PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX **C.H. No.: 75672**

IN THE COUNTY COURT
OF DISTRICT NUMBER ONE

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

PROVINCIAL FOODS INC.

Respondent

Ms. Nadine Smillie, counsel for the Appellant.
Winston Cole, Esq., counsel for the Respondent.

1992, January 29th, Palmeter, C.J.C.C.: This is an appeal from a decision of His Honour Judge Jean Louis Batiot, a Judge of the Provincial Court, dated the 23rd day of August, A.D., 1991, wherein he acquitted the Respondent that he:

> "... did unlawfully occupy the building located at civic number 100 Leiblin Drive, Halifax, for the manufacturing, preparation, assembly and packaging of prepared vegetable products without first obtaining therefore an occupancy permit pursuant to section 8 of **Halifax City Ordinance 131;** "
>
> **AND FURTHER**
>
> "... did unlawfully use the building located at civic number 100 Lieblin Drive, Halifax, for the manufacturing, preparation, assembly, packaging of

> prepared vegetable products in violation of section 24(3) of **City of Halifax Land Use Bylaw, Mainland Area,** contrary to section 22(1) of the **Planning Act."**

After reading the transcript I would determine the facts to be as follows:

The Respondent, prior to June 1990, was involved for a number of years in the preparation and sale of vegetables at a location at 10 Akerley Boulevard in the Burnside Industrial Park in Dartmouth, Nova Scotia.

In the fall of 1989 one Brian Wales, President of the Respondent, in looking for a new location closer to his home, located a possible new site at 100 Leiblin Drive in the City of Halifax. Mr. Wales talked to the landlord and was made aware that the premises had been occupied as a number of non-conforming uses to the existing by-laws since the area was annexed to the City of Halifax in 1969, and probably for many years prior to that time. He was advised to have discussions with the City of Halifax to determine if his proposed use could be carried on in the premises at Leiblin Drive.

In October 1989 Mr. Wales attended at the offices of the Building Inspection Unit at the City of Halifax to apply for a building permit and an occupancy permit to operate his business at 100 Leiblin Drive. Although the evidence is somewhat sketchy as to this meeting, it can be assumed that Mr. Wales referred to his existing premises in Dartmouth and indicated that the Respondent "sold prepared vegetables". He discussed the application with one Sandra MacDougall, an applications clerk in the Department, who had the responsibility of dealing with applicants and accepting applications. Ms. MacDougall questioned Mr. Wales about whether the sale was retail or wholesale and, after questions, determined that the application should be for occupancy for "retail sale of prepared vegetables."

Following these applications Mr. Wales had numerous dealings with various inspectors from the City of Halifax and with one Ms. J. Lavallee of the Atlantic Health Unit of the Nova Scotia Department of Health. It was made clear to Mr. Wales that no building permit or occupancy permit would be issued until approval of all necessary City of Halifax Departments and the Atlantic Health Units was obtained.

It is clear from the evidence contained in the transcript that the Respondent did not attempt to hide its type of business from the City of Halifax or from the Atlantic Health Unit and, in fact, Ms. Lavallee had visited the premises of the Respondent at Burnside before giving the Department of Health approval to the City of Halifax and the Respondent.

Finally on July 11th, 1990, the City of Halifax issued an occupancy permit to the Respondent under the signature of H.A. MacEachern, Manager Building Inspection to occupy space at 100 Leiblin Drive for the "retail sale of prepared vegetables." The Respondent took possession of the premises and continued the same type of operation which it had operated in Burnside.

Apparently as a result of some inquiries and complaints by residents in the neighbourhood of 100 Leiblin Drive, the City of Halifax wrote to the Respondent requesting it discontinue its preparation activities. Later a Building Inspector for the City of Halifax visited the premises on at least two occasions, noticed no retail operations but did notice considerable vegetable preparation activity and, as a result, charges were laid.

The charges were heard before His Honour Judge Batiot and by a decision dated August 23rd, 1991 he acquitted the Respondent of both charges. He basically held that the activities carried on by the Respondent in the premises on Leiblin Drive were not the activities authorized by the occupancy permit, but invoked the common-law doctrine of officially induced error on the part of the City of Halifax and, accordingly, acquitted the Respondent.

