NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia (Securities Commission) v. Potter, 2012 NSCA 12

Date: 20120131
Docket: CA 351542; CA 353014
Registry: Halifax

Between:

Staff of the Nova Scotia Securities Commission

Appellant

and

Daniel F. Potter, Calvin W. Wadden and Kenneth G. MacLeod

Respondents

and

National Bank Financial Ltd. and Mr. Eric Hicks

Appellants

and

Staff of the Nova Scotia Securities Commission/
Daniel F. Potter, Calvin Wadden and Kenneth MacLeod

Respondents

Restriction on publication: Pursuant to *Civil Procedure Rules* 90.37(15)(b); 90.37(15)(c); and 90.37(15)(d)

Judges: MacDonald, C.J.N.S., Hamilton and Bryson, JJ.A.

Appeal Heard: November 14, 2011, in Halifax, Nova Scotia

Held: Appeal allowed per reasons for judgment of Bryson, J.A.; Macdonald, C.J.N.S. and Hamilton, J.A. concurring

Counsel: Heidi Schedler, for the appellant/respondent, Staff of the Nova Scotia Securities Commission
David G. Coles, Q.C. and James A. Hodgson, for the appellants, National Bank Financial Ltd. and Mr. Eric Hicks
Daniel F. Potter in person

W. Dale Dunlop and Sean MacDonald for the respondents, Calvin Wadden and Kenneth MacLeod

Restriction on publication: Pursuant to Civil Procedure Rules 90.37(15)(b); 90.37(15)(c); and 90.37(15)(d)

1. Pursuant to *Civil Procedure Rule* 90.37(15)(b) a publication ban is imposed on the matters of C.A. No. 341542 and C.A. No. 353014;

2. Pursuant to *Civil Procedure Rule* 90.37(15)(c) the court files in relation to matters C.A. No. 351542 and C.A. No. 153014 be sealed;

3. Pursuant to *Civil Procedure Rule* 90.37(15)(d) the hearing of the appeal of matters C.A. No. 351542 be held *in camera*.

Reasons for judgment:

[1] These appeals heard together challenge the declaratory decision of the Honourable Justice Peter J. Rosinski dated June 16, 2011 (2011 NSSC 239) and his sealed decision of even date. Justice Rosinski decided that he had jurisdiction to grant declaratory relief regarding the legal propriety of certain discovery questions in discoveries authorized by Commissioner David Gruchy. Justice Rosinski declared that answering those questions would not be a violation of Nova Scotia securities laws. Mr. Potter, National Bank Financial Ltd. and Mr. Hicks also bring motions for fresh evidence. For reasons elaborated on below, I would allow the motion of National Bank Financial Ltd. and Mr. Hicks to adduce fresh evidence and dismiss that of Mr. Potter. I would also grant leave to appeal and allow the appeals and remit this matter for determination by the Commissioner.

[2] This proceeding originates with a 2006 Notice of Hearing issued by the Securities Commission alleging violations of the *Securities Act*, R.S.N.S. 1989, c. 418 ("*Act*"), by Daniel F. Potter, Calvin W. Wadden and Kenneth G. MacLeod. In summary, the allegations are that they engaged in undisclosed trading designed to manipulate the price of publicly traded securities, failed to file insider trading reports, committed unfair practices and acted contrary to the public interest, in breach of ss. 44(a)(2), 82(1), 113(2) and 116 of the *Act*.

[3] In December 2006, the Commission Vice-Chairman Baxter ordered staff of the Commission to provide disclosure and authorized discovery limited to:

> ...evidence directly relevant to the Applications, and is not to evolve into a "fishing expedition" on topics beyond the information requested in paragraph 33 of the written submission on behalf of Mr. Potter and KHI in this matter dated July 11, 2006.

[4] Further direction was later sought by the parties from Commissioner David Gruchy who had assumed conduct of the proceedings from Vice-Chairman Baxter. Commissioner Gruchy made the following order with respect to discoveries:

> 3. The scope of the discovery examinations to be conducted pursuant to this order is as directed by Commissioner Baxter in his December 11, 2006 decision together with the full scope of discovery regarding all materials provided on July 10, 2009 and July 29, 2009 in relation to the pending

> motions of Mr. Potter, Knowledge House Inc., Calvin Wadden and Kenneth MacLeod and any issues identified in the Notice of Hearing in this matter.

