Date: 19970530 Docket: C.A. 134657

NOVA SCOTIA COURT OF APPEAL

Hallett, Matthews and Freeman, JJ.A.
Cite as: Keating v. Bragg, 1997 NSCA 104

BETWEEN:

CHARLES V. KEATING, GREGORY KEATING and CATHERINE KEATING	)	John A. Campion, C. William Hourigan and Harry E. Wrathall, Q.C. for the Appellants
Appellants	)	
- and -	)	
JOHN L. BRAGG, ROBERT RADCHUCK, WILLIAM SAYERS, DONALD McDOUGALL, DAVID HOFFMAN, RODGER TAYLOR, STUART RATH, BRAGG COMMUNICATIONS INCORPORATED, a body corporate, and HALIFAX CABLEVISION LIMITED, a body corporate	)	William L. Ryan, Q.C. and Roderick H. Rogers for the Respondent John L. Bragg
	)	S. Bruce Outhouse, Q.C. for the Respondent Halifax Cablevision
Respondents	)	Duff Harper for the Respondent Directors of Halifax Cablevision Limited
	)	Appeal Heard: May 13, 1997
	)	Judgment Delivered: May 30, 1997

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Matthews and Freeman, JJ.A. concurring.

HALLETT, J.A.:

The appellants (the Keatings) are directors of Halifax Cablevision Limited. Through Access Cable Television Limited (Access) they hold beneficial ownership of 33.75% of the shares of Halifax Cable. The Keatings have the controlling interest in Access.

The respondent John Bragg (Bragg) holds the beneficial ownership of a number of cable companies serving customers in different parts of Nova Scotia through his controlling interest in the respondent Bragg Communications Incorporated. Halifax Cable is controlled by Bragg. Halifax Cable operates primarily in the City of Halifax and surrounding area while Access operates primarily in Dartmouth and certain surrounding areas. Bragg has a substantial minority interest in Access.

The respondent Radchuck is not a director of Halifax Cable but is the President and Chief Executive Officer. The respondent Hoffman is the secretary of Halifax Cable. The other respondents are directors of Halifax Cable.

In the fall of 1996 Bragg came to a business judgment that he ought to align his companies with Maritime Telegraph and Telephone Company Limited (MT&T) in a joint venture to supply expanded services to cable customers served by his companies. Bragg had discussions with MT&T executives which led to the signing on November 3rd, 1996, of a Memorandum of Agreement between Bragg and MT&T Holdings

Incorporated. I will reproduce those parts of the Agreement relevant to the issues raised in this proceeding and on this appeal. I have underlined those aspects of the proposed transaction that must be emphasized.

November 3, 1996

John Bragg
P.O. Box 158
Halifax, Nova Scotia
B0M 1P0

Dear Sirs:

Re: Memorandum of Agreement

On behalf of MT&T Holdings Inc. ("MT&T") I am writing to set out the terms and conditions of a proposed transaction which will establish the framework whereby Maritime Telegraph and Telephone Company, Limited ("MTTCL") and your Cable Holding Company. ("Bragg") will make investments, directly or indirectly, in the common equity of the other and whereby Bragg and MT&T will jointly pursue certain new ventures and share certain facilities in a co-operative manner while fostering fair competition.

This letter is intended to outline the terms and conditions of the proposed transaction as agreed in our discussions to date, but it is not intended to create formal legal relations or rights and obligations of any nature between MT&T and Bragg except as otherwise provided herein and the Completion of a formal agreement between MT&T and Bragg, containing terms and conditions satisfactory to both parties. The parties shall forthwith in good faith, negotiate the definitive agreement. Unless and until a definitive agreement between MT&T and Bragg with respect to the proposed transaction has been executed and delivered and except as specifically provided herein, neither MT&T nor Bragg will be under any legal obligation of any kind whatsoever with respect to such a transaction by virtue of this or any written or oral expression by any of its directors, officers, employees, agents or any other representatives or its advisors or representatives thereof. The agreement set forth in this paragraph may be modified or waived only by separate writing by MT&T and Bragg expressly so modifying or waiving such agreement.

Subject to the foregoing the terms and conditions upon which the proposed transaction may proceed are as follows:

1. MT&T will acquire, directly or indirectly, common shares in Bragg in such amount as will constitute 29.9% of the issued and outstanding common equity of Bragg (the "Bragg Securities"). The consideration for such subscription shall be the issuance of common shares of MTTCL from treasury to Bragg, on a private placement basis:

   equivalent as at November 1, 1996, in value to 29.9% of 10x EBITDA of Bragg projected for the fiscal period ending August 31, 1997 to be $23,545,000, to be adjusted if actual EBITDA is less than 90% of $23,545,000;

   equivalent to four million dollars at $28.00 each if and when MTTCL Securities close at $28.00 on the Toronto

Stock Exchange no later than the 1ST day of November, 1999

equivalent to four million dollars at $32.00 each if and when MTTCL Securities close at $32.00 on the Toronto Stock Exchange no later than the 1ST day of November, 2001

2. As part of the consideration for the MTTCL Securities, Bragg shall provide MT&T, or its affiliates with access to the Bragg controlled network as now or hereinafter existing at commercial rates.

3. Contemporaneously with the share subscription described in paragraph 1, MT&T and Bragg will, on a 50/50 basis, enter into a joint venture agreement dealing with future communications developments outside their core businesses including internet and other applications as determined by the parties from time to time. The joint venture agreement will contain terms and conditions outlining its terms, the respective funding obligations of the parties, management, use of applications developed and the requirement of reasonable notification of the desire of either party to dissolve the same. Termination shall have regard to the interests of the parties and the customers subject to arbitration provisions. MT&T shall lend, on a commercial basis reflecting its borrowing cost, $50 million over a ten year period to the joint venture to be expended on systems infrastructure as determined by the joint venture.

. . . . .

6. It is a condition of the proposed transaction that Bragg shall allow MT&T to conduct all "due diligence" investigations as may be required to satisfy MT&T of the nature, quality and extent of the assets, business and properties of Bragg. Prior to proceeding with any such investigations, MT&T shall enter into a mutually acceptable confidentiality agreement with Bragg. MT&T may terminate this agreement upon notice in writing to Bragg without any further liability other than confidentiality obligations, whatsoever hereunder if, in its sole discretion, it is not satisfied with the results of its due diligence investigation.

7. It is a condition of the proposed transaction that the following governmental or regulatory approvals will immediately be sought and each such requisite approval be obtained and that the parties hereto will co-operate and use their best effort to obtain such approval:

The issue of an Advance Ruling Certificate by the Director of Investigation and Research under the Federal Competition Act, confirming that the proposed transaction will not constitute a "merger" prohibited pursuant to that Act.

The approval of The Toronto Stock Exchange and of the Montreal Exchange for listing and trading on those Exchanges of the MTTCL Securities, subject to any applicable hold period prescribed by applicable securities laws.

. . . . .

12. The proposed transaction is intended to remain entirely confidential until the earlier of such time as MT&T determines it is required to make disclosure to ensure compliance with applicable securities

> law, or such time as the parties mutually agree to make earlier disclosure.

The letter to John Bragg was signed by Colin Latham, the President and Chief Executive Officer of MT&T. Bragg signed the letter accepting the terms and conditions set out.

On November 10th, 1996, Charles V. Keating, the father of the other two appellants and the dominant force in the creation and development of Access heard a rumour of a potential transaction involving Halifax Cable, of which he had no information.

