Date: 19990203 Docket: C.A.C. 147242

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Regan, 1999 NSCA 7

BETWEEN:

HER MAJESTY THE QUEEN	)	Kenneth W.F. Fiske, Q.C.
	)	for the Appellant
Appellant	)	
	)	Paul D. McLean
- and -	)	for the Respondent
	)	
	)	Michael A. Paré
GERALD AUGUSTINE REGAN	)	for the Applicant
	)	
Respondent	)	Application Heard:
	)	January 21, 1999
- and -	)	
	)	
THE ATTORNEY GENERAL OF CANADA	)	
Decision Delivered:		
	)	February 3, 1999
Applicant	)	
	)	
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BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS

CROMWELL, J.A.: (in Chambers)

I. Introduction:

On April 2nd, 1998, the Honourable Justice J. Michael MacDonald (as he then was) of the Supreme Court of Nova Scotia entered a judicial stay of proceedings in relation to counts 7, 9, 10, 11, 14, 15, 16, 17 and 18 in an Indictment preferred against the respondent. Her Majesty the Queen, as represented by the Attorney General of Nova Scotia ("the Provincial Crown"), has filed a notice of appeal. On the appeal, the Provincial Crown seeks an order setting aside the stay and directing a trial on those counts. The appeal has been set down to be heard by this Court on May 27th and 28th, 1999.

The Attorney General of Canada ("the federal Crown") seeks to intervene in the appeal either as of right under **Rule** 62.06 or with leave of a judge of the Court pursuant to **Rule** 62.35. The issues before me are whether the Attorney General may intervene as of right and, if not, whether I should grant leave to permit such intervention.

Counsel for the Attorney General of Nova Scotia does not object to the intervention of the Attorney General of Canada on the limited issue of pre-charge interviewing by Crown counsel and the appropriate role of the courts in relation to such conduct.

Counsel for the respondent opposes intervention by the Attorney

General of Canada.

II. Position of the Attorney General of Canada:

The interest of the Attorney General of Canada in the appeal relates to Grounds 1 and 2 of the notice of appeal filed by the Provincial Crown which are as follows:

> 1. **THAT** the Supreme Court Justice erred in law in his analysis of and approach to the concept and doctrine of "abuse of process" at common law as it relates to the involvement of the courts in controlling the Crown in connection with the initiation and carriage of prosecutions.
>
> 2. **THAT** the Supreme Court Justice erred in law in his analysis of and approach to the principles of fundamental justice under s. 7 of the **Canadian Charter of Rights and Freedoms** as they relate to the involvement of the courts in controlling the Crown in connection with the initiation and carriage of prosecutions.

These grounds of appeal refer generally to the law relating to abuse of process at common law and under the **Charter** as it relates to the involvement of the courts in controlling the Crown in connection with the initiation and carriage of prosecutions. The affidavit of Robert Frater, filed by the federal Crown in support of its application, seems to take a broader approach to the issues to include the role of the court in reviewing the exercise of prosecutorial discretion in general. However, counsel for the Attorney General of Canada, in his submissions to me, stressed that the federal Crown's intervention relates specifically to the role of Crown counsel with respect to potential witnesses prior to charges being laid. Both the affidavit and the submissions on behalf of the Attorney General before me emphasize, however, that the interest of the

Attorney General of Canada is not in the application of the law to the particular facts of this case, on which if permitted to intervene the Attorney General of Canada would take no position, but on the proper legal principles to be applied.

The focus of the Attorney General of Canada's interest is found in pp. 36-46 of Justice MacDonald's reasons in which he dealt with pre-charge interviewing of potential witnesses by Crown counsel. Briefly put, the argument addressed to Justice MacDonald was that Crown counsel was inappropriately involved in pre-charge interviewing which led to the Crown abandoning its role as a "quasi-judicial and independent officer of the court". In the course of considering this argument, Justice MacDonald analyzed the role of the prosecutor, particularly as it applies to interviewing potential complainants before charges are laid. He heard and considered expert evidence and concluded that, "the scope of pre-charge Crown interviewing in this country is a very narrow one ... on the occasions when it is performed it serves as a screen designed to protect an accused from going through the embarrassment of being charged only to later have the charges dropped or stayed." On the evidence before him, Justice MacDonald concluded that "at no time was the protection of the applicant a motivating factor" in the pre-charge interviewing conducted in this case.

