Date: 20001023
Docket: S.H. 140647C

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: HMC Group Inc. v. Nova Scotia (Attorney General), 2000 NSSC 75

BETWEEN:

HMC GROUP INC.

PLAINTIFF

- and -

THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in the Right of the Province of Nova Scotia, EMERGENCY HEALTH SERVICES AGENCY, and DR. MICHAEL F. MURPHY

DEFENDANTS

D E C I S I O N

HEARD BEFORE: **The Honourable Justice Walter R. E. Goodfellow in the Supreme Court of Nova Scotia on May 1st, 2nd, 3rd, 4th, 5th, 9th, 10th, 11th, 2000**
Final written representations received in July, 2000

DECISION: **October 23rd, 2000**

COUNSEL: **S. Bruce Outhouse, Q.C., R. Lester Jesudason and Tanya R. Jones, A/C, Solicitors for the Plaintiff**

William M. Wilson, Q.C., Dale A. Darling and Genevieve S. Harvey, A/C, Solicitors for the Defendants

GOODFELLOW, J:

[1] HMC Group Inc. (HMC) was formerly Halifax Message Centre Inc. Most of its business activities is the business of emergency and non-emergency call response and dispatch service. The present Company and its predecessors have been in business since 1948 and since 1985 have been conducting emergency call response and dispatch services. It began to provide emergency health call response and dispatch service in 1994.

[2] Metro and District Ambulance Services has been operated for years by members of the Richardson family. Gordon Richardson has been involved in the emergency medical ambulance business, with members of his family, since the late 1980's and until 1994 operated an in-house dispatch service.

[3] In June of 1994, the Province passed the *Emergency Health Services Act*, to come into force upon proclamation by the Governor in Council. This marked an initial step in the revamping of emergency health services in the Province of Nova Scotia. The *Emergency Health Services Act* has remained unproclaimed. Part of the revamping of emergency health services dealt

with the way in which ambulance services were to be provided and dispatched throughout the Province.

[4] In 1994, HMC entered into a contract with Metro to provide overnight emergency call response and dispatch service. In September 1995, the contract between HMC and Metro was expanded to include full-time emergency health call response and dispatch services.

[5] In July of 1995, the Minister of Health, the then Honourable Ron Stewart, appointed Dr. Michael Murphy as the first Commissioner of Emergency Health Services for the Province. The Commissioner and Agency were charged with the responsibility and authority of planning, defining and financing the implementation and monitoring of pre-hospital care activities. A part of those activities involved ambulance service and emergency medical dispatch.

[6] Dr. Murphy assumed his duties in and around August/September of 1995. Dr. Murphy has long been involved in the provision of emergency health services. In 1994, Dr. Murphy authored a report regarding the reform of

emergency health services within the province. As part of the overall strategy of improving emergency health services, dispatching and the provision of ambulance service was under study and was slated for upgrading.

[7] The provision of ambulance and dispatching services at this time varied from region to region throughout the province. In Halifax, ambulance services were provided by Metro and District and by the Victoria General Hospital. Dispatch services were provided to Metro and District through the Plaintiff, Halifax Message Centre and to the Victoria General Hospital by the hospital itself.

[8] HMC has been involved in emergency dispatch for many years. In 1985 onward HMC serviced a number of volunteer fire departments in Nova Scotia and approximately eighty per cent of the volunteer fire departments in Prince Edward Island, plus police departments in Prince Edward Island. In 1994, HMC purchased alarm monitoring. Early in 1994 HMC had discussions with Metro and District Ambulance about providing emergency medical dispatch from 11:00 P.M. to 7:00 A.M. and this progressed to the

entry into a contract with Metro and District Ambulance the 28th of July, 1994. This progressed to 24 hour emergency medical dispatch from around June 21st, 1995. This resulted in the handling upwards of 15,000 calls per annum making Halifax Message Centre the largest medical emergency dispatch operator in the Province doing somewhere in the range of twenty-five to thirty per cent of the total provincial volume. In the Metro area the competition was the V.G. Hospital Ambulance Service which had two ambulances, one in emergency and a backup. Around 1995, the number of emergency medical dispatches by calls received by the V.G. would be approximately 2,000. Halifax Message Centre also entered into a contract with Arsenault Ambulance which brought in 5,000 to 6,000 calls per annum and they provided Arsenault with 24 hour service except the periods 8:00 A.M. to 3:30 P.M. Monday to Friday. This resulted in HMC having in the range of thirty-five per cent or greater of the provincial volume of emergency medical calls.

[9] HMC's contract with Metro and District Ambulance Services provided a termination provision as follows:

> 15. The Agreement may be terminated by either party with a thirty (30) day notice in writing.

[10] The same provision exists in HMC's contract with Arsenault Ambulance.

[11] The principal officers of HMC are Richard N. Rafuse and William D. Tucker. In or about March 1995, Mr. Rafuse contacted the Department of Health and from the very outset, HMC made a considerable effort to familiarize itself with the criteria, guidelines and policies of the Province of Nova Scotia with respect to emergency medical dispatch. The end result of Mr. Rafuse's innumerable inquiries established that there were no provincial standards in place. Mr. Rafuse was advised that standards were in the process of being developed.

[12] On January the 15th, 1996, Dr. Murphy gave a verbal directive to Mr. Gordon Richardson of Metro that the dispatch service would be consolidated in the Victoria General Hospital. This verbal directive was followed up by a written directive of the 22nd of January, 1996 which made it clear that all ambulance dispatch, emergency and non-emergency, would be performed and coordinated by the V. G. Dispatch Centre until further notice. Subsequently, the dispatch service was placed basically out on tender and HMC did not participate based on their belief that Dr. Murphy

was an insurmountable obstacle to their participating in the medical dispatch service.

ISSUES

[13] The Plaintiff lists in its pre-trial brief the issues as follows:

1. **Are the Defendants liable to HMC on the basis of defamation?**
2. **Are the Defendants liable to HMC on the basis of injurious falsehood?**
3. **Are the Defendants liable to HMC for interfering with HMC's contract between it and Metro?**
4. **Are the Defendants liable to HMC on the basis of abuse of public authority?**
5. **Did the Defendants' actions result in HMC suffering loss of business opportunities?**

[14] The Defendants post-trial brief deals with the issues in the same order as stated by the Plaintiff.

[15] Both the Plaintiff and Defendant filed extensive post-trial briefs. The Plaintiffs in particular made extensive references to evidence and I can only

but assume that the Plaintiff secured a transcript of most, if not all, of the trial and I have had to rely upon my notes. When I had any doubt as to the accuracy of my notes, I listened further to the tape of the evidence.

LABA INCIDENT - JANUARY 13TH, 1996

[16] I want to make it clear that the finding or determination of responsibility for the late arrival of an ambulance at 6489 London Street on the 13th of January, 1996 is not my mandate. This is a lawsuit limited to the parties participating and the causes of action alleged. This action is not to determine fault with this incident nor with the Jeddore December the 21st, 1995 incident. A number of interested parties such as the families, Victoria General Hospital, Metro and District Ambulance Service, Minister of Health and the Fire Departments are not participants because this is a limited lawsuit and **NOT** a public inquiry. To the extent I comment on the evidence of this and the Jeddore incident, I do so only in the limited context of assessing the actions and weight to be given to the actions of the parties to this lawsuit in justification or otherwise for events that occurred relative to the claims advanced.

