2024 **Hfx. No. 538745**

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Companies Creditors Arrangement Act* R.S.C., 1985 c. C- 36 as Amended (the "**CCAA**")

AND IN THE MATTER OF an application of Blue Lobster Capital Limited ("**Blue Lobster Capital**"), 3284906 Nova Scotia Limited ("**328NSL**"), 3343533 Nova Scotia Limited ("**334NSL**") and 4318682 Nova Scotia Limited ("**431NSL**"), (collectively, the "**Applicants**")

SUPPLEMENTAL MEMORANDUM OF FACT AND LAW OF THE APPLICANTS

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TO: **Nova Scotia Supreme Court**
Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7
Attention: The Honourable Justice Jamieson

AND TO: The Electronic Service List

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SUPPLEMENTAL MEMORANDUM OF FACT AND LAW OF THE APPLICANTS

PART I - INTRODUCTION

1. This Memorandum is filed in response to the rebuttal materials filed by the Monitor on 03 July 2025 (the "**Monitor's Rebuttal**").

2. To the extent not defined herein, capitalized terms used will refer to those terms as defined in the Initial Order, Amended and Restated Initial Order ("**ARIO**"), or Sales and Investment Solicitation Process ("**SISP**") Order.

3. The Companies' position with respect to the competing motions scheduled for hearing on 07 July 2025, i.e. the Monitor's motion for approval of two transactions following the SISP (the "**Transaction Approval Motion**") and the Companies' motion for termination of the CCAA (the "**Termination Motion**"), has been set out in various other filings already before the Court.

PART II - FACTS

4. The facts involved in this matter have been extensively detailed for this Court by the Companies in their CCAA application, prior motions, and affidavits of Kevin Alexander Rice, including the most recent Affidavit of Rice filed on 02 July 2025.

5. In brief, the Companies entered a CCAA in December 2024. The SISP Order was granted in early March 2025. The Companies both prior to and after the SISP Order continued

engaging in their own refinancing efforts while simultaneously cooperating with the Monitor within the SISP.

6. Immediately prior to the SISP bid deadline, the Companies advised the Monitor that they had a deal which would allow them to submit a Plan of Arrangement – the Monitor encouraged the Companies not to file a motion seeking a meeting of creditors and to instead submit a letter for review alongside SISP bids.

7. The Companies had difficulty receiving information from the Monitor during the two weeks that followed the bid deadline and ultimately were told that two transactions ("**Transactions**") had been selected in preference to the Companies' proposed offer. The Transactions did not include certain of the Companies' real estate assets.

8. Lynch was a "successful bidder" on one of the Transactions and has issued the above noted materials in support of the Monitor's Transaction Approval Motion. The Companies submit that Lynch has not provided adequate proof to substantiate the costs that she claims.

PART II – ARGUMENT

Evidentiary Deficiencies

9. The law requiring proof of special damages is relatively trite. Parties claiming costs must support those claims with adequate documentation to avoid challenges. Courts require clear and admissible evidence to substantiate claims, and failure to provide such evidence can result in adverse rulings or cost consequences.

10. In ***Jarvis (Re)***, on a taxation of a trustee's fee accounts, the absence of corroborative evidence, such as time dockets, placed the court in a difficult position to approve fees, although it was not necessarily fatal to the claim.[1] Registrar Balmanoukian relied on prior Nova Scotia decisions for the principle that the failure to file time dockets would not be fatal, but that there must be some evidence or other admissible material to establish the fees claimed.

11. In the Nova Scotia decision ***Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)***[2], the applicants had filed affidavits that the respondents sought to strike on the basis that they were irrelevant, frivolous and vexatious. Justice Davison

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[1] ***Jarvis (Re)***, 2022 NSSC 295 **[TAB 1]**
[2] ***Waverley (Village) v Nova Scotia (Minister of Municipal Affairs)***, 1993 NSSC 71 **[TAB 2]**

considered the law relating to the content of affidavits, and said, at para. 20:

> It would be 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 inadmissible 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 second source and preferably the original source.
>
> 5.The affidavit must state that the affiant believes the information received from the source.

12. Justice Davison found it necessary to strike the affidavits in question in that case, which he found to be "replete with expressions of opinions which touch on and relate to a history of the project, environmental factors, traffic issues and various legal issues." In addition, most of the affidavits gave "no indication whether the information is based on personal knowledge or information and belief. Some refer 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" (para. 10). Justice Davison's decision was affirmed by the Court of Appeal.[3]

13. Rule 39.04 of the Nova Scotia *Civil Procedure Rules* permits a judge to strike an affidavit containing information that is not admissible or information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.

14. In ***Brogan v RBC Dominion Securities Inc***, the Court agreed to strike certain portions of an affidavit on the basis that they contain irrelevant statements, argument, inadmissible hearsay, and summation. These paragraphs failed to meet the legal standards for proper

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[3] ***Waverley (Village Commissioners) et al. v. Kerr et al.*** (1994), 129 N.S.R. (2d) 298 (NSCA) **[TAB 3]**, leave to appeal to SCC dismissed

affidavit content.[4]

15. In this case, the Lynch affidavit failed to provide a basis for the evidence it purported to tender. Specifically, Lynch's affidavit provided no material evidence – admissible or otherwise – to substantiate most of the costs allegedly incurred.

Refusal to Answer Interrogatories

16. To explore Lynch's position and alleged damages, the Applicants issued Interrogatories. These were not answered.

17. Refusal to answer interrogatories can lead to consequences for the affidavit. If a party fails to provide clarification or refuses to answer interrogatories related to an affidavit, the court may strike the affidavit or impose other penalties. This refusal may be interpreted as obstructing the discovery process, which could result in adverse findings or dismissal of the motion. Courts have jurisdiction to compel answers to interrogatories or draw adverse conclusions from a refusal to testify, particularly when the affidavit is central to the case.

18. While it is recognized that the Lynch Interrogatories were not serviced in strict compliance with the timelines imposed by the Nova Scotia *Civil Procedure Rules*, in the CCAA context these timelines are often abridged and the Applicants submit that, given Lynch is the one alleging that failure to complete the Transactions would it was incumbent upon Lynch to cooperate and facilitate the process once legitimate questions were raised with respect to the sufficiency of her affidavit evidence.

19. The Applicants submit that this further supports their position that her affidavit evidence should be struck in whole or in part but submit in the alternative that the Court ought to draw adverse inferences from Lynch's failure to supplement her evidence or reply to interrogatories seeking clarification.

PART III – RELIEF SOUGHT

20. As noted above, the Applicants are seeking to strike or exclude the Lynch affidavit evidence. Alternatively, the Applicants state that the evidence does not support the underlying claim and should be discounted or that adverse inferences should be drawn with respect to its reliability such that damages have not been proven.

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[4] ***Brogan v RBC Dominion Securities Inc***, 2009 NSSC 164 **[TAB 4]**

21. The Applicants are also seeking costs in the event that this request to strike all or parts of the Lynch affidavit is granted. Under Rule 39.04(5), a judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike, and any adjournment caused by it.

22. ***Layes v. Bowes*** reinforced that parties submitting inadmissible affidavit evidence may face cost consequences for requiring other parties to move to strike such evidence. At para 18 the court states "A party who submits inadmissible and objectionable affidavit evidence is free to spend their own funds to advance arguments in support of obviously objectionable content, but they shouldn't expect not to have to pay the costs of other parties called upon to move to have such inadmissible evidence struck".[5]

Signed this 04 day of July 2025.

O'KEEFE & SULLIVAN

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[5] ***Layes v Bowes***, 2021 NSSC 48 **[TAB 5]**

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TAB 1

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: *Jarvis (re)*, 2022 NSSC 295

Date: 20221017
Docket: No. 42489
Registry: Halifax
Estate Number: 51- 2410492

In the Matter of: The Bankruptcy of Ricky Todd Jarvis

Registrar:	Raffi A. Balmanoukian, Registrar in Bankruptcy
Heard:	June 10, 2022, in Halifax, Nova Scotia
Final Written Submissions:	July 8, 2022
Counsel:	Mary Ann Marriott, for the Trustee, Allan Marshall & Associates Inc. Ricky Todd Jarvis, not appearing

Balmanoukian, Registrar:

[1] *Re Vonic*, a decision of Associate Justice May Jean of the Ontario Superior Court, is not reported. It should be. By appending it to these reasons, I am making it so. I have also requested the Deputy Registrar to forward it to all Trustees appearing regularly in this Court, as direction and guidance for taxation of accounts, particularly with respect to proposals but also with respect to fees in general. I adopt *Vonic* and its reasoning in its entirety.

[2] The immediate case before me, that of Ricky Todd Jarvis, involves a completed Division I proposal. The Trustee sought to tax its fees ostensibly based on the formula set forth in the proposal, approved by this Court on November 9, 2018. It contained provisions for payment of $209 per month for 60 months (that is, to October 2023), plus the surrender of one property, maintenance of payments on four others (plus a truck), and liquidation of five separate properties for the benefit of the estate. By March 2022 the proposal had been fully performed, in other words about a year and a half ahead of schedule. Total receipts, including an advance from the Trustee of $3,488 (to make up the balance of periodic payments) totalled $104,710.37. If the Trustee's fees are approved as submitted, the net

dividend to creditors would be just over 30%. And, the creditors have it at least in part (there being an interim as well as a final dividend) ahead of schedule.

[3] Paragraph 2 of the proposal, as approved, provides for payment of 100% of the first $1500 collected, plus 20% of the balance "available for distribution to the creditors", plus HST and disbursements. That, says the Trustee, equals $22,142.08 and that is what it has submitted.

[4] When the Trustee's account first came to me for "desktop" taxation under letter dated April 28, 2022, no time sheets (or calculation method) were attached. I requested them. On May 6, 2022, the Trustee responded "This is a Div-I proposal where our fees are based on the proposal and no time is created." I directed the matter be put on the Court docket for consideration.

[5] In Court on June 10, 2022, the Trustee reiterated that it calculated the amount payable in accordance with the proposal, and did not keep time sheets. I indicated that neither the proposal nor its ratification ousted the Court's discretion in taxing fees, and that it did not reduce its functionality to that of a rubber stamp. I permitted the Trustee to submit additional affidavit evidence to justify its fees. It made those submissions on July 8, 2022.

[6] Before moving to those submissions, it is worth highlighting some of *Vonic's* seminal points (quotations are by Associate Justice Jean):

1. The starting point for any taxation that is not governed by Rules 128 or 129 is s. 39(2) of the BIA, namely the "7.5% rule" – however, this will almost never be the amount sought or even appropriate to seek by the Trustee, and has generally been considered to be out of date if not an anachronism. However, it remains good law.[1]

2. The Trustee (and others) have authority to seek an order to increase or reduce the remuneration under s. 39(5) by the Court; this will usually be the case.

3. Associate Justice Jean's prior unreported decision in *Re Boyle* "stands for the proposition <u>that the court was not a 'rubber stamp' obliged to approve the fees claimed by the trustee merely because the fees were set forth in a proposal</u>." (emphasis added)[2]

[1] I note in passing the persistent and perennial nature of the complaint of the cost of administration and the wasting of assets otherwise distributable among creditors. I am indebted to Mark Taggart at the federal Department of Justice for referring me to an article bemoaning such costs……in 1915: https://archive.org/details/canadianlawtime00unkngoog/page/18/mode/2up

[2] I would add parenthetically that the Court's discretion over fees – subject to "ceilings" in Rules 128 and 129 - extends to other forms of insolvency proceedings, including Division II proposals, ordinary administrations, and summary administrations. For example, in *BDO Canada Ltd. v. Carrigan-Warner*, 2022 NSSC 16, the Trustee argued in its notice of appeal that the Registrar did not have discretion to deviate from Rule 128 in taxing fees in a summary administration estate. That ground of appeal was abandoned at the time of hearing. It follows that the Registrar has the same discretion in Division II proposals which are ordinarily based on Rule 129, and *a fortiori* when fees are required or directed to be taxed. See also *Re Freckelton* 2021 NSSC 144, additional reasons at 2021 NSSC 146.

4. The onus of proving reasonableness of fees is on the Trustee, taking into account relevant principles, including prevention of unjustifiable payments, efficient administration, fair compensation, inspector approval (if any), hourly rate (and by whom incurred), and judgment exercised. To this, I would add "results obtained," in appropriate situations, such as when active asset management or realization, or dealing with difficult persons, legal principles, or assets form part of the landscape.

5. The lack of time records will not be fatal to reasonable Trustee compensation, but will impose on the Trustee an additional exercise in discharging its civil burden of establishing the reasonableness of its fees. "If the trustee decides to eliminate time docketing for the sake of expediency, it does so at its peril. The onus is and always remains upon the trustee to justify that the fees claimed are fair and reasonable."

6. "To be clear, I do not accept the position of the trustee that the court's jurisdiction to approve the SRD and the fees to be claimed by the trustee is supplanted by the approval of the creditors and the OSB that the trustee's fees be fixed by a formula. Creditor and OSB approval

> are factors relevant on a taxation and their approval is not dispositive."
>
> 7. "By the same token, I do not accept the position of the trustee that the court's jurisdiction to approve the SRD and the trustee's fees is ousted by the court's approval of the proposal….*Res judicata* and *issue estoppel* do not apply."

