IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Company of Canada, 2005NSSC126

Date: 20050527
Docket: SH 149142
Registry: Halifax

Between:

The Attorney General of Nova Scotia, Representing
Her Majesty The Queen in Right of the Province of Nova Scotia

Plaintiff

v.

Royal & Sun Alliance Insurance Company of Canada, Guardian Insurance Company of Canada, The Halifax Insurance Company, Wellington Insurance Company, General Accident Assurance Company of Canada and Quebec Assurance Company

Defendants

DECISION CONCERNING DISCOVERY OF THE HONOURABLE MICHAEL BAKER

Judge: The Honourable Justice Gerald R. P. Moir

Heard: 18 March 2005
Last Written Submission 24 March 2005

Counsel: Robert M. Purdy Q.C., Peter M. Rogers, and Adriana Meloni for The Attorney General of Nova Scotia

George W. MacDonald Q.C. and Jane E. O'Neill for The Halifax Insurance Company and Wellington Insurance Company

Michael E. Dunphy, QC and Daniel W. Ingersoll for General Accident Assurance Company of Canada

Matthew G. Williams for Royal & Sun Alliance Insurance Company of Canada and Quebec Assurance Company

Moir, J.:

[1] *Introduction.* The Province administered programmes to compensate people who, as children, had been institutionalized and had suffered physical or sexual abuse at the hands of provincial employees. Many were paid and the Province seeks, by this suit, to recover the payments and other losses from various insurers who provided liability coverage to the Province or its institutions since 1960. The insurers defend on several grounds including that claims paid by the Province were expressly excluded from coverages as they were not payable by reason of liability imposed by law, that the Province made material misrepresentations at the time coverages were sought, that the Province breached duties to notify insurers of occurrences and claims and that the Province breached conditions concerning making admissions and settlements without the consent of the insurer. Some of the defences expressly state that the government instituted and administered the compensation programmes negligently. The defences make conduct of the program relevant.

[2] The Honourable Michael Baker, QC, Minster of Justice and Attorney General for Nova Scotia, submitted voluntarily to discovery examination on 8 and 9 September 2003. The Honourable Mr. Baker had nothing to do with the initiation of the

compensation programmes and little to do with their administration. For the most part, those events take us back to a previous government. However, Mr. Baker appointed Justice Kaufman to conduct a ministerial inquiry into the programmes and the insurers are most interested in Justice Kaufman's findings and in the government's acceptance of his recommendations. Lead by Guardian, Halifax and Wellington, the insurers now apply for an order that Mr. Baker's discovery evidence was given by "an officer, director or manager of a party that is a corporation, partnership or association" within the meaning of Rule 18.14(1)(b) such that any part of the evidence can be used "[a]t a trial or upon a hearing of an application . . . . . for any purpose by an adverse party".

[3] The province opposes this application on several grounds. Firstly, Mr. Purdy and Mr. Rogers submit that a determination would be premature. It is an issue for the trial judge or the judge hearing an application at which Mr. Baker's discovery evidence might be used. On the merits, they submit that the Minister of Justice and Attorney General is not an "officer . . . of . . . a corporation". Further on the merits, they submitted that Rule 18 does not bind the Crown.

[4] *Whether the Application is Pre-Mature.* Rule 25 is not quite so limited as we sometimes think. Taken at its word, Rule 25.01(1) provides the Court with very broad powers to determine issues before trial or hearing:

> The court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,
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> > (a) determine any relevant question or issue of law or fact, or both;
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> > (b) determine any question as to the admissibility of any evidence;
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> > (c) order discovery or inspection to be delayed until the determination of any question or issue;
> >
> > (d) give directions as to the procedure to govern the future course of any proceeding, which directions shall govern the proceeding notwithstanding the provision of any rule to the contrary;
> >
> > (e) where the pleadings do not sufficiently define the issues of fact, direct the parties to define the issues or itself settle the issues to be tried, and give directions for the trial or hearing thereof;
> >
> > (f) order different questions or issues to be tried by different modes and at different places or times.

Despite this broad language some decisions seem to suggest that the Court cannot act under Rule 25 without consent of all parties. That is to say, the parties must present an agreed statement of facts. Mr. MacDonald referred me to *Copage* v. *Annapolis Valley Band*, [2004] N.S.J. 176 (SC) reversed on other grounds [2004] N.S.J. 480(CA), where Justice Warner demonstrated the fallacy of this kind of thinking. I quote in their entirety para. 30 to 35 of Justice Warner's decision: .

The law in Nova Scotia regarding Rule 25.01 begins with the refusal by Cowan, C.J.T.D., to strike a statement of claim in *McCallum* v. *Pepsi Cola Canada Limited* (1974) 15 N.S.R. (2d) 27. He said at paragraph 15:

> . . . It is quite clear that if the parties agree to submit the question of law, on an agreed statement of facts, as to whether the plaintiff has any cause of action against MacLean's Beverages Limited, that question may be decided by the court. In this case, however, there is no such agreement of the parties. Counsel appearing on behalf of the two other defendants, and on behalf of the plaintiff in each case, take the position that the questions raised are matters which should be decided by the judge presiding at the trial of each of these proceedings, and that it may be that certain facts, which are not apparent at the present time, may appear on the hearing which might affect the decision of the court.

