) as amended, commonly referred to as the Legal Ethics Handbook (attached as Exhibit 'F', Volume II).

[111] Mr. Pink also refers, in para. 19, to the Lawyers' Fund for Client Compensation, formerly known as the Reimbursement Fund, and to the Land Registration Act Compensation Fund. In para. 20 he says:

> 20. Lawyers in Nova Scotia are required to participate in a mandatory professional liability claims' program conducted by the Lawyers Insurance

> Association of Nova Scotia in accordance with the *Legal Profession Act* and the regulations. The purpose of this program is to protect the public from errors and omissions by lawyers by requiring that their activities covered by the program are insured. The insurance coverage provided by the Association covers errors and omissions made by insured lawyers in the provision of professional services normally provided or supervised by a lawyer within the scope of a usual lawyer client relationship.

[112] I have previously quoted para. 25 of his affidavit and I repeat it here as follows:

> 25. In the event that an interim injunction is not granted until the trial of this matter, the Society will endeavor to protect the public interest in respect of the activities of the Defendants by applying to them and to their activities the comprehensive scheme of regulation, standards and to discipline provided under the *Legal Profession Act* and regulations.

[113] The public interest is protected by these measures. There is also a sort of public interest in having the option of engaging Lorway MacEachern for the activities set out in Duncan MacEachern's affidavit

[114] As Gruchy, J. said in *Anderson v. Evans* (2005), NSSC 50, 231 N.S.R. (2d) 26, 733 A.P.R. 26 at para. 22:

> 22 ... it is necessary to consider the impact upon them resulting from the granting or withholding of an injunction.

[115] The plaintiff, in my view, can show very little on its side of the balance. Lorway MacEachern has sold only seven properties in almost two years and it is difficult to conclude, without any evidence, the effect this may have had on licensed real estate agents and/or brokers. Nor is there any evidence, except the ad from other lawyers published approximately nine months ago, that others are actively doing what Lorway MacEachern is doing, nor, if they are, of the impact on real estate agents and brokers.

[116] The public interest is protected and no harm has been shown to the Real Estate Commission but Lorway MacEachern has established itself over a two year period doing this sort of work. There would be an adverse impact on them if they had to stop, especially if other lawyers in the Sydney area are in fact doing this work. If successful at trial, they would have to start over and re-establish themselves. Furthermore, the Real Estate Commission took almost two years to bring this matter to court for an interim injunction and that delay also is an indication to me that the balance of convenience favours the defendants.

[117] If the parties cannot agree upon costs, I will accept written submissions.

Hood, J.