NOVA SCOTIA COURT OF APPEAL
Citation: ***Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)***, 2011 NSCA 43

Date: 20110512
Docket: CA 325779
Registry: Halifax

Between:

Cherubini Metal Works Limited, a body corporate

Appellant
Respondent on Cross-Appeal

v.

The Attorney General of Nova Scotia representing
Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent
Appellant on Cross-Appeal

Judges:	MacDonald, C.J.N.S.; Saunders and Farrar, JJ.A.
Appeal Heard:	February 14, 2011, in Halifax, Nova Scotia
Held:	Appeal dismissed and cross-appeal allowed per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Saunders, J.A. concurring.
Counsel:	George W. MacDonald, Q.C., Michelle C. Awad, Q.C. and Ryan M. Conrod, for the appellant/respondent on cross-appeal Michael T. Pugsley and Duane A. Eddy, for the respondent/ appellant on cross-appeal

Reasons for judgment:

Background

[1] The appellant, Cherubini Metal Works Limited, was the beneficial owner of Amherst Fabricators Limited ("AFL") which was established to create a steel fabrication plant in Amherst, Nova Scotia. AFL was party to a collective agreement with the United Steel Workers and its Local. AFL started operating the plant in November, 1998. Despite Cherubini's efforts to make it a viable operation, it went out of business in July, 2001.

[2] Cherubini commenced action against the Attorney General in August, 2002 seeking compensation for its losses associated with the failure of AFL. It alleged that the Department of Employment and Labour ("DOEL") through its Occupational Health and Safety Division ("OHSD"), in its capacity as the regulator of occupational health and safety, committed actionable torts against AFL which caused it to fail resulting in a loss to Cherubini. Cherubini further alleged that the tortious acts were carried out independently or in concert with the United Steelworkers of America and its Local.

[3] The original action named all three parties, however, the action against the Union defendants was dismissed on the basis that the collective agreement between Cherubini and the Union gave exclusive jurisdiction over the dispute to an arbitrator (2007 NSCA 38). The action then proceeded against the Attorney General alleging intentional interference with economic relations, misfeasance in public office, conspiracy, and regulatory negligence.

[4] The trial took place in the fall of 2008 spanning some 27 days.

[5] By decision now reported as 2009 NSSC 386, Nova Scotia Supreme Court Justice Patrick J. Duncan dismissed Cherubini's claims in their entirety, however, without costs to the Attorney General.

[6] Cherubini appeals alleging that the trial judge erred in his determinations on the issue of negligence. It does not appeal the trial judge's decision with respect to

conspiracy, misfeasance in public office or intentional interference with economic relations.

[7] At the time of the appeal hearing Cherubini asked us to consider an additional ground of appeal not pleaded in its Notice of Appeal nor argued in its factum; that is, whether DOEL was acting in good faith.

[8] The Attorney General cross-appeals arguing that the trial judge erred in finding that the Attorney General owed a duty of care to Cherubini and, further, in failing to award costs of the trial to it.

[9] For the reasons I will now develop, I would dismiss the appeal and allow the cross-appeal. I would also award costs to the Attorney General on this appeal.

Facts

[10] The trial judge's discussion of the facts is comprehensive. I will summarize those facts which are relevant to this appeal. The salient facts will also be addressed in the context of the various issues raised on appeal.

[11] In 1998, the appellant purchased the Amherst, Nova Scotia, assets (building, property and equipment) of the bankrupt Dominion Bridge Company from its receiver. AFL was incorporated and was the entity which operated the newly acquired steel fabrication plant. Production at the Amherst plant was meant to supplement and complement Cherubini's existing steel fabrication facility in Dartmouth, allowing it to handle more and larger business from a location that was closer to many of its marketplaces.

[12] With the Amherst assets came the requirement for Cherubini to deal with the United Steelworkers of America and its Local. From almost the start of its involvement with the Amherst plant, the appellant encountered hostility and animosity from members of both groups. The trial judge concluded that the Union and Local had engaged in conduct which was aimed at undermining the Collective Agreement. The Union and Local made complaints to the DOEL intended to paint AFL as an unsafe workplace and to harass the company (¶ 63).

[13] DOEL, through OHSD, was responsible for regulatory oversight at the Amherst plant and was responsible for the administration of the **Occupational Health and Safety Act**, S.N.S. 1996, c. 7 (the "**OHSA**"). The actions of OHSD are the focus of this appeal.

[14] The **OHSA** provides broad powers to the OHSD to inspect, gather information, seize, and issue orders for the purposes of securing compliance. Prosecution of regulatory offences in a quasi-criminal proceeding is also contemplated in the statute.

[15] During its operations, the plant received attention from the OHSD in the form of plant visits and 48 compliance orders issued under the **OHSA**. Four other compliance orders were issued under the **Stationary Engineers Act**, R.S.N.S. 1989, c. 440. OHSD also directed that a broad general inspection, characterized as a “Joint Evaluation” be conducted at AFL.

[16] During its operation, the plant was financially unsuccessful and, ultimately, Cherubini decided to close its doors.

[17] At trial, Cherubini alleged that the Government, through its actions by the issuance of the orders, the plant visits and the ordering of the joint evaluation committed the tort of conspiracy, tort of abuse of public office, interference with economic relations and negligence. It alleged that the unlawful acts and/or omissions of the Crown caused the plant to fail because of the lack of productivity resulting from having to comply with the orders and the economic costs associated with them.

[18] The trial judge found that the Attorney General owed Cherubini a duty of care. However, he found that the OHSD officials acted reasonably and in good faith. Finally, he concluded that the actions of the OHSD officials were not causative of Cherubini’s loss.

[19] As previously noted, Cherubini appeals the trial judge’s determination on the issues of negligence, the Attorney General cross-appeals saying that it does not owe Cherubini a duty of care and that the trial judge erred in failing to award the costs.

Issues

[20] The grounds of appeal and cross-appeal give rise to the following issues:

1. Did the trial judge err in finding the Attorney General owed a duty of care to Cherubini?

2. If the Attorney General owed Cherubini a duty of care, did the trial judge err in the formulation of the standard of care?

3. Did the trial judge err in finding the Attorney General did not breach the standard of care?

4. Was the validity of the compliance orders issued to Cherubini by the OHSD and Cherubini's decision whether to appeal those orders relevant to the trial judge's negligence analysis?

