

**NOVA SCOTIA COURT OF APPEAL**  
**Citation: *Wall v. Horn Abbot Ltd.*, 2003 NSCA 51**

**Date: 20030512**  
**Docket: CA 188469**  
**Registry: Halifax**

**Between:**

David H. Wall

Appellant

v.

Horn Abbot Ltd., 679927 Ontario Limited  
(Formerly Horn Abbot Productions Limited),  
Christopher Haney, Charles Scott Abbott,  
John Haney and Edward Martin Werner

Respondents

**Judge:** The Honourable Justice Jamie W. S. Saunders

**Case Management**

**Telephone Conference:** May 8<sup>th</sup>, 2003, in Halifax, Nova Scotia

**Release of Written**

**Reasons:** May 12, 2003

**Held:** Specific directions given with respect to the content of appeal books, filing of facta and setting date for appeal hearing.

**Counsel:** Kevin A. MacDonald, for the appellant  
John C. Cotter, for the respondent (company)  
William L. Ryan, Q.C., for the respondents (4 named individuals)

Saunders, J. A.:

[1] I indicated to counsel during the course of our 90 minute, recorded telephone conference on May 8, 2003 that for their ease of reference I would prepare a brief written decision confirming the specific directions I gave, which of course were more fully developed in the actual recording of the proceeding.

[2] At the outset, all counsel agreed that we proceed as I suggested and that after addressing their submissions I decide that which ought to be included within the appeal book, and to fix dates.

[3] After reviewing the extensive written briefs, and the various booklets of proposed discovery extracts filed in advance of the telephone conference , and after considering the thorough representations made by counsel during the telephone conference, I concluded that due to the unique circumstances surrounding this case and in particular the issues raised on this appeal, the content of the appeal book would have to be expanded from the norm and necessarily lengthy.

[4] Although a transcript of the proceedings before Nova Scotia Supreme Court Justice Simon MacDonald has not yet been completed, I am advised that the hearing in Sydney took three days: May 23, July 3 and July 4, 2002. Pre-hearing briefs were filed. The hearings involved oral submissions by counsel, questioning and cross-examination of witnesses, exchanges between the court and counsel and a variety of rulings on issues as they occurred. There was never a “written decision” as such, but a lengthy order to which is appended several schedules was, I am told, granted by MacDonald, J. on October 17, 2002.

[5] Messrs. Cotter and Ryan, counsel for the respondents, persuaded me that unless the written pre-hearing briefs filed on the application (and whatever materials were attached to those briefs) were included in the appeal book, counsel’s arguments on appeal would be cumbersome, time-consuming, and very difficult to follow. Further, because one of the most significant issues raised on this appeal is the appellant’s contention that MacDonald, J. erred in the exercise of his discretion concerning costs, it will be necessary for counsel to address the unusual circumstances which led up to Justice MacDonald’s treatment of costs and his substantial award in favour of the respondents. In order to fully present their

arguments on appeal, counsel persuaded me that it would be necessary to include more background information than would usually be the case.

[6] In light of the manner in which the hearing was conducted, I am reluctantly driven to the conclusion that the respondents' counsel are right to urge that the appeal record be as comprehensive as I have ordered. Otherwise I fear that the appeal itself will prove to be confusing, frustrating and unnecessarily complicated. Consequently I ordered that the appeal book contain the following:

1. A precise, accurate and complete list of the specific questions the appellant seeks to ask particular deponents at discovery, which form the subject of this appeal.
2. A transcript of the entire proceedings before Justice MacDonald on May 23, July 3 and July 4, 2002, including all questioning and cross-examination of witnesses, all exchanges between the court and counsel, and all rulings made during the course of the three day application.
3. The order, with attached schedules, consented to as to form by all counsel, issued by MacDonald, J. on October 17, 2002 confirming his disposition of the application.
4. The booklets of discovery excerpts as prepared by Kevin A. MacDonald, for the following individuals:
  - (i) David H. Wall, July - December 1999
  - (ii) Scott Abbott, June 2001
  - (iii) John Haney, June 2001
  - (iv) Edward M. Werner, June 2001
  - (v) Chris Haney, June 2001
  - (vi) James Ware, June 2001
5. In addition, pages 13 and 14 of the discovery examination of James Ware, held June 20, 2001.

