

1997

S.H. No. 140935

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

Allana Gilfoy, Peter Gouthro, Bob MacLeod, Dianne Cochrane, Ron Gould, David MacLean, Stewart Cormack, Darren Costain, Steve Allt, Jim Proudfoot, Terry Weir, Eric Daley, Bob Sayer, Shawn Barker, Andrew Allardice and Steve Dalziel, in their personal capacity and in their joint capacity as the Board of Directors of Soccer Nova Scotia an incorporated society pursuant to the provisions of the *Societies Act*, R.S.N.S. 1989, c.435, as amended, and **George Athanasiou**, in his personal capacity,

**PLAINTIFFS/DEFENDANTS
BY COUNTERCLAIM**

- and -

N. Bruce Kelloway

**DEFENDANT/PLAINTIFF
BY COUNTERCLAIM**

1998

S. H. No. 152387C

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

N. Bruce Kelloway

PLAINTIFF

- and -

James Wilson, Mourad Farid and Duncan Gray, in their personal capacity and **Soccer Nova Scotia**, an incorporated society pursuant to the provisions of the *Societies Act*, R.S.N.S. 1989, c. 435, as amended

DEFENDANTS

DECISION

Cite as: Gilfoy v. Kelloway, 2000 NSSC 65

HEARD BEFORE:

The Honourable Justice Walter R. E. Goodfellow in the Supreme Court of Nova Scotia on January 17TH, 18TH, 19TH and 20th, 2000

DECISION:

March 2 , 2000

PRESENT:

Peter Rumscheidt, Solicitor for Plaintiffs/Defendants by counterclaim and Defendants

N. Bruce Kelloway, Personally for Defendant/Plaintiff by Counterclaim and Plaintiff

Date: 20000302

GOODFELLOW, J.:

FILE BACKGROUND

- [1] The Plaintiffs in the original action, S.H. 140935, filed August 27th, 1997 are all members of the Board of Directors of Soccer Nova Scotia and George Athanasiou is the Executive Director of Soccer Nova Scotia. The initial action is by the Board Members in their personal capacity for defamation relating to a letter written by N. Bruce Kelloway, dated August the 5th, 1997. Mr. Kelloway in his defence and counterclaim admits as stated in para. 4 that it is an accurate quotation from his letter; namely, “I would also suggest to you that the suspension is not about the League, rather it is about my opposition to your indoor facility and my opposition to the administration and financial corruption that surrounds the Metropolitan Indoor Soccer League, the Nova Scotia Soccer League and Soccer Nova Scotia in general”.
- [2] Subsequently, the Plaintiffs in S.H. 140935 decided to discontinue their action and it was discontinued by Order dated the 20th of November, 1997 requiring costs to be paid to N. Bruce Kelloway in the amount of \$600.00.

[3] Mr. Kelloway filed his Defence and Counterclaim September 22nd, 1997 and continued with his Counterclaim. In addition, Mr. Kelloway commenced a separate action in S.H. 152387 dated December the 10th, 1998 against James Wilson, Mourad Farid and Duncan Gray who were the members of a Discipline Panel which tried Mr. Kelloway and suspended him from soccer.

[4] By agreement of the parties, the Counterclaim and separate action were consolidated by a Consent Order August the 9th, 1999.

[5] The substantive portions of the Counterclaim are in the following paragraphs:

21. The Plaintiff claims that the Originating Action was filed by the Defendants falsely and maliciously.

22. The Plaintiff claims that as a result of the filing of the Originating Action and the resultant decision of the Soccer Nova Scotia Discipline and Appeals Committee a negotiation to purchase the NorthCliffe Bubble, from one Mark Holden, had to be terminated.

23. The Plaintiff claims that as a result of the filing of the Originating Action and the resultant decision of the Soccer Nova Scotia Discipline and Appeals Committee he has been brought into ridicule and contempt, that he has lost business, business opportunity and has suffered damages.

[6] The separate action against the members of the Discipline Panel and the substantive portions of the Statement of Claim in S.H. 152387 are set out in paras. 4, 5 and 6 and expressed in the conference memorandum as follows.

(d) In the second action, whether the Discipline Committee of Soccer Nova Scotia had jurisdiction to conduct the hearing of Mr. Kelloway that it conducted, given the filing or lack thereof, of the By-Laws of the Society with the Registrar of Joint Stock Companies office;

- (e) Whether the Discipline Committee breached the laws of natural justice in the way it conducted the hearing, including whether it was biased in the conduct of the hearing, and whether its decision was defamatory;
- (f) Whether the individual defendants acted beyond their jurisdiction and defamed Mr. Kelloway by their decision.

[7] In both the Counterclaim and Consolidate claim, N. Bruce Kelloway seeks general damages, exemplary damages, punitive damages and costs. Interlocutory Applications were taken throughout the course of the conduct of these actions, Demand for Particulars, extensive Interrogatories, etcetera.

ISSUES

[8] The parties held a Date Assignment Conference June the 21st, 1999 and when I commenced my preparation for the trial in this matter, I inquired of

the parties whether the legal issues outlined in the Date Assignment Conference Memorandum were the issues outstanding and both confirmed in the positive. These detailed items labelled legal issues to be determined at trial are essentially what was addressed in the respective briefs filed for the trial, although it was generally recognized by the parties that there was a degree of overlapping. Nevertheless, I will address each and every one of the items that the parties agreed were issues to be determined at trial, which are as follows:

1. Whether the original plaintiffs in the first action, now defendants by counterclaim, had a fraudulent and malicious intent when they filed the Originating Notice commencing this action, which was subsequently withdrawn;
2. Whether the filing of the Statement of Claim in the first action had an impact on the hearing before the Discipline Committee dealing with Mr. Kelloway;
3. If either of (a) or (b) is found, what damages should be paid, considering the effect the Discipline Committee hearing had on Mr. Kelloway's business involvement at that time and his reputation;

4. In the second action, whether the Discipline Committee of Soccer Nova Scotia had jurisdiction to conduct the hearing of Mr. Kelloway that it conducted, given the filing or lack thereof, of the By-Laws of the Society with the Registrar of Joint Stock Companies office;

5. Whether the Discipline Committee breached the laws of natural justice in the way it conducted the hearing, including whether it was biased in the conduct of the hearing, and whether its decision was defamatory;

6. Whether the individual defendants acted beyond their jurisdiction and defamed Mr. Kelloway by their decision;

7. With respect to the second action, Mr. Kelloway seeks a declaration that the decision of the Discipline Committee is null and void, an injunction preventing the defendants from using information gathered in relation to Mr. Kelloway and punitive, general and exemplary damages.

ISSUE NUMBER ONE

1. Whether the original plaintiffs in the first action, now defendants by counterclaim, had a fraudulent and malicious intent when they filed the Originating Notice commencing this action, which was subsequently withdrawn.

