SUPREME COURT OF NOVA SCOTIA
Citation: ***Brocke Estate v. Crowell*****,**, 2014 NSSC 269

Date: 2014-07-14
Docket: Ken No. 310335
Registry: Kentville

Between:

Anna Gardner, Administrator of the Estate of
John Gary Joseph Brocke

Plaintiff

v.

Arthur Crowell and **Gaye Crowell**

Defendants

Judge:	The Honourable Justice Pierre L. Muise
Heard:	October 16, 2013, in Windsor, Nova Scotia
Supplemental Written Submissions:	October 31, 2013
Counsel:	**Brian Hebert**, Counsel for the Plaintiff **Debbie Brown** and **Franco Tarulli**,, Counsel for the Defendants

DECISION ON PRE-JUDGMENT INTEREST AND COSTS

INTRODUCTION

[1] The trial in this matter dealt with damages for a fatal injuries claim arising out of a motor vehicle accident. It was heard by a judge and jury over almost the entire month of September 2013. Following the Jury's verdict, the parties have been unable to agree on prejudgment interest and costs. These unresolved issues were argued in a motion heard October 16, 2013, with additional submissions and materials being filed October 31, 2013. This is my decision in relation to these issues.

POSITIONS OF THE PARTIES

PLAINTIFF'S POSITION

[2] The Plaintiff submits the court should take the following approach to determination of costs.

[3] Party and party costs should be awarded to the Plaintiff in accordance with Tariff A, using, as the amount involved, the total amounts awarded as damages in

the Jury's verdict, less amounts received by the Plaintiff, under Section B of the insurance policy of the deceased, plus prejudgment interest.

[4] Prejudgment interest should be awarded at a rate of 1.27% (based on the average annual rate on 1 to 3 year Government of Canada Bonds for the period from January 17, 2009 to the commencement of trial), over the entire 4.63 years between the date of death and the commencement of trial, subject to the alternative of using the net discount rate where damages have already been adjusted for inflation.

[5] In accordance with Tariff A, $35,000 should be added to account for the 17.5 days of trial and the additional $2000 per day provided for.

[6] The highest scale in Tariff A, Scale 3, should be used because:

(a) the case was unusual, as it involved determination of "the value of future art by an artist with no recent paintings but a history of painting valuable works of art dating back to the 1980s and 1990s" necessitating the use a number of art experts;

(b) by agreement, one of the experts was discovered in Toronto and another in Vancouver;

(c) there was a pretrial motion regarding the admissibility of expert evidence which was heard twice, the first time before a Justice who decided to recuse himself following a motion by the Plaintiff that he do so, then the second time by myself;

(d) only one witness resided in Nova Scotia, with 11 witnesses living in Calgary, one in the US and two in Toronto, necessitating travel outside of Nova Scotia to interview witnesses;

(e) liability was only admitted six weeks before trial; and,

(f) the Defendants' expert did not make it clear until the time of trial that she was allowing an increase in the prices for the deceased's art to account for inflation, when earlier knowledge of this detail would have impacted settlement discussions.

[7] The Plaintiff was represented under a contingency fee agreement which provided for payment of 30% of the award, which contingency fee was calculated as being $276,394.43 plus HST, assuming costs of $99,750 based on the basic scale in Tariff A and taking into account the 17.5 days of trial. The plaintiff provided evidence that its law firm's docketed fees were in excess of $449,000. However, it submitted that the contingency fee calculated as being $276,394.43 plus HST "should be accepted as a reasonable fee as between the Plaintiff and the

Plaintiff's counsel for the purpose of determining what amount of party and party costs will provide a substantial indemnity of the Plaintiff's costs", in light of the good results achieved, i.e. an award around $800,000. The Plaintiff comments that that was significantly higher than the Defendants' formal offer to settle for $550,000, inclusive of prejudgment interest and costs, dated May 15, 2013, and for $650,000, dated August 19, 2013, and closer to the Plaintiff's offer to settle for $1,000,000 plus costs and disbursements, dated February 5, 2013.

[8] Even applying Scale 3, tariff costs still amount to less than 50% of the Plaintiff's actual legal fees before HST. Therefore, an additional lump sum should be added to raise the costs award to 60% of actual reasonable legal fees. Then, HST should be added to that amount.

[9] The Plaintiff is of the view that the Defendants should not receive any costs in relation to the motion to deal with admissibility of expert evidence, made in advance of trial, because success was divided and costs are to be in the cause unless otherwise ordered.

[10] The Plaintiff submits she should not be penalized for having disclosed materials late because: they were disclosed before what would have been the normal finish date; the Defendants did not raise the issue of costs when they agreed

to conduct the resulting supplementary discovery of the Plaintiff in Calgary; they and their expert would have had to review the documents for discovery no matter when they were disclosed; and, it was only after discovering the Defendants' expert that the plaintiff realized that expert was under the impression that Mr. Brocke had not returned to art as a full-time career, and therefore sought documents to demonstrate that.

[11] The Plaintiff submits all witnesses were necessary, even if repetitive, because the Jury had to consider whether there was corroborating evidence, the absence of which might cause it to conclude that the evidence of those who sought to gain financially from the trial was self-serving.

[12] The Plaintiff distinguishes the case of ***Terris v. Crossman***, [1995] P.E.I.J. No. 116 (S.C., T.D.), presented by the Defendants in support of denying or reducing costs because the Plaintiff called one of its experts, Jefferey Spalding, to testify even though the Defendants agreed his report could be entered without cross-examination. She notes that, in that case, there was no cross-examination of the expert witness, while, in the case at hand, there was cross-examination of Mr. Spalding.

[13] The Plaintiff should not be penalized because her witnesses stray outside the bounds of admissibility as that is not unusual in a lengthy trial.

[14] The Plaintiff should not be penalized for not advising the Defendants in advance of the intended use of demonstrative aids because: irrespective of when they were presented, trial time would have been required to review them; and, the actuarial report was not finalized until midway through trial, making it impossible to complete some of the charts beforehand.

[15] With the exception of one of the Plaintiff's experts, Nicholas Metivier, who provided fact evidence on direct examination, the remaining expert witnesses for the Plaintiff were presented for cross-examination, without direct examination, thus reducing the use of trial time.

[16] The approaches taken by the Plaintiff in this trial are distinguishable from those in the cases presented by the Defendants in support of their contention that there should be a corresponding costs consequences. Therefore, no such negative consequences for the plaintiff should obtain in the case at hand.

[17] Part of the reasons leading to Jessie Gmeiner producing multiple iterations of her expert's report, following the Court's decision on admissibility, related to disagreement between the parties over the meaning of the Court's decision. Once

the Court's directions were obtained, the parties were able to agree on the form of the report. Therefore, no negative cost consequences should result.

[18] The Plaintiff submitted that: some of the trial motions resulted in divided success; some were resolved between the parties; and, some were decided in favor of the plaintiff. The issue of the net discount rate used in Ms. Gmeiner's report is something which the Defendants could and should have raised in advance of the trial, because it was contained in her first report. Further, it was the first time that the applicable regulation was judicially considered. Therefore, the Plaintiff should not be penalized in costs as a result of that motion.

[19] The conduct of the Plaintiff's counsel was far from that of counsel in the cases presented by the Defendants in support of their contention that it warrants negative cost consequences.

[20] "Perceived" issues arising from the Plaintiff's closing arguments or evidence were only a small part of the Court's closing instructions to the Jury, and not all of the issues raised were addressed in the charge. As such, they did not add significantly to the length of the charge.

[21] The Plaintiff is not claiming travel disbursements for her lawyer to travel to trial, but rather to travel for discoveries and to meet with out-of-province witnesses, which should be recoverable.

[22] The fact that the Defendants hired independent counsel personally to represent them during the trial because the Plaintiff refused to limit the claim to the policy limits is irrelevant to the issue of costs. The hiring of independent counsel does not become reasonably necessary until a conflict arises from the insurer signalling to the Defendants that it is might admit liability and damages exceeding the policy limit. Even then, the insurer continues to have the obligation to pay for the insured's independent counsel.

DEFENDANTS' POSITION

[23] The Defendants submit the Court should take the following approach to determination of costs.

[24] The Plaintiff's unnecessary or problematic witnesses, procedural delays, and improper actions or tactics (which will be outlined in further detail later in this decision) added unnecessarily to the length of the proceedings and the legal expenses of the Defendants. In contrast, the Defendants presented only one

witness, brought their motion regarding admissibility of expert evidence well in advance of trial, and conducted focused and streamlined cross-examinations, in order to keep the length of trial reasonable. Therefore, the Court should refuse to award costs to the Plaintiff and should award costs to the Defendants, in a lump sum amount between $24,000 and $30,000, to account for the excessive trial time required because of the Plaintiff's approach to the trial. In the alternative, the Court should at least refuse to award costs in relation to the portion of the trial time used up by unnecessary motions or evidence, and improper actions or tactics. They suggest that only seven days of the trial were reasonably necessary. Similarly, disbursements should be refused for unnecessary witnesses or unnecessary expert fees.

[25] The Defendants submit that, contrary to the assertions of the Plaintiff, they clearly represented to the Plaintiff, before trial, that they were prepared to recognize the prices for John Brocke's artworks, plus inflation, as the basis for lost income. They further submit that the Plaintiff only had to incur the expense of engaging the services of its expert because she refused to base lost income on past earnings while working full-time with gallery representation, and insisted on arguing for levels of income based on artists such as Alex Colville and Christopher Pratt, who had established reputations.

[26] The Defendants challenge the appropriateness some of the disbursements claimed by the Plaintiff, including the following: internal photocopies; faxes; postage; accommodations, meals and transportation for counsel, to the extent that it relates to attendance at trial, and any unnecessary travel elsewhere; travel for unnecessary witnesses; travel for the Plaintiff and those for which wrongful death damages were claimed; expert fees that were not reasonably necessary; and law searches; long distance charges; and, item 31 as it contains insufficient description or account to determine reasonableness.

[27] The Defendants submit that, considering the Plaintiff's offer of $1 million did not include costs and disbursements, the Defendants' offer of $650,000, inclusive of judgment interest and costs, was closer by about $54,000, to the actual award of around $798,000, after deducting statutory deductions.

[28] In addition, at trial, the Plaintiff's claim amounted to approximately $1.7 million plus costs and disbursements, so the Jury's award was less than one half of the amount claimed.

[29] However, given that the Jury's award fell between the two formal offers, neither party gains the benefit of the cost advantages outlined under Civil Procedure Rules 10.05 and 10.09.

[30] The $1 million, plus costs and disbursements, settlement offer by the Plaintiff was at the policy limit. The Plaintiff refused to limit the total of the claims to that amount after commencement of the trial. As a result, the Defendants hired private counsel to represent their interests at trial, in case the lawyers hired by their insurer to defend them chose, during the trial, to pay the policy limit and leave the Plaintiff to seek additional damages at trial. They paid their private lawyer a total of $42,692.31 for those services. They would not have had to incur those amounts if the plaintiff had agreed to limit the claim to $1 million. As such, they are personally entitled to costs in that amount against the Plaintiff.

[31] The Defendants specifically seek the costs associated with the supplementary discovery of Ms. Gardner which was necessitated because of the late disclosure of a large number of documents, which discoveries took place, at Ms. Gardner's insistence, in Calgary. They also seek the expenses of having their expert, Beth Noble review those documents, her previous opinions and provide a supplementary opinion.

[32] Irrespective of the approach taken in relation to costs at trial, the Defendants seek the costs of the admissibility motion, outright or as a set-off, based on Tariff C, with 2 days' appearance before the first Justice, followed by one day before me.

[33] The Defendants submit that no HST is to be added to a costs award.

[34] They agree with a pre-judgement interest rate of 1.27%. However, they submit it should be for a reduced timeframe to account for the delay in bringing the matter trial and for the fact that the Plaintiff has not been deprived of the use of the money for the entire time. They also submit that the prejudgment interest should not apply to certain parts of the damage awards.

ISSUES

[35] This motion raises the following issues.

1. What is the proper amount of pre-judgment interest?
2. What, if any, Tariff amount is appropriate or an appropriate starting point?
3. If no Tariff amount is appropriate, or an appropriate starting point, what if any lump sum amount is appropriate, or an appropriate starting point?
4. What, if any, amount should be deducted for the manner in which the Plaintiff conducted her case?

5. What, if any, amount should be set-off against the costs award?

6. Should HST be added to the costs award?

7. What, if any, disbursements should be awarded?

LAW AND ANALYSIS

ISSUE 1: WHAT IS THE PROPER AMOUNT OF PREJUDGMENT INTEREST?