On November 11th, 1996, the Chairman of Halifax Cable, McDougall, advised Charles V. Keating that an agreement in principle had been reached between Bragg and MT&T respecting a joint venture proposed between the parties. The Chairman provided Keating with a copy of the Press Release issued that date which set out that on November 11th the Directors of MT&T unanimously approved the concept of the joint venture. The Press Release stated:

> NEWS RELEASE
>
> November 11, 1996
>
> MT&T AND BRAGG REACH AGREEMENT IN PRINCIPLE
>
> (HALIFAX, NS) - MT&T and the Bragg Cable Group announced today they have reached an agreement in principle to form a new company which would link the telephone company and cable company networks together.
>
> At a meeting earlier today, the Board of Directors of MT&T unanimously approved the concept and established an independent committee of Directors to review and validate the proposal and make recommendations to the Board.
>
> High speed, two-way telecommunications requires tremendous line capacity - commonly called "broadband telecommunications". Telephone companies

and cable companies acting alone, are years away from being able to provide this technology down every street and into every home and workplace.

The MT&T/Bragg joint venture, would operate in new product areas only. Its first products and services are expected to be launched in 1997.

The first product to be offered by the new company would be internet service at speeds up to 20 times greater than available on regular telephone lines. This product would combine MT&T's popular Sympatico internet service delivered directly to homes and offices through the modern cable network serviced by the Bragg Cable Group. Amherst, Bridgewater, Halifax, New Glasgow, Sydney, and Truro would be among the earliest communities to receive this new service.

This is not a merger of MT&T and Bragg Cable Group. Each would continue to operate their traditional services independently and would compete with each other when appropriate.

The new agreement would result in MT&T and Bragg Cable Group exchanging a minority interest in each other. MT&T would acquire 29.9% of the shares of Bragg and in exchange, the Bragg organization would receive approximately 6% of the shares of MT&T.

The agreement is also subject to regulatory approvals and due diligence.

For more information contact David Hoffman at:

Office: (902) 447-2320, ext. 276
Home: (902) 447-3011

There were three additional pages attached to the Press Release containing information respecting the details of the proposed transaction plus background information on MT&T and the Bragg Cable Group. It is a reasonable inference that the term "Bragg Cable Group" refers to those cable companies owned or controlled by Bragg which would include Halifax Cable.

The background information was as follows:

BACKGROUNDER ON THE AGREEMENT BETWEEN
BRAGG CABLE GROUP AND MT&T

MT&T would purchase 29.9% of the equity of Bragg Cable Group. In exchange, the Bragg organization would receive approximately 1,875,000 MT&T common shares, to be issued by the Company's treasury - valued at $24.15 per share -- the TSE market price on November 1, 1996. There is no cash involved in the transaction.

Purchase price is based on ten times 1996/1997 operating earnings less debt (29.9% share) of Bragg Cable Group. This is earnings

before interest, tax, depreciation and amortization.

The Bragg organization would receive an additional $4 million in MT&T stock if the stock reaches $28.00 per share within three years and a further $4 million in stock if it reaches $32.00 per share within five years.

The two companies agree to form a joint venture company, owned on a 50/50 basis, to deal with the deployment of internet and other interactive multimedia applications as mutually determined. MT&T would finance, on a commercial basis, $50 million over a five to ten year period to the joint venture, for expenditure on systems infrastructure. MT&T would be reimbursed by the new company for its financing costs.

MT&T would appoint two representatives to the Board of Bragg Cable Group. The Bragg organization would nominate one representative to the Board of MT&T.

This agreement is unique in that it provides for an ongoing joint venture on new services between a telephone utility and a cable company in the same territory.

Through the success of the joint venture, the value of the agreement would be substantially in excess of a typical cable company purchase.

BACKGROUNDER ON BRAGG CABLE GROUP

Bragg Cable Group is a private organization, based in Oxford, Nova Scotia, controlled by the Bragg family.

Bragg Cable Group wholly owns cable companies in the following areas: Truro, Amherst, Springhill, Aylesford, Middleton, Berwick, Bridgewater, Lunenburg, Chester, Mahone Bay, Antigonish, Sydney, Windsor, New Glasgow (Nova Scotia); Summerside (PEI); Sackville (New Brunswick) - a total of 88,724 subscribers.

The Group directly and indirectly owns 66.25% of the cable companies in Halifax, Shelburne, Liverpool and Yarmouth (Nova Scotia) - a total of 63,315 subscribers.

The Company owns 25% of the cable companies serving Dartmouth, Kentville, Digby (Nova Scotia) and Sussex (New Brunswick).

About 60% of cable subscribers in Nova Scotia are located in areas served by the Bragg Cable Group.

The Bragg Cable Group network includes a number of modern high technology systems. Halifax Cable for example has virtually completed a 750 mhz system with two way capability and 500 home nodes.

New 450 mhz systems are in final construction stages in most other areas controlled by Bragg including Sydney, Bridgewater, Truro, New Glasgow, Springhill, Amherst, Aylesford, Middleton, Berwick, Blockhouse, Lunenburg, Chester, Mahone Bay and others.

These state of the art platforms, combined with MT&T's switching

capability and fibre optic/digital network will be exceptionally capable of providing broadband services to homes, institutions and businesses.

BACKGROUNDER ON MT&T

Maritime Telegraph and Telephone Company Limited is an investor owned telecommunications company, based in Halifax

The Company owns 100% of Maritime Tel and Tel Limited, (Nova Scotia's telecommunications company,) and MT&T Mobility Incorporated.

MT&T has an investment of 52% in the Island Telephone Company Limited, (Prince Edward Island's major telecommunications utility).

At September 30, 1996, the Company had 711.4 thousand network access services (telephone lines in services)

Consolidated revenues were $568.4 million in 1995, up 4% over the previous year and $443 million, up 3.5%, for the first nine months of 1996.

At September 30, 1996, the Company had $1.98 billion of telecommunications property and total shareholders equity of $538.1 million.

There are approximately 29 million common shares outstanding (excluding the agreement with the Bragg organization)

On November 12th, 1996, Access wrote Bragg as follows:

Dear John:

Access Cable Television Limited received information about the proposed transaction involving Halifax Cablevision Limited and Maritime Tel & Tel announced November 11, 1996. Access Cable Television Limited is a substantial shareholder of Halifax Cablevision Limited and is directly impacted by this transaction.

In order to protect the position of Access Cable Television Limited we require immediate access to you and your advisers so that we can understand all of the details, both financial and regulatory, of the proposed transaction.

This transaction, as you know, may affect the financing of Access Cable Television Limited and the assets and regulatory position of Halifax Cablevision Limited.

In order to advance this process as quickly as possible, I am enclosing a list of some of the areas we wish to investigate (without limiting the questions we may have).

To protect the interests of Access Cable Television Limited and to prepare adequately for our Board of Directors Meeting already called for November 14, 1996 we require answers to all of the attached questions in writing by the close of business Wednesday, November 13, 1996.

In these circumstances, we have not communicated with any other company but having regard to your position on the Board of Maritime Tel & Tel, we believe you are obligated to send a copy of this information request to the Chairman of the Board of Maritime Tel & Tel. If you choose not to do so, would you please advise us so we can consider our options.

