

Citation: *Topping v Department of Transportation and Infrastructure and Parsons*,
2026 NBKB 16

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

MC-867-2024

BETWEEN:

KEVIN TOPPING

PLAINTIFF

- and -

**DEPARTMENT OF TRANSPORTATION AND
INFRASTRUCTURE and LISA PARSONS**

DEFENDANTS

DECISION

BEFORE: Justice Maya Hamou

DATE OF HEARING: January 16, 2026

DATE OF DECISION: January 28, 2026

APPEARANCES: Kevin Topping, appearing on his own behalf
Jason Caissie, Counsel appearing on behalf of the Defendants

OVERVIEW

Factual Background

1. The Plaintiff, Kevin Topping, was at all relevant times the owner of a property located at 432 La Vallée in Memramcook, New Brunswick. The Plaintiff has since sold the property and resides in Vernon, British Columbia.
2. The Plaintiff filed a Notice of Action with Statement of Claim Attached (the “Claim”) against the Department of Transportation and Infrastructure (the “Defendant DTI”) and against Lisa Parsons (the “Defendant Parsons”) (collectively “the Defendants”). The Department of Transportation and Infrastructure is the Department within the Province of New Brunswick that maintains and oversees highways. Lisa Parsons was employed by DTI as an assistant district engineer during the times relevant to this litigation.
3. A few background facts are relevant to the Plaintiff’s Claim:
 - a. The Defendant DTI performed maintenance work on Route 106 in Memramcook, New Brunswick.
 - b. Around 2022, the Plaintiff contacted the Defendants to advise he was experiencing flooding on his property, suggesting it was caused by water runoff from Route 106 and that the flooding on the property was preventing him from rebuilding following a fire.
 - c. The Plaintiff obtained an engineering report which opined on the water drainage patterns on the Plaintiff’s property and on the cause of these water drainage patterns.
 - d. The Plaintiff provided the engineering report to the Defendants.
 - e. The Plaintiff provided the Defendants with a doctor’s note suggesting the Plaintiff should be accommodated for employment purposes to allow him to record meetings.
 - f. The Plaintiff requested to record his meetings with the Defendants. The Defendant Parsons told the Plaintiff she would not consent to having their meetings recorded.

Claim, Defence and Motions

4. The Plaintiff’s Claim against the Defendants alleges:
 - a. The Plaintiff’s property has experienced flooding due to improper drainage along Route 106.

- b. The Defendant DTI has failed to take remedial actions in response to the Plaintiff's allegations.
 - c. The denial of the request to record meetings with the Defendants was a violation of the Plaintiff's section 7 rights under the *Canadian Charter of Rights and Freedoms*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the "*Charter*").
 - d. The Plaintiff has suffered losses including immediate repair costs, loss of rental income and increased construction costs.
 - e. The Plaintiff has suffered emotional distress.
5. In their Defence, the Defendants state:
- a. DTI is responsible for winter maintenance on Route 106, but the Village of Memramcook is responsible for decisions on capital roadwork.
 - b. DTI undertook work on parts of Route 106 in 2018 at the direction of the Village of Memramcook but did not change the elevation of the road or remove a crown on the highway.
 - c. No major changes have been made to Route 106 in at least 50 years.
 - d. The Plaintiff's inability to undertake work on his property was due to the denial of a request for a permit by the Southeast Regional Service Commission.
 - e. The Defendants denied knowledge of any flooding of the property and denied claims of flooding caused by improper drainage on the highway.
 - f. The Defendants denied that the refusal to allow the Plaintiff to record meetings constituted a breach of the Plaintiff's section 7 *Charter* rights.
 - g. The Defendants denied an action could be maintained against Lisa Parsons personally for allegations of a breach of the Plaintiff's *Charter* rights.
 - h. The Defendants relied on section 4(8) of the *Proceedings Against the Crown Act*, RSNB 1973, c P-18, to suggest that no action could be maintained against Lisa Parsons for actions taken in the execution of her duties as an employee of the Crown.
 - i. The Defendants relied on section 70.1 of the *Highway Act*, RSNB 1973, c. H-5, which provides that the Crown is immune from liability for nuisance.
6. The Court is tasked with hearing three Motions from the Plaintiff and one Motion from the Defendants.