[36] The prejudgment interest rate of 1.27% which was proposed by the Plaintiff and accepted by the Defendants is based on the average annual rate on 1 to 3 year Government of Canada Bonds for the period from January 17, 2009 (i.e. the date of the accident) to the commencement of trial. I agree that it is an appropriate rate to use, subject to appropriate adjustments.

[37] In supplementary submissions, the Plaintiff submitted that the Court should use a rate of 3.5% or 2.5% over the 4.7 year period between the date of the accident and the commencement of trial. She based her submissions on ***Bush v. Air Canada***, 1992 CarswellNS 569 (C.A.), reafirmed in ***Seamone Co. v. Nova Scotia (Attorney General)***, 1999 CarswellNS 5 (C.A.), noting these cases stood “for the

proposition that the net discount rate should be used where damages have already been adjusted for inflation".

[38] However, paragraphs 61 and 63 of ***Bush*** demonstrate that the net discount rate is appropriately used in such a situation so as to avoid the plaintiff from the double recovery which would result from using a higher commercial rate.

[39] Paragraph 61 states:

> "A double recovery should be avoided in the exercise of the trial judge's discretion under s. 41(i) and (k) of the *Judicature Act*, *supra*. The conclusion must be that to the extent that inflation was taken into account for the period between the accrual of the cause of action and the trial, the judge should then adjust the interest rate so that it is not taken into account for a second time. This exercise should be carried out in fixing the rate and requires an examination of the award to determine whether inflation from the date the cause of action arose has been taken into account. … In many cases, the judge may not be able to say with any degree of certainty that an inflation factor has been built into the award. In these cases when the second step is taken, the commercial rate of interest would generally be appropriate. Where, however, the judge is satisfied that inflation has been built-in, a rate such as the discount rate of 2 ½% per annum is appropriate. If the trial judge does not do this, a double recovery results to the plaintiff. An injustice is therefore done which requires interference by an appeal court with such an exercise of discretion."

[40] Paragraph 63 states:

> "I am unable to say with any confidence that the respondent was adequately compensated for inflation in fixing of the award with respect to the period over which interest runs, and I would leave undisturbed the interest rate of 10% in this case."

[41] The Plaintiff submitted that, in the case at hand, we cannot tell whether the Jury adjusted for inflation. Therefore, by its own submission, even if it were

completely correct, in light of the ***Bush*** case the Government of Canada rate would prevail even if it was higher than the discount rate. The fact that the discount rate is more than double the Government of Canada rate makes it even less appropriate as it would result in over quadruple recovery.

[42] Consequently, I find that the appropriate rate is 1.27%, subject to adjustment downward to account for inflation adjustment being factored into the award.

[43] The Plaintiff's argument that prejudgment interest should be added to all damages awarded under the ***Fatal Injuries Act***, is based upon ***Shaw Estate v. Roemer***, 1982 CarswellNS 105 (S.C., A.D.) and ***Downey v. Yasmine***, 1985 CarswellNS 158 (S.C., T.D.). That was, indeed, the result in those cases. However, it is noteworthy that, in those cases, the fatal injuries awards were not divided between damages up to date of trial and damages after the date of trial. They were assessed as one global award for each claimant.

[44] In the case at hand, separate awards were made for past and future loss of financial support and valuable services. In addition, there were specific awards for loss of expectation of future gifts. Given this important distinguishing feature, in my view, the same result ought not obtain in the case at hand.

[45] The Court in ***Seamone***, at paragraphs 223, stated:

> "The purpose of pre-judgment interest was stated, by this Court, to
>
> … compensate the Plaintiff for being without the money represented by the award of damages. It is not designed to penalize the Defendant or to deprive the Defendant of an undue windfall in being able to enjoy the money during the intervening period."

[46] Section 41 of the ***Judicature Act,*** R.S.N.S. 1989, c. 240, states:

> "41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> ….
>
> (i) in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;
>
> …
>
> (k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> > (i) interest is payable as of right by virtue of an agreement or otherwise by law,
> >
> > (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
> >
> > (iii) the claimant has been responsible for undue delay in the litigation."

[47] The Defendants submit that, since the Plaintiff has not been deprived of the past valuable services and past financial support during the entire period between the accident and the date of trial, the prejudgment interest award should reflect that. Their submission finds support in ***Mader v. Lahey***, 1997 CarswellNS 572 (S.C.), at paragraphs 9 to 12, affirmed 1998 CarswellNS 180 (C.A.), and in ***Curry Estate v. Burke***, 1989 CarswellNS 393 (S.C., T.D.), at paragraph 34.

[48] The approach of the Court in ***Mader***, even though it dealt with past loss of income in a non-fatal injuries claim, is, in my view also applicable to past loss of support in a fatal injuries claim. In ***Mader***, at paragraphs 9, 10 and 12, the Court stated:

> "9 The past loss of income claim was not suffered as of the date of the accident. Rather, those damages were suffered from time to time and during the period of time from the date of the accident until the Plaintiff returned to work at the end of 1991.
>
> 10 As such, technically speaking, the pre-judgment interest on the past loss of income claim should be calculated from time to time as the loss was incurred to February 1994, five years from the date of the accident. …
>
> ….
>
> 12 Mr. Burnell could be asked to calculate the pre-judgment interest as it accrued from time to time. I prefer a simpler approach. The simpler approach simply is to calculate pre-judgment interest at 5 percent on $11,760.00 from a date one and one-half years after the accident (that is halfway through the roughly three year period during which the loss of income claim accrued)."

[49] In ***Mader*** counsel had agreed to a 5% interest rate.

[50] ***Curry Estate*** did deal with past loss of support in a fatal injuries claim and used a similar "simple" approach. In that case, instead of using one-half of the period between the date of the accident and the date of trial, it used one-half of the full pre-judgement interest rate.

[51] I am of the view that a similar simple approach should be used for past loss of support and valuable services. I opt for the use of roughly one-half of the period

between the date of the accident and the date of trial, which is approximately 2.3 years.

[52] The Defendants further submit that the pre-judgment interest award should also reflect the fact that the actuarial report presented to the Jury already built in inflation to convert the awards to trial date dollars. ***Bush v. Air Canada*** clearly states that it is an error not to adjust the pre-judgment interest rate to account for inflation adjusted awards so as to avoid double recovery.

[53] As it related to loss of support, the actuarial report stated "in general, wages in Canada have historically increased at a pace greater than the rate of inflation (by at least 1% per annum over the long-term)". Both Ms. Yeomans and Ms. Noble made allowance for inflation in their opinions regarding the value of Mr. Brocke's art. Therefore, in my view, the Jury, more likely than not, factored inflation into their loss of support award. The only exception may be that, for 2009, and perhaps part of 2010, it would simply have used the amount remaining to be paid on the existing Fialkow Commission. For part of 2009, and 2010, they likely also considered the potential Senator Hays Commission. Senator Hays testified as to the amount he would expect to pay for that commission as of the date that he testified, because it had not been yet agreed upon. Therefore, in my view, his anticipated amount already factored in inflation. Considering these points, I am of the view

that there should be some reduction in the interest rate to account for the past loss of support award having been, at least to some extent, adjusted for inflation. However, I am not of the view that it should be reduced to 25% of the full commercial rate as was the case in ***Bush v. Air Canada***. In my view, given the circumstances of the case at hand, it would be appropriate to reduce the prejudgment interest rate, on the past loss of support award, from 1.23% to 0.8%.

[54] As it relates to past loss of valuable services, the actuarial report provided statistical information regarding the value of household work in 2009, 2010, 2011, and 2012, as well as an extrapolation to 2013 arrived at by calculating the increase in the Consumer Price Index. It also included labor market information in relation to the average hourly rate for carpenters in the Annapolis Valley Region for the 2011/2012 period. The claim for loss of valuable services included a wide variety of services, a large part of which were related to carpentry type or similar services. Consequently, more likely than not, the Jury took into account the carpentry hourly rate information which was at least partially inflation-adjusted. For the household work type of loss of valuable services, they, more likely than not, would have taken into consideration the hourly rates for each applicable year. Therefore, once again, the Jury, more likely than not, used a combination of inflation-adjusted amounts, and non-inflation-adjusted amounts. As a result, I am also the view that

the prejudgment interest rate of 0.8% should be used for past loss of valuable services, in accordance with the directions in ***Bush v. Air Canada***.

[55] As noted at paragraph 34 of ***Curry Estate***, there should be no prejudgment interest on the award for loss of future support, nor for loss of future valuable services.

[56] The Defendants also submit, based on ***Gaum v. D.G. Wolfe Enterprises Ltd.***, [1998] N.S.J. No. 464, that the prejudgment interest period should be reduced to account for the Plaintiff's delay in bringing the matter trial. In ***Gaum*** there was an 11 year delay in bringing a slip and fall case to trial. The Court allowed prejudgment interest for four years. In the case at hand, it was only 4.7 years between the date of the accident and the date of trial. The Defendants submit that the Plaintiff's initial counsel did not obtain proper expert reports from Mr. Metivier in 2010, causing the Defendants to object to the reports. After the Plaintiff hired the Counsel who represented her trial, an additional report was obtained from Mr. Metivier, necessitating a supplementary rebuttal from the Defendants' expert. In addition, the Plaintiff sought additional expert opinions from other experts to bolster her initial expert's report. Those were sought in the summer of 2012. I agree that the matter could likely have been expedited if the Plaintiff's initial counsel had properly dealt with the issue of expert opinions. However, considering

the change in lawyers, and the fact that the Plaintiff's new lawyer had to obtain reports from more appropriate experts, I cannot find that there was a delay by the Plaintiff in bringing this matter to trial that was sufficiently undue to warrant reducing the period over which prejudgment interest is calculated.

[57] The Defendants submit that there should be no prejudgment interest added to the award for loss of care, guidance and companionship because: it is for both past and future losses, with the majority being for future losses; the range provided to the Jury was based on the damage awards in similar cases adjusted for inflation to the date of trial; and, the Jury awarded an amount slightly above the range, which provides adequate compensation for any prejudgment interest that might otherwise be justifiable.

[58] In my view, it would not be proper for me to eliminate or reduce prejudgment interest to account for a jury award that was above the range, as I would, in effect, be acting as a court of appeal, and changing the award.

[59] Although loss of care, guidance and companionship does have a future component it still attracts prejudgment interest: ***Simpson Estate v. Cox***, 2006 NSSC 116. In ***Simpson Estate*** prejudgment interest for 3.3 years was awarded.

That was approximately the amount of time between the date of the fatal accident and the date of trial (see ***Simpson Estate v. Cox*** ,2006 NSSC 84).

[60] However, the directive in ***Air Canada v. Bush*** applies to prejudgment interest on loss of care, guidance and companionship awards. The Court in ***Lutley v. Jarvis Estate***, 1992 CarswellNS 584 (S.C., T.D.),at paragraphs 156 and 157, added prejudgment interest to the award for loss of care, guidance companionship, from the date of the accident to the date of judgment, and, at paragraph 167, specifically stated:

> "In determining prejudgment interest I have considered the dicta of Chipman, J.A. in ***Air Canada v. Bush*** … . The cases I have used as comparisons were decided prior to this accident. I have not used an inflation factor to translate them to 1992 values."

[61] In the case at hand, the Jury awarded the high end of the range suggested by counsel for the Plaintiff, which was based upon inflation-adjusted amounts. Therefore, I must reduce the prejudgment interest rate accordingly. In keeping with the approach in ***Air Canada v. Bush***, I will reduce the prejudgment interest rate on the loss of care, guidance and companionship award from 1.23% to 0.3%. It shall be for 4.63 years, representing the date of the accident to the date of trial.

[62] The Defendants submit that there should be no prejudgment interest added to the awards for loss of expectation of future gifts of art because it was

compensation for a benefit to be obtained in the future and no date was set for completing the pieces of art. I agree with that submission and add that the evidence supported a finding that the art would not be completed until well into the future, given that even pieces of art which Mr. Brocke was producing to sell remained uncompleted for years. Therefore, there will be no prejudgment interest added to the awards for loss of expectation of future gifts.

[63] The parties did manage to agree that prejudgment interest on the awards for funeral expenses and the expenses of renovating the Plaintiff's garage to store Mr. Brocke's art are to run from the date the expenses were incurred to the date of trial. In my view, and that is the proper approach.

[64] The funeral expenses were incurred between January 17, 2009 and March 1, 2009. I will use February 2009 to September 2013 as the applicable period for prejudgment interest. That is approximately 4.5 years.

[65] The garage renovation expenses were incurred in October 2010. From then until the date of trial is approximately 3 years.

[66] The amounts awarded are based on actual figures, not inflation-adjusted figures, therefore the full prejudgment interest rate of 1.23% is to be used.