Yours very truly
Access Cable Television Limited

Charles V. Keating
Chairman

The questions Access wanted answered, as forwarded with the letter, were contained in the following document:

INFORMATION REQUESTED BY ACCESS CABLE TELEVISION LIMITED
FROM JOHN BRAGG AND HALIFAX CABLEVISION LIMITED

Details of the Commencement of Negotiations:

Who?

What?

When?

Where?

Why?

Documents related thereto

Details of the Transactions

Copies of all documents, draft and otherwise

All opinions, legal, regulatory and accounting

All other documentation

The accounting treatment of Halifax Cablevision Limited after the transaction

Details of the operation of Halifax Cablevision Limited after the transaction

Corporate structure

Future Expectations for Halifax Cablevision Limited and Maritime Tel & Tel

Future expectations for Halifax Cablevision Limited and Maritime Tel & Tel including projections

Accounting treatment for Halifax Cablevision Limited and Maritime Tel & Tel

Operational plans for Halifax Cablevision Limited and Maritime Tel & Tel

Process for resolving business conflicts

Minority shareholders position - Halifax Cablevision Limited

Regulatory Notice, Approvals and Concerns

CRTC

Nova Scotia Utilities and Review Board

Securities Commission

Competition Act Implications

Produce all documents, opinions and notices with respect to the above

Banking Implications and Approvals for Halifax Cablevision Limited and Access Cable Television Limited

Details of all information provided to the TD Bank in regards to this matter

Future financing arrangements

Conflicts of individuals and professionals

Identification of negotiators

Steps taken to protect the Minority Shareholders Position of Access Cable Television Limited Held in Halifax Cablevision Limited

Miscellaneous Matters Arising from the Above Questions and Other Matters

On November 13th, 1996, Mr. Bragg responded. I have underlined sentences that require emphasis in the context of these proceedings.

Dear Charles:

This letter is in response to your letter to me of November 12 last.

I feel I should firstly make clear that while it is my expectation that Halifax Cablevision Limited will benefit in a very material way from the proposed transaction which I have negotiated with Maritime Tel & Tel, it is not directly involved in those negotiations nor is it a party to any of the agreements either signed or contemplated at this time.

The proposed transaction has three basic parts:

1. We propose to exchange a minority interest in the company which holds, or will hold, all of my family cable television interests. It is contemplated that MT&T would acquire 29.9% of that holding company and my family holding company would receive in

exchange approximately 6% of the shares of MT&T. While there is an exchange of minority share interest, each of MT&T and the cable television companies controlled by my family interests would continue to operate independently, would continue their existing businesses and expect to compete with each other in their existing core businesses when appropriate and allowed by regulation.

2. It is proposed that MT&T and Bragg Communications would form a joint venture company to develop in new product areas.

3. MT&T will make available to the joint venture company up to $50,000,000.00 of capital expenditure financing over a five to ten year period on reasonable commercial terms.

As you will see, however, I have not committed Halifax Cablevision to be a party to any of the agreements proposed with MT&T as outlined above.

With respect to the list attached to your letter, I would offer the following comments:

Details of the Commencement of Negotiations-

The concept of the proposed transaction was developed by me quite recently, and negotiations respecting that concept initiated by me with MT&T only within the last few weeks.

Details of the Transactions-

As noted above, the documents involve agreements affecting my family holding companies or wholly-owned cable operations. Halifax Cablevision is not a party to those agreements.

The shareholders or corporate structure of Halifax Cablevision is not affected by the proposed transactions. It is not proposed that the operations of Halifax Cablevision or its accounting treatment will be changed by this transaction. It is proposed that Halifax Cablevision will continue to operate with its existing board of directors, independent of MT&T. Any agreements to be entered into by Halifax Cablevision, or any changes in its operations, would be the subject matter of discussion by its board.

Future Expectations for Halifax Cablevision Limited and MT&T-

As noted above, we would expect Halifax Cablevision to continue aggressively to pursue its business interests and its current business. We expect that Halifax Cablevision would carry the services to be offered by the joint venture company, provided its board agrees. We would see Halifax Cablevision benefitting, with my wholly-owned cable operations, from the projects to be developed by the joint venture company with the capital to be employed by it.

As you know from our recent correspondence respecting the Access Cable Television Limited financial statements, we are very concerned that our rights as a minority shareholder in Access Cable are respected and that we are fairly treated. I can assure you that it is our intent to continue to respect your minority shareholder rights in the same way.

Quite frankly, Charles, I see the proposed joint venture as a tremendous opportunity which will help my family's interest in cable television to grow, to meet the tremendous competition which is just around the corner, and to enable us to make the best use of our scarce capital resources. I would see all of those benefits being enjoyed by Halifax Cablevision as well as my wholly-owned operations and I would think your minority interest will increase in value as will our majority interest.

Regulatory Notice, Approvals and Concerns-

This transaction has moved at a very rapid pace. To this stage we have only addressed regulatory concerns in a preliminary manner but at present cannot see that we should offend any regulatory laws.

Banking Implications and Approvals for Halifax Cablevision Limited and Access Cable Television Limited -

We do not see the proposed transaction as impacting our existing banking arrangements in any material way. As you know, Bank of Nova Scotia is the banker from Halifax Cablevision and I do not see the transaction as contrary to any of its existing banking arrangements. As to the future, I can only see the transaction as being beneficial in relieving us of the obligation to arrange financing for some capital expenditures that we would otherwise have to undertake.

I can assure you that in my discussions with MT&T, I have made clear my desire to respect and treat fairly your position as a minority shareholder of Halifax Cablevision Limited. I am, with a copy of this reply, forwarding a copy of your November 12 letter to the President of MT&T.

When the arrangements have been fully negotiated and approved by the necessary Boards, we will be happy to give you a full briefing. In the meantime, my schedule does not permit me to be personally available on Thursday, November 14 or Monday, November 18.

Yours very truly,

John Bragg

Following this exchange of letters on November 12th and 13th, 1996, Bragg did not convene a meeting of Halifax Cable nor did the Keatings, despite the fact that they had a right to convene a meeting as directors and minority shareholders pursuant to the provisions of the Articles of Association of Halifax Cable. No further information was sought by the Keatings from Halifax Cable prior to the Keatings commencing proceedings in the Supreme Court of Nova Scotia on November 29th, 1996 requesting the following relief from the Court:

(a) a Declaration under Section 5 of the Third Schedule of the *Companies Act*, R.S.N.S. 1989, c. 81, as amended, that the minority shareholder of Halifax Cablevision Limited ("Halifax Cablevision"), being ACCESS Cable Television Limited ("ACCESS") and the creditors of Halifax Cablevision have been oppressed and that their interests have been unfairly disregarded and unfairly prejudiced by the conduct of the Respondents;

(b) an Order convening a meeting of the Board of Directors (the "Board") of

> Halifax Cablevision wherein the Respondents, in particular, but without limitation, John L. Bragg ("Bragg"), shall make full and frank disclosure of the proposed Maritime Tel and Tel ("MT&T") transaction, including providing all documents relating to the transaction, submitting to examination about the implications of the transaction for Halifax Cablevision and providing an accounting of all corporate opportunities involved and all benefits to be received by Bragg or companies related to or controlled by Bragg;
>
> (c) a Declaration that Bragg, Stuart Rath ("Rath"), Williams Sayers ("Sayers"), Donald McDougall ("McDougall"), Robert Radchuck ("Radchuck"), Rodger Taylor ("Taylor") and David Hoffman ("Hoffman") are in a position of conflict of interest with respect to the proposed transaction with MT&T;
>
> (d) an Order prohibiting Bragg and his representatives on the Board, being Rath, Sayers, McDougall, Radchuck, Taylor and Hoffman from voting on or participating in any review or decision to be made by Halifax Cablevision about the proposed transaction with MT&T and excluding them from voting on or participating in any decision which Halifax Cablevision makes to protect its interest once the details of the MT&T transaction have been disclosed, including any decision as to whether Halifax Cablevision should commence litigation against the conflicted directors or any other litigation to protect the legitimate interests of Halifax Cablevision;
>
> (e) an Order appointing the independent members of the Board as a committee of the Board to investigate the MT&T transaction and take whatever steps are necessary on behalf of Halifax Cablevision, including litigation;
>
> (f) an Interim and Final Order prohibiting the removal of Charles V. Keating, Gregory Keating and Catherine Keating as directors of Halifax Cablevision and prohibiting any dilution of their representation on the Board;
>
> (g) such further and other relief as this Honourable Court deems just and appropriate; and
>
> (h) the Applicants' costs of this Application on a solicitor and client basis.