7. The Plaintiff filed Motions seeking to strike out portions of the Defendants' Statement of Defence under Rule 23 of the *Rules of Court*, alleging that certain sections contain contradictory statements, legal errors, and improper defences. The Plaintiff also seeks a court order to permit him to file documents electronically rather than in hard copy format.
8. The Defendant filed a Motion seeking to dismiss the Claim against the Defendant Parsons under Rule 23 of the *Rules of Court*, seeking security for costs under Rule 58.01(a) of the *Rules of Court*, and seeking an order for substituted service.

Procedural Issues

9. At the outset of the hearing, the Court clarified some procedural issues arising from the Motions before the Court.
10. First, the Court confirmed, with the consent of the parties, that the Affidavits in the Record were to be considered in addressing all Motions currently before the Court.
11. Second, the Court confirmed, at the request of the parties and with their consent, that Tabs 8, 9 and 10 of the Record were to be considered in the hearing of the Motions. These tabs contained Affidavits from the Plaintiff which were served on the Defendants, but which were not considered properly filed, and which did not bear the stamp of the Court. Although the documents were sent to the Court, the documents contained some formatting deficiencies which the Clerk's Office determined rendered them non-compliant with the *Rules of Court*. The Court deemed these documents to be filed for the purpose of the Motions.
12. Third, the Court confirmed, at the request of the parties and with their consent, that a recent Notice of Motion and two recent Affidavits from the Plaintiff were to be considered in the hearing of the Motions. These documents were added as tabs 11, 12 and 13 of the Record. The documents had been previously served on the Defendants and sent to the Court but not filed or stamped. Further, the recent Notice of Motion requested similar relief to the relief outlined in the first two Motions filed by the Plaintiff. The Court deemed these documents to be filed for the purpose of the Motions.
13. The Court notes that the Defendants in the matter graciously prepared a Record with numbered pages and which included all Motions and Affidavits filed by the parties. While not explicitly required by the *Rules of Court*, the initiative of Counsel for the Defendants in preparing the joint Record is noted and appreciated. It greatly facilitated and assisted the Court with the hearing of the Motions on their merits.

ISSUES

14. On the Motions filed by the Plaintiff, the issues to be decided are:

- a. Should the Court strike parts of the Statement of Defence pursuant to Rule 23 of the *Rules of Court*?
- b. Should the Court grant permission for the Plaintiff to file documents with the Court electronically rather than in hard copy format?

15. On the Motion filed by the Defendants, the issues to be decided are:

- a. Should the Court strike out the Plaintiff's claim against the Defendant Parsons pursuant to Rule 23 of the *Rules of Court*?
- b. Should the Court grant summary judgment of the Plaintiff's Claim of breach of section 7 Charter right against the Defendants under Rule 22 of the *Rules of Court*?
- c. Should the Court order substituted service allowing the Defendants to serve the Plaintiff via electronic mail?
- d. Should the Court order security for costs pursuant to Rule 58.01(a) of the *Rules of Court*?

LAW AND ARGUMENT

Rule 23 - Motions to Strike Statement of Defence

16. The Plaintiff filed Motions seeking to strike out portions of the Defendants' Statement of Defence, under Rule 23 of the *Rules of Court*, alleging that certain paragraphs contain contradictory statements, legal errors, and improper defences.

17. By way of background, it is important to understand the context in which Rule 23 arises and the parameters applicable to evidence which may be considered on a motion under Rule 23. Rule 23 deals with "Determination of Questions Before Trial" and Rule 23.01(1) provides for determinations on questions of law, for the striking of pleadings and for judgments on admissions.

23.01 Where Available

(1) The plaintiff or a defendant may, at any time before the action is set down for trial, apply to the court

(a) for the determination prior to trial, of any question of law raised by a pleading in the action where the determination of that question may dispose of the action, shorten the trial, or result in a substantial saving of costs,

(b) to strike out a pleading which does not disclose a reasonable cause of action or defence, or

(c) for judgment on an admission of fact in the pleadings, in the examination of an adverse party, or in answer to a Request to Admit Facts;

18. Rule 23.02 provides that on motions under Rule 23.01(1), the Court is limited to a consideration of the pleadings or discovery.

23.02 Evidence

Except with leave of the court, on applications under Rule 23.01(1), evidence shall not be admitted except

(a) a transcript of a relevant examination, and

(b) affidavits which are necessary to identify a document or prove its execution.

