1992 **S.H. No. 83964**

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

THE VILLAGE COMMISSIONERS OF WAVERLEY, a body corporate, ROB BROWN, MARILYN CLARKE, COLIN CLARKE, RICHARD CLARKE, GERRY DAVIES, DON DAY, HAROLD DILLON, CAROL DUFFUS, ALAN DUFFUS, ROSLYN DUFFUS, LARRY GUMBLEY, MAXINE HANNABY, PENNY HANNABY, MIKE HARTLEN, PETER HILCHIE, BRUCE KEEVIL, SHEILA KEIZER, PAUL KEIZER, MALCOLM KIRK, MAUREEN KIRK, ROSEMARY KUTTNER, KEITH LARDNER, RON LINDALA, CLAIRE LOHNGHURST, BOB MCDONALD, DON MACKEY, PAT MACKEY, BUD MCDONALD, CLIFF MILLIGAN, HAROLD NESBITT, WENDY NESBITT, CHARLES SCHAFER, DANA SCHAFER, MARGO SOLLOWS, ELDON STEVENS, BETTY ANN STEVENS, WAYNE STOBO, NANCY STOBO, RITA TRACEY, ROY TRACEY

RESPONDENTS
(APPLICANTS)

- and -

THE HONOURABLE GREG KERR, Acting Minister of Municipal Affairs, THE **ATTORNEY GENERAL OF NOVA SCOTIA** representing Her Majesty the Queen in Right of the Province of Nova Scotia

APPLICANTS
(RESPONDENTS)

D E C I S I O N

1992 S.H. No. 83964

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

THE VILLAGE COMMISSIONERS OF WAVERLEY, a body corporate, ROB BROWN, MARILYN CLARKE, COLIN CLARKE, RICHARD CLARKE, GERRY DAVIES, DON DAY, HAROLD DILLON, CAROL DUFFUS, ALAN DUFFUS, ROSLYN DUFFUS, LARRY GUMBLEY, MAXINE HANNABY, PENNY HANNABY, MIKE HARTLEN, PETER HILCHIE, BRUCE KEEVIL, SHEILA KEIZER, PAUL KEIZER, MALCOLM KIRK, MAUREEN KIRK, ROSEMARY KUTTNER, KEITH LARDNER, RON LINDALA, CLAIRE LOHNGHURST, BOB MCDONALD, DON MACKEY, PAT MACKEY, BUD MCDONALD, CLIFF MILLIGAN, HAROLD NESBITT, WENDY NESBITT, CHARLES SCHAFER, DANA SCHAFER, MARGO SOLLOWS, ELDON STEVENS, BETTY ANN STEVENS, WAYNE STOBO, NANCY STOBO, RITA TRACEY, ROY TRACEY

RESPONDENTS (APPLICANTS)

- and -

THE HONOURABLE GREG KERR, Acting Minister of Municipal Affairs, **THE ATTORNEY GENERAL OF NOVA SCOTIA** representing Her Majesty the Queen in Right of the Province of Nova Scotia

APPLICANTS (RESPONDENTS)

D E C I S I O N

HEARD BEFORE:	The Honourable Mr. Justice John M. Davison
PLACE HEARD:	Halifax, Nova Scotia
DATE HEARD:	March 24, 1993
DECISION DATE:	April 1, 1993
COUNSEL:	Paul Miller, Q.C. for the respondent (applicants)
	Reinhold M. Endres, Q.C. for the applicants (respondents)

1992 S.H. No. 83964

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

THE VILLAGE COMMISSIONERS OF WAVERLEY, a body corporate, ROB BROWN, MARILYN CLARKE, COLIN CLARKE, RICHARD CLARKE, GERRY DAVIES, DON DAY, HAROLD DILLON, CAROL DUFFUS, ALAN DUFFUS, ROSLYN DUFFUS, LARRY GUMBLEY, MAXINE HANNABY, PENNY HANNABY, MIKE HARTLEN, PETER HILCHIE, BRUCE KEEVIL, SHEILA KEIZER, PAUL KEIZER, MALCOLM KIRK, MAUREEN KIRK, ROSEMARY KUTTNER, KEITH LARDNER, RON LINDALA, CLAIRE LOHNGHURST, BOB MCDONALD, DON MACKEY, PAT MACKEY, BUD MCDONALD, CLIFF MILLIGAN, HAROLD NESBITT, WENDY NESBITT, CHARLES SCHAFER, DANA SCHAFER, MARGO SOLLOWS, ELDON STEVENS, BETTY ANN STEVENS, WAYNE STOBO, NANCY STOBO, RITA TRACEY, ROY TRACEY

RESPONDENTS (APPLICANTS)

- and -

THE HONOURABLE GREG KERR, Acting Minister of Municipal Affairs, THE **ATTORNEY GENERAL OF NOVA SCOTIA** representing Her Majesty the Queen in Right of the Province of Nova Scotia

APPLICANTS (RESPONDENTS)

Davison, J.

