NOVA SCOTIA COURT OF APPEAL

Citation: *Halifax (Regional Municipality) v. Ofume*, 2003 NSCA 110

Date: 20031017
Docket: CA 195552
Registry: Halifax

Between:

Halifax Regional Municipality

Appellant

v.

Maureen Ofume

Respondent

Judges: Saunders, Freeman and Oland, JJ.A.

Appeal Heard: September 25, 2003, in Halifax, Nova Scotia

Held: **Appeal dismissed per reasons for judgment of Saunders, J.A.; Freeman and Oland, JJ.A. concurring.**

Counsel: Matthew G. Williams, for the appellant
Dr. Phillip Ofume as agent, for the respondent

Reasons for judgment:

Factual and Procedural Background

[1] The respondent, Maureen Ofume, says she was hurt when she fell out of a bus owned and operated by the appellant on September 18, 2000. This appeal determines whether her husband, who is not a lawyer, can represent her.

[2] Ms. Ofume claims that while she was getting out of the bus it pulled away causing her to fall on to the sidewalk. She commenced an action through her then solicitor, Peter D. Crowther, on September 17, 2001, alleging vicarious liability against the appellant, Halifax Regional Municipality ("HRM"), for the negligence of its bus driver and seeking damages for her injuries. HRM filed a defence to the action on March 26, 2002.

[3] Mr. Crowther later ceased to act for the respondent. The reasons for his departure are not material, although from reading the record I suspect that interventions by Mrs. Ofume's husband were a precipitating factor. Carriage of her lawsuit was taken over by her husband, Phillip C. Ofume, Ph.D., who, on November 15, 2002, filed what was purported to be an amended statement of claim. Its effect was to transform the original allegation of negligence in the operation of the bus into a "pleading" that contained sweeping allegations of racism, oppression, sabotage, obstruction of justice, foul play, malfeasance and similar nefarious conduct on the part of individuals or institutions said to have had a hand in the respondent's mishap and subsequent litigation.

[4] The matter came before Nova Scotia Supreme Court Justice A. David MacAdam in Chambers on January 29, 2003. HRM brought a two-part application, seeking first an order striking out the amended statement of claim pursuant to **Civil Procedure Rule** 14.25 on the ground that it disclosed no reasonable cause of action; and second, an order barring Phillip Ofume from acting on his wife's behalf in any representative capacity pursuant to s. 5(a)(5) of the **Barristers' and Solicitors' Act**, R.S.N.S. 1989, c. 30, as amended and **Civil Procedure Rule** 9.08(1).

[5] After considering the parties' written and oral submissions, MacAdam, J. allowed the application in part. He struck out practically all of the amended

statement of claim except for any added references that better identified the bus as "Metro Transit Bus No. 80" or particularly related to the action between the plaintiff and the defendant. MacAdam, J. declined the second aspect of HRM's application. He permitted Phillip Ofume to continue to act for the respondent, but upon strict terms. An order confirming the Chambers judge's directions was taken out on March 5, 2003.

[6] It is from that order which allows Phillip Ofume to continue to act for the respondent in this litigation that HRM appeals.

Position of the Parties

[7] The various submissions put forward by HRM may be reduced to three principal arguments. First, HRM complains that the Chambers judge failed to give any weight to s. 5 of the Nova Scotia **Barristers' and Solicitors' Act** ("the **Act**") which prohibits unqualified persons from practising law or appearing on behalf of others, and **Rule** 9.08(1) of the Nova Scotia **Civil Procedure Rules** which expressly permits a person to be self-represented or represented by a solicitor, but which makes no provision for an agency relationship by a non-solicitor. Second, HRM claims that the Chambers judge erred, both in law and in fact in permitting Dr. Ofume to continue to act, by failing to consider both Dr. Ofume's demonstrated inability to effectively represent the respondent's interests or advance this litigation in a timely and appropriate fashion, and failing to appreciate the prejudice his continued representation will cause both the appellant and the respondent. Third, HRM says that MacAdam, J. erred when he chose to ignore previous jurisprudence of his court as well as binding authority from higher courts, the effect of which would bar Dr. Ofume from any further representations of his wife in this law suit.

[8] Dr. Ofume's arguments were rambling, unfocused and in several respects irrelevant. We frequently had to interrupt and confine him to the pertinent issues of this case. While it was exceedingly difficult to make sense of Dr. Ofume's submissions, it would appear that his position may be restated as making the following points.

[9] First, he believes that "no lawyer in Canada" will take his wife's case as to do so will "cause them to lose their jobs". This is his rationale for embarking upon his own strategy of "reading the law since 1999." He says that if one were to

examine the record in this case and the countless "other cases he has launched or defended in Nova Scotia and before the Supreme Court of Canada" one would find, he asserts, that he has "never made a technical mistake in any of his cases" a proposition from which we are asked to infer that he has acquired sufficient skill to carry on with this one.

