SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Securities Commission) v. Potter, 2011 NSSC 239

Date: 20110616
Docket: Hfx. No. 334479
Registry: Halifax

Between:

STAFF of the Nova Scotia Securities Commission

Applicant

v.

Daniel F. Potter, Knowledge House Inc., Raymond G. Courtney, Calvin W. Wadden and Kenneth G. MacLeod

Respondents

Judge:	The Honourable Justice Peter P. Rosinski.
Heard:	May 18, 2011, in Halifax, Nova Scotia
Counsel:	Heidi Schedler, for the Applicants W. Dale Dunlop, for the Respondents Wadden and MacLeod Respondent, Daniel Potter, Self-Represented

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By the Court:

Introduction

[1] On May 19, 2006, Shirley P. Lee, in her capacity as Secretary to the Nova Scotia Securities Commission, issued a Notice of Hearing to the Respondents herein. Attached to that Notice was a Statement of Allegations dated May 18, 2006, regarding the same Respondents. The Securities Commission has not yet begun to hear evidence regarding the merits of these allegations - disclosure and the discovery process continue. The discovery process itself, ordered specially and intended to make the disclosure process more fair and efficient has fallen victim to delay.

[2] An Amended Notice of Application in Chambers was filed October 27, 2010 (August 19, 2010) by the Applicant which requested an order to sustain an objection to a line of questions made at the discovery of Brian Connell-Tombs in the matter [regarding the Respondents] before the N. S. Securities Commission and to confirm the process set out in CPR 18.17 regarding objections to questions at discovery.

[3] The Applicant submitted:

1. The question or line of questions asked on April 6, 2010 are "not relevant to either defending the allegations made by [NSSC Staff] on May 18, 2006 **or** in support of the Motions filed by Potter and KHI on June 30, 2006 **or** by Wadden / MacLeod on July 6, 2006";

2. Answering the questions asked on April 6, 2010 "will violate N.S. Securities laws";

3. The process set out in CPR 18.17 does not require a witness to answer a question after an objection on the basis of relevance has been made.

The following directions were given by me on November 3, 2010:

1. Amended Application to be heard May 18 and 19, 2011;

2. Filing dates set for briefs and affidavits;

3. The parties shall address the following issues:

(a) What is the jurisdiction of the Court to grant the requested relief?

(b) Does the Commission have jurisdiction to order discoveries of investigators?

(c) If the Commission has such jurisdiction, and it has adopted the *Nova Scotia Civil Procedure Rules (2009)* [hereafter CPR], what is the current state of the law under CPR 18.17?

(d) The potential violation of the *Securities Act*

The evidence available to the Court

[4] Only the July 9, 2010 sworn affidavit of R. Scott Peacock was filed. In paras. 8 and 9 of that affidavit, Mr. Peacock notes the June 30 and July 6, 2006 Notices of Motion filed by Potter and M and W respectively. Those Notices of Motion effectively requested a cessation of the investigation, removal of all investigative Staff then involved, and a prohibition on the use of the evidence gathered to that date against the Respondents. It is public record that on July 20, 2010, the Respondents filed a Notice of Appeal (Tribunal) with the Court of

Appeal. The Respondents seek to have the decision of Commissioner Gruchy dealing with the June 30 and July 6, 2006 Respondents' motions "be rescinded and the proceedings in the Nova Scotia Securities Commission stayed or alternatively, the decision be reversed or varied to provide that the Commission shall address the complaints concerning about the conduct of the investigation...". The Court of Appeal heard this appeal March 28, 2011 and reserved its decision.

[5] This Decision will deal with 3 related issues:

1. An adjournment request by MacLeod and Wadden (hereafter M and W) of the scheduled May 18 - 19, 2011 hearing;

2. The questions I set out in the Directions to the parties on November 3, 2010;

3. Whether I should hold an *in camera* hearing in order to fully consider the Staff argument that the answering of the question in issue will violate Nova Scotia Securities laws?

I - The adjournment request by Respondents MacLeod and Wadden dated April 19, 2011

Position of the parties regarding adjournment

(A) Potter (filed April 20, 2011) - although the Commission has discontinued its prosecution against Mr. Potter by written notice dated may 16, 2011, I will include references to Mr. Potter's submissions up to and including May 17, 2011, since his precise status is uncertain.

- "generally concurs with" Dunlop's submissions filed April 20, 2011;

but - is opposed* to an adjournment as requested by Dunlop:

> "It is submitted that the Court should now require this (secret) securities law issue to be determined. Otherwise, the same issue will simply come up all over again, when discoveries resume and similar questions are put to Mr. Peacock. There have already been numerous protracted delays in the proceedings before the Commission."

[*Although in oral submissions May 18, 2011, Potter supported the Dunlop adjournment request.]

(B) Dunlop (MacLeod and Wadden) (filed April 20, 2011).

- Agree with facts as set out by Staff in their March 23, 2011 written submissions;

- Since receipt of the March 23, 2011 Staff brief, there have been two events “that may affect the relevancy of this Application”;

> (i) Nova Scotia Court of Appeal hearing (was set for March 28 - 29, 2011) - no ruling yet regarding whether Securities Commission proceedings should be stayed as had been requested by the Respondents; ** [The Court of Appeal dismissed the appeal by the Respondents after these reasons had been written but before their release - 2011 NSCA 55]
>
> (ii) Potter and two others [not Wadden and MacLeod] have been charged criminally by an Indictment dated March 17, 2011, regarding Knowledge House Inc. [KHI] dealings and concern “essentially the same issue that is before the Commission ...This Honourable Court should be leery of making decisions that could in any way affect the right of Mr. Potter and the other two

defendants to remain silent". Therefore the Respondents request that this matter be adjourned until two things become clear:

> (1) [Whether] the Appeal Court will permit the proceedings to continue; and
>
> (2) If the [*Securities Act* prosecution] continues, in what form will it proceed?