In furtherance of the application, affidavits were filed by the Keatings, Bragg and other persons. The application was heard by Justice Goodfellow on December 16, 17th, 18th and 19th, 1996. Both Charles V. Keating and Bragg testified on the application and were extensively cross-examined. Justice Goodfellow rendered his decision on December 27th, 1996. He dismissed the Keatings' application.

Justice Goodfellow's Decision

Justice Goodfellow, after reviewing the facts as to the cable interests of

both the Keatings and Bragg set out the terms of the Memorandum of Agreement and the terms of the Press Release. He recited the relief sought by the Keatings and reproduced the relevant parts of the Third Schedule to the **Companies Act**, R.S.N.S. 1989, c. 81 as well as s. 99 of the **Act** (dealing with the duty of a director to disclose a conflict of interest). Justice Goodfellow then made nineteen (19) specific findings of fact including the following:

> (7) That John L. Bragg by virtue of his majority position in Halifax Cablevision Limited has the control and the authority to end up with a Board of Directors amenable to his direction. I find, however, that John L. Bragg fully intended to present any agreement with Maritime Tel & Tel by the Bragg Group, involving as it does Halifax Cablevision, to the Board for full discussion including the opportunity for Charles V. Keating to be heard.
>
> (8) That Maritime Tel & Tel brings to the proposed alliance $50,000,000.00 expertise, new products and faster access, all from becoming a strategic partner. There was nothing improper in John L. Bragg conducting preliminary negotiations to secure such, and that he has in fact an obligation to provide leadership to all of the companies, including Halifax Cablevision Limited.
>
> (9) That Halifax Cablevision is not specifically mentioned in the Memorandum of Agreement, and that it was expressly omitted from paragraph 8 because John L. Bragg considered that, while his concept was to have Halifax Cablevision participate, he could not bind Halifax Cablevision. John L. Bragg has stated to his advisors that he fully intends to submit the proposed transaction once it has been approved by Maritime Tel & Tel to Halifax Cablevision, and I accept his evidence that such was his intention all along.
>
> (10) John L. Bragg consistently and frequently reminded his advisors and Maritime Tel & Tel throughout the advancement of his concept, of the existence and necessity to have the position of Halifax Cablevision Limited determined by Halifax Cablevision Limited.
>
> . . . . .
>
> (12) That John L. Bragg advanced his concept of a strategic alliance with Maritime Tel and Tel after consultation with people within the industry, and after careful consideration as to the direction he sees as being in the best interests of the cable industry. Charles V. Keating, perhaps to some extent in response to what has transpired, very forcefully takes a diametrically opposed view that the cable industry has the opportunity which it should take to proceed to chart its own course. I find that Greg Keating, president of Access Cablevision Limited, as a result of an interview on July 23, 1996, agreed with the concept of alliances in some areas and there is no evidence to the contrary where it is reported that Greg Keating stated:
>
> > By the first quarter of 1997, Access will be announcing an alliance with a major telecommunications company. He went on to say Access has already been approached by AT&T. They have swapped network maps and gotten advice from their engineers and vice versa, says Mr. Greg Keating, MCI and Sprint Canada are other potential partners for similar alliances. Joint ventures and partnerships mean customers will eventually be able to choose one

> provider for local telephone service and cable service as well as enhanced basic services: video-telephones, video-conferencing and video-mail, internet and data sharing.
>
> The foregoing view publicly stated by Greg Keating seems to be somewhat at odds to the view expressed by Charles V. Keating in these proceedings. I do not accept Charles V. Keating's explanation that the alliance his son was speaking of was a marketing arrangement.
>
> I am, of course, not in a position to decide or even comment upon which course of action is most beneficial to Halifax Cablevision Limited, but I do recognize that there is a fundamental difference of opinion between Charles V. Keating and Mr. Bragg, and neither should be precluded from advancing fully whatever arguments they are able to muster in support of their respective positions.
>
> . . . . .
>
> (19) There is now a specific undertaking by Mr. Bragg to take the Memorandum of Agreement to the board of Halifax Cablevision for discussion. I am satisfied, on the totality of the evidence, that much of the basics of the Memorandum of Association was made known to Mr. Keating in the attachment to the press release, and what was not specifically set out would have been provided to him in any event by the undertaking of Mr. Bragg to provide a full briefing, quite probably to Mr. Keating, at or before the directors at a Halifax Cablevision board meeting.

Justice Goodfellow then made reference to the Articles of Association of Halifax Cable and, in particular, Article 72 dealing with the directors' requirement to convene a meeting of the shareholders upon the requisition of members of the company holding not less than 10% of the total voting rights of all members and other provisions of the Articles dealing with the right of the requisitioners to convene a meeting themselves if the directors failed to do so. He referred to Article 112 which provides that a director cannot vote in respect of any contract or arrangement in which he has an interest, although the Articles provide that this prohibition may, at times, be suspended or relaxed to any extent by a general meeting.

Justice Goodfellow then reviewed a series of cases dealing with applications for oppression relief pursuant to legislation similar, but not

identical to that provided by s. 5 of the Third Schedule of the **Companies Act** of this Province. He referred to the decision of **Canadian Arrow Service Ltd. v. O'Malley et al.** [1974] S.C.R. 592 and quoted from Laskin J.A. respecting the duties of senior officers and directors to act in good faith and avoid a conflict of duty and self-interest in their dealings with the company. After doing so Justice Goodfellow concluded that the factual situation in the **Canadian Arrow Service Ltd.** case was far different from what is alleged by the Keatings to be a breach of the fiduciary duties by the respondents. Justice Goodfellow, in accordance with the case law, applied a high standard to the conduct to the respondents and concluded "that no breach of a fiduciary relationship on the part of any director or officer of Halifax Cable Limited had been established."

Justice Goodfellow then reviewed a series of cases including **Re Ferguson and Imax Systems Corp.** (1983), 43 O.R. (2d) 128 (Ont. C.A.) and quoted from the decision of Brooke J.A. where he referred to the judgment of Arnup J.A. in **Goldex Mines Ltd. v. Revill et al.** (1974), 7 O.R. (2d) 216:

> The principle that the majority governs in corporate affairs is fundamental to corporation law, but its corollary is also important - that the majority must act fairly and honestly.