[7] To summarize, the Trustee that thinks that a Court will rubber stamp its fees

(a) because they are embedded in a proposal,

(b) because the creditors have voted for the proposal,

(c) because the Court has approved the proposal, or

(d) because the OSB has not objected,

had best think again. It will find its burden, burdensome. Not impossible, but incumbent upon it to a civil standard and where it fails to meet that standard, detrimental to its claim. This will be even more so if a proposal has been funded by lump sums or with little ongoing activity, or has been a kind of "running average" by a firm to achieve a commercial return over multiple files using the theory of "some days you're the pigeon, on other days you're the statue" with easy

files subsidizing the fraught ones. That is not an appropriate method by which to tax accounts, which is a bespoke exercise for that activity on that file. Put another way, a formulaic but undocumented (or poorly documented) claim for fees will result in that formula being a ceiling but not a floor when the Court taxes the account, and the floor may be considerably below that which the Trustee had theretofore considered itself in effect "entitled."

[8] Turning to the case at bar. Following my direction, the Trustee forwarded an affidavit containing something akin to a reconstructed time sheet, generating some 700 entries in all, with an average value of $31.63 per entry, or 15 minutes' time (for a weighted average hourly rate in the $125 range). I note the Trustee took some care to eliminate duplicate or auto-generated entries.

[9] There is no indication of time-spent per entry. Many of these are coded as "appointment" or "administration."

[10] That said, many entries contain detailed notes respecting intersects with creditors and the debtor. The "diary" is some 26 pages. While some entries would undoubtedly be less than 15 minutes (e.g., bank reconciliations), others such as meetings and conversations would be considerably more. Overall, I am satisfied that even if time-spent did not add up to 175 hours (700 entries @ 15 minutes

apiece), the combination of time spent, rate charged, and by whom incurred is overall fair and reasonable.

[11] The Trustee declared that this was a difficult proposal, given the assets and personalities at hand. The Trustee outlines these at her Exhibit E. While some of these challenges are "after the fact" (that is to say, the Trustee's fee was set out in the proposal before the difficulties arose or were foreseeable), it is adequate to say that this was not an "autopilot" situation.[3] Overall, I do not find that the efforts expended by the Trustee, both anticipated at the time of filing/approval (e.g. realization of several properties) and after-the-fact (extensive communication, tax implications, and a misdirection of funds by counsel having carriage of at least some of the sales) to be unreasonable, unwarranted, improvident, or (globally speaking) docketed at an untenable hourly rate. Rephrased positively, given the burden on the Trustee, I find that the Trustee's efforts are, globally speaking, reasonable, warranted, provident, and tenable.

[12] I also note that the dividend is significant – about 30 cents on the dollar of proven creditors – and was distributed well in advance of the proposal "due date."

[3] I will add for the record that one of the issues was the treatment of capital gains, as the properties are realized, in the hands of the Trustee. While this is not in issue before me on this file, I do not wish to be construed as approving or disapproving of the Trustee's treatment; I currently have another matter on reserve dealing with this issue on a notional rather than as-realized basis. As a point of guidance, it would be useful if the proposal had defined "net proceeds" as before or after giving effect to the tax implications of disposition.

Although neither this nor the lack of creditor objection binds the Court, they are factors to be taken into account. I will add, with respect, that I place little weight on the OSB's "clean" letter of comment, as these are issued in at least this jurisdiction more or less as a matter of course, including in estates where I have had substantial issue with the fees as submitted. Or to rephrase, if the OSB had concerns, this would at least from my experience be a significant red flag, but the lack of such concerns is of limited weight for the Court's exercise of its taxation function.

[13] Accordingly, I find that the Trustee has, generally, discharged its civil burden to establish the reasonableness of its fees in accordance with the proposal as filed. I say "generally" as I have some confusion as to the Trustee's calculations.

[14] The proposal claims 100% of the first $1,500 plus 20% "of contributions in excess of $1,500 available for payment to the creditors," plus costs and disbursements. There were, as noted, total receipts of $104,710.37 which included an advance from the Trustee of $3,488.00. I am unclear how the Trustee arrived at $22,142.08 as being 20% of the first $1,500 plus 20% of the balance "available for payment to the creditors." It looks to me that the Trustee calculated it thusly:

Receipts: $104,710.37

Less first $1,500.00

Equals: $103,210.37

20% of $103,210.37 plus $1,500 = $20,642.08 + $1,500 = $22,142.08

[15] If I am correct, it appears this does not address the advance (or why it was made), nor does it account for the Superintendent's s. 147 levy. Again, if I am correct, it appears that the Trustee calculated its fees without considering whether that levy is part of the "balance available for payment to the creditors," or not. It would also be before accounting for disbursements and HST, meaning that the Trustee would get 100% of those disbursements and HST, plus an additional 20% for its fees, despite those funds not being "available for payment to the creditors." Since these are deducted before calculating the dividend, it strikes me that these should be excluded from calculation of fees, unless I can be pointed to binding authority to the contrary. If the Trustee had sought to base its remuneration on "100% of the first $1,500 and 20% of the balance of *gross receipts*," it should have said so for consideration by creditors voting on the proposal.

[16] In making these comments, I am aware that the Trustee employed calculation software in common use in the industry. I am also aware of the OSB's directive 10R providing guidance on calculation of the levy, but that is a separate issue from calculation of fees.

[17] I am inclined to believe, absent clear language in the proposal (bearing in mind that this will be the "ceiling" for fees) or binding authority otherwise, the funds "available for payment to the creditors" would not include costs, disbursements, HST, or the levy – in this case, totaling $8,059.15 in the Trustee's SRD (although this would require recalculation if the fees are recalculated, as the levy would be higher and the fees and HST lower).

[18] I direct the Trustee to submit its calculations to me for review, and to provide such authority (if any) to justify charging its 20% claim on a "balance available for payment to creditors" as including the levy, costs, and disbursements. It is to do so within 30 days of release of this decision, failing which I will proceed without further ado. With that caveat, I reiterate that I consider the Trustee generally to have discharged the civil burden upon it to justify its fees. Upon review of the Trustee's calculations and submissions, or expiration of the noted 30 days, I will finalize this taxation accordingly.

[19] A copy of Associate Justice Jean's *Vonic* decision is appended.

Balmanoukian, R.

Appendix

ONTARIO

Re Vonic
Court File No. 32-1983170

Parties:
K. Sharma, LIT

REASONS FOR DECISION (Taxation read in Chambers on December 10, 2021)

The Taxation and Background

The trustee of the debtor's Division I proposal applies for taxation of its Statement of Receipt and Disbursements dated May 19, 2021 (the "SRD"). A review of the SRD reveals that receipts are $38,114.67 and disbursements are $14,252.01. The trustee seeks fees of $9,973.46 plus HST.

The primary issue raised on this taxation is whether the trustee's fees of $9,973.46 are to be approved. The OSB has issued a "clear" letter of comment. In the ordinary course, the debtor and the creditors have not been given notice of the taxation but it would appear that there is unlikely to be any objection.

The taxation raises the issue as to the manner by which the trustee is obliged to establish its entitlement to fees where there are no time dockets kept or otherwise available to support the trustee's claim for fees. In this case, the trustee relies exclusively upon the terms of the proposal which contain a methodology for calculating the fees to be taken by the trustee in administering the proposal. The relevant provision contained in the debtor's proposal is as follows, at para. 11:

"11. Provision for payment of all proper fees and expenses, including legal fees, of the Trustee under this proposal shall be made in the following manner:

(i) All such fees and expenses shall be paid in priority to the claims of any and all creditors;
(ii) All expenses, including legal fees to assist the debtor and to the Trustee, in preparation and administration of the proposal, shall be paid in priority and in addition to the fees claimed by the Trustee;
(iii) The fees of the Trustee to assist the Debtor in respect to the filing of the Proposal, prepare and file Cash Flows and all matters up to the preparation of filing the Proposal to creditors shall be $5,000 plus HST;
(iv) The fees of the Trustee for preparing for and attending at the First Meeting of Creditors as well as the Court hearing approving the Proposal shall be limited to a further $1,500 plus HST;
(v) The fees of the Trustee to administer the proposal ("administrative fees") beyond Court approval shall be paid upon each distribution pursuant to Paragraph 9 based on 12.5% of the gross amount thus distributed; and
(vi) Subject to final taxation by the court and independent of the powers of the inspectors, if any inspectors are appointed, the Trustee may take interim draws of its fees and disbursements from the funds paid under paragraph 9 including any retainers received by the Trustee prior to creditors meeting and court approval of this proposal, in full or in party by the Trustee a total amount which shall not exceed the total under paragraph 11(ii), (iii), (iv) and (v)."

The debtor's proposal was approved by the court on June 9, 2015. The proposal called for monthly payments of $525 for 72 months. The proposal was secured by a mortgage on the debtor's real property, a condominium, which mortgage was duly registered by the trustee.

The debtor defaulted in the proposal payments and the trustee issued a notice of default on January 10, 2018. Thereafter, the debtor resumed payments under the proposal but default in the proposal was not formally waived by the creditors. The debtor, within months, decided to sell his real property and, as the trustee had registered the mortgage against the real property, the proposal was paid in full by in or about June, 2018. The proposal was paid early, within approximately 36 months, as opposed to the 72 months called for under the terms of the debtor's

proposal. The trustee issued a certificate of full performance on June 6, 2018. Subsequent to the issuance of the certificate of full performance, the trustee called a "special meeting" of creditors held on June 20, 2018. No creditors objected to the debtor's default in payment and, thereafter, on June 27, 2018, the trustee issued an amended certificate of full of performance.

The trustee claimed fees (plus HST) based on the formula set out at paragraph 11 of the debtor's proposal. While the trustee provided an affidavit in support of its taxation (i.e. the affidavit of Gregory Judd sworn June 7, 2021), the trustee did not provide any further justification for the fees claimed beyond the arithmetic calculation provided for in the debtor's proposal. When the taxation came before me on September 1, 2021, I adjourned the taxation and requested time dockets.

In response to the September 1, 2021 endorsement and my request for time dockets, the trustee filed a report dated October 25, 2021 (the "Report"), and not an affidavit, in support of the taxation and approval of the fees claimed, as calculated by paragraph 11 of the debtor's proposal. The taxation was rescheduled for December 10, 2021.

The trustee states at paragraph 3 of the Report:

"3. In regards to the requested time dockets, we advise that this Trustee does not keep formal detailed time dockets of estate activities for its Division I Proposals where the terms of the Trustee's fees and expenses are set out in paragraph 11 of the Proposal by way of a "fixed fee" formula which was accepted as part of the Proposal by Creditors and later approved by the Court. Therefore, the Court order approving the Proposal with its "fixed fee" formula was relied upon by the Trustee in not having to keep formal detailed time dockets. In respect of the rationale and advantages of the "fixed fee" formula we attach hereto as Appendix "C" a document we prepared titled "Background of Fixed Fee Formulas in Division Proposals." (sic)

Appendix "C" to the Report is a three page document entitled "Background of Fixed Fee Formulas in Division I Proposals" and is signed by members of the trustee firm: Kunjar Sharma, President; Gregory Judd, Vice-President and General Manager; Jenna Li, Vice-President and Uwe Manski, Executive Director. This document appears to provide the rationale for the development by the trustee

of a fixed fee formula to be charged in most, but not all, Division I proposals and for its decision to eliminate time docketing in such Division I proposals containing a formula for fixing a fee.

I summarize the contents of Appendix "C" as follows:

1. The fixed fee formula was developed by the trustee approximately 10 years ago to provide debtors and creditors with more certainty as to the costs of administration for the Division I proposal taking into account contingencies, including matters such as time to negotiate the terms of the proposal, verifying the debtor's finances, becoming more complicated, debtor compliance with payments, simpler/streamlined taxations and the averaging of "good" and "bad" files, fee wise, over the trustee's practice;
2. The fixed fee formula was developed for administrative efficiencies to eliminate the need for time consuming accounting for chargeable time;
3. The fixed fee formula was based on the consumer proposal tariff, to a degree;
4. The structure of the fixed fee formula enabled the trustee to keep up front costs relatively low to facilitate earlier payment of dividends to creditors;
5. The fixed fee formula was aimed to reduce unexpected increases in costs of administration and corresponding decrease in dividends;
6. No creditor has ever objected to the trustee taking a fixed fee;
7. The proposals with the fixed fee formula have been approved by the court and therefore the trustee did not keep time dockets;
8. The trustee has many proposals whose administration is under way or completed wherein the fixed fee formula was relied upon and the trustee has not maintained time dockets; and
9. The OSB has not objected to the trustee's fees as claimed pursuant to the fixed fee formula.

Had the proposal been filed as a consumer proposal, the fees pursuant to the tariff would amount to $8,725.51, or approximately $1,250 less than the fees claimed by the trustee pursuant to the fee formula contained in paragraph 11 of the proposal.