By an originating notice (application inter partes) filed with the court on October 2, 1992, the respondents (applicants), which are referred to herein as the "applicants", gave notice of their intention to make application for an order in the nature of certiorari setting aside a prescription made by the Honourable Greg

Kerr, as the acting minister of Municipal Affairs, on August 26, 1992. The prescription or exemption was made pursuant to s. 123 (9) of the **Planning Act** R.S.N.S. 1989, c.346. Section 123 deals with matters relevant to the Halifax-Dartmouth Metropolitan Regional Development Plan including its content and the requirements for regional development permits. The power of the minister to exempt areas from the plan arises from s. 123 (9) which reads:

> "(9) The Minister may prescribe for the area to which the Regional Development Plan applies or any part or parts thereof developments for which no permit shall be required."

The reasons for the relief requested are set forth in the originating notice (application inter partes) as follows:

> "(1) The Honourable Greg Kerr exceeded his jurisdiction by granting a prescription purporting to exempt a rock quarry, rock crushing and extractive facility from the requirement to obtain a municipal development permit which prescription is not authorized by s. 123 of the **Planning Act**, R.S.N.S. 1989, c. 346;
>
> (2) The Honourable Greg Kerr exceeded his jurisdiction in that he improperly exercised his discretion by basing it on improper considerations not related to proper planning principles and/or did not take into account all relevant consideration;
>
> (3) The Honourable Greg Kerr exceeded his jurisdiction by granting a prescription of a type that is **ultra vires** and not authorized by s. 123 of the **Planning Act** R.S.N.S. 1989, c. 346;
>
> (4) The Honourable Greg Kerr erred in law by misinterpreting Subsection 9 of s. 123 of the **Planning Act** R.S.N.S. 1989, c. 346 and the powers conferred upon him;

(5) The Honourable Greg Kerr owed a duty to proceed with fairness in granting the prescription which required him to give reasonable notice to some or all of the applicants as well as a fair opportunity to be heard before deciding whether to grant the prescription. He breached this duty of fairness by making his decision without giving some or all of the Applicants reasonable notice and an opportunity to be heard.

In the alternative, the Applicants seek a declaration that the above-noted prescription is **ultra vires**, null and void, and of no force and effect."

Since 1981 Tidewater Construction Company Limited has been attempting to establish a rock quarry on its property on Rocky Lake Drive and these efforts have been consistently opposed by The Village Commissioners of Waverley and their predecessor.

In December of 1986 a permit was issued to Tidewater under the **Environmental Protection Act** following a public environmental control council hearing, a review by an environmental standards committee and certain judicial proceedings. Shortly before the environmental permit was issued the regional development plan was amended to address concerns over truck traffic generated by another quarry and this amendment, which was effected by an addition to regulation 29A precluded the issuance of any further development permits for rock quarries in Waverley.

In November of 1987 Tidewater commenced an action against the Province of Nova Scotia and others challenging the amendment to the regional development plan. This action was settled by agreement and discontinued in 1992.

By an order in council dated the 25th day of August, 1992 regulation 29A was repealed. Policy 4(D) was amended by adding:

> "An industrial use for the extraction of sand, gravel and rock deposits may be located outside the development boundary in areas where the resource exists provided that the use is located on a lot with a minimum size of 200 acres."

The order in council also added the following regulation:

> "27B Notwithstanding any other provision of these regulations, a regional development permit may be issued for an industrial use for the extraction of sand, gravel and rock deposits on a lot which has a minimum size of 200 acres."

On August 26, 1992 the acting minister of municipal affairs issued the impugned exemption which reads as follows:

> "No regional development permit or municipal development permit is required for a development, within the Halifax-Dartmouth Metropolitan Planning Region of the Halifax-Dartmouth Metropolitan Regional Development Plan and outside the development boundary of the aforementioned Plan, of a rock-quarry, a rock crushing, or extractive facility for which a permit was issued pursuant to the **Environmental Protection Act**, prior to the 20th day of August, 1992; including associated buildings, aggregate plants, material storage areas, weigh scales and facilities for production of asphalt and concrete."