19. The New Brunswick Court of Appeal in *Optimum Insurance Company Inc. v Donovan*, 2009 NBCA 6, at paragraph 31, stated that evidence permitted under Rule 23 motions is limited and that leave to admit further evidence under Rule 23.02 ought not be granted absent exceptional circumstances.
20. The Court of Appeal noted in *Sewell v ING Insurance Company of Canada*, 2007 NBCA 42 at paragraph 26 that when dealing with a motion to strike, the record should be comprised exclusively of the pleadings and that evidence purporting to provide a factual foundation for the action or defence is inadmissible. The Court of Appeal reiterated the purpose of Rule 23.01(1)(b) which is to strike a pleading that on its face does not disclose a cause of action (see also *International Association of Firefighters, Local 1053 v The City of Fredericton*, 2026 NBCA 4, para 7).
21. The Court of Appeal noted in *Druet v Girouard*, 2012 NBCA 40, at paragraph 21, that when dealing with a motion for the determination of a question of law under Rule 23.01(1)(a), evidence is not admissible as the Rule does not contemplate factual determinations and determinations of mixed fact and law.
22. Thus, based on the guidance of the Court of Appeal, the Plaintiff' Motion to strike portions of the Statement of Defence under Rule 23 of the *Rules of Court* is limited to consideration of

the pleadings and no additional information or documentation included in the Affidavits filed by the parties may be considered in this context.

Contradictory or Misleading Statements and Knowledge of Flooding

23. First, the Plaintiff argues that paragraphs 5(a) and 5(b) of the Statement of Defence, where the Defendants deny knowledge of flooding or that improper drainage caused the flooding, are contradicted by admissions made in paragraphs 5(c) and 5(d) and that they should be struck as they are “contradictory and misleading”. Paragraph 5 of the Statement of Defence reads as follows:

5. The Defendants state the following as to the allegations found at paragraph 1 under the heading “Facts Supporting the Claim”:

- a. The Defendants have no knowledge of ongoing flooding on the Plaintiff’s property;
- b. The Defendants deny that there is improper drainage along Route 106 causing flooding on the Plaintiff’s property;
- c. The Defendants admit that the Plaintiff did obtain an engineering report from Fisher Engineering which opined on the cause of water on the Plaintiff’s property, including an alleged lack of a road crown and drainage patterns; and
- d. The Defendants admit that the Plaintiff has provided the engineering report to DTI, and that DTI has not made any changes to Route 106 following receipt of this report.

24. The Defendants admitted in paragraphs 5(c) and 5(d) of the Statement of Defence that the Plaintiff obtained an engineering report which opined on the cause of water on the Plaintiff’s property and that the engineering report was provided to DTI. These admissions do not amount to an acceptance of the findings outlined in the engineering report; these admissions are solely an acknowledgement that the report exists and that the report was provided to DTI.

25. Paragraphs 5(a) and 5(b) of the Statement of Defence outline a denial of flooding on the Plaintiff’s property and a denial of flooding caused by improper drainage of water on Route 106. These denials arise from assertions set out in the Statement of Claim.

26. Under Rule 27.07 of the *Rules of Court*, applicable to Defences and Replies, a party is required to deny disputed allegations of fact. Further, a party is required to state they have no knowledge of all other facts, otherwise, the facts will be deemed to be admitted.

27.07 Rules of Pleading - Applicable to Defence and Reply

Admissions and Denials

(1) A party, in his defence or reply, shall deny every allegation of fact in the pleading of the opposite party which he disputes; all other allegations of fact in the pleading of the opposite party shall be deemed to be admitted unless the party pleading alleges that he has no knowledge thereof.

27. As suggested by the Defendants, a pleading of “no knowledge” does not mean the Defendants are not aware of the Plaintiff’s Claim, it simply means the Defendants are not in a position to admit or deny the pleaded fact. It will be the Plaintiff’s burden to establish the facts in order to be successful in its action.
28. The Court declines to strike the Statement of Defence and concludes the Defendants’ allegation that it has no knowledge of the Plaintiff’s ongoing flooding and no knowledge of the cause of flooding is not inconsistent with the remaining allegations in the Statement of Defence.

Absence of Material Facts

29. Second, the Plaintiff is moving to strike the parts of the Statement of Defence that respond to his allegations regarding an alleged breach of his section 7 *Charter* rights.