[5] During discovery examination, the following question was asked of a staff witness:

> Do you have any knowledge or information as to why the decision was made not to bring enforcement proceedings against particular subjects of the investigation with respect to whom you had recommended there was sufficient evidence to support a violation?

Counsel for staff objected to this question on the grounds that it may violate Nova Scotia securities law. The objection was initially referred to Commissioner Gruchy who ruled that the question was irrelevant:

> (a) The objection cannot be upheld as it does not disclose what securities law will be violated, and
>
> (a) The question was objectionable on grounds other than that stated by staff counsel in that it calls for irrelevant information and hearsay. ...

[6] Staff would not say what securities laws would be breached by answering the question. Staff expressed concern that even specifying the securities laws at issue would be a breach of those laws and suggested that the matter could be ruled upon by Commissioner Gruchy at an in camera meeting excluding the respondents. The Commissioner declined to follow this suggestion and expressed this concern:

> Any disclosure to me of the impugned evidence sought on discovery has the potential of tainting my impartiality or objectivity and I therefore decline to enter into the procedures sought by staff.

[7] Commissioner Gruchy ordered that discoveries continue but that in the event of an impasse, application be made to the Supreme Court of Nova Scotia by staff to obtain a ruling on "...the validity of staff's objections and the admissibility of the question."

[8] Staff proceeded with that application seeking an order sustaining the objection on grounds of irrelevancy and breach of Nova Scotia securities laws. Following a motion for directions before the application judge, the parties were required to address the following issues at the application:

a. What is the jurisdiction of the Court to grant the requested relief;

b. Does the Commission have jurisdiction to order discoveries of investigators;

c. If the Commission does have jurisdiction, and it has adopted the Nova Scotia Civil Procedure Rules, what is the current state of the law in Civil Procedure Rule 18.17;

d. The potential violation of the *Securities Act*;

[9] The application proceeded in camera. Following the hearing, but before his decision was released, the judge provided National Bank Financial Ltd. and Eric Hicks with an opportunity to make written submissions.

[10] Although he expressed reservation about his jurisdiction to grant the declaratory relief sought, Justice Rosinski ultimately determined that he did have such jurisdiction. He decided that answering the question would not violate Nova Scotia securities laws. He supplemented his public, written reasons with a sealed decision. For reasons that will become apparent, it is not necessary for this Court to consider the sealed decision but, in the interest of preserving the integrity of the process before Commissioner Gruchy, that decision should remain sealed until further order of the Court.

Fresh Evidence Applications:

[11] Mr. Potter seeks to adduce fresh evidence, much of which relates to civil proceedings between him, National Bank and others. Since none of this fresh evidence goes to the issue of jurisdiction on which this appeal turns, it is not relevant and on those grounds alone, should not be admitted.

[12] National Bank and Mr. Hicks seek to adduce Commissioner Baxter's December 11, 2006 decision authorizing discoveries, a list of specific production

requests previously made by Mr. Potter and a document relevant to Justice Rosinski's declaration. Since these parties were intervenors without full knowledge of the evidence they had to meet, and because their evidence goes to jurisdiction and is relevant to the impugned question, I would admit it.

Decision of Application Judge:

[13] Justice Rosinski clearly had concerns about his jurisdiction to order the relief sought. He approached that issue first.

[14] Justice Rosinski recognized that the Supreme Court's power to act in such cases as this is constrained. Citing *R. v. Caron*, 2011 SCC 5, he noted that the Court's "inherent jurisdiction" could be exercised to render assistance to an inferior tribunal, but only where that tribunal was powerless to act and it was essential to avoid an injustice that action be taken (Decision, para. 29). He went on to say that inherent jurisdiction should not be relied upon in this case:

> [35] I do not find "inherent jurisdiction" should be relied upon here, because the Commission is not "powerless to act" and it is not "essential to avoid an injustice that action be taken" since the Commission has an implied statutory mandate to control its own process to the extent necessary to prevent any injustice. Nevertheless, in my view, this Court has jurisdiction to entertain the application for the requested relief in this case. *Civil Procedure Rule (2009)* 38.07(5) specifically provides for declaratory relief regarding the "legal status or right of a person".