[9] This issue is raised primarily by para. 21 of Mr. Kelloway's counterclaim. There is not the slightest shred of credible evidence to suggest or support any conduct by the original plaintiffs, now defendants by counterclaim, that they individually or collectively acted in other than a responsible manner throughout all aspects of their relationship with Mr. Kelloway. They are to be commended individually and collectively for not responding, in anger, even though the temptation to do so must have been very powerful. Mr. Kelloway's letter directed to the Board Members was quite understandably viewed by each and every Member of the Board that gave evidence as an insult to her/his honesty and integrity. The evidence discloses that one person received it personally at his home address. The mere fact that the correspondence was addressed to the Board Members and not to them

individually does not reflect Mr. Kelloway's intent that the Board Members personally and acting as a Board, conspired to bring about his suspension motivated Mr. Kelloway says to his opposition to what he alleges is administrative and financial corruption.

[10] In cross-examination, Mr. Kelloway was asked:

Q. Am I correct in understanding that that lack of publication is at least in part the foundation for your allegation that the Statement of Claim was filed falsely and maliciously?

A. In part, that would be correct, yes.

Q. What else about the actions of the Defendants by counterclaim makes their filing of the Originating Action false and malicious?

A. Well, I think the biggest thing is the ... the lack of publication. My understanding of defamation is that without publication there can't be defamation and the letter was only sent to the members of the Board of Directors. If Mr. Athanasiou received a copy, he did not receive the copy from me. I wrote directly to the Board and it went directly to them so anything that would

be contained in that letter would be written directly to them. Additionally, the statements that were made refer to Soccer Nova Scotia in general and throughout the testimony we've heard people say Soccer Nova Scotia this and Soccer Nova Scotia that and never really identified an individual that they were talking to or even a group of individuals.

[11] This is typical of Mr. Kelloway's motivation, attitude and approach. He is an intelligent articulate person who seeks out technical responses and answers in order to avoid facts and issues. The issue before me is not whether the Plaintiffs would have been successful in their defamation action against him, this first issue and the overall claim of Mr. Kelloway is one of alleged misconduct by the Board Members in commencing an action against him that was in his words, "had a fraudulent and malicious intent".

[12] The totality of the evidence before me not only fails to suggest or support any fraudulent and malicious intent on the part of the now Defendants by counterclaim in their commencement of the action, the credible evidence itself is entirely to the contrary. The evidence is of responsible highly

motivated volunteers being personally and collectively insulted by Mr. Kelloway's unsubstantiated allegation of administration and financial corruption. The legitimate commencement of a civil suit as a response can only be described in the strongest of terms as a moderate response. The fact that they determined not to proceed with that suit by no means renders proof or the drawing of an inference that its commencement was at all malicious or fraudulent or that it was commenced with a malicious or fraudulent intent.

[13] The answer to the first issue raised by Mr. Kelloway is clearly NO.

ISSUE NUMBER TWO

2. Whether the filing of the Statement of Claim in the first action had an impact on the hearing before the Discipline Committee dealing with Mr. Kelloway.

[14] I will be dealing at some length under the other issues with respect to the constituting and empanelling the Discipline Panel which heard the complaints against Mr. Kelloway. The determination of this issue requires an examination of the evidence relating specifically to it.

[15] The filing of the Statement of Claim, as I have noted, took place August 27th, 1997. The letter from Mr. Kelloway was dated August the 5th, 1997 and on August the 11th, 1997. Mr. Kelloway in his evidence acknowledges that on August the 11th he received all the material at tab 46 and the letter at tab 47 of August the 11th, 1997 advising him of the charges.

[16] The first charge was:

Misconduct in your role as an Officer of the Forest Hills United Soccer League by having intentionally misled and misinformed Soccer Nova Scotia and the soccer community about the operations of the Forest Hills United Soccer League.

[17] And the second charge was:

Entering the Forest Hills United Soccer League into agreements without due process and consideration of the League membership.

[18] Mr. Kelloway while complaining in his evidence that the second charge was not very specific stated “it appeared at the time that I was being investigated

for misappropriation of funds or something similar. The information that was requested from me solely financial and so I assumed it was a financial issue that was being dealt with". Given the concerns expressed by Soccer Nova Scotia with respect to the financial aspects of Free Kick Soccer Supply Co. a sole proprietorship of Bruce Kelloway and Forest-Hills United Soccer League of which Bruce Kelloway was the president, it is not surprising that Mr. Kelloway assumed there was a financial issue arising out of the conflict of interest. There is the letter from Mr. Athanasiou demanding payment of the registration fees and referring to broken promises by Mr. Kelloway and in that letter it was clearly indicated that failure to make payment would amount to fraud. This is the same situation I believe that Mr. Eddy referred to and described as being "unfair" as he felt Forest-Hills United Soccer League was being dealt with differently than another league. All I can say is that the concerns of Soccer Nova Scotia, which I doubt Mr. Eddy was fully aware of, were of such magnitude and validity that Soccer Nova Scotia acted responsibly. Mr. Kelloway certainly knew that the financial issue was paramount. See for example the letter from Derek Tower, Head Coach of Cole Harbour Dragons to Mr. Kelloway (Exhibit #10) and for another

example the letter of John Coxon, President of Halifax Dunbrack Soccer Club at p. 472.

[19] Mr. Kelloway was served with the Originating Notice and Statement of Claim September the 4th, 1997.

[20] In Mr. Kelloway's evidence, he acknowledges that he had no idea whether Mr. Gray, a Member of the Panel on September 6th, 1997, was aware of the statements. With respect to Mr. Farid, Mr. Kelloway's evidence is that Mr. Farid was an advocate of the Soccer Nova Scotia indoor facility whereas he was considered to be an opponent of it and further, that the Executive Director of Soccer Nova Scotia would have put together the material advanced to the panel for his hearing and the Executive Director was a party to the lawsuit.

[21] Mr. Kelloway is unrepresented and I made every effort to extend courtesy and fairness to him. To be absolutely certain of his evidence, I decided not to rely upon my notes. I had made a note to myself that Mr. Kelloway did

not give any evidence or even comment on this issue and a transcript of his evidence confirms the correctness of my note.

[22] The material provided to the Discipline Panel did not include any reference to the defamation suit commenced by the individual members in their personal capacity and in their joint capacity as the Board of Directors of Soccer Nova Scotia. Mr. Athanasiou recalls that he had a request from the Executive of Soccer Nova Scotia to bring information to them to try and come to grips with what had been happening and to the position they arrived at where there was no longer an indoor facility.

[23] With respect to the compilation of the material, Mr. Athanasiou's evidence includes:

Q. Mr. Athanasiou, when you were given the mandate to compile the information, am I accurate in understanding that the goal at the outset was not to "convict" or "charge" Mr. Kelloway, rather was simply to gather information?

A. You're very correct.

Q. And after all the information was gathered or as much as could be gathered, the Executive reviewed it and only at that point made their decision to lay the formal charge? Is that correct?

