SUPREME COURT OF NOVA SCOTIA
Citation: *Kings (County) v. Berwick (Town),* 2009 NSSC 398

Date: 20091207
Docket: Ken No 318509
Registry: Kentville

Between:

Municipality of the County of Kings

Applicant

v.

Town of Berwick, Town of Hantsport, Town of Kentville,
Town of Wolfville, Annapolis Valley Regional School Board and
Her Majesty the Queen in Right of the Province of Nova Scotia

Respondents

Corrected Decision:	The text of the original judgment was corrected on February 10, 2010, and the description of the correction is appended.
Judge:	The Honourable Justice Gregory M. Warner
Heard:	December 7, 2009, at Kentville, Nova Scotia (oral decision: December 7, 2009)
Written Decision:	December 23, 2009
Counsel:	**Peter M. Rogers, Q.C.,** and **Jessie Irving**, counsel for the Applicant, Municipality of the County of Kings **John T. Shanks** and **Donn Fraser**, counsel for the Respondents, Town of Hantsport, Town of Kentville and Town of Wolfville **Stephen McGrath**, counsel for the respondent, Her Majesty the Queen in Right of the Province of Nova Scotia **Peter McInroy**, counsel for the Respondent, Town of Berwick **Leroy M. Lenethen**, Q.C., counsel for the respondent, Annapolis Valley Regional School Board, watching brief

By the Court:

A. Background

[1] The Municipality of the County of Kings ("Kings County") has made an application naming as Respondents the four other municipal governments - who, together with Kings County, fund the Annapolis Valley Regional School Board ("the School Board"), - the Province of Nova Scotia ("the Province") and the School Board itself. The four Respondent municipal governments consist of the Town of Berwick and the Towns of Hantsport, Kentville and Wolfville, hereinafter referred to as "Berwick" and "the Three Towns". All parties, other than the School Board itself, are signatories to the 1989 amending agreement creating the current version of the School Board.

[2] Kings County seeks a declaration that effective April 1, 2010, its funding for the School Board be determined by reference to its share of uniform assessment pursuant to s. 3(o) of the *Education Act*, and not by reference to its share of student enrollment amongst the municipal units in the School Board - the sharing in effect since 1982. This requires the court (1) to interpret agreements amongst the parties, and (2) if the Court's interpretation is contrary to the Applicant's interpretation, whether the Applicant can unilaterally terminate the agreement(s), and if so, (3) what constitutes reasonable notice for termination. If successful, the Applicant's annual funding contribution to the School Board would be reduced by about $1,000,000.00 and the combined contribution of the Three Towns would increase by about the same amount.

[3] The Applicant chose to apply by way of an **application in court** under the new *Civil Procedure Rule 5.07*. [This decision deals with the Three Towns' motion to convert the **application in court** to an **action** pursuant to *Civil Procedure Rule 6*.]

[4] To obtain a declaration "Kings County" indicates that the proper interpretation of the Statutory Agreement of 1982 (hereinafter referred to as the "Statutory Agreement"), establishing the predecessor School Board, and the amendment (hereinafter referred to as the "Statutory Amendment") entered into in 1989, adding the Town of Hantsport, do not establish School Board funding on a per student basis and that the default formula in the *Education Act* of uniform assessment as the basis of funding therefore applies. It further indicates that whatever the form of the agreement between the municipal units for funding of education, whether a Statutory Agreement or otherwise, that the agreement is not an agreement in perpetuity, but is an agreement that it is entitled, by law, to terminate upon reasonable notice, which notice it gave in November 2007.

[5] The question raised, or declaration sought, by Kings County is a million-dollar-a-year question. It pleads that it is paying a million dollars more under the present funding formula than the one to which it claims to be entitled to have the benefit of and the effect of this is that three of the other four municipal units would be obligated to make up the difference. Apparently the fourth one, the Town of Berwick, at the present time, would be unaffected.