Until these matters are known, this application is premature and given Staff's position on secrecy, should not proceed.

(C) Staff-Securities Commission (Schedler) - Opposed to adjournment

At the time the Applicants filed their Application August 19, 2010 (as amended October 27, 2010) the Respondents had already filed their appeal to Nova Scotia Court of Appeal. The Application hearing dates (May 18 and 19, 2011 dates) had been selected on November 3, 2010. Staff notes that this was:

1. After Notice of Appeal filed (July 20, 2010); and notably

2. No request was made to have this Application stayed, even though appeal hearing dates had been set and preceded this hearing; and that

3. How the criminal charges impact the *Securities Act* prosecution is a decision for the Commission which has been discussed yet it was still undecided as of May 11, 2011 (as noted earlier, the *Securities Act* prosecution as against Potter was discontinued as of May 16, 2011).

Whether to grant an adjournment - the principles of law

[6] At the May 18, 2011 hearing, I concluded that no adjournment was appropriate. These are my reasons.

[7] The Respondents, M and W requested that the August 19, 2010 (filed) Application in Chambers as amended, which was set down on November 3, 2010 for hearing May 18 and 19, 2011, be adjourned.

[8] M and W argue that the adjournment is appropriate because to proceed would be premature until:

> 1. The Nova Scotia Court of Appeal permits the Commission's prosecution to proceed (by denying the Respondents' appeal);
>
> 2. And if the Nova Scotia Court of Appeal by denying the Respondents' appeal permits it to proceed, in what form will it proceed? - Written brief filed April 20, 2011 p. 2 - since Potter and two other individuals are now charged criminally regarding "essentially the same issue that is before the Commission" - p. 1 Brief [see also Indictment filed CRH No. 346068].

[9] These bases boil down to a request for an adjournment of this Application in Chambers pending the outcome of an appeal in a related proceeding.

[10] This matter proceeded as an original proceeding in this Court - CPR 5.05(2) and 23.05 - Application in Chambers (Special / appointed time or Complex).

[11] Counsel provided no cases setting out on what basis or how I must decide on adjournment requests in such proceedings.

[12] Generally speaking, adjournments are an exercise of discretion based on the interests of justice in each individual case.

[13] Most of the cases I could find relate to adjournments or stays of trials, or trial judge's orders pending an appeal, sometimes on a related matter / proceeding:

> (Adjournment of trial pending related appeal) - *Tinkham Real Estate Ltd. v. Future Group Realty Ltd*., 2007 NSSC 167 [2007] NSJ No. 233 (Wright, J.);
>
> (Adjournment of trial) - *Secunda Marine Services Ltd. V. Caterpillar Inc.*, 2010 NSCA 105 [2010] NSJ No. 652 (Fichaud, JA);
>
> (Adjournments of judicial review pending a decisive Supreme Court of Canada decision) - *Alberta Teachers' Association v. Alberta*, 2010 ABQB 599 [2010] AJ No. 1118 per Veit, J.;

(Stay of the publication of settlement agreement approvals granted pending appeal) - *Gaudet v. Ontario (Securities Commission),* [1990] OJ No. 689 (Ontario Supreme Court), per Anderson, J.;

(Stay of an order to release confidential information pending appeal) - *Stewart McKelvey Sterling Scales v. N.S. Barristers Society,* 2005 NSCA 149 [2005] NSJ No. 466 (CA) per Oland, JA in Chambers;

(Stay of an order to produce information pursuant to FOIPOP legislation pending appeal) - *O'Connor v. Nova Scotia*, [2001] NSCA 47 [2001] NSJ No. 90 (CA) Cromwell, JA (as he then was) in Chambers.

[14] *Civil Procedure Rule (2009)* 4.20 deals with adjournments of trial dates. The principles therein are of assistance in assessing whether to adjourn a two day Application in Chambers such as the one in the case at Bar.

[15] The Rule requires that one consider:

1. The prejudice to the party seeking an adjournment, if it is required to proceed

2. The prejudice to the party opposing an adjournment if it is required to "stand down" its readied resources; [and if the adjournment is sought after the "finish date"]

> 3. The prejudice to the public if matters are frequently adjourned when it is too late to make the best use of the time of counsel, the Judge and court staff.

[16] Under the Old Rules (pre - January 1, 2009) Justice Wright in *Tinkham supra*, had to consider a trial adjournment request pending the disposition of an appeal in a closely related action.

[17] He concluded that under the old Rule 30.02, which conferred a wide discretion to adjourn, [“the Court may adjourn... upon such terms as it thinks just”], the settled law is that the interests of justice always govern, and they require a balancing of the interests of the opposing parties - para. 14.

[18] He specifically endorsed Ontario cases which illustrate the principle... “that once the Applicant establishes that a question left for determination by the Court of Appeal may affect the course of the trial, or have some considerable influence upon it, as a general rule the trial ought to be adjourned pending the outcome of the appeal, unless the Respondent demonstrates very special reasons otherwise.” - para. 18.