1 Discussion and Analysis

Section 39 of the BIA provides for the fixing of a trustee's remuneration as follows:

"(1) The remuneration of the trustee shall be such as is voted to the trustee by ordinary resolution at any meeting of creditors.

(2) Where the remuneration of the trustee has not been fixed under subsection (1), the trustee may insert in his final statement and retain as his remuneration, subject to increase or reduction as hereinafter provided, a sum not exceeding seven and one-half per cent of the amount remaining out of the realization of the property of the debtor after the claims of the secured creditors have been paid or satisfied.

(3) Where the business of the debtor has been carried on by the trustee or under his supervision, he may be allowed such special remuneration for such services as the creditors or the inspectors may by resolution authorize, and, in the case of a proposal, such special remuneration as may be agreed to by the debtor, or in the absence of agreement with the debtor such amount as may be approved by the court.

….

(5) On application by the trustee, a creditor or the debtor and on notice to such parties as the court may direct, the court may make an order increasing or reducing the remuneration."

I have previously noted in Re Boyle (Estate No. 31-2577808, unreported, December 15, 2020) that s. 39(5) of the BIA provides the jurisdiction and discretion to increase or reduce the remuneration claimed by a trustee and, further, stands for the proposition that the court was not a "rubber stamp" obliged to approve the fees claimed by the trustee merely because the fees were set forth in a proposal.

It is observed that it is common practice for a trustee to request remuneration based on the time spent and hourly rates charged but it has been been held that the 7 ½% general rule is no longer realistic having regard to the complexity of administration of estates and the increased statutory and non statutory obligations

imposed on trustees. See Re Unified Technologies Inc (1995), 32 CBR(NS) 300 (Ont. SC).

Houlden, Morawetz & Sarra, The 2018-2019 Annotated Bankruptcy and Insolvency Act (Thomson Reuters: Canada, 2018-2019) summarizes succinctly the principles to be considered in setting trustee remuneration as follows, at pp. 115-116:

"The **onus is on the trustee** to satisfy the court that the amount claimed for remuneration is justified. See Omni Data Supply Ltd. (2002), 39 C.B.R.(4th) 95, 2002 CarswellBC 3111 (B.C..S.C.).

The following principles must be considered on taxation: (a) **trustees are entitled to fair compensation for their services**; (b) unjustifiable payments for trustee fees to the detriment of the bankrupt estate and its creditors must be prevented; and (c**) efficient, conscientious administration of the bankrupt estate for the benefit of creditors and, so far as the public is concerned, in the interests of the proper carrying-out of the objectives of the BIA, ought to be encouraged**. Where a trustee has not administered a bankrupt estate in accordance with the BIA and has not fulfilled its statutory duties, whether at all or on a timely basis, the registrar has the discretion to reduce the trustee's fees on taxation, whether or not the trustee's conduct or lack thereof has had a negative financial impact on the bankrupt estate. In arriving at an appropriate amount by which the trustee's fees ought to be reduced, a registrar ought to consider whether the trustee's deficiencies were inadvertent; harm was caused to the bankrupt estate; and the office practices of the trustee that led to the deficiencies were remedied once brought to the trustee's attention: Re Nelson (2006), 2006 CarswellOnt 4198, 24 C.B.R.(5th) 40; additional reasons at (2006), 2006 CarswellOnt 6192, 31 C.B.R.(5th) 181 (Ont. S.C.J. [Commercial List]).

…

The **approval of the inspectors** of the trustee's remuneration is a factor that must be taken into account: Re Rico Enerprises Ltd. (1994), 30 C.B.R.(3d) 62 (B.C. Master)…

…

In calculating the fee for time spent, **the rate charged by the trustee should be reasonable** and in line with charges by other trustees in the jurisdiction in similar estates. **Rates for purely routine matters will be less than those for complex protracted negotiations. Routine work should be delegated to employees with**

reduced hourly rates. Trustees who prefer not to delegate routine work should reduce their hourly rate to that of employees who would normally perform such routine tasks: Re Gibney (2003), 2003 CarswellSask 546, 45 C.B.R.(4th) 256 (Sask.Q.B.).

In the absence of compelling reasons to the contrary, the trustee should be permitted to charge its fees for the time spent in the administration of the estate at a **reasonable rate of remuneration**; and for obtaining a positive result in getting in or saving assets for distribution to the creditors. **A trustee is expected to exercise judgment, restraint and common sense in making claims for fees**; it cannot expect the court to accept overly generous charges that exhaust the estate and leave little for creditors. The court must therefore exercise some judgment as to the overall costs and gains to the estate of the trustee's administration and may decide that, as a matter of judgment, a fee otherwise justifiable should be reduced, but this discretion must be exercised judicially and with care, especially if the fee is approved by the creditors or inspectors: Re Hess (1976), 23 C.B.R.(N.S.) 215 (Ont. H.C.)."

[emphasis added]

In Re Boyle, supra, I dealt with the taxation of a statement of receipts and disbursements in a Division I proposal where no time dockets were kept. I held that the lack of time dockets was not fatal to the approval of fees as claimed by a trustee but it does place the court in a position where there is no corroborative evidence as to the time and effort spent in the administration of the proposal.

Similarly, I said, in Re Diltze, 2002 CanLii 49588 (ONSC) at paragraph 4:

"…However, in my view, it is the responsibility of the Trustee to establish a record of the time spent on a matter if the Trustee wishes to be remunerated on that basis (see Three Stars Excavating & Grading Ltd., Re (1977), 25 C.B.R.(N.S.) 255 (Ont. S.C.). However, the fact that the Trustee in this case did not keep a record of time spent made contemporaneously with the rendering of the service is not fatal to the Trustee's application for approval. In Three Star, supra, the court said, at p. 259:

"The bill of costs of the liquidation was, in my view, very unsatisfactory. If a liquidator or any professional person intends to claim remuneration on the basis of

an hourly rate for time spent, it is his responsibility in my judgment, to keep a careful record of the hours, spent in the matter. He could not have received adequate remuneration by applying a percentage figure to the amount of the estate and I infer that he charged on a time basis for that reason. In the absence of time records, which, as I have said, I think he should have kept, I feel that the liquidator should have broken down his time estimation and those of his associates and staff to show their estimates of the amount of time spend by them on each of the individual items listed in the account. In that way, the parties interest in the amount of the account could satisfy themselves as to whether there were any items with which they had no dispute. The reference before the master would then be involved only with those matters, if any, as to which the parties felt the liquidator had spent more time than was necessary."

In Re Dilkes, the trustee did provide an estimate of time spent but not a time record or dockets. I thereafter drew upon my experience in matters of taxation and fixed the fee accordingly.

In disposing of this taxation, I consider and apply the above factors. I intend to fix the trustee's fees in this case although the trustee has not provided an estimate of the time spent or time dockets. I proceed on the basis of the trustee's materials filed on this taxation. For future taxations, it is my view that the trustee is obliged to prove entitlement to the fees claimed and this should take the form of sworn affidavit and other admissible evidence.

In disposing of this taxation, I consider the following factors that favour the approval of the fees claimed by the trustee:

1. The creditors have approved the fees claimed by the trustee, by virtue of the approval of the proposal;
2. The creditors will receive a not insignificant dividend of approximately 50%;
3. The creditors will receive their dividend sooner than anticipated; and
4. The OSB is not opposed to the taxation and the fees claimed by the trustee and has issued a clear Comment Letter.

I consider the following factors that weigh against approval of the fees as claimed by the trustee:

1. The trustee failed to keep time dockets to justify the fees claimed. There is no ability for the court to discern the amount of time and effort that was required to administer the estate and which would warrant the fee claimed;
2. It is not fair and reasonable that the trustee be compensated for work that was not done or not needed. Here, the proposal was completed in 3 years, approximately half of the anticipated time that the proposal was to be performed;
3. It is questionable as to whether the Division I proposal was capable of being performed. The debtor defaulted in the proposal and a notice of default was issued by the trustee on January 10, 2018. The creditors did not waive default in payment until June 20, 2018, after the trustee had issued a Certificate of Full Performance on June 6, 2018. The trustee reissued an amended Certificate of Full Performance on June 27, 2018, after a special meeting of creditors had been held on June 20, 2018 to waive default;
4. I question whether the trustee properly requested that the debtor's default in payment be waived and whether it was appropriate to move instead for an order annulling the proposal which would have the effect of the debtor being deemed to have made an assignment in bankruptcy. In my view, had this step been taken, the creditors would likely have been paid in full or would have received an improved dividend. I note that the debtor's real property, valued at $300,000 when sold in May/June 2018, was subject to a mortgage in the amount of $165,000 at the date of the filing of the proposal. By my estimation, the debtor's equity in the property was in the range of $100,000 to $135,000 (before costs of sale) . This equity would have been more than sufficient to pay the creditors, proven at $46,988.72; and
5. The debtor had limited income on account of medical condition and receipt of CPP and disability pension. The net benefit of a Division I proposal over that of a consumer proposal is not entirely clear. The trustee claimed that the debtor needed one additional year to make payments that were viable. One year of such payments ($6,300) are off set by legal fees ($1,722.50) and the additional fees above the consumer proposal tariff ($1,247.95). The net benefit of a Division 1 proposal, disregarding other disbursements, is $3,329.55 with a one year delay in completion. To my mind, it was not a foregone conclusion that a Division I proposal was more beneficial to the debtor or the creditors, given the increased costs and delay in distribution.

In fixing the trustee's fees, I have various options:

1. Fix fees at the statutory rate of 7.5%. This would result in fees of $2,858.60;
2. Fix fees on the basis of the consumer proposal tariff. This would result in fees of $8,725.51;
3. Fix fees on the basis of the consumer proposal tariff but reduce it due to reduced period of administration (3 years vs. 7 years);
4. Fix fees on the basis of the calculation in the proposal. This would result in fees of $9,973.46.

In my view, it is appropriate to start from the proposition that the statutory rate of 7.5% should be applied, absent any request by the trustee for an increased amount. Inferentially, the trustee is seeking more than a 7.5% statutory rate, given the terms of paragraph 11 of the proposal.

If the trustee is seeking fees above the statutory rate, the onus is on the trustee to establish entitlement and that the amount is fair and reasonable. Typically, a trustee in such a case claims fees on a time and hourly rate basis. Dockets would be vital in this situation.

Here, the trustee submits that the formula or manner of calculating the fee in paragraph 11 of the proposal is fair and reasonable. There is nothing filed to support the submission, aside from a description of the tasks that the trustee fulfilled in the administration of the estate.

Without the benefit of dockets which would provide a basis for an increased fee above the statutory rate, the court may be seen as pulling a number out of thin air. In my view, that approach is not principled, although in some ways justifiable if the trustee is unable to discharge its onus.

In my view, drawing on my experience over 15 years in taxing SRDs and given the circumstances of this case, it is my view that the statutory rate of 7.5% is not appropriate to fairly and reasonably compensate the trustee.

In my view, it is appropriate to award fees and disbursements on a consumer tariff, in the circumstances of this case, based on receipts for a 5 year period (or $31,500). A good argument can be advanced that the debtor ought to have filed a consumer proposal and the fees taken by the trustee would have been fixed under the consumer proposal tariff. It is not up to the trustee to decide what the creditors

would accept or not in a consumer proposal situation. It is my experience that creditors have accepted consumer proposals involving far less than a 50% dividend.

Given my view that a consumer proposal was appropriate, I decline to fix fees on the basis of the formula contained in the Division I proposal. The more complex administration of a Division I proposal and the costs associated with the same were not warranted and were only slightly more beneficial to the creditors. I would decline to allow the legal fees incurred to obtain court approval and to register the mortgage security, as these fees and steps would not have been required or be permitted disbursements in a consumer proposal.

The trustee shall be allowed the usual tariff disbursements. Legal fees are specifically not approved and shall be borne by the trustee.

Further justification for the reduced fees and disbursements is based on my view that the trustee did not take appropriate steps to administer the estate properly. In my view, the creditors would have been better served had the trustee annulled the proposal and placed the debtor in bankruptcy. The creditors could have been paid in full. I would have reduced the fees entirely on this basis, however, I am mindful that no creditors objected to the waiver of the default and took no steps to annul the proposal and place the debtor in bankruptcy. Alternatively, I would have reduced the trustee's fees by 10% to reflect this issue.

In conclusion, I am of the view that the fees and disbursements be fixed on the basis of the consumer proposal tariff and on the basis of receipts of $31,500 (payments over 5 years).

To be clear, I do not accept the position of the trustee that the court's jurisdiction to approve the SRD and the fees to be claimed by the trustee is supplanted by the approval of the creditors and the OSB that the trustee's fees be fixed by a formula. Creditor and OSB approval are factors relevant on a taxation and their approval is not dispositive.