Arnup J.A. had concluded that the oppression remedies provided for in Ontario legislation should be interpreted broadly when considering the interests of minority shareholders and that when dealing with a closed corporation the court must consider the *bona fides* of corporate transactions to determine whether the act of the corporation or its directors effects a result which is oppressive or unfairly prejudicial to a minority shareholder.

Justice Goodfellow referred to the decision of the Alberta Supreme Court in **400280 Alberta Ltd. and Franko's Heating & Air Conditioning Ltd. v. Franko's Heating & Air Conditioning (1992) Ltd. and Edward B. Franko** (1995), 26 Alta. L.R. (3d) 421 in which it was held that a director breached his fiduciary duty not to divert to his own company a maturing business opportunity which the company of which he had been a director was actively pursuing.

Justice Goodfellow referred to his own decision in **Isnor v. Isnor** (1993), 123 N.S.R. (2d) 283 at p. 292 where he had stated that in certain circumstances an application under s. 5 of the Third Schedule to the **Companies Act** might address anticipatory breaches of minority shareholders rights. He went on to state:

> I agree with Mr. Campion [counsel for the Keatings] that in certain circumstances it would not be premature to invoke a remedy where an event has yet to take place. It would be in exceptional circumstances such as where all details are agreed upon and are binding lacking only the passage of time for consummation, i.e., a sale. The situation before me is far removed in both circumstances and time in establishing the need to invoke third schedule relief. [emphasis added]

Mr. Justice Goodfellow then dealt with the submissions made by counsel for the Keatings which are, to a great extent, the same arguments that have been raised on the appeal before us. After reviewing the events which had occurred in November leading up to the Keatings' application filed on November 29th, 1996, and the hearing which commenced on December 16th, 1996, Justice Goodfellow addressed the submission made on behalf of the Keatings that Bragg ought to have advised the directors of Halifax Cable on or about November 11th, or some time between that date and November 29th,

of the details of the proposed transaction so that the directors could consider the establishment of an independent committee of the Board to review and recommend in principle the acceptance or otherwise of the concept of the proposed transaction. Justice Goodfellow came to the following conclusion:

> ...Mr. Bragg had a duty not to act in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of Halifax Cablevision Limited and Access Cablevision Limited and those who have an interest in either or both of these companies. This duty includes a duty of disclosure with as an aspect of timeliness which would be governed by the specific circumstances. In these circumstances there is no breach of the high duty upon Mr. Bragg by his concluding that a full briefing and full disclosure would be made to Mr. Keating personally and the Board, when matters had crystallized to a stage that would permit a full understanding of what was taking place, a full opportunity to discuss the consequences and to make an informed decision on the part of Halifax Cablevision Limited as to whether or not Halifax Cablevision Limited will direct the engagement of any consultants, commission a report or study, proceed to the adoption and the finalization of the agreement in principle or whatever, remains for the immediate future and has not been foreclosed or limited by any conduct on the part of Mr. Bragg or any of the other directors of Halifax Cablevision Limited.

Justice Goodfellow then dealt with the argument made by Keatings counsel that the Memorandum of Agreement was legally binding. He disagreed with counsel for the Keatings on this issue.

Justice Goodfellow then dealt with the submission made on behalf of the Keatings that Bragg had improperly appropriated for his personal benefit a business opportunity that Halifax Cable was pursuing. Justice Goodfellow concluded "the evidence does not establish, on a balance of probabilities, whether any improper appropriation has or necessarily will take place".

Justice Goodfellow found that there was no evidence of abuse, oppression or unfairness towards Access in Bragg entering into the Memorandum of Agreement with MT&T.

Justice Goodfellow discussed the provisions of s. 5 of the Third Schedule and the meaning of the words "oppressive", "unfairly prejudicial" or "unfairly disregards the interests of the minority" as used in that section of the Third Schedule.

With respect to the issue of the alleged conflict of interest Bragg had in his dealing with MT&T while a director of Halifax Cable, Justice Goodfellow reviewed the provisions of s. 99 of the **Companies Act** and Articles 112 and 139 of the Articles of Association of Halifax Cable. He made the observation that Bragg, given his interest in the Bragg Group, could not vote on the adoption, or otherwise, by the directors of Halifax Cable as to whether or not Halifax Cable ought to participate with MT&T and Bragg's joint venture company in the provision of additional services to Halifax Cable customers.

With respect to the right to vote of directors of Halifax Cable who were nominees of Bragg, Justice Goodfellow made the observation that if counsel for the Keatings were correct that a conflict arises solely by virtue of a director being a nominee of a majority shareholder and, as a consequence, unable to vote, then the end result would be that minority would exercise control of Halifax Cable. He referred to this as a ludicrous result.

Justice Goodfellow went on to make the following observations:

> In an appropriate set of circumstances, evidence might well establish the nominee of the majority shareholder(s) was not prepared to acknowledge, or failed to acknowledge, the right of a minority rendering such nominee without independence. With the result her/his nominator's personal interest would prevail exclusively without any consideration of the minority interest and might call for invoking the prohibition in Article 112. We are far, far removed from any such position here. I conclude that you have about as independent a board of directors as is possible given that they are

> nominees of the majority shareholder. I accept Mr. Bragg's evidence that he advanced their appointment as directors because they are people of honesty, independence of thought and integrity and that he has been successful to some extent in business because of a clear willingness and intelligence to listen to and take into account, the advice of independently minded persons, even when that advice is contrary to his own views. I do not subscribe to Mr Campion's view that the obligation of good faith renders mandatory compliance in these circumstances where Mr. Bragg constantly and consistently advised Maritime Tel & Tel of the need to consider the best interest of Halifax Cablevision amounts to conflict.

Justice Goodfellow then dealt with Mr. Campion's submission, made on behalf of the Keatings, that Mr. Bragg's conduct in the fall of 1996 was a course of deception and dishonesty. He again reviewed the facts as to what occurred during the month of November, which I have already set out, and, in particular, made reference to the nature and scope of the information sought by Access in the letter of November 13th, 1996. Justice Goodfellow concluded:

> It is not necessary to go over each and every one of the areas of information requested, but many of them were not capable of answer at that time, or would as Mr. Bragg stated, and I accept, require a great deal of time, effort and future expense. For example, Mr. Keating wanted to know the details of the operation of Halifax Cablevision Limited after the transaction, the operational plan for Halifax Cablevision Limited and Maritime Tel and Tel, future financing arrangements, etc., etc. Many details simply were not in existence because of the nature and stage of the preliminary Memorandum of Agreement and many of the questions, in whole or in part, were ones to be discussed and determined by Halifax Cablevision Limited.

Justice Goodfellow observed that Bragg had made it clear to MT&T that Halifax Cable was not a party to the Memorandum of Agreement. He also observed that Mr. Charles V. Keating chose not to contact or inquire of Mr. Hoffman to obtain additional information about the proposed transaction which he was invited to do by Mr. Bragg's letter to him of November 13th, 1996.

Justice Goodfellow then reviewed the law with respect to the oppression remedy provided for in s. 5 of Schedule 3 of the **Companies Act** and commented that its purpose was to provide a method of balancing the manner in which the majority may operate a company with the interests of the minority shareholder. The section requires a recognition that the exercise of the majority power to direct a company's course of conduct cannot be exercised in a manner oppressive to, unfairly prejudicial to or that unfairly disregards the interests of a minority shareholder.