The grounds of appeal as set out in the Appellant's factum are as follows:

> 1. THAT the Learned Trial Judge erred in law in applying the defence of officially induced error;
>
> (a) the finding of officially induced error is not supported by the facts.
>
> (b) that Ms. MacDougall's involvement did not give rise to the defence of officially induced error.
>
> (c) Ms. Lavallee's involvement did not give rise to the defence of officially induced error.

2. THAT the Learned Trial Judge erred in law in acquitting the Respondent after deciding that the actual use and actual occupancy were contrary to the legal use and legal occupancy.

(a) the application of the defence of officially induced error resulted in an excess of jurisdiction.

(b) the conclusion made by the Trial Judge was not supported by the facts as found by the Court.

Judge Batiot in his carefully reasoned decision, in my opinion, properly identified the two issues raised at trial, namely;

1. Whether or not the occupancy permit which was granted, in fact, covered the activity carried on, and,

2. Whether or not the City of Halifax should be bound by the allegations that Mr. Wales was mistakenly led to believe he could carry on the business that he was presently carrying on.

The first issue was answered by his Honour in the negative and the second issue in the affirmative. The appeal by the Appellant is related strictly to the second issue and I basically do not intend to direct myself to the first issue to any degree.

Counsel for both the Appellant and the Respondent have filed excellent factums relating to this appeal and particularly as it relates to officially induced error. In particular I agree with the comments made by counsel for the Appellant on page 4 of her facum where she states, "The defence of officially induced error is available to defeat a charge under a regulatory statute. It is a common law exception to the principle that ignorance of the law is not an excuse. With an officially induced error of law, the person has attempted to conform to the law, but is mislead by the very officials charged with its administration."

One of the leading cases in Nova Scotia on officially induced error is the case of **R v. Flemming** (1980) 43 N.S.R. (2d) 249, decided by O'Hearn, C.C.J. That case involved a charge of driving while disqualified under then Section 238(3) of the **Criminal Code** and the learned trial judge found that the defendant, in acting from advice received from

officials at the Motor Vehicle Branch lacked the necessary **mens rea** to be guilty of the offence.

At p. 272 of the report Judge O'Hearn identified two requirements for defence of officially induced error as follows:

> "(1) that the official whose advice is followed is involved in the administration of the law in question, so that it is reasonable in the circumstances, to follow his opinion;
> (2) that the opinion, itself, should appear to be reasonable in the circumstances."

In dealing with the question of who is an official Judge O'Hearn, in his usually well-reasoned decision, stated at pp. 273 - 274:

> "The condition that the official giving the misleading advice be engaged in the administration of the law in question is suggested, I think, by the need to conform as closely as possible to the policy of the maxim. It is not possible to consult the legislature or the courts as to what should or may be done, at least in the ordinary course, and the official administrating, the legislation, is accordingly the best available source of information and the closest to the Throne. (One reason for the English and Canadian attitude towards this type of offence is undoubtedly the

> tradition that the sovereign can do no wrong and no one is authorized to speak for the sovereign in such circumstances except by statute, or, possibly, a court of final appeal).
>
> This does not necessarily limit the official involved narrowly. The choice of official would probably be determined by the background of the questioner to a considerable extent, although again, it would have to be a reasonable choice if it is not to contradict the policy of the maxim. With my legal background I would doubt that any official in the provincial government could give an authoritative answer to such a question, so I would be tempted to find out what the practice was with respect to prosecutions, either from the N.C.O. in charge of traffic law enforcement of the local R.C.M.P. of the Halifax City Police, or I might try to find a lawyer involved in traffic prosecutions either in the Department of the Attorney General or in the Halifax City Solicitor's Office. I doubt, however, that a non-lawyer would approach the problem in this way. It is more likely that the ordinary citizen would approach some official in the Motor Vehicle Branch concerned with drivers licenses and driving standards, and that seems to be precisely what the defendant did in the instant case. The evidence on the point is admittedly not very expansive, but it was undoubtedly considered sufficient by the learned trial judge, and I am not prepared to say that he was wrong, in view of the background of common knowledge in Nova Scotia about the function of the bureau mentioned." (emphasis mine)

In her brief, counsel for the Appellant submits that the clerk, Ms. MacDougall, was merely an applications

clerk in the Building Inspection Division of the City of Halifax, was not involved in the decision making process and was not in effect an "official" as envisaged by the requirements for the defence of officially induced error.