[10] Second, he says the Nova Scotia **Barristers' and Solicitors' Act** is "a horizontal law" and "not a vertical law" and so is, as I understand it, subsumed by or subject to "the supreme law" said to have been passed or adopted by the United Nations in 1948. It is not clear to me what we are to make of this proposition. In any event, I propose to deal with the merits of the appeal without having to divine this assertion made by Dr. Ofume any further.

[11] Dr. Ofume's third assertion is to deny taking a fee, directly or indirectly, in representing his wife on this file. He described himself as a "volunteer" and said that no one is paying him any money for his involvement.

[12] I would characterize Dr. Ofume's final point as one alleging poverty and oppression and raising an access to justice argument. Put simply, Dr. Ofume seems to be saying that he and his wife cannot afford to pay a lawyer, that there is "no lawyer in Canada" prepared to take her case whether on a contingency or any other basis and that to prohibit Dr. Ofume from continuing to act on his wife's behalf will in his words "bury the case" and effectively deny her access to court and defeat any prospect of recovering compensation for her injuries.

[13] After carefully considering the entire record as well as the written and oral submissions at the hearing I have concluded that HRM's appeal ought to be dismissed.

Preliminary Matters

[14] I wish to deal first with two preliminary matters. Justice Cromwell of this Court issued an order in Chambers on July 22, 2003, granting the respondent leave to file a supplementary appeal book but reserving to the panel hearing the case the issue of whether or not the respondent should be granted leave to refer to its contents at the hearing. Counsel for HRM took no position and did not oppose our considering the contents except for pointing out that much of it was irrelevant to these proceedings. I have reviewed the material contained in the respondent's

supplementary appeal book, agree that most of it is irrelevant and in any event I need not refer to it in reaching these conclusions.

[15] The second preliminary matter relates to Dr. Ofume's concern over what he described as an incomplete transcript of the hearing in Chambers on January 29th. He went so far as to say that the tape of the proceedings had been deliberately tampered with such that the typed transcript of the hearing "was defective". There isn't a shred of evidence to support Dr. Ofume's contention. The editorial notes that often appear in the transcript, for example, "inaudible - both speaking" or "inaudible - unclear" or "inaudible - coughing" may well be a case of people talking at cross purposes or at the same time; wandering away from the range of the recording microphones; or Dr. Ofume's soft-spokenness or manner of speech that is often difficult to understand. In compliance with earlier directions given in Chambers before this Court counsel for HRM provided us and Dr. Ofume with a copy of the tape of the proceedings. In light of the conclusions I have reached it is not necessary for me to verify with any precision the accuracy of the transcript of the hearing before MacAdam, J. which led to the order under appeal. I do wish to emphasize, however, that there isn't a jot of evidence to suggest that anyone tampered with the tape or that "distortions" on the tape were the result of a deliberate act by persons unknown. I turn now to a consideration of HRM's principal arguments.

Standard of Review

[16] The law governing an appeal from an interlocutory order is well known. We will not interfere unless wrong principles of law have been applied or a patent injustice would result. See for example **Exco Corp. Ltd. v. Nova Scotia Savings & Loan** (1983), 59 N.S.R. (2d) 331 (C.A.) and **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 (C.A.).

Analysis:

*Failure to Consider the **Act** or the **Civil Procedure Rules***:

[17] I do not accept the submission that the Chambers judge failed to give any weight to s. 5 of the Nova Scotia **Barristers' and Solicitors'' Act**, R.S.N.S. 1989, c. 30 which prohibits unqualified persons from practising law or appearing on behalf of others. This question was obviously raised in submissions before the Chambers judge. It was not, evidently, an argument he found to be persuasive. Neither do I. For our purposes the material portions of the **Act** provide:

> **Person disqualified**
>
> **5 (1)** No person who is not a member of the Society and entitled to practise as a barrister shall carry on the practice or profession of a barrister.
>
> **Description of practice**
>
> **(2)** The carrying on of the practice or profession of a barrister includes for all purposes of this Act the doing by any person for fee, gain or reward, direct or indirect, of any of the following things:
>
> (a) drawing or preparing a deed, mortgage, release, assignment or testamentary document;
>
> (b) drawing or preparing any document relating to the incorporation, organization, reorganization or winding up of a corporation;
>
> (c) drawing or preparing any document to be used in proceedings in any court in the Province;
>
> (d) appearing in or before any court, public board or commission on behalf of another person;
>
> (e) giving legal advice to any person.

...

Interpretation of Section

5A (1) In this Section,

(a) "law corporation" means a corporation that is issued a permit by the Society;

(b) "permit" means a permit issued pursuant to the regulations to a corporation permitting the corporation to carry on the practice or profession of a barrister in the Province;

(c) "practising member" means a person who is a member of the Society and entitled to practise as a barrister in the Province;

(d) "prescribed person" means a person prescribed by the regulations.