And at paragraphs 20 and 21:

> . . . It is apparent that, in the present cases, the Statements of claim do disclose causes of action and that it is only by the introduction of evidence by affidavit that any question is raised as to the causes of action. It is for this reason, in my opinion, that rule 14.25(2) permits the introduction of evidence only by leave of the court. An application of the kind now before me should be made under rule 14.25 and would normally succeed only if the statement of claim disclosed on its face no cause of action.
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> . . . I am of the opinion that the action should not be dismissed at this stage, and that the defence raised on behalf of MacLean's Beverages Limited should be deal with by the judge who hears the proceedings in due course after hearing all the evidence. The application is dismissed with costs to the other parties to be taxed.

In this case it was appropriate for the Court to refuse to strike the Statement of Claim by reason of the fact that the parties were relying upon conflicting affidavits and it was clear that there were conflicts as to the facts.

This case was cited by the Nova Scotia Court of Appeal in *Curry* v. *Dargie* (1984), 62 N.S.R. (2d) 416. In this case, an officer of the Residential Tenancies Board was sued by a landlord for malicious prosecution. One of his defences was Crown immunity, which the defendant's counsel tried to have decided by an application made under rule 14.25 and 25.01. At paragraph 45, MacDonald, J.A., wrote:

> To my mind the only proper method of having the issue of Crown immunity determined in this case before trial was on a proper application under rule 25. This rule, however, appears to be applicable only where the parties agree to submit a question of law to the court based upon an agreed statement of fact. McCallum v. Pepsi Cola Canada Ltd. et al. (1974), 15 N.S.R. (2d) 27; 14 A.P.R. 27.

The *Curry* decision has been frequently cited by Nova Scotia Courts (at least 20 times that I could find) as stating that no application can come froward without an agreed statement of facts. In fact, what MacDonald, J.A., said in *Curry*, was that based on the McCallum decision, it "appears" that an agreed statement of facts is necessary. In both of these cases, there appeared to be serious issues of fact that were not agreed to and that were in dispute.

Using a principled approach, it is appropriate for a court to decline on a preliminary or interlocutory motion to determine an issue of law where the facts are in dispute or where the facts are not clear. I believe that *Curry* and *McCallum* may have been misapplied in subsequent decisions to suggest that it is not possible to have a matter determined under Rule 25.01 unless there is an agreed statement of facts. Rule 25.01 does not on the face of it require an agreed statement of facts. It is appropriate to leave for trial, matters of fact that are in dispute and upon which questions of law are dependant. However, the issue in the case at bar is whether or not the lengthy litigation before the Canada Labour Board decided as between the same parties the same issues that are outstanding to be determined in a four day trial before this court. To wait until the trial and to hear the evidence before deciding whether or not the matter is res judicata or not, would not be appropriate. This is particularly so where, as in the case at bar, there is no dispute as to the facts upon which this application is brought. It would be ironic if the defendant can, by refusing to agree to a statement of facts, prevent a court from determining, before a trial begins, whether there exists res judicata or issue estoppel.

[5] Justice Smith, now Associate Chief Justice, followed the same reasoning in *Children's Aid Society of Halifax* v. *C.V.*, [2004] N.S.J. 196 (SC). At para. 30 she pointed out:

> There is no requirement set out in Civil Procedure Rule 25.01 for the parties to agree to submit a question to the Court along with an agreed Statement of Facts in order for the Court to determine a question of law or fact (or both) under that section. The fact that this Rule allows the Court to proceed on its own motion indicates that there will be occasions, rare as they may be, when the Court will hear such a motion without any agreement of the parties or an agreed Statement of Facts having been filed.

She referred to several decisions that spoke of the need for an agreed statement of facts and then she said at para. 35 and 36:

> I conclude from these decisions that a preliminary determination of a question of law and/or fact under Civil Procedure Rule 25.01 should only be made where the essential facts upon which the Court will rely to make such a determination are not in issue. This will usually be established by the parties filing an agreed Statement of Facts with the Court. In exceptional cases where the facts upon which the Court will base its decision are not in dispute, the Court can proceed under Civil Procedure Rule 25.01 despite the fact that the parties have not agreed to submit a question to the Court along with an agreed Statement of Facts.
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> In this case, I am satisfied that the essential facts upon which this preliminary question will be answered are not in issue. While the parties have not filed a formal agreed Statement of Facts, they do agree upon the essential facts that I will be relying upon in order to make my decision on this preliminary issue.

[6] To the observations of my colleges, Justice Warner and Associate Chief Justice Smith, I would add only one very small point. If an agreed statement of facts were the unstated requirement of Rule 25, Rule 27 would be redundant.

[7] So, it now seems clear that resort cannot be had to Rule 25.01(a) where there are material facts that cannot be determined without trial unless justice demands that a rare exception be made. Complete agreement on all material facts is one approach to Rule 25.01(a), but where the moving party presents affidavits and no other party puts the evidence into contention another approach appears. An issue may be resolved before trial under Rule 25.01(a) unless resolution of the issue turns on any material fact requiring a trial for its determination.

