SUPREME COURT OF NOVA SCOTIA

Citation: Abbott and Haliburton Company v. WBLI Chartered Accountants, 2012 NSSC 210

Date: 20120601
Docket: Hfx. No. 270401
Registry: Halifax

Between:

Abbott and Haliburton Company Limited; A.W. Allen & Son Limited; Berwick Building Supplies Limited; Bishop's Falls Building Supplies Limited; Arthur Boudreau & Fils Ltée; Brennan Contractors & Supplies Ltd.; F.J. Brideau & Fils Limitee; Cabot Building Supplies Company (1988) Limited; Robert Churchill Building Supplies Limited; CDL Holdings Limited, formerly Chester Dawe Limited; Fraser Supplies (1980) Ltd.; R.D. Gillis Building Supplies Limited; Yvon Godin Ltd.; Truro Wood Industries Limited/Home Care Properties Limited; Hann's Hardware and Sporting Goods Limited; Harbour Breton Building Supplies Limited; Hillier's Trades Limited; Hubcraft Building Supplies Limited; Lumbermart Limited; Maple Leaf Farm Supplies Limited; S.W. Mifflin Ltd.; Nauss Brothers Limited; O'Leary Farmers' Co-operative Ass'n. Ltd.; Pellerin Building Supplies Inc.; Pleasant Supplies Incorporated; J.I. Pritchett & Sons Limited; Centre Multi-Décor De Richibucto Ltée; U.J. Robichaud & Sons Woodworkers Limited; La Quincaillerie Saint-Louis Ltée; R & J Swinamer's Supplies Limited; 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies; Taylor Lumber and Building Supplies Limited; Two by Four Lumber Sales Ltd.; Walbourne Enterprises Ltd.; Western Bay Hardware Limited; White's Construction Limited; D.J. Williams and Sons Limited; and Woodland Building Supplies Limited

Plaintiffs

v.

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants

First Defendant

v.

R. Brian Burgess

Second Defendant

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	March 26th and 27th, 2012, in Halifax, Nova Scotia
Written Decision:	June 1, 2012
Counsel:	Brian Murphy & Wanda Severns, for the plaintiffs Alan D'Silva, Erica Tait and Aaron Kreaden, for the defendant

By the Court:

[1] This is a motion to strike certain affidavits filed by the plaintiffs. In the main action, the plaintiffs advance a claim of negligent misrepresentation alleging the audited financial statements of AWARD Wholesale and Retail Distributors Ltd. were prepared negligently by the defendants, that the statements contain incorrect and misleading information, that they were not performed in accordance with General Assurance and Auditing Standards, and that they contained material deviations from Generally Accepted Accounting Principles. The defendants deny these allegations.

[2] The defendants filed a motion for summary judgment in 2010. In response, the plaintiffs filed affidavits of Fred O'Hearn, who dealt with AWARD as a sales representative, and Susan MacMillan, an expert witness and partner at Grant Thornton in Halifax. On March 7, 2012 the defendants filed a further motion seeking:

> a) an order striking out or expunging in its entirety the affidavit of Fred O'Hearn sworn September 10, 2010 (the "original O'Hearn affidavit"), without leave to amend;
>
> b) in the alternative, an order striking out paras. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the original O'Hearn affidavit, or portions of those paragraphs as illustrated by the shaded portions of the original O'Hearn affidavit attached as Schedule "A" hereto, without leave to amend;
>
> c) an order striking out or expunging in its entirety the affidavit of Fred O'Hearn sworn March 3, 2011 (the "amended O"Hearn affidavit"), without leave to amend;
>
> d) in the alternative, an order striking out paras. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the amended O'Hearn affidavit, or portions of those paragraphs as illustrated by the shaded portions of the amended O'Hearn affidavit attached as Schedule "B" hereto, all without leave to amend.

e) an order striking out or expunging the affidavit of Susan MacMillan sworn September 16, 2012;

f) the costs of the motion.

[3] This decision will deal with the motion to strike the March 3, 2011 amended O'Hearn affidavit and the Susan MacMillan affidavit. It was acknowledged by the plaintiffs that the amended O'Hearn affidavit of March 3, 2011 replaced the original affidavit sworn September 10, 2010. Argument was heard over two days on March 26th and 27th, 2012.

Motion to strike the Fred O'Hearn affidavit

[4] Both the defendants and plaintiffs have filed written submissions respecting the motion to strike the amended O'Hearn affidavit, and counsel agreed that I would deal with this affidavit on the basis of the written submissions of the parties, without oral argument.

[5] This motion is brought pursuant to Civil Procedure Rule 39:

Scope of Rule 39

39.01 A party may make and use an affidavit, and a judge may strike an affidavit, in accordance with this Rule.

Affidavit is to provide evidence

39.02 (1) A party may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation.

(2) An affidavit that includes hearsay permitted under Rule 5.13 of Rule 5 - Application, Rule 22.15 of Rule 22 - General Provisions for Motions, another Rule, a rule of evidence, or legislation must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information.

...

Striking part or all of affidavit

> 39.04 (1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge must strike a part of an affidavit containing either of the following:
>
> (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
>
> (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> (4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
>
> (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

[6] In *Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)* (1993), 123 NSR (2d) 46, Justice Davison set out the principles governing the contents of affidavits. He said, at para. 20:

> 1. Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.
>
> 2. The facts should be, for the most part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.

3. Affidavits used in applications may refer to facts based on information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised".

4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.

5. The affidavit must state that the affiant believes the information received from the source.

[7] A related principle is that those portions of an affidavit that are not relevant should be struck. The motion for summary judgment deals with a claim by the plaintiffs for auditor's negligence. Relevancy will be determined in that context.

[8] The defendants' motion seeks to strike out Mr. O'Hearn's amended affidavit in its entirety and, in the alternative, to strike out paras. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18.

[9] What follows is a discussion of the challenged portions of the affidavit and whether they should be struck as alleged by the defendants. The challenged portions are highlighted by shading. I will excerpt the paragraphs to be addressed, beginning with paras. 3 - 5:

3. From 1981 until 1984 I was employed by Building Products of Canada (an Esso Company) as a sales representative in Nova Scotia. I dealt with all the buying groups, including AWARD. I called on their members and their principals, including then President John MacDougall. I vividly recall John's message at the time. "We are a truly locally owned buying group, negotiating vendor programs for all our members maximize collective volumes to realize best pricing and maximum volume rebates. In addition, all rebates, 100%, go back to the individual on a prorata basis, depending on their purchases".

4. John MacDougall went on to explain, as a vendor one would want to belong to AWARD because of volume purchases he could deliver and the guarantee of being paid every cent, every time from all dealers. He told me this was possible because of the quality of the dealer members, which were sound safe businesses who offered up irrevocable letters of credit to secure their purchases. He pointed out, unlike the recently failed "ALLONT" or "BUIDLALL" group, all vendors would have been paid under AWARD's business model and the dealer

> members would not be on the hook for their group's failure and ultimate shortfalls.
>
> 5. In 1984, I left Building Products of Canada and started Lumbermart Limited. I did not join AWARD right away as I knew, as a startup company, I could not meet their financial requirements. I joined another local group, Buildrite Centres Inc. When this group was bought by Pierceys and ultimately closed out, I again met with John MacDougall of AWARD. He re-iterated to me the same values and messages as before and accepted my application for membership. By now my company was able to meet the necessary financial criteria and joined AWARD on August 17, 1993. We were given a large binder with all the "Individual Deals" or discounts for each vendor and I was impressed. Year end rebates were identified as approximates or plateaus, I inquired as to what this meant and it was explained to me by the said John MacDougall that if a group reached certain purchase plateaus we would qualify for larger year end rebates.