...

Requirement to be practising members

(5) All persons who carry on the practice or profession of a barrister on behalf of a law corporation shall be practising members

[18] Counsel for the appellant urges that Dr. Ofume's actions constitute "carrying on the practice" of a barrister and that since Mrs. Ofume's cause of action is a personal injury claim for monetary damages, one ought to infer that Dr. Ofume, in acting on his wife's behalf, is "doing" such things for a "fee ... direct or indirect". With respect, the assertion is nothing more than speculation In my opinion the decision whether to prosecute Dr. Ofume for practising law is a matter for the Nova Scotia Barristers' Society. At the hearing we were advised that its officials are well aware of the situation. There is nothing to prevent the Society from commencing an investigation and, if so advised, pursuant to s. 6, initiating a prosecution against Dr. Ofume under the **Summary Proceedings Act** for a

violation of the **Barristers' and Solicitors' Act** and its Regulations. I point out that in the factum filed by Dr. Ofume in this case he states at p. 4/18:

> Due to lack of lawyers in Canada to take carriage of her case, she appointed a Representative (Dr. Phillip Ofume) who has been practising law in Canada since 1999. (Underlining mine)

Whether such an admission together with the series of other acts referred to by HRM's counsel during the hearing constitute violations of the **Act** warranting formal prosecution is a matter for the Society to determine.

[19] I turn now to a consideration of **Civil Procedure Rule** 9.08(1) that allows a person to be self-represented, or represented by a solicitor, but makes no provision for lay representation. **Civil Procedure Rule** 9.08(1) states:

> **9.08.** (1) Except in the case of a litigation guardian as referred to in rule 6.02(3), any person, whether or not he sues as a trustee or personal representative or in any other representative capacity, may commence, carry on or defend a proceeding in the court by a solicitor or in person. (Underlining mine)

I have underlined the word "in" to emphasize – as I reminded Dr. Ofume during the hearing – that he misstated this provision throughout his written submissions by leaving out the word "in" and misquoting the **Rule** as if it read:

> ... carry on or defend a proceeding in the court by a solicitor or person. ... (sic)

[20] A first reading of **Civil Procedure Rule** 9.08(1) might suggest that its effect is to prohibit, in all cases, anyone other than a solicitor or a self-represented litigant from ever appearing in a Nova Scotia court room. Such an interpretation would be wrong for two principal reasons, the first based on the court's inherent jurisdiction and the second based on the rules of interpretation.

[21] There is ample authority that Canadian superior courts possess inherent jurisdiction to control their own procedures. In **Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd.** (1972), 21 D.L.R. (3d) 75, the Manitoba Court of Appeal carefully examined the nature of this jurisdiction. Writing for a unanimous court, Freedman, C.J.M. observed at pp. 80 - 81:

> What is the inherent jurisdiction of the Court? In his able factum, Mr. Weir, counsel for the defendants, expressed himself on that subject as follows:
>
> > The only “inherent jurisdiction” claimed by English Courts is the power to prevent abuse of its process by staying or dismissing vexatious actions.
> >
> > > **Orpen v. A.G. Ontario** (1924) 56 O.L.R. 327 at 332 and the cases cited therein.
>
> With respect, this narrows the scope of a concept whose nature has been described as "so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits": "The Inherent Jurisdiction of the Court", by I. H. Jacob, Current Legal Problems, 1970, pp. 23 to 52.
>
> It is true that inherent jurisdiction is frequently invoked to prevent abuse of the process of a Court by staying or dismissing a vexatious action. The Orpen case [Orpen v. A.-G. Ont., [1925] 2 D.L.R. 366, 56 O.L.R. 327], was of that type, and naturally enough the authorities there cited deal with frivolous or vexatious actions that were so stayed or dismissed. But it would be wrong to think that that type of case is exhaustive of the scope of inherent jurisdiction. In our view its nature is broader.
>
> Examples of other areas in which inherent jurisdiction may be invoked and exercised are not difficult to find. They include, as the article of Master Jacob, supra, indicates, the power to deal with contempt of Court; the right to require a plaintiff claiming damages for personal injuries to submit himself to a reasonable medical examination and to stay his action until he does so; the right, even after judgment, to vary the Court's own order so as to express correctly its intention and thereby to ensure that justice is not defeated; the power where the interests of justice so require to order that a case be heard in camera; the power to compel observance of the Court's process, and many others. To add a Canadian reference,

Holmested & Gale's Ontario Judicature Act and Rules of Practice (1971), vol. 3, says at p. 2245, s. 526(3):

> Inherent jurisdiction -- Apart from the rules, the court has power to set aside a judgment obtained on motion for default, and this power can be exercised by a Judge sitting in Weekly Court: Toronto Gen. Trusts v. Rosenfield (1925) 58 O.L.R. 23; see also Perfaniuk v. Ladobruk (1960) 34 W.W.R. 166 (Man. C.A.).

