The Queen (*Plaintiff*) *v.* **Mackinnon** (*Defendant*)

Jackett P.—Ottawa, February 26, March 17, 1970.

Practice—Place of hearing—Discovery—Motion to compel answers—Action for damages for injuries to serviceman—Defendant in Halifax—Plaintiff's motion set down for Ottawa—Policy of court to meet litigant's convenience—Costs.

MOTION.

R. W. Law and *N. M. Cutler* for plaintiff.

H. E. Wrathall for defendant.

JACKETT P.—On February 26, 1970, on the hearing in Ottawa of an application to compel answers on examination for discovery, I made an order reading as follows:

> Upon the application of the Deputy Attorney General of Canada dated February 9, 1970 for further answers on examination for discovery, the solicitor for the Defendant having agreed that the document attached hereto that is dated February 26, 1970 and has been signed by him may be treated as the answers so required, and the solicitor for the Deputy Attorney General of Canada having agreed to accept such document as such answers, the application is dismissed.
>
> I am taking the question of costs of the motion under consideration and I am asking counsel for each party to write a letter to the Registry setting out his position regarding costs briefly.

It should be explained that the arrangement, under which a solicitor's statement was given, and accepted, instead of requiring the defendant to reattend and answer questions was worked out at the suggestion of the court only after counsel for the defendant had been given a full hearing and it had been made clear to him why the court did not find his reasons for objecting to the defendant being required to answer the questions acceptable. In the ordinary course, therefore, the costs of the motion would have been awarded against the defendant in any event of the cause.

The reason why I reserved the question of costs was that, as it seemed to me, the motion should have been brought in Halifax, and not in Ottawa. I raised this question during the hearing, and, when I gave counsel an opportunity of taking a position in writing with regard thereto, I was hopeful that, upon taking further instructions, counsel for the Deputy Attorney General might have been in a position to take a position whereby the Crown would have submitted to an order that might have met the circumstances. As he did not, I must deal with the matter.

This is an action by Her Majesty in right of Canada against the defendant as executrix of her deceased husband's will for damage sustained by the Crown as a result of injuries sustained by a member of the Canadian Armed Forces in an automobile collision in Dartmouth, Nova Scotia, in which the defendant's husband sustained injuries as a result of which he died. The Crown's claim is for $5,288.36 and costs.

It appears that solicitors for the parties arranged informally for examination for discovery in Halifax of the defendant and that such examination took place on January 13, 1970.

On February 9, 1970, a notice of motion, addressed, *inter alia,* to the defendant's solicitor, was filed in the court. The notice shows that it was proposed to seek an order from the court that the defendant, who lives in Dartmouth, Nova Scotia, be required to attend at Ottawa, Ontario, at her own expense, to answer certain questions that she had failed to answer. That motion was made returnable in Ottawa, Ontario, on February 26, 1970.

The defendant's "Answer", or Statement of Defence, was filed by H. E. Wrathall of Halifax, Nova Scotia, as solictor for the defendant and was conveyed to the Registry under cover of a letter from Mr. Wrathall's office. Presumably Mr. Wrathall, similarly, dealt directly with the office of the Deputy Attorney General so that it was clear that both the defendant and her solicitor were situated in or near the City of Halifax.

In his submission concerning the question of costs, Mr. Law, who appeared for the Deputy Attorney General of Canada, says:

> In the ordinary course it is the practice—and the proper practice—to bring motions, and indeed to have trials at the location most convenient to the party opposing the Crown and for this reason the examination for discovery herein was conducted at Halifax.

While I do not necessarily accept this as a proper statement of the proper practice in all circumstances, I think it is a fair statement of the proper practice for such a case as the one under consideration.

Counsel for the Crown, however, seems to think that, because it "was always clear" that the defendant was bound to answer the questions that were the subject of the dispute, this in some way justified a departure from the practice in question and warranted making the motion in question returnable in Ottawa. I cannot accept it that it was "always clear" that the defendant was bound to answer the questions. That did not become "clear" until after argument of the motion was completed and the court had reached a conclusion with regard thereto. The place of convenience for making a motion returnable cannot depend on whether one side or the other is successful, or is likely to be successful.

I am prepared to assume that, when the solicitor who filed the motion for the Deputy Attorney General did so, he made it returnable in Ottawa because there were regular motion days in Ottawa and none in Halifax until the general sittings there in June. The court was in Halifax the week before this motion was brought on in Ottawa; and, in any event, if a request is made to the Registry, arrangements will be made to have a judge attend in Halifax or any other convenient centre for the hearing of any motion. There might have been some justification for a solicitor who has only an occasional case in the court not to realize this. A solicitor in the office of the Deputy Attorney General, or in any other office that has a continuing volume of

business in the court, must be deemed to know that the court will arrange to have a judge where his presence is required by the convenience of the litigants for the hearing of either a trial or a motion. The court has consistently made this clear, both from the bench and otherwise, for some time past.

In the circumstances, I am of opinion that the order as to the cost of this motion should be designed to compensate the defendant, at least in part, for the extra cost incurred as a result of being required to meet in Ottawa, rather than in Halifax, a motion not only that she answer certain questions, that she should have answered, but that she attend at her own expense in Ottawa to answer them, when there was no possible justification that she be asked to come to Ottawa for that purpose.

Such a motion is bound to bolster the impression, that is much too prevalent, that this court is an "Ottawa court". There is no justification in the statutory law for this erroneous view, and the judges have been endeavouring to ensure that the court operate, as it is supposed to do, throughout all of Canada and in such a way as to bring equally good service to litigants no matter where they are. If it is going to succeed in this effort, it must have the cooperation of the Bar.

My judgment is, therefore, that the defendant is entitled to be paid, as the costs of this motion, $250, in any event of the cause. In a very rough and conservative manner, I have computed this amount as being the solicitor and client costs of sending counsel to Ottawa to oppose the motion less the party and party costs that would have been payable to the Crown if the motion had been made in Halifax.