[10] The defendants say that the references to Mr. O'Hearn's discussions with Mr. MacDougall are inadmissible hearsay in all three paragraphs as they fail to provide any details relating to the time and place of the purported discussion, as well as the basis for Mr. O'Hearn's belief in the information. They say that such details are required each time hearsay is used in an affidavit as set out in *Station Road Sewer Association. v. Myers*, 2008 NSSC 203, at para. 12:

> ... It is more important that the affiant use this phrase in each of the paragraphs where the matter deposed to is based on information garnered from some other source, provided the source is identified and, further, provided the deponent believes that which is being proffered...
>
> [emphasis added]

[11] As to the basis for Mr. O'Hearn's belief in the information, para. 1 of the affidavit indicates that where Mr. O'Hearn has obtained information from others, he does believe that those statements are to be true. I am not satisfied that it is necessary to repeat this affirmation in each subsequent paragraph.

[12] The plaintiffs response as to paras. 3 and 4 is to say that Mr. O'Hearn is not referring to a particular statement, although there are quotation marks in para. 3. The plaintiffs submit that Mr. MacDougall is referring generally to a sales pitch he received. As to the statement in para. 5 that Mr. O'Hearn again met with Mr.

MacDougall, the plaintiffs say this refers to the general time period and that as a result of this meeting he joined AWARD on August 17, 1993. The plaintiffs say that this is a reference to Mr. MacDougall's sales pitch, but not to a specific statement.

[13] With respect, I am satisfied that the impugned statements in these paragraphs constitute inadmissible hearsay in that Mr. O'Hearn provides no details as to the time and place of the purported discussions. Paragraph 3 - 5 span a time period of more than a decade. Paragraph 5 does not refer to any specific discussion or even a general time period of such a discussion, and I am not satisfied that the fact that Mr. O'Hearn is describing a general sales pitch would justify its retention. Moreover, I am not satisfied that a "sales pitch" by Mr. MacDougall would be relevant to the cause of action against WBLI and R. Brian Burgess. The shaded portions of paras. 3, 4 and 5 should be struck for the above reasons.

[14] The next paragraph to be considered is para. 6, in which Mr. O'Hearn states:

> 6. I came to believe that the management of AWARD was very secretive and I was not encouraged by the said management team to ask questions about operations. At each spring AGM held in Moncton, we were all given our rebate cheques and a copy of the financial statements of AWARD as audited by the Defendant, WBLI. I personally recall that Lloyd Hillier (President of the Plaintiff, Hillier's Trades Limited) among others raised hard questions as those meetings and they were dismissed out of hand by the management of AWARD.

[15] The defendants say that the phrase "said management team" is inadmissible hearsay as it does not identify which individuals on the management team are being referred to. They say that the phrases "very secretive" and "hard questions" are innuendo and that Mr. O'Hearn's comments regarding the conduct of management are irrelevant to the claim.

[16] The plaintiffs say that Mr. O'Hearn's reference to "very secretive" management and a lack of encouragement comes from observations about the management climate of AWARD. They say this is neither hearsay nor innuendo. They say the statement is relevant to whether the defendants were negligent in essentially affirming AWARD's financial management and to the shareholders' and members' dependence upon an external auditor to ensure practices were sound. In the alternative, the plaintiffs say these statements can be ignored or struckout without affecting the remainder of the paragraph. They say that the reference to

Lloyd Hillier asking “hard questions” at an annual meeting is not hearsay, but is based on observation, and that it is relevant because it indicates questions were being asked about the management of AWARD, a fact that would be relevant to whether an external auditor highlighted any practices as questionable. The plaintiffs say that these statements go to “the fact of the observation, not the truth”.

[17] The challenged passages are shot through with opinion and innuendo. I agree with the defendants’ characterization. The highlighted portions of para. 6 should be struck.

[18] The defendants next challenge para. 7. In this paragraph, Mr. O’Hearn states:

> 7. I served on the Advertising Committee responsible for flyers and publicity. We were utilizing the services of Phil Otto’s Image Design, the principal of which, Phil Otto was John MacDougall’s close friend. The contract was billed through Image Design who negotiated a print rate, I did verily believe was, many thousands of dollars higher than a competitive bid would have been. I suggested we get quotes on the printing and was immediately silenced.

[19] The defendants say that as a lay witness Mr. O’Hearn is not permitted to offer an opinion on whether or not the bid was competitive, and that the relationship between Mr. MacDougall and Phil Otto is irrelevant.

[20] The plaintiffs say that Mr. O’Hearn was not identified as an expert on advertising costs, but he was a businessman who knew how to save on costs if necessary. They say that the fact that Mr. O’Hearn thought it might be wise to seek bids and was ignored is relevant to the financial practices of the corporation, which is in turn relevant to the auditor not highlighting unusual financial practices. In the alternative, the plaintiffs say that the offending portions could be struck without affecting the remainder of the paragraph.

[21] I agree with the submissions of the defendants. The passage in question offers nothing more than opinion, as well as the innuendo of Mr. O’Hearn’s claim that he was “silenced”. The highlighted portion of para. 7 should be struck.

[22] The defendants go on to challenge part of para. 8 of the amended O’Hearn affidavit, which states:

> 8. I began to question the financial workings of AWARD. I did not believe 40 members paying $700.00 a month could generate enough cash to cover salaries, and other expenses AWARD was incurring. I was told that an "admin fee" was charged to vendors to offset any shortfalls. Otherwise, I was told by John MacDougall that no rebates were ever used. I was told by John MacDougall that "all rebates negotiated" went back to the members 100%.

[23] The defendants say that the reference to the "admin fee" fails to state the source of the information or affirm Mr. O'Hearn's belief. The plaintiffs say that Mr. O'Hearn's account of how he began to question the financial workings of AWARD is not hearsay, but goes to the fact that he did question how AWARD was being managed, which is relevant. The plaintiffs agree that Mr. O'Hearn failed to identify the source of the information about "admin fees" and that this sentence should be struck. Mr. O'Hearn does identify John MacDougall as the source of the information in the rest of the paragraph. Read in conjunction with para. 1 which indicates belief in the source of information, the plaintiffs say the remainder of the paragraph should not be struck. I am satisfied that the shaded portion of para. 8 should be struck. The fact that Mr. O'Hearn questioned the financial workings of AWARD does not appear to be relevant to the issue of whether or not the defendants were negligent. As to the reference to the administration fee, the suggestion that this should be struck is not opposed by the plaintiffs and I so order.