[19] These general principles can, and should, be applied in the case at Bar.

Application of the law to case at Bar

[20] There is no direct evidence before me as to the implications of the cited appeal case heard March 28, 2011 [now decided: 2011 NSCA 55]. Commission Staff find it in their interests to proceed to hearing May 18 and 19, 2011; Potter, Wadden and MacLeod do not.

[21] The ruling sought by the Applicant is on a narrow legal point. No matter what my ruling is on the merits, the parties will still have an opportunity to address the implications of any Appeal Court decision before the Commission. I note the *Securities Act* prosecution against Potter has been discontinued, leaving only M and W still facing those allegations.

[22] I conclude that the questions left for determination of the Court of Appeal are not going to have any considerable influence on, or affect the course of, the Application I have been requested to hear. For those reasons, I refuse to adjourn the hearing of this Application.

II - Merits of the Application in Chambers

A declaration is the requested relief

[23] The Applicant herein is seeking, in essence, declaratory relief. Its application reads:

> "The Applicant is applying to a Judge in Chambers for an order to sustain an objection to a line of questions made at the discovery of Brian Connell-Tombs in the matter of [Potter, MacLeod, Courtney and Wadden] before the Nova Scotia Securities Commission
>
> **And**
>
> to confirm the process set out in *Civil Procedure Rule* 18.17 regarding objections to questions at discovery."

[24] Declaratory relief is an extraordinary and discretionary remedy which this Court generally has jurisdiction to entertain. When a Court is asked to make a declaration, it should be satisfied that (1) there is a sufficient factual and / or legal foundation in place to avoid giving "declarations in the air" [as noted in *Babiuk v. Calgary* (1992) 95 D.L.R. (4th) 158 at para. 18 as cited by our Court of Appeal in *Oakland / Indian Point Residents Association v. Seaview Properties Ltd.* 2010 NSCA 66 at paras. 45 - 49 per Oland, JA]; (2) there are not available effectual alternative remedies; and (3) in all the circumstances, the interests of justice favour making the declaration on the question in issue.

[25] *Civil Procedure Rule (2009)* 38.07(5) reads:

> "A party making a claim in an action or an application may plead or apply for a declaration of the legal status or right of a person."

The questions posed in the Order for Directions - November 3, 2010

1. *What is the jurisdiction of this Court to grant the requested relief?*

[26] Staff of the Commission have characterized the issue as referable to, and defined by the notion of a Superior Court's "inherent jurisdiction", to supervise and assist boards, commissions and other tribunals - p. 3 of March 23, 2011 brief.

[27] M and W concur with Staff's submissions on the first two questions in the Directions - p. 2 of brief dated April 19, 2011, as does Potter - p. 1 of April 20, 2011 letter / submission.

[28] Staff relies on *R v. Caron* 2011 SCC 5 as its authority for arguing this Court has "inherent jurisdiction to supervise and assist" the Commission. *Caron* is factually distinguishable, but its principles are of assistance in the case at Bar.

[29] In *Caron*, the Majority concluded that as a result of a public interest constitutional challenge, *Caron* had financially exhausted himself, and that the Superior Court had inherent jurisdiction in those exceptional circumstances (where the Provincial Court was confronted with language rights litigation of major significance that after months of trial had reached a point of collapse) to order Alberta to pay *Caron's* costs of the remaining portion of the litigation. The Majority recognized that such "inherent jurisdiction" should be exercised to "render 'assistance' (not meddle), but **only in circumstances where the inferior tribunals are powerless to act and it is essential to avoid an injustice that action be taken**" - para. 30 *Caron* supra [my emphasis added].

[30] The inherent jurisdiction of superior courts may be exercised "even in respect of matters which are regulated by statute or by rules of court, so long as it can do so without contravening any statutory provision" - Majority Decision at para. 32 *Caron* supra.

[31] Notably however, Abella, J, in a cautionary note, speaking for herself alone:

> When considering the proper limits of a superior court's inherent jurisdiction, any such inquiry should reconcile the common law scope of inherent jurisdiction with the implied legislative mandate of a statutory court or tribunal, to control its own process to the extent necessary to prevent an injustice and accomplish its statutory objectives" - at para. 54.

[32] In another recent case about the jurisdiction of provincial superior courts, (*Canada v. Telezone Inc.* 2010 SCC 62) the Supreme Court unanimously concluded that:

> 44 The term "jurisdiction" simply is shorthand for the collection of attributes that enables a court or tribunal to issue an enforceable order or judgment. A court has jurisdiction if its authority extends to "the person and the subject matter in question and, in addition, has authority to make the order sought": Mills v. The Queen, [1986] 1 S.C.R. 863, per McIntyre J., at p. 960, quoting Brooke J.A. in R. v. Morgentaler (1984), 41 C.R. (3d) 262, at p. 271, and per Lamer J., dissenting, at p. 890; see also R. v. Rahey, [1987] 1 S.C.R. 588, at p. 603; R. v. 974649 Ontario Inc., 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 15; R.v.Conway, 2010 SCC 22, [2010] 1 S.C.R. 765. The Attorney General does not deny that the Superior Court possesses in personam jurisdiction over the parties, or dispute the superior court's authority to award damages. The dispute centres on subject matter jurisdiction.