The effect of this prescription was to remove the requirement of Tidewater to obtain a regional or municipal development permit.

By an interlocutory notice (application inter partes) the

respondents gave notice of an application for an order striking the proceedings on the basis that the applicants "are not aggrieved and therefore have no standing to bring an application in the nature of certiorari, or to seek a declaratory judgment". In response to this application, the applicants filed 26 separate affidavits of residents of the Village of Waverley. The applicants had also served notices of examination for discovery on Mr. Greg Kerr, the acting minister, Ronald Simpson, director of planning of the department of municipal affairs and Dan Hiltz, the manager of industrial pollution control of the department of environment.

The respondents now make application for an order to strike the affidavits as being "irrelevant, frivolous, vexatious" and prejudicial to a fair trial and also make application to dismiss the notices of examination for discovery. These applications came on before me. The main proceeding for relief by way of certiorari together with the question of standing will be heard by a judge of this court at a subsequent date.

APPLICATION TO STRIKE AFFIDAVITS

The affidavits filed on behalf of the applicants are replete with expressions of opinions which touch on and relate to a history of the project, environmental factors, traffic issues and various legal issues. Most give no indication whether the information is based on personal knowledge or information and belief. Some make

reference to matters based on information but the source of the information is not stipulated nor is the belief of the affiants stipulated in the affidavit.

An affidavit should be confined to facts of which the affiant has personal knowledge except on an application where the affiant can give evidence based on information and belief if he states the source of the belief and the grounds of the belief. **Civil Procedure Rule** 38.02 reads:

> "(1) An affidavit used on an application may contain statements as to belief of the deponent with the sources and grounds thereof.
>
> (2) Unless the court otherwise orders, an affidavit used on a trial shall contain only such facts as the deponent is able of his own knowledge to prove."

A similar rule is contained in the English rules except that the words "interlocutory proceedings" are used instead of "application".

Great care should be exercised in drafting affidavits. Both pleadings and affidavits should contain facts but there are marked differences between the two types of documents. Affidavits, unlike pleadings, form the evidence which go before the court and are subject to the rules of evidence to permit the court to find facts from that evidence. They should be drafted with the same respect for accuracy and the rules of evidence as is exercised in the giving

of **viva voce** testimony.

Too often affidavits are submitted before the court which consist of rambling narratives. Some are opinions and inadmissable as evidence to determine the issues before the court. In my respectful view the type of affidavits which are being attacked in this proceeding are all too common in proceedings before our court and it would appear the concerns I express are shared by judges in other provinces. In particular I refer to the words of Mr. Justice McQuaid in **Trainor v Trainor** (1990), 87 Nfld. & P.E.I.R. 37 at 39:

> "This case also provides an opportunity for consideration of one other aspect of the materials now before it. The aspect in question, is, unfortunately, not unique to this case, but is one which has become more pervasive in recent times, that is to say, the provision of written material, supportive of one's position, in the form of long, rambling, narrative affidavits, often including the deponent's personal opinions on a wide variety of matters, hearsay, as well as the deponent's interpretation of his rights under the law.
>
> Such documents have little, if any, probative value, and are generally accorded the weight which they deserve.
>
> The old **Rules of Court**, Order 38, rule 4, contained the following provision:
>
> > "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory proceedings in which statements is to his belief, with the grounds thereof, may be admitted."
>
> The current English Rule, Order 45, rule 5 is of much the same tenor, but the commentary provides that where an affidavit is grounded on information or belief, the deponent must identify, specifically, the source of the information and belief, so that, if necessary, that person may be called as a witness. The "best evidence" rule requires either that the source of the information

> be called as witness, and subject to cross-examination, or alternatively, why the person with personal knowledge could not be called. (See Stevenson and Coté, **Civil Procedure Guide**, 1989, pp. 724/725).
>
> The purposes of an affidavit presented to the court is not to provide a forum for the deponent to express his opinion on all matters, however so remote, touching the issue before the court, but rather to place before the court, in concise and succinct form, only those facts which he, or a source witness who may be called by him, is able, and willing, to prove by sworn viva voce testimony.
>
> It should be clearly understood that these comments are not directed towards counsel in this case, or indeed, and counsel in particular. They are simply directed towards an increasing tendency for the filing of page after page of unsupported, and, it might be suspected, frequently unsupportable, allegations and averments. They are, generally speaking, of little use to the court, and regarded by it in equal degree."