A. Correct.

Q. When you put this correspondence together, it was for the purpose of stating the Association's case?

A. Initially, a lot of this stuff that you see it was brought together so, as I said, so they can see what's going on here, I mean, you know, as I said, they were hit with a bombshell, you know, somebody closed down the shop and I mean, they ... you know, they had to get to a point I think where they had to decide if any action was warranted. So based on all of this information, I would say that they made the decision to ... to charge you.

[24] Mr. Farid's evidence which I accept included being asked the question:

Q. Had you any involvement whatsoever in compiling information or reviewing or discussing anything to do with the closure of Forest Hills Soccer League?

A. No.

[25] He was asked further whether Mr. Kelloway made any reference to his law suit the morning of the panel discipline hearing and he responded:

A. I recall ... yes, first I had heard of it.

[26] The Chairman, James Wilson, was asked by Mr. Kelloway if he was aware of the civil litigation and responded, “no, the first he heard of it was from Mr. Kelloway’s counsel at the hearing and he has as yet to see the Statement of Claim”.

[27] The third member of the panel, Duncan Gray, was asked:

Q. At the time when the hearing took place, Sir, were you aware of the civil litigation that I was involved in with members of the Board of Directors of Soccer Nova Scotia?

A. It was brought up in discussion I believe it was one of the complaints brought forward by your lawyer. Actual litigation, I wasn’t really aware of it other than told at the time that it was happening.

[28] Mr. Gray went on to confirm that he had no involvement whatsoever in the gathering of information or evidence that was presented at the hearing. I find as a fact and accept Mr. Gray's evidence that prior to the morning of the Discipline Hearing, he had no knowledge at all of the outstanding litigation. Mr. Gray went on to confirm that he had no involvement whatsoever in the preliminary aspects of gathering information or evidence that was presented to the Discipline Panel.

[29] There is simply no evidence advanced by Mr. Kelloway to even remotely suggest, let alone establish on a balance of probabilities, that the filing of the Statement of Claim had any impact on the Discipline Committee hearing. The evidence that was advanced is essentially to the contrary and I have a very high comfort level in finding as a fact the filing of the Action and Statement of Claim had absolutely no impact whatsoever on the hearing before the Discipline Committee. As a result, the answer to the second issue is NO.

ISSUE NUMBER THREE

3. If either of (a) or (b) is found, what damages should be paid, considering the effect the Discipline Committee hearing had on Mr. Kelloway's business involvement at that time and his reputation.

[30] This issue is addressed by the negative conclusions to issues 1 and 2. I would also add that there is not a shred of evidence advanced that the effect of the Discipline Committee suspension of Mr. Kelloway reflected in any business involvement or endeavour. Any damage that might have occurred to Mr. Kelloway (to which there is no evidence) would be damage of a self inflicted nature. Mr. Kelloway took great pleasure in widely dispersing copies of his correspondence which may well have drawn attention to him, and the decision of the Discipline Committee of his misconduct. If Mr. Kelloway is referring in whole or in part to his allegation in para. 22 of his Statement of Claim relating to his alleged negotiation to purchase the Northcliffe Bubble from one Mark Holden, it is clear that none of the defendants by counterclaim or defendants in the consolidated action brought by Mr. Kelloway had any knowledge, participated or interfered in anyway with whatever might have transpired between Mr. Kelloway and Mr. Mark

Holden. The letter from Mr. Holden which I suspect was written at the request of Mr. Kelloway is of little value.

[31] Mourad Farid in his evidence was asked until the time the Discipline Panel rendered its decision, had he ever had any knowledge of any possible negotiations of Mr. Kelloway with respect to the Northcliffe Bubble and he responded, no, he had no knowledge of that.

[32] Mr. Gray was asked as to whether he had any knowledge of the negotiations or whatever transpired between Mr. Kelloway and Mark Holden in relation to the Northcliffe Bubble and he responded very clearly that he had no knowledge whatsoever of such at the time of the Discipline Hearing.

[33] A careful review of the evidence in its entirety, including the exhibits, leads me to the conclusion Mr. Kelloway has not established any entitlement to damages, nor has he established any actual damages in any event.

ISSUE NUMBER FOUR

4. In the second action, whether the Discipline Committee of Soccer Nova Scotia had jurisdiction to conduct the hearing of Mr. Kelloway that it conducted, given the filing or lack thereof, of the By-Laws of the Society with the Registrar of Joint Stock Companies office.

[34] The investigation and disciplinary hearing were conducted pursuant to the provisions of the subsection of the 1997 Constitution entitled “Policies and Procedures - Discipline and Appeals”. The 1997 Constitution was approved at the Soccer Nova Scotia General Annual Meeting held January 19th, 1997.

[35] Soccer Nova Scotia is incorporated under the *Societies Act* and:

Section 13 of the *Act* provides as follows:

13(1) A society may by special resolution make, amend or repeal by-laws, not inconsistent with this *Act* or with its memorandum, for the conduct and management of its activities and affairs.

(2) The by-laws of every society shall contain provisions in respect of the several of the matters mentioned in Schedule B.

- (3) No by-law or amendment to by-laws shall take effect until the Registrar approves of it.

Section 30(1) of the *Act* provides as follows:

Every society that contravenes or fails to observe any provision of this *Act* is liable on summary conviction to a penalty of not more than \$100.00.

[36] Any interpretation of the *Societies Act* must reflect s. 9(5) of the *Interpretation Act*, R.S. c. 235:

Interpretation of enactment

(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;

- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

Driedger on the Construction of Statutes, Third Edition, p. 38:

Modern purposive approach. Modern courts do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. As Matthews, J.A. recently wrote in *R. v. Moore*:

From a study of the relevant case law up to date, the words of an Act are always to be read in light of the object of that Act. Consideration must be given to both the spirit and the letter of the legislation.⁷

Thomson v. Canada (Minister of Agriculture),
L'Heureux-Dubé J. wrote:

[A] judge's fundamental consideration in statutory interpretation is the purpose of legislation.¹²

[37] We have the benefit of the purpose of incorporating under the *Societies Act* stated in the *Act* itself:

INCORPORATION

⁷(1985), 67 N.S.R. (2d) 241, at 344 (C.A.).

¹²[1992] 1 S.C.R. 385, at 416.

Purposes for incorporation of society

3 (1) A society may be incorporated under this *Act* to promote any benevolent, philanthropic, patriotic, religious, charitable, artistic, literary, educational, social, professional, recreational or sporting or any other useful object, but not for the purpose of carrying on any trade, industry or business.

[38] The *Societies Act* permits a group of five or more citizens who wish to promote the interests enumerated in para. 3. The purpose is expressly stated not to include the carrying on of any trade, industry or business.. It would be contrary to the purposive approach and the stated purpose of the *Societies Act* to take a strict technical approach.