[67] Therefore, the prejudgment interest to be added to the damage awards is as follows:

> (a) for the funeral expenses, $15,819.39 X 0.0123 X 4.5 years = $875.60;
>
> (b) for the loss of care, guidance and companionship awards, a total of $195,000 X 0.003 X 4.63 years = $2708.55;
>
> (c) for the past loss of financial support, $117,000 X 0.008 X 2.3 years = $2152.80;
>
> (d) for the past loss of valuable services, $38,000 X 0.008 X 2.3 years = $699.20; and,
>
> (e) for the cost of renovating the garage, $10,000 X 0.0123 X 3 years = $369.00.

[68] These amounts add up to a total prejudgment interest award of $6805.15.

ISSUE 2: WHAT, IF ANY, TARIFF AMOUNT IS APPROPRIATE OR AN APPROPRIATE STARTING POINT?

[69] ***Civil Procedure Rule*** 77 deals in-depth with the issue of costs. The relevant portions of Rule 77 include those which follow.

[70] Rule 77.02 provides that:

> “(1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.”

[71] Rules 77.06 to 77.08 provide:

> “77.06 (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.
>
> ….
>
> 77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
>
> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
>
> > (a) the amount claimed in relation to the amount recovered;
> >
> > (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
> >
> > (c) an offer of contribution;
> >
> > (d) a payment into court;
> >
> > (e) conduct of a party affecting the speed or expense of the proceeding;
> >
> > (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
> >
> > (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
> >
> > (h) a failure to admit something that should have been admitted.
>
> ….
>
> 77.08 A judge may award lump sum costs instead of tariff costs.”

[72] The Tariffs reproduced following Rule 77.18 state, among other things, the following:

> "TARIFFS OF COSTS AND FEES DETERMINED
> BY THE COSTS AND FEES COMMITTEE TO
> BE USED IN DETERMINING PARTY AND
> PARTY COSTS"
>
> In these Tariffs unless otherwise prescribed, the "amount involved" shall be
>
> (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
>
> (i) the amount allowed,
>
> (ii) the complexity of the proceeding, and
>
> (iii) the importance of the issues;
>
> ….
>
> TARIFF A
>
> Tariff of Fees for Solicitor's Services Allowable to a Party
> Entitled to Costs on a Decision or Order in a Proceeding
>
> In applying this Schedule the "length of trial" is to be fixed by a Trial Judge.
>
> The length of trial is an additional factor to be included in calculating costs under this Tariff and
>
> therefore two thousand dollars ($2000) shall be added to the amount calculated under this tariff
>
> for each day of trial as determined by the trial judge."

[73] Tariff A then lists the party and party costs to be awarded based upon 11 different ranges of "amounts involved", and in accordance with three scale levels. Scale 1 is 25% less than Scale 2, and Scale 3 is 25% greater than Scale 2.

[74] Tariff A is the tariff that applies to trials.

[75] In the case at hand, the Jury's award was between the offers to settle of the parties. Therefore, neither of the parties obtained a "favourable judgment" as defined in Rule 10.09 relating to offers to settle, and the provisions in Rule 10.09 for increasing tariff amounts, according to a sliding scale which depends on when the offer to settle is made, do not apply.

[76] In addition, in my view, the Jury's award was roughly midrange between the respective offers settle. Consequently, those offers have no real impact upon costs.

[77] The Defendants personally hired their own independent counsel to be present with them during the trial, while the lawyers hired by their insurer conducted the case for the Defendants, because the Plaintiff was not limiting the claim to the policy limits. However, I am not of the view that this ought to impact costs either. The lead counsel hired by the Defendants' insurer confirmed that there was no conflict of interest between the Defendants and their insurer in this case. She recognized the insurer's duty to defend beyond the policy limits. Though they had admitted liability, the lawyers hired by the insurer were clearly not admitting damages above the policy limits. There is no indication that they signaled to the Defendants that there was any realistic chance of that happening. . Throughout the trial they maintained vigorously that the amount should be significantly lower. Consequently, following the reasoning at paragraphs 23 to 25 of ***Theriault v. ING***

Insurance Co. of Canada, 2006 NBQB 407, I am of the view that there was no reasonable need for independent counsel. If there had been such a need the insurer would have had a duty to pay for such independent counsel. There is no evidence that happened. The Defendants chose to have their own lawyer present out of an abundance of caution. They are entitled to make that choice. However, in my view, in the circumstances, they cannot reasonably expect the Plaintiff to contribute towards the cost of that lawyer, irrespective of whether the plaintiff caused the trial to last longer than necessary.

[78] The Plaintiff submits that a lump sum award is required in the case at hand because even the highest scale in Tariff A does not provide substantial contribution towards her reasonable legal fees. She provided affidavit evidence that her law firm's docketed fees were in excess of $449,000, without providing any detailed breakdown of those fees. In ***MacCormick v. Dewar***, 2011 NSSC 10, the Court refused to award costs beyond the tariff amounts, in part because the plaintiffs had not provided detailed information in relation to the legal fees incurred. However, in the case at hand, the Plaintiff is not requesting that the docketed fees be accepted as the amount for reasonable legal expenses. She is, instead, asking that the amount of legal fees payable under the contingency fee agreement she entered into with her

lawyer be accepted as reasonable legal expenses in the case at hand. Therefore, it is unnecessary to examine a detailed account of the firm's docketed fees.

[79] The Plaintiff noted that the contingency fee agreement provided for payment of 30% of the award. However, in calculating the amount she added 30% of hypothetical costs also. In my view, it is not appropriate to base a costs award on "reasonable legal expenses" which are themselves based upon a hypothetical costs award. However, I agree that it is reasonable, in the circumstances, to use 30% of the award, in accordance with the contingency fee agreement, as a simple and approximate basis for determining reasonable legal expenses.

[80] The total award of damages in the case at hand, less statutory deductions, was $798,319.39. 30% of that is $239,495.82, or approximately $239,000. The trial took 17 ½ days. The Plaintiff was claiming $1.7 million. There were multiple experts from across the country. One had to be discovered as far away as Vancouver. Most of the witnesses were from Western Canada, with the remaining ones being from Central Canada or the United States. They had to be discovered and/or interviewed where they lived. Numerous expert reports were prepared. There was a pretrial motion regarding the admissibility of expert reports which took up approximately two days of counsel's time for court appearances. The exhibits were voluminous. There was much financial information, artist's records

and art literature to sift through. The case required learning about the world of art. The private lawyer hired by the Defendants only read the materials and motions filed, spent one half day meeting with trial counsel hired by the insured, and attended the trial. He was not involved in any discoveries, pretrial motions, nor preparation for trial. His fees and disbursements, without HST, totaled $37,123.75. Considering that, and considering the circumstances surrounding the preparation and presentation of the case were time-consuming, I am of the view that $239,000 constitutes reasonable legal expenses incurred by the Plaintiff.

[81] It is a proper approximate amount upon which to assess whether Tariff A will provide substantial contribution to those legal expenses, and whether a lump sum amount is warranted.

[82] I will not include HST in that amount because there was no evidence regarding whether or not the plaintiff could recapture the HST paid. There was evidence at trial of a Corporation through which both the Plaintiff and the deceased were funneling income. Therefore, the Plaintiff may be able to recapture some HST through that Corporation. Further, there was no evidence regarding the ability or inability to deduct legal expenses incurred to obtain an award to replace lost support. Therefore, the plaintiff may also gain the benefit of an income tax

deduction for legal expenses, providing further reason to disregard the HST portion for purposes of assessing the question of substantial contribution.

[83] As I stated at paragraphs 7 to 11 of **Sandra Richards v. Robert Richards et al**, 2013 NSSC 269:

> "[7] "Lump-sum costs are typically awarded where the basic award of costs under the Tariff would be inadequate to serve the principle of a substantial but incomplete indemnity": *Gammell v. Sobeys Group Inc.*, 2011 NSSC 190.
>
> [8] In *Bevis v. CTV Inc.*, 2004 NSSC 209, at paragraph 13, Justice Moir summarized his decision on lump sum costs in *Campbell v. Jones*, [2001] N.S.J. No. 373, as follows:
>
>> "(1) Costs are normally set in accordance with the Tariff. (2) However, the Tariff system serves the principle of a substantial but incomplete indemnity. The Courts do not choose artificial means, such as selection of an artificial "amount involved", in order to make the Tariff serve the principle. Therefore, when reasonable approaches to amount involved or scale under the Tariff fail to produce a substantial but partial indemnity, the Court may resort to its discretion under rule 63.02(a) and order a lump sum. (3) To settle an appropriate lump sum the Court will have regard to the actual costs facing the successful party or the labour expended by counsel, but the Court will seek to settle the amount objectively in conformity with one of the policies of the Tariff, to provide an indemnity that has nothing to do with the particularities of counsel's retention. The Court will attempt to provide a substantial but partial indemnity against what would ordinarily be charged by any competent lawyer for like services. (4) Finally, the Courts have usually avoided percentages. Substantial but partial indemnity is a principle, not a formula."
>
> [9] In *Landymore v. Hardy* (1992), 112 N.S.R.(2d) 410 (S.C., T.D.), Justice Saunders, as he then was, at paragraph 17, noted, citing the words of the Statutory Costs and Fees Committee, that costs "should represent a substantial contribution towards the parties' reasonable expenses". At paragraph 19, he referred to the information required to assess the reasonableness of legal expenses in order to determine what will constitute a substantial contribution, as follows:
>
>> "As it is the court's responsibility to assess the fairness and reasonableness of the effort expended, the trial judge will have to be told how much it cost the successful party to present or defend its case. Counsel will be expected to outline the amount of time spent on the file and the total fees charged

> the client, preferably in the form of a short affidavit filed with the court. Only then will a judge be able to assess whether those expenses were "reasonable" before going on to decide whether the costs to be awarded will in fact represent a significant contribution to such expenses."

[10] Our Court of Appeal, in *Williamson v. Williams*, [1998] N.S.J. No. 498, at paragraph 25, provided the following guidance on the meaning of "substantial contribution":

> "In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances."

[11] This suggests, in my view, that party and party costs awards considerably below the range of 2/3 to 3/4 of solicitor and client costs, may now satisfy the "substantial contribution" requirement. However, as noted by Justice Moir, "the Courts have usually avoided percentages", and, as noted by Justice Goodfellow, in Armour Group, the "level of exceptional services required" may vary from case to case. Therefore, no fixed costs-to-expenses ratio can be used. Nevertheless, it appears that lower contribution ratios are more likely to be acceptable now, than they were in 1989."

[84] Fichaud, J.A., in ***Armoyan v. Armoyan***, 2013 NSCA 136, at paragraph 37, stated:

> "As noted in Williamson, with which I agree, generally speaking the 'substantial contribution' should exceed fifty percent of the appropriate base sum, but should not approach the full indemnity of a solicitor and client award. The percentage should vary, in a principled manner, according to the circumstances of the case. Considering Mr. Armoyan's conduct, as discussed, and the rejected settlement offer of October 2011, a substantial contribution here should represent: (a) 66% of the $100,000 base sum before the settlement offer of October 2011 for the forum conveniens proceeding in the Family Division (i.e. $66,000); plus (b) 80% of the $200,000 base sum after that settlement offer for the forum conveniens proceeding in the Family Division (i.e. $160,000); plus (c) 80% of the $100,000

> base sum in the Court of Appeal for both appeals (i.e. $80,000). This totals $306,000, including disbursements." [Emphasis by underlying added]

[85] Justice Fichaud's inclusion of the words "generally speaking" suggests that he did not leave out the possibility that a contribution of less than 50% might be considered sufficiently substantial in appropriate circumstances. Further, he clearly increased the amount of contribution significantly to account for Mr. Armoyan's conduct in the proceeding.

[86] In contrast, the Defendants in the case at hand did everything they could to streamline the trial and to accommodate the Plaintiff's late disclosure. They even accommodated the Plaintiff's insistence that the supplementary discovery examination of her take place in Calgary, despite it being her own late disclosure of voluminous materials which necessitated the supplementary discovery. They commenced a pretrial motion to exclude expert evidence well in advance of the trial. They only had one witness. Their cross-examinations were focused and concise. They refrained, as much as possible, from objecting so as to not disrupt the Jury, despite the Plaintiff's witnesses straying outside the bounds of admissibility on multiple occasions. They quickly responded to mid-trial motions brought by the Plaintiff, and efficiently presented their own mid-trial motions. The Defendants could have raised the issue of the discount rate used by the Plaintiff's actuary before the commencement of trial because the erroneous rate was used in

her initial report. However, they had moved to exclude the report in its entirety. The court's decision excising only parts of the actuarial report was not rendered until about two weeks before trial. That left little time for a pretrial motion to address the discount rate, in the midst of trial preparation. Consequently, there is no conduct on the part of the Defendants which would warrant a principled increase in what constitutes substantial contribution. If anything, it is the manner in which the Plaintiff conducted her case which would warrant a reduction below 50%. I will address those later.