[17] William Tucker gave evidence and outlined the sequence of events of the 13th of January incident. A medical alarm for London Street was received by HMC at 20:21 and relayed by HMC to the Victoria General at 20:22. The Victoria General dispatched its own ambulance or backup and when neither were available, it called HMC who was responsible for dispatching Halifax & Metro Ambulances. The Victoria General called HMC at 20:26 and an HMC dispatcher, Mark Cove, started to call ambulance 41to dispatch it likely at 20:27 and was interrupted by ambulance 2302, Chris True, a paramedic, with Metro and District since 1980 and who was at the time of this incident was Metro and District's shift supervisor. He happened to be at the Victoria General Hospital and was in an area which permitted him to hear the dispatching by the Victoria General. At 20:28, Chris True heard Jeff Newton (V.G. employee dispatcher) answer a call for 2489 London Street and Brenda Antle, an employee of the V.G. lean through the communication window and say, "Metro already has that call". Chris True had not heard the call dispatched but assumed it had been given to ambulance 41 by telephone. At 20:29, Chris True radios to tell dispatch that his ambulance is at the bridge head and he hears ambulance 41, Ian Winter's voice, finishing a sentence and assumed it was ambulance 41 arriving at

London Street. Mark Cove dispatch does not respond but seconds later, dispatch calls ambulance 41 which does not answer so True radios, "I think 41 has arrived". At 20:41 True's ambulance is called by dispatch to St. Margaret's Bay Road and after acknowledging, ambulance 41 comes on the radio and says they are on Quinpool Road and will take that call so dispatch sends True's ambulance to 6489 London Street where they arrive at 20:46.

[18] The True ambulance is 2302 and Ian Winter is in ambulance 41. Both Jeff Newton and Brenda Antle are employees of the V.G. on duty at the time. True concluded that 41 had arrived at London Street and that the paramedics were out of the ambulance and that is when he picked up his mike and said to Mark Cove, "I think 41has arrived" and Mark Cove came back and said, "on London Street" and True responded, "yes, I believe so". The evidence does not disclose who contacted the fire department, however, the fire department arrived at London Street, in 10 to 12 minutes after he arrived, which, in Chris True's view, was unusual because the call would have gone to West Street or Lady Hammond Road and should have been a four minute trip and therefore the fire department ought to have been there before an ambulance 2302 at 20:46. It is True's perception that there is a rule of

thumb that North of North Street the fire department responds as being quicker than any ambulance and he believes that to be the practice he has observed since 1991.

[19] Tanya Beaton, a qualified DMD, was on duty at HMC January the 13th, 1996 and took the call from the V.G. at 20:26 relating to London Street at which time Mark Cove was taking two other code 1 calls in process so she tried to call the London Street premise to see if she could get an answer by telephone and there was none by which time Mark Cove was off the phone. It was 20:28 when the V.G. called back with the update which call was taken by Mark Cove and she says while Mark Cove was trying to give this information to ambulance 41, Chris True came over the radio and said that 41 was en route and should be there any minute and it is only later that Tanya Beaton learned that at that time ambulance 41 knew nothing of the London Street call.

[20] Mr. Tucker viewed these various statements and the internal forms of HMC and Metro and District Ambulance, along with the computer records referred to as task.com in producing reports, including the Metro and

District dispatch incident review to check whether or not the medical alarm received by HMC was at 20:21 and that at 20:22 HMC advised the V.G.

[21] Chris True referred to the Metro and District Ambulance records and in particular, the call record form which relates such things as the code, address, time in, time out, on scene and depart scene times. For Flying Cloud Drive the time in was 20:22, time out 20:23. For 41 St. Margaret's Bay Road the time in was 20:40 and time out 20:41 and for 6489 London Street, the time in was 20:26, time out 20:40, time on scene 20:46, depart scene 21:02. In his report, his comments were, "series of event led dispatch to think Amb. was dispatched when it hadn't been".

[22] Mark Cove in his statement says that 2302 (True) must have mistaken 23-3's arrival at Osborne with Mark's call for London. 2303 arrived at Osborne at 20:26 and he asked 2302 (True), "did you mean 6489 London" and received an affirmative answer. At 20:28 the V.G. called HMC with an update that the alarm was real, that it was a 60 year old male with chest pains and as Mark Cove was under the impression that ambulance 41 was on the scene, he did not attempt to update ambulance 41. He did not know any different

until ambulance 41 responded that they were closest in relation to the St. Margaret's Bay Road accident.

[23] Mark Cove says that the reason he took the information from 2302 (True) at face value is because 2302 was at the V.G. when the V.G. got the call from the alarm company.

[24] Chris True was asked, "was it reasonable for Mark to conclude that ambulance 41 was at London Street" and he said, "yes". Under cross-examination, while he did not know if the Message Centre had dispatched to London Street, he thought the ambulance had been dispatched initially by Mark Cove. He felt he was assisting Mark Cove who he had assumed had dispatched 41 in the first place. He acknowledged that when HMC receives a call the dispatcher, Mark Cove, ultimately is responsible to ensure that one has been dispatched because he receives the confirmation from the ambulance. While it is not normal for the confirmation to repeat the address, there is a confirmation such as "ten forty, on the way". He acknowledged that the dispatcher's job was not complete until he had confirmation from the dispatched ambulance. He also assumed that Mark

would have had confirmation of arrival and with respect to the whole picture, Mark Cove would know the normal situation and he agreed that it would be up to Mark Cove to piece it together. On re-examination, he acknowledged that Mark Cove did come back to him and ask for confirmation with respect to the arrival of ambulance 41 at London Street and he had responded to Mark, "I said, I believe so".

[25] Mark Cove had Tanya Beaton as his backup and she was beside him, It was extremely busy. Mark Cove called ambulance 41 on the radio but before he had a response, he interrupted to dispatch 2304 ambulance to Flying Cloud and then attempted at about 20:27-20:28 to reach ambulance 41 on the air to give them the location of London Street and the nature of the call. Ambulance 2302 came on the air and said that 41 was en route and that information came from Chris True, the Metro and District supervisor. Chris True indicated 41 had arrived on the scene. Mark Cove had always found True to be reliable and he speculates True must have mistaken the Osborne dispatch with London Street. In his experience, it was unusual that the V.G. would call Metro and District to dispatch and at the same time attempt to contact the London Street residence by telephone. He gave his statement at

the end of the shift and took the times off the log. He did not have access to the task.com records. The log sheet comes from the initial dispatch sheet which in turn comes from the task.com. It is his recollection that Mr. True said ambulance 41 had arrived and he asked True for confirmation and he believes Mr. True quoted the civic address at London Street. He knew he had not talked to ambulance 41 on the first attempt to dispatch and he knew he had not given ambulance 41 the London Street address. When asked how ambulance 41 would get the London Street address, he said it could have been from ambulance 2302, Mark True, or at the V.G. He says on occasion, not often but it did happen, the ambulance supervisor could override the dispatcher but it would be out of the normal. It is the dispatcher's primary function to dispatch. He acknowledges the normal procedure is to confirm the dispatch.

[26] Tanya Beaton confirmed the original medical alarm at 20:21 would be received at the V.G. at 20:22 and the V.G. did not respond until 20:26 which was when Mark Cove attempted to reach ambulance 41 and was interrupted at 20:27. The V.G. called back at 20:28 with an update and Mark Cove took that call and it was then that Chris True was on the radio

saying 41 was en route and should be there any minute. She was not sure what was exactly said by Mr. True subsequently, that is whether 41 had arrived or he thought it arrived. She was asked if the crew was inside a residence of emergency how common was it to try and contact them and acknowledged that such would be rare. Ms. Beaton confirmed that unless the dispatcher had information in response to a request from the attendants, the dispatcher would not try to contact the attendants in the residence because he or she would not want to interrupt them in case CPR was being performed, etcetera.