Certain other features of inherent jurisdiction pointed out by Master Jacob are relevant for us to note. Inherent jurisdiction is derived not from any statute or rule but from the very nature of the Court as a superior Court of law: "The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law." (p. 27). Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

Master Jacob concludes his very helpful analysis with the following definition at p. 51:

> In this light, the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

Vide also the paper “Inherent Powers of the Court” by Hartt, J., of Ontario, delivered to the Canadian Judicial Conference in August 1970.

Finally, we refer to the following apt language of Lord Morris in *Connelly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401 at 409:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction.

[22] This Court, in its recent decision in **Goodwin v. Rodgerson** (2002), 210 N.S.R. (2d) 42 at p. 48, affirmed the principle of inherent jurisdiction as it applies to the Supreme Court of this province:

> The inherent jurisdiction of the court has been described as a vague concept and one difficult to pin down. It is a doctrine which has received little by way of analysis, but there is no question it is a power which a superior trial court enjoys to be used where it is just and equitable to do so. It is a procedural concept and courts must be cautious in exercising the power which should not to be used to effect changes in substantive law.

[23] The Privy Council recognized the inherent jurisdiction of common law courts in **O'Toole v. Scott et al.**, [1965] 2 All E.R. 240, and took that jurisdiction to include the power to allow a non-lawyer to represent a party. The Privy Council held that Australian magistrates possessed a general discretion to allow any person to represent an "informant" in a prosecution. Lord Pearson found at p. 243 that the jurisprudence supported a general principle that "subject to usage or statutory provisions, courts or tribunals may exercise a discretion whether they will allow any, and what persons, to act as advocates before them". The language of the *Summary Jurisdiction Act*, 1848, giving a party the right "to have the witnesses examined and cross-examined by counsel or attorney on his behalf" (quoted at p. 245), was not sufficiently explicit to overcome the inherent discretion of the Court to govern its own proceedings.

[24] In **Baxter Housing Ltd. v. College Housing Co-operative Ltd.**, [1976] 2 S.C.R. 475, Dickson, J. (as he then was), writing for a unanimous Supreme Court, acknowledged at p. 480 that **Montreal Trust Co.,** supra, "may well be cited as a paradigm of the exercise of judicial discretion...". However, the Court allowed the appeal against the decision of the Court of Queen's Bench to appoint a receiver under terms that ran contrary to the Manitoba **Mechanics' Lien Act**, R.S.M. 1970, c. M80, s. 11(1). At p. 480, Dickson J. set limits to the exercise of superior courts' inherent jurisdiction:

> In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of legislative will. The effect of the order made in this case was to alter the statutory priorities which a court simply cannot do.

[25] This and similar jurisprudence in this country clearly establishes that Canadian courts of superior jurisdiction maintain a general inherent jurisdiction, which includes the discretion to control their own process. The question that arises in the instant case is whether a rule that purports to limit representation to a party or a solicitor is sufficient to override the court's inherent jurisdiction.

[26] The Ontario Divisional Court examined this question in **Equiprop Management Ltd. v. Harris**, (2000) 51 O.R. (3d) 496, 195 D.L.R. (4th) 680, 140 O.A.C. 1, 9 C.P.C. (5th) 323. There a paralegal sought leave to represent a party in an appeal from a decision of the Ontario Rental Housing Tribunal, the administrative body that decides the majority of residential tenancy disputes in that province. He argued that agents have an absolute right to represent parties in tenancy disputes, or in the alternative that the Court should grant leave to allow him to appear. Lang, J. dismissed the first argument, finding at p. 699 that the Rules of Civil Procedure govern appeals from the ORHT and that the **Tenant Protection Act**, S.O. 1997, c. 24 and **Statutory Powers Procedure Act**, R.S.O. 1990, c. S. 24 have no application to appeal proceedings. Lang, J. then went on to determine that the Court has no discretion to grant leave to a non-lawyer to represent a party. She relied on rule 15.01 of the Ontario **Rules of Civil Procedure**, which reads as follows:

> **WHERE SOLICITOR IS REQUIRED**
>
> **15.01** (1) A party to a proceeding who is under disability or acts in a representative capacity shall be represented by a solicitor. R.R.O. 1990, Reg. 194, r. 15.01(l).
>
> (2) A party to a proceeding that is a corporation shall be represented by a solicitor, except with leave of the court. R.R.O. 1990, Reg. 194, r. 15.01(2).
>
> (3) Any other party to a proceeding may act in person or be represented by a solicitor. R.R.O. 1990, Reg. 194, r. 15.01(3).