[24] Moving to para. 9 of the amended affidavit, Mr. O'Hearn states:

> 9. I personally was aware of excessive spending at AWARD. John MacDougall built a new house in an expensive neighbourhood, which was financed by AWARD according to other AWARD members. John MacDougall pledged a huge financial donation for the Olympic Games. These excesses were brought up by me at AWARD meetings and we were assured by John MacDougall that all was well.

[25] The defendants say that Mr. O'Hearn's reference to "other AWARD members" is inadmissible hearsay in that he does not identify which of the 37 (or more) plus plaintiffs/members actually told him this. They also say Mr. MacDougall's financial affairs are irrelevant to the summary judgment application and that the implications are scandalous.

[26] The plaintiffs say that Mr. O'Hearn's personal knowledge of excessive spending at AWARD goes "to the truth, not the fact" and is relevant to whether the defendants misrepresented how AWARD's finances were being managed. The plaintiffs acknowledge that Mr. O'Hearn did not state the source of the statement in the second sentence and agree that it should be struck. The plaintiffs say that John MacDougall's "excessive spending", and the fact that Mr. O'Hearn complained about it is relevant to the financial running of the not-for-profit corporation, where all rebate monies were to go to the shareholders. With respect, this is an action for auditor's negligence, not against members or officers of the company for excessive spending.

[27] I am satisfied that the whole paragraph should be struck, because in addition to the objections raised by the defendants on the specific shaded portions of the paragraph, the whole paragraph is irrelevant to the subject of the action and to the summary judgment motion.

[28] Paragraph 10 of the amended affidavit states:

> 10. John MacDougall resented being taken to task and always told me "it was approved by the board". The only comfort I had in the midst of these questionable happenings was the fact that the Statements of AWARD were Audited by a firm like WBLI.

[29] The defendants say that the highlighted statements are inadmissible hearsay and that Mr. O'Hearn does not state the source for the hearsay proposition that Mr. MacDougall "resented" being taken to task. They say that the reference to "questionable happenings" is innuendo and moreover, how Mr. MacDougall felt about this alleged excessive spending is irrelevant to the claim.

[30] The plaintiffs agree that the reference to Mr. MacDougall being "taken to task" should be struck, but argue that the reference to "questionable happenings" is not innuendo. They say that the fact that Mr. O'Hearn knew or was comforted by the fact that WBLI was auditing is relevant, since it is logical to conclude that matters at AWARD continued in the *status quo* for some time because the plaintiffs believed that management would be scrutinized by an external auditor. I am satisfied that the reference to John MacDougall resenting being taken to task should be struck as inadmissible hearsay and that the reference to"questionable happenings" is innuendo and should be struck.

[31] Paragraph 11 of the amended affidavit states:

> 11. I had been informed by other AWARD members that there were bad debts associated with fowler (sic) members. I joined the Board of Directors in March, 2000 and at that time my fears came true. Several members, the largest being Bagnell Mills a founding member of AWARD, were in financial difficulty. It came to my knowledge that this company was indebted to AWARD for $1.8M and the principal, Carl Bagnell, had been relieved of his guarantee to AWARD.

[32] The defendants say that the reference to "other AWARD members" lacks specificity and fails to state the source of the information and is, therefore, inadmissible hearsay. They say the assertion that Mr.O'Hearn's "fears came true" is innuendo, irrelevant and scandalous. The plaintiffs agree that the reference to "other AWARD members" should be struck and the claim that Mr. O'Hearn's "fears came true" can also be struck, but suggest that it is hardly innuendo or scandalous.

[33] I am satisfied that the shaded portion of para. 11 should be struck.

[34] In para. 12 of the amended affidavit, Mr. O'Hearn states:

> 12. As a Member of the Board, I was told by the company Comptroller, Nil D'Entremont that all measures were properly taken. John MacDougall was replaced by Tom Smith, as Chief Executive Officer. The downward slide continued for almost 2 years with Bagnells. I insisted on many occasions at board meetings that we cut off Bagnells and reduce our losses. I questioned a lot of the reported financial items in our audited statements. I was assured by Nil D'Entremont, that in the accounting world, this is how it was to be presented. I asked the following questions and received the following answers from Nil D'Entremont:
>
> > Q: Were the members liable in the event the group failed?
> >
> > A: No, each member was liable only for their own debt level backed by their letters of guarantee.
> >
> > Q: Were the monies we had invested via a 3% levy (to secure the release of our irrevocable bank letters after 3 years) secure and untouchable, in the event of AWARD's failure?

> A: Yes, they were invested in an interest bearing bond under a different account and could not be touched without member approval.

[35] As to the highlighted portions of para. 12 the defendants say that Mr. O'Hearn does not provide sufficient information for his statements relating to the Bagnells and questioning the financial statement, nor does it provide sufficient information in respect to the assurances allegedly provided by Nil D'Entremont and is, therefore, inadmissible hearsay. The plaintiffs say that Mr. O'Hearn is referring to his ongoing observations and concerns regarding Bagnells, and the potential liability of members and shareholders, over a two-year period. The plaintiffs agree that references to other shareholders could be struck.

[36] Like many of the other challenged passages, para. 12 is coloured by opinion and argument, with the use of phrases such as "downward slide" and "this is how it was to be presented". Further, the circumstances with Mr. D' Entremont are extremely vague. I am satisfied that the shaded portions should be struck for the reasons provided by the defendants.

[37] Paragraph 13 of the amended affidavit states:

> 13. I continued as a board member to be involved in the new hardware distribution facility known as ADL. As a board member I came to know that costs spiralled out of control, and guidelines were ignored. I rescinded my membership in the ADL group and tried to bring all the above issues to a head calling for an "in Camera" board meeting to discuss our financial situation at AWARD and the ADL situation. I am told by Alderice Godin that Tom Smith forbade other board members to meet with me, I resigned from the board.

[38] The defendants say that Mr. O'Hearn uses Alderice Godin for the source of Tom Smith's hearsay comments and, therefore, this is double hearsay. As well they argue Mr. O'Hearn's involvement with ADL, in camera board meetings and ADL's subsequent failure is irrelevant to the claim. The defendants also say that Mr. O'Hearn failed to provide sufficient details with respect to his call for an "in camera" board meeting. The plaintiffs appear to agree, suggesting the reference to double hearsay could be struck and Mr. O'Hearn's involvement with ADL on the board for AWARD "could be ignored".

[39] Plaintiffs' counsel suggests that some statements could be struck and others "ignored". I take the phrase "ignored" to be an admission that a particular phrase

should be struck or given no weight. Paragraph 13 should be struck in its entirety. In addition to the objections raised by the defendants, this is yet another paragraph that takes on the tone of an argument, with such phrases as "costs spiralled out of control."

[40] Paragraph 14 of the amended affidavit states:

> 14. AWARD took a downward spiral until, finally the president, Tom Smith was removed. I had concerns about the true financial picture of AWARD and brought copies of the AWARD audited statements to my accountant, David Fielding C.A. He knew Mr. Burgess and he told me if Brian Burgess "signed off on the statements" everything should be fine. When I told him Mr. Burgess had cheque signing authority for AWARD Mr. Fielding was shocked. He told me his belief that the firm's accountant should never "touch the money".