[15] Notwithstanding his foregoing findings that the Commission was not powerless to act, the judge went on to the three questions which must be answered successfully to invoke declaratory relief:

> A. Is there a sufficient factual and / or legal foundation in place to avoid giving a "declaration in the air"?
>
> B. Are there available effectual alternative remedies?
>
> C. In all the circumstances, do the interests of justice favour making the declaration on the question in issue?

[16] After answering the first question affirmatively, the judge acknowledged that the Commission had primary responsibility for determining the procedural ambit of discoveries (Decision, para. 46):

> [46] ...However, it is critical to keep in mind that ***the Commission*** has ordered discoveries, and it therefore ***has the responsibility to set the parameters of those discoveries*** which are not otherwise provided for in the Act or Regulations. [Emphasis added]

[17] He went on to find:

> [63] ...***In my view, the Commissioner has the power to deal with the Staff objections that an answer may violate some unnamed section(s) of Nova Scotia Securities laws***. Whether he has the power to hold an *in camera* hearing without specific statutory authority is unclear. In the case of the privilege associated with an informant, the common law would provide a non-statutory basis for such a hearing. I conclude that the Commissioner has the power to hold *in camera* hearings if common law authority exists. He chose not to do so. He consequently refused to consider the issue: "I would find it impossible to uphold Staff's future objections on the basis of undisclosed laws" - April 20, 2010 Decision and Addendum of June 10, 2010 [which can be found at the Nova Scotia Securities Commission website where all public documents were ordered by the Commissioner to be published]. [Emphasis added]

In this regard, the following observations of the judge were apt:

> [67] ***The question of a potential violation of securities laws would in my view most properly be determined by the Commission, which is expert in that area***.
>
> [68] Moreover, this process of discoveries was specifically determined by the Commission to be appropriate to this case. Generally ***the supervision of that process is best left to the Commission rather than have this Court make an ad hoc intervention which could lead to a separate interlocutory appeal*** and even more delay.
>
> [69] While I have some sympathy for the Commission's expressed desire not to become too entangled in the bases for the Staff objection, ***the Commission is in a better position to assess the need for an in camera hearing, and determine what other procedural safeguards could be employed instead***. I note solicitor-client privilege issues are provided for in s. 29F of the Act. They are statutorily referred for resolution to the Nova Scotia Supreme Court to be heard *in camera*. Perhaps the Commissioner thought a similar process could be used in the case of the so called "privilege" issue in this case. However, the solicitor-client privilege process in s. 29F is designed to deal with the seizure of documents, not testimonial "privilege" or statutory prohibition on answering questions at discovery or trial.
>
> [Emphasis added]

[18] With respect, it is therefore puzzling that the judge went on to say:

> [70] In summary, ***I incline toward concluding that there may be an alternative remedy(ies) to a declaration from this Court***, but whether the Commission in the exercise of its powers can cause those remedies to be effectual is quite uncertain given the unarticulated nature of the basis for the so called "privilege" objection.
>
> [Emphasis added]

The concern about remedial efficacy is not consistent with the judge's earlier findings regarding the substantive and procedural expertise and competency of the Commission.

[19] With the exception of his remedial concern, I agree with all of the foregoing observations of the application judge. But even assuming the validity of his concern, he did not resolve whether alternative remedies were available. He should not have exercised any jurisdiction before settling that question. The criteria for the exercise of judicial discretion are legal (*British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, at para. 43), and a failure to consider an element of a legal test is an error of law (*Housen v. Nikolaisen*, 2002 SCC 33, at para. 36).

Jurisdiction of the Commission:

[20] The Commission enjoys a broad statutory jurisdiction. Section 5 of the *Act* makes this plain:

> **Duties, powers and functions of Commission**
>
> 5 (1) The Commission shall perform such duties as are vested in or imposed upon the Commission by this Act or the regulations, the Governor in Council or the Minister.
>
> (2) The Commission is authorized and empowered to hold hearings relating to the exercise of its powers and the discharge of its duties and functions assigned to it by this Act or the regulations, the Governor in Council or the Minister.
>
> (3) For the purpose of any hearing pursuant to this Act, the Commission and each member of the Commission shall have and may exercise all the powers, privileges and immunities of a commissioner appointed pursuant to the Public Inquiries Act.