He then summarized his findings as to what had taken place between the parties as follows:

> Mr. Bragg and Mr. Keating have a long history of business association with entirely different approaches to the conduct of business. They have co-existed by virtue of a mutuality of interest and benefit, and although their personalities and approaches are vastly different, they developed a measure of respect, if not at times a fondness for each other. Unfortunately their relationship has probably been irreparably damaged, first by the suspicion and concern raised for Mr. Keating's management of Access, in certain respects that leave a perception of impropriety. The answers to the enquiries by Mr. Bragg do not appear to have been reasonably or adequately provided sowing a measure of mistrust between the parties. Mr. Keating's industrious, outgoing, impulsive nature presented increasing difficulties in containing any required degree of confidentiality in their business dealings. This became a legitimate concern by Mr. Bragg in the development of his concept for the future of his cable interests which he wished to advance to the stage of a preliminary memorandum of agreement before presenting Halifax Cablevision the fullest of opportunity for discussion, consideration and a decision as to the course to be charted by Halifax Cablevision. Mr. Bragg consistently expressed his concern and awareness of his obligation to Halifax Cablevision and while a Memorandum of Agreement and the press release clearly indicate the inclusion of his interest in Halifax Cablevision, preliminary negotiations deliberately and carefully avoided any attempt at binding or representing the final position to be determined by Halifax Cablevision Limited. It is not as Mr. Campion would phrase it, a program of deceit or of in and out, etc., but a consistent awareness by Mr. Bragg of his obligation to Halifax Cablevision Limited, and an advancement and notice to Maritime Tel & Tel, that Halifax Cablevision would be required to make its own decision and must be treated fairly. Halifax Cablevision, as I have stated in answer to the further arguments, will have its opportunity to make its decision, and if Mr. Keating only wished additional information it was not necessary or appropriate for him to commence and resort to litigation without following up and expressing whatever further inquiries or specifics he wished to Mr. Bragg's response of November 13th, 1996.
>
> On the totality of the evidence, the Keatings have failed to establish on a

balance of probabilities that Bragg or any of the other named defendants have unfairly disregarded their interests or those of Halifax Cablevision or Access Cablevision. The Keatings have failed to establish on a balance of probability justification as required by s. 5, or on any other basis, and their application must be dismissed.

Notice of Appeal

The notice of appeal from Justice Goodfellow's decision was filed on January 10th, 1997, and sets out the grounds of appeal as follows:

1. The learned trial Judge erred in law in defining and applying principles of law in the following areas:

   (a) fiduciary duty;
   (b) conflicts of interest;
   (c) timely, full and frank disclosure of information;
   (d) the oppression remedy;
   (e) rights to confidentiality;
   (f) directors' obligations and rights;
   (g) minority shareholder obligations and rights; and
   (h) the drawing of adverse inferences.

2. The learned trial Judge erred in making mixed findings of fact and law concerning:

   (a) the obligations of Mr. Bragg to call a directors meeting in a timely manner and his obligations to give full, frank and timely disclosure of the MT&T transaction to the Board of Directors of Halifax Cablevision;
   (b) the interpretation of the Memorandum of Agreement ("MOA");
   (c) findings about personal benefits;
   (d) appropriation of business opportunities of Halifax Cablevision; and
   (e) alternatives available to the Applicants, other than litigation.

3. The learned trial Judge erred in making the following findings of fact:
   (a) personal comments about Charles Keating; and
   (b) in omitting to account for certain actions and omissions after November 13, 1996.

4. Such further grounds as counsel may advise.

5. AND the Appellants will ask that the judgment appealed from be reversed and that they be granted relief as follows:

   (a) a Declaration under Section 5 of the Third Schedule of the *Companies Act*, R.S.N.S. 1989, c. 81, as amended, that the interests of the directors of Halifax Cablevision and the minority shareholder of Halifax Cablevision (ACCESS Cable) were unfairly disregarded and unfairly prejudiced by the conduct of the Respondent, Mr. Bragg, and Bragg Communications Incorporated ("Bragg Communications");
   (b) an Order convening a meeting of the Board of Halifax Cablevision wherein Mr. Bragg and Bragg

> Communications shall make full and frank disclosure of the proposed MT&T transaction, including providing all documents relating to the transaction, submitting to examination about the implications of the transaction for Halifax Cablevision and providing an accounting of all corporate opportunities involved and all benefits to be received by Mr. Bragg or companies related to or controlled by Mr. Bragg before any further steps be taken in the negotiation of the MT&T transaction;
>
> (c) a Declaration that Mr. Bragg and the other director Respondents were in a position of conflict of interest with respect to the transaction with MT&T and any consideration of the MOA or contracts flowing therefrom;
>
> (d) an Order prohibiting Bragg from voting on or participating in any review or decision to be made by Halifax Cablevision about the transaction with MT&T;
>
> (e) an Order appointing the independent members of the Board as a committee of the Board to investigate the MT&T transaction and take whatever steps are necessary on behalf of Halifax Cablevision, including litigation; and
>
> (f) the Appellants' costs of the Application and this appeal on a solicitor and client basis.

With some minor changes, the relief sought from this Court is more or less identical to that sought in the application heard by Justice Goodfellow.

Standard of Review on Appeal

The appropriate standard of review of Justice Goodfellow's findings of fact and credibility is as set forth by Roscoe J.A. in **Cole v. Cole Estate**, 4 E.T.R. (2d) 193 (N.S.C.A.) where Justice Roscoe stated:

> The Supreme Court of Canada has on numerous occasions discussed the scope of appellate review, not only in relation to its own powers, but also in relation to first appellate courts. In *Fletcher v. Manitoba Public Insurance Corp*, [1990] 3 S.C.R. 191 Madam Justice Wilson referred to statements set forth in a number of cases including *Stein v. " Kathy K" (The)*, *("Storm Point" (The))* (1975), [1976] 2 S.C.R. 802 and *Lewis v. Todd*, [1980] 2 S.C.R. 694; 34 N.R. 1; 115 D.L.R. (3d) 257; 14 C.C.L.T. 294, and concluded at p. 204:
>
> > These authorities, in my view, make crystal clear the test for determining when it is appropriate for an appellate court to depart from a trial judge's findings of fact: appellate courts should only interfere where the trial judge has made a "palpable and overriding error which affected his assessment of the facts." ...As this court and the House of Lords have repeatedly emphasized, it is the trial judge who is in the best position to assess the credibility of the testimony. An appellate court should not depart from the trial judge's conclusions concerning the evidence "merely on the result of their own comparisons and criticisms of witnesses".
>
> The test respecting a trial judge's findings of credibility was stated by

MacDonald, J.A. in *Travelers Indemnity Co. of Canada v. Kehoe* (1985), 66 N.S.R. (2d) 434; where he said at p. 437:

> This and other appellate courts have said time after time that the credibility of witnesses is a matter peculiarly within the province of the trial judge. He has the distinct advantage, denied appeal court judges, of seeing and hearing the witnesses; of observing their demeanour and conduct, hearing their nuances of speech and subtlety of expression and generally is presented with those intangibles that so often must be weighed in determining whether or not a witness is truthful. These are the matters that are not capable of reflection in the written record and it is because of such factors that save strong and cogent reasons appellate tribunals are not justified in reversing a finding of credibility made by a trial judge. Particularly is that so where, as here, the case was heard by an experienced trial judge.