[27] In the course of cross-examination, she indicated that the dispatcher would give the ambulance full information and the dispatcher would get the on scene arrival time. She agreed that the dispatcher would expect the ambulance to acknowledge the call and until the call is acknowledged, the dispatcher would try and get the ambulance. The dispatcher had control over the dispatch and would expect also that the ambulance would confirm the arrival time.

[28] She was asked if she had heard or received such an exchange, as came from Chris True, what would she do and she said, “there was so much going on, she would have taken Chris’ word” but acknowledged that she would have expected that the dispatch of the ambulance would have been done initially by herself and she thought that Mark had dispatched the ambulance. She was asked how common it was for the supervisor of Metro and District to dispatch an ambulance, she said, “it was rare, it was not common, he would not use another frequency to dispatch and she would not use a cellular telephone”, acknowledging in re-examination that if there had been any contact, for example, Mr. True with ambulance 41 by cell, Mr. True or the V.G. or anyone with ambulance 41 by cell telephone or other channel, the dispatcher would not know.

SUMMARY OF PROBLEMS THAT AROSE

1. There was a four minute delay at the Victoria General Hospital from the time it received the medical alert at 20:22 and advised Metro and District at 20:26. I do not accept the speculative evidence of Ms. Antle who suggests possibly the clocks were out two minutes or so. I cannot find with exact

certainty that there was precisely a four minute delay but the delay was or approached four minutes.

2. The V.G. employee advises True ambulance 2302 Metro and District that the call to dispatch ambulance 41 to London Street had been made.

3. Cove when asked about ambulance 41 arrival at London Street in confirmation, received such from True.

4. The HMC dispatcher knowing he did not contact ambulance 41 in the initial attempt did not establish contact on the second attempt and at no time actually dispatched ambulance 41 or advised ambulance 41 of the code. While the Metro and District Supervisor may on rare occasions override the dispatcher, it is the dispatcher who has the control and responsibility of the dispatch and its confirmation. This is one of the areas that ought to have been spelled out by the Province of Nova Scotia in a protocol or guideline and although the Province proclaimed the *Emergency Health Services Act* in June of 1994, it was never proclaimed nor were there regulations. guidelines or a protocol established despite the communication problems brought to their attention by Halifax and Metro Ambulance and the repeated requests for such by HMC.

[29] The root of this specific incident initiates at the Victoria General Hospital in part through an unexplained delay of approximately four minutes and the erroneous communication by the V.G. with respect to the dispatch of ambulance 41. These errors were compounded by True's assumption that HMC(Cove) had done the initial dispatch and relying upon the V.G. statement that 41 had been dispatched to London Street and was en route subsequently made the wrong assumption and confirmed to HMC (Cove) that ambulance 41 had arrived at London Street when in fact it had not, nor had it been dispatched to London Street.

[30] While the root of this specific incident initiates at the Victoria General Hospital, the evidence indicates the Province recognized as early as 1993 financial and other problems in the delivery of timely and efficient ambulance services to the public in Nova Scotia. HMC, virtually from its entry into the dispatch service, made repeated requests in the communication and dispatch field for regulations, guidelines or a protocol, at no time did the Province have such in place nor bring about such in the lengthy period leading up to the Laba incident. Certainly if the Province of Nova Scotia had fulfilled its responsibility initially or as a result of the

inquiries and prodding of HMC to bring into being regulations, guidelines or a protocol, then the possibility of a Laba type incident occurring would have been substantially diminished.

JEDDORE INCIDENT - DECEMBER 21ST, 1995

[31] HMC has been involved in emergency dispatch for many years. In 1985 onward they serviced a number of volunteer fire departments in Nova Scotia and approximately eighty per cent of the volunteer fire departments in Prince Edward Island, plus police departments in Prince Edward Island. In 1994, HMC purchased alarm monitoring. Early in 1994 HMC had discussions with Metro and District Ambulance about providing emergency medical dispatch from 11:00 P.M. to 7:00 A.M. and this progressed to the entry into a contract with Metro and District Ambulance the 28th of July, 1994. This progressed to 24 hour emergency medical dispatch from around June 21st, 1995. This resulted in the handling upwards of 15,000 calls per annum making Halifax Message Centre the largest medical emergency dispatch operator in the Province doing somewhere in the range of twenty-five to thirty per cent of the total provincial volume. In the Metro area the competition was the V.G. Hospital Ambulance Service which had two

ambulances, one in emergency and a backup. Around 1995, the number of emergency medical dispatches by calls received by the V.G. would be approximately 2,000. Halifax Message Centre also entered into a contract with Arsenault Ambulance which brought in 5,000 to 6,000 calls per annum and they provided Arsenault with 24 hour service except the periods 8:00 A.M. to 3:30 P.M. Monday to Friday. This resulted in HMC having in the range of thirty-five per cent or greater of the provincial volume of emergency medical calls.

[32] The Chezzetcook Volunteer Fire Department was not providing dispatch services in the Jeddore area but was providing ambulance service in addition to fire service for the area. When the fire department decided to discontinue providing ambulance service, Metro and District was directed by Dr. Murphy to take over this ambulance service. Mr. Tucker introduced in evidence the Metro and District Dispatch incident review for the Jeddore incident as well. The incident review notes that the call was received at 20:12. A wireless in the area was poor because of infrastructure and cell phone telephone use was spotty. There was a problem with the batteries in the pagers. Overall, it was clear that there were a number of weaknesses in

the ability to communicate and contact the ambulance. HMC provided the results and statements of its investigation to Metro and District by fax January the 15th, 1996. Mr. Tucker noted in his report, "dispatcher did excellent job in handling call given the circumstances". HMC had only been involved in this wide geographical area for a very brief time and Metro Ambulance attendants were new to the area at the time of this incident.

[33] Gordon Richardson, who has been involved in the emergency medical ambulance business with members of his family since the late 1980's, was an extremely knowledgeable person in all aspects, including dispatch which was done by his family owned company for most of the history of Metro and District Ambulance on an in-house basis. In 1994, they utilized the services of HMC for emergency medical dispatch. It is clear from his evidence that the attempt to consolidate dispatching in the Victoria General was not a new direction. At one time in 1993 there was an additional subsidy proposed to the ambulance service contingent upon transferring the dispatch function to the Victoria General Hospital. Dr. Murphy wanted the transfer to the V.G. to take place around January the 18th, 1996, however, the Victoria General did not have the capacity to handle the immediate

transfer and it took place February the 26th, 1996. Mr. Richardson gave clear evidence that EHS was advised prior to the Jeddore incident of the problems in the geographical area and Metro and District Ambulance Service. He provided a lengthy letter to Karen Ursel January the 19th, 1995 (tab 43) outlining in some depth details relating to the response to what started as a medical alarm activated in the home. In his letter, Gordon Richardson pointed out that in reviewing the events of this incident the history of the Musquodoboit service should be reviewed as well. The Chezzetcook fire department, which had provided the dispatch service for many years, had elected to discontinue ambulance service to the community and on October 29th, 1995 Metro and District was given direction by Dr. Murphy to initiate discussions with Diane Golden of the Department of Health to provide 24 hour ambulance service to the Musquodoboit-Chezzetcook area starting November the 1st and from the very onset it appeared communications would be difficult and inefficient. The Metro and District Ambulance dispatch channel was ineffective, the provincial grid system switches frequency in the middle of the service area and is also unreliable and cellular phones work in only parts of the area. There was therefore reliance with a pager for the Twin Oaks Hospital and directions

given that when the crew were out of the ambulance, they should provide the telephone number where they could be reached. Metro and District made known the communication problems and Nova Tronics noted it was a common problem in this area. The report by Gordon Richardson is quite extensive and shows a conscientious effort to deal with the problems that existed from the very outset when they were directed to provide 24 hour ambulance service October 29th, the service to begin November the 1st of 1995. Karen Ursel in her risk management: occurrence report noted Gordon Richardson's comments that related to 1) page's failure; 2) problem numbering system on W. Jeddore Road; 3) using inaccurate clock in ambulance. The block relating to improper dispatch procedure was left blank and clearly the root of this incident was the failure of the Province to address the pre-existing area communications problems. I agree with Mr. Tucker that the HMC dispatcher conducted herself in a commendable professional manner and did everything she possibly could in the circumstances.