[27] Lang, J. examined this rule and its application to the case before her at ¶ 54:

> I look at rule 15.01(3), which only allows self-representation or solicitor representation, for support. The rule makes no reference to other representation, although such representation is contemplated by rule 15.01(2). Unquestionably, the court has inherent jurisdiction to control its own process, including who will

> have right of audience, and the court may exercise that inherent jurisdiction provided that it does not conflict with a statutory enactment, including rule. Rules are generally considered to be additional to, rather than in substitution for, inherent jurisdiction. See **Straka v. Humber River Regional Hospital**, [2000] O.J. No. 4212 (QL)(C.A.) at para. 26 [now reported 193 D.L.R. (4th) 680].

[28] She then briefly discussed **Baxter Student Housing Ltd.,** supra and **Montreal Trust Co.,** supra, making particular note of the limit imposed on inherent jurisdiction expressed by Dickson, J. as a bar against making "an order negating the unambiguous expression of the legislation will." Lang, J. applied this principle to the Ontario Rules at ¶ 56:

> While it may be argued that rule 15.01(3) is equivocal because it simply omits reference to agent representation, this is belied by the specific reference to other representation with leave in rule 15.01(2). Agents are not given a right of audience under any circumstances by rule 15.01(3).

[29] This case was not appealed and has not yet been judicially considered by an appellate court. Although Ontario's Divisional Court often sits as a three-person panel, this case apparently resulted from an application and is the opinion of Lang, J. sitting alone. It should finally be noted that Lang, J. found that the paralegal in question was, by representing a party in court, practicing law in violation of s. 50 of the **Law Society Act**.

[30] In my view a different result obtains in this province. It is my considered opinion that the Nova Scotia Supreme Court possesses an inherent jurisdiction, which includes the discretion to control its own process by, among other things, allowing or excluding laypersons from representing parties before the court. Section 5(1) of the **Barristers and Solicitors Act** prohibits non-lawyers from carrying on the practice or profession of law, but that section on its face does not meet the **Baxter Housing** and **Montreal Trust Co.** tests of unambiguously removing the inherent jurisdiction of the court. If the discretion to allow lay representation is to be removed, it must be through the operation of **CPR** 9.08.

[31] For ease of reference I will repeat the provisions of **C.P.R.** 9.08 which contain the purported prohibition against non-solicitors representing parties before the courts:

> **Right to sue or defend in person or by a solicitor**

> 9.08. (1) Except in the case of a litigation guardian as referred to in rule 6.02(3), any person, whether or not he sues as a trustee or personal representative or in any other representative capacity, may commence, carry on or defend a proceeding in the court by a solicitor or in person.[Amend 31/1/98]
>
> (2) A body corporate may commence, carry on or defend a proceeding by a duly-authorized officer resident in the province.
> [Amend. 27/10/80]

[32] On its face, some of the language of this rule bears a similarity to the Ontario rule considered by Lang, J. in **Equiprop,** supra. The words "by a solicitor or in person" are quite clear, and appear to restrict representation before the courts to either self-represented parties or lawyers. However, the rule does not make use of mandatory language such as "shall," but instead states that a person "may" act by a solicitor or in person. It is significant to note that even subsection (2) of this rule, which deals with corporations, does not use mandatory language, whereas rule 6.02(3), requires that "A litigation guardian of a person under disability *shall act by a solicitor"* (emphasis added). The use of mandatory language elsewhere in the rules to require a solicitor suggests that the use of permissive language in this section was intentional. At the very least, the use of the permissive "may" instead of "shall" militates against a finding that this rule is unambiguous.

[33] In addition, the heading to this rule indicates that the rule sets out the "right" to act in person or through a solicitor. In contrast, the heading to the corresponding Ontario rule reads "Where Solicitor is Required". Ruth Sullivan, in *Sullivan and Driedger on the Construction of Statutes*, 4th Ed., Butterworths: Ottawa, 2002, states at p. 305 that :

> The view favoured in recent judgments from the Supreme Court of Canada is that for purposes of interpretation headings should be considered part of the legislation and should be read and relied on like any other contextual feature.

[34] Read in its appropriate context under the heading of "Right to sue or defend in person or by a solicitor", rule 9.08 cannot be said to be an unambiguous bar against non-lawyers representing parties before the court. In my opinion the

ambiguity inherent in the permissive language of the rule, as reinforced by the permissive heading, renders the rule incapable of trumping the inherent jurisdiction of the court.

[35] It is important to remember that our juridical antecedents in Nova Scotia are said to be the oldest in Canada and arise from authority, customs and traditions that may be quite different than in other parts of the country. In **Midland Doherty v. Rohrer and Central Trust** (1985), 70 N.S.R. (2d) 234; N.S.J. No. 121 (Q.L.)(C.A.), MacKeigan, C.J.N.S., writing for the Court, considered the inherent jurisdiction of this Court in the context of re-hearing an appeal where the interests of justice require it. He wrote:

> [15] This Court, I conceive, is not limited in jurisdiction as some statutory Courts may be. Its jurisdiction is that of the Supreme Court as originally established long before the Judicature Act of 1884 ...