5. Did the trial judge err in determining that any loss suffered by Cherubini was not caused by the actions of the Attorney General?

6. Were the OHSD officials acting in good faith?

7. Did the trial judge err by failing to award costs to the Attorney General at trial?

Standard of Review

[21] The law on the standard of review was exhaustively considered by Saunders, J.A. in **McPhee v. Gwynne-Timothy**, 2005 NSCA 80. Those standards are:

1. For findings of fact and inferences drawn from facts, there must be a palpable and overriding error to warrant overturning a trial judge. An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. A high degree of deference is paid to a trial judge's findings (**McPhee, supra**, ¶ 32)(Issues #5 and #6).

2. On questions of law the standard of review is one of correctness, the trial judge must be right (**McPhee, supra**, ¶ 33)(Issues #1, #2, #4).

3. Findings of mixed law and fact are said to fall along a "spectrum of particularity". They involve applying a legal standard to a given set of facts and are to be reviewed according to the palpable and overriding error standard unless the alleged error of law can be isolated from the mixed question of law and fact. Where that occurs the isolated legal principle will attract a correctness standard (**McPhee, supra**, ¶ 33)(Issue #3).

[22] On the final issue, whether the trial judge erred in failing to award costs to the Attorney General, we will not interfere unless the trial judge erred in principle (**McPhee v. Canadian Union of Public Employees**, 2008 NSCA 104, ¶ 71).

Analysis

1. Did the trial judge err in finding the Attorney General owed a duty of care to Cherubini

[23] Prior to the oral hearing in this matter, we requested counsel address the effect of s. 78 of the **OHSA** and s. 5(4) of the **Proceedings Against the Crown Act**, R.S.N.S. 1989, c. 360 (the "**PACA**") and, in particular, whether these provisions limit the duty of care owed to Cherubini. Although the Attorney General argued at trial that it did not owe Cherubini a duty of care, it did not rely on these provisions. For reasons that will become apparent, the application of s. 78 of the **OHSA** and s. 5 of the **PACA** is a significant factor in determining whether the Attorney General owed Cherubini a duty of care.

The Occupational Health and Safety Act

[24] Section 78 of the **OHSA** limits the liability of the Crown's servants and agents for acts or omissions done when acting under the authority of, or in accordance with, requirements imposed by the **OHSA** and the regulations made thereunder:

> 78 No action lies or shall be instituted against an officer, a committee, a member of a committee, a representative, the Director, an appeal panel, a member of an appeal panel or the Director of Labour Standards where that person or body is acting pursuant to the authority of this Act or the regulations for any loss or damage suffered by a person because of an act or omission done in good faith by the person or body
>
> (a) pursuant to, or in the exercise or supposed exercise of, a power conferred by this Act or the regulations; or
>
> (b) in the carrying out, or supposed carrying out, of a function or duty imposed by this Act or the regulations.

[25] Section 5 of the **PACA** governs the liability of the Crown in tort. Clause 5(1)(a) provides for the vicarious liability of the Crown for torts committed by its officers and agents:

> **5**(1) Subject to this Act, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject
>
> (a) in respect of a tort committed by any of its officers or agents.

[26] Subsection 5(2) confirms that the Crown is not vicariously liable for acts and omissions of its officers and agents unless the acts or omissions complained of are actionable against the officer or agent:

> (2) No proceedings lie against the Crown under clause (a) of subsection (1) in respect of an act or omission of an officer or agent of the Crown unless the act or omission would, apart from this Act, have given rise to a cause of action in tort against that officer or agent or his personal representative.

Determining Whether a Duty of Care Exists

The *Anns* Test

[27] The determination of whether a duty of care should be imposed is governed by the **Anns** test, as reaffirmed and clarified in **Cooper v. Hobart**, 2001 SCC 79 and its companion case, **Edwards v. Law Society of Upper Canada**, 2001 SCC 80. The test was expressed as follows in **Edwards**:

> 9 At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity — that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.
>
> 10 If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

[28] In **Fullowka v. Pinkerton's of Canada Ltd.**, 2010 SCC 5 at ¶ 39, Cromwell, J. summarized the principles applicable to the determination of whether there is sufficient proximity to give rise to a *prima facie* duty of care:

> The statute is the foundation of the proximity analysis and policy considerations arising from the particular relationship between the plaintiff and the defendant must be considered.
>
> The fact that an alleged duty of care is found to conflict with an overarching statutory or public duty may provide a policy reason for refusing to find proximity. Both *Cooper* and *Edwards* are examples. In *Cooper*, a duty to individual investors on the part of the Registrar of Mortgage Brokers potentially conflicted with the Registrar's overarching public duty; in *Edwards*, the proposed private law duty to the victim of a dishonest lawyer potentially conflicted with the Law Society's obligation to exercise its discretion to meet a myriad of objectives.

> **A statutory immunity provision may also, as in *Edwards*, indicate the Legislature's intention to preclude or limit private law duties.**
> (Emphasis added)

[29] The importance of the presence of a statutory immunity clause in determining whether to impose a duty of care is illustrated by **Edwards, supra**. In **Edwards**, the appellants represented a class of individuals who were allegedly victimized by a gold delivery fraud. The appellants were encouraged by selling agents to purchase gold from a seller and to pay the funds to a solicitor's trust account. The appellants later learned that, although over US$9 million had been provided in trust to the solicitor, no mine existed and no gold was ever produced. The respondent Law Society commenced an investigation regarding the unorthodox use of the solicitor's trust account. The appellants argued that once the respondent knew the account was being used improperly, it had a duty to ensure that the account be operated according to the regulations or, alternatively, to warn the appellants that it had abandoned its supervisory jurisdiction. The motions judge allowed the respondent's motion to strike for failure to disclose a cause of action. The Court of Appeal upheld that judgment, as did the Supreme Court of Canada.

[30] The Supreme Court held that the facts did not give rise to circumstances in which it would be proper to find a duty of care. Under the first branch of the **Anns** test, the Court concluded that the case did not fall within, nor was it analogous to, any category of cases in which a duty of care had previously been recognized. In considering whether there was sufficient proximity between the parties to give rise to a *prima facie* duty of care, the Court held that the **Law Society Act**, R.S.O. 1990, c. L.8 did not reveal any legislative intent to expressly or impliedly impose a private law duty on the Law Society. In particular, the Court considered the statutory immunity clause of the **Law Society Act** and its effect on the determination of whether a duty of care should be imposed. The Court held:

> 16 Finally, and perhaps most indicative of the Legislature's intent, the Act provides statutory immunity in s. 9 of the Act which read:
>
> > 9 No action or other proceedings for damages shall be instituted against the Treasurer or any bencher, official of the Society or person appointed in Convocation for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power under this Act, a

> regulation or a rule, or for any neglect or default in the performance or exercise in good faith of any such duty or power.
>
> 17 Section 9 precludes any inference of an intention to provide compensation in circumstances that fall outside the lawyers' professional indemnity insurance and the lawyers' fund for client compensation.