ISSUE NUMBER ONE

1. Are the Defendants liable to HMC on the basis of defamation?

Defamation Act Chapter 122 S.N.

Interpretation

2 In this Act,

(b) "defamation" means libel or slander.

[34] In the text Duncan and Neill "Defamation" 1978 Butterworth's means:

CHAPTER 5

The ingredients of a prima facie case

5.01 In order to establish a prima facie case in an action for libel or slander it is necessary for the plaintiff to prove

(a) that the words complained of were published of him;

(b) that the words were defamatory of him; and

(c) that the words were published by the defendant or in circumstances in which the defendant is responsible for the publication.

[35] *Hiltz and Seamone Co. v. Nova Scotia (Attorney General) et al* (1999), 173 N.S.R. (2d) 341 (N.S.C.A.). In this case a firm of consulting engineers brought a defamation action for damages against the Attorney General and a Department of Environment engineer. The engineer sent a letter approved by her superior highly critical of the plaintiff's work respecting a sewage

treatment plant. The trial judge concluded the letter clearly imputed *inter alia* incompetence, lack of integrity and dishonesty. The letter was distributed to Department employees, the Association of Professional Engineers of Nova Scotia, the municipality and was available to the public through the Department's library. The critical parts of the letter are reproduced in the Appeal Court decision commencing at p. 348. The extract is very lengthy and suffice to have related the findings approved by the Court of Appeal.

[36] The trial judge concluded that the statements expressed in the letter were expressed as "statements of fact" but even if considered to be statements of opinion, she determined that they were made p. 357 "with malice and are also defamatory, having been made in order to disparage the plaintiff and outside the realm of any reasonable debate on matters of public interest".

[37] In *Hamel et al v. The Queen in Right of Canada, et al* (1996), 141 D.L.R. (4th) affirmed 175 D.L.R. (4th) 323, the plaintiffs were in the business of buying and selling horses in the Province of Quebec. Upon arriving at a customs office, the plaintiffs were stopped and 10 of their horses were taken

by the R.C.M.P. to a veterinary hospital to be searched, as the police were informed that the horses were being used to smuggle drugs. No drugs were found but information about the case was leaked to the press, and the reputation of the owners of the horses was damaged.

[38] The trial judge concluded on a balance of probabilities that a member of the R.C.M.P. was responsible for leaking the information to the media. It was not necessarily to identify the actual R.C.M.P. person responsible for the fault.

[39] Justice Rouleau said at pp. 369-370:

> Moreover, interference with reputation may found a claim for compensation where it amounts to a fault and has caused damage:
>
> > [Translation] In order for defamation to found an action for damages, the person who perpetrated the defamation must have committed a fault. The fault may result from two types of conduct. The first is where the defendant knowingly, in bad faith, with intent to cause harm, attacks the reputation of the victim and seeks to ridicule, humiliate and expose him or her to hatred or contempt in the eyes of the public or of a group. The second is a result of conduct where there was no intent to cause harm, but where the defendant nonetheless interfered with the victim's reputation through recklessness, negligence, impertinence or carelessness. Both forms of conduct constitute a civil fault for which compensation may be awarded, and there are no differences between them in terms of the right to a remedy. In other words, we must refer to the ordinary rules of civil liability and resolutely abandon the false idea that defamation is the result only of an act of

> bad faith involving the intent to case harm. Moreover, in civil law defamation is not the result only of the disclosure or publication of false or incorrect news.

[40] In an action for defamation the pleadings are of particular importance and should be precise in setting out with clarity and particularity the words claimed to be defamatory. While several of the paragraphs of the Plaintiff's Statement of Claim filed the 18th of August, 1997 touch upon the issue of defamation, the specifics such as they are appear to be contained in the following paragraphs:

> 13. In the letter dated January 30, 1996, which was distributed to the Minister of Health, *inter alia*, Murphy wrote:
>
> > "It was my decision as Commissioner, in consultation with the Department, to move the dispatch operation to a facility with a demonstrated experience and expertise in the field. This move in the public interest was in response to issues discovered or relayed to the Commission relating to dispatch and response misadventures in the recent past."
>
> HMC says that the Province reached this conclusion without proper or any investigation, although Murphy knowingly misled HMC than an investigation had been carried out.
>
> 14. HMC says that Murphy falsely represented that there was "a four minute delay" by HMC in its response to the call by the Laba family when he knew that there had not been such a delay on the part of HMC. HMC says further that this representation by Murphy goes to the heart of the Department's decision to terminate the contract between HMC and M&D.
>
> 15. At that time Murphy or someone on his behalf communicated to M&D, the Q.E.II and the media that the termination of the dispatch contract between M&D and HMC "was a result of the Harry Laba incident" and "was needed for public safety". The intent and effect of these statements was to blame HMC for

> the delay in the response of an emergency response to the residence of Harry Laba.
>
> 16. The information transmitted to M&D, the Q.E.II and the media by Murphy or someone on his behalf was false to Murphy's knowledge and was made with malice.
>
> 32. By their written and verbal statements, Murphy and the Province did defame the business reputation of HMC, and as a result of that defamation the business reputation of HMC has been injured.

[41] HMC also complains about a brief video clip which I have observed.

[42] Subsequently, an amendment was granted before the Plaintiff closed its case setting out the following as the defamatory remark:

> 20. The decision was taken "in the interest of public safety" and that Dr. Murphy told a reporter for the Daily News that:
>
> > "All Halifax ambulances are now dispatched from the VG by people trained in emergency services. While it was part of a long-range plan, it was deemed immediately necessary after the Laba case."

[43] HMC relies upon the case of *Jones v. Bennett* (1967), Carswell CB32, 59 W.W.R. 449. In its brief, HMC recites the words used by Premier Bennett as follows:

> I am not going to talk about the Jones boy. I could say a lot, but let me assure you of this; the position taken by the Government is the right position.

[44] HMC points out that these words were argued as not appearing to be slanderous in isolation, that Justice Ruttan essentially found that when one considers the prior publicity surrounding the matter, the ordinary person

would infer a negative connotation from the words about Jones and thus he held the words to be defamatory. I wholeheartedly agree that the surrounding circumstances are relevant and in my view, the circumstances in the *Jones v. Bennett* case are far removed from what occurred here. Jones had been charged criminally and acquitted. The Attorney General of British Columbia filed the Notice of Appeal and shortly afterwards the Province introduced a Bill to provide for the retirement of Mr. Jones and it deemed him having been retired and removed from his position with the Purchasing Commission from an earlier date. When the Bill was introduced it set off a storm of controversy and no reason was apparently given by the Government for introduction and passing of the Bill and the Premier's comments complained of were in that context and in my view very clearly were meant to convey that Mr. Jones was lacking in character, honesty and integrity. The British Columbia Court of Appeal upheld Justice Ruttan's findings that the words were defamatory but did find qualified privilege. There is no such inference that can be drawn from any of the articles or the publication by T.V. in the case before me.

[45] HMC relies considerably on the evidence of Ms. Shaune MacKinlay, a reporter with the Daily News, who was responsible for two of the articles and I have carefully reviewed my notes and also listened to the tape of her testimony and I accept generally the position advanced by the Defendants.