The following excerpt from the reasons for judgment is helpful in establishing the scope of his ruling:

> ... It is nonetheless crucial for me to zero in on the precise issue at bar. For example the impropriety of Crown counsel becoming involved in the **investigation** is not an issue in this application. The Crown should never be involved in an investigation and they acknowledge this. Nor does this application directly involve the merits of Crown pre-charge screening. This is an accepted practice in at least three of our provinces ...
>
> The crucial issue before me is a more narrow one. It involves firstly, the Crown's determination to interview complainants pre-charge and secondly, the impact of that process on the number and types of charges that were ultimately laid. ...
>
> In this case the Crown did not review the investigators' charging decision. They became part of it. They interviewed all potential complainants. Their involvement became subjective by nature. Like the police, it is understandable that they would have strong feelings. ... It is impossible to retain the requisite level of objectivity by conducting lengthy (and no doubt emotional) pre-charge interviews with complainants. ... The charging decision is crucial. It determines who the complainants will be. It must be reviewed with total objectivity. It therefore only makes sense to interview post-charge. (Emphasis added)

It is not my role on this application to interpret or comment on the reasons of Justice MacDonald. However, it is of significance for the application before me to note that there are passages of his reasons which are capable of the interpretation that Crown counsel should rarely, if ever, be involved in interviewing potential witnesses before charges are laid. As I understand it, it is on this aspect of the decision which the Attorney General of Canada wishes to make submissions.

The Attorney General of Canada first submits that it is entitled to intervene under **Rule** 62.06. The relevant portion of that **Rule** is as follows:

> **62.06.** Where any constitutional question or question of public importance is raised by an appeal,
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> (a) any party may serve a notice on the Attorney General of Canada or the Attorney General of Nova Scotia, or
>
> (b) the Court or a Judge may direct the Registrar to notify the Attorney General of Canada or the Attorney General of Nova Scotia, and

> (c) the Attorney General of Canada or the Attorney General of Nova Scotia or the Attorney General of any other Province of Canada with or without such notice may intervene as a respondent in the appeal and may file with the Registrar a notice of intention and serve it as prescribed by rule 10.12 on the parties to the appeal.

While **Rule** 62 relates to civil appeals, it applies to the applications before me by virtue of **Rule** 65.03(2) which provides that **Rule** 62, when not inconsistent with **Rule** 65, applies to criminal appeals.

It is not argued that this appeal raises any constitutional question within the meaning of **Rule** 62.06. The submission is that the appeal raises a question of public importance thereby giving rise to a right to intervene under **Rule** 62.06(c).

In the alternative, the Attorney General seeks to intervene under **Rule** 62.35 which provides:

> **62.35.** (1) Any person, including any person who intervened in a proceeding pursuant to Rule 8, interested in an appeal, may, by application in accordance with Rule 62.31 apply to a Judge in Chambers for leave to intervene upon such terms and conditions as the Judge may determine.

III. Position of the Respondent:

The respondent's counsel summarizes his position on the application as follows:

> (i) This application should be dismissed for failure to comply with Rule 62.31 which requires an applicant to file a memorandum of points of argument and list of authorities to be relied upon.

(ii) The application for a direction as to whether the Applicant may intervene as of right pursuant to s. 62.06 should be dismissed as lacking merit.

(iii) As the Applicant has not met the test for as of right intervention, these proceedings should be treated as an application for leave to intervene pursuant to Rule 62.35. Such an application must be brought within 20 days of the filing of the notice of appeal. No further aspect of this application should be addressed given the failure of the Applicant to seek an extension of time.

(iv) In the event that this Honourable Court is prepared to address issues arising out of an application for leave to intervene, it is the Respondent's position that the Respondent ought to be permitted to cross-examine the affiant on the affidavit which is tendered in support of the application;

(v) In the event that this Honourable Court directs that the Respondent is not entitled to cross-examine the affiant, it is the Respondent's respectful request that the application be addressed on its merits without further hearing, such that the Respondent is not put to the expense of a further hearing. In this regard, it is the Respondent's position that this Honourable Court ought not to exercise its discretion to grant leave to intervene.