[39] I am impressed with the evidence of the members of the Board of Directors. They are volunteers motivated solely to see the benefits of the game they love, soccer, made available to boys and girls on a non-business, non-profit basis throughout Nova Scotia. Many, in fact most of them, relate their involvement in soccer initially as parents.

[40] Mr. George Athanasiou was called by Mr. Kelloway and he outlined the background and history of Soccer Nova Scotia's relationship with the Office of the Registrar of Joint Stock Companies. Mr. Athanasiou is the author of the blue book and after the Annual General Meeting he took all this material to the Registrar of Joint Stock Companies and left it with that office. A member of the staff reviewed the material and indicated some changes and Mr. Athanasiou saw that these were all complied with and the material returned to the Office of the Registrar. Subsequently, the Registrar indicated further changes were required and Mr. Athanasiou pointed out that they made all the changes and amendments that were previously indicated.

[41] I accept the acknowledgment of the Deputy Registrar and concur in the opinions she expressed to Soccer Nova Scotia in her letter of August the 28th, 1994 as follows:

RE: SOCCER NOVA SCOTIA

Dear GEORGE ATHANASIOU:

Further to our meeting of today, the documents received in the 1996 that were returned had only required certain amendments and the ones

that I reviewed today required even more detailed information as we have a new Registrar that likes to ensure that all documents now received conform with the *Societies Act* and that the previous Registrar was more lenient.

Further, the Society has been in existence as a body corporate since 1977 and the mere fact that By-Laws reviewed today that have not been filed does not mean that the Society is not in existence and cannot function.

I apologize for any inconvenience this may have caused.

Yours truly,

Carrie Stone, Deputy Registrar of Joint Stock Companies

[42] The Deputy Registrar in part is simply acknowledging that Soccer Nova Scotia has a certificate of incorporation under the *Societies Act*:

Section (8) A certificate of incorporation of a society issued by the Registrar shall be conclusive evidence that the requirements of this Act in respect of incorporation have been complied with and that the society is duly incorporated according to this Act.

[43] Mr. Athanasiou traced the background of the relationship with the Registrar's office. He delivered the Soccer Nova Scotia Constitution revised January, 1995 (tab 6) which was passed by the Special Resolution of Soccer Nova Scotia and filed January the 18th, 1996 with the Registrar.

[44] The Registrar then wrote January 31st, 1996 indicating that:

under Schedule B of the *Societies Act* "which are the items which must be addressed in the By-Laws", we note that #4 of Schedule B, the removal of Directors and Officers has not been addressed, also #2 has not been addressed and Article 12(c) states that the amendments shall become effective upon attaining a two-third majority of votes. This must be changed to three-fourths as set out in the *Societies Act*.

The letter goes on to state:

We are returning the remainder of the documents as they are not required to be filed with our office.

[45] This letter of January the 31st, 1996 at tab 13 should be cross-referenced to the Minutes of the 1997 Annual General Meeting, the 19th of January, 1997

at tab 23. The Annual General Meeting Minutes disclose that the requirements of the Registrar in the letter of January the 18th, 1996 were addressed. This resulted in the document entitled, "Constitution Revised January 20th, 1997". In evidence, is a letter April the 10th, 1997 from the Registry of Joint Stock Companies acknowledging receipt of Minutes and Constitution March the 4th. This letter indicated that Minutes should not be filed and that with respect to "Constitution", the word cannot be used as it is not defined under the *Societies Act* and must be changed to "By-Laws". The Registrar's office went on to indicate some further changes. At no time did the Office of the Registry of Joint Stock Companies verbally or in writing say that the By-Laws of Soccer Nova Scotia are not in effect or that they were not registered. Mr. Athanasiou said in his evidence is that he thought the registration had taken place and other witnesses confirmed that Soccer Nova Scotia operated under approved By-Laws. Certainly they were approved in 1995 at an Annual General Meeting and **all** the changes indicated by the Office of the Registrar were incorporated in the revised January 20th, 1997 and approved at the Annual General Meeting on the 19th of January, 1997. The first question is whether or not there has been, on a factual basis, approval by the Registrar of the Constitution revised 20th

January, 1997. Certainly the word “Constitution” for all practical purposes is in this case the same and intended to be the word “By-Laws”. In all of the circumstances, Soccer Nova Scotia received in 1996 constructive approval, if not actual approval, based upon completion of the requirements of the Registrar and having met those requirements, constructive approval was complete no later than when the Registrar received the March the 4th, 1997 letter transmitting the documentation, including the “Constitution” (By-Laws) of Soccer Nova Scotia revised January 20th, 1997. Soccer Nova Scotia was in the position that it had done all that was required of it and more. In any event, the subsequent amendments which Soccer Nova Scotia again in due course complied with, do not have any impact on the standing of Soccer Nova Scotia as a properly registered society under the *Societies Act*.

[46] Alternatively to my finding of actual as well as constructive approval by the Registrar, the legal significance of s.13(3) of the *Societies Act* 1977 By-Laws of Soccer Nova Scotia were on record in the Registrar’s office and those By-Laws provided the management of the affairs of the Society with the ability to discipline and suspend individuals who contravened the letter

and/or spirit of governing rules of the game. I have found, however, as a matter of fact, that the 1977 By-Laws were replaced by the 1995 By-Laws which were properly amended to meet the directions of the Registrar, resulting in the revised “Constitution” (By-Laws) of January the 20th, 1997 being actually or constructively approved by the Registrar.

[47] The issue is phrased as a matter of “filing” and the exact terminology in s. 13 (3) is approved. Assuming for the sake of argument that the By-Law was not approved, what then flows from such? In my view, consistent with the spirit and intent of the *Societies Act* where a By-Law has been approved by a duly constituted society and clearly met all of the requirements of registration approval at the time such was sought amounts to no more than an irregularity and if anything, might invoke a penalty under the *Act* but would not render the By-Law null and void.

[48] Our Court of Appeal decision in *North, et al and Volunteer Bureau/Helpline Society v. Tanner, et al* (1982), 51 N.S.R. 2d 557, Cooper J.A., p. 565, para. 21:

In my opinion the irregularities of the board of directors in performance of their duties are matters of internal procedure. It may be that the Society would be liable to a penalty under s. 28 of the *Act* for contravening or failing to observe provisions of the *Act*, but such failure cannot have the effect in itself of dissolving the corporate body - see s. 23 of the *Act*.

[49] The Court of Appeal went on to approve the remarks of Cowan, C.J. in concluding a resolution under the *Companies Act* which was validly passed was operative even though the requirement of filing under the *Companies Act* had not been met. Cooper, J.A., p. 565-566:

I also refer to *Dorey v. Bondeco Automotive Industries Ltd, et al* (1979), 30 N.S.R. (2d) 620; 49 A.P.R. 620, at p. 634, where Cowan, C.J., of the Trial Division of this court said:

The special resolution removing the plaintiff as a director of the Maritime company was validly passed. It was not apparently filed, as it should have been, under the provisions of the *Companies Act* in the office of the Registrar of Joint Stock Companies of Halifax. It is quite clear, however, that the resolution itself is valid, even without filing,

and that the only effect of not filing the special resolution as required by the *Companies Act* is to impose a penalty on the company for failure to file. In my experience, such a penalty has never been exacted by the Registrar.