[6] The Three Towns affected take issue with the applicant's claim. They say that the Statutory Agreement, on its face, provides for the per student formula. If it does not, then the court should allow the "per student formula" to be established by reference to admissible extrinsic evidence for the purposes of resolving any ambiguity or for the purposes of establishing a collateral agreement or for the purposes of establishing an agreement that should entitle it to rectification of the written agreements or on the basis that the applicant should be estopped from changing its position after in fact following the per student formula as all other municipalities have for the 27 years since the agreement was originally made.

B. **The *Rules* and their application**

[7] An Application in Court, under *Rule 5.07* to *5.09*, is not a precise replication of old *Rule 9* under the 1972 *Rules*. It is a new type of proceeding intended as a speedy, flexible alternative to a trial. It is expected that Applications in Court under *Rule 5* will proceed to hearing considerably faster than Actions under *Rule 4*.

[8] Unlike *1972 Rule 9.02*, substantial disputes of fact are permitted if they can be resolved in a summary way. An Application in Court is commenced using form 5.07. The application is accompanied by a Motion for Directions that must be heard within 25 days. The Court has broad case management power on the Motion for Directions, including the power to order disclosure and limit or permit discovery. As an aside, I note that there is no presumptive time-limit on discovery as under *Rule 57.10(3)* and that *Rules 5.07* to *5.09* allow the court to permit orders for cross-examination out of the court, limit the subjects of, and time for, cross-examination at the hearing, set dates for filing affidavits and briefs, set the hearing date, and give any other necessary direction.

[9] Kings County chose Application in Court as the route for determination of its request for a declaration that, effective April 1, 2010, funding of the School Board be on the basis of the uniform assessment formula as opposed to the per student formula. The Three Towns of Kentville, Wolfville and Hantsport make this motion under *Rule 6* to convert the Application in Court to an Action.

[10] *Rule 6.02(2)* states that the burden of satisfying the judge that an application should be converted is on the party making that motion ("the moving party"). To fulfill that burden, pursuant to *Rule 6.03*, the moving party (in this case, the Three Towns) must, by affidavit, provide a description of the evidence that it would seek to introduce at a trial, set out its position on all of the issues raised in the application, and disclose all further issues the party would raise if the proceeding remained an application or if the proceeding was converted to an action.

[11] In support of this conversion motion, the Three Towns have filed the affidavits of their three respective CAO's.

[12] *Rule 6.02* contains express guidance - presumptions and factors, for determining the motion. By Subsection 6.02(3), an application is presumed to be preferable (obviously a rebuttal

presumption) (1) if substantive rights asserted by a party will be eroded in the time it takes to bring the matter to trial and, conversely, the erosion will be significantly lessened if the dispute is resolved by application, and (2) if the court is being requested to hold several hearings in one proceeding, the example set out in the *Rules being* a corporate reorganization.

[13] No party to this motion has said that this matter involves a request for several hearings per Rule 6.02(3)(b).

[14] With regards to *Rule 6.02(3)(a)*, the Applicant, Kings County, says that the substantive rights that it asserts will be eroded in the time it would take to bring the matter for trial; this substantive right is described as its right of budgetary certainty, which will be lost to all parties if no determination of each party's respective funding obligation is made by April 1, 2010 and Kings County acts on the notice it gave in 2007 to contribute in accord with the default (uniform assessment) formula.

[15] I agree with the submission of the Three Towns that this application, filed on October 20, 2009, requesting that (1) all of the pre-hearing steps respecting an application in court be completed, (2) the hearing be held and (3) a decision or a declaration be made, by March 31, 2010, sets too speedy a time-frame for a full and fair determination of the issue. To the extent that Kings County finds itself with its substantive right of budgetary certainty compromised or eroded, the Three Towns submits that this uncertainty is not by reason of the desire of the Three Towns for a trial but by reason of the fact that the application was only brought five months before the Applicant's proposed implementation date of a new funding formula.