[33] The Court also approvingly referenced the following:

> 43 The oft-repeated incantation of the common law is that "nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged": Peacock v. Bell (1667), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88. In contrast, the jurisdiction of the Federal Court is purely statutory.

[34] Any general jurisdiction that I have over the Commission must be based on this Court's "inherent jurisdiction" - see Moir, J.'s conclusion that this Court has authority to supervise boards commissions, or other tribunals as part of its inherent jurisdiction - *CBC v. Nova Scotia (A.G.)* 2011 NSSC 295 para. 11. However, that jurisdiction should only be relied upon where the inferior tribunal is "powerless to act, and it is essential to avoid an injustice that action be taken" - ***Caron*** *supra* para. 30.

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

The limits of declaratory relief

[36] More significantly I must consider whether this Court should use that jurisdiction to make a declaration in the circumstances of this particular case?

[37] This requires an examination of 3 questions:

A. Is there a sufficient factual and / or legal foundation in place to avoid giving a “declaration in the air”?

B. Are there available effectual alternative remedies?

C. In all the circumstances, do the interests of justice favour making the declaration on the question in issue?

A. *Sufficient factual / legal basis?*

[38] I have the July 9, 2010 sworn affidavit of Scott Peacock which does provide the necessary factual foundation. As the parties specifically do not want me to delve into the second question: “Does the Commission have jurisdiction to order discoveries of the investigators”; I will not do so.

[39] Potter and M and W wish to ask the Staff investigators (Peacock, Connell-Tombs and Meanchoff) at discoveries:

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

[40] Staff objected to such questioning on the basis of irrelevancy (p. 3(18) transcript of April 7, 2010 discussions Exhibit 8, Affidavit of Scott Peacock and more significantly as follows:

> "The witness cannot answer this question because the answer may violate Nova Scotia Securities laws."

[41] Commissioner (and retired Nova Scotia Supreme Court Justice) David Gruchy, ruled that the question is "a request for irrelevant information" - p. 17(17) transcript of April 7, 2010 appearance, Exhibit 8 to affidavit of Scott Peacock [see also p. 18(1) of Exhibit 8 and p. 1 written Decision of Commissioner Gruchy, April 20, 2010 at Exhibit 9.]

[42] Furthermore, Commissioner Gruchy made a number of rulings that bear on the central issue herein - see p. 24-25 and 27(1), Exhibit 8 to affidavit of Scott Peacock and Exhibit 9 for the written Order [and the publicly available June 10, 2010 Addendum].

[43] He concluded in that Order:

> (6) If and when an impasse occurs, I direct that an application be made to the Supreme Court of Nova Scotia by Staff to obtain a ruling on the validity of Staff's objections and the admissibility of the question. I will authorize and direct my counsel to assist in the framing and presentation of the matter to the Court so as to give me directions as to the procedure and rulings to be made.
>
> I emphasize however, that Mr. Donovan should not become tainted by the disclosure of contentious evidence."
>
> For reasons I have previously set forth in other decisions in this matter I have concluded that it would be unwise to embark on a lengthy, expensive hearing when a question as basic as the right to make full answer and defence is outstanding and discoveries are incomplete. I have concluded the admissibility of this question and the validity of this objection must be resolved.
>
> Dated at Halifax, Nova Scotia this 20th day of April, 2010.

B. *Are other effectual remedies available?*

[44] This requires an examination of those questions upon which the Applicant seeks a declaration.

(i) Relevancy of the question and the proper process for relevancy based objections at discovery.

[45] I note that the *Securities Act*, RSNS 1989 c. 418 as amended, has General Rules of Practice and Procedure.

[46] Those Rules do **not** contain any provision for the discovery of witnesses; they do provide in Part 8 for pre-hearing "disclosure". The source of the Commission's authority to order discoveries is unclear. It may be argued to be based on a broad reading of Rule 18 ["general" matters] or a manifestation of a tribunal's implied legislative mandate to control its own process to the extent necessary to prevent an injustice and accomplish its statutory objectives (although I am skeptical that these are persuasive, principled and compelling positions). I keep in mind that all parties herein agree that they do not want me of my own initiative to examine the validity of the Commissioner's Order directing that the investigators herein be discovered by the Respondents [see e.g. Decision and Order at Exhibit 6 of Scott Peacock's affidavit). I will respect their request as I find it accords with the interests of justice in this case. However, it is critical to keep in mind that the Commission has ordered discoveries, and it therefore has the responsibility to set the parameters of those discoveries which are not otherwise provided for in the Act or Regulations.

[47] Commissioner Gruchy has ruled that the question in issue is irrelevant. However, he has ordered what may be construed as a direction regarding both the relevancy and so called "privilege" issue:

> "If and when an impasse occurs [which it has regarding the admissibility of this question / the related objection] I direct that an application be made to the Supreme Court of Nova Scotia by Staff to obtain a ruling on the validity of Staff's objections and the admissibility of the question."

[48] It is clear to me that the Commissioner effectively only intended to direct an application to this Court be taken on the admissibility of the question insofar as the objection thereto was based on a concern that the answer may violate Nova Scotia Securities laws - (see pp. 24(12 - 18) and 27(1) Exhibit 8 and his reasons in the written Decision, Exhibit 9: "The fundamental basis of this objection was not disclosed, viz. what securities law it may be violating".) Commissioner Gruchy found that "the objection cannot be upheld as it does not disclose what securities law will be violated" - written Decision, Exhibit 9, affidavit of Scott Peacock.