Although affidavits used in applications such as the proceeding that is presently before the court can be based on information and belief, the source of the belief must be specifically identified and the source should be the original source of the information. In **Savings and Investment Bank Ltd. v Gasco et al.**, [1984] 1 All E.R. 296 (Ch. D.) Gibson, L.J. spoke about second hand hearsay and affidavits at page 305:

> "Further I find it impossible to accept counsel for SIB's submission that it is sufficient in order to comply with r 5(2) that the deponent should identify only the source to him of his information even though it is clear that that source was not the original source. Thus, if the deponent was informed of a fact by A, whom the deponent knows not to have firsthand knowledge of the fact but who had obtained the information from B, I cannot believe

that it is sufficient for the deponent to identify A as the source of the information. That, to my mind, would largely defeat the requirement that the sources and grounds should be stated and would make it only too easy to introduce prejudicial material without revealing the original source of hearsay information by the expedient of procuring as the deponent a person who receives information second hand. By having to reveal such original source and not merely the immediate source, the deponent affords a proper opportunity to another party to challenge and counter such evidence, as well as enabling the court to assess the weight to be attributed to such evidence."

Mr. Justice Chipman in **Weldon v Kavanagh and Formac Publishing Co.** (1989), 94 N.S.R. (2d) 181 (N.S.C.A.) in speaking of rule 38.02 had this to say at page 185:

"In Williston and Rolls, **The Law of Civil Procedure**, Volume 1, the authors state at p. 486:

> "Affidavits must be confined to the statement of facts within the knowledge of the deponent, but, on interlocutory motions, statements as to his belief, with the grounds therefor, may be admitted. Hearsay evidence or any evidence not within the personal knowledge of the deponent must be rejected if used in support of an originating motion. An affidavit sworn on information and belief is only receivable in interlocutory proceedings, and the deponent must state the source of his information and swear to his belief in it. If this is not done, the offending portion should be entirely disregarded."

I agree. The affidavits in question do not indicate what, if any, witnesses will be called or where they may come from. The only statement is that Formac's employees "including any persons which may <u>be called</u>" all reside in Halifax County. No grounds upon which the beliefs expressed in these affidavits have been provided. In my view these affidavits, being the only material offered in support of the application, fail to furnish any

> information upon which Nunn, J., could have exercised his discretion to grant an order changing the venue.
>
> In passing, I emphasize that the **Civil Procedure Rules** were enacted with the intention that their provisions be observed. The object of the **Rules** is "to secure the just, speedy an (sic) inexpensive determination of every proceeding" (rule 1.03). Failure to adhere to the **Rules** almost invariably operates to defeat this objective. I respectfully submit that judicial resources are sufficiently scarce that the time of the court should not be taken up with applications supported by defective documentation. If the proper material required to support an application exists, it is not too much to ask that counsel provide it."

The respondents refer to two cases where the court took a firm view with respect to the use to be made of affidavits which fail to conform with the rules. In **Lawrence Square Ltd. v Pape et al.** (1978), 6 C.P.C. 51 (Ont. H.C.) the court stated at page 52:

> "It will be observed that Mr. Makriyiannis [the deponent] failed to give the grounds for the beliefs which he has stated in paras. 22 and 23 of his affidavit. The provisions of R. 292 are explicit, and <u>in face of an objection being taken, the Court may not waive the irregularity</u>: see Re **Indust. Accept. Corpn. and Commissioner of Excise**, [1936] O.W.N. 493; **Russell v. Niagara, St. Catharines & Toronto Ry.**, [1945] O.W.N. 347; **Inducon Const. (Eastern) Ltd. v. Vaupere**, [1967] 1 O.R. 245. [emphasis added]"

In **Air Canada et al. v Maley et al.** (1976), 69 D.L.R. (3d) 180, Mr. Justice Addy of the Federal Court stated at page 181:

> "Counsel for the plaintiffs did not object to these particular assertions, but I must say that to this Court they are not acceptable in evidence. It is elementary law of evidence that such assertions are not acceptable

> and, therefore, in so far as they do not give the source of the information and belief, and the particulars on which the belief is founded, they are to be totally and completed rejected as if they did not exist. [emphasis added]"

The impugned affidavit was further criticized by the court on page 181:

> "The affidavit of the defendant Maley is filled with general assertions of incidents, and the affidavits of others are also filled with these assertions which he claims occurred without giving details as to time, place, hour and the names of persons involved or any other such information."