[16] In his oral submissions today, the Applicant's counsel suggests that the deadline of March 31, 2010, is not extremely rigid in the sense that School Board funding early in the fiscal year is usually premised upon the prior years' numbers and that, in effect, some time for further pre-hearing processes, and thus some delay can be accommodated without a significant impact upon the budgeting process of Kings County.

[17] I do not find that any erosion of the substantive rights of Kings County would result from conversion, thereby creating a presumption that an application is preferable. Any erosion is because the application was only brought on October 20, leaving insufficient time to fairly determine the issues required to be determined by the Applicant's framing of the issue.

[18] By *Rule 6.02(4)*, an action is presumed to be preferable to an application if (a) it is established that a party has a right to and wishes to exercise a right to trial by jury and it is unreasonable to deprive them of their right or (b) it is unreasonable to require a party to disclose information about witnesses early such as information about a witness that may be withheld and only brought out to impeach credibility.

[19] The Three Towns do not claim a right to a trial by jury. They did not argue it; they did not plead it. It is not in issue.

[20] I agree with Mr. Rogers' analysis of *Rule 6.02(4)(b)*. In the affidavits filed by "Three Towns" and in their written submission, they state that there is evidence, which they have been unable to uncover in the short time since the filing of the application, of witnesses (they set out a long list of potential witnesses) and potential documents, that, in their view, might be relevant as extrinsic evidence in the interpretation of the agreements and which may establish context for determining reasonable notice, if the agreement is terminable unilaterally by Kings County.

[21] That kind of evidence is not what *Rule 6.02(4)(b)* is about. *Rule 6.02(4)(b)* refers to information about witnesses that a party should not be required to disclose before trial, not information which, at this time, is not available.

[22] In summary, no circumstances advanced in this motion create a presumptive preference for an action pursuant to *Rule 6.02(4).*

[23] *Rule 6.02(5)* enumerates four factors that would favour an application. I will deal with them one by one.

[24] *Rule 6.02(5)(a).* The first factor is that the parties can quickly ascertain who their important witnesses will be. There is some evidence before the Court supportive of Three Towns' position that because the written agreement created in 1982 and formally amended in 1989, appear to be the primary written documents by which any obligations between the parties were created, and because these events occurred so long ago and span such a long period, it is difficult, in an abbreviated time to determine whom the important witnesses will be.

[25] My analysis of this factor is that, if the Three Towns show due diligence in pursuing witnesses and demonstrate that more time may produce relevant evidence from them, that would warrant a possible extension of the time-frames made during the teleconference held pursuant to the Motion for Directions on November 10, or, possibly, the conversion of the application to a trial. [The affidavits do not now satisfy me as to the relevance of the potential witnesses listed by the Three Towns.]

[26] I make the following qualifications: My sense is, in the context of the issues in this proceeding, that evidence of witnesses, other than as possessors of documents, will likely constitute a minor aspect of the factual matrix or context for the interpretation of the agreements. Absent contemporaneous memoranda, it is hard to imagine that a witness, who attended negotiations and meetings 27 years ago or 20 years ago, will retain sufficiently detailed or specific memory that his or her evidence would be helpful in parsing and interpreting the nuances of the written agreements that resulted from those meetings or negotiations. I am skeptical that the *viva voce* evidence of witnesses, other than witnesses for the production of documents and memoranda that are contemporaneous with the events, would be a significant factor in the determination of the legal issue. Witnesses of current events should be easily ascertainable.

[27] *Rule 6.02(5)(b).* A second factor in favour of an application occurs when the parties can be ready to be heard in months rather than in years. In this particular case, the application was set down for hearing four months after the Motion for Directions, less than five months from the date of the application.