[41] The defendants say this is inadmissible opinion evidence, as Mr. Fielding is not a properly qualified witness and has no basis to offer an opinion either through Mr. O'Hearn or otherwise. Moreover, Mr. Fielding's opinion as communicated through Mr. O'Hearn is inadmissible hearsay. They say that the assertion that "AWARD took a downward spiral" is unsupported.

[42] The plaintiffs say that the assertion that AWARD "took a downward spiral" is "stated as a fact". Moreover, they say that it would be disingenuous of the parties to argue that this is not a known fact in the proceeding, and suggest that the court should exercise its discretion to allow this statement to stand. They say that Mr. O'Hearn sought an accountant's guidance due to his concerns about the true financial picture of AWARD and, therefore, Mr. Fielding's comments are relevant. The plaintiffs acknowledge that the reference to Mr. Fielding's shock could be "ignored or struck". They argue that what Mr. Fielding told Mr. O'Hearn should remain, being relevant to the issue in the proceeding. I am satisfied that the shaded portions of para. 14 should be struck for the reasons submitted by the defendants.

[43] Moving to para. 15 of the amended affidavit, Mr. O'Hearn states:

> 15. When I found out later from John Morrisey, Vice President of AWARD that the 3% contingency money was gone, the bank was threatening to bounce our cheques and each member would be held liable for any shortfalls of the group I was suspicious that our past audited statements were false.

[44] The defendants submit that Mr. O'Hearn fails to provide sufficient details about statements allegedly made by Mr. Morrissey, nor does he state the basis for his belief in those statements and, therefore, this is inadmissible hearsay. The plaintiff's response is that Mr. O'Hearn cites his source as John Morrissey, that the information is relevant on the issue of negligence, and that para. 1 indicates the belief from the source of the information. Paragraph 15 does not indicate when the discussions occurred, but states only "when I found out later". There is no evidence about the specific statements allegedly made by Mr. Morrissey. This paragraph should be struck in its entirety.

[45] At para. 16, Mr. O'Hearn states:

> 16. AWARD engaged Grant Thornton to review AWARDS audit history. I was informed by Grant Thornton and do verily believe that as all AWARD members were, that previous audited statements were in error in failing to disclose true costs, write offs and did not fairly represent a true financial picture of AWARD for all the material times that WBLI and Brian Burgess were auditors. I have read the financial review conducted by Grant Thornton, have spoken to Sue MacMillan of Grant Thornton and do verily believe their conclusions that the financial audits performed by the Defendants were in error.

[46] The defendants say that as a lay witness Mr. O'Hearn is not permitted to offer his opinion on Grant Thornton's auditing. Similarly his attempt to bolster the credibility of other witnesses violates the rule against oath helping. They say that this is inadmissible opinion. The plaintiffs argue that this paragraph is relevant to the fact of AWARD's audit history being reviewed and to the fact that Mr. O'Hearn was told and believed that previous audit statements were in error. They agree that Mr. O'Hearn's belief in their conclusions should be struck. I find that this paragraph should be struck in its entirety. I am not satisfied that Mr. O'Hearn's conclusions as to Grant Thornton expert's advice is relevant to the ultimate determination of this issue.

[47] At para. 17, Mr. O'Hearn makes the following remarks:

> 17. Throughout Mr. Burgess and WBLI's engagement by AWARD, I verily believe that they were too close to this group, the executives and the daily workings of the company to offer an unbiased level of services. I relied on the auditing function of WBLI and Burgess at my detriment as did all other Plaintiffs herein.

[48] The defendants submit that comments about reliance by others are inadmissible hearsay, and that Mr. O'Hearn's view that the defendants were "too close"is an inadmissible opinion. They say the entire paragraph is inadmissible legal argument and that Mr. O'Hearn's opinion regarding the defendants independence is irrelevant. I agree. This paragraph is more in the nature of pleading or argument than evidence. The whole of para. 17 should be struck.

[49] Finally, the following appears at para. 18 of the amended affidavit.

> 18. It is my belief and knowledge, as representing a shareholder of AWARD and as a former board member of AWARD that all Plaintiff companies lost money as a result of the actions of the Defendants either directly or as shareholders of AWARD, the proposed Plaintiff.

[50] The defendants say that Mr. O'Hearn refers to other plaintiffs without providing the source of the information and the grounds for his belief, resulting in inadmissible hearsay. The fact that Mr. O'Hearn believed that "all plaintiff companies" lost money is irrelevant, according to the defendants. The plaintiffs request an exercise of the court's discretion to keep this paragraph "for the fact, not for the truth, that plaintiff companies lost money". They submit that Mr. O'Hearn is speaking from personal and general knowledge and from having the opportunity to review AWARD's finances as a shareholder and as a member of the board.

[51] Paragraph 18 should be struck in its entirety for the reasons advanced by the defendants.

[52] Therefore, the remaining portions of the affidavit of Mr. O'Hearn not struck are reproduced as follows:

> 1. This affidavit is sworn to be true and contains my personal knowledge of the facts herein alleged. Where I obtained information from others I have so indicated throughout and I do readily believe those statements to be true.
>
> 2. I have had a long period of involvement with AWARD employees and practices from the early 1980s' as a "vendor" and "shareholder" then later as a "member of the board" and "committee member". I also played a

major part in its transition from a local buying group to being a member of a national group, Tim Br Mart.

3. From 1981 until 1984 I was employed by Building Products of Canada (an Esso company) as a sales representative in Nova Scotia. I dealt with all the buying groups, including AWARD. I called on their members and their principals, including John MacDougall.

...

5. In 1984, I left Building Products of Canada and started Lumbermart Limited. I did not join AWARD right away as I knew, as a startup company, I could not meet their financial requirements. I joined another local group, Buildrite Centres Inc. When this group was bought by Pierceys and ultimately closed out, ... By now my company was able to meet the necessary financial criteria and joined AWARD on August 17, 1993. ...

6. ... At each spring AGM held in Moncton, we were all given our rebate cheques and a copy of the financial statements of AWARD as audited by the Defendant, WBLI. ...

7. I served on the Advertising Committee responsible for flyers and publicity. We were utilizing the services of Phil Otto's Image Design, the principal of which, Phil Otto was ...

8. ... I did not believe 40 members paying $700.00 a month could generate enough cash to cover salaries, and other expenses AWARD was incurring. ... Otherwise, I was told by John MacDougall that no rebates were ever used. I was told by John MacDougall that "all rebates negotiated" went back to the members 100%.

9. I personally ...

10. ... and always told me "it was approved by the board". The only comfort I had in the midst of these .... was the fact that the Statements of AWARD were Audited by the firm like WBLI.

11. I joined the Board of Directors in March 2000 .... Several members, the largest being Bagnell Mills a founding member of AWARD, were in financial difficulty. It came to my knowledge that this company was

indebted to AWARD for $1.8M and the principal, Carl Bagnell, had been relieved of his guarantee to AWARD.

12. As a Member of the Board, I was told by the company Comptroller, Nil D'Entremont that all measures were properly taken. John MacDougall was replaced by Tom Smith, as Chief Executive Officer. ... I asked the following questions and received the following answers from Nil D'Entremont:

Q. Were the members liable in the event the group failed?

A. No, each member was liable only for their own debt level backed by their letters of guarantee.

Q. Were the monies we had invested via a 3% levy (to secure the release of our irrevocable bank letters after 3 years) secure and untouchable, in the event of AWARD's failure?