Disposition of the Appeal

A number of issues are raised on the appeal. I am satisfied that the main appeal (to be distinguished from the appeal of Justice Goodfellow's cost award) must be dismissed as the application for relief from the alleged oppression of Access as a minority shareholder of Halifax Cable was premature. Secondly, the findings of fact and inferences drawn from the facts by Justice Goodfellow were fully supported by the evidence. He did not err in law; he applied the principles of law respecting the duties of directors as established in the decisions to which he referred.

Section 5 of the Third Schedule to the **Companies Act** states:

> 5 (1) A complainant may apply to the court for an order under this Section.
>
> (2) If, upon an application under subsection (1) of this Section, the court is satisfied that in respect of a company or any of its affiliates
>
> (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the company or any of

> its affiliates are or have been exercised in a manner,
>
> that it is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.
>
> (3) In connection with an application under this Section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> (a) an order restraining the conduct complained of;
>
> (b) to (n) not relevant.
>
> (4) .....
>
> (5) .....

Unlike the Ontario legislation, s. 5 of the Third Schedule does not provide that anticipatory or threatened action by a company or its directors that oppresses a minority is actionable.

The reason why the application for relief was premature was due to three facts. First, the Memorandum of Agreement signed by John Bragg with MT&T, with the exception of Clauses 6, 7 and 12, which are irrelevant to the issues raised in these proceedings, was not legally binding on Bragg as is evidenced by the first two paragraphs of that Agreement. Those paragraphs could not make it any clearer that the Memorandum of Agreement (with the exceptions noted) was not intended to create formal legal relations or rights and obligations of any nature between the parties to that Memorandum. This was a proposed transaction. The proposed transaction as set out in the subsequent paragraphs was "subject to" the provisions set out in the first two paragraphs. I repeat the second paragraph for the purpose of emphasis:

> This letter is intended to outline the terms and conditions of the proposed transaction as agreed in our discussions to date, but it is not intended to create formal legal relations or rights and obligations of any nature between MT&T and Bragg except as otherwise provided herein and the Completion of a formal agreement between MT&T and Bragg, containing terms and conditions satisfactory to both parties. The parties shall forthwith in good faith, negotiate the definitive agreement. Unless and until a definitive

> agreement between MT&T and Bragg with respect to the proposed transaction has been executed and delivered and except as specifically provided herein, neither MT&T nor Bragg will be under any legal obligation of any kind whatsoever with respect to such a transaction by virtue of this or any written or oral expression by any of its directors, officers, employees, agents or any other representatives or its advisors or representatives thereof. The agreement set forth in this paragraph may be modified or waived only by separate writing by MT&T and Bragg expressly so modifying or waiving such agreement.

I reject Mr. Campion's submission that this was a binding agreement in that it committed Mr. Bragg to finalize the proposed transaction. Mr. Justice Goodfellow did not err in concluding Halifax Cable was not bound by the Memorandum of Agreement. I would also note that Bragg had made it abundantly clear to Mr. Latham that Halifax Cable was not bound to any course of action by reason of Bragg having signed the Memorandum of Agreement. This is evidenced by Bragg having sent to Mr. Latham a copy of Bragg's letter of November 13th, 1996 to Charles V. Keating in response to his request for information.

The second reason why the application for relief was premature is that Halifax Cable was not a party to that Memorandum of Agreement and, therefore, was not bound by that Agreement even if Bragg was bound to conclude an agreement with MT&T, a contention that I reject.

Thirdly, nothing had been done by Bragg, as the controlling shareholder of Halifax Cable or Halifax Cable itself or its executives or its directors which could warrant the Court granting the relief sought by the Keatings. Justice Goodfellow did not err in refusing to grant the oppression relief sought by the Keatings. He did not err because there has not been any action taken that

supports the claim which is, at best, one of anticipatory oppression or anticipatory breach of fiduciary duties of directors. There was no duty on Bragg to convene a meeting of the Board of Directors to consider the proposed transaction at any time prior to November 29th, 1996, or prior to the date of the hearings in December. Justice Goodfellow did not err in failing to find Bragg had such a duty.

With the exception of the issue of the cost award granted by Justice Goodfellow, which will be dealt with separately, it is not necessary to deal with any of the other issues raised in the Notice of Motion dated November 29th, 1996, or those raised in the Notice of Appeal as each involve questions arising from a mere anticipation of possible infringements of the Keatings' rights as directors of Halifax Cable and the right of Access as a minority shareholder of Halifax Cable.

It is not necessary on this appeal to decide if a court, in considering an application under s. 5 of the Third Schedule, could grant relief in anticipation of a breach of duties owed by directors to a minority shareholder as the evidence adduced before Justice Goodfellow clearly does not warrant the granting of the relief in anticipation of a possible breach. The time for disclosure by Bragg to the Directors of Halifax Cable of relevant information respecting the proposed transaction is when an agreement is presented to the Board of Directors that, if approved, would result in Halifax Cable agreeing with the joint venture company to be established by Bragg and MT&T to use that company's services to expand the services to customers served or

capable of being served by Halifax Cable. At that time or prior thereto, the directors will also have to consider whether the proposed joint venture improperly diverts a business opportunity that was being pursued by Halifax Cable to the joint venture company and whether the proposed transaction is in the interest of Halifax Cable and its shareholders.

At that time the Directors of Halifax Cable will be bound to comply with their duties to the company and the minority shareholder in making these determinations.

With respect to Bragg, the evidence adduced before Justice Goodfellow, which he accepted, shows that Bragg felt that an alignment with MT&T was the best course of action for Bragg to follow with respect to the cable companies which he owned outrightly and, for that matter, with respect to those that he controlled. He did not bind Halifax Cable to any course of action. If, as and when the proposed transaction between Bragg and MT&T reaches the point where an agreement is presented to the Board of Directors of Halifax Cable for consideration as to whether or not to align itself with the joint venture company, Bragg will be bound to comply with the appropriate laws of corporate governance applicable to him as a director of Halifax Cable with an interest in the matters being considered.

A failure of either Bragg or the Directors of Halifax Cable to comply with their duties owed to the shareholders could properly form the basis of a claim for relief by the minority shareholder at that time.

As of the date of the application before Justice Goodfellow, there had not been any infringement of any of the rights of Access as a minority shareholder of Halifax Cable. The fact that Bragg has the majority interest in Halifax Cable does not prevent him from pursuing a course of conduct on behalf of his other cable companies that he feels are in their best interests. Once again, it will be for the directors of Halifax Cable to determine, in good faith, whether Halifax Cable should enter into a contract with the new joint venture company if, as and when such a contract is put forward for consideration by the Board of Directors of Halifax Cable. In arriving at a decision on this question, the Board of Directors will have to vote in accordance with what is in the best interests of Halifax Cable and take into consideration whether entering in to such a contract oppresses the interests of Access as a shareholder of Halifax Cable. Bragg is of the opinion that all the shareholders of Halifax Cable will benefit as shareholders from the proposed transaction. The board of directors of Halifax Cable will have to make a good faith judgment on this issue. This will involve giving due consideration to the Keatings' views as Directors of Halifax Cable.

I agree with Justice Goodfellow that the mere fact that a director is a nominee of a majority shareholder in itself does not disentitle the director to vote at a properly convened meeting of the board of directors to consider a contract in which the majority shareholder has an interest. A director's duty is to vote in accordance with what is in the best interest of the company and in a manner that is not oppressive to the interest of a minority shareholder in the company.