Because there was insufficient proximity to give rise to a *prima facie* duty of care, the Court considered it unnecessary to consider the second stage of the **Anns** test; however, it held that had the existence of a *prima facie* duty of care been found at stage one, such duty would have been negated at stage two by residual policy considerations outside the relationship of the parties.

[31] In **Cooper v. Hobart**, **supra**, released on the same day as **Edwards**, the Registrar of Mortgage Brokers, a statutory regulator, suspended a registered mortgage broker's licence and issued a freeze order in respect of its assets because funds provided by investors were allegedly used for unauthorized purposes. The appellant, an investor who had advanced money to the broker, brought an action against the Registrar alleging that he breached the duty of care that he owed to the appellant and other investors by having not acted earlier to suspend the broker's licence and to notify investors that the broker was under investigation. The Supreme Court held that no duty of care should be imposed on the Registrar.

[32] It held that the **Mortgage Brokers Act**, R.S.B.C. 1996, c. 313 did not impose a duty of care on the Registrar to investors with mortgage brokers regulated by the **Act**. The Registrar's duty was to the public as a whole; to recognize a duty to individual investors would potentially give rise to a conflict with the Registrar's overarching duty to the public (¶ 44). As in **Edwards**, the Court made reference to a limitation of liability clause in the **Act**, which exempted the Registrar or any person acting under his authority from any action brought for anything done in the performance of duties under the **Act** or regulations, or in pursuance or intended or supposed pursuance of the **Act** or regulations, unless it was done in bad faith. The presence of this clause was a factor that militated against the recognition of a *prima facie* duty of care at the first stage of the **Anns** analysis.

[33] In addition to **Edwards** and **Cooper**, statutory immunity provisions also came into play in **Syl Apps Secure Treatment Centre v. B.D.,** 2007 SCC 38. In **Syl Apps**, a child was apprehended by the Children's Aid Society and placed in a

foster home after she alleged that her parents had physically and sexually abused her. A police investigation resulted in no criminal charges being laid. The child was found to be a child in need of protection and temporary wardship was ordered. After being placed in foster care and subsequently transferred to several psychiatric facilities, the child was sent to a treatment centre. The child, with her consent, was later made a permanent ward of the Crown. Her parents, grandmother, and three siblings issued a statement of claim seeking $40,000,000 in damages, alleging that the treatment centre treated the child as if her parents had physically and sexually abused her, that this was negligent conduct, and that the negligence caused the child not to return to her family, thereby depriving the family of a relationship with her.

[34] The Supreme Court held that to impose a duty of care to the child's family on a treatment centre and its social workers, in this context, would create a potential conflict with the ability of the centre and its workers to effectively discharge their statutory duties (¶ 49). This conclusion was strengthened by the presence of statutory immunity provisions in the **Child and Family Services Act**, R.S.O. 1990, c. C.11, **Ministry of Community and Social Services Act**, R.S.O. 1990, c. M.20, and **Courts of Justice Act**, R.S.O. 1990, c. C.43, all of which were evidence of a clear legislative intent to protect those working in the child protection field from liability for the good faith exercise of their statutory duties. The Court held that these provisions "lend further support to the conclusion that there is no proximity in the relationship between the family of a child in care and those directed by a court to protect that child's best interests" (¶ 60 - 62).

[35] These authorities all indicate that the presence of a statutory immunity or limitation of liability clause is an important policy consideration that militates against a finding of sufficient proximity to establish a *prima facie* duty of care. This was so even though the clauses did not always purport to limit the liability of the named defendant; e.g., in **Edwards**, where the limitation of liability clause purported to apply to the Law Society's officers and agents, but not to the Law Society itself.

[36] Cherubini relies heavily on the Supreme Court of Canada's decision in **Fullowka, supra**. This case is distinguishable because the statute under consideration in Fullowka – the **Mining Safety Act**, R.S.N.W.T. 1988, c. M-13 (repealed by the **Mine Health and Safety Act**, S.N.W.T. 1994, c. 25, s. 50) — did

not possess any kind of limitation of liability clause similar to those found in the statutes considered in **Edwards**, **Cooper** and **Syl Apps**. The absence of such a clause was one less policy consideration weighing against the existence of a *prima facie* duty of care. The Court in **Fullowka** ultimately determined that a duty of care did exist.

The Effect of the Proceedings against the Crown Act

[37] In **Edwards**, the statutory immunity clause that the Supreme Court relied on, in part, to negative the existence of a duty of care did not actually immunize the respondent Law Society, just its officers and agents. This is similar to this case. Section 78 of the **OHSA** restricts the liability of certain persons acting under the **OHSA**. Subsection 5(4) of the **PACA**, however, extends this limitation so as to immunize the Crown from vicarious liability.

[38] In **Lewis v. Prince Edward Island** (1998), 160 Nfld. & P.E.I.R. 183 (P.E.I.C.A.), the court was concerned with the interpretation of a provision similar to ss. 5(4) of our **PACA**. There a farmer sprayed his potato crop with a chemical sprout inhibitor pursuant to an order of an inspector appointed under the **Plant Disease Eradication Act**, R.S.P.E.I. 1988, c. P-7. When the crop was harvested, it yielded an unusual number of small potatoes. The farmer sued the Crown in negligence, claiming damages for the reduced marketability of his crop yield. The farmer succeeded at trial, but lost on appeal.

[39] On appeal, the majority of the Appellate Division (per McQuaid, J.A., Mitchell, J.A. concurring) held that the trial judge had made palpable and overriding errors in the assessment of the evidence as to whether the inspector who issued the order to spray had done so in good faith. The majority also held that while the Crown owed the respondent a *prima facie* duty of care, that duty was negatived by a provision of the **Plant Disease Eradication Act**, R.S.P.E.I. 1974, c. P-7.