[46] From the case law the test is as to whether or not statements are defamatory is whether in the circumstances in which the writing was published reasonable men to whom the publication was made would be likely to understand it in a libellous sense. A reasonable man would understand the words of the communication to be words that would bring forward a response of ridicule, contempt, lack of respect, or would otherwise project a flawed or diminished character, etcetera, etcetera. In its brief, HMC refers to correspondence between Dr. Murphy and the Minister, the Frank Magazine article, and the two articles which were written by Shaune MacKinlay of the Daily News. HMC also notes the brief T.V. clip and comments by Mr. Terry Degen.

[47] I was impressed with the professionalism and forthrightness of Ms. MacKinlay. She made it clear that in reporting she strives for accuracy. Her evidence was very clear that if there was something enclosed in

quotation marks that would mean it is a direct quote. It represents exactly what the person said. If an article refers to somebody saying something but is not enclosed in quotation marks, she indicated that that would be paraphrasing what they said but not intended to be a verbatim record of what was said.

[48] The March 16th, 1996 article stated:-

> Halifax Message Centre lost its dispatching contract with Metro and District Ambulance Feb. 26. Message Centre general manager Bill Tucker won't comment on the Laba call, except to say his company has been "attacked unfairly".

[49] It is clear and I find as a fact that Ms. MacKinlay utilizes quotation marks when there is a direct quote. In addition, her evidence very clearly indicates to me that when a person is mentioned in a paragraph, there is the highest probability the contents of that paragraph source is the person named. I conclude that it was HMC general manager, Bill Tucker, who advised HMC had lost its contract and was "attacked unfairly". Ms. MacKinlay made it clear that Dr. Murphy was not going to discuss the Laba incident and his only public comments were in essence that the matter was under review. After the brief report of EHS was made public, Ms. MacKinlay wrote a further article published April 24th entitled, "Report holds no answers for man's family". Incidentally, in the earlier report Gordon Richardson of

Metro and District disputed the thirty minute suggestion of the time required for an ambulance to reach the Laba residence and also, in relation to the consolidation of dispatches being handled by the V.G., said, "that has been in the works for some time". He went on further and here Ms. MacKinlay is giving the gist of his further comments and not a verbatim report. The article says he said it should prove more efficient because it means the closest ambulance, V.G. or Metro and District, will be dispatched. This article contains the amendment which was granted, namely, "all Halifax ambulances are now dispatched from the V.G. by people trained in emergency service, said emergency services head Dr. Mike Murphy. While it was part of a long range plan, it was deemed immediately necessary after the Laba case, he said".

[50] The article in the very next sentence says Murphy would not discuss details of the Laba case, but said the old system was "awkward". These comments attributed to Dr. Murphy are the gist of what he said to Ms. MacKinlay and not a direct quote. Ms. MacKinlay makes it clear that the two page report from the Department of Health contains no answers for the family, that the report itself refers only to a January 13th emergency call and does not

mention Harry Laba, the V.G., the Halifax Message Centre or Metro and District Ambulance. The main source of this second article is the information Ms. MacKinlay had at the time of her earlier article and the two page report from the Department of Health.

[51] It seems to me on a factual basis that there are no statements that are attributed to Dr. Murphy or the Province of Nova Scotia or its employees, including Terry Degen, that would individually or collectively represent a defamatory statement. I do not think any reasonable man would infer from the articles, T.V. and media reporting other than there was a problem. Dr. Murphy in refusing to discuss the Laba incident avoided attributing fault or attacking the character, integrity, competence, etcetera of HMC. The principals of the Plaintiff, Messrs. Rafuse and Tucker, are extremely responsible individuals with a high sensitivity to their well deserved public reputation and far too readily inferred a challenge to their character. Any reasonable person reading the article would recognize that there was an extensive delay in providing an ambulance to the Laba residence. As a result, steps were taken to consolidate dispatch in the V.G. Consolidation, as stated in one source, it was a planned process and the fact that there was a

delay in an ambulance attending at the Laba residence expedited that process. No reasonable man, in my view, will infer from that that the fault was any particular individuals or company. There was no statement whatsoever of fault, criminal, civil or otherwise, no finger pointing and in my assessment, no defamation.

[52] In their pre-trial brief, HMC submitted that the actions and statements of Dr. Murphy and the Province directly or alternatively by way of innuendo had the effect of defaming its professional reputation and competence. It goes further and suggests that the Province effectively held HMC to be the culprit in the death of Mr. Laba. Quite frankly, my review of the evidence does not reach that conclusion and in fact I do not think the weighing of the evidence supports the conclusion advanced by HMC.

ISSUE NUMBER TWO

2. Are the Defendants liable to HMC on the basis of injurious falsehood?

[53] The tort of injurious falsehood was considered by our court in the case of *Courtyard Green Developments Limited v. L & R Equities Limited* (1986), 76 N.S.R. (2d) (T.D.). In paragraphs 58-59 of the decision, Justice Grant

outlines the essential elements necessary to support such an action and quotes from *Salmon on Torts*:

> The wrong of injurious falsehood...consists in false statements made to other persons concerning the plaintiff whereby he suffers losses through the action of those others...
>
> It may be stated as a general rule that it is an actionable wrong maliciously to make a false statement respecting any person or his property with the result that the other persons deceived thereby are induced to act in a manner which causes loss to him.

[54] In *Royal Bank Powder Co. v. Wright Crossley & Co.* (1901), 18 R.P.C. 95, at p. 99:

> 148. Conditions of Liability
>
> To support such an action it is necessary for the plaintiff's to prove (1) that the statements complained of were untrue; (2) that they were made maliciously - i.e. without just cause or excuse; (3) that the plaintiff's have suffered damage thereby.

[55] The tort was also considered in the fairly recent case of *Moss v. Forsyth* (1999), 135 Man. R. (2d) 234 (QBM). In that case the plaintiffs sued the defendants for defamation and wrongful interference with contractual relations. They alleged that the defendants had deliberately and maliciously provided false and misleading information about their business ventures to Revenue Canada. An income tax audit ensued resulting in the plaintiffs being reassessed. The plaintiffs eventually had to declare bankruptcy.

[56] Duncan & Neill on Defamation has summarized the distinction between an action for defamation and an action for malicious falsehood as follows:

> (a) In an action for defamation it is necessary to prove that the words are defamatory: in an action for malicious falsehood there is no such requirement.
>
> (b) In an action for defamation the falsity of any defamatory words is presumed and the burden of proving justification lies on the defendant: in an action for malicious falsehood the plaintiff has to plead and prove as part of the cause of action that the words were false.
>
> (c) In an action for defamation it is not necessary for the plaintiff in order to establish a prima facie case to prove that the defendant was actuated by malice: in an action for malicious falsehood the plaintiff has to prove malice as part of the cause of action.
>
> (d) In an action for libel it is not necessary for the plaintiff to prove that he has suffered damage as damage is presumed: in an action for malicious falsehood the plaintiff has to plead and prove as part of the cause of action that the publication has caused him special damage or that he is exempted from doing so by the provisions of section 3 of the *Defamation Act* 1952.
>
> (e) A cause of action for defamation does not pass to the personal representatives of a deceased plaintiff nor does it survive against the estate of a deceased defendant: an action for malicious falsehood survives the death of either party.

[57] HMC has failed to establish on a balance of probabilities that any words of Dr. Murphy, directly or indirectly, referring to HMC were false. Additionally, HMC, while it has established Dr. Murphy had an inherent bias for the medical world of which he is a product, nevertheless HMC have fallen short of establishing any measure of malice or intent to inflict

harm to HMC on the part of Dr. Murphy or anyone acting on behalf of the Province of Nova Scotia.