[28] The affidavit evidence of the Three Towns discloses some issues: The disclosure of relevant documents by all parties, and the initial attempts to interview the potential witnesses (and failing cooperation, the likely motions for and discovery of potential witnesses), might take longer than the two or three months set aside for those processes, but, in my view, that is a long way from finding that this is a proceeding that requires years, not months, to proceed to hearing. This legal dispute does not require years before it will be ready to be heard. The dispute is primarily, as Mr. Rogers says, an issue of law (interpretation of agreements and a statute) with a factual component, and the factual component is primarily context for the interpretation of the agreements amongst the parties. The factual component is not the centre of the dispute, it is an aid for the interpretation of the contract that is the centre of the dispute. On my analysis, this factor favours an application.

[29] *Rule 6.02(5)(c).* A third factor favouring an application is that the hearing is of predictable length and content.

[30] After reading the affidavits of the CAO's of the Three Towns, I am not sure that the hearing is of predictable length. My sense is that they should be, or are, or appear to be, fully engaged in discovering what documents might exist. The response of Counsel for the Province of Nova Scotia, to my inquiry on how it was progressing in its document search, was: 'not well'. Because the relevant time period is the 1980's and because of the following of normal document retention/destruction polices, the Province believes few records will be found. This causes me some concern in that what the Three Towns are looking for and hoping to find may no longer exist. I accept that it is possible that the hearing may require more than the two days scheduled during the Directions hearing on November 10. In any event, it is not going to take years to find that out, and the absence of records would not likely lengthen the hearing by very much.

[31] In the annotations to *Rule 6*, in the LexisNexis edition of the *new (2009) Rules,* is a reference to *2475813 Nova Scotia Ltd.* v *Ali*, 2002 NSCA 59, a motion to convert an application under the *old (1972) Rule 9.02* to an action. In *old Rule 9.02*, an application was appropriate when the principal issue was a question of law or interpretation of an enactment, and when there was "unlikely to be any substantial dispute of fact". The Court of Appeal upheld the Chambers' judge's decision to convert an application to a trial. The comments of Cromwell J.A., in ¶¶ 6 to 9, are a relevant analysis of the "predictable content" part of *Rule 6.02(5)(c),* even though he wrote in respect of a different rule. He wrote:

> [6] The material before the chambers judge does not clearly define the issues to be adjudicated in the application and indicates that there are extensive parallel and related proceedings commenced by way of action pending. The pleadings which are exhibited to the affidavits reveal wide-ranging allegations and cross-

> allegations, all of which appear to be in dispute . . . Mr. Brett's affidavit filed in support of the application to approve a sale . . . addresses only vaguely and inferentially the factors which the Court is required to consider . . . On the other hand, the material filed on behalf of the respondents fails to identify with precision particular facts in dispute.
>
> [7] We have not had the benefit of submissions on the scope of the issues which it will be the court's duty to consider on the application or the impact that scope would have on the definition of what facts would be relevant to the application. . . . With more carefully defined issues and material responsive to them, we are far from persuaded that this matter could not have proceeded by way of application.
>
> [8] However, in light of the material presented to the chambers judge and the apparent absence of either definition of the issues or material more closely focused on those issues, we see no error in principle in the judge's conclusion that the affidavit evidence will not be adequate and that the wide-ranging material placed before her revealed numerous factual disputes. There was no way in which the chambers judge could define the relevance or otherwise of many of these factual disputes. In short, the material before the judge presented apparently wide-ranging disputes over a number of matters and over a number of years and failed to provide her with any realistic way to assess the relevance or otherwise of these disputes to the application . . .

[32] In this case, the parties have clearly defined the issues. They are both fairly clear and focussed. There is no question that some extrinsic evidence is likely to be admissible and, as Mr. Shanks aptly sets out in his pre-hearing brief, citing Swan's text for this point, often the process, when the hearing is not before a jury, involves hearing the extrinsic evidence and then deciding whether it is admissible.