[40] Justice McQuaid applied the **Anns** test as it was understood to be at that time — focusing on foreseeability only at the first stage, and policy considerations at the second stage. At the first stage, the court determined that it should be within the reasonable contemplation of the inspector that carelessness on their part in

making an order could result in damage to the person to whom the order was issued, such as a farmer. This gave rise to a *prima facie* duty of care.

[41] Turning to the second stage of the **Anns** test, Justice McQuaid considered whether the **Plant Disease Eradication Act** contained a provision limiting or negativing the scope of the duty. His Lordship considered s. 19(2), which provided as follows:

> 19(2) No action lies against the Minister, any inspector or other person for any act done or performed in good faith in purporting to have been performed under this Act or the regulations.

[42] He also considered s. 4(4) of the **Crown Proceedings Act**, R.S.P.E.I. 1988, c. C-32, which is essentially the same as s. 5(4) of the Nova Scotia **Proceedings Against the Crown Act** and held:

> [t]hese provisions indicate an intention on the part of the Legislature to shield the appellant from liability, if its servants or agents carry out their duly vested duties or powers in good faith, consistent with the objects and purposes of the *Act*. (¶ 38)

[43] He went on to hold that the inspector had been acting in good faith when the order to spray was made, and concluded:

> [41] Failure to take steps to enforce the provisions of the *Act* and failure on the part of the inspector to exercise the powers vested in him under the *Act* may have had devastating effects on the potato industry. Officials administering and enforcing the provisions of the *Act* are always making decisions which are inherently adverse to the interests of a farmer who has bacterial ring rot. Nevertheless, in making these decisions officials are to be governed by the overriding consideration of how to best achieve the control and eradication of the disease. Mr. MacDonald acted in good faith honestly believing in a state of facts which gave him no alternative but to take action consistent with the purposes and object of the *Act*. Consequently, by virtue of s. 19(2) and by virtue of s. 4(4) of the *Crown Proceedings Act*, the appellant is immune from any liability which might arise from his actions which were specifically authorized by s. 5(2). On this ground alone the appeal could be allowed; ...

[44] The court went further and found, aside from the statutory limitations on liability, where the legislation in question inherently must adversely affect the interests of individuals, the second stage in the **Anns** test requires that the

legislation be reviewed to determine if the imposition of a private law duty to take care not to harm the individual at any stage of the decision-making power conflicts with the public law duty to make decisions or exercise the authority vested by the legislation. If such a conflict exists, it must be resolved by limiting the private law duty of care to permit the exercise of the powers conferred by the legislation. Thus, the private law duty imposed on the inspector (and on the Crown vicariously) in the context of the situation in **Lewis** was limited to a duty to ensure that the proper circumstances existed for the issuance of the order (¶ 51).

[45] In **Lewis, supra**, the Court found a *prima facie* duty of care when applying the first stage of the **Anns** test. It did so without regard to the relevant immunity provisions. Instead, it resorted to the immunity provisions at the second policy stage to vitiate the *prima facie* duty. In light of **Edwards** and **Cooper, supra**, I would take a different approach. In my view, such immunity provisions go right to the heart of whether a *prima facie* duty of care exists and, therefore, should be considered at the first stage.

[46] After all, failure to take steps to enforce the provisions of the **OHSA** and failure on the part of an official to exercise the powers vested in him under the **Act** may have devastating effects on both employers and workers. Officials administrating and enforcing the provisions of the **OHSA** are, by the nature of their duties, making decisions which are inherently adverse to the interests of either the worker or the employer, but, in making those decisions officials must be governed by the overriding consideration of how best to achieve and maintain a safe and healthy workplace. As in **Cooper, supra**, to impose a duty of care in these circumstances would potentially give rise to a conflict with the officials' overarching duty to maintain a safe work environment.

[47] Therefore, under the **Anns** test as refined by **Cooper** and **Edwards**, the immunity created by s. 78 of the **OHSA** and s. 5(4) of the **PACA** are policy factors to be taken into consideration to determine whether there is sufficient proximity to give rise to a *prima facie* duty of care.

[48] The presence of s. 78 of the **OHSA** precludes any inference that the legislator intended to impose liability on OHSD officials' good faith exercise of their powers authorized by, and in compliance with, duties required under the

OHSA. Section 78 militates against the finding that there is sufficient proximity between the parties to justify the imposition of a *prima facie* duty of care.

[49] In its oral submissions, Cherubini relied upon the decision of the British Columbia Court of Appeal in **Dorman Timber Ltd. v. British Columbia** (1997), 97 B.C.A.C. 178 which, coincidentally, was decided very close in time to when the **Lewis, supra** appeal was being heard before the Prince Edward Island Court of Appeal. In **Dorman Timber** the British Columbia Court of Appeal was considering whether a provision in its **Forest Act**, R.S.B.C. 1979, c. 140, similar to s. 78 of our **OHSA**, protected the Crown from its being vicariously liable for the actions of its servants. It concluded that the **Forest Act** only afforded personal immunity from liability for the servant and could not be interpreted to absolve the Crown. The court did not consider whether the existence of the immunity provision in the **Forest Act** went to the determination of whether a duty of care existed. The court looked at the provision, solely for the purpose of determining whether it provided a defence to the Crown once it was found that the servant owed a duty of care and had breached the standard of care. It was not argued that the existence of the provision was a factor to be considered in the finding of a duty of care.

[50] For that reason alone, it is distinguishable. Further, to the extent that it can be seen as authority for the proposition that the Crown cannot rely on s. 78 of the **OHSA** for the purposes of determining whether the duty of care exists, I would, respectfully, choose not to follow it. Its reasoning runs contrary to **Edwards**, **Cooper**, **Syl Alps** and **Lewis**, **supra**.

[51] Therefore, in conclusion, I would find as follows:

1. this case does not fall within, nor is it analogous to, any category of cases in which a duty of care had previously been recognized;

2. the alleged duty of care conflicts with the overarching statutory or public duty of the Attorney General to fulfil its statutory mandate; and

3. in considering whether there is a sufficient proximity between the parties to give rise to a *prima facie* duty of care, the **OHSA** does not reveal any legislative intent to expressly or impliedly impose a private

> law of duty on the Attorney General. To the contrary, the statutory immunity clause in s. 78 of the **OHSA** is indicative of the Legislature's intention to preclude or limit private law duties.