[8] In this application there is only one short affidavit. It is so uncontentious that it is an affidavit of counsel. It exhibits excerpts from the evidence of the Honourable Mr. Baker, which, in turn, gives his cabinet appointments, indicates that he appointed Justice Kaufman to inquire into the compensation programme, and confirms that he provided the response of the Province of Nova Scotia to the Kaufman Report. None of this is contentious. To that Mr. Purdy added the uncontentious information that the Minister was never asked whether he was speaking for the Province at the discovery,

he was not asked if he understood that his evidence bound the Province and his voluntary discovery was not set up on the basis that he was there to bind the Province in the sense of making admissions for it.

[9] As I appreciate Mr. Purdy's presentation on behalf of the Province, its primary concern is that the Province should not be bound by what the Honourable Mr. Baker said on subjects outside the authority of his Department. To distinguish between what was within his authority and what was not would require a much broader inquiry upon much more extensive evidence than that presently furnishing me. It demands a trial or, at least, extensive evidence on a summary judgment application.

[10] Mr. Dunphy submitted that the present question is the use to which a party can put the Minister's discovery and it does not raise questions of admissibility such as whether something the Minister said amounts to an admission. Under Rule 18.14(1) discovery is only used at trial or hearing "so far as is admissible under the rules of evidence". For Mr. Dunphy, the question is whether anything admissible said by the Honourable Mr. Baker "may be used" [18.14(1)] "for any purpose by an adverse party" under 18.14(1)(b) or merely "to contradict or impeach the testimony of the deponent as a witness" under 18.14(1)(a). In other words, can an insurer offer any

statement made by the Minister at his discovery for its truth, assuming it is otherwise admissible?

[11] In my assessment, the submission of Mr. Dunphy on this point goes a long way to answering that of Mr. Purdy. However, there is an important connection between Rule 18.14(1)(b) and the evidentiary ruling that admits an out of court statement on the basis that it is an admission by a party. At para. 4 of *Midland Doherty Ltd.* v. *Rohrer*, [1983] N.S.J. 19 (SC) Justice Hallett said:

> Where the deponent was at the time of discovery a party or an officer, director or manager, but not a mere employee, of a party that is a corporation, the deposition may be used for any purpose by an adverse party. The basis for the admissibility of a deposition of this sort pursuant to para. (b) is that the evidence constitutes an admission against the party or the corporation by a person with some authority: *Clayton Devs. Ltd.* v. *N.S. Housing Comm.* (1980), 50 N.S.R. (2d) 214. Implicit in this principle is the recognition of the practice that a party must prove its case by viva voce evidence of the party and witnesses called at trial by the party; not by depositions. The depositions of a party can be used only by an adverse party pursuant to para. (b).

The basis of Rule 18.14(1)(b) is that officers can make admissions on behalf of corporations. Although we do not have a system under which a corporate party puts up just one witness for discovery, our rule makes no allowance for variations in authority among various officers. So, if officers commented at discovery about something completely outside their authority, Rule 18.14(1)(b) would appear to let the

comment in at trial as a sort of deemed admission. To that extent Rule 18.14(1)(b) does affect admissibility. Of course, value or weight is another matter. The corporate party would be free to adduce evidence tending to show the want of authority and they would be free to call more knowledgeable or authoritative witnesses to contradict what had been said at discovery but I do not think they could keep it out.

[12] Determination of this question does not require being steeped in the evidence in the way a trial judge becomes steeped in the evidence and is better able to rule on subjects such as relevancy. On the contrary, all that is required is to determine whether the Honourable Mr. Baker was "an officer, director or manager of a party that is a corporation".

[13] In my assessment, the application is not premature. It engages evidence so uncontentious that all material facts necessary to answer the question can be determined easily without trial.

[14] I have a discretion under Rule 25 and pursuant to the inherent jurisdiction as well, and I would exercise that discretion against dealing with this question if doing so would cause an injustice. Providing a ruling now on whether the Minister testified

as an officer will not compromise the Province's position that some things he commented upon are outside the ordinary bounds for an admission because such statements in the deposition would go in anyway if he was an "officer". On the other hand, in a complicated case like this parties need to know in advance what use they can make of a discovery deposition. This will assist with preparation. In my assessment the issue is within Rule 25 and it should be dealt with sooner rather than later.

[15] (Incidentally, applications in this action and the trial itself have been assigned to me. Obviously, that played no role in the foregoing. I am not now the judge on a motion for summary judgment or the trial judge.)

[16] *The Substantive Issues.* I will discuss s. 13 of the *Interpretation Act* and its application to Rule 18.14. Then I will briefly discuss the Crown prerogative against being ordered to submit to discovery, not because I have to decide whether the prerogative applies but because authorities on that subject supply the background of the Province's argument on the next subject. So, I will lastly deal with the question of whether the Minister and the government are within the words "officer" and "corporation" in Rule 18.14(1)(b).

[17] *Applicability of Rule 18.14 to the Crown.* Section 14 of the *Interpretation Act*, R.S.N.S. 1989, c. 235 provides:

> No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner unless it is expressly stated therein that Her Majesty is bound thereby.