It would helpful to segregate principles which are apparent from consideration of the foregoing authorities and I would enumerate these principles as follows:

1. Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissable material. An affidavit should not take on the flavour of a plea or a summation.

2. The facts should be, for the most part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.

3. Affidavits used in applications may refer to facts based on

information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised".

4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.

5. The affidavit must state that the affiant believes the information received from the source.

In our jurisdiction the opposing party has the right to cross-examine any affidavit introduced in an application. (See **Guptill v Guptill** (1987), 82 N.S.R. (2d) 390.) This affords another good reason why care should be exercised in drafting affidavits. It is also clear that solicitors should not be the affiants on affidavits dealing with substantive matters not only because it would offend the best evidence rule but also because it would place the solicitor in jeopardy of being cross-examined which would possibly require him to withdraw from the proceedings.

There is no question that the affidavits filed by the applicants offend many of the principles set out herein. To the extent that they purport to relate to matters of planning, law and the environment, they are irrelevant and should not be received for that reason. However the solicitor for the applicants stated that

the affidavits have only been filed in response to the motion by the respondents to strike for want of standing. The respondents had filed a written memoranda in support of the application to strike the certiorari application on the grounds of lack of standing in which they allege the applicants "have not claimed and do not have a direct, or personal interest" in the impugned prescription. In making his point in its written submission that the applicants do not have standing because they are not directly affected or have a genuine interest in the matter decided by the minister, the respondents' argument was framed as follows:

> "We know nothing about the many applicants, or their interests in the matter. We know nothing about how the Minister's decision affects one or the other applicant. Displeasure with the Minister's decision alone does not support legal process. There is only one affidavit in support of the application, the Lockhart affidavit which appears to speak for the Village of Waverley. Lockhart himself is not a party.
>
> There's is nothing before the court in support of the application except for Waverley, and Waverley would (not) be directly affected by the Minister's decision..."

It was in response to these allegations that the applicants filed the additional affidavits. If there are portions in the affidavits which support or tend to support the position of the applicants on the issue of standing, those portions should be permitted to go before the judge who determines that issue. The extent, if any, to which the allegations support the standing and the weight to be given to the affidavits would be a matter for the

judge who will be determining that issue.

The solicitor for the respondent very forcibly argued against the retention of any of the affidavits for any reason. He also took the position that the affidavits should either be admitted or rejected. It is clear that offending portions of affidavits can be deleted and the rest retained. Reference is made to **Gordon, Dixon, Baillie and Munroe v Nova Scotia Teachers' Union** (1983), 59 N.S.R. (2d) 124. Similarly affidavits can be retained for limited purposes. The affidavits for the most part should be rejected insofar as any attempt is made to use them to prove facts of an environmental or planning nature but could be retained to the extent that they illustrate that the affiants have a fear, concern or belief. The fact which is being attested to in the affidavit is the fact that they have such a fear, a concern or a belief which fact may establish an interest in the proceedings sufficient to give standing.

During the course of oral submissions I made the suggestion that rather than having the applicants go to the expense of drafting further affidavits, the court could declare the limited basis on which the affidavit is to be received. I considered that approach to be a pragmatic one which would not cause injustice to either party. Judges are trained in rejecting information which is before them for certain purposes and accepting that information for other purposes. Such a situation occurs frequently in criminal cases

where a judge sitting without a jury is required to enter into an examination of the admissibility of evidence through a **voir dire**. I expressed the view that a judge who hears the standing issue would not be tainted by the fact that the affidavits contain information which are irrelevant to the issue before him and that by stipulating the limited purpose for which the affidavits are received a more expeditious and less expensive result would be achieved.

Since the hearing I have had the opportunity of reviewing the affidavits more extensively. Large portions of these affidavits should be rejected as offending the principles to which I have referred in these reasons. I have determined the affidavits should be rejected in their entirety with the right to file other affidavits for the sole purpose of attempting to establish facts on the issue of standing.