(vi) If additional dates are to be scheduled, whether for cross-examination or for argument of the application, it is the Respondent's request that they be set by teleconference.

IV. Procedural Matters:

The respondent objects to the application on procedural grounds as noted in points (i), (iii) and (iv) in the summary set out above. These objections relate to the federal Crown's failure to file a memorandum of points of argument as set out in **Rule** 62.31, failure to apply within the 20 day time limit set out in **Rule** 62.35 and the respondent's wish to cross-examine Robert Frater on his affidavit filed in support of the application.

Rule 62.35 requires that applications to intervene should be filed and served within 20 days after the filing of the notice of appeal. Counsel for the

respondent rightly points out that this time limit has been exceeded by several months, the notice of appeal having been filed in May of 1998. However, as events have evolved, consideration of the intervention application at this time will not delay the hearing of the appeal. In fact, at the time the appeal was set down, the Chambers judge and the parties were alive to the possibility of the federal Crown's application to intervene and a possible filing date for the intervener factum was discussed in the event that the application should be successful. I have a broad discretion under **Rule** 62.31(8) to extend any time limit prescribed by the **Rule**. In the unusual circumstances of this case, I will order that the time for applying for intervention be extended to January 21, 1999.

The objection with respect to the memorandum of argument was not pressed and I will not dismiss the application because of the failure to file such memorandum. No adjournment was sought by the respondent on this basis.

With respect to cross-examination, counsel for the respondent does not claim cross-examination as of right and has not referred me to any authority permitting me to order that the affiant, who lives and works in Ottawa, should be produced in Toronto for cross-examination. The affidavit was served on respondent's counsel on November 25th, 1998, and while there were some efforts to arrange cross-examination on consent, no application was made for an order requiring it. There is little in the affidavit that could not be presented by

way of submissions. In all of the circumstances of this case and having regard to the contents of the particular affidavit, it is not, in my opinion, in the interests of justice to adjourn the matter for cross-examination.

I will, therefore, as requested by counsel for the respondent and the applicant, address the application on its merits.

V. Intervention as of right:

The Attorney General of Canada claims intervention as of right pursuant to **Rule** 62.06 on the basis that the appeal raises a question of public importance. In short, the submission is that if the federal Crown thinks an issue raises a question of public importance, it is entitled to intervene.

I was not referred to any authorities interpreting this **Rule** and I have found none. In my opinion, however, this **Rule** does not apply in the circumstances of this case.

Counsel for the Attorney General of Canada made it clear that he was not seeking to intervene “as a respondent” but on a more limited basis. **Rule** 62.06(c) contemplates intervention “as a respondent” and therefore does not deal with more limited forms of intervention such as that sought by the Attorney General of Canada in this case.

Moreover, I do not think there can be a right to intervene in an appeal under **Rule** 62.06, absent a constitutional question, until there has been a judicial determination that the case raises a question of public importance within the meaning of that **Rule**. Any other interpretation would have effects that could not have been contemplated by the makers of the **Rule**.

The **Rule** applies equally to the Attorney General of Canada and the Attorneys General of all the Provinces of Canada. Therefore, the interpretation advanced by the applicant, if accepted, would mean that all the provincial Attorneys General in Canada could intervene in an appeal in Nova Scotia, as of right, on any issue which they considered to be of public importance. This would be contrary to the well settled principle that the Attorney General of Nova Scotia is the proper representative of the public interest in criminal appeals prosecuted by the Provincial Crown in Nova Scotia. In my view, where the intervention is premised on a question of public importance rather than a constitutional question, a judge of the Court must determine that the issue is one of public importance within the meaning of the **Rule** before the intervention will be permitted.

The words “public importance” are not defined in the **Rules**. In my opinion, however, a reading of the **Rule** as a whole suggests that an issue is one of public importance for the purposes of this **Rule** where the interests of the

public are engaged so as to make the intervention as of right by the Attorneys General appropriate.

Given that the Attorney General of Nova Scotia is a party to this appeal, that no issue unique to federal law arises on the appeal, and that the issue relates to a particular aspect of conduct by the Crown prior to the laying of charges, I am doubtful that the appeal raises a question of "public importance" within the meaning of this **Rule**. In saying this, I do not wish to suggest that the issues raised in the appeal are not important but simply that they are not of the sort of broad public importance so as to require the intervention as of right by the Attorney General of Canada and the other provincial Attorneys General in a criminal appeal in which the public interest is already represented by the Attorney General of Nova Scotia.