The *Judicature Act*, R.S.N.S. 1989, c. 240 and the subordinate legislation authorized by it, the Civil Procedure Rules, say nothing expressly to bind the Crown to Rule 18. Thus, although under our rules "any person" can be compelled to give evidence at discovery, a Crown agent could not be so compelled in litigation where the government was not a party: *Thornhill* v. *Dartmouth Broadcasting Ltd.* (1981), 45 N.S.R. (2d) 111 (NSSC). Equally clearly, a Crown agent can be compelled to give evidence on discovery in any proceeding against the Crown: *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360, s. 11. What of proceedings by the Crown? Strangely, the statute law binds the government to rules for discovery and production "as if it were a corporation" (s. 11) when the government is sued but not when the government is suing. So these observations of Justice Burchell at para. 23 of *Thornhill* apply equally in cases such as this where the Crown is plaintiff and not defendant:

> The language of Civil Procedure Rule 18 is general and an open reference to "any person" cannot, in my opinion, be construed as an express statement that the Rule shall bind Her Majesty. Even if the Rule could be given that construction, it would be necessary, in my opinion, to discover express authority to bind Her Majesty in the statutory delegation of the power to make rules. No such express legislative intent can be found in section 42 of the *Judicature Act*, which defines the power of the judges to make rules.

And, yet I think that the Crown as plaintiff is bound by Rule 18.14 in situations where it takes full advantage of the Civil Procedure Rules.

[18] When the Crown takes advantage of a statute, it must accept the attendant disadvantages. To that extent, the Crown waives its immunity from statute law when it takes advantage of an enactment not expressed to bind the Crown. I am indebted to Mr. MacDonald and Ms. O'Neill for their helpful review of the extensive authorities on this subject. Because of a concession made by Mr. Purdy and Mr. Rogers, I need only give a brief account of those authorities. Mr. Purdy and Mr. Rogers referred me to *Sparling* v. *Caisse de Depot & de Placement du Quebec*, [1988] 2 S.C.R. 1015 and *Neary* v. *Nova Scotia* (1994), 137 N.S.R. (2d) 31 (CA). They noted particularly this passage from p. 10 of Colin H. H. McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (Australian National University Press, 1978) referred to by the Supreme Court at p. 1023 - 24 of *Sparling*:

> By taking advantage of legislation the crown will be treated as having assumed the attendant burdens, though the legislation has not been made to bind the crown expressly or by necessary implication. The force of the rule of immunity is avoided by the particular conduct of the crown and the integrity of the relevant statutory provisions, beneficial and prejudicial.

Mr. Purdy and Mr. Rogers wrote:

> Under this principle, the Crown must submit to the burdens imposed by a statutory regime if it chooses to invoke its benefits. Accordingly, the Civil Procedure Rules apply to litigation in which the Crown, as plaintiff, has invoked the process of the Courts.

I think that is a sound statement of law in light of the authorities to which counsel referred. Mr. Purdy and Mr. Rogers are quick to add "The principle does not require or contemplate that the plain meaning of the Rules be ignored.", which takes us to the second substantive issue. However, before turning to that I should set out my appreciation of the waiver principle assisted by the authorities to which Mr. MacDonald and Ms. O'Neill referred.

[19] The earliest reference is to *Crooke's Case* (1691), 1 Show. K.B. 208, 89 E.R. 540 where it was said at p. 210 - 11, p. 542: "If they have any right, the King can only have it by this Act of Parliament, and then they must have it as this Act of Parliament

gives it." The Supreme Court of Canada has been concerned with the waiver principle on many occasions in modern times. At common law, contributory negligence was a complete defence. Contributory negligence legislation reformed that law and provided for apportionment according to fault. The government of Canada tried to have it both ways in *Toronto Transport Commission* v. *Canada,* [1949] S.C.R. 510. It was found to have been 50% at fault but it sought 100% of the damages. The Supreme Court applied the waiver principle. This principle cuts across constitutional lines. Thus, a claim of the federal Crown for loss of services on account of injury to a member of the armed services was also subject to provincial contributory negligence legislation in *R.* v. *Murray*, [1967] S.C.R. 262. See also, the statement of Chief Justice Laskin in *Alberta* v. *Canada Transport Commission ("The PWA Case")*, [1978] 1 S.C.R. 61: "This does not mean that the Federal Crown may not find itself subject to provincial legislation where it seeks to take the benefit thereof . . .".

[20] More recently the Supreme Court of Canada has clarified the limits of the benefit/burden principle. There must be a fairly close nexus between the statutory provision relied upon by the Crown to its benefit and the statutory provision sought to be applied against the Crown notwithstanding our s. 14 or its equivalent federally or its equivalent in the other provinces except British Columbia.

[21] In *Sparling*, cited at para. 18 above, a Québec Crown Corporation had purchased over 10% of the shares in a *Canada Business Corporations Act* company. The provincial Crown agency refused to file insider trading reports. The Québec Court of Appeal and the Supreme Court of Canada held that the statutorily authorized act of purchasing shares in a *CBCA* company and the insider trading provisions were so closely connected that the government agency was bound by the later although there was no express mention of the Crown in that connection. Justice La Forest delivered the judgment for the Supreme Court. After referring to the passage from Professor McNairn quoted above in para. 18, Justice La Forest set the issue this way at para. 20 of *Sparling*:

> A question which immediately comes to mind is whether by taking advantage of one right conferred by the Act (e.g., voting the shares) the Crown would subject itself to all or only some of the other provisions of the Act. If only some, it is difficult to conceive how it could be determined which provisions would apply – indeed it is hard to see how most provisions, including those relating to insider reports, would ever apply to the Crown. If, on the other hand, all of the Act would apply upon the Crown taking affirmative advantage of one provision, then it is difficult to see why this result should not follow from the purchase of the shares alone. Upon purchasing the shares certain rights, e.g. the right to vote the shares and the right to receive dividends, accrue immediately to the purchaser. As will be discussed, the aggregate of these rights and their attendant obligations are indeed definitive of the notion of

a share. With respect, I cannot see why some affirmative act with regard to one right acquired by the purchaser of a share changes the situation in any relevant way.