A. Yes, there were invested in an interest bearing bond under a different account and could not be touched without member approval.

13. ... I resigned from the board.

14. ... until, finally the president, Tom Smith was removed. I had concerns about the true financial picture of AWARD and brought copies of the AWARD audited statements to my accountant, David Fielding C.A. ...

...

16. AWARD engaged Grant Thornton to review AWARDS audit history. ...

...

19. I make this affidavit in support of a motion to amend the Statement of Claim adding AWARD as a party Plaintiff and in opposition to a Motion requesting the within action to be dismissed.

[53] The question now is whether these struck portions can be separated from the remaining portions of the affidavit.

Should the O'Hearn affidavit be struck in its entirety?

[54] The authority to strike the affidavit in its entirety is found in Rule 39.04(3), which provides as follows:

> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.

[55] I have also considered the comments of Justice Cromwell (as he then was) in *Wall v. Horn Abbot Ltd.* (1999), 176 N S R (2d) 96 (CA) where he explained that where an affidavit is fundamentally defective "a court should not be required to take it apart in pieces to preserve some possibly admissible material". This is consistent with Rule 39.04(3).

[56] I am satisfied the O'Hearn affidavit is fundamentally defective and should be struck in its entirety. In particular, what is left when the challenged provisions are struck is difficult to separate from the struck portions, and is difficult to understand. Moreover, it is not the function of this court to dissect an otherwise poorly drafted affidavit to try to preserve some admissible material. (*Wall, supra)*

MacMillan Affidavit

[57] The defendants seek to strike the affidavit of Susan MacMillan, an expert retained by the plaintiffs, pursuant to Rule 39 of the *Nova Scotia Civil Procedure Rules*. The defendants do not rely on Rule 55, the Expert Opinion Rule, but rather argue that the affidavit should be struck under Rule 39 because it contains opinions that are not independent and unbiased.

[58] In 2005 the plaintiffs retained the accounting firm Grant Thornton to complete a review engagement of AWARD Wholesale Distributors Limited (AWARD), a federally incorporated company that the plaintiffs were using to arrange purchasing economies of scale for their various operations in the building materials retail business. The plaintiffs were dealing with the Kentville, Nova Scotia, office of Grant Thornton (Kentville Grant Thornton), and a retainer with that office was limited to a Review Engagement of AWARD's 2005 financials, a subsequent restatement of AWARD's 2004 financial statement, and a special procedure report in 2006. Kentville Grant Thornton was not retained as an external

auditor and AWARD was not an assurance client of Kentville Grant Thornton at the time.

[59] Prior to Kentville Grant Thornton, the defendants were the external auditors of AWARD. The defendants also provided AWARD with other financial, accounting, business advice and services.

[60] On September 6, 2006, on the basis, at least in part, of the work conducted by Kentville Grant Thornton, the plaintiffs commenced an action for professional negligence against the defendants. The plaintiffs' statement of claim includes reference to the work conducted by Kentville Grant Thornton. For example, para. 12 of the "further amended originating notice" filed on December 18, 2006, states:

> 12. AWARD contracted the Chartered Accountant firm of Grant Thornton LLP in 2006 and that Firm issued a Review Engagement Report for AWARD for the fiscal year ending December 31, 2005. There are numerous differences between the WBLI AWARD December 31, 2004 audited financial statements and the Grant Thornton AWARD December 31, 2005 Review Report. The Plaintiffs claim that the negligence of WBLI in the preparation of AWARD's financial statements for the material period of time resulted in the representation that AWARD was a profitable company when in fact it was not profitable and was operating in a materially significant deficit position.

[61] Similarly, during discoveries, counsel for the plaintiffs stated that the work conducted by Kentville Grant Thornton "does form part of the negligence claim."

[62] In or around May or June of 2009 the plaintiffs approached Susan MacMillan to act as an expert in the action against the defendants. Ms. MacMillan is a partner in the Halifax office of Grant Thornton (Halifax Grant Thornton) where she leads the Forensic Accounting and Investigative Services practice for Nova Scotia.

[63] Before a retainer agreement was signed, Ms. MacMillan approached the professional standards group within Halifax Grant Thornton to determine whether a conflict of interest prevented her from accepting the retainer. She testified that Grant Thornton does not have a national conflicts committee, that no conflicts check was done on each of the plaintiffs, and that the conflicts concern was in relation to the previous work done for AWARD. She further testified that someone

in the Halifax professional standards group contacted general counsel in Toronto. According to Ms. MacMillan, the ultimate answer that came back was that she could accept the retainer. There was no written evidence of what information was given to the professional standards committee or to general counsel, and there was no written record of an affirmative response to the question of whether Ms. MacMillan could act for the plaintiffs.

[64] A retainer agreement was signed between the plaintiffs and Ms. MacMillan, on behalf of Grant Thornton, in September 2009. Ms. MacMillan testified that she was retained by the plaintiffs to review the work the defendants conducted for AWARD for the period 1995 - 2004. The agreement describes the retainer more broadly as "litigation support services."

[65] On August 13, 2010 the defendants filed a motion for summary judgment. On September 17, 2010 the plaintiffs filed an affidavit of Ms. MacMillan, sworn on September 16, 2010 as part of their response to the summary judgment motion. A number of procedural steps delayed hearing the summary judgment motion. In February 2011 the defendants gave the plaintiffs notice of their intention to move to strike Ms. MacMillan's affidavit at the outset of the summary judgment hearing. In their notice of motion filed on March 7, 2012 the defendants relied on Rule 39 only. They did not purport to rely on Rule 55, the Expert Opinion Rule.

Issues:

[66] This motion raises three issues:

1) Can a motions judge strike an expert's affidavit/report prior to trial on the basis that the affidavit is not independent and unbiased?

2) Should such a motion be brought under Rule 39 or Rule 55?

3) Should Ms. MacMillan's affidavit be struck?

Issues 1 and 2 are interrelated and will be dealt with together.

Position of the Parties:

<u>Defendants (Moving Party)</u>

[67] The defendants submit that if a party is allowed to file an expert's affidavit in response to a summary judgment motion, there must be some mechanism for addressing improper and inadmissible expert evidence. Otherwise, the defendants contend, as an example, that a party could put forward an affidavit from a 12-year-old purporting to be an expert, and the existence of this purported expert evidence would be enough to defeat any summary judgment motion since the affidavit would be immune from being struck.

[68] The defendants submit that Ms. MacMillan is not independent and unbiased, and as a result her evidence does not meet the threshold required for admissibility of an expert's opinion. They argue that Ms. MacMillan could not take a contrary view to the conclusions of the Kentville Grant Thornton office without exposing her partners to potential liability. They further argue that this case is analogous to *Fellows, McNeil v. Kansa General Insurance Co.* (1998), 40 OR (3d) 456 (Gen Div), varied on other grounds (2000), 138 OAC 28 (Ont CA) [*Fellowes*] where the court refused to allow a solicitor to act as an expert given that he had previously acted as an advocate for the party. The defendants also contend that Ms. MacMillan's opinion violates the standards set up by the accounting profession to minimize unacceptable conflicts of interest.