ISSUE NUMBER FIVE

5. With respect to the second action, Mr. Kelloway seeks a declaration that the decision of the Discipline Committee is null and void, an injunction preventing the defendants from using information gathered in relation to Mr. Kelloway and punitive, general and exemplary damages.

[50] I do not intend to review all of the evidence. The evidence leads me to the clear conclusion that considerable care was taken in the selection of the panel members to make certain that they were generally knowledgeable with respect to soccer in Nova Scotia but had not been contaminated in any way by being involved in the investigation or preliminary process that led to the charges against Mr. Kelloway and the evidence submitted to the panel for its consideration. Mr. Kelloway was provided with a copy of everything that was to be considered at his hearing. He was provided ample notice and in his own evidence he acknowledges a familiarity with the discipline process

having appeared in the capacity of a referee on one or more occasions prior to his own discipline hearing. Mr. Kelloway acknowledges receipt of a letter from the executive director dated August 11, 1997 indicating that he has been charged and the substance of the charges. This is contained in the first paragraph of Mr. Kelloway's letter dated August 14, 1997. In a further letter from Mr. Kelloway dated August 19, 1997 to Soccer Nova Scotia he states:

I acknowledge that Soccer Nova Scotia has sent me all of the relevant information that it intends to introduce into evidence against me, and that there was no list of witnesses included. It therefore acknowledged that Soccer Nova Scotia intends to introduce no witnesses.

[51] Mr. Kelloway endeavours to make an issue that he was not aware or entitled to call witnesses at his discipline hearing and that is simply wrong. He was provided with the material including policies and procedures, discipline and appeals which is at Tab 56 from p. 685 on and this is a detailed outline of the Discipline and Appeals Committee and the hearing procedure clearly indicates the ability to call witnesses (Article 5.3(d)). Mr. Kelloway did in fact attend the hearing with his solicitor but chose not to participate in the

hearing beyond having his solicitor record objections to the proceedings. There is nothing in the evidence to warrant support that there has been any breach of natural justice or bias on behalf any member of the panel in the conduct of Mr. Kelloway's hearing. The decision was more than amply supported by the evidence before the panel and a decision rendered after all fair due process it is justified and cannot be said to be defamatory.

ISSUE NUMBER SIX

6. Whether the individual defendants acted beyond their jurisdiction and defamed Mr. Kelloway by their decision.

[52] This heading is more specific with respect to the panel although it is framed in respect to the individual defendants acting beyond their jurisdiction. Issue No. 4 also raises jurisdiction but it is spelled out specifically in relation to the filing or lack of filing of the by-laws of the Society. Clearly from Mr. Kelloway's brief, argument and examination and cross-examination of his witnesses he raises a jurisdictional question as to whether or not Soccer Nova Scotia had any jurisdiction over him personally. He repeatedly raised the question of how was I a member.

[53] He submits in his brief that neither he nor the Forest Hills United Soccer League made application for membership.

[54] In response I want to review the evidence presented in answer to the question raised by Mr. Kelloway. In 1994 Mr. Kelloway made a request to operate Forest Hills United Soccer League out of Wellington for the 1994/95 indoor season. He was advised by letter dated September 15, 1994:

The executive has approved the League provisionally and asked me to proceed to outline your League and any other League for that matter, criteria for full sanctioning.

[55] One of the prerequisites was to provide Soccer Nova Scotia an approved constitution of the League and it was provided. Article I of the Forest Hills United Soccer League constitution 1(b) reads:

(b) The League and all persons participating in The League shall be subject to the Rules and Regulations of Soccer Nova Scotia (SNS).

[56] Mr. Kelloway was advised by letter October 24, 1994 that having met the criteria required September 15, 1994 Soccer Nova Scotia granted full sanctioning to the League. In a memorandum from Mr. Kelloway as president of the League to all coaches and managers dated October 30, 1995 stated:

Attached you will find the new Soccer Nova Scotia rules and regulations for Indoor Soccer which we must abide by. This is a condition of maintaining the sanctioning of the League so no modifications are possible at the local (League) level. If you would like to see changes to these rules I strongly recommend that you get them to your District President, through your club, before November 5th, when Soccer Nova Scotia will debate these rules again.

[57] Attached to this memorandum is supplementary League regulations which are stated to enhance the Soccer Nova Scotia Rules and Regulations prerequisite of the Soccer Nova Scotia registration form and fees being paid and making specific reference to any players playing on more than one team being suspended and the discipline matter referred to Soccer Nova Scotia for action.

[58] Forest-Hills United Soccer League by letter of March 16, 1995 requested sanctioning to operate the indoor soccer League for the 1995/96 indoor season. By letter April 27, 1995 Soccer Nova Scotia advised that the rules for indoor soccer have been clarified and approved by the SNS Board on April 22, 1995. They now become part of SNS's rules and regulations. This is at p. 413. Some problems apparently occurred with respect to players either not being registered or playing on more than one team and in fact there is an allegation by Soccer Nova Scotia that Mr. Kelloway's own son was permitted to play on more than one team. In any event Mr. Kelloway on the letterhead of Forest-Hills United Soccer League May 1, 1995 is in part a response to what the executive director referred to as irregularities in the League and he repeated the request for sanctioning. On the subject of sanctioning Soccer Nova Scotia wrote May 1, 1995 indicating that it was very important for the executive of the League to realize that the League is truly a commercial venture. By letter of September 15, 1995 Mr. Kelloway on behalf of Forest-Hills United Soccer League stated:

The Forest-Hills United Soccer League accepts the SNS Rules and Regulations, and the SNS policies and procedures for indoor soccer as delivered to us on July 7, 1995.

[59] On October 3, 1995 sanctioning was granted. Mr. Kelloway on behalf of the League on October 30, 1996 requested sanctioning for 1996/97 and confirmed they continued to accept the SNS policies and procedures for indoor soccer. Mr. Kelloway advised subsequently that if there was no sanctioning by 4:00 p.m. on that date he would have to go out to the clubs and teams and close the League until the matter is settled. Provisional sanctioning was granted November 1, 1996. The Forest-Hills United Indoor Soccer League Articles of Association ratified November 25, 1996 extended membership to teams formed by Soccer Nova Scotia registered players, clubs in good standing with Soccer Nova Scotia, etc. They established a standing committee on discipline with appeals to be heard in a manner as prescribed by Soccer Nova Scotia. The authority of Soccer Nova Scotia is further acknowledged by Mr. Kelloway in his president's address at the general meeting of the Forest-Hills United Soccer League November 25, 1996 where he stated:

I negotiated with Soccer Nova Scotia and as a result we sit here tonight to put in place a constitution written for and by Soccer Nova Scotia, and on April 1st of 1997 we will sit again in an Annual General Meeting and hold elections for all positions and to put in place the rules and Regulations as written for and by Soccer Nova Scotia.