[49] Not wishing to delve into the grounds for the objection any further, Commissioner Gruchy directed that the Application in Chambers herein be pursued by Staff. Shortly thereafter, on June 18, 2010, in relation to an unrelated motion

before the Commission, Commissioner Gruchy stated a general concern in his decision:

> In our view, in exercising its discretion as "master of its procedure" the Commission ought to have due regard for all the circumstances described above, as well as concern for not unduly "judicializing" its processes.

[50] The Commissioner has the power to deal with this question's admissibility as to relevance - he has already ruled on it - it is irrelevant. At the hearing, Dunlop argued that Commissioner Gruchy's comments were made in relation to any answer as being irrelevant, because it was based on hearsay, insofar as Connell-Tombs was concerned - however, Staff counsel pointed out that the Commissioner clarified that he was speaking of "relevance" *per se* - see eg. p. 15(11) - 18(4) Transcript of April 7, 2010 proceedings Exhibit 8 affidavit of Scott Peacock.

[51] Potter made the important distinction that arguably what the Commissioner left to be resolved by this Court, is not whether the question could be seen to be relevant or not, but what is the proper process on the discovery herein once an objection based on irrelevancy is taken.

[52] Commissioner Gruchy may also be argued to have been seeking clarification from this Court as to what the proper procedure on objections at discovery should

be once the matter was returned to the Commission from this Court, but I am not persuaded that was his intention. I say this for the following reasons.

[53] Potter notes that Commissioner Gruchy contemplated a discovery process that would see an objection made on relevance, and even if the Commissioner agreed, the objection would merely be noted, yet the witness would still be required to answer that question - see p. 18(11) - 19(25) Exhibit 8 of Peacock affidavit, where the following exchange is recorded:

> Mr. Hill: We are going to be continuing with discovery examination of this witness [i.e. Connell-Tombs]... Its quite possible that Ms. Schedler will object on the basis of relevance... The normal process is for a witness to answer the question... The objection to be noted and the issue of relevance to be dealt with at the trial or the hearing.
>
> The Chair: ...I agree with you. This is precisely what the practice was... I don't know what the new rules are but it required the... recorder to make... to make a decision. But the practice developed exactly as you set it forth Mr. Hill. The question to be answered and should it may be asked, the objection noted, the question answered and you proceed from there. I would plead with you all to follow that process.
>
> Ms. Schedler: Commissioner Gruchy, I guess, the concern from Staff's perspective is that on an issue of relevance Staff can acknowledge that the process that you have just suggested... to answer the question and have the issue determined at a hearing. Perhaps that's an appropriate process, however when the issue is dealing with a possible violation of the law... unfortunately, like, as I indicated previously, to reveal the law is to reveal the argument.

[54] During the April 7, 2010 proceedings recorded above, the Commissioner was relying on the *1972 Civil Procedure Rules* CPR (1972) which were superceded by the January 1, 2009 Rules - CPR (2009).

[55] The Commissioner appears to have intended that the 1972 Rules discovery practice be followed, and this may explain why, although he ruled the question in issue "irrelevant", he still considered that it should be answered at the discovery barring any other valid objection - see CPR (1972) 18.09 and 18.12 which read:

> Scope of examination
>
> 18.09.(1) Unless it is otherwise ordered, a person, being examined upon an examination for discovery, shall answer any question within his knowledge or means of knowledge regarding any matter, not privileged, that is relevant to the subject matter of the proceeding, even though it is not within the scope of the pleadings.
>
> (2) In order to comply with paragraph (1), the person being examined may be required to inform himself and the examination may be adjourned for that purpose.
>
> (3) When any person examined for discovery omits to answer or answers insufficiently, the court may grant an order requiring him to answer or to answer further and give such other directions as are just.
>
> Objections, and rulings of examiner

> 18.12. (1) An examiner shall, upon an examination for discovery, cause every question and answer to be taken down and a note made upon the dispositions of any question objected to and the ground of the objection, but the evidence objected to shall be taken subject to the objection
>
> (2) No objection to any question shall be valid if made solely upon the ground that any answer thereto will disclose the name of a witness, or that the question will be inadmissible at the trial or hearing if the answer sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> (3) Any ruling or direction of the examiner may be appealed to the court, and the examiner shall upon request certify under his hand the question raised, any answer thereto, and his ruling or direction thereon.
>
> (4) The validity of an objection to any question, answer, ruling or direction shall be decided by the court, and the costs of and occasioned by the objection shall be in the discretion of the court and may be ordered to be paid by the person under examination.

[56] Notably consistent with Commissioner Gruchy's position, the Court of Appeal encouraged a liberal and large scope to what could be "relevant" at discoveries (taking the annotation from the CPR (2009) - albeit significantly the comments are made in relation to the CPR (1972)):

> *Wall v. Horn Abbot Ltd.*, [2003] N.S.J. No. 438; C.A. 188469, Bateman, J.A., December 3, 2003. 2003 NSCA 129; S507/9. After nine days of discoveries, the plaintiff claimed the individual defendants had wrongly refused to answer 145 questions and the corporate defendants another 20 questions. The Chambers Judge ordered the individual defendants to answer 8 questions and the corporate defendants to answer about 20 questions. The plaintiff appealed *Held*, appeal dismissed. A practice has developed among members of the Bar to generally permit witnesses to answer all questions posed at discovery, even when not strictly relevant to the subject-matter of the proceeding. It is a good practice and one which should be preserved. A witness at discovery who arbitrarily refuses to

> answer questions risks an adverse ruling and cost consequences when the matter is brought before a judge. After a three-day hearing, the Chambers Judge had ruled on the relevance of the disputed questions. Costs in any event of the cause to the defendant of $3,000, payable forthwith.