Plaintiffs (Responding Party)

[69] The plaintiffs argue that Rule 39 cannot be used to strike an expert's opinion on the basis of a lack of independence or bias. The plaintiffs contend that "admissibility" in Rule 39 is limited to submissions that are not appropriate for an affidavit, such as hearsay or irrelevance.

[70] In the alternative, the plaintiffs contend that Ms. MacMillan's affidavit meets the threshold requirements for admissibility, and any concerns that exist regarding independence and impartiality go only to weight. The plaintiffs cite *R. v. Transport (1973) Ltee*, 2002 CarswellOnt 2768 (Ont Ct J)) for the proposition that an expert's affiliation with a party does not disqualify his/her evidence. The plaintiffs submit that the degree of affiliation between Ms. MacMillan and her partners at Kentville Grant Thornton does not disqualify her evidence. They further submit that Ms. MacMillan's affidavit does not contravene her profession's standards for conflicts because Kentville Grant Thornton was not doing work for AWARD contemporaneous to the work conducted by Ms. MacMillan.

Law & Analysis:

[71] Can a motions judge strike an expert's affidavit/report prior to trial on the basis that the affidavit/report is not independent and unbiased? Should such a motion be brought under Rule 39 or Rule 55?

[72] There are a number factors that complicate the analysis of the issues that are raised in this case. Firstly, counsel for both parties are not from Nova Scotia and do not practice regularly under our *Civil Procedure Rules*. Perhaps as a result, their submissions tended to focus on the legal question of whether Ms. MacMillan's evidence was admissible and the factual question of whether she is independent and impartial. Counsels' submissions did not focus on whether the Rules permit such an affidavit to be struck at this stage of the proceeding by a motions judge.

[73] Secondly, the normal practice in this court is for an expert's opinion to be in the form of a report which is put before the court as an exhibit to a short affidavit by the expert. It is not the normal practice, as happened in this case, for an expert's opinion to be contained entirely in an affidavit. As a result, the case law has tended to focus on challenging an expert's report and not an expert's affidavit; the interrelationship between Rule 39 and Rule 55 has not been raised in any reported decision.

[74] Lastly, the practice in this court has been to address issues with expert opinions before the trial judge and not on interlocutory motions. This does not necessarily mean that the Rules exclude such motions, but there is a paucity of cases dealing with preliminary challenges to an expert's opinion evidence.

[75] There are two Rules relevant to this motion, Rule 39 and Rule 55. Rule 39 allows a party to use affidavit evidence subject to admissibility. Rule 39.04, which was cited earlier, provides a mechanism for striking part or all of an affidavit. That Rule reads:

> **Striking part or all of affidavit**
>
> **39.04** (1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.

(2) A judge must strike a part of an affidavit containing either of the following:

(a) information that is not admissible, such as an irrelevant statement or a submission or plea;

(b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.

(3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.

(4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.

(5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

[76] Rule 55, the Expert Opinion Rule, provides a process for entering expert evidence before the court. The Rule requires expert opinion evidence to be filed as an expert's report attached to an affidavit unless otherwise directed. Rule 55.04 deals with the required contents of an expert's report and reads as follows:

Content of expert's report

55.04 (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:

(a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;

(b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;

(c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;

(d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;

(e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

(2) The report must give a concise statement of each of the expert's opinions and contain all of the following information in support of each opinion:

(a) details of the steps taken by the expert in formulating or confirming the opinion;

(b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;

(c) the degree of certainty with which the expert holds the opinion;

(d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

(3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:

(a) the expert's relevant qualifications, which may be provided in an attached resumé;

> (b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;
>
> (c) reference to all publications of the expert on the subject of the opinion;
>
> (d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;
>
> (e) statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.

[77] Rule 55.10 provides a procedure for challenging an expert's report that is not consistent with the requirements of Rule 55.04. Rule 55.10 reads:

> **Objection to report and advance ruling**
>
> **55.10**(1) A party who receives a report and who wishes to have the opinion evidence excluded at the trial or hearing on the basis that the report does not sufficiently conform with this Rule must, in a reasonable time, notify the party who delivers the report of the deficiency.
>
> (2) A party may make a motion for an order determining whether a report sufficiently conforms with this Rule to permit the purported expert to testify at a trial or hearing.
>
> (3) An order under this Rule is binding at the trial of an action or hearing of an application only on the issue of conformity with Rule 55.04 or 55.05.

[78] The Rules in Nova Scotia are judge-made rules promulgated by the judges of the Supreme Court and Court of Appeal pursuant to the *Judicature Act*, RSNS 1989, c. 240. The *Civil Procedure Rules* are tabled in the Legislature, but unlike the rules of court in many Canadian provinces, the Rules in Nova Scotia are not passed as Regulations.

[79] Nonetheless, the *Judicature Act* deems the Rules to have the force of law (*MacNeil v. MacNeil* (1975), 14 NSR (2d) 398 (CA)). As such, the principles of statutory interpretation apply when an interpretation matter arises under the Rules (*Secunda Marine Services Ltd v. Caterpillar Inc.*, 2012 NSSC 53 at para. 51). In interpreting the Rules, a liberal approach is required to ensure that the "Civil Procedure rules are our tools and not our masters" (*Noseworthy v. Murphy* (1999), 174 NSR (2d) 367, 1999 CarswellNS 91 at para. 11 (SC)) in the quest "for the just, speedy, and inexpensive determination of every proceeding" (Rule 1.01).

[80] Before turning to an interpretation and applications of Rules 39 and 55 in the context of this case, it is helpful to be reminded of the purpose, and test for admissibility, of expert evidence. The purpose of expert evidence is to assist the trier of fact in the search for the truth by providing an opinion on a material issue that the trier of fact would otherwise not be able to assess. In *R. v. Mohan*, [1994] 2 SCR 9, the Supreme Court of Canada established four factors for determining the admissibility of expert testimony: 1) relevance 2) necessity in assisting the trier of fact 3) the absence of any exclusionary rule and 4) a properly qualified expert.

[81] The author of Expert Evidence, 2nd ed (Markham, ON: LexisNexis, 2009) at 257-264 suggests a slightly broader framework for determining admissibility:

1) What is the opinion?

2) Is there any exclusionary rule?

3) Is the witness a properly qualified expert?

4) Is the witness reliable?

5) What is the probative value of the evidence?

6) What is the prejudicial effect of the evidence?

[82] From these admissibility requirements it can be seen that there are three broad categories on which expert evidence can be attacked. There are the standard attacks that can be made on any affidavit, as outlined in the *Waverley* decision, such as the assertion that the evidence contains hearsay or irrelevant statements. There are also attacks that are specific to expert opinion evidence. These include

challenges to the evidence itself and challenges to the person proffering the evidence. The former challenge could be an argument that the scientific or sociological evidence proffered by the expert is too novel to be reliable. The latter challenge could be that the expert is insufficiently independent and impartial to properly assist the court or that the expert is insufficiently qualified to proffer the evidence.