By the same token, I do not accept the position of the trustee that the court's jurisdiction to approve the SRD and the trustee's fees is ousted by the court's approval of the proposal. The court's approval of a proposal under section 59 of the Bankruptcy and Insolvency Act is aimed at assessing whether the terms of the

proposal are reasonable and calculated to benefit the general body of creditors. The quantum of the trustee's fees is not an issue specifically addressed on an application for court approval of a Division I proposal. *Res judicata* and *issue estoppel* do not apply.

I also wish to be clear that I do not accept that administrative efficiencies associated with a fixed fee properly oust the court's jurisdiction to approve the trustee's fees. If the trustee decides to eliminate time docketing for the sake of expediency, then it does so at its peril. The onus is and always remains upon the trustee to justify that the fees claimed are fair and reasonable. As held in *Re Boyle* and *Re Diltze*, the failure to file time dockets will not be fatal but there must be some evidence or other admissible material to establish the fees claimed.

As to the trustee's position that creditors seek certainty as to the costs of administration, that may be so. However, I am of the view that such certainty (or efficiencies) does not override the trustee's obligation to justify the fairness and reasonableness of its fee. And to be clear, it has been my experience that time dockets have been filed by this trustee firm where the proposal contains a fixed fee or formula for calculating the fee.

The trustee is directed to prepare an amended SRD in accordance with the rulings here, to resubmit for comment to the OSB and thereafter resubmit to me for final issuance.

Associate Justice Jean

April 11, 2022

TAB 2

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

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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 Cote, **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 be called" 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 at 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 in face of an objection being taken, the Court may not waive the irregularity: 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 Coast. (Eastern) Ltd. v. Vaupere**, [1967] 1 O.R. 245. [emphasis added]"

In **Air Canada at al. v Maley at 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.

> Theirs 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 Societe Les Affreteurs Reunis 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 **Theberge 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 at al. and Coates at al.; Re Southham et al. and Mulroney at 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.

TAB 3

C.A. No. 02872
C.A. No. 02930

NOVA SCOTIA COURT OF APPEAL

Matthews, Freeman and Roscoe, JJ.A.

BETWEEN:

THE VILLAGE COMMISSIONERS OF WAVERLEY, a body corporate, BOB BROWN, MARILYN CLARKE, COLIN CLARKE, RICHARD CLARKE, GERRY DAVIS DON DAY, HAROLD DILLON, CAROL DUFFUS, ALLAN DUFFUS, ROSLYN DUFFUS, LARRY GUMBLEY, MAXINE HANNABY, PENNY HANNABY, MIKE HARTLEN, PETER HILCHIE, BRUCE KEEVIL SHEILA KAIZER, MALCOLM KIRK, MAUREEN KIRK, ROSEMARY KUTTNER, KEITH LARDNER, RON LANDALA, CLAIRE LONGHURST, BOB MCDONALD, CLIFF MILLIGAN, HAROLD NESBITT, WENDY NESBITT, CHARLES SCHAFER, DANA SCHAFER, MARGO SOLLOWS, ELDON STEVENS, BETTY ANN STEVENS, WAYNE STOBO, NANCY STOBO, RITA TRACY, ROY TRACY
appellants

THE HONOURABLE GREG KERR, Acting Minister of Municipal Affairs, THE ATTORNEY GENERAL OF NOVA SCOTIA representing Her Majesty The Queen in the Right of the Province of Nova Scotia and TIDEWATER CONSTRUCTION COMPANY LIMITED
respondents

Bruce H. Wildsmith, Q.C., and Paul B. Miller for appellants

Reinhold M. Endres, Q.C. for respondents

Nancy G. Rubin for the Intervenor

Appeal Heard: February 1, 1994

Judgment Delivered: March 3, 1994

THE COURT: Appeals dismissed from interlocutory decisions settling record in certiorari application and striking notices for discovery examination of minister respecting his discretionary administrative decision per reasons for judgment by Freeman, J.A.; Matthews and Roscoe, JJ.A. concurring.

FREEMAN, J.A.:

On August 26, 1992, the Honourable Greg Kerr, then Acting Minister of Municipal Affairs for the Province of Nova Scotia, exercising statutory authority, prescribed that stone quarry operations in the Village of Waverley, Halifax County, be exempt from regional or municipal development permits if environmental permits had been previously issued; the intervenor Tidewater Construction Company Limited held such a permit and its stone quarry operation was exempted.

The appellants, the village commissioners and citizens of the area, responded October 2, 1992, with an application seeking an order in the nature of **certiorari** quashing the issuance of the prescription and in the alternative a declaration that the prescription is **ultra vires**, null and void and of no force and effect. That application has not yet been heard.

The applications at issue in this appeal were interlocutory proceedings brought by the appellants to gather information in support of their application for **certiorari**. Specifically, the appellants have appealed from two Supreme Court orders, one made by Justice Davison striking out notices of examination for discovery for Mr. Kerr, and two provincial officials, Ronald Simpson and D.E. Hiltz; the other made by Chief Justice Glube settling the record, that is, determining the material to be included with a return made by the minister pursuant to Civil Procedure Rule 56.08.

1. The Discovery Issue

Availability of Discovery

Dealing with the striking of the notices for examination, Justice Davison stated:

> "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 excess of 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."

Justice Davison's remarks reflect prevailing judicial opinion in these matters, and they are supported by law and public policy. Courts will consider the discovery of administrative decision makers only exceptionally and when there are valid reasons for doing so. Valid reasons must have an evidentiary foundation, which may be established by affidavit.

Justice Davison noted the breadth of **Civil Procedure Rule 18.01**, which provides that any person may be examined by any party regarding any matter, not privileged, that is relevant to the subject matter of a proceeding. **Civil Procedure Rule 18.02** makes discovery available for chambers applications as well as for trials. I would incline to the view that **Rule 18** does not necessarily impose discovery in the context of judicial review, although that is a civil proceeding, but does not preclude it where discovery is otherwise appropriate. It is apparent from the case law that discovery is not generally appropriate to judicial review by way of **certiorari**.

In **Riverside Terrace Realty Limited v. North Vancouver (District),** [1992] B.C.J. No. 353 (B.C.S.C.) (Unreported) discovery of decision makers was refused to an applicant who alleged bias. Spencer J. stated at p. 8 of his decision:

> "It is true that where bias or some other departure from natural justice is alleged the court may inquire beyond the record of the decision below to see if it is proved, but that does not mean that discovery can be had as in a trial process. Were that the case, every proceeding for **certiorari** or for orders in the nature of **certiorari** would entitle the applicant to discovery against the administrative tribunal. A tribunal, which by law is not required to give reasons for its decisions in the first place, would find itself cross-examined on its decision in an attempt to show bias or other jurisdictional error. I do not think the law permits that to be done."

In **Lawson v. Solicitor General and Messier**, B.C.C.A. Vancouver Registry No. 012016, January 28, 1992, Goldie, J.A. writing for the court approved the trial judge's decision to refuse examination for discovery on an application for **certiorari** to quash the order of the solicitor general calling for an inquest. He said that it would be "a retrograde step to encourage the procedures associated with a trial in an application for judicial review."

After a review of the origins of the remedy of **certiorari**, Krever J. (as he then was) of the Ontario High Court of Justice found that "discovery is not available in **certiorari**" in **Re Medhurst and Medhurst et al.**, [1984] 7 D.L.R. (4th) 335.

In **Agnew v. Ontario Association of Architects** (1987), 236 O.A.C. 354, an applicant appealed to the Ontario Divisional Court and subpoenaed members of a requirements committee who had refused an architect's license to practice. In setting aside the subpoenas Campbell J. stated at p. 359:

"If the applicant is correct, this application for judicial review would not stand or fall upon the record of the tribunal, but on the recollection of its members about their process of decision and it would be open in every application for judicial review to examine all of the tribunal members about how they reached their decision."

He also observed:

> "There are some obvious cases where a subpoena would be justified. Statements or conduct outside the decision process, like expressing an opinion to the press, might render the tribunal member amenable to subpoena: **Re Canada Metal Co. Ltd. et al. and Heap et al.** [(1975) 54 D.L.R. (3d) 641 (C.A.)]. If the evidence sought relates to some matter collateral to the decision, something that is not inextricably bound up with the decision itself, the decision-maker may be amenable to subpoena: **Re Clendenning** [(1976), 15 O.R. (2d) 971]."

In **Broda v. Edmonton (City)** (1989), 102 A.R. 255 Trussler J. considered an application for discovery of city councillors in an application for judicial review of City of Edmonton decisions respecting land use bylaws. He stated at p. 259 of his decision:

> " The governing principle on judicial review applications is that 'there is no interrogatory or discovery process associated with an application for one of the prerogative remedies.' [Citing Jones and deVillars, **Principles of Administrative Law** (1985) p. 431] This is particularly true when dealing with an intra-jurisdictional error of law where only the record can be the subject of the review. The discovery process does not apply even if bias or a jurisdictional defect is alleged, in which case all other types of evidence become admissible."

In **Bettes v. Boeing Canada** (1992), 8 Admin. L.R. (2d) 232 Howden J. of the Ontario Court of Justice quashed a subpoena to a member of the Ontario Labour Relations Board as an abuse of process in a **certiorari** application when affidavit evidence alleging tampering with a witness was insufficient to establish a reasonable **prima facie** case that justice had been denied.

In **Ellis-Don Limited v. Ontario (Labour Relations Board)** (1992), 95 D.L.R. (4th) 56 (Ont. Gen. Div.), a perception of procedural unfairness was created by a draft decision which differed from the final decision. On a **certiorari** application officials of the Ontario Labour Relations Board were required to submit to discovery with respect to the procedure followed by the board, but not with respect to substantive matters related to the Board's deliberations. This is the only case we have been referred to in which discovery of members of a decision-making tribunal has actually been permitted.

The rationale for examining members of administrative tribunals was considered in **Tremblay v. Quebec (C.A.S.)**, [1992] 1 S.C.R. 952. In that case the Supreme Court of Canada dealt with a perception of procedural unfairness which arose when a draft decision by a panel of the Quebec *Commission des affaires sociales* was altered by the Commission after a plenary review. Writing for the full Court, Gonthier J. stated at pp. 965-66:

> ". . . (W)hen there is no appeal from the decision of an administrative tribunal, as is the case with the Commission, that decision can only be reviewed in one way: as to legality by judicial review. It is of the very nature of judicial review to examine inter alia the decision maker's decision making process. Some of the grounds on which a decision may be challenged even concern the internal aspect of that process: for example, was the decision made at the dictate of a third party? Is it the result of the blind application of a previously established directive or policy? All of these events accompany the deliberations or are part of them.
>
> Accordingly, it seems to me that by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Of course, secrecy remains the rule but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice. (emphasis added)

In **Tremblay** the Commission secretary was examined over objections; questions as to the formal process established by the Commission were ruled admissible.

I would conclude, accepting the recent authority of **Tremblay** and **Ellis-Don,** that a restricted right of discovery of administrative decision-makers or members of decision- making tribunals does exist, and that it is not necessarily limited to questions of procedure rather than the subjective decision-making process. A distinction exists between discovery, which is a somewhat unfocused fact gathering exercise, and the examination of witnesses in the course of a judicial review, when issues are more defined and questions must be relevant to them. In either case, discovery or testimony, a proper evidentiary foundation must be created, generally by affidavit evidence, to establish that valid reasons exist for concern that there has been a want of natural justice or procedural fairness, or that the discretionary authority has been otherwise exceeded. I am aware of no authority for the discovery examination of a discretionary decision-maker under a statute when the issue is whether his or her authority was properly exercised, although there is a clear analogy with the review of adjudicative decisions. A further difficulty arises when the decision-maker is a minister of the Crown; crown immunity was the basis for Justice Davison's decision and the focus of submissions of counsel.

Discretionary Decisions

While care must be taken not to prejudge the main matter, the interlocutory applications in issue in this appeal must be viewed in the context of the **certiorari** application respecting a purely administrative act in the exercise of the Minister's sole discretion, rather than the more familiar review of a judicial or quasi-judicial act. In the past there was a reticence to review the exercise of an administrative discretion; see **The King v. Noxema Chemical Co.**, [1942] S.C.R. 178 and **Calgary Power Ltd. v. Copithorne**, [1959] S.C.R. 24. In the latter case a ministerial decision to expropriate was seen as a policy decision for which the minister would be answerable only to the legislature. However in **Warne v. Province of Nova Scotia** (1969), 1 N.S.R. (2d) 150 Cowan C.J.T.D. was prepared to inquire into an expropriation to ensure it was authorized by the enabling act. See the text **Administrative Law**, 3rd edition, 1989, Emond Montgomery Publications Limited, Toronto, the authors, J.M. Evans, H.N. Janisch, David J. Mullan, and R.C.B. Risk at p. 651-2.

The Supreme Court of Canada settled the question of availability of judicial review of discretionary administrative decisions in **Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police**, [1979] 1 S.C.R. 311 and **Martineau v. Matsqui Institution Disciplinary Board**, [1980] 1 S.C.R. 602, (1980) 106 D.L.R. (3d) 385. In the latter case Dickson, J. (as he then was), Laskin C.J.C. and McIntyre J. concurring, concluded at (p. 410 D.L.R.) after a review of the authorities:

> 1. **"Certiorari** is available as a general remedy for supervision of the machinery of Government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interest, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.
>
> 2. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. . . . "

The authors of **Administrative Law** say (p.651) the basic question raised on the review of discretionary decisions is this:

> "Does the ambit of the discretionary authority granted authorize the decision under attack?"