[36] The Ontario rules, under the authority of which **Equiprop** was decided, are enacted as regulations pursuant to s. 66 of the **Courts of Justice Act**, R.S.O. 1990, c. 43. The rules are created by a "Civil Rules Committee", which consists of fourteen judges and thirteen other persons involved in the legal community, including the Attorney General or his or her representative. The rules are subject to the approval of the Lieutenant Governor in Council. The judges of the Court obviously have a part in the making of the rules, but the rules are regulations under the **Act**.

[37] The Nova Scotia **Civil Procedure Rules**, in contrast, are made by the judges of the Superior Court and the Court of Appeal pursuant to s. 46 of the **Judicature Act**. The Attorney General does not have a hand in their creation, and they are not subject to approval by the Lieutenant Governor in Council.

[38] One recalls that in **Baxter,** supra, the Supreme Court of Canada was addressing the appointment of a receiver under the **Mechanics' Lien Act**, where the lower court had chosen to exercise its inherent jurisdiction to fill in what it saw as a gap in the substantive law. As the substantive law was governed by statute, Dickson, J. found that the court had overstepped by attempting to "alter the

statutory priorities". In its unanimous judgment, the Supreme Court of Canada allowed the appeal finding that the receiver's appointment was wrong in law and that the lower court's inherent jurisdiction was not such as to empower a judge of that court to issue an order negating the unambiguous expression of the legislative will.

[39] Our rules in Nova Scotia certainly do not "alter the statutory priorities" as was found in **Baxter,** supra. Our **Civil Procedure Rules** do not oust or temper the court's inherent jurisdiction; rather they reflect its authority and countenance its application.

[40] Unlike **Baxter**, this case does not arise from an attempt to plug a perceived statutory hole but rather from the exercise of a judicial discretion to control the court's process. In the instant case the discretion exercised by Justice MacAdam derives from the Court's inherent jurisdiction to control its own proceedings. I see this control as fundamental to a court that derives its power and existence not from statute but from the Constitution. The operation of the court is a necessary function of our society. The inherent jurisdiction which helps to maintain the efficiency and fairness of such a court is something far greater than the jurisdiction to correct substantive problems, as was considered in **Baxter**. The inherent jurisdiction exercised by the Chambers judge here is the kind of jurisdiction spoken of by Lord Morris in **Connelly,** supra, quoted in **Montreal Trust Co., supra**, which gives rise to the "powers which are necessary to enable [a court] to act effectively".

[41] This Court should not lightly interfere in the exercise of this important and necessary jurisdiction unless it is clearly within the interests of justice to do so. Specifically, with respect to the discretion to allow lay persons to represent others before the courts of Nova Scotia, although such a discretion should be exercised cautiously and sparingly and always with a full consideration of such factors as: the capability and integrity of the lay person; the complexity of the case; the vulnerability of and potential harm to the represented party; the prejudice to the opposing side; the operation of s. 5(1) of the **Barristers' and Solicitors Act**; the demands upon time and judicial resources; the interests of other litigants seeking access to our courts; the objective of securing a just, speedy and inexpensive determination of every proceeding (**C.P.R. 1.03**); and the duty to ensure that

respect for the administration of justice does not fall into disrepute – I am persuaded that allowing judges to decide who may appear before them on a case by case basis, rather than instituting an outright prohibition, will better serve the interests of justice.

[42] For all of these reasons I would not disturb the manner in which Justice MacAdam chose to exercise his discretion.

Failure to consider Dr. Ofume's Abilities and Motives:

[43] HRM's second argument alleges error on the part of the Chambers judge in failing to consider Dr. Ofume's demonstrated inability to provide effective counsel to his wife. I am not persuaded by the appellant's submission. It will be useful at this point to refer to Justice MacAdam's directions. The operative parts of his order are reproduced below:

ORDER

> BEFORE THE HONOURABLE JUSTICE MACADAM IN CHAMBERS:
>
> **UPON HEARING** Matthew G. Williams, as counsel for the Defendant and Dr. Phillip Ofume for the Plaintiff;
>
> **AND UPON READING** the material filed herein;
>
> **IT IS ORDERED** that the Amended Statement of Claim filed by the Plaintiff be struck, with the exception of the amendment thereto which specifically references Metro Transit Bus Number 80, and such other amendments directly relating to the action between the Plaintiff and the Defendant;
>
> **IT IS FURTHER ORDERED** that Dr. Phillip Ofume is permitted to continue to act for the Plaintiff, Maureen Ofume, on the condition that she provide her consent that Dr. Ofume represents her in this proceeding;

> **IT IS FURTHER ORDERED** that Dr. Ofume, as the Plaintiff's representative, and with her consent, may continue to represent the Plaintiff in this proceeding so long as he confines himself to the issues involved in the proceeding;
>
> **IT IS FURTHER ORDERED** if Dr. Ofume, as representative of the Plaintiff, fails to comply with the above conditions, the Defendant may apply to the Court for such further Order as this Honourable Court may deem just in the circumstances;
>
> **AND IT IS FURTHER ORDERED** in respect to these proceedings, that the Plaintiff shall communicate with Defence counsel, and the Defendant shall communicate with the Plaintiff through the Plaintiff's representative Dr. Ofume.
>
> **DATED** at Halifax, Nova Scotia, this 5th day of March, 2003.