[83] In *Morriscey v. Zwicker*, 2001 NSCA 56, at para. 29, the Court of Appeal emphasized the importance of the judge as a gatekeeper for admitting expert evidence: "The judge stands as the gatekeeper to determine all issues of admissibility. Nowhere is that more important - or difficult - than when considering the evidence of experts." In *Morriscey*, the gatekeeper was the trial judge, not a motions judge. There seems to be some disagreement in the case law about which judge is best positioned to make a determination regarding the admissibility of expert evidence.

[84] In Ontario, motions judges have the discretion to strike expert evidence on an interlocutory motion, but that discretion must be exercised with caution. In *Andersen v. St. Jude Medical Inc*, (2002), 29 CPC (5th) 234 (Ont Sup Ct J), the defendants in a proposed class action moved to strike an expert's report on the basis that its contents were irrelevant to the motion for certification. In dismissing the motion, Cullity J. held that a motions judge had discretion to grant such relief, but refused in the circumstances of the case, stating, at para. 10 and 17:

> I accept that, in a clear case, parts of an affidavit may be expunged as irrelevant, or otherwise inadmissible, prior to the hearing of the certification motion. If, in other cases, it appears at the hearing of the motion to certify that unnecessary expense and delay has been caused by delivering affidavits that are relevant only to a trial of the action, appropriate sanctions will be available.
>
> ...
>
> In civil cases, the court will often be entitled to admit evidence conditionally and a decision whether to deal with questions relating to the admissibility of the contents of affidavits in advance on a motion to strike, or to defer the question to the hearing of the motion or application for which the evidence is tendered, must, I believe, lie in the court's discretion. Any apparent inconsistency in the authorities that were cited is probably explicable on that basis.

[85] In *Harrop (Litigation Guardian of) v. Harrop*, 2010 ONCA 390 at paras. 2-3, a case dealing with a challenge to expert evidence rather than the expert, the Ontario Court of Appeal held that a motions judge has the jurisdiction to rule on admissibility, but that this should be done with caution:

> In our view, the policy considerations relevant to this issue all point to the trial judge determining this question. It avoids the risk of a multiplicity of proceedings in any given case. It ensures a full context in which the decision can be made. It avoids the risk of preliminary steps being taken for purely tactical reasons. And it avoids creating different appeal rights depending on whether the decision is made by a motion judge as an interlocutory order or the trial judge.
>
> Thus, even if a motion judge has such jurisdiction, it should be exercised only in the rarest of cases. Nothing has been shown to us to put this case in that category.

[86] Outside Nova Scotia, there is a line of cases that suggests attacks on the reliability of an expert, not his/her evidence, can be made on a preliminary basis (See eg Fellowes; *Bank of Montreal v. Citak*, 2001 CarswellOnt 944 (Ont Sup Ct J), though this decision was made by the appointed trial judge on a pre-trial basis; Ivaco Inc, Re, 2007 CarswellOnt 3320 (Ont Sup Ct J); *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42; *Hutchingame v. Johnstone*, 2006 BCSC 271). There is also a line of cases that suggest such concerns should be left to the trial judge and generally admitted subject to weight (See eg *Loblaws Inc v. United Dominion Industries Ltd.*, 2007 NLTD 45; *Carleton Condominium Corp No 21 v. Minto Construction*, 2001 CarswellOnt 4558 (Ont Sup Ct J), aff'd 2004 CarswellOnt 583 (Ont CA)).

[87] The defendants submit that this court has the discretion under Rule 39 to strike all or part of an expert's affidavit if it can be shown that that affidavit will be inadmissible. The defendants further submit that Rule 55 merely set out what is required for the admission of expert evidence but does not in any way limit the remedies available in Rule 39.

[88] In *Marshall (Litigation Guardian of) v. Annapolis (County) District School Board*, 2009 NSSC 203, Moir J., heard an interlocutory motion to strike an expert's report pursuant to Rule 55. Moir J. dismissed the motion on the basis that it was filed late, but went on to make other remarks about challenges to the admissibility of expert evidence. Moir J. held, at paras. 32-33, that Rule 55.10 only permits a party to obtain an advanced ruling with respect to conformity with

the Rule, not with respect to admissibility. Moir J., did not comment on the application of Rule 39, the Rule that the current motion is brought under. As such, there appears to be no reported decision on whether a party can bring an interlocutory motion to strike expert evidence under Rule 39.

[89] In my view, the determination of whether an advanced ruling on admissibility of expert evidence is possible depends on how Rule 55.04 is interpreted. If Rule 55.04 is interpreted to set out substantive requirements for an expert's report, namely independence and objectivity, then an advanced ruling is precluded; but if Rule 55.04 is interpreted to outline requirements for the form of an expert's report, namely that certain statements regarding independence and objectivity must be made, then an advanced ruling becomes available.

[90] Rule 55.10(1) states that a party wishing to challenge an expert's report on the basis of non-conformity with Rule 55.04 must give notice to the other party. Rule 55.10(2) states that the challenging party may then make a motion regarding non-conformity. Rule 55.10(3) states that an order resulting from such a motion is binding on the trial judge "only on the issue of conformity" with Rule 55.

[91] Under the first interpretation of Rule 55.04, conformity would require that the expert's report be independent and objective. It follows that challenges regarding independence and objectivity would have to be made under Rule 55.10. To hold otherwise would violate the statutory presumption of coherence. If Rule 39 could be used to challenge an expert's affidavit on any grounds then there would be no need for Rule 55.10, and all challenges could be brought under Rule 39, either against expert evidence contained in an affidavit or against the paragraph in an expert's affidavit that references an attached expert's report.

[92] Under the second interpretation of Rule 55.04, only the statements in Rule 55.04(1)(a) and (b) would have to be included in order to satisfy the independence and objectivity formalities of the expert's report. A challenge to the substantive lack of independence or objectivity would not be a challenge for non-conformity. The expert's report could include these statements - the affidavit did not in this case - and the challenge would be not with respect to the lack of form, but rather with respect to the substance. Since the substance might render the expert's report inadmissible, a motion to strike could be brought under Rule 39, since the affidavit would either itself be inadmissible or make reference to exhibits that are inadmissible.

[93] In my view, a textual, contextual, and purposive approach to interpreting Rule 55.04 supports the second interpretation. Firstly, Rule 55.04(1) states that "[a]n expert's report must be signed by the expert and state all of the following as representations by the expert to the court." Rule 55.04(1) does not state that an expert's report must meet the following criteria and then list independence and objectivity. This supports the conclusion that Rule 55.04 should be interpreted to address form, not substance.

[94] Secondly, Rule 55.01(2) states that the "Rule does not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible." Rule 39 provides a specific mechanism for dealing with affidavit evidence that is inadmissible. This suggests that the common law regime for admissibility still applies to expert affidavits and that the common law remedies implemented in Rule 39 must also apply.

[95] Lastly, a purposive analysis also supports allowing advanced rulings on the admissibility of expert evidence in certain situations. In *Lawrence v. Lawrence Estate*, 1997 CarswellBC 954 (BC SC) at para. 8, the British Columbia Supreme Court held:

> …it is appreciated that a party, or indeed the parties, may wish to know whether or not an expert's report will be admitted into evidence, as soon as possible, and prior to trial. And I see no reason presently why a motion such as the present one cannot be brought prior to trial, provided all relevant trial evidence can be placed before the Chambers judge and full submissions can be made.