In short, the Court ought not to inject itself into the affairs of Halifax Cable unless the company or its Directors has acted in a manner that involved either a breach of the Directors' duties to the company or the Directors act in a manner oppressive to the interests of the minority shareholder in the company. Nothing of this nature had happened prior to the appellants' application before Justice Goodfellow. As in the case of **In Re: A Company** [1983], 1 Ch. 178 at p. 190-191, the application for relief was premature.

Mr. Campion has submitted that as Bragg agreed for the first time, under cross-examination, that he would hold a meeting of the Board of Directors of Halifax Cable to consider the Memorandum of Agreement, that Justice Goodfellow ought to have granted that part of the Keatings' application which is set out in paragraph 5(b) of its application.

With respect, I disagree with this submission. The fact that Bragg agreed to hold such a meeting is not a reason for the Court to have made such an order. Furthermore, the relief sought by the Keatings in paragraph 5(b) of the Originating Notice went much further than simply a request that the Court order such a meeting to be held. Paragraph 5(b) was a request that the Court make an order convening a meeting of the Board of Directors wherein Bragg would be required to make full and frank disclosure of the proposed transaction and submit to examination with respect to the implications of the transaction for Halifax Cable and an order that provided that Bragg give an accounting of all corporate opportunities involved and benefits to be received

by Bragg or the companies he controlled. Such an intrusive intervention into the affairs of Bragg's other cable operations was not warranted at the time the application was heard. The application was premature and sought relief by way of court ordered disclosure that, at that time, went beyond that which the legitimate interests of the Keatings in Halifax Cable warranted.

Mr. Campion submitted to us that by the end of the hearing before Justice Goodfellow all that the Keatings were really seeking was full disclosure of the details of the proposed transaction between Bragg and MT&T and that is all the relief being sought on the appeal. That submission belies the fact that the relief sought from this Court in the notice of appeal and as repeated in the appellants' factum was essentially the same relief as set out in paragraph 5 of the application before Justice Goodfellow. As previously noted, the time for disclosure of relevant information will be when the matter is to be considered by the Board of Directors of Halifax Cable if and when a contract to become involved with the joint venture company is put before the Board of Halifax Cable.

Mr. Campion submitted, in the course of his argument, that Justice Goodfellow's findings of fact are internally inconsistent with one another. Mr. Campion puts a very fine interpretation on the judge's findings of fact. In my opinion Justice Goodfellow's findings of fact are supported by the evidence. He did not make palpable or overriding errors that affected his assessment of the evidence. Accordingly, there is no basis upon which this Court ought to interfere with his findings of fact on relevant issues nor interfere with the

conclusions he drew from those findings.

Mr. Campion objects to comments made by Justice Goodfellow in his decision with respect to the personality of Charles V. Keating.

Mr. Campion asserts these findings were unnecessary and have hurt Mr. Keating's reputation in the cable industry. Justice Goodfellow had been invited by Mr. Campion to make findings of credibility with respect to the testimony of those two gentlemen. Justice Goodfellow accepted the invitation and concluded that based on his assessment of the testimony of Bragg and Keating, he accepted the evidence of Bragg on relevant issues.

In paragraph 66 of his Factum Mr. Campion attributes statements to Justice Goodfellow that on the first reading of the Factum create the impression that Justice Goodfellow used the words shown in quotes in describing Charles V. Keating. Paragraph 66 of the Factum states:

> Mr. Justice Goodfellow also directly and indirectly made personal comments about Keating using words such as "combative", "tended to move his perceptions in directions not necessarily supported by the facts", "self-interest", "incautious", "not aware of right and wrong", which findings were not supported by the evidence, were unnecessary to the Application.

A review of the decision shows what Justice Goodfellow actually stated in his decision:

> Mr. Keating is an industrious, intelligent, vigorous individual whose enthusiasm and combativeness tend to move his perceptions in directions that are not necessarily supported by fact. Mr. Bragg is an entirely different type of individual, with a greater consciousness, awareness, and caution in considering what is right and what is wrong on the determination of which he does not allow himself to be overwhelmed by self interest.

On a second reading one might say that the alleged derogatory

comments fall within the terminology of being "indirect" comments. But I would not be inclined to put the same face on Justice Goodfellow's comments as Mr. Campion has done in his submission.

It would appear that submissions as to Bragg's motives in proceeding to negotiate with MT&T without advising the Keatings took up a fair part of Mr. Campion's submissions in the hearing before Justice Goodfellow as it did on the hearing of the appeal. Under the circumstances, counsel for Bragg apparently felt compelled to adduce evidence respecting some of Bragg's grievances with respect to the manner Keating was operating Access which Bragg felt was not in the best interest of Access. My initial inclination was to say nothing about this matter but considering the importance attached to it by Mr. Campion I felt it would be better to address the issue.

Irrespective of what impression Justice Goodfellow had of Charles V. Keating, the rejection by the learned judge of Mr. Campion's submission that Bragg pursued a course of dishonesty and deceit in the period leading up to the signing of the Memorandum of Agreement on November 3rd, 1996, and thereafter was based on an acceptance by Justice Goodfellow of Bragg's evidence as to why he pursued this potential business opportunity on a confidential basis. The learned trial judge's acceptance of Bragg's evidence is supported by the evidence, with or without reference to Mr. Keating's credibility. Based on the evidence before him, I am satisfied Justice Goodfellow did not err in rejecting Mr. Campion's characterization of Bragg's action, in negotiating and signing the Memorandum of Agreement with MT&T, as one of dishonesty and deceit. The evidence shows that Bragg had legitimate reasons to negotiate with MT&T without disclosing to Access what

he was proposing for the cable companies he owned and controlled.

Because of the prematurity of the application, Justice Goodfellow was not in a position to assess whether the entry by Halifax Cable into a business relationship within the framework of the proposed transaction between Bragg and MT&T would amount to a diversion of a corporate opportunity of Halifax Cable nor in a position to assess whether the Directors or Bragg would act in a manner that would constitute oppression of the minority shareholder or constitute a breach of their fiduciary duties. Nor is this Court in a position to do so.

That is a question for the directors of Halifax Cable in the first instance. It is a decision that requires business judgment that, as a rule, is best left to a board of directors acting in good faith. It is only if the decision of the directors

of Halifax Cable is reached in a manner that infringes the rights of the minority shareholder would a court properly become involved.

Conclusion

The application before Justice Goodfellow was premature; the Keatings simply failed to prove they were entitled to the relief sought. Therefore, the main appeal from Justice Goodfellow's decision ought to be dismissed.

With respect to the appeal from costs, as awarded by Justice Goodfellow, and the question of costs of the appeal, I would order that counsel for the Keatings file a supplementary factum should he choose to do so by June 9th, 1997, with a copy to counsel for the respondents. I would

further order that counsel for the respondents file their supplementary facta by June 16th, 1997, should they choose to do so.

Hallett, J.A.

Concurred in:

Matthews, J.A.

Freeman, J.A.

C.A. No. 134657

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CHARLES V. KEATING, GREGORY KEATING and CATHERINE KEATING Appellants - and - JOHN L. BRAGG, ROBERT RADCHUCK, WILLIAM SAYERS, DONALD McDOUGALL, DAVID HOFFMAN, RODGER TAYLOR, STUART RATH, BRAGG COMMUNICATIONS INCORPORATED, a body corporate, and HALIFAX CABLEVISION LIMITED, a body corporate Respondents	REASONS FOR JUDGMENT BY: HALLETT, J.A.