[60] With respect to indoor registrations Mr. Kelloway wrote November 28, 1996:

As our volunteer organization has been charged, by SNS, with the duty to collect this registration information on your behalf, without any form of recompense, we would hope that SNS would see it's way clear to support us by allowing us sufficient time to assemble the information required and that you would support transfer and sport accident claims arising from play in our League.

[61] Soccer Nova Scotia apparently had difficulties obtaining the individual player registration fees from Forest-Hills Soccer League and I refer to Mr. Athanasiou's letter of January 6, 1997:

I wish to inform you that you have until 12:00 p.m. January 7, 1997 to forward to Soccer Nova Scotia all registration monies that you have in your possession as a result of your League collecting on our behalf \$10.00 indoor registration per player participating on teams making up the Forest Hills Indoor Soccer League of which you are the President. **This money does not belong to you.** This money is what constitutes a registration fee for players without which they are not registered.

You collected this money on the pretense of sending it to Soccer Nova Scotia so players can be registered. Without this money, players are not registered and consequently are not covered for insurance purposes. You are telling them they are registered. **This, in my opinion, constitutes fraud on your behalf.**

To refresh your memory, I am attaching a memo where I made my views clear. On your assurance that you will send a list of players

participating in your League and accompanying registration for each one of them as soon as possible, and on the agreement of SNS's President, Soccer Nova Scotia accepted insurance liability for a small extension of time. You sent the list of players but you did not send any money. I have requested, on more than one occasion, by phone and memo (see attached) this money.

On one occasion, you promised to bring the money in on December 20th, no later than 2:00 p.m. I stayed here until 6:30 p.m. waiting. No show and no phone call, either. A subsequent message left on your phone answering service advising you of consequences obviously went unnoticed.

Bruce, everything has a limit. You must pay up. Failure to forward the indoor registration money you have collected by 12:00 p.m., January 7th will result in Soccer Nova Scotia withdrawing sanctioning of the League's operations resulting in:

- a) No athletic injury coverage for participants;
- b) No liability coverage for coaches and managers;
- c) No Soccer Nova Scotia registered referees;

- d) Discipline cases involving players, coaches and team supporters will not be heard by the Soccer Nova Scotia Discipline Committee;
- e) No responsibility to the facility owners for actions such as vandalism by the participants.

All interested parties will be notified upon sanctioning withdrawal.

[62] By memorandum February 24, 1997 Free Kick Soccer Supply Co. Ltd.

under Mr. Kelloway's signature advised that the company is unable to pay the balance of its fees it owes to the Wellington Athletic Club and has been evicted from the premises. It goes on to state that the company has contacted Soccer Nova Scotia in the hopes that it could arrange for the players to finish their season.

[63] The foregoing is simply some extracts from correspondence throughout a

portion of the time period and the only conclusion one can come to is that Forest-Hills United Soccer League actively sought sanctioning and recognized the consequences that flowed from sanctioning. Mr. Kelloway's question repeated during the trial "How was I a member?" was nothing more

than one of the technical approaches used by Mr. Kelloway whenever it suited his convenience. He knew well the consequences of seeking and obtaining sanctioning and that ultimate authority rested with the sanctioning body Soccer Nova Scotia. Mr. Kelloway's letter of September 15, 1995 referred to earlier is a clear acknowledgment that those associated with the Forest-Hills United Soccer League accepted and were bound by Soccer Nova Scotia's rules and regulations. Mr. Kelloway in his own evidence acknowledged he had appeared at least three times before a discipline panel of Soccer Nova Scotia before his own personal hearing. I hasten to add his appearances were as a referee or official and one of the appeals was an appeal of the Forest-Hills United Soccer Club of which he was president. Forest-Hills United Soccer League and Bruce Kelloway were specifically advised in writing October 3, 1995 that sanctioning was based on the League's acceptance of the Soccer Nova Scotia rules and regulations and the Soccer Nova Scotia policies and procedures for indoor soccer as presently exists.

[64] I will not recite at any length the evidence of witnesses examined and cross-examined by Mr. Kelloway on the question of how was I member. Their

evidence which I accept is that jurisdiction lay by affiliation and sanctioning and few would have known that better than Mr. Kelloway.

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7. With respect to the second action, Mr. Kelloway seeks a declaration that the decision of the Discipline Committee is null and void, an injunction preventing the defendants from using information gathered in relation to Mr. Kelloway and punitive, general and exemplary damages

[65] After a careful weighing of all the evidence which has been an extremely time-consuming task and on the conclusions already stated Mr. Kelloway has failed to establish any entitlement to a declaration, injunction or damages.

MISCELLANEOUS

[66] There were innumerable issues and matters raised by Mr. Kelloway in his direct and cross-examination of his witnesses, memorandum and argument and I will comment on some of them. In addition, I want to record some

further comments with respect to the weight to be attached to certain evidence, particularly where the credibility factor is significant.

- 1. R.C.M.P. Investigation** - Mr. Kelloway seems to indicate that Soccer Nova Scotia initiated wrongfully an R.C.M.P. investigation into his conduct. I find as a fact neither Soccer Nova Scotia nor any of the defendants by counterclaim or defendants in the consolidated action in any way initiated the R.C.M.P. investigation that took place. If they had, I would not have found any fault with this course of action. Mr. Kelloway controlled funds paid by team registrations and his profit proprietorship, Free Kick Soccer Supply Co., later incorporated, failed to meet rental fees on Wellington Athletic Club resulting in eviction. Understandably, a storm of protest from parents, coaches and players resulted. I find as a fact that the R.C.M.P. investigation came about as indicated by the evidence of Mr. Athanasiou and Mr. Clayton that a parent of a Dartmouth United kid participating in Mr. Kelloway's League, Forest Hills United Soccer League, laid a complaint with the R.C.M.P. Mr. Clayton and Mr. Athanasiou were only involved in the R.C.M.P. investigation by virtue of a request by the R.C.M.P. to attend at

the Cole Harbour Detachment to be interviewed as a result of the parent's complaint.

2. **N.S. Soccer - Solicitor** - Mr. Kelloway takes exception to the utilization by Soccer Nova Scotia of a solicitor in the area of seeking disclosure. Several witnesses acknowledged that Soccer Nova Scotia could have made the request for this financial disclosure and had an entitlement to it without utilizing the services of a solicitor. Soccer Nova Scotia held an extraordinary meeting Tuesday, March the 4th, 1997 where the following motions were passed:

MOTION: Brian Cochrane/Jim Clayton

That Soccer Nova Scotia authorize the expenditure for legal counsel to assist in our response to our members' correspondence in reference to the operation of the Forest Hills United Soccer League and its affiliations.