[57] Even earlier, at the time Commissioner Gruchy made his direction that "the Nova Scotia method of discovery *mutatis mutandis*, should be followed in this case" [Decision September 15, 2009 at Exhibit 6 affidavit of Scott Peacock] the new Rules were in effect.

[58] I conclude that the Commissioner intended the discovery process to proceed as he had described it. The Commission's General Rules of Practice and Procedure, most recently updated June 18, 2007 are self contained. They contain no reference to the *Civil Procedure Rules* at all. The *Civil Procedure Rules* therefore are presumptively inapplicable to hearings of, or discoveries ordered by, the Nova Scotia Securities Commission. Nevertheless, it may be helpful to note a few recent decisions regarding what is considered "relevant".

[59] In several recent decisions, the distinction between the meaning of "relevance" under the 1972 and *2009 Civil Procedure Rules* was considered.

[60] What is meant by "relevant" in *Civil Procedure Rule (2009)* 18.13, Scope of Discovery, has been definitively determined in a comprehensive decision by Moir, J. based on *Civil Procedure Rule (2009)* 14.01 "Meaning of Relevant in Part 5": *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4 [2011] NSJ No. 8 at para. 46.

[61] More recently, Hood, J. confirmed that the "semblance of relevancy" test is no longer applicable, consistent with Justice Moir's decision - *Johnson v. Mill*, 2011 NSSC 66 [2011] NSJ No. 106. For an interesting consideration of relevancy under the CPR (1972) Rule 20.02 - Order for discovery of documents etc. - see *Banks v. National Bank Financial Ltd.* 2011 NSSC 79 per Muise, J.

[62] I note Potter's April 20, 2011 letter to the Court refers to the relevance issue as "essentially a red herring". In my view, that is not so. It is nevertheless, fair to describe the "privilege" issue as the primary issue in this case.

(ii) the so called "privilege" issue

[63] As a starting point, I observe that the Commission arguably has *Charter of Rights* jurisdiction as a "court of competent jurisdiction" to declare unconstitutional certain sections of the *Securities Act* - see *R v. Conway* [2010] 1

SCR 765 and *Shapray v. British Columbia* (Securities Commission) 2009 BCCA 322 [2009] BCJ No. 1358. In my view, the Commissioner has the power to deal with the Staff objections that an answer may violate some unnamed section(s) of Nova Scotia Securities laws. Whether he has the power to hold an *in camera* hearing without specific statutory authority is unclear. In the case of the privilege associated with an informant, the common law would provide a non-statutory basis for such a hearing. I conclude that the Commissioner has the power to hold *in camera* hearings if common law authority exists. He chose not to do so. He consequently refused to consider the issue: "I would find it impossible to uphold Staff's future objections on the basis of undisclosed laws" - April 20, 2010 Decision and Addendum of June 10, 2010 [which can be found at the Nova Scotia Securities Commission website where all public documents were ordered by the Commissioner to be published].

[64] Now that a problem has arisen in this discovery process, the Commissioner wishes this Court to make a declaration that will resolve the admissibility of an answer to the question. The Commission is clearly disposed to this Court dealing with the so called "privilege" issue because the Commission does not want to conduct the *in camera* hearing that Staff has requested:

> "...I believe an *in camera* meeting excluding the Respondents would be improper. Any disclosure to me of the impugned evidence sought on discovery has the potential of tainting my impartiality or objectivity and I, therefore decline to enter into the procedures sought by Staff" - see references in Commissioner's Decision dated April 20, 2010 (Addendum dated June 10, 2010).

[65] Prior to the hearing of this Application, I reviewed the Act to see if it provides a process for the Commission itself to resolve such statutory "privilege" issues.

[66] As an example only, I noticed that s. 29A of the Act is a "confidentiality" provision, that seeks to protect information arising from or obtained in an investigation under s. 27 and 29. Section 29AA permits disclosure of such matters where the Commission concludes that to do so "would be in the public interest". Therefore if the question in issue in the case at Bar arose before the Commission, it could conduct a hearing, possibly even *in camera*, to address those ss. 27 and 29 issues pursuant to s. 29AA. Similarly, one would think that if s. 27 and 29 were the basis of the Staff's objection, then the Commission at a pretrial discovery stage would also have such power, and therefore could itself effectually resolve such issues.

[67] The question of a potential violation of securities laws would in my view most properly be determined by the Commission, which is expert in that area.

[68] Moreover, this process of discoveries was specifically determined by the Commission to be appropriate to this case. Generally the supervision of that process is best left to the Commission rather than have this Court make an *ad hoc* intervention which could lead to a separate interlocutory appeal and even more delay.

[69] While I have some sympathy for the Commission's expressed desire not to become too entangled in the bases for the Staff objection, the Commission is in a better position to assess the need for an *in camera* hearing, and determine what other procedural safeguards could be employed instead. I note solicitor-client privilege issues are provided for in s. 29F of the Act. They are statutorily referred for resolution to the Nova Scotia Supreme Court to be heard *in camera*. Perhaps the Commissioner thought a similar process could be used in the case of the so called "privilege" issue in this case. However, the solicitor-client privilege process in s. 29F is designed to deal with the seizure of documents, not testimonial "privilege" or statutory prohibition on answering questions at discovery or trial.