Accordingly, the Attorney General of Canada cannot intervene as of right.

VI. Intervention under Rule 62.35:

Rule 62.35 does not provide a "test" for the exercise of a judge's discretion to grant intervener status. However, subsection (3) of the **Rule** sets out certain matters that are to be included in an application to intervene:

> **62.35.** (3) An application for intervention shall briefly
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> (a) describe the intervener and the intervener's interest in the

> appeal;
>
> (b) identify the position to be taken by the intervener on the appeal; and
>
> (c) set out the submissions to be advanced by the intervener, their relevancy to the appeal and the reasons for believing that the submissions will be useful to the Court and different from those of other parties.

In addition to these considerations, the cases to which I have been referred by counsel set out other factors to be taken into account. These include: (i) concern that the fairness of the process will be adversely affected by intervention in a criminal case; (ii) the desirability of a "national perspective" which the Attorney General of Canada may provide; (iii) concern about delay in the proceedings likely to result from intervention; (iv) whether the intervention is likely to widen the issues beyond those raised by the parties; and (v) whether the issue is primarily case specific or whether it is one that is likely to affect the state of the law.

It is helpful to review these factors and considerations in light of the submissions of the parties:

> (a) the intervener's interest in the appeal and the "national perspective" of the Attorney General of Canada:

The Attorney General of Canada is responsible for the prosecution of a great variety of non **Criminal Code** offences in Nova Scotia as well as throughout Canada. To the extent that the case under appeal raises general issues concerning pre-charge witness interviewing by Crown counsel, the

Attorney General of Canada will be directly affected by the outcome of the appeal. In its conduct of prosecutions within the Province of Nova Scotia, the federal Crown will be bound by the decision of this Court on this question. Given its prosecutorial responsibilities across Canada, it obviously has an interest in these issues outside of Nova Scotia in the sense that these questions relate to its activities throughout Canada.

The respondent submits that the applicant's interest is not sufficient. I disagree. In my opinion, the Attorney General of Canada's interest could not be clearer. While I agree with the respondent that simply having an interest in the outcome of the appeal is not sufficient to justify intervention, the proposed intervener's interest is a relevant consideration. Such interest exists in this case.

(b) the position to be taken by the intervener on the appeal:

The material and submissions before me do not identify with much precision the position which the intervener proposes to take on the appeal. The affidavit of Robert Frater, General Counsel in the Criminal Law Branch of the Department of Justice, indicates that "if permitted to intervene the Attorney General of Canada would submit that the trial judgment is erroneous in several respects in relation to the proper role of Crown counsel during criminal investigations, and with respect to the proper role of the courts in reviewing Crown conduct in the investigation." Of particular concern to the Attorney

General of Canada, and on which she wishes to make submissions, are those passages of the trial judgment which may affect the exercise of prosecutorial discretion, particularly pp. 36 to 46. Mr. Frater goes on: "... The Attorney General of Canada would not address every issue in the appeal, and .... she would not take any position on the disposition of the appeal."

The generality of these statements did not become more specific in the oral submissions addressed to me on behalf of the Attorney General of Canada. While it was emphasized that the Attorney General of Canada's interest is in making submissions concerning Crown counsel's role with respect to witnesses pre-charge, and the related question of the role of the courts in reviewing and controlling that aspect of the Crown's activities, no specific submissions or evidence were placed before me to identify with any precision the position to be taken by the intervener on the appeal. I agree with counsel for the respondent that the material filed by the Attorney General is "broad, general and vague". This aspect is more fully addressed under the next consideration.