ISSUE NUMBER THREE

3. Are the Defendants liable to HMC for interfering with HMC's contract between it and Metro?

[58] I want first to address the question raised in the brief filed by HMC, namely:

What information and investigation results were available to Dr. Murphy when he made the decision January the 18th, 1996, the directive to consolidate the dispatch activities of Metro and District Ambulance with that of the V. G. Ambulance Service?

[59] Dr. Murphy says he was aware of the dispatch and communication problems that occurred earlier in the Jeddore/Saunders incident of December, 1995.

[60] I have already outlined details with respect to the Jeddore incident and with respect to the information available to Dr. Murphy on the 18th of January when he issued his directive for the consolidation of dispatch services in the VG, there is the following important evidence, the letter from District 10 Volunteer Fire Department dated January the 18th and the letter of Gordon

Richardson with enclosures on behalf of Metro and District Ambulance Service of January the 19th. Neither of these would have been received in time by Ms. Ursel to communicate the contents to Dr. Murphy on his verbal directive of the 15th of January, 1996. The letter from the fire department was faxed at 7:05 P.M. the evening of the 18th and obviously arrived to Ms. Ursel's attention post Dr. Murphy's directive.

[61] Ms. Ursel whose presence conveyed a measure of professionalism and credibility expressed the view that the Jeddore incident was not a dispatch issue. She testified, "the example might be the Saunders case period. It wasn't a dispatch issue. It was a communications issue". The problems of communication in the Jeddore area were brought to the attention of Dr. Murphy long before the occurrence of the unfortunate Saunders incident. Indeed, Mr. Richardson had offered suggestions how they could be addressed (reference his letter October 29th, 1995).

[62] Before returning to Ms. Ursel's evidence, I want to refer to evidence of Dr. Murphy in cross-examination where he testified as follows with respect to the Jeddore incident:

> **Q.** The radio problems, which had nothing to do with HMC?
>
> **A.** Yes.

Q. And you agree with me that there was a civic addressing problem which had nothing to do with HMC?
A. Yes.

Q. And the bottom line is that you would never have pulled HMC's contract on account of the Saunders incident?

A. As I said earlier today, you know, a snowflake does not a blizzard make. And so I think that there are a variety of contributing factors. I think we believed that there was a substantial issue here, but there were other substantial issues too.
[Further questioning]

Q. And you agree with me that the Saunders incident had nothing whatsoever to do with there being two dispatch centres, because the VG wasn't serving the Musquodoboit area.?

A. I agree with that, yeah.

[63] Ms. Ursel confirmed that in her report there was a space for "improper dispatch procedure" in the reporting form and she did not make any entry and confirmed that based on the information she had with respect to the Jeddore incident, she saw no deficit performance by HMC. Ms. Ursel's evidence was also informative as to what Dr. Murphy had available to him when he issued the directive to consolidate dispatch services in the Victoria General.

Q. And I suggest to you, Ms. Ursel, that at the time M&D was ordered to transfer its dispatch service to the VG, your investigation was not anywhere near complete, correct?

A. Can you repeat?

Q. Yes. You had started the process of data collection.

A. Correct.

Q. But you don't know what information you had actually gotten at the point in time when the order was given by Dr. Murphy to – for M&D to transfer its dispatch to the VG?

A. I had preliminary information. To be able to describe that to you at this time, no ...

[64] I have very serious reservations that Ms. Ursel's preliminary report was in the hands of Dr. Murphy at the time he issued the consolidation directive. If pressed, I would conclude it was not.

[65] With respect to the Laba incident, Dr. Murphy would have learned of it Monday, January the 15th, 1996. His directive was first by telephone from Hamilton, Ontario to Mr. Richardson and this was followed up by his letter of the 22nd of January, 1996 which was copied to the Honourable Doctor Ron Stewart and Doctor Ed Cain.

> 22 Jan 1996
>
> Mr. Gordon Richardson
>
> Metro and District Ambulance
>
> Dear Mr. Richardson,
>
> I spoke with Dr. Ed Cain regarding the issue of Metro and District Dispatch on Friday 19 Jan 1996. He informed me that clarification of the directive to consolidate the dispatch activities of your service with that of the VG Ambulance Service was requested. The Directive from this office is that **all ambulance dispatch**, emergency and non-emergency, for the two operations be performed and coordinated by the VG dispatch centre until further notice. The cost of this arrangement is to be borne by EHS until an alternative method of ambulance service funding is determined, at which time the issue will be revisited.
>
> It is my anticipation that this arrangement will be in place by mid February.

Yours truly,

MF Murphy MD, FRCPC
Commissioner, Emergency Health Services

cc. Hon Dr. Ron Stewart
Dr. Ed Cain

Q. Okay. Why did you feel that you had to provide that direction to Metro & District?

A. There were several things that were going on at that time and there were two specific instances. The two cases of note, and the Court has heard about both of them, was the Laba case, number one, but number two, the case of a Dr. Saunders, a gentleman in his eighties who had died in the Jeddore area as a result of an ambulance call in December of 1995. And we had done a significant amount of investigation around that case and there was clearly an issue with respect to the dispatch centre being able to get a hold of the ambulance. We hold the ambulance contractor accountable for delivery of care. Whether he elects to do that dispatch himself or out source that dispatch, that's – that's not fundamentally an issue of mine. But the difficulty that we saw was that on the one hand the paramedics were saying, "We told the dispatch centre where we were", and the dispatch centre saying, "We don't have that information". So we would never have the ability to understand what that was, whether it was an issue or not, but I'll tell you we did know. We did know that he had developed congestive heart failure at around 9:00 in the evening, and over the ensuing hour or so it took for the ambulance to arrive, he had smothered to death. The ambulance that did not arrive was an advance life support ambulance. The paramedics in that ambulance could have saved his life. So that we had a very clear idea that that was also a potentially preventive death. So I – we had that information ...

[66] Doctor Murphy on Monday morning, the 15th of January got in touch with Karen Ursel who was tasked to conduct an investigation. It is her evidence that she went to the Victoria General and picked up information and also in direct examination she believed she received documentation from Mr. Richardson. While I have no doubt that she did receive documentation from

Mr. Richardson, it was provided by him in response to a request in one package with his letter of January the 19th, 1995 so that it would have been impossible for Ms. Ursel to report specifically on what she had received from Mr. Richardson/Metro to Dr. Murphy prior to his directive of the 18th of January, 1996 to consolidate the dispatch activities of Metro into the Victoria General Ambulance Service. Dr. Murphy was examined on discovery and was asked for example, if by Tuesday, the 16th of January, 1996, if he had conducted any investigation personally and responded, "I do not have specific recollection of having done personally any investigations". This has to be contrasted with his evidence at trial where he now says that he immediately contacted the Victoria General Hospital, went to the V.G., reviewed records and statements and either called Mr. Richardson from the V.G. or afterwards and also spoke to Dr. Carr. In addition, he spoke to Dr. Cain and went back to his office and contacted Mr. Richardson Monday morning. His response as to how he remembers these various steps now when he could not do so at discovery is that his memory was triggered by other evidence. He certainly confirmed that he had no recollection at the time of discovery:

> **Q.** And I suggest to you, sir, that at the time you gave your discovery evidence, you could not recall the details of any investigation or investigation results at the

> time you made the decision to direct M&D to transfer its dispatch function to the VG Isn't that correct?
>
> **A.** At the time of discovery I had – I did not recollect that.
>
> **Q.** That's right. And you couldn't recall what written information, if any, you had on the Laba incident prior to making the decision to cause M&D to switch its dispatch function to the VG. Isn't that correct?
>
> **A.** Correct.