Justice La Forest then discussed the nature of shareholder rights and incorporation statutes. He concluded at para. 28 and 29:

> Application of the benefit/burden exception does not result in subsuming the Crown under any and every regulatory scheme that happens to govern a particular state of affairs. Although some earlier authorities . . . [references omitted] . . . had been thought by some to support the view that the Crown was bound by any regulatory scheme of sufficient scope, this approach was rejected by Laskin C.J. in the *P.W.A.* case (p. 69). The exception is not of such broad reach. Its application depends not upon the existence or breadth of a statutory scheme regulating an area of commerce or other activity, but, as noted earlier, upon the relationship or nexus between the benefit sought to be taken from a statutory or regulatory provision and the burdens attendant upon that benefit. The focus is not on the source of the rights and obligations but on their content, their inter-relationship. As McNairn, op. cit., puts it at pp. 11 - 12:
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>> Reliance upon a statute may . . . be for such a limited purpose that the crown ought not, as a result, to be taken to have assumed the attendant burdens. Such is the case when a statute is resorted to for a purely defensive reason, for example to give notice under a registration scheme of the existence of a crown claim. The use of a statute in this way may be distinguished from active reliance to secure positive rights, the assumption of the burdens of a statute being a possible consequence only of the latter circumstance.
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> Here, the interrelationship between the rights and obligations acquired by the purchaser of a share is so close both conceptually and historically that there can be no question of the application of the benefit/burden exception. Indeed, as earlier mentioned, a share is an integral whole. Thus, the Crown, when it purchases a share of a company to which the Act applies, is bound by the entirety of the Canada Business Corporations Act insofar as it defines and regulates the rights and obligations of shareholders.

[22] The need for a strong nexus was emphasized on the next and, as far as I am aware, the last occasion on which the Supreme Court considered the principle of benefits and burdens. *Alberta Government Telephones* v. *CRTC*, [1989] 2 S.C.R. 225 was a case where a provincial Crown corporation, which was also a federal undertaking under s. 92 (10)(a) of the *Constitution*, asserted immunity from provisions of the *Railway Act*, R.S.C. 1970, c. R-2 enabling the CRTC to compel telecommunications companies to share facilities for the interchange of telecommunications traffic. The Crown corporation derived some benefits from the Trans Canada Telephone Systems agreement, which was authorized by the *Railway Act* and CRTC regulations. It was not a member of that agreement. The nexus was insufficient to defeat the immunity under s. 16 of the *Interpretation Act*, R.S.C. 1970, c. I - 23. The Chief Justice wrote for the majority. Dickson, C.J. adopted the chamber judge's reasons for concluding any nexus was insufficient and he added the following commentary at para. 144 and 145:

> This conclusion regarding the applicability of the benefit-burden exception might clash with our sense of basic fairness. It may seem, at first blush, inappropriate that AGT can so arrange its affairs as to take certain benefits of the CRTC-regulated system, but avoid other burdens of CRTC regulations. However, this concern is in effect simply a way of questioning the Crown immunity doctrine itself. As I said in *Eldorado, supra,* at p. 558:
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>> It [the doctrine of Crown immunity] seems to conflict with basic notions of equality before the law. The more active government becomes in activities that had once been considered the preserve of

> private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject. This Court is not, however, entitled to question the basic concept of Crown immunity, for Parliament has unequivocally adopted the premise that the Crown is prima facie immune. The Court must give effect of the statutory direction that the Crown is not bound unless it is "mentioned or referred to" in the enactment.
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> *Sparling* v. *Quebec, supra,* set out a test requiring a fairly close nexus between benefit and burden. Quite apart from its precedential weight, this is in keeping with the very nature of the Crown immunity doctrine. In my view, the scope of the benefit/burden exception must be fashioned using the underlying doctrine as a reference point. Because of the necessarily deferential approach the courts must take on questions of Crown immunity, given s. 16 and the test laid out earlier in this judgment for what it takes to mention or refer to the Crown, it would be inconsistent with the presumption of immunity to carve out a wide-ranging exception to the presumption. An exception cannot swallow a rule, which is, it seems to me, what must happen if the benefit/burden doctrine were broadened such that the Crown would be bound by all of the burdens of a regulatory statute no matter how unrelated to the benefits gained by the Crown from that statute. In other words, a fairly tight (sufficient nexus) test for the benefit/burden exception follows from the strict test for finding a legislative intention to bind the Crown. A broad benefit/burden test would be overly legislative in the face of the current formulation of s. 16. Regretfully perhaps, but undeniably, the statutory Crown immunity doctrine does not lend itself to imaginative exceptions to the doctrine, however much such exceptions may conform to our intuitive sense of fairness.

