Date: 19980615 Docket: C.A.C. 143295

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Xidos, 1998 NSCA 148

Chipman, Pugsley Bateman, JJ.A.

BETWEEN:

JOHN XIDOS	)	Ralph W. Ripley
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Douglas L. Richard, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
	)	
Respondent	)	Appeal Heard:
	)	June 15, 1998
	)	
	)	
	)	Judgment Delivered:
	)	June 15, 1998

THE COURT: Leave to appeal is refused as per oral reasons for judgment of Bateman, J.A., Chipman and Pugsley, JJ.A. concurring.

<u>BATEMAN, J.A.:</u> (Orally)

This is an appeal from a decision of Justice Edwards of the Supreme Court wherein he set aside a stay of proceedings granted by a Provincial Court judge.

There is an extensive history to these legal proceedings involving the appellant, John Xidos. For the purpose of this appeal, it need only be said that Mr. Xidos was charged on a three count information involving an alleged failure to comply with notices issued by Revenue Canada requiring the provision of certain corporate information. His counsel made application to stay the charges based upon an alleged breach of **ss.7** and **8** of the **Canadian Charter of Rights and Freedoms.**

At the hearing of the stay application the Crown took issue with the sufficiency and admissibility of certain of the Affidavit evidence submitted by the applicant and sought a ruling on that matter as a threshold issue. Due to a confusion in procedure and lack of clarity on the part of the Crown attorney, the Provincial Court judge rendered his decision granting the stay without permitting the Crown to tender evidence on the main motion. The judge, initially, had not appreciated that the Crown was seeking a ruling on the threshold issue, but reserving the right to call evidence on the motion.

The Crown successfully appealed to the Supreme Court. In his decision, Justice Edwards referred to the remarks of the Provincial Court judge, wherein the judge recognized, albeit late in the proceeding, that the Crown had intended to reserve the right to call evidence. The Provincial Court judge determined that he would not, at that stage, permit the Crown to call its evidence. He remarked that it would be unfair to the Defence to do so, the Crown having heard the "summations and comments" of the Defence on the motion.

On this issue Justice Edwards said:

> . . . it is my opinion that he should have permitted the Crown to call Mr. Martin at that point. In essence, what he did was decide that application after having heard evidence from one side only. In my view, it would not have been prejudicial to Mr. Xidos at that stage to allow the Crown to call Mr. Martin. . . . The point is, the Crown should have been given the opportunity to call evidence.
>
> . . . The Crown's intent was clearly to have a ruling on whether or not the *Charter* was activated in this particular situation and, if it was, that it be given the opportunity to call evidence on whether or not there had been *Charter* infringement.
> (Emphasis added)

The transcript reveals that Defence counsel's submissions ("summations and comments") to that point in the proceeding related only to the threshold issue of the Affidavits and not the motion in its entirety. There would not, then, have been any unfairness in permitting the Crown to proceed and Justice Edwards was correct in so finding.

Having reviewed the transcript and the submissions of counsel Justice

Edwards said "... I am satisfied that the Crown had taken the position that it was reserving the right to call evidence." This is a finding of fact, supported by the evidence, with which we are not entitled to interfere (**R. v. Surette** (1993), 123 N.S.R. (2d) 152 (N.S.C.A.)). Having so found, Justice Edwards concluded that the Provincial Court judge erred in not permitting the Crown to present evidence on the motion.

The appellant maintains, as well, that Justice Edwards, having sat on a previous motion in this matter, on which occasion he was called upon to review certain documents which were allegedly the subject matter of solicitor client privilege, should not have heard this appeal. The record does not reveal that the appellant took any issue with Justice Edwards presiding at the hearing of the appeal. Nor are we satisfied that, in these circumstances, there arises any issue of real or apprehended bias on the part of the Summary Conviction Appeal judge.

An appeal of the decision of a Summary Conviction Appeal judge, pursuant to **s.839** of the **Criminal Code**, requires leave of the court and is limited to questions of law. The error of law required to ground jurisdiction in the Court of Appeal is that of the summary conviction appeal judge (**R. v. Emery** (1981), 61 C.C.C. (2d) 84 (B.C.C.A.)). There is no such error here.

The appellant having failed to raise a question of law, leave to appeal is refused. For clarity, the order of the Summary Conviction Appeal judge remitting the matter for hearing of the motion for a stay of proceedings is affirmed.

Bateman, J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.

C.A.C. No. 143295

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

JOHN XIDOS Appellant	)	REASONS FOR JUDGMENT BY:
- and -	)	
HER MAJESTY THE QUEEN	)	Bateman, J.A. (Orally)
Respondent	)	