[33] Counsel's analysis may be a stretch of the admissibility of extrinsic evidence further than what Fridman would allow. There is no question that John Swan and Geoff Hall both write that the doors of relevance and admissibility are far wider. The analysis may be more in line with the English case law than the dated case law of the highest court in Canada, that is, *Consolidated-Bathurst Export Ltd.* v *Mutual Boiler & Machinery Insurance Co.*, [1980] 1SCR 888 and *Eli Lilly & Co.* v. *Novapharm Ltd.*, [1998] 2 S.C.R. 129. The approach in that case law is more restrictive about relevance and admissibility than the English approach.

[34] Although many Canadian courts will hear extrinsic evidence to rule on admissibility and many others will admit extrinsic evidence for a broad range of purposes - such as enumerated in *Gallen v. Nunweiler*, 1984 CarswellBC 104 (BCCA) at ¶¶ 33 to 38, courts uniformly exclude evidence of subject intent, that is, what an individual witness thought, understood or believed. It is not the belief, thought or understanding of an individual that is relevant; it is not what he or

she thought he or she was agreeing to; it is what the document or the conduct shows they entered into that identifies and founds the analysis.

[35] Regarding the *Rule 6.02(5)(c)* factor, a hearing of predictable length and content, I am satisfied that, unlike the circumstances in the Court of Appeal case I quoted from, the issues in this case appear to be focussed. The parties may disagree on the extent to which extrinsic evidence is admissible, or even whether the parole evidence rule applies in this particular case. In any event, the factual component of this proceeding is not centred around credibility so much as reliability in respect of evidence from 27 years ago, and, because the evidence is admissible as factual context, relates more to communications and events, than intentions, thoughts, and beliefs.

[36] *Rule 6.02(5)(d)*. The fourth factor favouring an application exists when the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing including affidavit material, permitted direct evidence and cross-examination.

[37] While there is no formal concession by the Three Towns that credibility will not be an issue, this is not a case that rises or falls on credibility, but maybe on reliability.

[38] The difference between an application in court and a full, traditional trial, is that direct evidence in an application is primarily given by way of affidavit. An affidavit is usually formulated by counsel, or with the assistance of counsel, and is usually a fairly articulate and focussed presentation by a witness of what facts he or she wants the court to receive. It is usually far more focussed and helpful to the court, than rambling oral evidence that sometimes is sidetracked into matters unrelated or less directly related to the real issues.

[39] Seldom is credibility decided by direct examination and probably less in the context of this kind of proceeding where the factual evidence is of context. Cross-examination is the real tool for discovery of truth. **Sidney Lederman, AlanBryant**, **and Michelle Fuerst**, in *The Law of Evidence in Canada*, **(called Sopinka)**, Third Edition (Markham: LexisNexis, 2009), at p. 1133 under the heading of cross-examination ¶ 16.112 states:

> The oft quoted words of Wigmore that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth" indicate its great value in the conduct of litigation. Three purposes of generally attributed to cross-examination:
>
> (1) to weaken, qualify or destroy the opponent's case;
>
> (2) to support the party's own case through the testimony of the opponent's witnesses;
>
> (3) to discredit the witness.

> . . .
>
> The Supreme Court of Canada, in *R. v. Lyttle*, reaffirmed the principle . . . The Court emphasized the importance of cross-examination. Cross-examination, the Court said, is a "faithful friend in the pursuit of justice and an indispensable ally in the search for truth; and should be "jealously protected and broadly construed."

[40] Applications in court permit cross-examination, which can be unlimited. Cross-examination is the tool to test credibility in a trial and it is preserved in an application in court. Whether I suspect that direct examination in trials is overrated or not, it is my sense that the issues of facts in this proceeding relate more to reliability than credibility; in either event, the opportunity to cross-examine in the hearing of an application in court is more than enough to satisfactorily assess credibility.

[41] There is no identification in the three affidavits of the Three Towns of a particular issue of credibility (as opposed to reliability) that could become so significant that it could not be satisfactorily dealt with by way of cross-examination. The issues in this case are focussed enough that the use of affidavits to present direct evidence will probably assist everyone in focussing on the relevant factual context and avoiding the irrelevant.