Many of the affidavits of the citizens have similar paragraphs. For the guidance of counsel should he wish to file other affidavits, I will choose for illustration purposes, the joint affidavit of Eldon and Betty Ann Stevens. A review of that affidavit indicates paragraphs 8, 9 and 10 should be deleted along with the second sentence in paragraph 4 and the second sentence in paragraph 6. The rest of the affidavit could be received for the limited purpose of assisting to establish standing. I emphasize that whether these type of allegations do support standing will be solely for determination by the judge who hears the motion to dismiss for lack

of standing.

The affidavit of William E. Lockhart sworn the 13th day of February should be rejected in its entirety. It has no redeeming features. Aside from the obvious comment that there is no basis for stating the commission "has a belief" there is not a paragraph which could be received in evidence. Questions of law are not facts. Quite apart from the fact that the references to statements alleged to have been made by Premier Donald Cameron and the Honourable Kenneth Streatch are meaningless and vexatious, they have no relevance to the question of standing. Counsel assured the court the purpose of the affidavit was confined to the issue of standing.

APPLICATION TO STRIKE NOTICES OF DISCOVERY

The respondents have issued notices of examination for discovery of the Honourable Greg Kerr, acting minister of municipal affairs, Ron Simpson, the director of planning for the department of municipal affairs and Dan Hiltz, the manager of industrial pollution control for the department of the environment. The applicants move to strike these notices of examination for discovery for the principal reason that these witnesses are employees of the crown and not compellable to submit to examinations for discovery.

The **Civil Procedure Rules** governing conduct of proceedings in the Supreme Court of Nova Scotia are as broad as the rules in any

other province. For example **Civil Procedure Rule** 18.01 states:

> "18.01. (1) Any person, who is within or without the jurisdiction, may without an order be orally examined on oath or affirmation by any party regarding any matter, not privileged, that is relevant to the subject matter of the proceeding."

Civil Procedure Rule 18.02 makes it clear that examinations for discovery are available for applications in chambers as well as for proceedings destined for trial. As a general comment I would observe that examinations for discovery prior to chambers applications should be used with restraint not only with a view to curtailing costs of proceedings but also chambers applications for the most part do not involve proceedings where there exists a substantial dispute of fact. It is difficult to conceive of what factual information can be made available in this proceeding for a certiorari where the grounds are based on excessive jurisdiction, breach of natural justice and an argument of **ultra vires**.

It is the position of the respondents that they wish to examine by way of discovery the minister with a view to finding out the "information and considerations which he took into account in exercising his discretion to grant the prescription". I would suggest that it would be undesirable to see a practice develop whereby statutory decision makers are subject to examinations for discovery for the purpose of establishing grounds to overturn the decisions.

The main thrust of the argument on behalf of the respondents relates to compellability of employees or agents of the crown to attend on examinations for discovery. In **Thornhill v Dartmouth Broadcasting Ltd. et al.** (1981), 45 N.S.R. (2d) 111, Mr. Justice Burchell had for consideration the examination for discovery of two members of the Royal Canadian Mounted Police. The notice for examination for discovery required the officers to produce documents with respect to an investigation which involved a minister of the crown. The action was for defamation and the defendants took the position that the words "any person" in **Civil Procedure Rule** 18.01 were to be construed as an intention on the part of the legislature to make the crown subject to discovery under the Nova Scotia rules. This argument was rejected by Mr. Justice Burchell who found that at common law there existed no right of discovery against the crown or an officer or agent of the crown acting in his capacity as such officer or agent. Burchell, J. stated that s. 13 of the **Interpretation Act**, R.S.N.S. 1967, c. 151 provided "a complete answer" to the position advanced by the Defendants. That section reads:

> "13 No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner unless it is expressly stated therein that Her Majesty is bound thereby."

The **Proceedings against the Crown Act**, R.S.N.S. 1967, c. 239 stipulates that in proceedings against the crown, the **Civil Procedure Rules** including the rules relating to examinations for discovery apply to the same extent as if the crown were a

corporation. This act only applies where the crown was a party to the action. In the proceeding before me neither party is suggesting that the **Proceedings against the Crown Act** has application. No other statute in Nova Scotia requires Her Majesty to submit to discovery.