[70] In summary, I incline toward concluding that there may be an alternative remedy(ies) to a declaration from this Court, but whether the Commission in the

exercise of its powers can cause those remedies to be effectual is quite uncertain given the unarticulated nature of the basis for the so called “privilege” objection.

C. *Do the interests of justice favour making a declaration regarding the question in issue?*

[71] On February 8, 2011, the Commissioner issued a memorandum pursuant to Rule 9.8 of the *General Rules of Practice and Procedure.* Under “Agreements”, one finds:

> 1. Discovery of R. Scott Peacock, Brian Connell-Tombs and Alexis Meanchoff shall reconvene June 20 to 24, 2011 provided a decision in Staff of the Nova Scotia Securities Commission v. Daniel F. Potter, et al. Hfx. No. 334479 is issued in advance of the discovery dates.
>
> 2. Disclosure by [the Respondents] pursuant to Rule 8.3 shall be completed by November 30, 2011.
>
> 3. The hearing shall be held January 31 to March 15, 2012. The hearing shall be held four days per week (Monday to Thursday inclusive).

[72] My understanding is that the discoveries herein were intended to be completed insofar as possible, so that only the question in issue here would be left to be addressed when they resumed - see Commissioner Gruchy's April 10 and June 10, 2010 (Addendum) Decisions.

[73] This Court does have jurisdiction to make a declaration in a case such as the one at Bar - CPR (2009) 38.07(5). The Applicant requests this Court to use its authority to provide the relief requested here - i.e. "an order to sustain an objection to a line of questions made at the discovery of Brian Connell-Tombs... before the Nova Scotia Securities Commission, and to confirm the process set out in *Civil Procedure Rule* 18.17 regarding objections to questions at discovery."

[74] Stated more precisely, Staff wants the Court to rule the question asked of Connell-Tombs (which is to be repeated to the other investigators later), and that line of inquiry, to be:

> (i) Irrelevant according to the interpretation of "relevant" in the *Civil Procedure Rules (2009)* and
>
> (ii) Statutorily prohibited by unidentified Nova Scotia Securities laws.

[75] Staff has also requested the Court to "direct the parties to follow the process set out in Rule 18.17(6)(b) upon resumption of the discoveries" - p. 8 of March 23, 2011 brief.

[76] I decline to make such direction, as it is unnecessary, since the Commission has already decided that the *Civil Procedure Rules (1972)* procedure will apply *mutatis mutandis* to the discovery process; and because I am requested and empowered to grant declaratory relief - nothing more.

[77] The Commissioner has already ruled that the question in issue is irrelevant, and that decision seems defensible in my view.

[78] On a careful review of the materials, I therefore am driven to the conclusion that as to the alleged relevancy objection issue:

(i) The Commissioner, who speaks for the Commission, has clearly stated that the Commission, which has directed discoveries of the investigators herein without any explicit legislative authority to do so, further requires that any objections during the *ad hoc* discovery process

follow the 1972 Rules process. Therefore I need not answer question 3: “If the Commission... has adopted the CPR (2009) what is the current state of the law under CPR 18.17?”.

(ii) Staff were agreeable to follow those 1972 Rules on relevancy objection issues.

(iii) The Commissioner ruled that the question in issue was irrelevant.

(iv) The fundamental or central issue is in relation to the so called “privilege” objection made by Staff to the question in issue, and that is the penultimate question the Commissioner directed Staff to have brought before this Court.

[79] Consequently, there is no need for this Court to make a declaration in relation to the relevancy objection issue(s). Nevertheless, if I am in error regarding the “relevance” issue, I should alternatively examine the so called “privilege” issue. I have been requested to make a declaration that would “sustain an objection” to the question in issue being answered on the basis of the unidentified

statutory prohibition. I conclude that it is in the interests of justice to make a declaration as to the effect of the statutory prohibition.

2. Question 4 - The potential violation of the *Securities Act*

(a) *Whether to hold an in camera hearing to decide the so called "privilege" issue?*

[80] Staff has requested that I hear its argument about the alleged statutory prohibition to allowing the question to be answered, not in open court, but *in camera*, with the public, and parties, save Staff, excluded.

[81] Failing my agreement to hear the matter *in camera*, Staff's position is summarized in its March 23, 2011 brief:

> "If the Court is not prepared to hear this argument *in camera*, Staff will withdraw the argument."

[82] The request to determine the extent, if any, of a statutory prohibition on Staff investigators answering the question in issue here requires separate and careful treatment.

[83] I say this because the appropriate process must first be determined: *in camera* excluding all persons except the Applicant Staff and witnesses (if any); closed court (excluding all the public save for the parties' counsel and witnesses, if any); or open court (none being excluded)?

[84] As authority for an *in camera* hearing, Staff is relying on *Civil Procedure Rule (2009)* 85.06(1), which reads:

> Privileged documents
>
> 85.06 (1) Nothing in these Rules diminishes the power of a judge who must determine a claim that a document is privileged, or otherwise subject to a confidentiality protected by law, to keep the document confidential until the determination is made.