[52] I would allow the cross-appeal of the Attorney General and find that a duty of care does not arise in these circumstances and, therefore, there can be no finding of negligence. However, I will go on to address the other grounds of appeal raised by the appellant which formed the basis of the trial judge's decision.

2. Assuming the Attorney General owed Cherubini a duty of care, did the trial judge err in formulation of that standard of care?

[53] As noted earlier, the formulation of the standard of care is a question of law and will be reviewed on the standard of correctness.

[54] Once a duty of care exists the standard of care must be formulated correctly. In **Ryan v. Victoria (City)**, [1999] S.C.J. No. 7 (Q.L.) at ¶ 21, the Court refers to the seminal decision of this Court in **Nova Mink Ltd. v. Trans-Canada Airlines**, [1951] 2 D.L.R. 241 in defining the relationship between the duty and the standard of care:

> The relationship between the duty and the standard of care was explained by MacDonald J.A. of the Nova Scotia Court of Appeal in *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241, at p. 254:
>
> > It is the function of the Judge to determine whether there is any duty of care imposed by the law upon the defendant and if so, to define the measure of its proper performance; it is for the [trier of fact] to determine, by reference to the criterion so declared, whether the defendant has failed in his legal duty.
> >
> > . . .
> >
> > The common law yields the conclusion that there is such a duty only where the circumstances of time, place, and person would create in the mind of a reasonable man in those circumstances such a probability of harm resulting to other persons as to require him to

> take care to avert that probable result. This element of reasonable prevision of expectable harm soon came to be associated with a fictional Reasonable Man whose apprehensions of harm became the touchstone of the existence of duty, in the same way as his conduct in the face of such apprehended harm became the standard of conformity to that duty ...
>
> Thus, a discussion of duty centres around its existence, while the standard of care clarifies what the content of the duty is. Where there is no duty there is no negligence.

[55] The trial judge determined the standard of care that had to be met by the OHSD in its operational activities, was "reasonableness":

> [444] To succeed the plaintiff must show that the OHSD officials did not act in a reasonably competent way, having regard to the nature and severity of the risk, the industry custom and practices and relevant guidelines available. These factors must be balanced against the surrounding circumstances including the availability of qualified personnel and the relative costs of remedial measures.

[56] In formulating the standard of care the trial judge considered **Swanson Estate v. Canada (F.C.A.)**, [1991] F.C.J. No. 452 (Q.L.)(Decision, at ¶ 442). The court in **Swanson**, at p. 9, outlined the factors which inform the standard of care analysis:

> The government is not an insurer; it is not strictly liable for all air crashes, only for those caused by the negligence of its servants. The standard of care required of these inspectors, like every other individual engaged in activity, is that of a reasonable person in their position. What is required of them is that they perform their duties in a *reasonably competent way*, to behave as would reasonably competent inspectors in similar circumstances, no more and no less. In evaluating their conduct, courts will consider custom and practice, any legislative provisions and any other guidelines that are relevant. The risk of harm and its severity will be balanced against the object and the cost of the remedial measures. In the end, the court must determine whether the employees of the defendant lived up to or departed from the standard of care demanded of them, in the same way as in other negligence cases. (See, generally, *Fleming, The Law of Torts*, (7th ed. 1987) at p. 96.) (emphasis added)

[57] Each case is different and some factors are more informative than others on what the requisite standard of care is and whether it was met in the circumstances.

The trial judge here focused on the legislative provisions of the **OHSA**, the OHSD policies, and the statutory and operational discretion authorized under the **OHSA**.

[58] DOEL, in accordance with the **OHSA**, is responsible for the promotion, coordination, administration and enforcement of occupational health and safety within the Province of Nova Scotia. The **OHSA** applies to all workplaces under Provincial jurisdiction and establishes a system which identifies rights and responsibilities for the various parties in workplace safety.

[59] The foundation of the **OHSA** is the Internal Responsibility System, which is based upon the principle that employers and employees, in addition to any other individuals who can affect the health and safety of persons at the workplace, share responsibility for health and safety. Each party assumes responsibility for creating and maintaining a safe and healthy workplace to the extent of their authority and ability to do so. The system includes a framework for participation, sharing of information and refusal of unsafe work. The DOEL's role is to establish and clarify the responsibilities of the various parties under the **OHSA** and to intervene appropriately when those responsibilities are not carried out.

[60] The DOEL ensures compliance with the **OHSA** through inspections and/or investigations of workplace accidents and complaints. In addition, the **OHSA** requires educational instruction to be provided on the principles of occupational heath and safety.

[61] In **Ryan v. Victoria (City), supra**, the Court explains how legislative standards are relevant to the common law standard of care:

> Legislative standards are relevant to the common law standard of care, but the two are not mutually co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. See, e.g., *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 36, and *Saskatchewan Wheat Pool*, at p. 225. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. See *Linden*, supra, at p. 219. Statutory standard can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to

> be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties. (¶ 29)

[62] The **OHSA** prescribes and provides for the activities that were carried out by the OHSD at the Amherst Plant and is the basis upon which the "reasonableness" of the conduct ought to be assessed. The trial judge correctly incorporated the legislative standards contained within the **OHSA** into his formulation of the standard of care.

[63] Cherubini argues that the trial judge did not have regard to the OHSD policies when he formulated the standard of care. With respect, I disagree. It is apparent from the decision that the trial judge, in formulating the standard of care, considered the legislative standards contained in the **OHSA**, OHSD policies, and the existence of statutory and operational discretion relative to divisional policies. The trial judge held as follows:

> [149] The **Act** provides broad powers to inspect, gather information, seize, and issue orders for the purposes of gaining compliance. There is power to prosecute regulatory offences in a quasi criminal proceeding.
>
> [150] In addition there is a panoply of internal policies and procedures intended to guide the regulators in the performance of their duties.
>
> ...
>
> [168] ...The position taken by the Executive Director in his evidence is that neither the training advice, nor the policies could fetter the discretion of any officer to exercise their statutory powers, providing that the actions taken were authorized by the **Act** or Regulations.
>
> . . .
>
> [248] ... I am satisfied that the orders issued fell within the discretion that the statutory regime provides to an OHS officer.
>
> . . .