They explain:

> "It is not a matter of determining whether the decision is correct but

whether it is authorized. Over the years the courts have employed a number of techniques to determine whether the ambit of discretion has been exceeded or not. For example, it could be asked whether the decision reflects the proper purpose for which the discretion has been granted and whether it is based on relevant considerations. As well, it could be asked whether the possessor of the discretion actually exercised it, or allowed himself to be dictated to, or refused to exercise the full range of choice available to him by fettering his discretion by way of inflexible pre-judgment. . . . (W)hen a discretionary power is granted to a minister or some official, rather than to a more formally constituted adjudicative body such as an administrative tribunal, and, should something go wrong, it is more accurate to characterize the ministerial decision as one involving an abuse of discretion and that of the administrative tribunal as an error of law, fact or jurisdiction."

Sir William Wade, in **Administrative Law**, Sixth Edition, Clarendon Press, Oxford, 1988, relates judicial review of discretionary administrative decisions to the rule of law. At p. 23 he states:

> "The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorized by law--and in nearly every case this will mean authorized by Act of Parliament. . .. But the rule of law demands something more, since otherwise it would be satisfied by giving the government unrestricted discretionary powers, so that everything that they did was within the law. . . . The secondary meaning of the rule of law, therefore, is that governments should be conducted within a framework of recognized rules and principles which restrict discretionary power. . . . Thus the Home Secretary has a nominally unlimited power to revoke any television license and a local planning authority may make planning permission subject to such conditions as it thinks fit, but the courts will not allow these powers to be used in ways which Parliament is not thought to have intended. . . . Faced with the fact that Parliament freely confers discretionary powers with little regard to the dangers of abuse, the courts must attempt to strike a balance between the needs of fair and efficient administration and the need to protect the citizen against arbitrary government."

At page 388 he states:

> "What the rule of law demands is not that wide discretionary power should be eliminated, but that the law should be able to control

its exercise. ... The first requirement is the recognition that all power has legal limits. The next requirement, no less vital, is that the courts should draw those limits in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen. Parliament constantly confers upon public authorities powers which on their face might seem absolute and arbitrary. But arbitrary power and unfettered discretion are what the courts refuse to countenance. They have woven a network of restrictive principles which require statutory powers to be exercised reasonably and in good faith, for proper purposes only, and in accordance with the spirit as well as the letter of the empowering Act. They have also, as explained elsewhere, imposed stringent procedural requirements."

The same point as to unfettered discretion is made by Lord Denning in **Breen v. Amalgamated Engineering Union**, [1971] 2 QB 175 at p. 190, quoted in Wade at p. 403:

> "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith, nevertheless the decision will be set aside. That is established by **Padfield v. Minister of Agriculture Fisheries and Food,** [1968] A.C. 997 which is a landmark in modem administrative law."

In the present case the Minister acted pursuant to s. 123(9) of the **Planning Act** R.S.N.S. 1989 c. 346 which provides:

> "(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 statute makes no objective statement of the specific purpose for which the minister is so empowered, a factor which limits the potential scope for judicial review. Section 123 is essentially a code within the **Act** making regional development permits a requirement for areas within the Halifax-Dartmouth Metropolitan Regional Development Plan, and includes appeal procedures where permits are granted or refused.

The exemption issued by Mr. Kerr 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."

Under **Civil Procedure Rule** 56 an application for an order in the nature of certiorari begins with an originating notice endorsed with a demand for a return by a decision-maker. **Rule 37.06** provides that affidavits supporting applications under **Rule 56** must be served on seven clear days notice.

Rule 56.08 (1) provides:

> "56.08(1) Upon receiving an originating notice so endorsed, the judge, magistrate, justice or justices, officer, clerk or tribunal, shall return forthwith to the prothonotary the judgment, order, warrant decision or reasons for judgment, together with the process commencing the proceeding, the evidence and all exhibits filed, if any, and all other things in the proceeding, together with the originating notice served upon him, with a certificate endorsed thereon in the following form, ... "

The materials contemplated by **Rule 56.08(1)** are generally available when a lower tribunal has acted judicially or quasi judicially and constitute the record to be reviewed by a court as to questions of jurisdiction, errors of law on the face of the record, and issues of procedural fairness or natural justice. As Justice Davison observed, it is difficult to see how the discovery of the decision-maker can add to the record. When the review is sought of a discretionary administrative decision for which there are no procedural or evidentiary requirements there may be little resembling the record defined in **Rule 56.08**.

Despite the difficulties, judicial review is available when there are valid reasons to consider that a disputed decision is not within the ambit of the decision-maker's discretionary powers. Despite the absence of authority there is no basis for concluding that discovery may not be available in such circumstances. Indeed, given the sketchiness of the record inherent with such decisions, there may be circumstances when the discovery of the decision-maker is essential if justice is to be done. Discovery will not be granted lightly, however. Decisions by ministers and officials are protected by the presumption of regularity as well as the doctrine of deliberative secrecy referred to in **Tremblay**. Courts must be reluctant to intrude into the domain of government decision-making without valid reasons for considering that discretionary authority may have been unjustly exercised. Once again, an evidentiary foundation is essential.

The Evidentiary Foundation

Under **Rule 18.01** the right to examine for discovery is available upon notice without order. If the person to be examined objects, he or she has the onus of supporting an application to strike the notice for examination. It is a clear inference from the authorities cited above that the onus is discharged when the person to be examined established that he or she is to be examined as a decision-maker in an application under **Rule 56**. The onus must then shift to the party seeking the discovery. In the words of Justice Gonthier in **Tremblay**, what must be shown are "valid reasons for believing that the process followed did not comply with the rules of natural justice." In the present case, by analogy, what must be shown are valid reasons for believing the prescription issued by Mr. Kerr was outside the ambit of the discretionary authority granted by s. 123(9) of the **Planning Act** and further, in my opinion, it must also be shown that the record is insufficient to provide a basis for review. Valid reasons, to my mind, would be reasons that **prima facie** rebut the presumption of regularity. Again by inference from the authorities cited above, the threshold is substantially higher for discovery than similar thresholds which must be crossed before evidence going beyond the record can be considered at the hearing of the merits of a **Rule 56** application.

The shifting onus in regard to the evidence sought in these matters was considered in **Agnew** with respect to a subpoena to compel the appearance and testimony of a witness in a pending application before a special examiner under Ontario's **Rule 39.03**, which provides for discovery. Counsel had sought to question members of a tribunal which had acted judicially, not about their decision or their decision-making process, but only about "the basis on which they made their decision."

Campbell J. stated (p. 13-15 O.R.):

> “The onus is on the party attacking the subpoenas to displace the general rule that the party issuing the subpoenas has, **prima facie**, the right to issue them and obtain the evidence sought.
>
> These general rules are subject to certain exceptions. For instance, judges are not ordinarily compellable to testify about their decisions or the basis on which they reached them. . . .
>
> In a case of a judge subpoenaed to testify about something touching on his decision, a burden of persuasion shifts to the party issuing the subpoena to demonstrate that the evidence sought does not seek to penetrate the mental process by which the judge came to his decision.

The authorities do not make it clear whether this general rule applies

equally to members of administrative tribunals. In logic, there is no reason why it should not. The mischief of penetrating the decision process of a tribunal member is exactly the same as the mischief of penetrating the decision process of a judge.

...

... (A)ny party issuing a subpoena against a member bears a burden of persuasion to establish that the purpose of the subpoena, and the actual questions to be asked under its authority, would not involve any aspect of the decision process."

Agnew was cited in **Bettes v. Boeing Canada** (8 Admin. L.R. at p. 238) by Howden J. in dealing with the submission of counsel:

"... Mr. Baker is correct in saying that examinations are not normally permitted to inquire into how judges or tribunal members make their decisions. However, he is not correct in implying that as long as he stays clear of penetrating the mental process, an examination under r. 39.03 is a virtual right without regard to relevance and some evidentiary basis to the issues being pursued."

Similar considerations apply in logic to statutory decision-makers when the issue is the proper exercise of their discretion.

If valid reasons have been shown in the present case, they must be found in the affidavit of Paul B. Miller, solicitor for the appellants, dated February 8, 1993. In that he states his belief that discovery of Mr. Kerr "is necessary in order to determine on what basis and upon whose advice he issued the impugned ministerial prescription." Discoveries of Ronald Simpson, Director of Planning, Department of Municipal Affairs, and Dan Hiltz, Nova Scotia Department of the Environment, are sought to determine what advice they gave to the minister. With respect, this falls short of the mark. It does not impugn the decision by showing, or pointing to the existence of, valid reasons for believing it was outside the ambit of the statutory authority. If the reasons asserted by Mr. Miller were sufficient, any decision-maker could be examined on discovery by any person discontented with any decision and seeking grounds for judicial review. This would be incompatible with efficient government and the law does not permit it.

The appellants sought to show that the exemption prescribed by Mr. Kerr was part of a package, including a land swap and repeal of a regulation forbidding quarry development at Waverley, provided to settle a lawsuit which had been brought by the intervenor Tidewater against various cabinet ministers and officials of the Nova Scotia government. The allegations, which they argued were supported by the public record, were contained in the September 24, 1992, affidavit of William E. Lockhart, a Waverley village commissioner, which Justice Davison did not admit into evidence and which was not before the court.

At the same time Justice Davison struck out the notices to examine, he struck out twenty-six affidavits submitted on the issue of standing of the appellants for insufficiencies of form and content. Mr. Lockhart's affidavit was one of them. That was not clear at the hearing of the appeal but it has since been acknowledged by counsel. Justice Davison granted leave for the Lockhart affidavit to be replaced by a properly drawn affidavit because it was the evidentiary foundation for the certiorari application, without which the proceeding would have collapsed. It was not replaced in the proceeding before Justice Davison and therefore was not before this court.

Counsel for the appellants have, by letters subsequent to the hearing, advised that a replacement had been filed. They requested leave to have the replacement affidavit considered in this appeal. Quite apart from the undesirable precedent this might create, it is contrary to the well established rules for admission of fresh evidence in that it could have been provided on the hearing of the application by due diligence. See **Palmer and Palmer v. The Queen** (1979), 50 C.C.C. (2d) 193.

Evidence tending to establish that the exemption had been prescribed to settle a lawsuit might well attract the interest of a reviewing court, which would have to determine whether there had been a proper exercise of the discretion granted by the legislature. If that were an issue in a pending **certiorari** application, the chambers judge would then have been in a position to consider whether there were valid reasons for allowing discovery of the minister and officials. In the absence of admissible evidence establishing valid reasons, discoveries of administrative decision-makers cannot be allowed.

The appellants argue that the Lockhart affidavit was relevant only to the doctrine of deliberative secrecy referred to in **Tremblay** which they assert was developed in the factum of the respondents and intervenor and was not argued at chambers. This is not persuasive. Access to discovery in **certiorari** applications is extremely limited, and it is fundamental that a proper evidentiary basis be laid before it can be considered.

Assuming valid reasons for discovery of a discretionary decision-maker, it would then become necessary to determine whether the particular decision-maker is protected by crown immunity. Justice Davison did not strike the examination notices on the basis of absolute blanket crown immunity, as the appellants asserted, but on the related ground of the Crown's well-recognized prerogative to refuse discovery. The appellants argued that Mr. Kerr prescribed the exemption not as a minister acting as an agent of the Crown but in the role of a mere decision-maker designated by the statute. Therefore they contended the Crown's right to refuse discovery could not be invoked on his behalf. It is not necessary to consider that question in determining that Justice Davison correctly struck the examination notices, and that the appeal must be dismissed. In my view the

appellants did not cross the evidentiary threshold making Crown immunity the determinative issue. They failed to show that valid reasons existed for believing there had been an abuse of discretion, and therefore for subjecting the minister to examination.

2. The Record

As noted above, the record described in **Rule 56.08)(1)** can be considered only by analogy in matters involving the exercise of a statutory discretion, such as prescribing an exemption under s. 123(9) of the **Planning Act**. There is little that approximates "the judgment, order, warrant, decision or reasons for judgment, together with the process commencing the proceeding, the evidence and all exhibits filed, if any, and all other things in the proceeding."

In response to the Originating Notice filed October 2, 1992, Mr. Kerr filed a certificate with attachments including the originating notice, a press release issued August 14, 1992, a report and recommendation dated August 19, 1992, Order in Council No. 92-884 and the Ministerial exemption dated August 26, 1992. He certified that these were all the papers and documents in his custody in the matter, and he stated his appointment as acting minister.

In addition the certificate included a narrative passage referring to briefings the minister had received and a statement that in the exercising of his ministerial discretion under s. 123(9) there was no hearing, no evidence, no transcript and no formal decision. An attached **jurat** showed the certificate was sworn April 13, 1993. Chief Justice Glube found the **jurat** to be improperly affixed because the document was not an affidavit: "otherwise Mr. Kerr would be available for cross-examination."