[67] Dr. Murphy went on to answer:

> **Q.** And if you couldn't recall at the time of discovery, again, tell the Court how you can recall now?
>
> **A.** Um, I don't believe that I have specific recollection, nor I portrayed specific recollection of verbal interchanges, except to say that over the period of time with Karen Ursel assigned to a fact-finding mission, she and I would have discussed this – this was a huge event at the time. This, the magnitude of this event, was such that it really superseded virtually everything else that was going on in the division at the time.

[68] It is my finding that he quite probably had a telephone call from Dr. Carr, learned that there had been an inordinate delay in the ambulance attending upon Mr. Laba in circumstances where it might well have led to a different result, if the ambulance had arrived in a more timely fashion. Beyond that, it is quite probable that Mr. Murphy's recollection at trial is faulty and that whatever additional steps he took by way of personal investigation, etcetera, did not precede his verbal directive of January the 18th to Mr. Richardson/Metro to consolidate dispatch services into the V.G. Ambulance Service.

[69] It seems to me quite likely that he had at least a grasp that there was a dispatch problem or communication problem relative to the Laba situation and had a knowledge of the Jeddore difficulties and proceeded to issue his directive on the basis that something had to be done and that his fundamental philosophy of medical personnel or medically trained personnel dealing with dispatch services was preferable. This is certainly a questionable judgment call, particularly as he had so little to base that judgment call on at the time of the January the 18th directive. At that time, the experience in medical dispatch of HMC was far more extensive than anyone else in the Province. HMC had also exhibited a record of training, professionalism, responsibility, etcetera. Neither the Victoria General nor any other service could come anywhere near meeting such experience and qualifications.

[70] Our Court of Appeal recently considered this tort in *Cheticamp Fisheries Co-Operative v. Canada* (1995), 139 N.S.R. (2d) 224 (CA). The test to be applied is referred to by Justice Chipman on p. 228:

> The trial judge reviewed the nature of the tort of "interference of economic relations" and considered that it comprised three elements: (1) unlawful conduct by the defendant; (2) carried out deliberately with the intention of causing damage

> to the business of the plaintiffs; and (3) damage thereby caused to the business of the plaintiffs.

[71] Justice Chipman goes on to state on p. 229:

> Counsel on this appeal did not dispute that this tort consisted of the three elements referred to by the trial judge. In *Clerk and Liddell on Torts* (16 Ed. 1989), the author says at p. 850:
>
> There exists a tort of uncertain ambit which consists in one person using unlawful means with the object and effect of causing damage to another. In such cases the plaintiff is availed of a cause of action for this 'clearly recognized' but 'relatively undeveloped tort' ...

[72] As Chipman. JA pointed out, the trial judge was in error in concluding that the fact that the Defendants knew the imposition of dockside monitoring fees were unlawful or reckless as to whether or not they were unlawful was not the test, as what is required is an intention to cause the damage.

[73] In *Remedies in Tort*, Klan, etc., the elements of the action are outlined as follows:

> **3. Elements of Cause of Action**
>
> 50 The plaintiff must prove that the defendant had an intention to injure the plaintiff; the plaintiff suffered economic loss or a related injury; and the means employed by the defendant were unlawful.

[74] My reading of the case law indicates that an essential ingredient of establishing the tort is the requirement that the Plaintiff establish the Defendants' intention to cause injury. The predominant purpose of the

Defendants' conduct must be to injure the Plaintiff and not just a furtherance of the Defendants' own self interests or philosophy.

[75] In the factual situation before me, there is no contractual relationship between the Defendants and HMC. The contractual relationship that existed was one between the Defendants and Metro and District Ambulance Service who, in effect, sub-contracted out the dispatch function to HMC. As I indicated earlier at page 42, Dr. Murphy stated, "we hold the ambulance contractor accountable for delivery of care". In other words, HMC's obligation is to Metro and District Ambulance by virtue of its contract and Metro and District Ambulance are accountable to the Defendants. A similar situation existed with respect to the Arsenault Ambulance Service. The evidence discloses a history of the ambulance services requiring frequent negotiation, further ad hoc assistance, advanced payments, etcetera, to keep afloat and the ultimate responsibility for the provision of ambulance service to the public lies with the Province of Nova Scotia.

ISSUE NUMBER FOUR

4. Are the Defendants liable to HMC on the basis of abuse of public authority?

[76] There is no disagreement between counsel as to the law on this issue. Justice Anderson in *Zutphen Brothers Const. v. N. S. (Attorney General)* (1993), 125 N.S.R. (2d) 34 emphasized the duty of Government to treat bidders fairly in the tendering process and said at p. 39:

> I want to again stress in this particular case the importance of fairness in the awarding of contracts which utilize public's funds in the care of Government officials.

[77] Similarly, I concur in the view expressed by Parrett, J. in *Carrier Lumber Ltd. v. British Columbia*, [1999] B.C.T.C. TBEd. AU. 192 (B.C.S.C.) where he said at p. 502:

> When public servants choose to embark on such conduct, utilizing the powers they hold to cause damage to others and to cover their own actions, they must understand, clearly and unequivocally that they will be held accountable for such abuse.

[78] Justice Parrett's remarks were preceded by the finding in that case that the Defendant public servants had conducted themselves in both a deceptive manner and on the exercise of bad faith. The bad faith was illustrated by attempts in conduct calculated to conceal their real actions and motivations

and to create a different appearance calculated to cast the blame and the resulting losses on the Plaintiff.

[79] In cases such as *Roncarelli* commented on in *CheticampFisheries*, above, the abuse was flagrant, not connected with the purposes for which the powers were given and done with the specific intent of harming the Plaintiff.

[80] The evidence in this case was lengthy and the briefs filed on behalf of the parties, both pre and post trial, are extensive. I do not propose covering every evidentiary or factual issue raised. The Plaintiff's in their pre-trial brief have raised a number of alleged examples of abuse of authority.

[81] The first was the cancellation of HMC's contract. As is clearly indicated, Dr. Murphy issued the directive to Metro and District Ambulance and I have covered in some detail what I conclude was known by Dr. Murphy when he issued that directive. While I can question, particularly with the benefit of hindsight the efficacy of that directive, I hasten to add that it is not for the court to substitute its opinion, particularly in areas where it has no expertise

as to what decision should at any given point of time be made. There is no doubt that Dr. Murphy acted in part influenced by his inherent bias in favour of the Victoria General Hospital and the medical world in general. There is no doubt that HMC were at the time the most responsible and experienced in the dispatch field in Nova Scotia. HMC embarked upon training and training programs for its employees and stood ready at all times to take advice and any guidance available as to the continual improvement of the professional services they provided. There is no doubt that the Province of Nova Scotia, despite the knowledge of the communication problems in the Musquodoboit Harbour area and the knowledge that there were no guidelines or protocol set for ambulance or other dispatch personnel, failed in any timely fashion to direct its attention to these deficiencies. HMC certainly brought the requests for guidelines, etcetera, to Dr. Murphy and the Minister repeatedly over a time frame that is hard to comprehend why there was not a definitive protocol approved and issued by the Department of Health as a guideline. All of these factors evoke a measure of concern with respect to the Government's failure to address them and a corresponding appreciation of the professionalism of HMC in bringing them to the attention of the authorities and of developing a level of

professionalism in the absence of such guidance. Nevertheless, the conduct of the Province of Nova Scotia, Dr. Murphy and EHS falls short of an abuse of authority. The ambulance field itself was in somewhat of a state of turmoil. It was far from a financially secure field and Dr. Murphy concluded something had to be done as a result of the difficulties that existed and influenced by his medical roots, directed the consolidation in the Victoria General Hospital. As was pointed out by Gordon Richardson and others, the consolidation process was intended to take place, however, it was anticipated to be consolidated in the hands of free enterprise and indeed the Minister of Health confirmed that on numerous occasions to HMC and in the final analysis, the consolidation move to the Victoria General Hospital was of a relatively short duration and the matter placed out on tender.