The learned trial judge in his decision certainly held that Ms. MacDougall was such an official and I am unable to come to the conclusion that he erred. Who else would the Respondent really have contact with in the Building Inspection Department. The clerk took the applications, she made the suggestions and cooperated in the filling out of the application. Even though Mr. Wales knew of the non-conforming use to which the premises had been put, he was still a layman and relied upon the City of Halifax, through its employees to give him proper advice as to what use he could put the premises. This is surely corroborative of the comments of Judge O'Hearn in **Flemming** when he refers to "conform as closely as possible to the policy to the maxim."

Was it reasonable for Mr. Wales to follow the official's opinion? The learned trial judge found that it was. In considering the case before him, in light of Flemming, I would agree and can find no error on the part of Judge Batiot in coming to these conclusions. I would also agree that the opinion itself would appear to be reasonable in the circumstances.

The Appellant has submitted that the defence of officially induced error is not supported by the facts and presumably it means the evidence adduced. It is the contention of the Appellant that the Clerk, Ms. MacDougall, did not receive complete information from Mr. Wales as to the use or, in the alternative, that she was mislead by Mr. Wales. I do not accept the latter contention because the evidence indicates that Mr. Wales did nothing to hide his type of business or the activity which would be carried out on the premises from the Health Department or the City of Halifax Building Inspectors during the application period and before the permit was granted. Other members of the City of Halifax Building Inspection staff were aware of the Respondent's intentions aside from Ms. MacDougall and, in my opinion, the City should be presumed to be aware of the negotiations with the Health Department because a permit could not be issued without Health approval.

In his decision at p. 10, the learned trial judge found that "Mr. Wales fully described his operation which Ms. MacDougall, on behalf of the City, then defined inaccurately on the occupancy permit application." It is

true that the evidence as to description of the operation is somewhat scanty, but there was evidence before the learned trial judge to enable him to come to his conclusion. I cannot find that he erred in this conclusion. In my opinion the subsequent dealings with the City Building Officials and the Health Department lend credence to the fact that Mr. Wales did describe his operation to Ms. MacDougall.

Accordingly I find that the learned trial judge did not err in law in applying the defence of officially induced error.

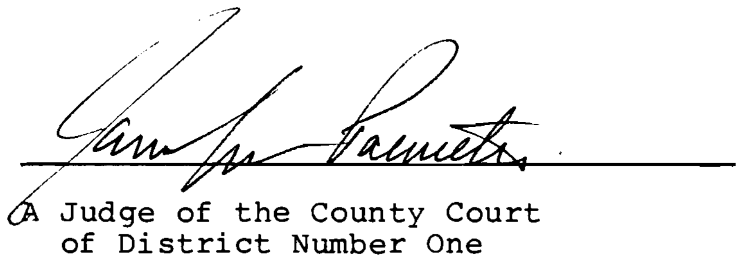
The second issue raised by the Appellant is that the learned trial judge erred in law in acquitting the Respondent after deciding that the actual use and actual occupancy were contrary to the legal use and legal occupancy. The Appellant suggests that by acquitting the Respondent the learned trial judge in effect granted a license to offend and thereby exceeded his jurisdiction.

In addition the Appellant argues, defences of officially induced error should only be confined to isolated offences and not to those of a continuing nature.

It is true that if the acquittal of these charges is permitted to stand the City of Halifax will be prohibited from succeeding on subsequent charges against the Respondent for the activity charged. I cannot accept, however, that there should be, or that there is a distinction between a similar act violation or a continuing violation once the defence of officially induced error has been made out. I accept the argument of counsel for the Respondent to the effect that the continuance of a non-conforming use is really one set of facts and not a continuing license to break the law.

The arguments of the Appellant on this second issue have not convinced me that the learned trial judge erred in law.

I will, accordingly, dismiss the appeal. There will be the usual order as to costs in favour of the Respondent.



A Judge of the County Court
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ON APPEAL FROM

THE PROVINCIAL COURT

HEARD BEFORE: Judge Jean Louis Batiot

PLACE HEARD: Halifax, Nova Scotia (Spring Garden Road)

DATE HEARD: May 28, 1991