[42] Just to complete that point about credibility, **David Paciocco and Lee Stuesser,** *The Law of Evidence*, Fourth Edition (Toronto: Irwin Law, 2005), also discusses cross-examination. In the index to that text, the entry for "credibility" refers the reader to "cross-examination", not "direct evidence". Under "cross-examination" , the writers made basically the same points as in the Sopinka text, citing Wigmore and *R v Lyttle*.

[43] *Rule 6.025(5)* states that the factors in favour of an application "include each of the following". I have reviewed this motion in the context of the four listed factors. The list is not an exclusive list nor intended to be an analysis of all the relevant factors that may favour an application. There may be other factors relevant to a particular circumstance.

[44] I am concerned that if the Three Towns do not have the opportunity, as long as they pursue it diligently, to explore for relevant information with the 20 some odd municipal politicians and staff, the length of the hearing may be longer. That is a relevant factor in assessing the time frames and deadlines set out in the order for directions of November 10. While that is not before me directly, I want to be clear on the record of my concern that, if the exercise of due diligence by the Three Towns in attempting to contact relevant witnesses and records from 27 years ago or 20 years ago still leaves them unable to meet the deadlines imposed by the order of directions, they should not be prejudiced in the full and fair presentation of their response to the application.

[45] *Rule 6.02(6)*. This final enumerated factor speaks of the relative costs and delay of an action or of an application as circumstances to be considered. I do not need to quote from the

speeches of the Chief Justice of Canada found on the Supreme Court of Canada's web page, and in the national press, to the effect that one of the serious problems in the justice system in this country is access to justice, caused by delay and cost. The cost of litigation is such that disputes that can be resolved by focussed hearings should be resolved by focussed hearings, and by procedures that balance the issues with reasonable costs. This should be of concern to everyone in the justice system.

[46] From claims for costs made in applications that I have adjudicated, I conclude that sometimes they are incredibly expensive. They are even more expensive after trials.

[47] I appreciate that this is a million-dollar-a-year issue, and I approach this on the basis that it should not be rushed to conclusion prematurely, but on the other hand that should not be a reason that the crossing of every "t" or the risk of liability by the result should create a proceeding that is so cumbersome and expensive, and contrary to the principle described as *Civil Procedure Rule 1*, which now simply reads: "These Rules are for the just, speedy and inexpensive determination of every proceeding".

[48] I do not see any reason to delay determination of this issue for years and to lengthen the hearing by providing for direct examination, instead of direct evidence by affidavit with the opportunity for cross-examination. The relative cost, length and delay of this proceeding, can be ameliorated by an application in which the evidence is given by affidavits, which the parties and counsel examine before they walk into the courtroom, creating hopefully a more prepared and focussed approach to the cross-examination of witnesses.

[49] In my view, the factual issues, that are, or appear to be, secondary to the primary legal issues in this case, strongly favour that the matter is dealt with by way of an application in court as opposed to a traditional trial.

[50] I repeat that despite the fact that I think the issues are defined and the material facts that would be responsive to those defined issues may be hard to find at this late date and may therefore be limited, and the hearing therefore may be fairly focussed, the magnitude of the consequences of the litigation requires that no party be rushed into a hearing if, despite due diligence in pursuing witnesses who might have critical or relevant information, they are unfairly prejudiced by the timetable set out in the order for directions.

[51] The directions for discovery and disclosure for this application are no less broad or fair, and in respect of discovery, probably broader than they would be for an action. For an action, there are time limits on discovery. No time limits on discovery were ordered in respect of this application.

[52] The issues in this proceeding should be dealt with in an orderly manner. I am concerned about the short time frame left for rendering a decision after the hearing in order to meet the Applicant's time frame for a declaration. But that is not the issue today. The issue today is to determine whether the traditional trial is a preferred route to ensure that the hearing is fair, and

that all of the relevant information is before the Court. The onus of establishing this is on the Three Towns.