[23] The Nova Scotia Court of Appeal applied the decisions in *Sparling* and *Alberta Government Telephones* v. *CRTC* in *Neary* v. *Nova Scotia*, [1994] N.S.J. 537. The Nova Scotia government pleaded the twelve month limitation under s. 10 of the *Fatal Injuries Act*, R.S.N.S. 1989, c. 163. An action under that statute had been commenced two months late under circumstances that involved no prejudice to the government. Although the Crown is not expressly mentioned in connection with it, the plaintiff moved this Court's discretion under s. 3(2) of the *Limitation of Actions Act* to relieve

the limitation period. The Court of Appeal agreed with Justice Hall that there is a sufficient nexus between the limitation under the *Fatal Injuries Act* and the discretion to relive against limitations under the *Limitation of Actions Act* to apply “the benefit/burden (waiver) principle” (para. 12).

[24] The Civil Procedure Rules are subordinate legislation. Neither the authorizing statute nor the Rules expressly state that the Crown is bound by the Rules. Therefore, the Crown is immune from the Rules unless there is a sufficient nexus between a benefit taken by the Crown and the attendant disadvantages. A sufficient nexus is not established unless it is seen within narrow bounds so that the exception is not allowed to wholly extinguish that to which is only an exception, Crown immunity from statutes that do not expressly bind the Crown.

[25] In my assessment, the nexus in this case is so close that the benefit and the burden are two sides of the same coin. The Rules provide procedural rights to disclosure, the effectiveness of which depend upon procedural duties to make disclosure. The nexus is even stronger than the analogy to sides of a coin indicates. The Rules have an integrity to them. Since 1972, disclosure of evidence has been fundamental to the Rules and the practice, where before then documentary production

and disclosure were more discretionary and parties could take advantage of their being in exclusive control of some of the relevant information. Take away rights to and duties of disclosure and the character of Rules and the practice will change substantially. Keeping Chief Justice Dickson's cautionary words in mind, the necessary nexus appears nevertheless.

[26] _Crown Ministers as Corporate Officers._ The "benefit/burden" principle is not really an exception to the provision in most interpretation statutes concerning Crown immunity. It has not been justified by the courts on the basis of statutory interpretation. Rather, when applicable at all, the principle applies because the Crown has to be taken to have waived the immunity. This principle predates the provision in interpretation statutes. It first developed in relation to the immunity at common law as expressed ultimately in *Bombay Province* v. *Bombay Municipal Corporation*, [1947] A.C. 58 (PC). However, the "benefit/burden" principle appears to have developed well after Crown immunity from discovery. When that doctrine first arose discovery was a remedy provided by chancery courts, sometimes as a final remedy, usually as a procedural remedy and sometimes as a final remedy in equity but in aid of a claim at law. Since discovery is now founded on statute law and since the scope of discovery expanded remarkably in more modern times, it may be appropriate to ask

whether immunity from discovery makes sense in light of the benefit/burden principle, even though immunity from discovery "seems to be well established . . . at common law": *Québec* v. *Canada* (*The "Keable Commission Case"*), [1979] 1 S.C.R. 218 at p. 245.

[27] I do not have to decide whether Crown immunity from discovery has been overtaken by statute because in this case the Minister voluntarily submitted to examination for discovery. I only have to decide whether, when a Minister of the Crown has been discovered, the responses can be used for all purposes or only for impeachment. The question turns on Rule 18.14(1)(b), which allows the responses to be used "where the deponent was a party, or an officer, director or manager of a party that is a corporation, partnership or association, for any purpose by an adverse party." This provision distinguishes itself from Rule 18. 14(1)(a), which provides that discovery responses may be used "to contradict or impeach" any witness, and from Rule 18.14(1)(c), which overcomes the hearsay rule where the witness at discovery cannot be produced at trial. Textually speaking, the questions are whether the Minister was an "officer" and whether the Crown is "a party that is a corporation". However, some authorities relied upon by the government take us back to the immunity against discovery.

[28] Mr. Purdy and Mr. Rogers submit "At common law, Ministers of the Crown are not considered officers, employees, agents or directors of the Crown." They suggest that this is why it was necessary to include a "Minister of the Crown" in the definition of "officer" under the *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360, s. 2(c). They also rely upon *Leeds* v. *Alberta,* [1989] 6 W.W.R. 559 (ACA) and a decision of Chief Justice McEachern referred to by the Alberta Court of Appeal in *Leeds*, *B.C.T.F.* v. *B.C.*, [1986] 2 W.W.R. 469 (BCSC). They refer to the following from para. 38 of *Leeds*:

> Can a minister be examined under R. 200? The Crown argues that a minister cannot be compelled to attend for discovery, as he is neither an officer nor an employee of the Crown. *R.* v. *Smith*, 22 Alta. L.R. 544, [1927] 1 W.W.R. 474, [1927] 2 D.L.R. 69 (C.A.), and *Anthony* v. *A.G. Alta.,* [1942] 1 W.W.R. 833 (Alta. T. D.), are cited. Both of these cases were decided before the enactment of the Proceedings Against the Crown Act, R.S.A. 1980, C. P-18. This legislation, which was enacted in 1959 in substantially the same form as the present statute, abrogates the Crown's immunity from suit and its exemption from discovery . . . .