[96] I am satisfied that where all relevant trial evidence can be placed before a motions judge and full submissions made, there is no reason why an advanced ruling on admissibility of an expert's evidence cannot be given. The purpose of the Rules is for the "just, speedy, and inexpensive determination of every proceeding" (Rule 1.01). In my view, justice requires, as Cullity J. held in *Andersen*, that such a remedy be reserved for the clearest of cases; however, if a complete record is before the motions judge, and a clear case exists, speedy and inexpensive determinations of proceedings would be thwarted if admissibility had to wait until trial. These requirements will likely only appear when the challenge is to the reliability of the expert and not to the qualifications of his/her evidence.

[97] In summary, a textual, contextual, and purposive interpretation of Rule 39 and Rule 55 supports the conclusion that a party may bring an interlocutory motion to challenge an expert's affidavit on the basis that it is inadmissible in whole or in part.

[98] The ramification of not allowing a motions judge to strike such evidence, in the clearest of cases, is that the court will lose the benefit of the summary judgment process. Unlike in Ontario, where a summary judgment judge can assess and weigh evidence, the summary judgment judge in Nova Scotia must take each party's evidence at face value. Thus, even expert's evidence that is clearly inadmissible can be sufficient to create the appearance of a genuine issue for trial. This runs counter to the Rules' stated purposes of speed and efficiency. Moreover, while I acknowledge that in the vast majority of cases the trial judge will be best placed to make these decisions, there are situations where the expert evidence is so offensive that a interlocutory remedy must be available. In these situations, the ramifications of allowing the matter to proceed to trial, only to see the obvious result of the impugned evidence being struck or given no weight, far outweigh the risks of allowing a motions judge the discretion to strike the evidence on an interlocutory basis.

Should the expert's affidavit in this case be struck?

[99] There is no disagreement between the parties that in Nova Scotia an expert's report must be, and be seen to be, independent and impartial (*Lunenburg Industrial Foundry and Engineering Ltd v. Commercial Union Assurance Co of Canada*, 2005 NSSC 62 at para. 32; *Tingley v. Wellington Insurance Co.*, 2008 NSSC 317 at para. 16; *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315 at para. 22).

[100] Ms. MacMillan gave extensive testimony in direct and cross-examination regarding her retainer and the work done by her partners at Kentville Grant Thornton. It is unlikely that any more information will be available at trial regarding her independence.

[101] In my view, the affidavit of Ms. MacMillan in this case falls well short of the requirement that expert's evidence must be seen to be independent. This is one of those clearest of cases where the reliability of the expert is so impugned that their evidence does not meet the threshold requirements for admissibility.

Ms. MacMillan admitted, in response to a hypothetical question on cross-examination, that she would have had to reconsider her retainer if she had known that one of her partners would be testifying in the trial. This response is captured in the following exchange:

> Q: If someone told you that the Grant Thornton partners from the Kentville office were going to testify about the 2005 review engagement date in this case, and that evidence was going to form part of the negligence claim against WBLI, would that have precluded you from being a witness in this case?
>
> A: One is I think…and again this is hypothetical right…
>
> Q: Yes.
>
> A: I would certainly have had to look at it in that context, which I didn't because that was not what I was asked to do.
>
> Q: Can you answer the hypothetical?
>
> A: You gotta look at all the…I gotta think about that because that was never a part of the…and so what I think about whether I could then be retained to be as an expert witness…
>
> Q: Yes.
>
> A: I think I would have a long hard thinking about that.
>
> Q: And what conclusion would you come to?
>
> A: Probably that no we wouldn't.

[102] The problem Ms. MacMillan faces is that this is not a hypothetical example. The work of Kentville Grant Thornton forms part of the plaintiffs' statement of claim and case for negligence. Interestingly, Ms. MacMillan seems to have incorporated some of the work of the Kentville office of Grant Thornton as part of her opinion, as reflected in paras. 62 and 76 of her affidavit. The moment that work is put to the court as evidence Ms. MacMillan will be in an apparent conflict of interest. It does not matter that she might have reached the same conclusion as her partners. It also does not matter that the work was not done contemporaneously. What matters is that a reasonable observer would see that she is constrained from

providing a contrary view. A contrary view would expose her partners, and therefore herself, to the prospect of liability, regardless of whether Kentville Grant Thornton had an ongoing retainer with the plaintiffs.

[103] In the context of the legal profession, the Manitoba Queen's Bench has held that such conflicts are impermissible: "I find that it is no longer proper practice for counsel to act in a matter where a partner, associate or employee is going to be called as a witness at the trial as to a matter which is in dispute" (*Harvard Investments Ltd v. Winnipeg (City)* (1994), 93 Man R (2d) 269, 1994 CarswellMan127 at para. 16 (QB)). Indeed, the circumstances of Ms. MacMillan and Kentville Grant Thornton are analogous to the decision in *Fellowes*. The only distinguishing feature is that the advocate and witness in *Fellowes* were the same person whereas the advocate and witness in this case are from the same firm. It appears that the accounting profession's rules also bar such conflicts (See Tab 29 of Exhibit 1). The most applicable rule is the caution against "self-review threats" though I note that these are focussed on threats to independence arising in the context of ongoing obligations to assurance clients. Neither the plaintiffs nor AWARD were assurance clients of Grant Thornton. Nonetheless, the principle underscoring a self-review threat is relevant:

> A Self-Review Threat occurs when any product or judgment from a previous engagement needs to be evaluated in reaching conclusions on the particular assurance engagement, or when a person on the engagement team was previously a director or officer of the client, or was an employee in a position to exert direct and significant influence over the subject matter of the assurance engagement.

[104] If "assurance engagement" is replaced with "litigation support" it is clear why such threats are also relevant to accountants acting as expert witnesses before the court. While Ms. MacMillan may not have had to evaluate the work of Kentville Grant Thornton in preparing her affidavit, it is almost inevitable that she will be asked, as an expert before the court, for an explanation as to why her apparently independent opinion is consistent with the work of her partners that underscores the plaintiffs' case.

Conclusion:

[105] Rule 39 and Rule 55 work in tandem. Rule 39 addresses concerns of admissibility. Rule 55 addresses concerns of form in experts' reports. A textual,

contextual, and purposive interpretation of the two rules suggests that in the clearest of cases, and where all the evidence that would be available at trial is before the court, a motions judge may strike the whole or entirety of an expert's report on the grounds that it is inadmissible.

[106] In this case, all the evidence that would be available at trial is before the court. This is also one of those clearest of cases where the motion to strike remedy is warranted. The affidavit of Ms. MacMillan lacks the requisite independence to meet the threshold of admissibility. She is in an apparent conflict of interest in that she cannot take an opposing view to one party's advocate without exposing her partners and herself to potential liability. For this reason her opinion is not independent and her affidavit should be struck.

[107] The defendants shall have their costs. In the event the parties cannot agree I will hear submissions.

Pickup, J.