[87] I agree with the Plaintiff that the present case is an appropriate one for the use of Scale 3, in Tariff A, because of time-consuming circumstances of the case, including: its unusual nature, given that the deceased was in the process of reviving his art career; the number of experts, some of which required discovery in Toronto and Vancouver; and, the out-of-province travel necessitated by the large number witnesses in Western Canada, Toronto and in the United States.

[88] In my view, in the case at hand, the "amount involved", for the purposes of Tariff A, is the amount awarded less statutory deductions, i.e. $798,319.39. Prejudgment interest is not to be included in the amount involved for the purposes of determining tariff costs: ***Mader**, supra*, para. 39. However, it would not matter if prejudgment interest were added because the amount involved would still be in the

range of $750,001 to $1 million. Using that amount involved, Scale 3 prescribes a tariff amount of $80,938. Since there were 17.5 days of trial, a further $35,000 is to be added in accordance with the specified supplementary daily amount of $2000. That results in total tariff costs of $115,938 which rounds off to $116,000. That is approximately 49% of the reasonable legal costs of $239,000. In the circumstances, given the exemplary manner in which the Defendants conducted their case, as compared with the less than exemplary manner in which the Plaintiff conducted her case, and the rough approach used to determining reasonable legal expenses, I am of the view that $116,000 does constitute a substantial contribution to the Plaintiff's legal expenses. I note that Oland, J.A., in ***MacIntyre v. Cape Breton District Health Authority***, 2011 NSCA 3, awarded lump sum costs of $300,000 where solicitor client costs were $700,000, without conducting an analysis of whether an amount less than the solicitor client costs represented reasonable legal expenses. That case is some support for the conclusion that lump sum costs awards need not meet the 50% threshold to provide substantial contribution in every situation.

[89] In the event I am wrong on that point, I also find that the circumstances of the case were not sufficiently special to require a level of "exceptional" legal services that was sufficient to warrant departing from tariff costs. The Court in

Armour Group Ltd. V. Halifax (Regional Municipality), 2008 NSSC 123, at paragraphs 20, 21, 24 and 25: held that such special circumstances were required and informed the determination of how far the court should depart from the tariff amounts; and, provided examples of what might constitute special circumstances. The examples included the following: 1) complexity; 2) public interest; 3) pre-chambers process; 4) unsettled questions of law; 5) conduct or misconduct of a party and or solicitor; 6) failing to use an alternative and less costly process to determine the dispute; 7) the need for additional counsel; 8) the presence of multiple counsel, unless the additional counsel have limited participation; and, 9) the presence of expert witnesses. In the case at hand, the unusual nature of the case, and the number and location of the witnesses, including expert witnesses, the number of documents, along with the pretrial motion warranted using Scale 3. However, despite being unusual, the case was not complex. The case is not of any real public interest. The pretrial process, though time-consuming, did not require exceptional legal services. Other than the question of the discount rate there were no unsettled questions of law. Any misconduct was on the part of the Plaintiff. The Defendants paid more than their share of the mediation in an effort to resolve the matter through a less costly process, which proved unfruitful. The Plaintiff did not require multiple counsel. There were expert witnesses. However, it was not

because of the technical nature of the subject matter. Rather, it was because of the subjective nature of art and of the aspects of the art business which are not common knowledge amongst the public. Therefore, even if the tariff amount did not provide substantial contribution, the circumstances of the case would not warrant departure from the tariff amount, because they did not demand "exceptional legal services".

[90] For these reasons, I am of the view that the tariff amount of $116,000 is an appropriate starting point, subject to any adjustment warranted by the manner in which the Plaintiff handled this case.

ISSUE 3: IF NO TARIFF AMOUNT IS APPROPRIATE, OR AN APPROPRIATE STARTING POINT, WHAT IF ANY LUMP-SUM AMOUNT IS APPROPRIATE, OR AN APPROPRIATE STARTING POINT?

[91] In view of my determination on Issue 2, it is unnecessary to address this issue.

ISSUE 4: WHAT, IF ANY, AMOUNT SHOULD BE DEDUCTED FOR THE MANNER IN WHICH THE PLAINTIFF CONDUCTED HER CASE?

[92] Rule 77.12 states:

> "(1) A judge may award, assess, and provide for payment of costs for any act or omission of a person in relation to a proceeding or an order.
>
> (2) A judge who determines that expenses are caused by the improper or negligent conduct of counsel may order any of the following:
>
> > (a) counsel not recover fees from the client;
> >
> > (b) counsel reimburse the client for costs the client is ordered to pay to another party as a result of counsel's conduct;
> >
> > (c) counsel personally pay costs."

[93] In the case at hand, it has not been advanced, and there is no evidence, that the manner in which the Plaintiff's case was conducted arose from the improper or negligent conduct of counsel, acting on his own, as opposed to in accordance with the instructions of the Plaintiff herself. As such, a case has not been made out for costs consequences personal against the lawyer for the Plaintiff.

[94] Rather, the Defendants are seeking an order requiring the Plaintiff to pay costs to them, or at least denying costs to the Plaintiff, based upon the manner in which she conducted her case.

[95] The impugned conduct, they submit, is comprised of problematic witnesses, delays and improper actions or tactics, including those in the list which follows. I will provide the Court's comments in relation to each item as I go through the list.

a. Submission:

The reports of five of the Plaintiff's experts were problematic. Those included the reports of Nicholas Metivier, Edith Yeomans, Jeffrey Spalding, Jerri Lynn Erikson and Jessie Shaw Gmeiner. The Defendants brought a motion to exclude those reports. The Plaintiff also requested that the report of the Defendant's expert, Beth Noble, be excluded. The hearing commenced in March 2013. However, it was short-circuited because the justice hearing it recused himself on the Plaintiff's motion that he do so. The admissibility motion was ultimately heard by myself on June 26, 2013. In a reserved written decision, I excluded Ms. Erickson's report entirely. I excluded the great majority of Mr. Metivier's report. I excluded the majority of Mr. Spalding's report. Ms. Gmeiner's report had to be significantly revised to eliminate reliance on Mr. Metivier's opinion and remain neutral. The portions of the reports of Ms. Yeomans and Ms. Noble countering or commenting on the inadmissible portions of Mr. Metivier's reports were excluded because of the inadmissibility of Mr. Metivier's expert evidence.

Court Comment:

I agree with the Defendants and add the following. The bulk of Mr. Metivier's reports was clearly tainted by the bias arising from his prior work with the gallery that represented Mr. Brocke and from the fact that he was

self-promoting his own plan for Mr. Brocke. His general comments regarding the sale of art in Canada could easily have been covered by one of the other experts, such as Ms. Yeomans. Similarly, his rebuttal of the opinion regarding lack of appreciation the value of Mr. Brock's paintings was covered by Ms. Yeomans. That left only the incorporated opinion prepared for the Canadian Cultural Property Export Review Board ("CCPERB") to be specifically addressed by him. The fact that they were prepared for income tax purposes and tainted by the tendency to support his earlier opinions, diminished the reliability of that opinion significantly. The CCPERB values were referenced by Ms. Yeomans and Mr. Spalding, in their reports. That would have been sufficient to bring that opinion into the trial. As such, Mr. Metivier added little as an expert witness. His primary function was as a fact witness. The report of Ms. Erickson was excluded because it dealt solely with grief and grief counseling, which are not compensable in wrongful death cases in Nova Scotia. As such, it was totally irrelevant, and should never have been presented. Similarly, the Plaintif ought to have recognized the many shortfalls in the report of Mr. Spalding and submitted a revised report instead. I also infer that the non-neutral

portions of Ms. Gmeiner's report were prompted from the input of the Plaintiff and should also have been avoided by the Plaintiff.

b. <u>Submission:</u>

Even though the action was commenced in 2009, and the trial had already, in March 2013, been set to September 2013, it was not until April 2013 that the plaintiff produced to the Defendants three volumes of materials. Most, if not all, of those materials were ultimately part of the exhibit books at trial. The Defendants withdrew the motion they had filed to exclude those documents, agreeing instead to their admissibility on condition that they could conduct an updated discovery of Ms. Gardner to address those new documents. Ms. Gardner agreed to such a discovery on condition that it take place in Calgary. Therefore, the Defendants had to incur additional costs of having their lawyer travel there for discoveries. Those additional costs could have been avoided if the documentation had been produced in accordance with the Civil Procedure Rules such that they could have been addressed in the initial discovery. In addition, the supplementary materials required the Defendants to obtain an updated report from their own expert in July 2013. Although their expert would have to have reviewed the materials at an

earlier date, in any event, there is an additional expense associated with revisiting the matter to provide a supplementary opinion based on new materials.

Court Comment:

I agree that this late disclosure caused unnecessary extra legal expenses to Defendants. The Plaintiff suggests that the relevance of the materials did not become known until the Defendants' expert was taking the position that Mr. Brocke had not returned to his art work full-time. However, the evidence at trial clearly showed that, at the time of the accident, Mr. Brocke was still putting the finishing touches on his studio and still working on the homestead property. He had not decided on gallery representation. He did not have any completed works for a show. He was questioning whether he wanted to work as an artist full-time. Therefore, the Plaintiff ought to have known that the nature of his return to his artwork was an issue and had to be established by her. Further, the late-disclosed documents did not pertain only to his status as an artist immediately preceding his death, it contained records going back many years. The Plaintiff, having unreasonably withheld substantial and substantive the disclosure until shortly before trial, in my view, ought to have had the courtesy of minimizing, as much as possible, the

extra costs caused to the other party by that late disclosure. To insist upon being re-discovered in her own area so as to save herself the inconvenience of traveling to Nova Scotia demonstrates a lack of appreciation of the importance of timely disclosure.

c. Submission:

The Court's written decision on the admissibility of the expert reports clearly concluded that "neither grief, nor grief counseling, are compensable in wrongful death cases in Nova Scotia". Nevertheless, the Plaintiff's pretrial brief advanced such a claim. Consequently, the Defendants were forced to make a motion at the beginning of the trial to readdress that point so as to attempt to prevent grief and sorrow evidence from being led by the Plaintiff.

Court Comment:

In making this claim, the Plaintiff was challenging the correctness of the express ruling in ***Campbell Estate v. Varanesse*** (1991), 102 N.S.R.(2d) 104 (S.C., A.D.) that damages could not be awarded under the ***Fatal Injuries Act*** for grief and sorrow. I am bound by that decision. So that aspect was clearly doomed to failure She was also challenging the decision in ***Rowe v. Brown***,

2008 NSSC 13, where the Court disallowed a claim for emotional distress on the basis that it was not a permissible head of damages under the ***Fatal Injuries Act***. Although the ruling in ***Rowe*** is not binding on me, it flows naturally from the ruling in ***Campbell Estate*** and makes sense. Further, the Plaintiff did not witness the accident. So any emotional distress could only flow from grief and sorrow. As such, that aspect of the claim was also doomed to failure. Therefore, in advancing that claim, the Plaintiff unnecessarily wasted the Defendants' legal resources.

d. Submission:

At the beginning of the trial, the Plaintiff indicated that she was seeking to call Ms. Erickson as a fact witness. In the course of the discussion as to what Ms. Erickson could testify to, since her expert evidence was declared inadmissible, the Defendants learned for the first time that she was a long-time friend of the Plaintiff. She was allowed to testify as a lay witness.

Court Comment:

Given the long-standing personal relationship between the Plaintiff and Ms. Erickson, the Plaintiff ought to have known that Ms. Erickson was not a

proper person to provide expert opinion evidence, as she clearly would not have the requisite lack of bias. In addition, when she testified, it was clear that she was also acting as an advocate for the Plaintiff. The fact of that relationship was not revealed to the Defendants until the time of trial. Had her expert's report not been excluded for lack of relevance, it may never have surfaced. In my view that would have been misleading by omission, and it was an unjust and unfair tactic to attempt to have Ms. Erickson present expert evidence on her behalf. Further, even after Ms. Erickson's expert report was excluded because it related to grief and sorrow, Ms. Erickson strayed into the area of grief and sorrow in her fact evidence. The reason for exclusion of her expert evidence ought to have been made known to her and it ought to have been impressed upon her that she was not to provide any evidence related to those matters. Her evidence added nothing to the trial. Therefore, more likely than not, the plaintiff presented Ms. Erickson as a witness in an attempt to substitute her fact evidence for the opinion evidence declared inadmissible, so as to put some evidence of the grief and sorrow experienced by the Plaintiff before the Jury. My view, that resulted in prejudice to the Defendants and in wasting their legal resources.

e. Submission:

Ms. Erickson's evidence added nothing to the overall trial, and neither did the evidence of Mark Skarzinski, who was added as a last-minute witness to replace a witness who could not appear. This added unnecessarily to the expense and duration of trial. Similarly, the evidence of Willow Brocke, even though she was not a late addition to the witness list, added nothing.