The narrative portion she found was "neither necessary nor requested by the court." However she did not strike out either the **jurat** or the narrative.

The filing of affidavits as part of the record was roundly criticized by Ferg J. of the Manitoba Court of Queen's Bench in **Thompson General Hospital v. Manitoba Organization of Nurses' Associations** (1986), 42 Man. R. (2d) 200 at p. 203:

> "... I must condemn, in the strongest terms, the practice of filing affidavits, as was the case here, sworn by the dissenting member of the board, and an affidavit in reply sworn by the chairman. The majority award and the reasons supporting it surely must speak for itself, and dissenting reasons can add absolutely nothing to the record. To permit such a practice would be akin to a judge, having rendered a decision, filing affidavit evidence for use by the Court of Appeal to influence its decision and to bolster his position. ..."

Despite criticism of the practice, affidavits of explanation filed by the decision-maker are part of the record. Sir William Wade states at page 312:

> "A tribunal cannot be allowed to frustrate judicial review by withholding documents which are part of the record of the proceedings before it. It can also be ordered to supply particulars which it has a legal duty to incorporate in its decision (as where procedural regulations require a statement of reasons), thus saving a separate application for **mandamus**. If it voluntarily supplies particulars, as by filing an affidavit in **certiorari** proceedings, that too is part of the record. So is a letter explaining the reasons for an administrative decision, even if sent some time later and not to the party himself." (emphasis added)

In a passage from Wade at the same page (p. 312) cited by Chief Justice Glube, Lord Denning (In **R. v. Northumberland Compensation Appeal Tribunal ex p. Shaw**, [1952] 1 K.B. 338 at p. 352) is the source of the following description of the record in civil cases:

> "The record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, **certiorari** lies to quash the decision."

That common law view is at variance with **Rule 56.08(1)** which governs in this province, and which incorporates both reasons and the evidence into the record. In discretionary matters that version of the record applies by analogy only, and circumstances must govern. Section 123(9) does not require reasons for a prescription, and Chief Justice Glube found "no legal duty on the minister to supply reasons for his decision."

Citing Wade at p. 312 that "the record extends to include any document referred to in the primary documents" Chief Justice Glube found that environmental permits referred to in the prescription and the Halifax-Dartmouth Regional Development Plan should be included in the record. Otherwise, she accepted the documents submitted with Mr. Ken's certificate as the record. In doing so she found matters related to the oral briefings of the minister by officials, referred to in the narrative of his certificate, including documents referred to in the course of those briefings, not to be part of the record.

She ordered:

> "The return filed pursuant to Rule 56 is to be amended by way of the filing of a copy of the Halifax-Dartmouth Metropolitan Regional Development Plan, including the map showing the development

boundary, and copies of environmental permits issued prior to August 20, 1992, to other quarries in the Halifax-Dartmouth regional development planning area to which the ministerial prescription may apply; otherwise the Applicants' application is dismissed, without costs."

As counsel for the respondents and the intervenor pointed out, a court cannot create a record where none exists. A minister becomes informed of the affairs of his department from many sources, and where no formal procedure is prescribed, the sources of his information are not part of the record unless they are in the nature of reports implemented by the exercise of his statutory discretion. In my opinion Chief Justice Glube's order and her reasons for it disclose no error reversible on appeal.

Counsel for the respondents and intervenor have cited numerous decisions in which this court has held, with respect to appeals from decisions on interlocutory applications, that "we should only interfere if serious or substantial injustice, material injury or very great prejudice would result if we did not." No such injustice, injury or prejudice results from the striking of the discovery notices or the fixing of the record. The **certiorari** application remains to be heard, and there are other means of gathering information. Denial of discovery, particularly in circumstances where discovery is usually denied, and refusal of a further expansion of a record that appears complete, are at worst inconveniences, not injustices.

I would dismiss the appeals but in the circumstances, without costs.

Freeman, J.A.

Concurred in: Matthews, J.A.
Roscoe, J.A.

1992

S.H. 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, Allan Duffus, Roslyn Duffus, Larry Gumbley, Maxine Hannaby, Penny Hannaby, Mike Hartlen, Peter Keizer, Malcolm Kirk, Maureen Kirk, Rosemary Kuttner, Keith Lardner, Ron Lindala, Claire Longhurst, Bob McDonald, Don Mackey, Pat Nesbitt, Wendy Nesbitt, Charles Schafer, Dada Schafer, Margo Sollows, Eldon Stevens, Betty Ann Stevens, Wayne Stobo, Nancy Stobo, Rita Tracey, Roy Tracey

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

Respondents

HEARD: **Before the Honourable Chief Justice Constance R. Glube in Chambers at Halifax May 17th, 1993. Final brief received May 31st, 1993.**

DATE: **June 21, 1993**

COUNSEL: **Paul B. Miller**
Bruce Wildesmith, Q.C. for the Applicants

Reinhold Endres, Q.C., for the Respondents

Robert G. Grant
Nancy G. Rubin, for the Intervenor

C.A. No. 02862
C.A. No. 02930

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

THE VILLAGE COMMISSIONERS OF WAVERLEY, a body corporate, BOB BROWN, MARILYN CLARKE, COLIN CLARKE, RICHARD CLARKE, GERRY DAVIS

DON DAY, HAROLD DILLON, CAROL DUFFUS, ALLAN DUFFUS, ROSLYN DUFFUS, LARRY GUMBLEY, MAXINE HANNABY, PENNY HANNABY, MIKE HARTLEN, PETER HILCHIE, BRUCE KEEVIL SHEILA KAIZER, MALCOLM KIRK, MAUREEN KIRK, ROSEMARY KUTTNER, KEITH LARDNER, RON LANDALA, CLAIRE LONGHURST, BOB MCDONALD, CLIFF MILLIGAN, HAROLD NESBITT, WENDY NESBITT, CHARLES SCHAFER, DANA SCHAFER, MARGO SOLLOWS, ELDON STEVENS, BETTY ANN STEVENS, WAYNE STOBO, NANCY STOBO, RITA TRACY, ROY TRACY

appellants

THE HONOURABLE GREG KERR, Acting Minister of Municipal Affairs, THE ATTORNEY GENERAL OF NOVA SCOTIA representing Her Majesty The Queen in the RiGHT of the Province of Nova Scotia and TIDEWATER CONSTRUCTION COMPANY LIMITED
respondents

REASONS FOR JUDGMENT BY: FREEMAN, J.A.

TAB 4

SUPREME COURT OF NOVA SCOTIA

Citation: Brogan v. RBC Dominion Securities Inc., 2009 NSSC 164

Date: 20090519
Docket: Syd. No. 28135
Registry: Sydney

Between:

Thomas Brogan, Romad Developments Ltd.,
Tom Brogan & Sons Construction Ltd., Derrick J. Kimball,
Nash T. Brogan and Jocelyn Brogan

Plaintiff/Respondent

v.

RBC Dominion Securities Inc.

Defendant/Applicant

Judge: The Honourable Justice Arthur J. LeBlanc.

Heard: April 7, 2009, in Halifax, Nova Scotia

Counsel: William P. Burchell, Esq. for the plaintiff/respondent
Alan V. Parish, Q.C. with Jason Cooke, Esq.
defendant/applicant

By the Court:

[1] This is a motion to strike portions of an affidavit. The defendant (and applicant) has applied for a stay of proceedings for want of prosecution of the main proceeding, pursuant to Rule 28.13 of the *Civil Procedure Rules 1972* and the Court's inherent jurisdiction to control its process. This application is scheduled to be heard on May 29, 2009. In response to the defendant's application, the plaintiffs (and respondents) filed an affidavit of the plaintiff Derrick J. Kimball. In advance of the hearing of the main application, the defendant seeks to have two paragraphs struck from Mr. Kimball's affidavit. This decision deals only with the motion to strike portions of the affidavit, brought pursuant to Rule 39.04 of the current *Civil Procedure Rules*.

[2] The Statement of Claim, filed on September 21, 2000, alleges that the plaintiffs maintained investment accounts with the defendant, RBC Dominion, and that the defendant advised them to purchase two gold mining stocks that resulted in significant losses to the plaintiffs. The plaintiffs claim on the basis of breach of fiduciary duty, alleging that the defendant knew of insider trading and violation of securities laws by the two companies and their officers. They also alleged that the defendant was vicariously liable for the breaches of duty of its former employee,

Patrick O'Neill. The plaintiffs also allege breach of contract and negligent advice. The defendant denied the allegations in its defence, filed February 17, 2004, and counterclaimed against the plaintiff Nash T. Brogan on the basis of misrepresentation. Mr. Brogan filed a defence to the counterclaim on March 22, 2004. In the affidavit filed in support of the defendant's application, the defendant sets out the history of the proceedings and describes the prejudice that will allegedly ensue if the proceeding is allowed to continue. The applicant requests that paragraphs 10 and 12 of Mr. Kimball's affidavit be struck. The Notice of Motion also referred to paragraph 7, but the applicant indicates in its written submissions that it does not request that paragraph 7 be struck.

[3] The defendants bring this motion to strike part of Mr. Kimball's affidavit pursuant to Rule 39.04 of the *Civil Procedure Rules*, on the basis that the impugned paragraphs are irrelevant, argument, plea or inadmissible hearsay. Rule 39.04 provides as follows:

> 39.04 (1) the judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge must strike part of an affidavit containing either of the following:

> (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
>
> (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.

[4] The applicant only requests that two specific paragraphs of the affidavit be struck. I am required by Rule 39.04(2) to strike any part of the affidavit containing "information that is not admissible, such as an irrelevant statement or a submission or plea" or "information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information."

[5] The leading case on affidavits in this province is *Waverley (Village Commissioners) et al. v. Nova Scotia (Minister of Municipal Affairs) et al.* (1993), 123 N.S.R. (2d) 46 (SC), in which Davison J. of this court considered precisely what should be contained in an affidavit. On an application for judicial review to

set aside an order of the Minister of Municipal Affairs, the applicants filed affidavits that the respondents sought to strike on the basis that they were irrelevant, frivolous and vexatious. Justice Davison considered the law relating to the content of affidavits, and said, at para. 20:

> It would be 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 inadmissible 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 second source and preferably the original source.
>
> 5. The affidavit must state that the affiant believes the information received from the source.

[6] Justice Davison found it necessary to strike the affidavits, which he found to be “replete with expressions of opinions which touch on and relate to a history of the project, environmental factors, traffic issues and various legal issues.” In addition, most of the affidavits gave “no indication whether the information is based on personal knowledge or information and belief. Some refer 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” (para. 10). Justice Davison’s decision was affirmed by the Court of Appeal: *Waverley (Village Commissioners) et al. v. Kerr et al.* (1994), 129 N.S.R. (2d) 298 (CA). An application for leave to appeal to the Supreme Court of Canada was dismissed: [1994] S.C.C.A. No 411.

[7] The adequacy of affidavits was addressed again in *Wall v. Horn Abbot Ltd.*, [1999] N.S.J. No 124 (C.A.), an application to strike an affidavit under Rule 38.02(1) of the *Civil Procedure Rules 1972*. Cromwell J.A. (as he then was) held addressed the use of hearsay and information and belief. He said, at paras. 30 and 38:

> 30 ... The purpose of the Rule is to allow the deponent to set out his belief as to matters of fact relevant to the proceedings, not to offer commentary on his assessment of the credibility of others. What the affidavit is to contain is the statement of deponents' belief of relevant facts with the sources and grounds for the belief stated. See *Waverley* ...; see also *Watts Estate v. Contact Canada Tourism Services Ltd.* (1998), 212 A.R. 207 (C.A.) at para 27 -28. It is not proper for an affidavit to set out long recitations, much of marginal relevance, of

> conversations with others and then say which parts of them the deponent believes. In the absence of explanation why some parts of the recounted statements are believed and others are not, the affidavit does not comply with the Rule....
>
> ***
>
> 38 Hearsay evidence is admissible on applications under Rule 38 if the deponent believes it to be true and sets out the basis of that belief. As discussed earlier, this is not done consistently in the affidavit. Moreover, this affidavit was directed squarely at the merits of the plaintiff's case. Hearsay, let alone hearsay upon hearsay, should be given little if any weight on that issue. The Rule relaxing the admissibility of evidence on applications was designed to facilitate Chambers applications, not to deny the normal procedural protections when the merits of a claim are being decided.

[8] In *Balders Estate v Nova Scotia (Registrar of Probate)*, [1999] N.S.J. No. 182, Saunders J. (as he then was) considered the contents of an affidavit of a solicitor who was not the solicitor of record, but who was a partner of the former solicitor of record and who was a plaintiff in the action. He said, at para. 12, that there was nothing to prohibit placing the “expert opinion” of the lawyer before the Court in the form of an affidavit, the lawyer having “deposed to matters either within their personal knowledge, or identified and adopted as the foundation for their ‘information and belief’” (para. 12).