[85] Staff argue that:

> "...reference in the Rule to 'document' can and should be interpreted to include information, and should not be restricted to physical documents" -p. 9 of March 23, 2011 brief.

[86] Staff go on to extend their position to *Civil Procedure Rule (2009)* 85.06(4):

> "In the event that the Court disagrees with Staff's position [after the in camera hearing] Staff would request the Court to maintain confidence over the argument in accordance with Rule 85.06(4), so it can determine how to proceed." - p. 9 of March 23, 2011 brief.

[87] Staff has only generally stated the reasons for an *in camera* hearing:

> "Answering the question asked at the discovery of Connell-Tombs on April 6, 2010 will violate Nova Scotia Securities laws". - Amended Notice of Application in Chambers filed October 27, 2010.

[88] At my request, Staff alerted the media that they had requested from the Court "a publication ban under *Civil Procedure Rule* 85.06 for the purpose of maintaining a confidentiality protected by law" - as posted on the Nova Scotia Publication Ban Media Advisory website, May 17, 2011.

[89] Although strictly speaking, the request for an *in camera* hearing, is not a "publication ban" - the effect is similar - the public is excluded. The "open court" principle is not to be violated, unless the Applicant can demonstrate to the Court that, in spite of the arguments to the contrary, whether arising by implication or by the media counsel or whoever has standing, the interests of justice require an *in camera* hearing.

[90] I note that Staff made no formal motion for an *in camera* hearing, but rather put forward its position to have such a hearing, in its written brief dated March 23, 2011.

[91] Furthermore, such requests usually require an exercise of discretion by the Court, and for both these reasons it was appropriate to alert the media.

The position of the parties regarding the appropriateness of an in camera hearing.

[92] Mr. Dunlop and Potter argued that Staff should provide more information about their basis for refusal to divulge the precise sections, and what legislation, the Staff claims will be violated.

[93] I accept Ms. Schedler, as an officer of the Court, at her word, that even such disclosure would violate the legislation in question. I believe it appropriate to presume a "privilege" exists in these circumstances - paras. 40 and 47 *Named Person v. Vancouver Sun* [2007] 3 SCR 253 per Bastarache, J. For the Majority.

[94] As to the appropriate process, I conclude that in this case, there is no discretion regarding whether the statutory prohibition should or should not be continued in the Commission proceedings/ discoveries - see *Named Person* supra at para. 42.

[95] The legislation either prohibits or does not prohibit the disclosure that would follow an answering of the question in issue by the investigators. There is no balancing of competing interests.

[96] Therefore, I find that the appropriate process to follow here should track the process used in non-discretionary situations such as informer privilege - see eg. *Named Person v. Vancouver Sun* [2007] 3 SCR 253 at paras. 31 - 61 and especially paras. 46 - 53 per Bastarache, J., for the Court save LeBel, J. (dissenting in part).

[97] That process envisages an *in camera* hearing as “a last resort” (para. 41 *Named Person* supra), but one which I consider essential in this case. I therefore proceeded to hear Staff *in camera* on May 18, 2011.

[98] The onus is on Staff / the Applicant to provide sufficient evidentiary and legal basis to satisfy me that a statutory prohibition requires that no answer be given to the question in issue as asked at discovery.

[99] I now turn to a consideration of that issue. The answer will be split into two parts. The first part (the public part) will give as much indication as I can of the basis of my decision. The second part (the sealed part) will be sealed and outline candidly my reasoning process in greater detail.

Whether the answer(s) to the question in issue is / are prohibited

[100] *In camera,* Staff counsel identified the source of the statutory prohibition. I heard evidence from Scott Peacock, the Director of Enforcement for the Nova Scotia Securities Commission.

[101] My responsibility is to examine the statutory provisions and consider whether the evidence supports the Applicant's position that the investigators are statutorily prohibited from answering the question in issue.

[102] I note that the *General Rules of Practice and Procedure* underline the seriousness with which the legislation views the dissemination of confidential information - eg. Rule 8.12:

> Notwithstanding anything contained in the Rules, no disclosure is required to be made:
>
> (a) which would contravene s. 148(2) of the Act;
>
> (b) of information which is protected from disclosure by privilege;
>
> (c) of a fact or matter which is inadmissible by virtue of Nova Scotia Securities laws;
>
> (d) of information which would not otherwise be disclosable by law.

[103] I am satisfied that the investigators will not violate Nova Scotia Securities laws if they answer the question in issue.

[104] My specific reasons will be sealed so as to preserve the confidentiality in issue. They will constitute a sealed Addendum to this public part of the Decision, until the appeal period has expired - if no appeal is taken within that time, the sealed reasons will become publicly available.

[105] In summary, I have concluded that:

1. the Respondents' adjournment request should be denied; and this Court -

2. has jurisdiction to grant declaratory relief;

3. should not grant declaratory relief regarding the "relevancy" based issues herein because it is not necessary to do so;

4. will assume the Securities Commission has jurisdiction to order discoveries of the investigators in this case;

5. should grant declaratory relief regarding the so called "privilege" issue;

6. should hear Staff *in camera* regarding the so called "privilege" issue.

Conclusion

[106] In relation to the *in camera* hearing, evidence and submissions, I conclude that it is in the interests of justice to make a declaration as follows:

> As a matter of law, if the Nova Scotia Securities Commission investigators answered the question in issue [see para. 39 herein] and the anticipated follow up questions, they will not be violating Nova Scotia Securities laws.

J.