> (c) The application to intervene should set out the submissions to be advanced by the intervener, their relevancy to the appeal and the reasons for believing that the submissions would be useful to the court and different from those of other parties:

As mentioned, no specific summary of the proposed submissions was placed before me. In essence, the Attorney General of Canada submits that this

Court will inevitably make general statements about the role of prosecution counsel in relation to witnesses before charges are laid and that the Attorney General of Canada has a national perspective on these issues which will be of benefit to the Court. I was referred to remarks of Justice Sopinka in **R. v. Osolin**, [1993] 2 S.C.R. 313 at 314:

> In respect of issues other than constitutional questions, the public interest in a criminal appeal is represented by the Attorney General of the province from which the appeal originates. In some cases, the issue may involve a national perspective in respect of which the Attorney General of Canada will have a special interest which will warrant an intervention by the Attorney General. (emphasis added)

While, no doubt, the Attorney General of Canada could bring a "national perspective" to the issues relating to Crown counsel's interaction with witnesses prior to charges being laid, there is nothing before me to suggest that these issues have unique aspects in relation to federal prosecutions. There was no evidence before me of what the precise submissions of the Attorney General of Nova Scotia on the appeal will be and his factum is not due to be filed until February 22nd. In light of that, it is, no doubt, difficult for the Attorney General of Canada to reach any firm conclusions about how the proposed submissions by the Attorney General of Canada will differ from those of the Attorney General of Nova Scotia.

Counsel for the Attorney General of Canada undertook that if intervention is permitted, the submissions on behalf of the Attorney General of Canada will not be duplicative of those made by the Attorney General of Nova

Scotia. While this does not go very far towards satisfying the requirement of **Rule** 62.35(3)(c), it is a relevant consideration as regards the factor of unnecessary duplication of submissions.

It does seem to me that the issues raised on appeal have both broad and very specific aspects. It is impossible to say in advance whether the panel hearing the appeal will be of the view that the case is one turning on the application of well settled principles to the specific facts of the case or whether the case may require the formulation of principles of general application. If the panel were to take the second of these two views, the national perspective of the Attorney General of Canada could be of assistance to the court. Provided that the Attorney General of Canada does not duplicate submissions already placed before the Court, the submissions would, by definition, be different than those of other parties.

(d) Delay

The appeal is scheduled to be heard in late May. The Attorney General of Canada has indicated in her submissions that, as an intervener, she will be bound by the appeal books and will not be seeking to add to the record. A tentative date of March 22nd was discussed with respect to the filing of an intervener's factum if the intervention is permitted and that date would not require alteration of the date for filing of the respondent's factum or for the date of the

appeal.

It was suggested in the respondent's Memorandum of Argument that intervention by the federal Crown should not reduce the respondent's time in oral argument. It follows, says the respondent, that intervention by the federal Crown will require new dates for the appeal to be set.

Two full days have been set aside for argument of this appeal, an extraordinary amount of time as compared to other appeals to this Court which are normally argued in one-half day. Moreover, under **Rule** 62.35(5)(c) an intervener shall not present oral argument unless otherwise ordered by a judge or the court. If the right to intervene were granted to the Attorney General of Canada, such order could be on terms that oral argument would be in the discretion of the panel hearing the appeal who would make the decision to call upon the Attorney General for oral submissions having had the benefit of reading her factum. If that approach were taken, there is no reason that the intervention of the Attorney General of Canada would require new dates to be set for the hearing of the appeal. I conclude that the proposed intervention will have no impact upon the schedule for filing or on the dates set for the hearing of the appeal.

(e) Concern about fairness of the appeal process, broadening the dispute and helpfulness:

As Sopinka, J. noted in **Osolin**, **supra**, the discretion to allow interventions in criminal appeals has been exercised sparingly. This reluctance to permit intervention arises in some cases from concern that the proposed intervener will raise issues not raised by the Crown as a ground of appeal: see, e.g. **Re Regina and Morgentaler, Smoling and Scott** (1985), 19 C.C.C. (3d) 573 at p. 576. In other cases, the reluctance has been based on concern that the fairness of the appeal would be jeopardized as a result of the accused, in effect, having to face two prosecutors: **R. v. Finta** (1990), 1 O.R. (3d) 183; **R. v. Murdock and Johnson** (1996), 148 N.S.R. (3d) 183; **R. v. Ross** (1992), 116 N.S.R. (2d) 418. As Morden, A.C.J.O. put it in **Finta, supra**,:

> A criminal proceeding in which the accused person is obliged to respond to submissions of more than one prosecutor lacks the appearance of fairness.