6. In addition, the following extracts from particular discovery examinations which I have reproduced from the written submission filed by Mr. Ryan, dated February 28, 2003 (pages 4-5).

## Schedule "A"

<u>Witness</u>	<u>Question #</u>	<u>Additional Pages to be Included</u>
Christopher Haney	1	60, 61 (ending at line 25)
Christopher Haney	4	242 (line 25) - 250 (line 24)
Christopher Haney	5	327 (beginning at line 9), 523 (line 7) - 524 (line 4)
Christopher Haney	6	79 (line 23) - 94 (line 10); 200 (lines 16-21); 358 (beginning at line 23); 359; 393 (lines 9-24); 515 (line 22) - 516 (line 20)
Christopher Haney	7	14 (line 8) - 16 (line 3); 277 (line 10) - 278 (line 25)
Christopher Haney	9	402 (line 25) - 403 (line 14)
Christopher Haney	10	385 (line 4) - 386 (line 7); 394 (line 10) - 399 (line 1); 404 (line 2) - 410 (line 16); 412 (line 8) - 413 (line 23)
Christopher Haney	12	97 (line 25) - 99 (line 5)
Christopher Haney	15	498 (line 13) - 499 (line 2)
Christopher Haney	16	347 (lines 2 - 14)
Christopher Haney	17	377 (line 7) - 399 (line 18); 339 (line 24) - 340 (line 4)
Edward Werner	2	3 (lines 5-6); 54 (line 19) - 57 (line 5); 69 (line 21) - 70 (line 24); 75 (line 18) - 79 (line 17); 117 (line

		481) - 121 (line 11); 126 (line 21) - 129 (line 5)
Edward Werner	7	138 (lines 3 - 15)
John Haney	4	75 (lines 23 - 25)
Scott Abbott	1	127 (line 6) - 128 (line 5); 138 (line 15) - 139 (line 16); 140 (line 21) - 141 (line 19)
Scott Abbott	3	52 (line 18) - 71 (line 18)
Scott Abbott	4	237 (lines 16 - 20); 223 (lines 16 - 19)

7. I directed counsel to ensure that they highlight in yellow the precise words or series of words on any page of every discovery excerpt upon which they intend to rely as being relevant in either advancing or resisting the issues raised on this appeal.
  
8. All written briefs filed by the parties on the application before MacDonald, J., which are:
  - (i) Mr. MacDonald's brief, dated May 14, 2002;
  - (ii) Mr. Cotter's brief dated, May 21, 2002;
  - (iii) Mr. Ryan's brief, dated May 21, 2002;
  - (iv) Mr. MacDonald's supplementary brief, dated June 234, 2002<sup>1</sup>;
  
9. The affidavits filed on the application before MacDonald, J., which were:

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<sup>1</sup> During the teleconference, counsel recalled that there may have been certain attachments appended to one or more of these pre-application briefs. I was advised that they would not be lengthy or bulky and I was persuaded by counsels' representations that they ought to be included with the briefs in order for subsequent arguments to be meaningful. Rather than take time during the telephone conference to ascertain the extent of these "attachments" counsel agreed to liaise and work it out between themselves. Should they be unable to reach agreement on this point, they are free to request a further telephone conference with me to dispose of it.

- (i) Affidavit of David H. Wall, unsworn when submitted to the court, but subsequently sworn on May 23, 2002;
  - (ii) Affidavit of John E. MacDonell, sworn May 21, 2002;
10. Notice of Appeal, dated October 28, 2003;
  11. The plaintiff's (appellant's) interlocutory notice, dated May 15, 2002;
  12. The order of Kennedy, C.J.S.C., dated August 17, 1998, which severed the issues of liability and damages.

[7] Based on the views expressed by counsel, I set one-half day for the appeal hearing. The following dates were fixed:

Appeal Book to be filed by Mr. MacDonald:	June 30, 2003
Appellant's Factum due:	September 12, 2003
Respondents' Facta both due:	October 10, 2003
Appeal Hearing:	Monday, November 24, 2003, at

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10:00  
a.m.

[8] Unless I am advised of any difficulties, I will assume that all is proceeding as directed and that there will be no further need to manage this file or for me to communicate with counsel.

Saunders, J.A.