[21] Securities Acts are part of a larger framework for the regulation of the securities industry in Canada (*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at 589; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, para. 34). The expertise of securities commissions in

interpreting their own legislation is judicially well recognized. As the Supreme Court noted in *Re Cartaway Resources Corp.*, 2004 SCC 26:

> 46 Although courts are regularly called on to interpret and apply general questions of law and engage in statutory interpretation, courts have less expertise relative to securities commissions in determining what is in the public interest in the regulation of financial markets. ***The courts also have less expertise than securities commissions in interpreting their constituent statutes given the broad policy context within which securities commissions operate***: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1336. [Emphasis added]

[22] Although staff did not particularize the securities laws which would allegedly be breached by a response to the impugned question, it is obvious that the Commission would be well placed to entertain staff's objection. The application judge acknowledged as much. He was right. In *Nova Scotia (Securities Commission) v. Schriver*, 2006 NSCA 1, Justice Cromwell observed:

> [34] ...***The essential character of the dispute, in my view, is concerned with whether Mr. Schriver breached s. 30(3) of the Act*** and whether the Commission, in the public interest, ought to make any of the orders set out in the Notice of Hearing. Simply put, the essential character of the dispute is whether Mr. Schriver's conduct should engage the Commission's authority and responsibility to act in the public interest. Viewed in this way, the essential character of the dispute lies at the core of the Commission's statutory mandate.
>
> . . .
>
> [43] ...there is nothing before us to suggest that is an issue in this case.

Moreover, the jurisprudence recognizes that statutory schemes sometimes contemplate overlapping jurisdiction: see, for example, **Morin, supra** at paras. 24 - 25. How to sort

> out the problem of parallel proceedings is not before us. The only proceeding in issue here is that before the Commission. ***There is nothing in the statute which deprives the Commission of the authority to inquire into whether a provision of the Act has been breached***. [Emphasis added]

[23] While these quotations are in the context of discussing the standard of review, they leave no doubt about the Commission's jurisdiction to rule on the legal interpretation of its own legislation or the deference accorded such rulings, in light of the Commission's acknowledged expertise.

[24] The Supreme Court has indicated that courts should be reluctant to intrude into control of a specialized tribunal's process unless necessary to assist that process. As Justice Abella exhorted in *Caron*:

> [52] The superior court's inherent jurisdiction, it seems to me, should not be seen as a broad plenary power to "assist", but should be interpreted consistently with this Court's evolving jurisprudence about the role, authority and mandate of statutory courts and tribunals. This includes an awareness of the need to avoid bifurcated proceedings in all but exceptional cases. (See *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 29; and, *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 79.) The fundamental purpose of such intervention by the superior court must be limited, as Binnie J. points out, to "what is essential to avoid an injustice" (para. 38). For the first time, that inherent jurisdiction was, interpreted in this case to include the ability to make an interim costs award in a proceeding before a statutory court or tribunal.

. . .

> [54] ...When considering the proper limits of a superior court's inherent jurisdiction, any such inquiry should reconcile the common law scope of inherent jurisdiction ***with the implied legislative mandate of a statutory court or tribunal, to control its own process to the extent necessary to prevent an injustice and accomplish its statutory objectives***. (See *Cunningham*, at para. 19; *ATCO*, at para.51; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 37; *R. v. Jewitt*, [1985] 2 S.C.R. 128; and *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 35.)... [Emphasis added]

[25] The legal issue in this case arose in the context of disclosure – ie., discovery. The *Act* extensively addresses disclosure and the Commission's authority to deal with it (see, for example, ss. 29, 29A, and 29AA). Moreover, the courts have recognized the Commission's expertise in this area in an earlier appeal involving some of the same parties. In *Potter v. The Nova Scotia Securities Commission*, 2006 NSCA 45, Justice Cromwell discussed the primacy accorded to the Commission's decisions in disclosure issues:

> [38] Under s. 29A of the **Act**, much of what Mr. Potter seeks to have included in the record or to obtain by way of discovery is to be kept confidential unless the Commission grants permission for its release. The decision to release the information or not requires balancing of the competing interests in light of the overall statutory scheme and of the specific circumstances of the case. ***The Commission is in the best position and has the statutory discretion to perform that balancing. Its decisions in this area are entitled to judicial deference.***
>
> [39] ***It is well-settled that securities commissions are entitled to a measure of judicial deference*** as they carry out their statutory duties in the public interest. They have the central and pre-eminent role in the field of securities regulation in the public interest and the courts have stressed the nature and importance of this role over and over again: see, e.g., **Pezim v. British Columbia (Superintendent of Brokers)**, [1994] 2 S.C.R. 557 at 589, 593 and 595; **British Columbia Securities Commission v. Branch**, [1995] 2 S.C.R. 3 at para. 34.
>
> . . .
>
> [48] ***The Commission, subject to appeal or judicial review, has the lead responsibility to strike and maintain the required balance with respect to***

> ***disclosure of investigative material***: see, e.g., **Deloitte & Touche, LLP v. Ontario (Securities Commission), supra** [S.C.R] at paras. 21 - 29. As the Court said in **Smolensky, supra**, testimony and other information obtained under compulsion in securities investigations engage privacy interests and the ability to keep such information confidential will likely enhance the effectiveness of the investigation. However, the Court also noted that there are corresponding claims of procedural fairness tending to require disclosure which must be balanced on a case by case basis in light of the Commission's public interest mandate.
>
> [49] Not only is the balancing of confidentiality and disclosure in the investigative context central to the Commission's statutory mandate, the Commission is better placed than the courts to perform that balancing, particularly at this preliminary stage. Unlike the courts, the Commission's balancing may be performed in light of the actual information in issue and a detailed grasp of the investigation and the underlying policy issues in relation to securities regulation. [Emphasis added]

[26] The present dispute involves the legality of replying to a discovery question requiring interpretation of Nova Scotia securities law. Such a dispute is a matter which falls squarely within the regulatory mandate and expertise of the Commission (*Pezim*, *supra*, at 599). As a general proposition, courts will not usurp the decision-making role of an inferior tribunal:

> ...even assuming that it had the power to do so, the Court should not intervene when the legislator has seen fit to create a lower court with jurisdiction to dispose of the matter on which a declaratory judgment has been brought. (*Terrasses Zarolega Inc. v. Québec (Régie des installations olympiques)*, [1981] 1 S.C.R. 94, at p. 106.)

[27] *Terrasses Zarolega* was quoted with approval in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 89-90:

> The final case cited by the respondents on the s. 7(1)(*b*) reporting remedy is *Terrasses Zarolega Inc. v. Régie des installations olympiques*, [1981] 1 S.C.R. 94. The respondents rely on this case for the proposition that where a statute provides for remedies, then those remedies not only must be pursued but also exhaust the avenues of recourse. In that case, the Olympic Village in Montréal was expropriated. The expropriation Act created an arbitration committee to determine the compensation to which the appellants were entitled. The appellants

> applied to the Quebec Superior Court, prior to the creation of that committee, for a declaratory judgment on, *inter alia*, the compensation issue. Chouinard J., for this Court, held that because the legislature intended to make the arbitration committee responsible for determining compensation, that issue had been given over to that committee with the result that no remedy before the courts existed. Chouinard J., at p. 107, endorsed the view expressed in de Smith, *Judicial Review of Administrative Action* (4th ed. 1980), at p. 513, that "the broadest judicial discretion may be exercised in determining whether a case is one in which declaratory relief ought to be awarded . . . ." ***Declaratory relief should not be granted when the legislature has seen fit to create a lower tribunal with jurisdiction to dispose of the matter for which declaratory relief is sought***. Chouinard J. clearly saw this rule as an aspect of the principle that a remedy may be denied if "another convenient and equally effective remedy is available": p. 106, *supra*, quoting Mignault J. in *City of Lethbridge v. Canadian Western Natural Gas, Light, Heat and Power Co.*, [1923] S.C.R. 652, at p. 663. ... [Emphasis added]

[28] Some of the foregoing cases also highlight two other concerns that emerge in this case. First, the problem of bifurcation arises. Commissioner Gruchy initially found that the discovery question was irrelevant. In answering the statutory interpretation question, the application judge assumed that the answer would be relevant. That assumption is a ground of appeal. These different approaches are an inherent and undesirable risk of bifurcation. They illustrate why the court should have hesitated to seize jurisdiction here. Second, the process followed in this case circumvents the expertise of the Commission and the court's deference to it.