<u>Court Comment:</u>

I agree that the evidence of Ms. Erickson added nothing to the trial. Mr. Skarzinski provided some evidence of his discussions with Mr. Brocke regarding blended families and a string of positive descriptors and adjectives for Mr. Brocke and his relationship with the Plaintiff and the children. However, he provided little concrete evidence. His evidence was of minimal utility. However, Willow Brocke did provide concrete evidence regarding Mr. Brocke's development and practices as an artist, as well as his family life. In my view, that evidence was useful, and the evidence of the early years was not available from the other witnesses.

f. <u>Submission:</u>

At the beginning of the trial, the Defendants also sought to exclude the evidence of Emily Draper who the Plaintiff was seeking to use as a lay

witness, when, in fact her evidence would have been expert opinion evidence in relation to annuities. She was not permitted to testify.

Court Comment:

In my view, it ought to have been clear to the Plaintiff that the evidence she sought to elicit from Ms. Draper was expert evidence, because the annuity cost figure or figures to be presented would have to have been arrived at by actuarial calculation. As a result, the Plaintiff caused the Defendants to incur the costs of a motion they ought not have been required to make.

g. Submission:

The Plaintiff produced Chris Sandvoss, who was a personal friend of Mr. Brocke, as a witness. However, his evidence added nothing as the approximately $1050 in artwork Mr. Brocke had added to musical instruments of Mr. Sandvoss was already in the financial documents in evidence. The cost of his travel from Calgary to testify was not justified given the lack of value of his testimony.

Court Comment:

I agree that the only concrete evidence Mr. Sandvoss provided was in relation to the works that Mr. Brock had painted on his musical instruments, and that the amounts were already contained in the art business accounting records exhibited. His evidence regarding discussion of a three cello project in collaboration with Peter Togni of the CBC was merely a discussion of an idea, with no concrete plans. It was of little or no use. Consequently, I agree that the value of his evidence did not justify the cost of his travel from Calgary.

h. Submission:

The revised report prepared by Ms. Gmeiner, following the Court's decision on admissibility, did not comply with the directions in the decision. The Defendants' motion to require her to rewrite it so that it did conform to the decision was successful. Three more versions had to be produced before it did conform. That unnecessarily increased the costs of preparing the report that was ultimately used, and any wasted expenses should not be recovered. In the course of those revisions, the Defendants insisted that Ms. Gmeiner use the 3.5% discount rate specified in the Insurance Act and related regulations. The plaintiff refused to direct that she do so. The parties had to

submit written briefs mid-trial and a half day was used to argue the issue. I ultimately determined that the 3.5% discount rate was to be used.

Court Comment:

I agree with the counter-submission of the Plaintiff that there had not been any prior judicial pronouncement on the interpretation of Section 4 of the *Automobile Insurance Tort Recovery Limitation Regulations* , and, therefore, no negative cost consequences should arise from the plaintiff refusing to direct Ms. Gmeiner to use the 3.5% discount rate specified in that section. However, it was clear that Ms. Gmeiner's reformulation of her report, following this Court's decision on admissibility, did not comply with the directions for revision contained in the decision. It also contained some additional information, not contained in the initial report. More likely than not, the failure to follow this Court's direction, and adding new information, occurred because Ms. Gmeiner followed the Plaintiff's directions. As such, any additional report preparation expense should not be recoverable, and the additional expense unnecessarily incurred by the Defendants in reviewing and disputing the changes to the report should be considered in determining costs.

(i) Submission:

Also at the beginning of the trial, the Plaintiff indicated she wished to provide guidance on the appropriate range of damages in her opening statement to the Jury. The hearing of the motion to determine whether that was permissible was scheduled for the following morning, before bringing the Jury in. The Defendants scrambled to provide written submissions in advance of the motion. At the time scheduled for the hearing of the motion, the Plaintiff, who had not provided any written submissions, simply advised that the issue was not going to be pursued. The Plaintiff's frivolous motion caused the Defendants to incur unnecessary legal expenses.

Court Comment:

The fact that the Plaintiff withdrew the motion without even making argument highlights how frivolous and ill-conceived it was. I agree that the Defendants were forced to incur unnecessary legal expenses as a result. In addition, it unnecessarily diverted the attention and energy of their lawyers from the real issues at trial, thus prejudicing the Defendants. Therefore, cost consequences should follow.

j. Submission:

Time was spent on the first day of trial removing documents in the exhibit books compiled by the Plaintiff which had not been disclosed to the Defendants, as well as other inadmissible evidence.

Court Comment:

This again demonstrates the Plaintiff's lack of appreciation for the importance of timely disclosure. It also demonstrates a carelessness in relation to ensuring that only admissible evidence was presented to the Jury. If it were the only problematic point, it would not impact costs. However, it is to be considered as part of the constellation of problematic points in this case.

k. Submission:

Towards the middle of the trial, it was discovered that an un-redacted copy of Mr. Metivier's report had been left attached to the report of the Plaintiff's expert, Ms. Yeomans, which was in the exhibit books compiled by the Plaintiff. The Jury had to be polled to determine whether individual jurors had read the report, then all the exhibit books had to be revised to remove the offending material. This took one half day. The Defendants had only received the exhibit books at 4:45 PM the day before trial. Consequently,

they had not had time to peruse them to pick up the offending material given the voluminous nature of the exhibit books.

Court Comment:

This, yet again, demonstrates the Plaintiff's carelessness in ensuring that inadmissible evidence did not find its way to the Jury. It too should be added to the constellation of problematic points to be considered as part of determining costs.

l. Submission:

There were repeated incidents of the Plaintiff's witnesses attempting to provide evidence which had been ruled inadmissible, or which they were incapable of giving as a fact witness, and even taking advantage of opportunities to slip in such evidence. This necessitated removal of the Jury from the courtroom to discuss the issues and ultimately instructions to the Jury to ignore inadmissible testimony.

Court Comment:

I agree with the submissions of the Plaintiff that it is not uncommon for this to occur occasionally in a long trial. However, the extent of the other

inadmissible evidence included in the exhibit books, and the presentation of Ms. Erickson as a fact witness which had nothing useful to add, but strayed into the area grief and sorrow, causes the Court to question whether the Plaintiff made reasonable effort to ensure her witnesses did not provide inadmissible evidence. Nevertheless, I am not prepared, without further evidence, to attribute negative cost consequences to the Plaintiff as a result of her witnesses failing to remain within the bounds of admissibility.

m. Submission:

The Defendants had written to the Plaintiff prior to trial advising her that they would not need to cross-examine her expert witness, Mr. Spalding and were prepared to have his testimony entered without his attendance. She chose to call Mr. Spalding in any event, thus, unnecessarily incurring the expense and trial time of his attendance.

Court Comment:

The Court in ***Terris v. Crossman***, [1995] P.E.I.J. No. 116 (S.C., T.D.), at paragraphs 3 to 7, noted that negative cost consequences generally flow from a party unnecessarily calling an expert witness to testify when the other party agrees the expert's report may be entered into evidence without cross

examination, and that such consequences may include denying recovery of disbursements for that expert. In my view negative cost consequences should flow from the Plaintiff insisting that Mr. Spalding would be brought to testify after the Defendants indicated they did not need to cross-examine him. I also find that the disbursement associated with procuring his attendance and his testimony at trial should not be reimbursed. In my view it does not matter that the Defendants decided to cross-examine him once he was there. The Plaintiff still brought him to the trial unnecessarily. It also does not change things that there was a chance he might be called on rebuttal. That would have required a separate attendance many days later in any event.

n. Submission**:**

In the course of the Plaintiff's closing address to the Jury, her counsel sought to use five large billboards as demonstrative aids, without any advance warning to the Defendants. This necessitated argument and a determination in relation to which, if any, of these demonstrative aids could be used, causing further delay. The Plaintiff was only permitted to use one of them. The remainder provided evidence that was not introduced at trial or misrepresented the evidence presented at trial.

Court Comment:

The Plaintiff responded to this submission with two points. First, irrespective of when the charts were presented, it would have taken time to review them and determine whether they could be used. Secondly, the actuarial report was not finalized until partway through trial, and that was needed for the preparation of some of the charts. These points have some merit. However, had the issue of the charts been raised prior to commencement of closing arguments, the issue could have been addressed at a time when it would not have resulted in a prolonged pause for the Jury, mid-argument. In addition, the applicable law and its application to the case could have been examined during the evening, rather than during trial time. The delay in finalization of the actuarial report was, in my view, to a large extent due to the Plaintiff's actions. Further, it was still finalized in time to allow the charts to be prepared in advance of closing arguments. However, considering the overall length of the trial, this maneuver added relatively little to the length of the trial. I also note that the Plaintiff was permitted to use two of the demonstrative aids, as opposed to one.

o. Submission:

Even after the Court ruled the portion of the demonstrative evidence which misrepresented the evidence of Beth Nobles to be not usable because it was misleading and prejudicial, counsel for the Plaintiff proceeded to provide the same information to the Jury verbally.

Court Comment:

Counsel for the Plaintiff did misrepresent to the Jury that Ms. Noble's evidence was that you could take the average price per square inch values for paintings sold by Mr. Brocke in the 1990s and apply them to works he created in the 1980s. When she had been asked a question regarding present day values of a particular painting from the 1980s, in the context of the price per square inch approach, she had noted that the painting in question was from the 1980s and not the 1990s, and been told to forget about that, and was asked in follow-up, only about taking the price per square inch calculation from the 1990's and inflating it to current day values. She did not indicate that the submitted approach could be taken. She also added that the price per square inch approach is not always the process used to arrive at an appropriate price for a painting. None of the other experts provided any evidence that their opinions on valuation could be dismantled into price per square inch components and applied to works in the 1980s.

In addition, the submissions on behalf of the Plaintiff had initially stated that actual amounts submitted had been part of Ms. Noble's opinion. That was corrected during the second part of her closing arguments, after being addressed by the Court in the absence of the Jury. However, there was no correction of the misrepresented general approach. The Court had to deal with that in its instructions.

There was no opinion evidence comparing the nature, quality, nor sizes of the works sold by Mr. Brocke in the 1980s with those sold and 1990s, nor any opinion evidence regarding appropriate comparable size categories. Therefore, the submissions made on behalf of the Plaintiff, in addition to misrepresenting, took on the flavor of expert opinion evidence.

p. Submission:

After closing arguments, the Defendants raised over 30 problematic items emanating from the Plaintiff's closing address and matters arising throughout the trial as a result of the Plaintiff's actions and witnesses. The Court itself raised additional ones. At least a full day was spent dealing with those issues. In contrast, the one complaint regarding the Defendants' closing address that the Plaintiff raised was dropped.

Court Comment:

The Plaintiff argued that these problematic points “were addressed separately and formed only a small part of the closing instructions”. I agree that they were addressed separately. In addition, considering the instructions as a whole, they formed a relatively small part. However, the portion of the instructions addressing the problems arising from the Plaintiff’s closing arguments included over six pages of single-spaced typed text. In my view, that is a significant amount of instruction time to have to devote to problems arising from closing arguments. The problems arising from the evidence of the Plaintiff’s witnesses were spread out through-out the instructions in small morsels. However, many evidentiary points were not re-raised, even though they were problematic, because the prejudice of re-raising them was greater than the prejudice of remaining silent in relation to them.

A few of the problematic points included those which follow.

In closing, the Plaintiff attempted to use inadmissible hearsay evidence to argue Mr. Brocke was in the ”same category” as other realist painters such as Alex Colville. The closest supporting evidence was that of Ms. Yeomans who testified they were both realist painters. However, she did not place

them in the same category in terms of reputation and other characteristics. Mr. Metivier, while testifying, had slipped in an inadmissible comparison between Mr. Brocke and Alex Colville. This misrepresented and inadmissible evidence caused the Court great concern because of the particular prejudice it would create in front of a jury sitting only 15 minutes' drive from where Alex Colville lived and worked. This prompted prolonged discussions on how to best deal with the prejudice, taking into consideration the dangers of repeating the comparison in the course of instructions to the Jury. It was an example of a deliberate attempt by the Plaintiff to use highly prejudicial inadmissible evidence, which had already been the source of much discussion, both pre-trial and mid-trial.