2. Violation of Charter Rights

- The Plaintiff, as someone with a learning disability, submitted a medical note requesting permission to record interactions with DTI officials to process information effectively
- Lisa Parsons, Assistant District Engineer, denied this request, impairing the Plaintiff’s ability to fully participate in discussions and advocate for the protection of his property.
- This denial violates Section 7 of the Canadian Charter of Rights and Freedoms, which guarantees life, liberty and security of the person.

30. Effectively, the Plaintiff pleads the Defendants were presented with a doctor’s note stating the Plaintiff needed accommodation for work to allow him to record meetings by email / text or audio to be successful at his employment and that the Defendant Parsons advised the Plaintiff she would not consent to the Plaintiff’s recording of their conversation; the Plaintiff alleges this conduct violated his section 7 *Charter* rights.
31. The Defendants responded to the Plaintiff’s allegations relating to a breach of section 7 of the *Charter* in paragraph 6 of their Statement of Defence.

6. The Defendants state the following as to the allegations at paragraph 2 under the heading “Facts Supporting the Claim”:

- a) The Plaintiff did provide a medical note to the Defendants which stated that the Plaintiff needed an accommodation for work requesting that meetings be recorded by email/text/audio video recorded to help the Plaintiff be successful at his employ;
- b) The Defendant Lisa Parsons did advise the Plaintiff that she would not consent to the Plaintiff recording conversations and meetings by audio and/or video recording; and
- c) The denial of this request was not a violation of the Plaintiff's Section 7 Charter Rights.

32. In addition, the Defendants, in paragraphs 27 to 30 of the Statement of Defence, stated:

27. The Defendants state that section 7 of the Charter does not apply, as the Plaintiff's life, liberty and/or security of the person are not affected by the decision not to engage in conversations or meetings with the Plaintiff if such conversations are being audio and/or video recorded by the Plaintiff.

28. The Defendants state furthermore that a claim for breach of section 7 Charter rights cannot be maintained against the Defendant Lisa Parsons, as individual civil servants are not subject to Charter requirements, an only government bodies are required to comply with Charter requirements.

29. If the Plaintiff's section 7 Charter rights are at play, the Defendants state that the Defendants state that the Defendants actions did not breach the Plaintiff's Charter right.

30. Alternatively, if the Plaintiff's section 7 Charter rights were breached, any such breach is justified as a reasonable limit as provided by section 1 of the Charter.

33. Although not explicitly stated in the Plaintiff's Motion, the Court interprets this as a Motion to strike the Defendants' Statement of Defence on the basis that it does not disclose a reasonable defence. The test to be applied on a motion under Rule 23.01(1)(b) of the *Rules of Court* to permit the striking of a pleading that on its face does not disclose a defence requires the Court to assume the facts, as stated, are true and that it is "plain and obvious" that the Statement of Claim discloses no reasonable cause of action.

34. As noted in the previous section of this decision, the *Rules of Court* provide that a party is required to deny disputed allegations of fact. The Defendants are entitled to make denials in their pleadings, thus giving rise to a dispute issue to be resolved at trial. If the Plaintiff believes elements of fact prove his allegations such element will be presented at trial.

35. As such, for the preceding reasons, the Court declines to strike the Statement of Defence in response to the Plaintiff's alleged breach of section 7 *Charter* rights.

Electronic Filing of Documents

36. In his Motion, the Plaintiff requests an order that he be allowed to file documents, including affidavits, electronically rather than filing hard copies with the Court. The Plaintiff's request is based on the fact that he resides in British Columbia and as a self-represented litigant experiences some difficulty in filing documents compliant with the *Rules of Court*. The Plaintiff's challenges are compounded by the delays and costs occasioned by sending several paper versions of his documents from British Columbia in an effort to file documents compliant with the *Rules of Court*.
37. The Defendants take no position on this request.
38. Under the *Rules of Court*, the general rule is that documents are filed by leaving them or mailing them to the clerk's office (Rule 4.06(3) of the *Rules of Court*). However, in the civil context, electronic filings are permitted under certain circumstances. The Court may direct that an electronic version of a document be filed under Rule 4.06(4.01) of the *Rules of Court*. In such a case, the filing date is deemed to be the date shown on the acknowledgement of receipt issued by the clerk's office. Further, unless the Court orders otherwise, the copy printed by the clerk's office is considered to be the original version of that document.
39. The Court of King's Bench of New Brunswick is woefully unequipped to deal with electronic filing; electronic filing remains the exception rather than the norm. The Court observes that the Plaintiff attempted to file numerous documents which were returned by the Clerk's Office as being non-compliant with the *Rules of Court*. The Court finds that the back and forth creates delays, costs, and hampers access to justice for the Plaintiff.
40. On this basis, the Court orders under Rule 4.06(4.01) that the Plaintiff is permitted to file documents with the Court electronically. Documents shall be in PDF format and will be deemed to be filed on the date outlined in the acknowledgement of receipt confirming compliance under the *Rules of Court*. Upon the Court confirming compliance of a document filed electronically, the Plaintiff must send the original hard copy of that document to the Court. Compliance under the *Rules of Court* for documents filed electronically remains to be assessed by the Clerk's Office.