And, the following from para. 46 and 47:

> However, courts in British Columbia have put a restriction on the right to discovery against a minister. In *B.C.T.F.* v. *B.C.,* [1986] 2 WWR 469 . . . (S.C.), the court

considered the question of discovery of a minister, although the action was not brought under the British Columbia Crown Proceeding Act. It was held that policy reasons dictate that ministers should only be subjected to discovery in special cases. At p. 475 McEachern C.J.S.C. said:

> "At the outset I wish to reject any suggestion that the plaintiff can gain comfort from the discovery provisions of the Crown Proceeding Act. Canex makes it clear that an action of this type is not brought under that Act.
>
> In my view this question must be decided upon a consideration of the law relating to discovery, even though there are strong policy reasons why ministers should not, except in very special cases, be examined personally. Ministers are not defendants in the usual sense. Neither, in my view, are they directors, officers, employees or agents of the Crown for the purposes of R. 27: *R.* v. *Smith,* 22 Alta. L.R. 544, [1927] 1 W.W.R. 474, [1927] 2 D.L.R. 69 (C.A.). Rather, they are nominal parties unless there are specific allegations to the contrary, and there is so much Charter litigation that ministers cannot be expected to submit to discovery which may be endless unless there are powerful reasons justifying such a procedure. In this case it is suggested the examination of the Minister of Education might require four days."

From this it is clear that McEachern C.J.S.C. was of opinion that unless the action was brought pursuant to the Crown Proceeding Act, the equivalent of our Proceedings Against the Crown Act, ministers were not officers for the purposes of discovery. The converse is that if, as in this case, the action is brought pursuant to the Proceedings Against the Crown Act, a minister, pursuant to that Act and R. 200, is prima facie subject to examination for discovery. I am of the view from a reading of the whole Act that the intent of the legislature was to put ministers of the Crown in the same position as officers of a corporation. It follows then that ministers of the Crown are amenable to R. 200 and subject to examination for discovery.

[29] In *Re. Associated Investors of Canada Ltd.* (1988), 84 A.R. 241 (ACA) at p. 250 the Alberta Court of Appeal held that statutes that may seem to abrogate the

immunity from discovery were subject to a "strict interpretation". The same Court reaffirmed this position at para. 9 of *Canada Deposit Insurance Corp.* v. *Oland* (1997), 53 A.L.R. (3d) 192 (ACA) and said at para. 17 "In the absence of some statute provisions to the contrary, the expressions 'officers and employees' in Rule 200 have been consistently held not to include officers or Ministers of the Crown." Why would "officer" not include "officers . . . of the Crown"? In cases not involving officers of the Crown, the courts have held that "the word 'officer' should be given the widest possible interpretation" in rules for discovery: *Control Data Canada Ltd.* v. *Senstar Corporations* (1986), 8 C.P.R. (3d) 567 (FC, TD) at p. 570 and see also the numerous authorities to which Justice Cullen referred at p. 569 and 570.

[30] In my respectful assessment, the answer to this question of officers of the Crown not being officers under discovery rules leads back to a time when some statutes were interpreted "strictly". *Associated Investors* in 1988 and *Canada Deposit Insurance Corp.* v. *Oland* in 1997 explicitly rely upon a theory of strict vrs. liberal construction. *B.C.T.F.* v. *B.C.* in 1986 and *Leeds* v. *Alberta* in 1989 explain their apparent departure from plain meaning only by reference to earlier decisions. These are *Anthony* v. *Alberta,* [1942] 1 W.W.R. 833 (ASC, TD), *R.* v. *Smith*, [1927] 2 D.L.R. 69 (ASC, AD) and *Crombie* v. *R.*, [1923] 2 D.L.R. 542 (OSC, AD). *Anthony* v.

Alberta merely refers back to *Smith*. In *R.* v. *Smith,* at para. 5, the Court says, without further explanation, "... a minister of the Crown is not an officer within the meaning of R. 250 . . .". (The Court refers to the Crown as a "corporation sole" at para. 6.) *Crombie* v. *R.* embraces a theory of strict construction against abrogating royal prerogatives; see, p. 550.

[31] These decisions stand for a number of legal propositions. Firstly, each recognises Crown immunity against discovery as a prerogative, with the trial level decision in *Crombie* justifying it on the basis that "the fullest discovery compatible with public policy is freely made" by English style governments (p. 543). The question of a prerogative against discovery is not in contest in this case. Secondly, these authorities recognize that, in claims by or against the Crown where a minister of the Crown is plaintiff or defendant the minister is merely a nominal party or a representative, such that rules for the discovery of individual parties have no application because the true or represented party is the Crown. I have no difficulty accepting that. Thirdly, these authorities recognize that the prerogative can be taken away by statute including by rules of procedure as subordinate legislation. Fourthly, they interpret provisions similar to our Rule 18.14(1)(b) as not being worded strongly enough to cut down on the prerogative.