> [446] Mr. Ross intervened at AFL primarily by his inspection activities. His conduct, notwithstanding his inexperience in the industry was consistent with his statutory obligations, as set out in Section 47-57 of the **Act**. His practice of defaulting to orders was not consistent with the divisional policy, nor the practices of other inspectors, but those factors could not render his actions less competent, only more conservative in applying the law.
>
> . . .
>
> [449] Other activities of OHSD officials are to be assessed against the obligations to assist and support as set out in Section 2 of the **Act**. The statute provides broad discretion to the Divisional officials in determining how to fulfill these functions.
>
> (Emphasis added)

[64] The Legislature gave a broad discretion under the **OHSA** to the OHSD when carrying out its statutory mandate to eliminate and/or minimize workplace injuries or accidents in the Province. Consequently, I cannot agree that the trial judge either ignored or failed to take into account the **OHSA** policies. He considered them having regard to the broad discretion given to the division in carrying out its mandate. This is consistent with the Supreme Court of Canada decision in **Hill v. Hamilton-Wentworth Regional Police Services Board**, 2007 SCC 41 where the Court held:

> 54 Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals. An appropriate standard of care allows sufficient room to exercise discretion without incurring liability in negligence. Professionals are permitted to exercise discretion. What they are not permitted to do is to exercise their discretion unreasonably. This is in the public interest.

[65] The trial judge correctly formulated the standard of care with respect to the OHSD's operational activities. The trial judge had regard to the **OHSA**, OHSD policies and the interplay between those policies and OHSD's statutory and operational discretion (Decision, ¶ 217, ¶ 323-336 ; ¶ 445-454). I will discuss, in more detail, under the next ground of appeal, Cherubini's assertion that a deviation from a policy is a breach of the standard of care.

[66] I would dismiss this ground of appeal.

[67] I will now turn to Cherubini's argument that the trial judge erred in his determination of whether the Attorney General breached its standard of care.

3. Did the trial judge err in determining that the Attorney General did not breach the standard of care?

[68] This issue is a question of mixed law and fact with no extricable question of law and will be reviewed on the palpable and overriding standard.

[69] Cherubini argues that because the OHSD failed to follow its own divisional policies it breached the standard of care to act reasonably in the performance of its duties. It also argues that the policy removed the discretion of an officer. The trial judge addressed this issue head-on in his decision:

1. He did not find any malice or bad faith on the part of the OHSD officers. (¶ 326)

2. The alleged deviations from policy were not deviations from the **OHSA**. The trial judge found the inspector's decisions must be measured against the **OHSA**, and not an internal policy that is intended for internal use only (¶ 330).

3. The orders issued to AFL were valid and fell within the discretionary power imparted on the OHSD and its officers under the legislation and they were subject to a right of appeal or judicial review (¶ 248, 446, 447, 448, 450, 453).

4. He did not find that the conduct of the OHSD officials materially contributed to plant closure, which militates against the finding of unreasonable conduct (¶ 454 and 455).

5. The "policies" pertaining to Joint Evaluations had not been updated to reflect the OHSD's practices in the relevant time frame and, in hindsight, did not reflect the intentions of the OHSD managers in how or why such a general inspection would be ordered (¶ 329).

[70] In assessing the trial judge's determination of "reasonableness", it must be remembered that he found the actions of the OHSD officials were done in furtherance of the legislation, carried out in good faith, authorized by the **OHSA** and not motivated by ill-will or causally connected to the business failure. In light of these findings, the OHSD's conduct cannot be found to be a breach of the standard of care. Further, the trial judge's findings are amply supported by the evidence as detailed in his reasons.

[71] Cherubini's argument fails to recognize the discretion given to the OHSD in the **OHSA** in carrying out its duties. The trial judge was not only correct in considering this discretion in assessing whether a deviation from policy was a breach of the standard, it was incumbent upon him to do so.

[72] To accede to Cherubini's argument would be to narrowly interpret the discretion given to the **OHSA**.

[73] Sharpe, J.A. of the Ontario Court of Appeal in **Ontario (Minister of Labour) v. Hamilton (City)**, (2002) 58 O.R. (3d) 37 stated with regard to the purpose of the **OHSA** legislation:

> [16] The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

[74] To find that any deviation or failure to follow policy would automatically give rise to a breach of a standard of care would not be in keeping with the broad purpose of the statute to maintain and promote a reasonable level of protection and safety of workers in and about their workplace. The discretion of the officials, and the **OHSA**, must be interpreted in a manner consistent with its purpose.

[75] I would dismiss this ground of appeal.

4. Was the validity of the compliance orders issued to Cherubini by the OHSD and Cherubini's decision whether to appeal those orders relevant to the trial judge's negligence analysis?

[76] This is a question of law and will be reviewed on the correctness standard.

[77] Cherubini argues:

1. the validity of the compliance orders issued by the OHSD;

2. whether those compliance orders were appealed; and

3. the outcome of any such appeals

have no bearing on the liability of the Attorney General in negligence.

[78] This ground of appeal arises from two paragraphs in the trial judge's decision:

> [447] His orders were subject to appeal. Some of his orders were appealed and found to be lawful. Others of his orders were appealed and the plaintiff abandoned those appeals. Some orders were not appealed. In the absence of any successful appeal, I find the orders to have been lawful. It is my further view that if the orders are lawful, there can be no breach of the duty of care in respect of the orders.
>
> [448] The inspections and the orders emanating from the Joint Evaluation, and the rigging assessment were effected in accordance with statutory obligations and custom. The plaintiff alleges that certain of the rigging orders reflected incompetence on the part of the inspector. It may be that the practice directions were flawed, but the plaintiff's attempted appeal was not successful and so I am not prepared to find that the issuance of those orders was negligent.

[79] In these paragraphs of the trial judge's decision he is simply looking at the orders and determining whether they were lawful. Having made the determination that they were lawful, he then considered whether they breached the standard of care he had set out previously (the trial judge refers to the duty of care in ¶ 447, however, I think it is clear from the context that he meant to refer to the standard of

care). The standard of care, which I have already determined, was correctly formulated by the trial judge.

[80] The trial judge looked at the circumstances of the orders, as issued, and related it back to whether the issuance of those orders breached the standard as he had found it. The lawfulness of the orders was a relevant factor to be taken into consideration in determining whether there had been a breach of the standard of care.

[81] At trial Cherubini acknowledged that it could not attack the validity of the orders but argued that it was open to the court, as part of the overall assessment of DOEL's actions, to determine whether the factual basis, and the motivation for the issuance of the orders, supports its position that DOEL engaged in tortious conduct against AFL.