In addition to the time spent during instructions to the Jury in addressing these problematic points, there was significant trial time spent discussing them and how they should be addressed. I agree with the Defendants that at least a full day was used up in such discussions. Further, during those discussions, counsel for the Plaintiff, on multiple occasions, misrepresented the evidence which had been led at trial. That resulted in sending the Court on unnecessary "wild goose chases", re-listening to the recordings of the evidence, to confirm what the evidence really was. Consequently, the

Plaintiff's careless /reckless approach unnecessarily used up significant trial time and resources.

q. Submission:

The Plaintiff objected to the Court providing the Jury with a written copy of its instructions necessitating submissions and argument, causing further delay, even though the Plaintiff acknowledged the Court was authorized to do so.

Court Comment:

The Court ultimately decided not to provide a copy of its written instructions the Jury. Therefore, no negative cost consequences ought to flow from the Plaintiff's objection.

r. Submission:

During the pre-charge conference, the Plaintiff's counsel took a significant amount of time attempting to minimize the issues created by the way the Plaintiff's case was presented throughout the trial, including the apparent lack of preparatory effort to avoid witnesses from providing evidence already ruled inadmissible, and by his closing address.

Court Comment:

I agree that was the case. However, the resulting wasted trial time and resources has already been considered under item “p”.

s. Submission:

The problematic issues resulting from the Plaintiff’s conduct of the case required a significantly longer charge to the Jury than would otherwise have been necessary, so as to overcome any resulting prejudice to the Defendants.

Court Comment:

I agree that the approach taken by the Plaintiff did result in a longer charge to the Jury. The extent of that has already been discussed under item “P” as well.

[96] I agree with the submission of the Plaintiff that she was successful on some mid-trial motions and not totally unsuccessful on others. I also agree that mere lack of success on some motions does not justify reducing a costs award. This is particularly the case where the issue addressed on the motion initially arose as a result of some action or evidence of the party who was ultimately successful on the

motion, such as the issues in relation to the report of Ms. Noble, which arose from the fact that it was prepared in response to a portion of the report of one of the Plaintiff's experts. However, in my view, where motions are made necessary by improper or ill-considered actions, or where the motions themselves are ill-conceived, causing unnecessary delay or expense to the opposing party, negative cost consequences should follow.

[97] In my view, the following motions were unnecessary, or were made necessary by improper or ill-considered actions of the Plaintiff, and should attract negative cost consequences:

a. the motion to present the evidence of Emily Draper as it ought to have been clear that it amounted to expert actuarial evidence, without notice;

b. for the most part, the motion dealing with Ms. Gmeiner's report, because after the Court clearly directed the portions to be removed so as to avoid it presenting an unbalanced picture to the Jury, the Plaintiff proceeded to add new content which also presented an unbalanced picture;

c. the motion dealing with evidence related to grief and sorrow, or emotional distress arising therefrom, as the law is clear on those points; and,

d. the motion requesting that the Plaintiff be permitted to refer to a range of damages in her opening remarks, which, after reading the submissions of the Defendants, the Plaintiff dropped, confirming her motion was ill-conceived in the first place.

[98] These unnecessary motions used up approximately 1 day of unnecessary trial time.

[99] The Plaintiff's carelessness in assembling the joint exhibit books, improper approach to revising Ms. Geminer's report, and demonstrative aids ambush resulted in unnecessary trial time, in addition to resulting motions, of at least one day.

[100] The improper evidence and closing submissions of the Plaintiff used further unnecessary trial time totalling one day to one and one-half days.

[101] The unnecessary evidence of the Plaintiff witnesses, Ms. Erickson, Mr. Skarzinski, Mr. Sandvoss, and, Mr. Saplding, along with the discussions relating to it, unnecessarily used up more than one-half day, but less than one day.

[102] In addition, during the third day of trial, the Jury brought to the Sheriff's attention that the Plaintiff was "doing a lot of directing to the witnesses" with non-verbal communication by nodding her head. This prompted a discussion and assessment regarding what instruction should be given to the Jury and the order of witnesses. It culminated in the Plaintiff voluntarily being absent from the Courtroom when certain witnesses testified. That issue also wasted trial time.

[103] On Day 5 of the trial there was a discussion regarding Nicholas Metivier explaining why photos of unfinished works were not attached to his report. The discussion raised unfulfilled disclosure obligations of the Plaintiff. It used up about an hour of trial time.

[104] It is appropriate to deny costs associated with unnecessary witnesses or wasted trial time: ***Zlatkovic v. Wladyczanski***, [1981] O.J. No. 431 (H.C.J.), affirmed by C.A. October 13, 1982, unreported; ***Terris v. Crossman*** , [1995] P.E.I.J. No. 116 (T.D.); ***Robertson-Phillips v. Demuth***, [1991] B.C.J. No. 3671 (S.C.); and, ***Moyer v. Bosshart***, [1991] B.C.J. No. 3738 (S.C.).

[105] In my view, a total of approximately 4.5 to 5 trial days were wasted by or because of the Plaintiff. As a result, the Plaintiff's daily costs amount for that time, totalling $9,500 should be deducted from her costs award.

[106] That wasted trial time unnecessarily increased the Defendants legal expenses, as did the Plaintiff's abandoned or unnecessary motions, and those motions made necessary by improper actions or tactics of the Plaintiff. Those should attract a cost consequence. Further, the prejudicial actions and tactics of the plaintiff should attract cost consequences as they, more likely than not, had an impact on the Jury which could not be fully remedied by instructions.

[107] The travel to Calgary for the supplementary discovery of the Plaintiff, made necessary by her failing to provide timely disclosure and refusing to travel to Nova Scotia, also significantly increased the Defendants costs.

[108] In my view, considering these points, and the other problematic points I have discussed, the Plaintiff's costs award should be reduced by a further 45%.

[109] Despite all of the problematic issues I have raised, I am not of the view that the circumstances of this case justify a total denial of costs, or costs to be paid to the Defendants, as submitted by the Defendants.

[110] In support of their submission that such a result should obtain, they presented cases which include:

a. ***HMC Group Inc. v. Nova Scotia (Attorney General)***, [2000] N.S.J. No. 335 (S.C.), referred to in Rhyno Demolition Inc. v. Nova Scotia (Attorney General), [2005] N.S.J. No. 225 (S.C.);

b. ***Robb Estate v. Canadian Red Cross Society***, [2001] O.J. No. 702 (S.C.J.);

c. ***Real Securities of Canada Ltd. V. Beland***, [1987] O.J. No. 1424 (D.C.); and,

d. ***Fraser v. Westminer Canada Ltd.***, [2005] N.S.J. No. 89 (C.A.).

[111] In ***HMC Group***, the relevant conduct of the defendant, which resulted in it, as a successful party, paying costs, was conduct prior to the commencement of litigation, i.e. the manner in which it had used incidents of delayed ambulance arrival to support and justify its pre-existing plan to consolidate emergency dispatch services. To proceed with that consolidation, it had also terminated a contract with the plaintiff, and reneged on direction and authority it had given. In the case at hand, the Plaintiff succeeded in obtaining an award of damages higher than what it would have received if it had accepted the Defendants' offer, and there was nothing in the Plaintiff's pre-litigation conduct which would warrant a negative costs consequence. It is also noteworthy that the defendant in ***HMC***

Group was a government, which likely influenced the trial judge's approach to costs.

[112] In ***Robb Estate***, the court awarded, to the unsuccessful defendant, the Red Cross Society, the costs associated with unnecessary, ill-conceived or improper motions and witnesses, including improperly prepared and/or presented expert evidence, emanating from the improper conduct and trial approaches or tactics of the plaintiff's counsel. It rejected the Society's submission that the plaintiff's costs should be reduced to demonstrate the court's disapproval of the plaintiff's counsel. In that case, the court found that reducing the costs entitlement of the plaintiff families would be unfairly visiting the conduct of their lawyer upon them, who the court found to be reasonable and respectful. It indicated that the proper remedy would have been to award costs consequences directly against the lawyer, which had not been requested. It noted that the "machinations" of the plaintiff's counsel had not influenced the outcome of the trial because the trial judge was alert to the ramifications of his conduct. It is noteworthy that, in that case, there were multiple plaintiff estates and defendants, with some contribution towards costs to be paid by the Society, from other defendants.

[113] In the case at hand, in my view, more likely than not, the decision to call the witnesses which I have found to have been unnecessary, the use or attempted use

of problematic experts, in particular Ms. Erickson and Mr. Metivier, and the attempt to improperly slip in comparisons between Mr. Brock e and Alex Colville, was at least partially due to the Plaintiff herself, as opposed to her lawyer only. Ms. Erickson was her long-time personal friend. She is the one who personally contacted Mr. Metivier to assist her in pursuing her claim. Mr. Metivier, while working for the Mira Goddard Gallery, had promoted Mr. Brocke as being comparable to Alex Colville and would have continued to do so in the future. Mr. Sandvoss was also a personal friend of the family. Mr. Skarzinski was a personal friend and Mr. Brocke's brother-in-law. The motion regarding damages for grief or grief counseling was, in my view, an extension of the attempt to have Ms. Erickson provide evidence on those points. Also, in the case at hand, there is only one Plaintiff seeking damages for herself and other claimants, and the only defendants are the driver and owner of the Defendants' motor vehicle. Further, liability was admitted, leaving damages is the only issue. It was not a situation where the respective liabilities of multiple defendants were at issue, as in the ***Robb Estate*** case. Further, I cannot conclude that the "machinations" of the Plaintiff, through her counsel, did not affect the outcome of the trial.

[114] Consequently, in my view, unlike the ***Robb Estate*** case, the case at hand is an appropriate one in which to address the problematic manner in which the

Plaintiff's case was prosecuted by a reduction in the Plaintiff's costs, rather than by a piecemeal award of costs to the Defendants in relation to specific motions and witnesses at trial.

[115] The ***Real Securities*** case involved a motion by the lawyer for all but one of the defendants seeking costs personally against the lawyer for the plaintiff, in relation to a motion to adjourn a motion by the plaintiff to strike a counterclaim, which had been set for a day on which the defendants' lawyer was not available. Though the defendants' were successful in obtaining the adjournment, costs were denied because the defendants had caused substantial delay and the plaintiff's lawyer acted reasonably in initially opposing the adjournment request, and that lawyer's ultimate consent to the adjournment was the "turning point" in it being granted. The Court found both counsel had permitted "pride to get in the way of common sense and co-operation". It also found that the defendants' lawyer made "provocative and denigrating" remarks against the plaintiff's lawyer, which it characterized as "improper, vexatious and unnecessary". In the case at hand, there were no such improper personal attacks against opposing lawyers, nor any request for costs personally against the lawyer for the Plaintiff, Ms. Gardner. Though, more issues should have been resolved by consent in the case at hand, there was no evidence that it was the pride of the lawyers for either side which prevented it. The

case at hand involves a determination of costs following a month-long civil jury trial, including numerous mid-trial motions, preceded by a subtstantial motion to exclude expert evidence, such that problematic conduct did not emerge constantly throughout the proceedings and was not as all-encompassing as in the ***Real Securities*** case. Therefore, in my view, it not a useful precedent and does not justify a total denial of costs to the Plaintiff in the case at hand.

[116] In ***Fraser v. Westminer***, the Court denied costs to the successful defendants primarily because they spent "50% of the pretrial and trial time unsuccessfully challenging the factual basis" for the findings in an earlier and very lengthy litigation. That situation did not obtain in the case at hand. However, the Court, at paragraphs 34 and 35, provided the following relevant and helpful commentary:

> "**34** The corporate appellants have not provided us with any specific cases supporting its argument that there must be almost abusive or reprehensible conduct before there can be costs sanctions. Rather it refers us to Orkin, supra, s. 205.2(2). That section refers to many cases where costs have been denied in many different factual circumstances, for example, if a person has been guilty of reprehensible, or dishonest and criminal conduct, of unfair dealings, or has engaged in unnecessarily harsh proceedings. On the other hand, it also refers to cases where costs have been denied where a party failed to proceed promptly, prolonged the trial by calling unnecessary witnesses, behaved unreasonably during or leading up to litigation, introduced irrelevant evidence and made an unduly long argument or advanced an unmeritorious claim. <u>What these cases suggest is that a trial judge has a broad discretion to decide what actions merit costs consequences, not that the action must almost amount to an abuse of process</u>.
>
> **35** The Rules approach costs in the same way. They provide for discretion, 63.02(1), set the presumption that costs will go to the successful party on the whole proceeding or on any issue of fact or law, 63.03(1), and then in Rule

> 63.04(2) set out some factors that may be considered by a court in fixing costs. As indicated in s. 28, supra, these factors include conduct which unnecessarily lengthens the duration of the proceeding, 63.04(2)(c), the manner in which the proceeding was conducted, 63.04(2)(d), any step which was prolix or unnecessary, 63.04(2)(e) and any other matter relevant to the question of costs, 63.04(2)(j). This does not suggest a party's action must be almost abusive to warrant a costs sanction. It suggests a broad discretion in the trial judge."
> [Emphasis by underlining added.]