[44] The terms of the order are clear. Dr. Ofume's continued representation is subject to and bound by strict and precise conditions. Their violation enables the appellant to apply immediately for further relief. It also in no way impedes any other judge in the exercise of his or her discretion, whether in Chambers or at trial. If at any other stage of these proceedings difficulties arise, whether as canvassed in MacAdam, J.'s order or otherwise, remedies are available to the appellant.

[45] It was suggested to us during the hearing by counsel representing HRM that their decision to appeal was not taken lightly but prompted by the view that they were left with no alternative because, in counsel's words, the litigation had virtually "ground to a halt" due to Dr. Ofume's behaviour. We were told that he refuses to accept or open mail; fails to take or return telephone calls; and seeks to evade service or purports to deny proper service in the face of affidavit evidence to the contrary. While Dr. Ofume may be well educated in those subjects where he claims to have earned a doctorate, the appellant insists that his track record before the courts in Nova Scotia belie any efforts to co-operate or act on instructions from the plaintiff in this case. The appellant says that Dr. Ofume does not have the legal skills to effectively represent his wife in a personal injury action and that because he is so caught up in his thoughts of skullduggery and malfeasance by others, it

will prove impossible for him to channel his energies towards the capable and timely advancement of his wife's interests.

[46] This case appears to be a straightforward personal injury action. Maureen Ofume says she was hurt in a mishap three years ago. Delay will not work to her advantage. Her claim should not be cluttered or impeded by extraneous, irrelevant tangents and pursuits. Her right to seek damages from HRM for injuries purportedly caused by the Municipality's vicarious negligence ought not to be turned into a claim designed to advance the personal or political agenda of Dr. Ofume or to expose the perceived ill-treatment that seems to consume him.

[47] Justice MacAdam's order makes this clear. Its breach triggers consequences. Nothing in it prevents further or other relief available to the appellant upon application. Some examples come to mind. Whereas Dr. Ofume may not be diligent in pursuing his wife's claim there is no reason for the appellant to have to wait for something to happen. Discovery examination of the respondent could be convened before a court-appointed examiner upon Sheriff's service of a notice of examination or, if necessary, an order. Demands to produce medical documentation as well as submit to an independent medical could also be effectively served. Application might be made to prohibit the respondent (but not the appellant) from taking any further steps to advance her own claim until all outstanding costs orders were paid, forthwith. The appellant might also apply for security for costs if so advised, at any stage of the proceedings. The respondent's failure to attend or respond to any or all of the suggested strategies might then invoke an application by the appellant to strike out Mrs. Ofume's claim, thus putting an end to her cause of action. I see no impediment to the appellant's pursuit of these and similar steps, if so advised, at any stage of these proceedings so as to protect its own interests.

[48] Before leaving my consideration of HRM's second principal argument, I wish to address a point made by counsel at the hearing concerning the possibility that Dr. Ofume would be a witness at his wife's trial having apparently been at the scene of the accident and also someone able to comment upon her subsequent treatment and condition. Such an eventuality would, it was argued, place Dr. Ofume in a conflict as he could not be both a witness and an advocate on his wife's behalf. In my opinion the expressed concern is premature. Such an eventuality is

better left to the trial judge who will be in the best position to assess any such conflict and decide the procedures that might be enforced to deal with it.

Failure to Follow Precedent: Stare Decisis:

[49] I turn now to the appellant's third principal argument. HRM says the Chambers judge erred by choosing to ignore compelling authority from his own court and binding authority from higher courts, the effect of which would be to bar Dr. Ofume from acting in the case. When appearing in Chambers, counsel for HRM referred the Chambers judge to the decision of his colleague, Justice Goodfellow, in **Ofume v. Vukelich**, [2002) N.S.J. No. 6, said to be an "almost identical" situation, wherein Justice Goodfellow had considered Dr. Ofume's conduct to have been "deliberately misleading amounting to an abuse of process" causing him to rule that:

> ... 6. Dr. Phillip C. Ofume is henceforth prohibited from acting as the agent or representative of Maureen Ofume in any further respect in this action.
>
> 7. Due to the conduct of Dr. Phillip C. Ofume in deliberately misleading the Court, Dr. Phillip C. Ofume shall effective immediately be prohibited from representing Maureen Ofume in any and all other present or future actions that she may commence, noting CPR 9.08(1) permits Maureen Ofume, subject to the Stay pending payment of costs, to act as her own solicitor or through a solicitor.