[82] That is precisely what the trial judge did. He considered the appropriateness of the orders, the factual foundation for those orders and determined that their issuance did not breach the standard of care. It was but one factor which the trial judge took into account in a very lengthy well-reasoned decision. In taking the lawfulness of the orders into consideration he did not commit any error of law.

[83] The Attorney General argues that Cherubini is precluded, by the doctrine of *res judicata*, from re-litigating any issues raised by matters within the orders. With respect, I did not take Cherubini's argument to be questioning the validity of the orders but rather, as set out above, were requesting that the nature of the orders and the number of orders be taken into consideration when determining a breach of the standard of care.

[84] As a result, and because of my findings that the trial judge properly considered the orders and their validity, it is not necessary to address the Attorney General's argument on *res judicata*.

5. Did the trial judge err in determining that any loss suffered by Cherubini was not caused by the actions of the Attorney General?

[85] The trial judge's conclusion on causation is a question of fact and will be reviewed on a palpable and overriding error standard.

[86] This ground of appeal assumes a finding of wrongful conduct by the trial judge. However, he did not find any wrongful acts on the part of the Attorney General. His decision on this point is as follows:

> [453] The core problem underpinning Mr. Ross' comments in December of 2000, and the decision to order a Joint Evaluation, was a poorly functioning IRS. The reasons were largely driven by the union leadership. The defendant correctly recognized the labour-management problem and was attempting to find a mechanism to get the parties to work together and, to borrow Mr. O'Neil's phrase, get them "out of OHS' hair". The range of options available to OHS were limited. It would have been preferable that they consulted with the employer before ordering the evaluation - to hear both sides of the issues complained of. That may have generated a different and less intrusive response, but with the existing communication problems as between AFL management and OHSD, it is speculative to say that it would be so. In reality, OHSD had to make an independent and credible assessment of the workplace safety at AFL if it were to have any hope of stemming the union efforts to drag it into their dispute with the employer. In one sense, it had the potential to assist the employer in its disagreements with the union. I am satisfied, however, that senior officials of the union were determined not to make the relationship work with the employer under any circumstances.
>
> [454] For these reasons, I do not find the comments of Mr. Ross in 2000 nor the decision to order a joint evaluation to breach the duty of care owed by the defendant to the plaintiff, or to be causative of a loss. In making this determination, I am also determining that there was no material contribution to a loss by these activities as contemplated by the decision of the Supreme Court of Canada in *Athey v. Leonati* [1996] 3 S.C.R. 458.
>
> [455] Further, I am not satisfied that there was a causal link between the actions of the OHSD and the closure of the plant. In my view, that result is solely attributable to the employees' inability to produce the quantity and quality of product necessary to meet the expectations of Cherubini.
>
> [456] The parent company had the ability and a plan to delegate contracts to AFL. AFL was not intended at that time to seek out and obtain its' own contracts. Cherubini had the capacity to continue to provide business to AFL, but it chose not to. I am confident that had the production expectations been met, the actions of the regulator would not have influenced the continuing operation of AFL. It is too remote to suggest that the defendant's activities contributed to the union workers' inability, or desire, to meet production targets.

(Emphasis added)

[87] Causation in tort law curtails the scope of factually relevant events. The concept of causation ensures that tortfeasors be held liable only for the logically connected consequences of their tortious conduct.

[88] John G. Fleming, *The Law of Torts*, 9th ed. (Sydney, Australia: Law Book Co., 1998), at p. 218, addresses the issue of logical causation by inquiring if the injury is one of cause and effect in accordance with scientific or objective notions of physical sequence.

[89] The various claims asserted by Cherubini all require, in addition to proof of commission of the tort itself, that the alleged loss be proven, and that it be caused by the commission of the tort.

[90] Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Markham: LexisNexis Canada, 2011) at p. 362 states as follows:

> Although one cannot totally and completely divorce the two issues, it can be said that cause-in-fact is fundamentally a question of fact, which can be treated relatively expeditiously in most tort litigation.

[91] In **Blackwater v. Plint**, 2005 SCC 58, the Supreme Court of Canada considered the distinction between causation in relation to liability and causation in relation to damages assessed:

> 78 It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway.

[92] This Court in **Nova Scotia (Attorney General) v. B.M.G.**, 2007 NSCA 120 also addressed the distinction:

> [159] It is important to distinguish between causation in relation to liability and causation in relation to damage assessment. With respect to liability, the principle is that the defendant is liable if his or her wrongful acts were a cause of injury even though they were not the only cause. The principle with respect to damages is that the defendant is not responsible for injury or loss that the plaintiff would have suffered even absent the defendant's wrongdoing. ...

[93] In order for causation to be proven by Cherubini, there must be proof, on a balance of probabilities, of a causal nexus between the wrongful acts of the Attorney General and the loss that has occurred.

[94] The trial judge found the cause of the plant's failure had nothing to do with the actions of DOEL. He found the plant failed because of problems with producing the required volumes of quality products and because of a myriad of union - driven problems.

[95] There was ample evidence on which the trial judge could make the findings that the acts of DOEL neither caused nor materially contributed to the loss including:

1. plant losses and a lack of quality in production were not caused by DOEL;

2. the plant operated at a financial loss before DOEL got seriously involved; and,

3. the decision to close the plant had to do with a lack of profit and a lack of quality in production and union issues and the belief by management things would not change for the better.

[96] In finding that the action of DOEL did not contribute to the loss the trial judge did not err.

[97] Cherubini also argues that it can succeed on liability by showing some actionable damage only. It argues evidence on the nature of the damage and

assessment of its quantum is for the second stage of the proceeding. With respect, that approach fails to distinguish between causation as it relates to liability and causation as it relates to damages as noted in **Blackwater, supra**, and **B.M.G., supra**.

[98] While Cherubini recognized the need to prove causation in respect of which losses were caused by the Attorney General for the purposes of the assessment of damages (which would obviously be dealt with at the damages stage of the proceeding), it overlooked the need to prove that the Attorney General's actions were the source of the loss, i.e., that the damages complained of would not have been sustained "but for" the Crown's actions.

[99] Cherubini alleged regulatory negligence on the part of the DOEL. In **Mustapha v. Culligan of Canada Ltd.**, 2008 SCC 27, the Supreme Court of Canada held that causation – that the damage was caused, in fact and in law, by the defendant's act or omission — is one of the four elements which must be proven by a plaintiff to establish the liability of a defendant in negligence (¶ 11).