Rule 23 – Motion to Strike Claim Against the Defendant Parsons

41. The Defendants seek to strike the Plaintiff's Claim against Lisa Parsons under Rule 23 of the *Rules of Court*. The analytical framework for motions to strike under Rules 23.01(a) and 23.01(b) of the *Rules of Court* are set out in an earlier portion of this decision.
42. The Defendants request to strike the Claim against the Defendant Parson is threefold. First, the Defendants maintain the Statement of Claim fails to disclose a reasonable cause of action under section 7 of the *Charter* as the decision to deny the recording of a meeting does not engage the rights of life, liberty and security of the person. Second, the Defendants maintain that subsection 4(8) of the *Proceedings Against the Crown Act*, precludes a claim against a Crown employee for acts performed within the scope of their duties. Third, the Defendants argued that employees or officers of the Crown cannot be held personally liable for *Charter* breaches. As it concerns the Claim against the Defendant Parsons, the last two arguments are determinative of the questions.
43. The Defendants maintain the Claim is statute barred by operation of section 4(8) of the *Proceedings Against the Crown Act*. This section provides that no proceeding may be maintained personally against an officer or agent of the Crown for acts or omissions performed in the course of their duties.
- 4(8) Notwithstanding any provision of this or any other Act, no proceedings lie directly against an officer or agent of the Crown, in the name of the officer or agent or in the name of his or her office, in respect of anything done or omitted to be done by the officer or agent in the course of the performance or purported performance of his or her duties.
44. A similar situation arose in *Brooks v Fredericton City Police Force et al*, 2017 NBQB 83, where Justice Morisson noted at paragraph 18 that to pursue a claim against an employee of the Crown, the plaintiff must plead material facts demonstrating the employee acted outside the course of their duties. The allegations against the Defendant Parsons and the facts pled surrounding the alleged wrongdoing specifically reference the Defendant Parsons' conduct in the course of her employment. Any wrong committed by the Defendant Parsons in the course of her employment would be actionable against the Defendant DTI, not against the Defendant Parsons in her personal capacity. On this basis, the Claim against the Defendant Parsons, in her personal capacity, cannot be maintained.
45. Additionally, as it concerns the Claim against the Defendant Parsons, the Defendants argue that, as a matter of law, individual employees or officers of the Crown cannot be held personally liable for damages arising from *Charter* breaches. The Supreme Court of Canada

in *Vancouver (City) v Ward*, 2010 SCC 27, at paragraph 22 outlined that damages arising from a breach of *Charter* rights may only be recovered against the state and not against individual actors. Aside from the allegation of a breach of his section 7 *Charter* rights, the Plaintiff pleads no independent tort or actionable wrong against the Defendant Parsons. On this basis, the Claim against the Defendant Parsons, in her personal capacity, cannot be maintained.

46. As such, based on the preceding reasoning and under Rule 23 of the *Rules of Court*, the Court strikes the Statement of Claim in its entirety against the Defendant Parsons and directs the conversion of the Motion into a Motion for Judgement dismissing the Claim against the Defendant Parsons in its entirety (see Rule 37.10(a) of the *Rules of Court*). The remaining portions of the Statement of Claim against the Defendant DTI will continue through the steps of the litigation process.