The reference to Goodfellow, J.'s approach in that proceeding prompted this exchange in Chambers between counsel for HRM and MacAdam, J.:

> **MR. WILLIAMS:** I would think Mr. Ofume is a very special circumstance, My Lord, in that Justice Goodfellow in previous cases explicitly prohibited him from appearing before this Court in any capacity ...
>
> **THE COURT:** Well, I'm not sure that that was not (inaudible - unclear) ... I mean I can deal with this case. Justice Goodfellow can deal with his. Court of Appeal can deal with both of us, ...

[50] On the strength of such authorities as **Fairview Industries Ltd. (Re)**, [1991] N.S.J. No. 445 (N.S.S.C.,T.D.) and the cases cited therein as well as the Supreme Court of Canada's judgment in **Binus v. The Queen**, [1967] S.C.R. 594, the appellant argues on the basis of *stare decisis* that Justice MacAdam should have considered himself bound by the earlier decision of his colleague, but that even if he were not, he ought not to have departed from such persuasive authority without compelling reasons expressed in writing.

[51] It was also suggested to us at the hearing that Justice Goodfellow's decision in **Vukelich**, supra, had been approved by this Court and that therefore Justice MacAdam was bound to follow his colleague's disposition since it had been endorsed by this court, a court of higher authority.

[52] I reject the appellant's submissions for several reasons. First it is not correct to say that Goodfellow, J.'s decision in **Vukelich** was approved or endorsed by this court. Rather, it came before Cromwell, J.A., sitting as a single judge of this court in Chambers, in the form of an interlocutory appeal that was filed late, outside the time prescribed by our **Rules**. Justice Cromwell dismissed the application to extend the time to file a notice of appeal or set the matter down for appeal or strike out the order of Goodfellow, J. for two reasons. First, he concluded that he had no authority as a judge in Chambers to set aside the earlier lower court order which was the subject of the intended appeal. Second, he found no reason to excuse Dr. Ofume's non-compliance with the applicable provisions of **C.P.R.** 62. Thus, while Justice Cromwell's disposition had the effect of dismissing Dr. Ofume's appeal from Goodfellow, J.'s order thereby prohibiting Dr. Ofume from continuing to act as the agent or representative of his wife, Maureen, in any respect in <u>that</u> action, it certainly cannot be seen to endorse, approve or express a view one way or the other concerning Justice Goodfellow's declaration that Dr. Ofume:

> 7. ... shall effective immediately be prohibited from representing Maureen Ofume <u>in any and all present or future actions that she may commence</u> ....
> (Underlining mine)

> The correctness and enforceability of such a prohibition is not before us on this appeal.

[53] In my opinion, cases like **Binus**, or **Fairview Industries**, upon which the appellant here relies are not applicable in these circumstances. **Binus** was a case where the Supreme Court declared that its statement of a legal proposition in an earlier case (that proof of inadvertent negligence was not sufficient to support a conviction for dangerous driving under (then) s. 221(4)) ought to have been accepted and applied by a lower court (there the Ontario Court of Appeal) under the principle of *stare decisis*. **Fairview Industries** and the cases referred to in it involved the interpretation of the provisions of certain statutes, for example, whether bankruptcy legislation would extend to cover certain guarantors, such that a ruling in one case based on certain facts was thought to "bind" a court hearing a subsequent case wherein the circumstances and subject-matter were thought to be substantially indistinguishable.

[54] In my view those situations are clearly distinguishable from the case before us which engaged the court's inherent jurisdiction to control its own process and invited the Chambers judge to exercise his judicial discretion by effectively superintending and enforcing these proceedings, a responsibility always guided by the principle of seeking to do justice between the parties.

[55] There was, therefore, no obligation upon MacAdam, J. to follow the approach taken by his colleague who chose a different approach in exercising his discretion in a different case the year before.

[56] For all of these reasons I see no basis for interfering in the manner in which Justice MacAdam chose to exercise the court's inherent jurisdiction in controlling its own proceedings.

[57] I would dismiss the appeal but in the circumstances would not award any costs against the appellant. Following Dr. Ofume's application in Chambers here to introduce his supplementary appeal book, Justice Cromwell by order dated July 22, 2003, directed that the costs of that application be fixed at $500 as costs in the cause of the appeal. In light of my finding that there was nothing relevant to this

appeal contained in any of the materials filed by the respondent in his supplementary appeal book, I would order that those $500 costs referred to in Justice Cromwell's order be made payable by the respondent to HRM, forthwith.

Saunders, J.A.

Concurred in:

Freeman, J.A.

Oland, J.A.