[53] The Three Towns have not established that the factors in favour of the choice of Kings County to proceed by way of an application in court are outweighed by any factor supporting converting the proceeding to an action.

[54] Costs in the amount of $1,000.00 shall be payable by the Three Towns in the cause.

J.

SUPREME COURT OF NOVA SCOTIA
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Applicant

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Town of Wolfville, Annapolis Valley Regional School Board and
Her Majesty the Queen in Right of the Province of Nova Scotia

Respondents

Corrected Decision:	The text of the original judgment was corrected on February 10, 2010, and the description of the correction is appended.
Judge:	The Honourable Justice Gregory M. Warner
Heard:	December 7, 2009, at Kentville, Nova Scotia (oral decision: December 7, 2009)
Written Decision:	December 23, 2009
Counsel:	**Peter M. Rogers, Q.C.,** and **Jessie Irving**, counsel for the Applicant, Municipality of the County of Kings **John T. Shanks** and **Donn Fraser**, counsel for the Respondents, Town of Hantsport, Town of Kentville and Town of Wolfville **Stephen McGrath**, counsel for the respondent, Her Majesty the Queen in Right of the Province of Nova Scotia **Peter McInroy**, counsel for the Respondent, Town of Berwick **Leroy M. Lenethen**, Q.C., counsel for the respondent, Annapolis Valley Regional School Board, watching brief

Erratum:

[1] Paragraph 1 shall be replaced with:

> The Municipality of the County of Kings ("Kings County") has made an application naming as Respondents the four other municipal governments - who, together with Kings County, fund the Annapolis Valley Regional School Board ("the School Board"), - the Province of Nova Scotia ("the Province") and the School Board itself. The four Respondent municipal governments consist of the Town of Berwick and the Towns of Hantsport, Kentville and Wolfville, hereinafter referred to as "Berwick" and "the Three Towns". All parties, other than the School Board itself, are signatories to the 1989 amending agreement creating the current version of the School Board.

[2] Paragraph 2 shall be replaced with:

> Kings County seeks a declaration that effective April 1, 2010, its funding for the School Board be determined by reference to its share of uniform assessment pursuant to s. 3(o) of the *Education Act*, and not by reference to its share of student enrollment amongst the municipal units in the School Board - the sharing in effect since 1982. This requires the court (1) to interpret agreements amongst the parties, and (2) if the Court's interpretation is contrary to the Applicant's interpretation, whether the Applicant can unilaterally terminate the agreement(s), and if so, (3) what constitutes reasonable notice for termination. If successful, the Applicant's annual funding contribution to the School Board would be reduced by about $1,000,000.00 and the combined contribution of the Three Towns would increase by about the same amount.

[3] Paragraph 3 shall be replaced with:

> The Applicant chose to apply by way of an **application in court** under the new *Civil Procedure Rule 5.07*. [This decision deals with the Three Towns' motion to convert the **application in court** to an **action** pursuant to *Civil Procedure Rule 6*.]

[4] The second sentence in Paragraph 5 shall be replaced with:

> It pleads that it is paying a million dollars more under the present funding formula than the one to which it claims to be entitled to have the benefit of and the effect of this is that three of the other four municipal units would be obligated to make up the difference.

[5] Paragraph 6, the third sentence shall be amended to commence: "If it does not, then the court should allow the "per student formula" to be established by reference to admissible extrinsic evidence . . ."

[6] The last sentence of Paragraph 8 shall be replaced with:

> The Court has broad case management power on the Motion for Directions, including the power to order disclosure and limit or permit discovery. As an aside, I note that there is no presumptive time-limit on discovery as under *Rule 57.10(3)* and that *Rules 5.07* to *5.09* allow the court to permit orders for cross-examination out of the court, limit the subjects of, and time for, cross-examination at the hearing, set dates for filing affidavits and briefs, set the hearing date, and give any other necessary direction.