Rule 22 – Motion for Summary Judgment

47. The Defendant seeks summary judgment of the Plaintiff's Claim of breach of *Charter* rights against the Defendants under Rule 22 of the *Rules of Court*. In the context of Rule 22 motions, the Court may consider a broader evidentiary record found in the affidavits of the parties.
48. As it concerns the Claim against the Defendants under section 7 of the *Charter*, the Defendants argue that it is "plain and obvious" that the Plaintiff's Claim in this regard does not disclose a reasonable cause of action. The Defendants maintain that the refusal to record a meeting does not engage any of the rights protected by section 7 of the *Charter*. Section 7 of the *Charter* provides that everyone has the right to life, liberty and security of the person.
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
49. Specifically, the Defendants state that the right to life is not engaged where the state action does not impose a risk of death; the right to liberty is not engaged as the matter does not involve physical restraint or inherently personal choices; and, the right to security of the person is not engaged as the Plaintiff's alleged Claim does not involve the physical and psychological suffering required to engage that right.
50. Each of these components may be examined on their own.

51. As it concerns the right to life, the Supreme Court of Canada in *Carter v Canada (Attorney General)*, [2015] 1 SCR 331, stated the following at paragraph 62:

[...] In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly.

52. The Plaintiff's right to life, as contemplated in *Carter v Canada (Attorney General)* is not engaged by the Defendants' refusal to consent to the Plaintiff recording a meeting with government employees.

53. As it concerns the right to liberty, it is comprised of two aspects. The first aspect involves the protection of the person in the physical sense and is engaged when there is a physical restraint such as imprisonment, arrest, detention, extradition. The second aspect involves the protection of a sphere of personal autonomy involving inherently private choices going to the core of what it means to enjoy individual dignity and independence (*Godbout v Longueil (City)*, [1997] 3 SCR 844, para 66, *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55, para 49). This second aspect has been engaged in situations such as the right to refuse medical treatment, the right of parents to make important choices concerning the health and wellbeing of their children.

54. The Plaintiff's right to liberty, whether in the physical sense or in the sense of personal autonomy, is not engaged by the Defendants' refusal to consent to the Plaintiff recording a meeting with government employees.

55. As it concerns the right to security of the person, the third component of section 7 of the *Charter*, it encompasses both a physical and psychological aspect. This right involves the right to be free from threat of physical punishment or suffering; this is the physical aspect. This right is also engaged where state action seriously impairs the person's psychological or mental health. For example, the Supreme Court has found that the state seeking to obtain custody of a person's child engages the security of the person under section 7 of the *Charter* considering the impact on the psychological integrity of a parent (*New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, para 55). To breach a person's psychological security of the person, the state action must have a serious and profound effect on the person's psychological integrity. The psychological harm must be greater than stress or anxiety; it is measured objectively with a view of the impact on the psychological integrity of a person with reasonable sensibilities (*Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307).

56. The Plaintiff has outlined in his affidavit the impact of the Defendants' refusal to permit him to record the meeting with DTI employees and the impact of the alleged failure to accommodate his learning disability. Viewing the situation objectively, the impact of this refusal cannot be categorised as impacting the psychological integrity of a person with reasonable sensibilities.
57. The Plaintiff did not have any *Charter* or other legal right to require the Defendants to meet with him. The Defendants were entitled to refuse to meet with the Plaintiff and entitled to refuse the recording of the meeting.
58. The Plaintiff right to security of the person, as contemplated in section 7 of the *Charter* is not engaged by the Defendants' refusal to consent to the Plaintiff recording a meeting with government employees.
59. As pointed out by the Defendants, the *Charter* does not provide a legal right to a meeting with government official about one's personal property and does not entitle a person to record such a meeting. This is simply not the nature of rights sought to be protected by section 7 of the *Charter*.
60. To allow this portion of the Claim to move forward, considering the lack of legal foundation, could unduly delay the completion of the matter before the Court.
61. Based on the foregoing, a Claim for a breach of the Plaintiff's section 7 *Charter* rights cannot be maintained against the Defendant DTI. Under Rule 22 of the *Rules of Court*, the Court strikes the portions of the Statement of Claim seeking relief under section 7 of the *Charter* against the Defendant DTI. The remainder of the claims outlined in the Statement of Claim, as it concerns the Defendant DTI, may proceed through the litigation process.

Substituted Service

62. The Defendants seek an order for substituted service under Rule 18.04 of the *Rules of Court*. Such order may be granted where personal service of a document is required by the *Rules of Court* and where it appears impractical to effect prompt personal service.
63. In the current case, the Court agrees with the Defendants' submission that with the Plaintiff, residing in British Columbia having changed addresses since filing the action and requesting on multiple occasions to be served via email due to travel outside the country, renders personal service impractical and untimely. The Plaintiff, in oral submissions to the Court, expressed a preference to be served by email.