[9] In finding that the affidavits before him were not objectionable, Justice Saunders said, at paras. 18-20:

> 18 Unlike trials, affidavits filed in support of an application may contain hearsay provided, as Mr. Endres put it in argument, such hearsay is put forward

on a principled basis. This was so long before the common law rules with respect to hearsay evidence were so dramatically reformed by such decisions as *Khan*. Nova Scotia Civil Procedure Rule 38.02 provides:

> "(1) an Affidavit used on an application may contain statements as to the 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."

19 Thus in a matter such as this, begun by originating notice (application inter partes) the parties are entitled to file affidavit evidence going beyond the deponent's personal knowledge. One is able to augment the deponent's own personal knowledge with "hearsay" admitted on a principled basis, that is in a fashion that will announce and vouch for its necessity and reliability. That is why C.P.R. 38.02(1) compels the disclosure of:

> "... the sources and grounds thereof"

and why Mr. Justice Davison explained in *Waverley, supra* that:

> "4. (t)he information as to the source must be sufficient to permit the court to conclude that the information comes from a second source and preferably the original source.
>
> 5. (t)he affidavit must state that the affiant believes the information received from the source."

20 There is nothing objectionable within Mr. Matthews' affidavit, nor in the manner in which he has expressed it. He begins by identifying himself as the Proctor of the estate of the late Nora Langton Balders. In that capacity he has personal knowledge about all of the subjects to which he swears unless the factual assertion is prefaced by the specific caveat that it is based upon information and belief. In those instances Mr. Matthews properly identifies his sources, either by reference to individuals - for example John W. Arnold, Q.C. whose affidavit he has read; the two co-executors from whom he obtains instructions; or the correspondence and other attachments appended as exhibits to his affidavit.

[10] Notwithstanding that Mr. Kimball is a lawyer, the present affidavit does not come before the court as one supporting an expert legal opinion. Rather, he is offering evidence of facts in the character of a party to the proceeding.

[11] Another point raised by the applicant is that an affidavit filed on an interlocutory application (or, presumably, a motion under the current rules) must relate to the facts and issues arising on the application or motion and not to the main proceeding. In *Federal Business Development Bank v. Silver Spoon Desserts Enterprises Ltd.*, [2000] N.S.J. No. 72 (S.C.), the Court struck many paragraphs as irrelevant to the issues on the application, even if relevant in the broader context of the litigation as a whole. Hood J. stated, at para. 12:

> In his November 8, 1999 supplementary brief, Mr. Mitchell refers to Rule 38.11 which provides that "the court may order any matter, that is ... irrelevant ... to be struck out of an affidavit". He then refers to the test of relevancy set out in [Sopinka et al.] *The Law of Evidence in Canada*, Toronto, 2nd ed. at s. 2.35 at p. 24:
>
> > 2.35 A traditionally accepted definition of relevance is that in Sir J.F. Stephen's *A Digest of the Law of Evidence*, where it is defined to mean:
> >
> > ... any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

> Pratte J. in *R. v. Cloutier*, [1979] 2 S.C.R. 709 accepted a definition from an early edition of *Cross on Evidence*:
>
> For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.

[12] Hood J. went on to say, at paras. 18-19:

> 18 With respect to the big affidavit, certain portions do not meet the test for relevance articulated in the Sopinka text. They do not relate to the facts in issue on this application. Some may be relevant in the broader context of the litigation as a whole. That is not a matter for me but for the trial judge.
>
> 19 Portions of the big affidavit do not relate to the question of relief from the implied undertaking nor, if relief is granted, to the issue of whether this is evidence that would cause me to set aside or vary the deficiency judgment. Nor do they relate to the question of a costs penalty for non-closure.

[13] The above represents, in my view, the rationale for admitting affidavit evidence on the former application or the current motion. I do not believe that whether it is a proceeding under the former *Civil Procedure Rules 1972* or under the current *Civil Procedure Rules* should cause the court to come to any different conclusion. I note that I have considered all of the cases cited by the parties, including *Atlantic Canada Opportunities Agency v. Ferme D'Acadie*, 2008 NSSC

334, and *Chopik v. Mitsubishi Paper Mills Ltd.*, 2002 CarswellOnt 2336 (Ont. S.C.J.).

[14] In this case, the issue on the main application is dismissal for want of prosecution. As such, affidavits filed on the application must be relevant to that issue. The analysis for dismissal for want of prosecution is set out in *Clarke v. Sherman*, 2002 NSCA 64, [2002] N.S.J. No. 238, at para.7:

> 7 ... [I]n *Hurley v. Co-op General Ins. Co.* (1998), 169 N.S.R. (2d) 22, Flinn, J.A., after noting Justice Cooper's two-fold test in [*Martell v. McAlpine (Robert) Ltd.* (1978), 25 N.S.R. (2d) 540 (N.S.S.C., App. Div.)] went on to approve the reasons of Lord Justice Salmon in *Allen v. McAlpine (Sir Alfred) & Sons Ltd., et al.* by observing:
>
> > 30 These principles are set out in helpful detail by Lord Justice Salmon in *Allen v. Sir Alfred McAlpine & Sons Ltd. et al*, [1968] 1 All E.R. 543, at p. 561, and cited with approved by Justice Hallett in *Moir v. Landry* (1991), 104 N.S.R. (2d) 281 (N.S.C.A.) at p. 282:
> >
> > > A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:
> > >
> > > (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.

> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the time.
>
> If the defendant establishes the three factors to which I have referred, the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. If he is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his own fault. If, however, the delay is entirely due to the negligence of the plaintiff's solicitor and the plaintiff himself is blameless, it might be unjust to deprive him of the chance of recovering the damages to which he could otherwise be entitled.
>
> 8 Thus, to summarize, in order to succeed the onus is upon a defendant to show: first, that the plaintiff is to blame for inordinate delay; second, that the inordinate delay is inexcusable; and third, that the defendant is likely to be seriously prejudiced on account of the plaintiff's inordinate and inexcusable delay. If the defendant is successful in satisfying these three requirements, the court, before granting the application must, in exercising its discretion, go on to take into consideration the plaintiff's own position and strike a balance - in other words, do justice - between the parties.

[15] Relevance on this motion will be determined in accordance with the elements of dismissal for want of prosecution. It must thus relate to the length of the delay, any credible excuse for the delay, any serious prejudice to the defendant or the balancing analysis, taking into consideration the degree of blame attributable to the plaintiffs themselves for the delay.

[16] In his affidavit, Mr. Kimball states that he is one of the plaintiffs in the action and has personal knowledge of the matters deposed to, except where stated to be based on information and belief in which case he believed them to be true. He states that the matter relates to events in 1996 and 1997, and that notice of the claim was provided to the defendant by Howard Crosby Q.C. in 1998. He goes on to recount that the proceeding was commenced in September 2000. A demand for particulars was filed on October 10, 2000 and a response to the demand was filed on December 8, 2003. The plaintiff's list of documents was filed on December 29, 2003. The defence and counterclaim were filed on February 17, 2004, with a defence to the counterclaim filed on March 22, 2004. An application was filed by the plaintiff to compel the defendant to file its list of documents on March 6, 2006. The defendant's list of documents was filed May 30, 2006.

[17] Mr. Kimball averred that the claim was under the care of Mr. Crosby who passed away on December 12, 2003. In October 2004, the defendant's solicitor suggested that Heidi Foshay Kimball withdraw as solicitor of record. The plaintiffs subsequently retained Ontario counsel in November 2004. According to Mr. Kimball, "that retainer ended in November 2007 as it became apparent that it was

logistically difficult to move the case along with counsel in Ontario." The plaintiffs then retained William Burchell of Sydney Mines, who filed a Notice of Change of Solicitor and a Notice of Intention to Proceed. Mr. Kimball states that in 2008 counsel for the defendants was advised that the plaintiffs were prepared to proceed to discoveries, that a without prejudice offer was made by the defendant, and that the Notice of Change of Solicitor and Notice of Intention to Proceed were filed.

[18] Having set out a chronology of the steps taken in the proceeding. Mr. Kimball went on to state:

> 10. When the claim was initially advanced by Howard Crosby, contact information for Patrick O'Neill, the stock broker who had represented the Defendant throughout, was requested but not provided. It now appears that Mr. Parish had contact information for Mr. O'Neill and made contact with him but at no point was this information provided to the Plaintiffs. The Defendant had an obligation to provide this long sought contact information to the Plaintiffs.
>
> ***
>
> 12. It now appears that at the time the Defendant was corresponding with Mr. Crosby (and prior to Mr. Parish's retainer), the Defendant was aware of wrongdoing. The List of Documents ultimately provided by the Defendant includes the employment file for Patrick O'Neill. Those documents indicate that Mr. O'Neill was being investigated by the IDA and was under active supervision by the Defendant during the time he was acting for the Plaintiffs. Indeed the records show that the Defendant was concerned about Mr. O'Neill's trading activities in relation to at least some of the Plaintiffs' accounts. A Uniform Termination Notice appearing at page 918 of the Defendant's list of Documents appended as Exhibit "B" indicates knowledge of wrongdoing on the part of the Defendant. None of this information was ever brought to the attention of this Plaintiff and I am advised never brought to the attention of any other Plaintiffs.

> One concern highlighted in the file was the heavy trading in specific securities that was occurring or had occurred in certain clients' accounts including the Plaintiffs' accounts.

[19] These are the paragraphs impugned by the applicant, whose submission is that they should be struck on the basis of irrelevance, argument, improper hearsay, and taking the form of a summation or plea. The applicant takes the position that these paragraphs do not contain material relevant to the factors to be considered on an application to dismiss for want of prosecution. The respondents maintain that the two paragraphs do relate to the elements of the main application.

[20] The applicant argues that the entirety of paragraph 10 is irrelevant to the application to dismiss for want of prosecution. Although it may have relevance to the issues at trial, it is submitted, none of the averments in para. 10 have relevance to the current application. The respondents claim that paragraph 10 addresses the issue of whether the defendant suffered prejudice on account of delay. They submit that Mr. O'Neill was extremely important to their claim and that if this information had been provided to them, there could have been a more pressing approach to the litigation, including proceeding with discovery after peladings closed in 2004.

[21] The respondents argue that Mr. Kimball, in drafting the affidavit, was reviewing his file in the context of being counsel. It is my view that Mr. Kimball was not a solicitor on this file. He is a plaintiff and I assess his affidavit in that context. I will deal with each sentence of paragraph 10:

> *When the claim was initially advanced by Howard Crosby, contact information for Patrick O'Neill, the stock broker who had represented the Defendant throughout, was requested but not provided*

[22] I am not prepared to rule at this time that this statement is irrelevant. It may be relevant depending on the nature of the argument. However, Mr. Kimball's source of knowledge is not identified, and there is no indication that he believes that source to be true. This passage is consequently struck.

> *It now appears that Mr. Parish had contact information for Mr. O'Neill and made contact with him but at no point was this information provided to the Plaintiffs.*

[23] As with the first sentence, this statement does not disclose or reveal the source of Mr. Kimball's knowledge. The respondents submit that the source of knowledge is Mr. Kimball's personal knowledge, adding that the same information appears in Mr. Parish's affidavit of October 23, 2008. None of this is apparent from the phrase "it now appears." Neither the source of the information nor the

basis for information and belief are found in this sentence, other than to the extent that such information was not provided to Mr. Kimball.

> *The Defendant had an obligation to provide this long sought contact information to the Plaintiffs.*

[24] This is legal argument and should be contained within the context of a legal memorandum. This portion of the paragraph is to be struck.

[25] Paragraph 12 relates to the plaintiffs' dealings with the defendants, both prior to and after the retainer of Mr. Parish, the defendant's counsel. The applicant submits that paragraph 12, too, is irrelevant to the issues on the dismissal application. The first three sentences are as follows:

> *It now appears that at the time the Defendant was corresponding with Mr. Crosby (and prior to Mr. Parish's retainer), the Defendant was aware of wrongdoing. The List of Documents ultimately provided by the Defendant includes the employment file for Patrick O'Neill. Those documents indicate that Mr. O'Neill was being investigated by the IDA and was under active supervision by the Defendant during the time he was acting for the Plaintiffs.*

[26] On its own, the first sentence of paragraph 12 would appear to be a statement that should be struck. However, while not agreeing that it is conclusory, read in the context of the next two sentences, it appears to be an observation that

Mr. Kimball could make upon reviewing the list of documents, and specifically the employment file of Mr. O'Neill. I do not necessarily agree that the statement is reliable or credible, but Mr. Kimball could be cross-examined on it. However, the last portion of the last sentence, to the effect that Mr. O'Neill was under active supervision by the defendants during the time he was acting for the plaintiffs, is not supported. Unless Mr. Kimball can point to a source of information which he believes to be true, that portion of this sentence must be struck.

> *Indeed the records show that the Defendant was concerned about Mr. O'Neill's trading activities in relation to at least some of the Plaintiffs' accounts.*

[27] The above portion of the paragraph provides no source of information and belief and must be struck from the affidavit.