[117] Current Rule 77.07 sets out similar factors to consider in increasing or decreasing tariff costs.

[118] In my view, this broad discretion to impose cost consequences for actions of parties continues to apply under the current *Civil Procedure Rules*, and the factors noted above justify the Court exercising its discretion to decrease tariff costs as outlined.

ISSUE 5: WHAT, IF ANY, AMOUNT SHOULD BE SET-OFF AGAINST THE COSTS AWARD?

[119] Rule 77.11 provides that: "A judge who awards party and party costs may order a set-off against another award of costs or any other amount."

[120] In the case at hand, the Court released its written decision on the pre-trial motion to exclude expert opinion evidence on August 15, 2013. The trial commenced September 3, 2013. The form of the order was not settled until after

the commencement of trial and no substantive submissions on costs were made in relation to that motion until after completion of the trial.

[121] The Plaintiff submits that, since the Court did not otherwise order, the costs of that motion should be "in the cause". She relies on ***Sable Mary Seismic Inc. v. Geophysical Services Inc.***, 2012 NSCA 57 in support.

[122] However, in my view, the issue of costs in relation to that motion was not argued until the costs of the trial were argued. They are yet to be determined. In addition, ***Sable Mary Seismic***, at paragraph 20, was applying paragraph (2) of Tariff C, which states: "Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A." Therefore, even if I had already determined the amount of costs for the pretrial motion, if I had not otherwise ordered, I would have to deduct any costs awarded to the Defendants on the motion from any costs awarded to the Plaintiff following trial, and add any costs awarded to the Plaintiff on the motion to any costs awarded to her following trial. Consequently, the costs of the pretrial motion are not properly treated as being "in the cause", such that "the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding" as specified in Rule 77.03(4)(a).

[123] In my view, the approach which best does justice between the parties, in the case at hand, is to assess costs on the pretrial motion and add them to, or deduct them from, trial costs, as applicable.

[124] The Defendants were substantially successful on the pre-trial motion for exclusion of expert reports.

[125] The report of Ms. Erickson was excluded in its entirety as it related only to grief, for which no damages could be awarded. It became obvious at trial that Ms. Erickson ought never have been retained as an expert for the Plaintiff as she was a long-time personal friend. In my view, the Plaintiff ought to have recognized that a personal friend lacked the level of impartiality required to provide expert opinion evidence. Failing to disclose the relationship in an attempt to introduce her evidence revealed a desire to gain an unfair advantage. Had the relationship been disclosed, it would have been clear that she could not properly act as an expert, and it would likely have obviated the need for a motion to exclude it.

[126] The majority of the opinions in the reports of Mr. Metivier were excluded, largely due to his lack of impartiality. His reports were pared down to an opinion on how paintings are sold and priced in Canada, and an opinion rebutting that of Ms. Noble, including incorporation by reference of the opinion he prepared for the

CCPERB. The first part of the opinion could easily been provided by another expert with no personal connection to the deceased's former and potentially future art business. The weight of his opinion prepared for the CCPERB was negatively affected by his diminished level of impartiality. The Plaintiff contacted him to assist her in the litigation knowing of his connection to the deceased and associated level of partiality. In my view, it ought to have been clear to the Plaintiff that Mr. Metivier was not a proper person to provide the bulk of the opinions in his reports. It resulted in the Defendants incurring expenses in making the motion which it ought not have had to have incurred. His opinions which were the most central to the proceeding were excluded. They were comprised of opinions in the following general categories: future production and prices; future salability; past gallery experience; and, the impact of taking extended time away from painting.

[127] Mr. Spalding's report had provided opinions in relation to 17 points. They were all excluded except for his opinions on two points, with his opinion on one of those points having references to Mr. Brocke being an exceptional artist removed.

[128] The portions of Ms. Gmeiner's actuarial report promoting Mr. Metivier's plan for marketing Mr. Brocke's art and its acceptance by the Jury, and those portions challenging the opinion of Ms. Noble, the expert for the Defendants, were excluded. Those were the aspects of her report which the Defendants had a real

issue with. They were not strongly opposed to her presenting evidence of fair and balanced actuarial calculations, though they submitted that the process of engaging in such calculations could be presented to the Jury by way of instructions from the Court.

[129] The Defendants sought exclusion of the expert report of Ms. Yeomans, which was admitted in its entirety. However, the Defendants acknowledged that, of all the expert reports presented by the Plaintiff, that of Ms. Yeomans was the most fairly presented. Their main submission was that it was unnecessary because the Jury could make its decision based upon income information from when Mr. Brocke was working full-time as a gallery artist.

[130] The Plaintiff sought to exclude the report of Ms. Noble. The only portions of her report which were excluded were those in which she rebutted the portions of the three reports of Mr. Metivier which were excluded.

[131] Tariff C provides that the range of costs for an application in which the hearing lasts one day or more is $2000 per full day, and $1000-$2000 for a hearing lasting more than one half day but less than one day. Rule 77.05(1) provides that: "The provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise." I see no reason to order otherwise.

[132] The parties appeared in court to argue the exclusion motion: before Justice Warner for one full day, on March 5, 2013; and, before myself, for more than one half day, but less than a full day, on June 26, 2013. That results in total Tariff C costs ranging from $3000 to $4000.

[133] The motion involved nine reports from six different experts. With the exception of the report of Ms. Erickson, the reports contained opinion on multiple points, with Mr. Spalding's report containing opinion on 17 points. Ample reference was made to the lengthy discovery evidence of Mr. Metivier and Ms. Noble. In my view, this necessitated a significant amount of effort to prepare for and conduct the motion. In addition, the motion was of significant importance to the parties as the evidence was central to the Plaintiff's loss of support claim. These factors, in my view, warrant multiplying the maximum amounts in the range of costs by two, as provided for in paragraph (4) of Tariff C.

[134] Therefore, in my view, an appropriate costs award for the exclusion motion, which will do justice between the parties, is that the Plaintiff be required to pay costs of the motion to the Defendants in the amount of $7000, which amount is to be set-off against and deducted from trial costs payable by the Defendants to the Plaintiff.

[135] I am not of the view that the recusal motion should engender any costs consequences for or against any party. It was not opposed and Justice Warner decided to recuse himself without hearing argument. The parties did appear before Justice Warner on April 18, 2013 for that motion. However, he announced his recusal immediately and proceeded to address case management issues. The entire appearance lasted only 20 minutes.

ISSUE 6: SHOULD HST BE ADDED TO THE COSTS AWARD?

[136] In my view, our Court of Appeal, has clearly determined that HST is not to be added to a costs award: ***G.B.R. v. Hollett***, [1996] N.S.J. No. 345 (C.A.), at para 198; ***Mader v. Lahey***, 1997 CarswellNS 572 (S.C.), at para 43, affirmed 1998 CarswellNS 180 (C.A.); and, ***MacIntyre v. Cape Breton District Health Authority***, 2010 NSSC 170, at para 27, affirmed 2010 NSCA 3.

ISSUE 7: WHAT, IF ANY, DISBURSEMENTS SHOULD BE AWARDED?

[137] Brian Hebert's Supplemental Affidavit sworn October 30, 2013, attaches, as Exhibit A, a revised Bill of Costs which lists the disbursements claimed against the Defendants. I will address the requested disbursements in the order in which they

appear on that list. Unless otherwise indicated, amounts referenced are inclusive of HST.

[138] Items 1 to 4 include the MVI report, filing fees, law stamp and medical records, totalling $483.02. In my view those are proper disbursements and I allow them.

[139] Item 5 claims 75% of the cost of 21,353 internal photocopies at $.25 per copy. In my view, the actual cost of the photocopying is significantly less than that, and internal photocopies should not become a source of profit to a law firm at the expense of the party paying costs. In my view, a much fairer rate, which might still exceed the actual cost, is $.10 per copy. There has been no breakdown of the purposes for which the copies were made. More likely than not, a significant portion would have been for the purpose of making copies for the client, rather than to prosecute the action. In my view, that portion should be disallowed, even though there is insufficient information to determine it with precision. To account for that disallowed portion, I will allow only 70% of the internal photocopies, at $.10 per copy. That totals $1,494.71, before HST and $1718.92 after HST.

[140] Items 6, 7 and 8 claim the costs of copying and binding exhibits for trial through three different external businesses. With the exception of the enlarged

photo and whiteboards which the plaintiff was not permitted to use as demonstrative aids, those are proper disbursements. The invoice from The Printing House Ltd., dated September 16, 2013, has already been reduced to account for that disallowance. According to my calculations, the proper total allowable amount for items 6, 7 and 8, based on the receipts attached as part 1 of Exhibit B to Mr. Hebert's Supplemental Affidavit, is $8503.92.

[141] Item 9 claims 75% of photocopies with Bailey & Associates Inc. at $.25 per page, without noting the number of copies, and providing only a subtotal of $1818.16 before reduction, for a total of $1,568.16. However, the invoice from Bailey & Associates gives no indication of the number of copies, nor of the purpose for which the copies were made. It merely shows a photocopy expense totaling $1620 noted as having been incurred on November 12, 2009. In my view, that does not provide sufficient information to properly assess the reasonableness of the photocopying expense. However, the invoice does reveal that, more likely than not, that firm represented the Plaintiff from February 2009 to June 2010. It is reasonable to expect that, during that period of time, it would have incurred legitimate photocopying expenses. In the absence of more detailed information, I will only allow $350, inclusive of HST, for this item.

[142] Item 10 claims a total of $595.18 for “delivery”. Mr. Hebert explained that these were Courier charges. He did not specify whether they were charges associated with an internal or an external Courier, nor why it was reasonable to incur Courier costs. The Wickwire Holm draft report of disbursements, attached as part 13 of Exhibit B merely describes the expenses as being for “deliveries”. Therefore, it does not provide any further assistance to the Court in assessing the reasonableness of the expenses. Delivery or courier costs are properly claimable disbursements if reasonably incurred. Given the nature of the file, in my view, it would reasonably necessitate such expenses being incurred, and the total amount claimed appears to be within a reasonable range. Therefore, I will allow the amount claimed.

[143] Item 11 claims $1068.57 for “investigative services”. The Plaintiff’s counsel indicated that this was to have someone “speak to witnesses”. It is one of the items listed in the Bailey & Associates invoice without any explanation as to what the services were. Counsel for the Plaintiff did not explain how he knew what the expense was for and did not express his view as to what it was for with certainty. I have not been provided with sufficient information to determine that it was reasonable to hire someone to speak to witnesses, nor even that that is what the expense was for. Consequently, I disallow the claim for item 11.

[144] Items 12 and 13 indicate that the Plaintiff has properly withdrawn her claim for reimbursement of fax and postage expenses.

[145] Items 14, 15 and 16 claim expenses relating to accommodations, meals and transportation required for the Plaintiff's lawyer to travel out of province for the purpose of attending discoveries and meeting with witnesses. Those expenses total $7,743.29. In my view they are appropriate and I allow them.

[146] Item 17 claims reimbursement of expenses related to transporting expert witnesses to trial. I agree with the plaintiff that no disbursements should be allowed for Ms. Erickson. She was not allowed to testify as an expert and she did not provide any useful evidence as a lay witness. Her report went only to grief, for which damages were not available. Had Mr. Metivier not been required as a lay witness, his value as an expert witness would have been so minimal that the cost of his attendance would have outweighed the value of his evidence. Since he was required as a lay witness, I will allow a claim for his travel, meals and accommodations. There was no invoice or receipt provided breaking down those expenses. However, counsel for the Plaintiff provided a copy of a certified check in the amount of $3500 made payable to Harrison Pensa in trust. Counsel for the Plaintiff explained that it represented $2500 in witness fees to accompany the subpoena served upon Mr. Metivier, with the addition of an extra $1000 to account

for the fact that he was also an expert witness. An expert witness is obligated and undertakes to attend court to testify as required. An appropriate expert witness need not be subpoenaed, and need not be served with witness fees like other witnesses. However, his only significant value as a witness was as a lay witness, and it appears that he became a less than willing witness. Therefore, I will allow the $2500 basic witness fees as the amount for travel, meals and accommodation expenses in relation to Mr. Metivier. Edith Yeomans' invoice dated September 19, 2013, indicates total disbursements for travel, meals and accommodations of $1556.79. Those are supported by receipts and I allow them. Jeffrey Spalding's invoice indicates a car rental fee of $284.43 and a lunch fee of $16.50. The airfare receipt for Jeffrey Spalding shows a total airfare of $1733.86. There is also an invoice in the amount of $103.50 shown as being for Mr. Spalding's accommodations. However, the Defendants advised the Plaintiff in advance of trial that they did not need to cross-examine Mr. Spalding and were prepared to agree that his report could be entered into evidence without him testifying. Therefore, it was not reasonably necessary to procure his attendance at trial, and I will not allow travel expenses for him. The fact that the Defendants did decide to cross-examine him since he was present does not make it reasonable to procure his attendance. The fact that it was possible he may be required for rebuttal does not make it

reasonable either. In the end he was not called in rebuttal. If he had been required for rebuttal then his travel expenses would have been reasonably incurred. Jessie Shaw Gmeiner's invoice dated September 12, 2013, indicates a mileage expense of $104.76. I will allow that amount as well. These result in properly claimed and supported disbursements for travel, meals and accommodation for experts totaling $4,161.55.