64. As such, the Court permits the Defendants to personally serve the Plaintiff by email at kevtopplegal@gmail.com. Counsel serving documents must include their name, address, and telephone number. Similar to the *Rules of Court* governing service by email of a solicitor of record, service will be deemed complete once the Plaintiff acknowledges receipt and acceptance.

Security for Costs

65. The Defendants have requested an order for security for costs of \$10,000 pursuant to Rule 58.01(a) of the *Rules of Court*. Rule 58.01(a) of the *Rules of Court* provides that a Plaintiff may be ordered to furnish security for costs where it appears the person is ordinarily a resident outside of New Brunswick. The relief outlined in Rule 58.01(a) is discretionary. Rule 58.01 of the *Rules of Court* also refers to other situations which could give rise to an order for security for costs, including situations where:

- the defendant holds a judgment or order for costs against the plaintiff from another action that remains unpaid.
- the plaintiff is a nominal plaintiff and there is reason to believe they lack sufficient assets in New Brunswick to pay the defendant's costs if ordered to do so.
- the plaintiff is an association or corporation with insufficient assets in the Province to satisfy a potential costs order.
- the defendant is specifically entitled to security by statute.

66. None of these other situations are present in this case. The Defendants suggested that a lien placed on the property relating to unpaid contractors and a notice from the Village of Memramcook relating to the "unsightly property" shows the Plaintiff's failure to respect judgments or orders. However, there is no evidence in the Record of the Plaintiff failing to comply with judgments or orders of the Court.

67. In addition to the place of residence of the Plaintiff, the Defendants' argument focuses on the Plaintiff's financial means and capacity to pay a security for costs order rather than on the Plaintiff's capacity to pay a costs order. The difference between the capacity to pay security for costs and the capacity to pay for costs is an important nuance. The inability to pay a costs award is a consideration in awarding security for costs. The ability to pay security for costs is not a consideration when awarding security for costs. There is no evidence to support the notion that the Plaintiff would be unable to pay a costs award if ordered to do so. In fact, in

this case, the Defendants have provided ample argument to support the Plaintiff's ability to pay a costs award. The inability to pay costs is a reason to award security for costs, not the inverse. A party's capacity to pay security for costs, as argued by the Defendants, is not a reason to award security for costs in the absence of other elements under Rule 58.01.

68. The Defendants also referenced *Windsor Energy et al v. Northrup et al*, 2015 NBQB 5 and *UA Local 772 v UA*, 2013 NBCA 33. The situations in those cases are different than those present in this case which includes a self-represented litigant suing the province for an alleged wrong. While the Court may consider the merits of an action in determining whether to award security for costs for an impecunious plaintiff residing out of the province, such is not the case in this matter. This Motion was brought by the Defendants and, on the face of the evidence and arguments brought forward by the Defendants, the Court finds an insufficient basis to order security for costs based solely on the Plaintiff's province of residence. Thus, while the Plaintiff is not a resident of the Province of New Brunswick, none of the other potential avenues giving rise to security for costs under the *Rules of Court* are present.

69. For the above noted reasons, the Court declines to award security for costs in this matter.

DISPOSITION

70. As such, based on the preceding comments, the Court orders as follows:

- a. The Court denies the Plaintiff's request to strike paragraphs of the Defendants' Statement of Defence.
- b. The Court allows the Plaintiff to file documents with the Court electronically in the context of the within action. Documents are to be filed along with the Order of the Court allowing for electronic filing. Electronically filed documents must be compliant with the other provisions of the *Rules of Court*.
- c. The Court allows the Defendant's request to strike the Claim against the Defendant Parsons in her personal capacity and enters judgment dismissing the Claim against the Defendant Parsons. The style of cause will be amended to reflect the removal of Lisa Parsons as a Defendant in this matter.
- d. The Court allows the Defendants' request for partial summary judgment and dismissed the Claim for breach of the Plaintiff's *Charter* rights against the Defendant DTI.

- e. The Court allows the Defendants' request seeking substituted service of the Plaintiff to proceed by email at kevtopplegal@gmail.com. Substituted service will be effective upon receipt of an acknowledgement of receipt by the Plaintiff.
- f. The Court denies the Defendants' request for security for costs under Rule 58.01(a) of the *Rules of Court*.

71. Considering the partial success of the parties on the Motions before the Court, each party shall bear its own costs.

Justice Maya Hamou
Court of King's Bench of New Brunswick