Mr. Justice Burchell referred to and relied upon **Crombie v The King** (1922), 52 O.L.R. 72 wherein the court stated at page 77:

> "As pointed out by Lord Watson in **Ind Coope & Co. v. Emmerson** (1887), 12 App. Cas. 300, 309, discovery is a remedy as distinguished from a right, and so is a matter of procedure proper to be dealt with by rules of practice. And, if Rule 327 had provided for examination of officers of the Crown or had negatived the right to examine, such express rule would have governed the practice. But, though discovery is a remedy merely, yet none the less the right of the Crown to refuse discovery is a matter of prerogative right: In **re La Société Les Affréteurs Réunis and The Shipping Controller**, [1921] 3 K.B. 1, following **Tobin v. The Queen** (1863), 32 L.J.C.P. 216, 14 C.B.N.S. 505.
>
> The prerogatives of the Crown exist in British Colonies to the same extent as in the United Kingdom: **Maritime Bank v. The Queen** (1889), 17 Can. S.C.R. 657; **Regina v. Bank of Nova Scotia** (1885), 11 Can. S.C.R. 1. The cases of **Attorney-General v. Newcastle-upon-Tyne Corporation**, [1897] 2 Q.B. 384, and **Thomas v. The Queen** (1874), L.R. 10 Q.B. 44, make it plain that formerly, in proceedings by way of petition of right, the remedy of discovery did not exist as against the Crown; or, in other words, that the Crown had a prerogative right to refuse discovery. If a petitioner now has a right in Ontario to such discovery it must have arisen by virtue of our present Rules, and my best opinion is that such a new and important remedy as the examination of Deputy Ministers cannot, as against the Crown, be created or introduced by "analogy," and that the prerogative right of the Crown to refuse such discovery cannot be taken away by "analogy," but only by express words. I refer to the judgment of the Privy Council in **Théberge v Laudry** (1876), 2 App.

Cas. 102, where it is said at p. 106:

> "Their Lordships wish to state distinctly, that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shewn to take away that prerogative.""

In **Longo v The Queen**, [1959] O.W.N. 19 (Ont., C.A.), Mr. Justice Laidlaw stated at page 20:

> "The remedy of discovery against a Crown officer was a new, important and far-reaching remedy. A decision of the Court that such a remedy existed under the Rules should not be based on the indirect analogy of the Crown and a corporation. In the absence of an express provision it should be held that such a remedy did not exist."

In **Attorney-General of Quebec and Keable v Attorney-General of Canada et al.** (1978), 90 D.L.R. (3d) 161 (S.C.C.) the issue before the Supreme Court of Canada involved limitations on the powers of a commissioner to examine into alleged illegal activities of police forces in Quebec and dealing specifically with the commission's power to subpoena the solicitor-general of Canada, Mr. Justice Pigeon said:

> "Such an inquiry is rather in the nature of a discovery and it seems to be well established that, at common law, the Crown enjoys a prerogative against being compelled to submit to discovery."

In **Re Associated Investors of Canada Ltd.** (1988), 57 Alta. L.R. (2d) 289 Mr. Justice Kerans, speaking for the Alberta Court of Appeal, dealt at some length with the historical development of the laws as it related to the "immunity" of crown agents to submit to discovery. With apparent reluctance Kerans, J.A. concluded his analysis at p. 302 as follows:

> "...I consider myself bound to apply the rule that a Crown agent cannot be compelled, in the absence of statutory authority strictly construed, to submit to discovery."

It is noteworthy that the judge distinguished between trial testimony and discovery testimony because of the "broad ranging nature" of discovery, the fact that issues are not usually in focus at the time of discovery and that the rules on discoveries are interpreted in a liberal fashion as they relate to relevancy. In dealing with the issue he referred to the **Thornhill** case as well as **Re Mulroney et al. and Coates et al.; Re Southham et al. and Mulroney et al.** (1986), 54 O.R. (2d) 353 (Ont. C.A.) which in turn accepted the views of Burchell, J. in the **Thornhill** case. In referring to the two decisions Kerans, J.A. restricted the ratio to a finding that statutes do not bind the crown unless they do so expressly.

The distinction between testimonial immunity and compellability on discovery is important when one considers **Carey v R.** (1986), 35

D.L.R. (4d) 161 (S.C.C.) and **Smallwood v Sparling**, [1982] 2 S.C.R. 686. Both of these cases dealt with testimonial immunity including the production of documents by **subpoena duces tecum** where the immunity is claimed on the basis of public interest. That type of testimonial immunity is subject to the discretion of the court but there is no discretion in the court to overturn the crown's immunity against discovery. In the absence of unequivocal language in a statute the common law right of the crown to decline discovery examination prevails.

The application to strike the notices of examination for discovery is granted. If necessary, I will receive written argument on costs when the order is submitted to me.

J.

April 1, 1993
Halifax, Nova Scotia.