[82] There is no doubt that Terry Degen with the authority of the Province finally responded to the repeated requests of HMC for a full investigation of the Laba incident and a commitment that the results of the investigation would be made public. HMC was prepared from the outset to cooperate fully with any such investigation or inquiry and to abide by public disclosure of

findings, even if such indicated a measure of responsibility on its part. One could not ask for more responsible professional approach and I can fully understand their disillusionment when the Province finally released its two page report which I have already indicated Shaune MacKinlay aptly labelled, "Report holds no answers for man's family". The report, while it made recommendations, provided no answers to those involved or to the public. The report represented a reneging by the Province on the direction and authority it had given to Mr. Degen and unfortunately I am unable to conclude that such represents an actionable cause. It is one of many aspects that I conclude are appropriately weighed in the court's discretion with respect to costs.

[83] HMC points to the fact Metro and District Ambulance partnered with another party in the request for proposals when the government's intent to have central dispatch in the hands of private enterprise was put into place after the consolidation move to the V. G. Hospital as being the result of an abuse of authority on the part of Dr. Murphy. I have reviewed my notes and reflected very carefully on the evidence in this regard. There is no evidence in writing or verbal statements or communication by Dr. Murphy to Gordon

Richardson that has been introduced in evidence. What has been stated is Gordon Richardson had an impression that he would not have a "snowball's chance" if he partnered with HMC. He relates this to a telephone conference with Dr. Murphy but does not provide any indication of what was said, what was communicated or any basis upon which he could legitimately reach such a conclusion, other than the fact Dr. Murphy had ordered the consolidation move on a temporary basis to the Victoria General Hospital. With respect, there must be some evidence for me to weigh Mr. Richardson's impression representing an abuse of authority by Dr. Murphy. I have already stated that Dr. Murphy had an inherent bias towards the medical world of which he was a product and that the issue of a centralized dispatch service had been considered I believe in 1993 for possible financial assistance and in any event, was part of the plan of the revamping of the delivery of medical services in Nova Scotia. Its coming into being, even in the circumstances that it occurred, does not, in my weighing of the evidence and on the evidence available to me, reach the threshold of establishing on a balance of probabilities that an abuse of authority by Dr. Murphy or anyone on behalf of the Province of Nova Scotia has been established.

[84] The conduct of the Defendants has relevance with respect to the issue of costs but falls short, in my view, of an exercise of public authority based either on their having knowledge that the exercise was beyond their scope of authority or with malice. HMC has failed to establish on the balance of probabilities that the actions taken were done with any intention of harming HMC.

ISSUE NUMBER FIVE

5. Did the Defendants' actions result in HMC suffering loss of business opportunities?

[85] Neither in the Plaintiff's lengthy pre-trial brief nor in its even lengthier post-trial brief is there a clear dollar figure as to the total damages sought by HMC in the event it was successful. HMC suggests that one could calculate HMC's direct loss from losing the Metro contract as being approximately $58,500.00, exclusive of indirect losses, and legal fees in relation to the Laba incident total $21,547.58. Under the heading of 'abuse of authority' HMC simply requests substantial damages and for 'loss of business opportunity' its brief states, "we appreciate that HMC's loss from being prevented from effectively competing in the RFP for the Western Region is

difficult to quantify". The Minister of Health repeatedly indicated a preference for non-governmental delivery of dispatch services and the move to the Victoria General proved to be temporary. The initial contract with Nova Star gave it an entitlement to a payment of $351,666.66 in the initial phase-in period and compensation of the magnitude of approximately a million dollars annually for the five year term.

[86] The closest HMC comes to establishing an entitlement to damages is in relation to the direction given by Dr. Murphy to Halifax Metro and District Ambulance to consolidate the dispatch services in the Victoria General Hospital. If HMC had been successful in establishing on a balance of probabilities an entitlement of damages due to interference with HMC's contractual relationship with Halifax Metro and District Ambulance, then quite probably a case for substantial damages would result. I would have required further argument and representations and assistance from the parties to comes to grip with the quantification of such damages had there been an entitlement. There is no doubt limiting factors would have to be weighed, including the fact that both the contracts between HMC and Metro and District Ambulance and Arsenault Ambulance contained a thirty day

termination clause and such a short notice does have an element of vulnerability.

[87] In addition, while HMC pressed at the outset for a full public inquiry and disclosure of what went wrong in the Laba incident, such never occurred. HMC were misled by the Province into believing that a full inquiry and statement as to what had transpired would be released. Mr. Terry Degen gave them assurances in that regard, only to be undercut by Dr. Murphy and the Province of Nova Scotia. Shaune MacKinlay of the Halifax Daily News very appropriately entitled her article on the release of the two page public report April 23rd, 1996 as one that 'held no answers for the family'. It held no answers for any of the parties but did make certain recommendations. I find that Mr. Degen was not a party to the change of direction by the Province in deciding, contrary to the instructions given to him, to relay to HMC that there would be a public outline of what had transpired.

[88] Messrs. Tucker and Rafuse acted professionally and responsibly throughout and I appreciate their frustration in deciding not to tender for the dispatch contract because the initial tender documents indicated Dr. Murphy was

going to be involved in the determination of which tender was to be accepted. While this turns out to have been an error and that there was no intent for Dr. Murphy to participate in such process, the Province clearly communicated that to HMC and the public. The overall perception of HMC that Mr. Murphy would not look upon HMC favourably certainly had some justification but nevertheless, in the final analysis, HMC did not tender for the contract despite encouragement from Mr. Degen who, in a relatively short time frame, obtained a fairly clear grasp of what was going on. At one point, he stood back to see what political fallout might occur by the introduction by HMC of the former Premier's Executive Secretary as the solicitor for HMC. There was nothing inappropriate in the utilization of this service but it did add a perception of political intervention and contributed to the clouding of where the matter would likely come to rest.

[89] Dr. Murphy, at one point in his evidence, said that he would have signed a letter of reference for HMC and quite frankly, I do not accept his evidence in that regard. I also had difficulty with respect to the increased detail Dr. Murphy was able to provide at trial compared to his evidence on Discovery. I have found that his motivation has been to attempt to retain the dispatch

services in the medical world and in particular the Victoria General Hospital but the evidence fell short that he acted with malice or wrongful intent as relates to HMC.

[90] In summary, had I found entitlement to damages, I would have required further representations and assistance from counsel for quantification. I would answer this issue in the affirmative only to the extent that the contractual relationship between the Province and Metro and District Ambulance was subject to the direction by Dr. Murphy and the clear indirect injuries suffered by HMC has not been established on the balance of probabilities as actionable.

COSTS

[91] Counsel are entitled to be heard on the issue of costs and disbursements. Normally, and I, like every other justice, have written innumerable decisions reiterating the fundamental rule that costs follow the event - CPR 63.03. However, it is subject to the proviso “unless the court otherwise orders” and so costs are in the discretion of the court. I want to indicate my preliminary view with respect to the issue of costs; namely, that while I

have found HMC fell short of establishing an actionable entitlement to damages, nevertheless, the conduct of the Defendants indicates to me that probably a proper exercise of discretion would be to deny the Defendants costs following the event and to consider granting costs and disbursements to the HMC even though it was not successful. I leave these thoughts with counsel and hope that they will be able to resolve the issue of costs failing which they are entitled to be heard and in that event I would ask that they file and exchange their views on costs within two weeks of receipt of this decision.

J.