CARRIED

MOTION: Brian Cochrane/Jim Clayton

That we instruct legal counsel to obtain from the Forest Hills United Soccer League and Free Kick Soccer Supply Company information on the following:

1. Copies of the monthly bank statements fro account held by the League and Free Kick for the period from May 1, 1996 to date;
2. Copies of all cancelled cheques written on any accounts held by the League and/or Free Kick for the period from May 1, 1996 to date;
3. Copies of all debit/credit memos from the bank or banks with which the League and/or Free Kick has accounts for the period from May 1, 1996 to date;
4. Invoices/receipts for all expenditures associated with the running of the League during the 1996/1997 season;
5. A list of all teams participating in the League in the 1996/1997 season;
6. A list of the fees received from each team participating in the League in the 1996/1997 season and confirmation respecting when the fees were received;
7. Copies of all contracts entered into by the League or on its behalf by Free Kick; and
8. Copies of all minutes from both the most recent Annual General Meeting and any Executive Meetings of Free Kick as well as those from the League.

CARRIED

I find no fault whatsoever in Soccer Nova Scotia engaging and instructing legal counsel to seek disclosure from Forest Hills United Soccer League and Free Kick Soccer Supply Company. I agree entirely with Mr. Clayton's evidence where he indicated that the Board felt a solicitor should be involved and he wanted to make sure everything was kept above board and further, that the engaging of a solicitor was the more prudent way to act. Mr. Clayton also

expressed the view that they were receiving so many letters from Mr. Kelloway and that the information they were getting was very conflicting.

- 3. Evidence of Paul Hornbuckle** - I had the opportunity to observe Mr. Hornbuckle on the stand and there is also some correspondence from and relating to him in the exhibit books. I have no doubt that Mr. Hornbuckle truly loves the sport of soccer and what he is most guilty of is placing blind trust and faith in Mr. Kelloway. Mr. Hornbuckle signed various documents, including the Constitution of Forest Hills United Soccer League, the initial contract or agreement between Wellington Sports Incorporated and the Forest Hills United Soccer League, (first rental agreement) and held the position of Treasurer of the League. He held the position more in name than in function. I accept his evidence that he did such things as signing blank cheques for Mr. Kelloway and that he signed a lot of things as he said, “just because I trusted you and never never it all come to this”. Mr. Hornbuckle had to deal with young children and tell them they could not play in the soccer field. He had the position of running the canteen for Free Kick Soccer Supply Co. and he was paid a small marshall’s fee for his other

services. The root of the difficulties Mr. Hornbuckle found himself in was as I have stated, his unfortunate blind faith and trust in Mr. Kelloway.

- 4. Evidence of Fitzroy Eddy** - Mr. Eddy, a solicitor, has an extensive record in soccer, particularly as a referee. He started refereeing around 1978 and subsequently became President of the Nova Scotia Soccer Referees Association for a Region and then finally the entire Province. He had held other positions such as a coach and executive positions. He reached a level as a referee from two levels below the highest certification available in Canada. He was a member of the Executive Committee and Board of Soccer Nova Scotia by virtue of his position as President of the Nova Scotia Referees Association from approximately November, 1993 to August, 1996. Mr. Eddy submitted his resignation to the Nova Scotia Soccer Referees Association and also to Soccer Nova Scotia in August, 1996. He did so in part because his time as a volunteer was extensive and he was entering law school and could not keep up the pace of his involvement in soccer, attend to his studies and to his family. While a member of the Board of Soccer Nova Scotia, he served one time as a member of the Discipline and Appeals Committee and on one instance was a member of a panel where Mr.

Kelloway, then a referee, brought a charge against individuals who were either parents or coaches. In his evidence, he alleges an occasion where the Chair of the Appeals Committee, Mr. Steve March, in Mr. Eddy's opinion discarded the Constitution or By-Laws and Mr. Eddy says he resigned on principle. Mr. Eddy expressed the view that Forest Hills United Soccer League was treated unfairly and in a manner different than the Metropolitan Indoor Soccer League. He states that Mr. Athanasiou expressed on many occasions at executive meetings and outside of executive meetings that "he had to teach Bruce Kelloway a lesson" and that in the opinion of Mr. Eddy it seems as though Mr. Athanasiou went after every document, looking at crossing every 't', and dotting every 'i' when it came to Forest Hills United Soccer League. In Mr. Eddy's view, Mr. Athanasiou was on a crusade to punish Mr. Kelloway for going into Wellington and providing a League for players.

Mr. Eddy's reasons for leaving soccer were, as I have stated, many and varied. It is clear to me that he did not appreciate in August of 1996 the full extent of the profit intent and motivation of Mr.

Kelloway with respect to Mr. Kelloway's involvement in soccer, conflicting messages Mr. Kelloway was giving to Soccer Nova Scotia

and subsequently, the complete failure of Mr. Kelloway in providing full financial disclosure of his own personal interests through Free Kick Soccer Supply Co. Mr. Eddy was charged and my note indicates did not attend his Discipline Meeting and was suspended.

Unfortunately, he also placed a measure of trust in Mr. Kelloway and was so preoccupied with the various demands upon him that he had no knowledge or appreciation of the depth of the conflict of interest of Mr. Kelloway. The loss of Mr. Eddy's services to soccer in Nova Scotia is most unfortunate, however, his opinions and recollections are not based on any measure of objectivity and stand no better than allegations.

5. **Evidence of Barry Cogswell** - Mr. Cogswell in 1997 was elected Registrar for the Forest Hills United Soccer Club and the other officers were Mr. Kelloway, Mrs. Kelloway and Paul Hornbuckle. He was just new to the Club when all other members of the executive were suspended. When he first heard of the suspension, he contacted Dianne Cochrane, who was at the time the District President, and received the advice from her, "I'm not sure what to tell you to do but I would recommend that the Club distance

themselves from those that are suspended". Mr. Cogswell found this somewhat strange advice but quite frankly, I think it was the only advice that could be given. All other members of the Executive were suspended meaning they cannot participate in soccer. I have no doubt that it was incredulous to him that a newly appointed executive would find itself down to one executive member in such a short period of time. In his view, the suspensions injured the Club. I think Mr. Cogswell is probably accurate in his opinion that many parents saw soccer as an inexpensive alternative to hockey. One of the underlying reasons it is inexpensive, separate and apart from equipment costs, etcetera, is the foundation of voluntariness as contrasted to profit seeking. While Free Kick Soccer Company's existence and presence was open and public that it was driven by Mr. Kelloway's intention to make a personal profit was far from recognized by Mr. Cogswell or Mr. Eddy. The problems of the Forest Hills United Soccer Club were of the making of Bruce Kelloway, Susan Kelloway and Paul Hornbuckle. It is their misconduct for which they were suspended that caused injury to the Club.