[7] "The applicant" at the end of the first sentence of Paragraph 10 shall be replaced with "the party making that motion ("the moving party"). In the second line of Paragraph 10, the phrase ". . . the party (the Three Towns) must, . . ." shall be replaced with ". . . the moving party (in this case, the Three Towns) must, . . ."

[8] In Paragraph 15, on the third line of the last sentence the words ". . . this uncertainty is not by reason of the Three Towns desires for a trial . . ." shall be replaced with ". . . this uncertainty is not by reason of the desire of the Three Towns for a trial . . ."

[9] Paragraph 16 shall be replaced with:

> In his oral submissions today, the Applicant's counsel suggests that the deadline of March 31, 2010, is not extremely rigid in the sense that School Board funding early in the fiscal year is usually premised upon the prior years' numbers and that, in effect, some time for further pre-hearing processes, and thus some delay can be accommodated without a significant impact upon the budgeting process of Kings County.

[10] In Paragraph 18, the last portion that reads ". . . and only held to impeach credibility." shall be changed to ". . . and only brought out to impeach credibility."

[11] Paragraph 22 shall be replaced with:

> In summary, no circumstances advanced in this motion create a presumptive preference for an action pursuant to *Rule 6.02(4).*

[12] In Paragraph 24:

a) The first line shall be amended to read: "The first factor is that the parties . . ."

b) The second line shall be amended to read: “There is some evidence before the Court supportive of the position of the Three Towns that because the 1982 agreement and the 1989 amending agreement appear to be the primary written documents by which any obligations between the parties were created . . .”

[13] Paragraph 25, the second line, the word “demonstrates” should be “demonstrate”.

[14] Paragraph 26, the first sentence should read:

> I make the following qualifications: My sense is, in the context of the issues in this proceeding, that evidence of witnesses, other than as possessors of documents, will likely constitute a minor aspect of the factual matrix or context for the interpretation of the agreements.

[15] Paragraph 28, the second sentence shall read:

> This legal dispute does not require years before it will be ready to be heard.

[16] Paragraph 30, the fourth and fifth sentences should read:

> Because the relevant time period is the 1980's and because of the following of normal document retention/destruction polices, the Province believes few records will be found. This causes me some concern in that what the Three Towns are looking for and hoping to find may no longer exist.

[17] Paragraph 31:

a) The second sentence should read:

> In *old Rule 9.02*, an application was appropriate when the principal issue was a question of law or interpretation of an enactment, and when there was “unlikely to be any substantial dispute of fact”.

b) In the quotation, Paragraph 7, in the second sentence the word “of” in the statement “. . . or the impact of that scope. . .” should be deleted to read “. . . or the impact that scope . . .”

[18] In Paragraph 38, second sentence, the word “the” in the clause “. . . of what the facts he or she wants the court to receive.” should be deleted to read “. . . of what facts he or she wants the court to receive.”

[19] In Paragraph 39, the title of the text should read: *The Law of Evidence in Canada*.

[20] In Paragraph 43:

a) the first sentence should read:

Rule 6.025(5) states that the factors in favour of an application "include each of the following".

b) in the third sentence the word "is" should be inserted between the words "list" and "not".

[21] Paragraph 45, in the second sentence the word "other" in the clause ". . . and in the other national press, . . ." shall be deleted to read ". . . and in the national press, . . ."

[22] Paragraph 50 shall be replaced with:

I repeat that despite the fact that I think the issues are defined and the material facts that would be responsive to those defined issues may be hard to find at this late date and may therefore be limited, and the hearing therefore may be fairly focussed, the magnitude of the consequences of the litigation requires that no party be rushed into a hearing if, despite due diligence in pursuing witnesses who might have critical or relevant information, they are unfairly prejudiced by the timetable set out in the order for directions.

[23] Paragraph 52:

a) in the first sentence the word "within" in the clause ". . . should be dealt within an orderly manner" shall be replaced with "with in".

b) in the fourth sentence the word "it" at the end of the sentence should read "the Court."

J.