[32] The fourth point turns on a question of legislative interpretation. Does "officer" in Rule 18. 14(1)(b) include a minister of the Crown? Like all other legislation, statutory or subordinate, the Civil Procedure Rules are to be interpreted in accordance with the modern principle which takes the words in their grammatical and ordinary meanings when read in full context harmoniously with the legislative scheme and purposes: Elmer A. Driedger *The Construction of Statutes,* 2ed. (Butterworths, Toronto, 1974) as adopted by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. 2 at para. 21 to 23; *Chiew* v. *Canada*, [2002] S.C.C. 3 para. 27 and see para. 28; *Barrie Public Utilities* v. *Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 para. 20 and para. 86, and; *H.L.* v. *Canada*, [2005] S.C.C. 25 at para. 179. The modern principle of statutory construction prevails over earlier theories of strict construction: *Stubart Investments Ltd.* v. *Canada,* [1984] 1 S.C.R. 536 per Estey J. at p. 578 and *Canada* v. *Antosko*, [1994] 2 S.C.R. 312 at para. 24. Driedger foresaw this change in the law. Writing in respect of taxation statutes, where a supposed rule of strict construction had been routinely applied, he said of strict vrs. liberal construction: "Whatever distinction there was between these two classifications or these two methods of construction has been abolished by statute." (2ed., p. 149). He referred to the federal equivalent of s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235,

which deems every enactment to be remedial, saying (also at p. 149), "All statutes, therefore, are now 'remedial' and must be 'liberally' construed." Although the courts would go on for another ten years construing taxing statutes "strictly", Driedger wrote: "It remains to be seen whether there is any special rule for the construction of taxing statutes."

[33] The distinction between strict and liberal construction and the nebulas methods for identifying which statute qualifies for which approach to construction were abolished both by the requirement for liberal construction in the interpretation statutes and by the adoption by the Supreme Court of Canada of Driedger's modern principle of interpretation. As I see it, the cases holding that "officer" does not include an officer of the Crown in statutes or subordinate legislation concerning discovery are founded upon a doctrine of strict vrs. liberal construction that is no longer good law. The protections afforded by the notion that statutes are to be strictly construed against disturbing a Crown prerogative are now found in the provision to the effect that statutes bind the Crown only by express mention, as found in most Canadian interpretation statutes. Once we are beyond that question, as we are where the Crown is bound by disadvantageous provisions closely related to statutory provisions it has taken to its advantage, the words of the disadvantageous provisions have to be

interpreted in the ordinary way. Respectfully, *Canada Deposit Insurance Corp.* v. *Oland, Leeds* v. *Alberta, Re. Associated Investors of Canada Ltd., B.C.T.F.* v. *BC, Anthony* v. *Alberta*, *R.* v. *Smith* and *Crombie* v. *R.* rest upon a foundation that is no longer good law. On the contrary, whether "officer" in Rule 18.14(1)(b) includes a minister of the Crown depends entirely on the ordinary meaning of the Rule when read in the full context of the surrounding words, the legislative scheme of which the Rule is a part and the legislative purposes informing the Rule.

[34] An earlier and obsolete meaning aside, the primary sense of "officer" is "One who holds an office, post or place" *The Oxford English Dictionary* 2ed. (Oxford, Clarendon Press, 2000) v. X, p. 732. The OED follows that definition with several subordinate senses, the first of which is accompanied by examples from 1325 to modern times. That first subordinate definition reads:

> One who holds a public, civil, or ecclesiastical office; a servant or minister of the king . . . ; a person authoritatively appointed or elected to exercise some function pertaining to public life, or to take part in the administration of municipal government, the management or direction of a public corporation, institution, etc. In early use applied esp. to persons engaged in the administration of law or justice.

The Minister and Attorney General holds "high public office". He is the "chief law officer of the Crown". His "office" is at pleasure. He took an "oath of office". The

Crown is a corporation. So, he is an officer of a corporation. What in the context of the surrounding text, the scheme and the purposes of the Rules could take us away from the ordinary meaning of "officer"?

[35] In my assessment, the surrounding text supports the view that "officer" should be read in its full senses. The Rule firstly describes "where the deponent was a party". Clearly, that refers only to individuals. The Rule then takes up the situation of a deponent on behalf of a party "where the deponent was . . . an officer, director or manager of a party that is a corporation, partnership or association". The text seems to embrace witnesses put up by a non-individual party and having some authority. The text suggests an attempt to cover all kinds of parties by referring first to individuals and then the non-individuals.

[36] The purposes of the Rules generally are stated in Rule 1.03, "The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding." That statement was taken by us in 1972 from the Federal Rules of Civil Procedure, as was much of Rule 18 (see U.S. Rule 26), the broadest discovery rule in Canada. The purpose of Rule 18 resides more in "just" than in "speedy" or "inexpensive". The purpose of Rule 18 is to provide the means for full disclosure by

parties and by strangers. The scheme is a simple one: the equivalent of a subpoena, a notice of examination (before an examiner, now redundant in practice), protection for privilege but otherwise questioning limited only by semblance of relevancy or a tendency to help with the detection of other evidence, and a transcript to impeach strangers or to be used for any purpose against a party witness. The purposes and scheme of Rule 18 are consistent with giving "officer" its full and plain meaning, just as decided by *Control Data Canada Ltd.* v. *Senstar Corporations* cited above at para. 29 and the numerous authorities to which Justice Cullen referred in that judgment.

[37] In conclusion, a minister of the Crown is an "officer" and the Crown is a "corporation" within Rule 18.14(1)(b), such that when a minister voluntarily submits to discovery his responses "may be used . . . for any purpose by an adverse party". Therefore, the Honourable Mr. Baker's discovery responses may be used for any purpose by a defendant.

J.

Halifax, Nova Scotia
27 May 2005