6. Justice Moir's Decision - Mr. Justice Moir dealt with Mr. Kelloway's request for an order in the nature of certiorari and concluded that such was not available to review activities of a private society. I totally agree with the view expressed by Justice Moir at p.6 of his decision:

In my opinion, a sporting association, no matter how important it may be to the recreational life of the public and no matter how monopolistic or powerful it may be within its field, remains an organization for recreation and entertainment. The governing bodies of sports do not perform a function of such vital importance that one would say if the governing body did not perform the function, the state would have to take control.

Soccer Nova Scotia exercises no statutory authority. It is not closely connected to government. Its functions may be very important to many, but they are not public functions within the Datafin meaning. Therefore, a decision of its disciplinary panel is not subject to judicial review, even on the broadened English approach.

7. Audited Financial Statement April 30, 1996 - Mr. Kelloway takes exception to this audited financial statement of Forest-Hills United Soccer League not being part of the evidence in the hearing before him. It is appreciated that one would not expect any detailed audit and this one is based upon test basis of the evidence supporting the conclusion. The statement is sparse to say the least and simply indicates the team fees of \$55,287.00 and operating expenses of \$55,107.00 which presumably were paid to a related party, Free Kick Soccer Supply Co. They

therefore had N. Bruce Kelloway the president of Forest-Hills United Soccer League utilizing this audit as some type of financial blessing of the manner in which business was conducted between the league of which he was president and the proprietorship of which he was the owner. I, and I am sure most interested parties would on examining the financial statements take little comfort. The financial statements do not disclose how much was paid to Mr. Kelloway, to his wife Susan or Mr. Hornbuckle, when, to whom or for what. Mr. Kelloway refers to the League being a non-profit association and you have from the outset a serious conflict of interest between Mr. Kelloway on the one hand as president of the non-profit association and Mr. Kelloway as the operator of his proprietorship, Free Kick Soccer Supply Co. which received virtually all of the team registration fees without any personal accountability by Mr. Kelloway.

8. Free Kick Soccer Supply Co. - Mr. Kelloway in his president's address November 25, 1996 reported that in 1995 sixty-nine teams payed \$900.00 and in 1996 seventy-two teams paid \$765.00. Soccer Nova Scotia was concerned very early with respect to the possible conflict between Mr. Kelloway operating a commercial venture and the volunteer league and in fact sought clarification and only awarded sanctioning after sending Mr. Kelloway a memorandum May 1, 1995

requiring confirmation as to how the league would be operating. Mr. Kelloway consistently projected the league as a volunteer non-profit organization and while Free Kick Soccer Supply Co. had a visible presence at no time did Mr. Kelloway fully disclose his overriding interest in the profit motive. In his president's address he went out of the way to answer the question "What does Free Kick or Bruce Kelloway do with the money?" No accounting was provided. Mr. Kelloway simply stressed charitable sponsorship of Free Kick Soccer Co. particularly as compared in his view to Soccer Nova Scotia. He conveyed Free Kick ensures that in hardship cases children who could not afford to pay could play. The initial contract between Forest-Hills Soccer League and Wellington Sports Incorporated dated November 9, 1994 signed by Bruce Kelloway and presumably subsequently the contract was also signed by Bruce Kelloway in his personal proprietorship. Soccer Nova Scotia did not preclude free enterprise participating, however, the problem I find very clearly as a fact is that Mr. Kelloway was extremely deliberately misleading. He would, for example, as he did in one memorandum dated October 30, 1995, refer to the League being a non-profit organization and incorporated in the same paragraph reference to Free Kick Soccer Supply Co. without differentiating. It is not surprising that grave concerns by parents, players, etc. began to be expressed and I will not detail them but simply refer to a few

including the letter of Mr. Stephen Allt of March 20, 1997 which is quite a telling recital, the letter of Derek Tower, Head Coach of the Cole Harbour Dragons previously mentioned, the letter from Paul Hornbuckle where he stated his understanding from the outset that the League was a non-profit organization, etc. plus of course the evidence of Mr. Kelloway himself, some of which is as follows.

In February of 1997 the Free Kick Soccer Supply Co., which I own, was evicted from the Wellington Athletic Club for failure to pay rent. There was a dispute between the Free Kick Supply Co. and the Wellington Athletic Club as to the amount that was owed and other factors surrounding it. Those were resolved in January of 1998 and it did end up that the Free Kick Soccer Supply Co. Owed to the Wellington Athletic Club \$15,000.00.

Consistent with Mr. Kelloway's deliberate course of avoiding personal disclosure is the following sequence of questions and answers;

Q. Mr. Kelloway, you've confirmed that part of the request that came in my March the 6th, 1997 letter was with respect to records for the Free Kick Soccer Supply Co. And you had sent me a letter shortly thereafter indicating that that Company was not going to participate in the exchange of information?

A. That's correct.

Q. And why ... why did the Company take that position?

A. Those records form a part of my personal income tax form and they are on file with the Federal Government.

Q. Which forms are those?

A. The records of the Free Kick Soccer Supply Company, it was a sole proprietorship, Sir. So I would have to claim revenues and losses on my personal income tax.

Q. Correct. And so ... and what's the connection between that and choosing not to disclose them?

A. I don't normally show my income tax forms around, Sir.

Mr. Kelloway's response to the request for why this information would not be produced was a letter March 10, 1997 which stated:

Free Kick Soccer Supply Co. shall not be participating in the request of exchange of information,

Yours truly,

and when asked if the reason he now gives was stated in that letter he responded at p. 14:

Q. 494

A. Is it 15 and 16.

...

Q. I'm correct in stating that the Free Kick Soccer Supply Company was a profit making in ... at least in intentions, it was a profit making enterprise?

A. The was it's intent, Sir, yes.

THE COURT: That was it's true intent?

MR. KELLOWAY: Yes, Sir.

MR. RUMSCHEIDT: And if ... and how would the profit in theory at least have been generated?

A. Well, the theory, Sir, was that it would be generated by the canteen facility and renting ... renting time in the facility.

Q. So you paid ... Free Kick would pay a certain rate to rent the time from Wellington and Free Kick would then rent the time out to others at a somewhat increased rate with a little profit margin hoped for?

A. That was the theory, Sir.

9. Cases - Review - While I have only referred to two of the case authorities advanced by counsel, I have in fact read carefully and considered all the cases advanced by counsel and Mr. Kelloway. The cases cited by Mr. Kelloway include ones dealing with competency of a medical practitioner under the British Columbia *Medical Practitioners Act* - a case where judicial review was sought in relation to a discipline committee of the Canadian Kennel Club, another case where there was a finding of fact that an apprehension of bias existed due to the conflict of a law

firm. None of these cases are of any assistance to me in light of my findings of fact and credibility and the determination referred to by Justice Moir.

CONCLUSION

[68] Mr. Kelloway's counterclaim and Mr. Kelloway's claim in the consolidated action both stand dismissed.

COSTS

[69] Counsel and Mr. Kelloway are entitled to be heard on costs and disbursements and I ask that they file and exchange their respective views and any response on or before March 17, 2000.

J.