[29] In seizing jurisdiction, the application judge expressed a concern that the Commission may lack appropriate remedial authority. He doubted whether the Commission had the power to ensure the remedies were effectual. But this is really a question of the Commission's own process. Here the courts have been generous in acknowledging broad powers. For example, see *Potter* at para. 39 (quoted in para. 25 above) and:

> [40] The issues raised by Mr. Potter require three types of decisions: an interpretation of the statutory powers of investigators under s. 27 of the **Act**, a determination of the extent of disclosure that should be made ***and a determination of the mechanisms that should be***

> ***put in place to address both the substance and the practical implications of his claim of solicitor and client privilege***. While the substance of the privilege issue is a pure question of general law, the other issues involve the proper interpretation of the **Act** and the exercise of discretion.
>
> [Emphasis added]

[30] The emphasized language illustrates that the court's deference extends to **how** the Commission discharges its statutory functions. There is no reason why the Commission could not decide the legal issue at play or the procedure for determining it and protecting the relevant interests engaged.

[31] In this case, staff declined to disclose the securities laws that might be involved except *ex parte* and in camera with the Commissioner. The respondents objected and raised the spectre of thereby tainting the process. But courts have to balance competing legal, privacy and privilege issues every day. A helpful procedure in this case may draw inspiration from the decision of Lamer, C. J. and Sopinka, J. in *R. v. O'Connor*, [1995] 4 S.C. R. 411 at para 30. The Commissioner would not be tainted by this process any more than a superior court determining questions of admissibility, relevance or privilege on a *voir dire* or otherwise in a judge alone case.

Conclusion:

[32] In my view, the questions asked of and answered by Justice Rosinski could and should have been dealt with directly by the Commission which is best placed to do so. Any concern about disclosure (either to the parties or the public), privilege or related evidentiary and procedural questions can be decided by the Commission.

[33] Without restricting the Commissioner in any way, he should decide:

- the procedure by which to consider staff's objection;
- whether the impugned question may be asked and answered;

- whether the existence of evidence thereby revealed and/or its content should be disclosed and if so, when and to whom;

- whether confidentiality orders or undertakings should be made and the terms thereof.

[34] In order to preserve the integrity of the process before the Commissioner, I would

(a) continue the sealing order of Justice Rosinski's sealed decision;

(b) continue the order of this Court of August 25, 2011 issuing a publication ban and sealing order;

(c) continue the terms of undertakings sought and given as described in para. 63 of Justice Rosinski's sealed decision.

However, to be clear, the foregoing are not intended in any way to fetter the Commissioner's freedom to entertain a renewed application to him by staff and to fully consider evidence, process and all other matters described in the preceding paragraph, or which the Commissioner considers necessary for the proper disposition of all issues arising from the application, including disclosure of confidential matters which may be captured in (a), (b) and (c) of this paragraph. It will be for the Commissioner to decide what he should receive by way of evidence, if, as, when and to whom disclosure should be made and what, if any, arrangements for confidentiality should be implemented.

[35] Application may later be made to this Court for reconsideration of the foregoing orders (para. 34(a), (b) and (c), once proceedings under the *Act* in this matter are fully resolved.

[36] In view of the disposition of this appeal on the basis of jurisdiction, it is not necessary to consider the specific grounds of appeal raised by the appellants.

[37] One has much sympathy for the Commissioner in this case. He was faced with a legal objection without apparently fair means of resolving it. With respect, having raised the matter, staff could have been more creative in proposing a

resolution. The parties have the benefit of a highly experienced and respected jurist as Commissioner, who enjoys the confidence of the court. Likewise, one can empathize with Justice Rosinski who properly raised the jurisdiction point, on which he received only modest argument.

[38] Accordingly, I would allow the appeal and remit the issue of the propriety of the questions asked, and any other procedural or evidentiary issues arising therefrom, to the Commissioner for determination. Under the circumstances, I would award no costs.

Bryson, J.A.

Concurred in:

MacDonald, C.J.N.S.

Hamilton, J.A.