The reluctance to grant intervener status in criminal cases is linked to the nature of the issue which the intervener wishes to address. This point was made by Morden, A.C.J.O. in **Finta, supra**, in which he contrasted “case specific” issues ... “whose resolution is not likely to have ramifications beyond the actual decision of the appeal” and issues the decision of which is likely to affect not only the parties but potentially “the state of the law”. In his view, “case specific” issues are not the kind of issues on which leave to intervene is usually granted whereas intervention may be more readily granted as regards issues which go to the “state of the law”.

Essentially the same point was developed by the majority of the Alberta

Court of Appeal in **R. v. Neve** (1996), 108 C.C.C. (3d) 126. Irving, J.A., for the majority, stated at p. 131:

> Any granting of intervenor status is discretionary, and ought to be exercised sparingly. Interventions have been permitted in criminal proceedings although normally such interventions are intended to offer a broader perspective beyond the merits of a particular prosecution. Canadian criminal proceedings, procedurally and in their purpose, must remain a simple *lis* between the accused person and the accusing Crown. We were shown no case where an intervention was permitted when its stated purpose was to argue the merits of the appeal itself. Where intervention is sought on a point of law, that should be defined with particularity, rather than in vague and elusive terms. (emphasis added)

As noted above, one of the concerns of fairness motivating courts to exercise their discretion to grant intervener status in criminal cases sparingly has been concern that the accused person not face and have to respond to issues not raised by the facts of the appeal itself and not relied on by the Crown in the prosecution.

In this case, I am persuaded that the proposed intervention by the Attorney General of Canada will not have this effect. As mentioned above, there are at least two possible interpretations of the reasons for judgment giving rise to this appeal. One interpretation is that the decision is highly fact specific. In that aspect of the appeal, the Attorney General of Canada professes to have no interest. Another possible interpretation of the reasons for judgment under appeal, however, raises more general questions which, to use the words of Morden, A.C.J.O., go to “the state of the law”. It is on this aspect of the appeal that the Attorney General of Canada seeks to intervene.

While the panel of this Court hearing the appeal may or may not find it necessary or desirable to deal with the broader questions, it seems to me almost inevitable that they will be raised and argued in the appeal. It seems to me to be highly probable that the respondent will have to address both the case-specific and the broader aspects whether or not the Attorney General of Canada intervenes. That being the case, I do not think that intervention by the Attorney General of Canada will have the effect of requiring the accused person to respond to new issues that are not inherent in the appeal filed by the Provincial Crown.

The concern about the respondent being required to face "two prosecutors" is an important one. However, the concern that the appearance of fairness will be compromised is less acute where, as here, the intervention concerns issues already before the Court and relates to the state of the law as opposed to the application of the law to the facts. Fairness can also be preserved by the terms limiting the extent of the proposed intervener's participation in the appeal.

An important consideration, both under **Rule** 62.35(3)(c) and under the case law, is whether the proposed intervention will be helpful to the Court. Russell, J.A., in dissent, in **Neve, supra**, stated at p. 135 that:

> The essential question is whether, bearing in mind the applicant's interest and expertise, the applicant will be a hindrance or a help to the Court in deciding the appeal.

Morden, A.C.J.O. touched on the same issue in **Finta, supra** when he discussed the question of whether the proposed intervener's "different perspective manifests itself in different submissions". In **R. v. Murdock and Johnson, supra**, Bateman, J.A. referred to Sopinka and Gelowitz, **The Conduct of an Appeal** at p. 185 as follows:

> The proposed intervenor must convince the court that it brings something additional to the appeal that the parties may not be able to supply. Often this 'something additional' is a different or wider perspective on the issues before the court on appeal. (emphasis added)

She also referred, with approval, to comments of Wakeling, J.A. in **Brand v. College of Physicians and Surgeons (Sask.)** (1990) 72 D.L.R. (4th) 446 at p. 467:

> ... it seems clear that having an interest in the result of this appeal would not of itself create a basis for granting the application to intervene. Rather, there must be some prospect that the process will be advanced or improved in some way by virtue of the intervention. (emphasis added)

Counsel for the respondent submits that the Attorney General of Canada has not established that its proposed intervention would be of any real usefulness because it cannot point to a perspective not otherwise before the Court.