[100] The Attorney General could not have been held liable without Cherubini having first established causation. Had the Attorney General been found liable, causation would then have also been a factor at the damages stage of the proceeding. AFL was losing money — the trial judge would have had to determine which of Cherubini's losses were caused by regulatory negligence and which losses would have occurred regardless of the negligence.

[101] Liability in negligence is contingent upon a finding of causation. Cherubini could not establish the Attorney General’s liability without first establishing causation — in law and in fact — at the liability stage of the bifurcated action. The trial judge concluded that it failed to do so. In so finding he did not err.

[102] I would dismiss this ground of appeal.

6. Were the OHSD officials acting in good faith?

[103] This was not a ground of appeal which was raised in the Notice of Appeal nor argued in the appellant’s factum. However, after the issue of s. 78 of the **OHSA** and s. 5 of the **PACA** was raised, Cherubini asked us to consider this

additional ground of appeal. It argued that if it was found that there was no duty of care owed because of the operation of s. 78 of the **OHSA**, and s. 5 of the **PACA**, those provisions were inapplicable because the Attorney General was not acting in good faith. Once again this is a question of fact and will be reviewed on a palpable and overriding error standard.

[104] Section 78 of the **OHSA**, again, provides as follows:

> 78 No action lies or shall be instituted against an officer, a committee, a member of a committee, a representative, the Director, an appeal panel, a member of an appeal panel or the Director of Labour Standards where that person or body is acting pursuant to the authority of this Act or the regulations for any loss or damage suffered by a person because of an act or omission done in good faith by the person or body
>
> (a) pursuant to, or in the exercise or supposed exercise of, a power conferred by this Act or the regulations; or
>
> (b) in the carrying out, or supposed carrying out, of a function or duty imposed by this Act or the regulations.

[105] Cherubini asks us to conclude that the Attorney General was not acting in good faith and, therefore, s. 78 would not apply to the facts of this case.

[106] The trial judge, on a number of occasions in his decision, when discussing the actions of the OHSD officials, concluded that they were acting in good faith.

[107] In making this finding, he did not commit any palpable and overriding error. On the contrary, the evidence supports his conclusions.

[108] The trial judge found:

1. DOEL was not motivated by bad faith or malice (¶ 269 and 326);

2. the actions taken by the DOEL were carried out to meet the purposes of the public safety legislation that it was duty bound to enforce (¶326);

3. the DOEL did not intend to injure the defendant nor did it engage in any illegal or unlawful conduct towards the plaintiff (¶ 338); and

4. the DOEL employees conducted themselves confident in the belief that their actions were within the statutorily mandated powers given to them and that they were pursuing a safe workplace (¶ 372).

[109] These findings were made only after a thorough review of the evidence by the trial judge. There is nothing in the record that would warrant our interference with this conclusion.

[110] As a result, I would dismiss this ground of appeal.

7. Did the learned trial judge err in failing to award costs to the successful party below?

[111] During final submissions to the trial judge neither party made any reference or submissions on costs. This may be explained by the bifurcation of the proceedings. Given that the issue of liability was to be tried first, followed by a trial (if necessary, on the issue of damages), it is reasonable to assume that the parties intended to leave their submissions on costs until some time after the conclusion of the trial on liability. However, the trial judge neither asked for nor received submissions on costs and concluded, summarily, in his decision as follows:

> While the action is dismissed, I am not prepared to make an award of costs against the plaintiff. (¶ 467)

[112] The Attorney General says that the trial judge erred by failing to invite counsel to make submissions on costs; by failing to decide costs on a principled approach; and by depriving the Attorney General of its costs when its conduct, as disclosed by the decision of the trial judge, did not warrant a departure from the usual approach that costs follow the event. I agree.

[113] The general rule is that costs should follow the event. While a trial judge has the discretion to depart from the general rule, it is an error in principle not to award a successful party costs unless there are sound reasons for doing so (**McPhee v. Canadian Union of Public Employees**, **supra** at ¶ 71).

[114] If a trial judge gives no reason for departure from the general rule and none is apparent from a review of the record, the Court of Appeal is entitled to intervene (**McPhee v. Canadian Union of Public Employees**, **supra**, ¶73). However, the lack of reasons is not a freestanding ground of appeal. This Court must then review the record to see whether it discloses a proper basis for the trial judge's exercise of discretion.

[115] Why costs should generally be awarded to the successful litigant was addressed by Saunders, J. (as he was then) in **Landymore v. Hardy** (1992), 112 N.S.R. (2d) 410:

> [17] Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged. ...

[116] A review of the record does not disclose a sound basis for the trial judge's failure to award costs to the Attorney General. At trial, Cherubini led evidence that the DOEL, by their actions, engaged in conduct which was intended to be an intentional interference with Cherubini's economic relations. They also argued that the Attorney General committed the tort of misfeasance in public office, conspiracy, and finally, regulatory negligence. It was unsuccessful on every one of its causes of action. Further, the trial judge found the OHSD officials, at all times, acted in good faith and in accordance with their statutory mandate.

[117] With respect, the costs of this matter should have followed the event and the trial judge erred by failing to so order, or at least explain why he was departing from the general rule. However, unlike the situation in **McPhee v. Canadian Union of Public Employees**, **supra**, we do not have sufficient information before us which would allow us to determine the appropriate amount of costs. As a result, I would remit the issue to the trial judge for determination of the appropriate amount of trial costs.

[118] I would allow this ground of appeal on the cross-appeal and award costs to the Attorney General at trial to be assessed by the trial judge.

Costs of this Appeal

[119] The Attorney General has been successful in defending the appeal and has been successful on both grounds of its cross-appeal. Albeit, its success on the duty of care was as a result of a legal determination made on a ground initially raised by this Court and not originally argued by it.

[120] The Attorney General shall be entitled to costs of the appeal and the cross-appeal which I would fix in the amount of $22,500 plus taxable disbursements. I have set this amount having regard to the volumous record, the acknowledged size of the claim, the extensive issues, the necessity to file multiple facta and the Attorney General's success on the appeal and cross-appeal.

Conclusion

[121] Cherubini's appeal is dismissed; the cross-appeal of the Attorney General is allowed; the Attorney General shall have its costs in the amount of $22,500 plus taxable disbursements. The determination of the amount of trial costs to be paid to the Attorney General is remitted to the trial judge for determination.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Saunders, J.A.