> *A Uniform Termination Notice appearing at page 918 of the Defendant's list of Documents appended as Exhibit "B" indicates knowledge of wrongdoing on the part of the Defendant.*

[28] The applicant says this is a point for trial, not a motion for dismissal, arguing that it is not relevant. The respondent submits that it is relevant to the issue of prejudice with respect to what the applicant knew of Mr. O'Neill's trading activities. My concern is not with relevance, but with the fact that Mr. Kimball is

alleging that this form, on its face, speaks of wrongdoing. That is, in my opinion, more argument than fact and this sentence should be struck for that reason. While the notice indicates, among other things, that the employee has been the subject of "internal discipline or restrictions for violation of regulatory requirements," whether this constitutes "wrongdoing," in the phrasing of the affidavit, remains a matter of argument, pleading or summation. At best it is an indication of Mr. Kimball's opinion of the significance of the notice. In any event, it is more argument than evidence should not be in the affidavit.

> *None of this information was ever brought to the attention of this Plaintiff and I am advised never brought to the attention of any other Plaintiffs.*

[29] This sentence is in part appropriate, but where it speaks of the other plaintiffs, then there is no source of information and belief.

> *One concern highlighted in the file was the heavy trading in specific securities that was occurring or had occurred in certain clients' accounts including the Plaintiffs' accounts.*

[30] In the last sentence there is no identification of the source of the information, no support for the statement that the so-called trading was heavy and no source for the statement that the trading occurred in the plaintiffs accounts. Without

identifying the source and indicating whether Mr. Kimball believes the information to be true, the statements must be struck from the affidavit. Furthermore, this statement is conclusory and is argument.

[31] The respondents submit that Mr. Kimball merely "reviewed the production from the Defendant and summarized his observations," in order to demonstrate that there is contemporaneous documentary evidence that will be available to witnesses, in answer to the applicant's claim on the dismissal application that the passage of time has caused prejudice on account of fading memories of potential witnesses. I do not accept this characterization of the relevant portions of the affidavit. The passages in question amount to drawing conclusions from the contents of the documents, in the nature of a "summation or plea." The interpretation of the documentary evidence is not a matter for an affidavit.

[32] Also relevant to the issue of prejudice, the respondents submit, is the question of the applicant's knowledge of the whereabouts of Mr. O'Neill, and the failure to supply this information to the respondents. The respondents take the view that had they had this information at an earlier stage of the proceeding, they could have proceeded more quickly.

Conclusion

[33] I am satisfied that substantial portions of the affidavit fail to meet the *Waverley* standard in their current form. The appropriate remedy, I believe, is a direction that the sentences for which the sole deficiency is the failure to identify the source may be modified so as to comply with *Waverley*, unless otherwise indicated in the decision. The other defective passages – such as passages of legal argument or speculation – shall be struck in their entirety.

[34] Costs of this motion shall be in the cause.

TAB 5

SUPREME COURT OF NOVA SCOTIA
Citation: *Layes v. Bowes*, 2021 NSSC 48

Date: 20210211
Docket: Hfx No. 478371
Registry: Halifax

Between:

Kevin Joseph Layes and Carmen Marie Blinn

Plaintiffs/Respondents

v.

Dr. Matthew Bowes, Dr. Stephen Paul Sturmy, National Medical Services Inc. carrying on business NMS Labs, The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia

Defendants/Applicants

COSTS DECISION

Judge: The Honourable Justice Ann E. Smith

Written Submissions:
Plaintiffs/Respondents – None
Defendants/Applicants, Dr. Matthew Bowes and the Attorney General of Nova Scotia – January 8, 2021
Defendant/Applicant, Dr. Stephen Sturmy – January 8, 2021
Defendant/Applicant, National Medical Services Inc. – January 8, 2021

Counsel:
Derek B. Brett for the Plaintiffs/Respondents

Agnes E. MacNeil, Q.C., Neil J. G. Kuranyi for the Attorney General of Nova Scotia

Colin J. Clarke, Q.C., Stewart Hayne, for Dr. Sturmy

Scott R. Campbell, Sarah A. Walsh for National Medical Services Labs

By the Court:

Introduction

[1] Dr. Matthew Bowes ("Dr. Bowes") and the Attorney General of Nova Scotia ("AGNS"), Dr. Stephen Sturmy ("Dr. Sturmy") and National Medical Services Inc. ("NMS") each moved to strike all, or parts of affidavits filed by the Plaintiffs in support of their motion to exhume the remains of the late John Layes Sr.

[2] The Defendants were substantially successful on their motions. This Court held, in its decision on the motions dated December 8, 2021, that each Defendant was entitled to its costs.

[3] The parties did not reach an agreement on costs. The Court received written submissions on costs from counsel for each Defendant. The Plaintiffs' counsel advised that this Court's decision on the motions had been appealed and that a ground of appeal was that this Court was in a conflict of interest having allegedly stated during a previous motion for exhumation heard on January 12, 2018 (Hfx. No. 471151) that I would recuse myself if NMS, represented by Stewart McKelvey, became a party.

[4] The Plaintiffs' counsel took the position that this Court should not determine costs in those circumstances. This Court advised counsel for the Plaintiffs by letter dated January 12, 2021, that I had listened to the audio recording of the January 12, 2018 motion, and had not made the statements concerning conflict involving NMS and Stewart McKelvey which had been attributed to me.

[5] I advised Plaintiffs' counsel that I intended to consider the issue of costs and would accept costs' submissions on behalf of the Plaintiffs by Friday, January 15, 2021. The Court did not receive costs' submissions on behalf of the Plaintiffs nor any reply to its January 12, 2021 letter.

Costs

[6] Costs generally follow the event. There are no reasons why that should not be the case here.

[7] The issue is the amount of the costs.

[8] The *Tariffs of Costs and Fees* under Rule 77 is the starting point in determining the quantum of costs.

[9] I note that Rules 77.02. 77.08 and 77.10(1) are also relevant and provide:

General discretion (party and party costs

77.02 (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

(2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

…

Lump sum amount instead of tariff
77.08 A judge may award lump sum costs instead of tariff costs.

…

Disbursements included in award
77.10 (1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

[10] Tariff C provides:

TARIFF C

Tariff of Costs payable following an Application heard in Chambers by the Supreme Court of Nova Scotia

For applications heard in Chambers the following guidelines shall apply:

(1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.

(2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.

(3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:

(a) the complexity of the matter,

(b) the importance of the matter to the parties,

(c) the amount of effort involved in preparing for and conducting the application.

(such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application	**Range of Costs**
Less than 1 hour	$250 - $500
More than 1 hour but less than ½ day	$750 - $1,000
More than ½ day but less than 1 day	$1000 - $2000
1 day or more	$2000 per full day

[11] This motion was heard in approximately three days. The initial Tariff provides for $6,000 in costs, to each successful Defendant.

"What order of costs will do justice between the parties?" (Rule 77.02(1))

[12] In each of the Defendants' submissions in support of lump sum costs in the amount of $12,000, they refer to the decision of Goodfellow, J in *Armour Group Ltd. v. Halifax (Regional Municipality)* 2008 NSSC 123 (NSSC). In this decision Goodfellow J. in paragraph 20 set out a non-exhaustive list of factors indicating the need for "exceptional legal services".

[13] The factors to which Goodfellow, J referred were more recently summarized by Muise J. in *Richards v. Richards*, 2013 NSSC 269 (NSSC) at paragraph 6 as follows:

> [6] The motions judge ought not depart from Tariff C costs unless there are special circumstances requiring a sufficient level of exceptional legal services. Examples of such special circumstances include the following: 1) complexity; 2) public interest; 3) pre-chambers process; 4) unsettled questions of law; 5) conduct or misconduct of a party and or solicitor; 6) failing to use an alternative and less costly process to determine the dispute; 7) the need for additional counsel; 8) the presence of multiple counsel, unless the additional counsel have limited participation; and, 9) the presence of expert witnesses. The "level of exceptional services required" as a result of one or more of these, or other applicable circumstances, provides the grounds for whether the motions judge should exercise his or her discretion to depart from Tariff C, and to what degree. [*Armour Group Ltd. v. Halifax (Regional Municipality)*, 2008 NSSC 123, at paragraphs 20, 21, 24 and 25.]

[14] In *Richards*, Muise J. awarded lump sum costs after applying these factors to the matter before him. The hearing in that case was five days with multiple parties. The Applicant unsuccessfully sought oppression remedies and an injunction against the Respondents. Justice Muise concluded that tariff costs were inappropriate and awarded lump sum costs totalling $58,000 between four Respondents.

[15] In this case, I find that the default application of Tariff C would not result in justice being done between the parties. I am satisfied as well that “exceptional legal services” were required by defence counsel.

[16] I now consider examples of some of the special circumstances set out in *Armour Group* and *Richards*:

1. Complexity

The time a hearing takes to complete is some indication of complexity. This was not a half-day chambers' motion where objections were made to the content of a single affidavit. The motion took three days to hear. The factual matrix was complex, dealing with, *inter alia*, expert scientific opinion evidence in four of nine challenged affidavits. The Defendants' counsel each raised multiple grounds as to why the content of the challenged affidavits should be struck. In that regard, each counsel prepared a chart for the assistance of the Court which provided a detailed road-map of the challenges to the content of the Affidavits.

2. Conduct or Misconduct of a Party

This Court found that one of the nine impugned Affidavits should be struck in its entirety on the basis of bias. Multiple paragraphs of the nine Affidavits were struck on the basis of irrelevancy. Other paragraphs were struck on the basis of containing scandalous material and unsourced hearsay. Other

statements in the Affidavits were determined to constitute opinion evidence outside the scope of expertise of the affiant.

Each of the Defendants point out that in March 4, 2020, counsel for Dr. Bowes and the AGNS sent correspondence to the Prothonotary noting its concern with the Affidavits filed by the Plaintiffs on the exhumation motion, then scheduled to be heard on March 23 and 24, 2020. Counsel noted that it did not know until March 2, 2020 that the Plaintiffs intended to produce expert evidence in support of the exhumation motion and requested the adjournment of that motion to allow it to meaningfully respond to the expert Affidavits. The motion was adjourned and this Court was appointed Case Management Judge on September 29, 2020. In counsel's March 4, 2020 correspondence, he also referred to the Affidavits as containing inadmissible hearsay as well as vexatious and inflammatory statements.

The decision of this Court upheld the overwhelming majority of the problematic content of the Affidavits identified by Defence counsel in March, 2020. Yet, the Plaintiffs took no steps to address the many objections, including by filing amended affidavits. Had they done so, the motion may have been unnecessary, or at the least, shortened. Indeed, rather that addressing the Defendants' concerns, the Plaintiffs filed additional expert

affidavit evidence in September 2020, being the Affidavits of Drs. Slone and Cooper. This Court struck several of the statements in each of these Affidavits.

3. Questions of Law that are Unsettled

An issue before this Court was whether the requirements in Rule 55 applied to expert evidence filed on an interlocutory motion. To this Court's knowledge, this issue had not been previously addressed by the Nova Scotia Supreme Court. Counsel devoted time in oral argument and in their written submissions on this issue. The Court agreed with counsel for the Defendants that the Rule 55 requirements mirrored the common law in certain key respects, but that certain of the procedural aspects of Rule 55 did not apply on an interlocutory motion.

4. Multi Counsel

Each lead defence counsel took an active role on the hearing of the motion. Each made detailed written submissions and oral argument. This was not a situation where counsel for one party took the lead, with other counsel merely adopting and relying on the other counsel's submissions. The only exception

> to this was that Mr. Kuranyi, counsel for Dr. Bowes and the AGNS, took the lead in making both written argument and oral submissions on the issue of the disclosure of parts of each expert's working file. These arguments were largely successful. However, they formed a small portion of the Defendants' overall arguments and this Court sees no need to distinguish between the effort of counsel for the AGNS and Dr. Bowes and that of the other Defence counsel.

Conclusion

[17] It is abundantly obvious to this Court that Defence counsel were required to expend significant time and effort to prepare for, and respond to this motion.

[18] A party who submits inadmissible and objectionable affidavit evidence is free to spend their own funds to advance arguments in support of obviously objectionable content, but they shouldn't expect not to have to pay the costs of other parties called upon to move to have such inadmissible evidence struck.

[19] This motion was of great importance to each Defendant. The Plaintiffs allege that John James Layes, Sr. was murdered by family members through the administration of poison over a several month period and that Dr. Sturmy assisted in that process. The Plaintiffs also allege that Dr. Bowes negligently conducted an autopsy of the remains of the late John James Layes. The Plaintiffs also allege that

NMS negligently performed its work and participated in a “cover-up” of the real cause of the death of John James Layes, Sr., and that the cause of death was chronic poisoning.

[20] I have carefully considered all of the relevant Rules and case law and conclude that costs in the amount of $12,000 should be awarded to each Defendant. I conclude that that amount does justice between the parties.

[21] The total costs are payable in any event of the cause and must be paid within sixty (60) calendar days of this decision.

Smith, J.