I agree that the material filed and submissions made by the Attorney General of Canada do not identify such a perspective with any precision. However, it is apparent on the face of the reasons under appeal and upon review

of the grounds of appeal asserted by the Attorney General of Nova Scotia that there are legal issues raised by this appeal which potentially relate to the conduct of Crown counsel throughout Canada. I also note that Justice Wakeling in **Brand** expressed the test as being whether there is "some prospect that the process will be advanced or improved in some way" by the proposed intervention. The possibility of an issue involving a national perspective giving rise to a special interest on the part of the Attorney General of Canada was recognized by Justice Sopinka in **Osolin, supra**. In my opinion, this appeal may raise such issues. Having regard to the national perspective available to the Attorney General of Canada, I am satisfied that there is at least "some prospect" of that perspective being helpful to the Court in considering the issues on appeal. I am also of the view that the terms of the proposed intervention could be crafted to minimize the dangers of unfairness arising from duplication. In addition, if the opportunity to make oral submissions is reserved to the panel hearing the appeal, which will have had the benefit of reading the factum filed by the proposed intervener, the court at that point will be in a good position to assess the likelihood of receiving assistance from such oral submissions.

VI. Conclusion:

Having considered and weighed these various factors, I am persuaded that the intervention by the Attorney General of Canada ought to be permitted on terms. The proposed intervention does not seek to add issues to the appeal

other than those raised by the Provincial Crown. The proposed intervention relates to the “state of the law” as opposed to the “case specific” issues arising from the particular facts of this case. The respondent will, in all probability, have to address both sorts of issues with or without the intervention. Having regard to these factors, in my opinion, there will be no unfairness, or appearance of unfairness, of the respondent on the appeal being required to respond to the issues and arguments raised on the proposed intervener in addition to those raised and relied upon by the Provincial Crown.

It is not my function to speculate about the view of the case that may be taken by the panel hearing the appeal. It does seem to me, however, that there is some prospect that the panel may wish to address the “broader issues” raised by the appeal relating to the role of Crown counsel in interviewing potential witnesses before charges are laid and the role of the court in reviewing the prosecutor’s conduct at that stage of the proceedings. If the panel hearing the appeal is so inclined, I am persuaded that the national perspective of the Attorney General of Canada has some prospect of being useful to the panel in its consideration of those issues.

It is not possible for me to assess the extent to which submissions to be made on behalf of the Attorney General of Canada will be different from those to be advanced by the Attorney General of Nova Scotia. However, unnecessary and undesirable duplication can be guarded against by both the undertaking of

the Attorney General of Canada not to duplicate submissions made by the Attorney General of Nova Scotia and by ensuring that the panel hearing the appeal has the discretion to decide whether or not to hear from the Attorney General of Canada orally after having had the opportunity of reviewing the factum. Fairness can also be assured by providing ample time for the preparation of the respondent's factum to deal with both the arguments of the Attorney General of Nova Scotia and the Attorney General of Canada.

I am also persuaded that the proposed intervention will not delay the hearing of the appeal.

Accordingly, I will sign an order granting leave to the Attorney General of Canada to intervene on this appeal on the following conditions:

a. the Attorney General of Canada will file its intervener's factum no later than March 22, 1999;

b. the factum will not exceed 25 pages including appendices;

c. the Attorney General of Canada will be bound by the appeal books filed by the parties and may not add to them;

d. the Attorney General of Canada will not duplicate or reiterate arguments made by the Attorney General of Nova Scotia or address issues other than those arising from Grounds 1 and 2 in the Notice of Appeal;

e. the Attorney General of Canada will not take a position as

regards the disposition of the appeal; and

f. the opportunity of the Attorney General of Canada to make oral argument will be within the discretion of the panel hearing the appeal.

Counsel for the applicant should prepare and submit an order, approved in form, for signature.

Pursuant to s. 683(3) of the **Criminal Code**, there shall be no order as to costs.

Cromwell, J.A.

C.A.C. No.147242

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN	)	
Appellant	)	
- and -	)	BEFORE THE
	)	HONOURABLE
GERALD AUGUSTINE REGAN	)	JUSTICE
	)	CROMWELL
	)	(in Chambers)
Respondent	)	
	)	
- and -	)	
	)	
THE ATTORNEY GENERAL OF CANADA	)	
	)	
Applicant	)	