[147] Item 18 indicates that the Plaintiff has properly withdrawn her claim for disbursements associated with law searches.

[148] Item 19 indicates that the Plaintiff is still seeking disbursements totaling $129.54 for long distance charges, despite having stated during the hearing that she was withdrawing that claim. To the extent that long distance charges may have been required to communicate with witnesses or potential witnesses, I am of the view that it is a reasonable and proper disbursement. In my view, any portion relating to communications between the Plaintiff and her lawyer ought not be allowed. I do not have information regarding what proportion of that amount relates to communication with witnesses. However, I will reduce the total amount by approximately 50% to account for the fact that, more likely than not, a significant portion of long distance charges related to communications with the Plaintiff herself. Therefore, I will allow $65 for item 19.

[149] Item 20 claims total of $5941.29 for expenses relating to discovery of witnesses. In my view, these are proper disbursements. However, according to my calculations, the receipts/invoices provided establish a total expense of $5895.71. I will award that amount.

[150] Item 21 claims $25,236.47 in expert fees for the actuary, Jessie Shaw Gmeiner. According to my calculations, even if one considers the full amount of the invoices provided, the total would be $23,304.47. In addition, it is appropriate to deduct certain amounts from that total. The September 12, 2013 invoice includes a mileage charge of $104.76. That amount has already been included in determining the total expert witness travel expenses, and must be deducted. On the Defendants' motion to exclude expert evidence I excluded those portions of Ms. Gmeiner's report which expressly selected Mr. Metivier's plan over the opinion of Ms. Noble, because it's prejudicial effect outweighed its probative value, and permitted the substitution of neutral examples to demonstrate the calculation process. Ms. Gmeiner charged $3450 to revise her report prior to trial. However, in making those revisions, she failed to follow the Court's direction, provided a best case scenario example, and added additional elements to her report. The Defendants were successful on a mid-trial motion to require the report to be rewritten. It took three further iterations before arriving at the final version which

complied with my ruling. She charged an additional $5658 for those additional revisions. In my view, more likely than not, the Plaintiff significantly influenced the content of the initial report and revised reports so as to bolster her case. She ought to have known that it would result in an actuarial report which was unfairly slanted. Consequently, in my view, it is proper to deduct from the total expert fees relating to Ms. Gmeiner: a small portion of the charge for the initial report; a large part of the charge for the revisions following my decision and prior to trial; and, a large part of the charges for producing, during the trial, the multiple versions preceding the one complying with my ruling. However, during the trial, Ms. Gmeiner had to spend some time adjusting her report to conform with my decision on the Defendants' mid-trial motion to determine the appropriate discount rate. In deciding how much to deduct, I have taken that into consideration, and have determined that it is appropriate to deduct $6500. Therefore, that leaves $16,699.71 as reasonable disbursements for the actuarial evidence.

[151] Item 21 claims $13,500 in expert fees for Mr. Metivier. $2,500 of that amount has been allowed as travel expenses. The portions of the Metivier's report which were admitted into evidence were minimal and available from other sources, which were free of the taint of bias attaching to Mr.Metivier. Mr. Spalding and/or Ms. Yeomans could have spoken to how paintings are sold and priced in Canada,

and both did refer to the valuation of *Via La Butte* and *Aurora* for the CCPERB. His value to the trial was as a fact witness. In addition, Mr. Metivier indicated, at discoveries, that he was providing his expert opinion for free. Any fee charges arose only from his reluctance to come to court to testify. He had to be procured as a lay witness. However, if that had not been the case, the value of his expert evidence would not have warranted the cost of even procuring his attendance, let alone paying any expert fees. When I did a cost-benefit analysis in relation to his expert evidence, in determining admissibility, it was on the understanding he would not be charging expert fees. Consequently, in my view, the entire expert's fee for Mr. Metivier ought to be disallowed as a disbursement expense.

[152] Item 23 claims $30,542.70 in expert fees for Ms. Yeomans. According to my calculations, her invoices total $26,558.87. The Plaintiff in her revised Bill of Costs, has shown that amount as being before HST and then erroneously added HST to arrive at the amount claimed. The proper total of the invoices is $26,558.87. However, I have already allowed $1556.79 of that amount for travel, meals and accommodation expenses in relation to getting the experts to the place of trial. Consequently, that amount must be deducted, leaving a balance of $25,002.08 in expert fees for Ms. Yeomans. In my view, she was the most helpful of the art experts. Her hourly rate for preparation of the report was $300 and her

hourly rate for preparation for trial is $250. Those rates seem high. However, I am unable to conclude that they are so unreasonably high as to warrant disallowing a portion of them. Nevertheless, I noted that she charged $2000 per day for attendance at court on two days. In fact, she only testified on September 17, 2013, commencing at approximately 10:45 AM and ending at approximately 2:15 PM, with a lunch break, which amounts to approximately ½ day. It appears as though she charges in full-day units as opposed to half-day units. Consequently, I will only disallow the charges of attendance at court for one day, instead of 1.5 days. That amounts to a further reduction, after factoring the HST, of $2300, leaving $22,702.08 as the appropriate amount of disbursements for expert fees in relation to Ms. Yeomans.

[153] Item 24 claims $2800.93 in expert fees for Mr. Spalding. His report was much less comprehensive than that of Ms. Yeomans and his expert evidence was less valuable. His account for professional fees is modest. A large portion of Mr. Spalding's report was excluded. However, that was primarily because it lacked sufficient information for the Jury to properly assess the opinion, not because he lacked impartiality, nor, except where he acknowledged it to be the case, because he lacked expertise. In my view, the Plaintiff requested an expert's report from Mr. Spalding in good-faith, at least partly to overcome the problems associated with

Mr. Metivier's bias. However, since the Defendants advised the Plaintiff they did not need to cross-examine him, it was not reasonably necessary to have him testify in person. Therefore, there should be a reduction in Mr. Spalding's expert's fees of $1,000 to account for the portion of his fees which related to attending court to testify. Also, $300.93 of that amount was for travel expenses. Consequently, that amount must also be deducted from the total, leaving a balance of $1500 in expert fees for Mr. Spalding.

[154] Item 25 claims $317.27 for the expert report prepared by Ms. Erickson. I agree with the Defendants that no disbursements should be allowed for the Erickson report, for the same reasons that I disallowed travel expenses for her.

[155] Item 26 claims $4456 for an expert accident reconstruction report from Stuart Smith. However, the only document provided in support of this claim is a proposal and estimate. In my view, that is insufficient to establish what, if any fee was paid to Mr. Smith. I, therefore, disallow the claim for this item.

[156] Item 27 claims $4532 for an "expert report" from Ms. Noble. However, the Plaintiff explained that that amount was the costs she incurred to have the Defendants' expert, Ms. Noble, attend discoveries. That is a proper disbursement and is supported by invoices. I allow the full amount.

[157] Items 29, 30 and 31 claim a total of $13,472.36 for accommodations, meals and transportation for the Plaintiff's witnesses, including the Plaintiff herself.

[158] I agree with the Defendants that the only concrete evidence Chris Sandvoss provided was in relation to the works that Mr. Brocke had painted on his musical instruments, and that the approximately $1050 paid to him was already contained in the art business accounting records exhibited. His evidence regarding discussion of a three-cello project in collaboration with Peter Togni of the CBC was merely a discussion of an idea, with no concrete plans. It was of little or no use. Consequently, I agree that the value of his evidence did not justify the cost of his travel from Calgary. I similarly view the evidence Mark Skarzinski. Most of his evidence was comprised of long strings of positive adjectives for Mr. Brocke. He engaged in philosophical discussion of Mr. Brocke as an artist, husband and father, and of the conversations he had with Mr. Brocke. However, he added little or no concrete evidence. He could not even relate any discussion with Mr. Brocke regarding any specific challenges he may have been having with his stepdaughter, Carrie Alison, even though the evidence of other witnesses clearly indicated that was a well-known and ongoing issue. I am also the view that the value of Mr. Skarzinski's evidence did not justify the cost of procuring his attendance from

Calgary. Therefore, I disallow any expenses relating to Mr. Sandvoss and Mr. Skarzinski.

[159] The Defendants also submit that expenses incurred for the Plaintiff, and the children and step-children of John Brocke (collectively referred to as the children), to attend trial should not be allowed as proper disbursements. The Plaintiff sought and was awarded damages relating to loss of care, guidance and companionship, and loss of future gifts, for those children.

[160] The court in ***Allto-Import, A. Larsson AB. V. Fairbanks***, [1990] N.S.J. No. 207 (S.C., T.D.), in the second from last paragraph, stated:

> "For general policy considerations, I am of the view that a losing party in an action ought not be substantially penalized merely because the successful party resides in some distant part of the world. In this case, the plaintiff, a Swedish company, elected to come to this Province to do business. If, in the course of doing business in this Province it elects to sue (as in this case) or is sued it ought to be treated as any other party and be regarded as resident in this Province. This constraint would, of course, apply only to parties (or as in this case, persons acting in that capacity for a company) and not to expert witnesses."

[161] The Plaintiff suggested that the ***Allto-Import*** case should be distinguished on the basis that it involved a corporate litigant doing business in Nova Scotia, while the case at hand involves an individual plaintiff. However, ***Allto-Import*** itself states that such a Corporation "ought to be treated as any other party". Therefore, it saw no reason to distinguish between corporate and individual litigants. Further,

the Court in ***Creighton v. Nova Scotia (Attorney General)***, 2011 NSSC 437, dealing with an individual plaintiff in a quieting of titles action, applied the reasoning in ***Allto-Import***, and denied the plaintiff's own expenses to travel to Nova Scotia throughout various stages of the litigation, including the hearing. In my view, the principle does apply to individual litigants, irrespective of whether the litigation arises from the conduct of any business in Nova Scotia.

[162] ***Allto-Import*** does state that the "constraint would … apply only to parties". However, it makes that comment to highlight that it does not apply to expert witnesses. Further, in applying the constraint to the officers and directors of a corporate party, the Court signaled that its reference to "parties" was not to be read in a strict and narrow sense. Rather, a flexible interpretation is to be applied to take into account the practical realities of particular circumstances.

[163] In the case at hand, the children, Joseph Brocke, Bethany Brocke, Carrie Alison and Rebecca Laxshimalla, were not added as parties, even though they had standing to sue in their own right. Instead, damages were sought and obtained for them by the Plaintiff. Effectively, the Plaintiff, as personal representative of the Estate, also sued as the representative of the children, for wrongful death damages to which they were found to be entitled, as opposed to damages for the Estate itself, which might ultimately benefit them as beneficiaries. Therefore, the children

were effectively parties; and, in my view, the constraint against allowing their travel related expenses to be claimed as disbursements applies. It would be nonsensical to disallow their travel expenses if are added as named parties, and to allow those expenses merely because the Plaintiff sued as their representative.

[164] Consequently, I will disallow all expenses for transportation, meals and accommodations in relation to the Plaintiff and the children.

[165] The invoices at parts 10, 11 and 12, of Exhibit B to the supplementary affidavit of Brian Hebert, reveal expenses which are identifiable as being for Nathan Ball and Willow Brocke, totalling $3046.76. I will allow this amount as the disbursements under items 29, 30 and 31. This amount includes transportation, meals and accommodations in relation to Mr. Ball and Ms. Brocke. In this amount, I have included $11.08 as the portion of the September 10, 2013 lunch receipt which was attributable to Mr. Ball, even though the precise portion was not specified.

[166] The grand total of disbursements allowed is $77,997.14.

CONCLUSION

[167] Based on the foregoing, I conclude and order that the Defendants shall pay the Plaintiff:

a. $6,805.15 in pre-judgment interest;

b. $40,925.00 in Costs (after deducting the $7,000 in costs of the pre-trial motion for exclusion of expert reports awarded to the Defendants and against the Plaintiff), with no HST to be added; and,

c. $77,997.14 for disbursements, inclusive of HST.

ORDER

[168] I ask counsel for the Plaintiff to prepare the order.

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Muise, J.