C.A. Nos. 135904 & 136205

NOVA SCOTIA COURT OF APPEAL
Cite as: Begg v. Halifax (County), 1997 NSCA 82

Hallett, Jones and Roscoe, JJ.A.

BETWEEN:	)	
	)	
AYLMER R. BEGG, carrying on business under the name and style of A.R.B. RECYCLING	)	Appellant appeared in person
	)	
Appellant	)	
	)	
- and -	)	
	)	
MUNICIPALITY OF THE COUNTY OF HALIFAX	)	Roderick H. Rogers for the Respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard: March 25, 1997
	)	
	)	
	)	
	)	Judgment Delivered: March 26, 1997

THE COURT: The appeal is dismissed with costs in the amount of $1,000.00, including disbursements as per reasons for judgment of Roscoe, J.A.; Jones and Hallett, JJ.A., concurring.

ROSCOE, J.A.:

These are appeals from two decisions made by Supreme Court judges in Chambers. The first is a decision of Justice Jamie W. S. Saunders dismissing an application made by the appellant to have Roderick Rogers and the firm of Stewart

McKelvey Stirling Scales removed as solicitors for the respondent. The second is a decision of Justice Suzanne M. Hood striking a jury notice for the trial of the action in this case which is scheduled to be heard next week.

The action was commenced in June, 1995, and arises out of a contract respecting the collection of recyclable materials by the appellant on behalf of the respondent Municipality. The appellant, in the amended statement of claim, alleges breach of contract, negligent misrepresentation and unjust enrichment.

These appeals are from interlocutory discretionary orders and therefore the standard of review is that described in **Exco Corp. Ltd. v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331 (C.A.) where MacKeigan, C.J.N.S. stated:

> This Court is an appeal court which will not interfere with a discretionary order, especially an interlocutory one such as this that is now before us, unless wrong principles of law have been applied or patent injustice would result.

Justice Saunders dismissed the application to have the respondent's solicitors removed because first, it was not made in a timely fashion, and second, in applying the test established in **MacDonald Estate v. Martin** (1990), 48 C.P.C. (2d) 113 (S.C.C.), there was no conflict in any event. That test is:

> Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

It appears from the affidavits filed, that although the appellant attempted to retain Stewart McKelvey Stirling Scales, in relation to this action, in July, 1995 and faxed documents to them, the law firm did not accept the retainer and notified the appellant that it could not act within two days of receiving the faxed documents. It is also clear that the documents were copies of letters from the appellant to the Prothonotary and court orders which were on file in the Prothonotary's office and therefore contained nothing of a confidential nature. Furthermore, the Chambers judge found there was no evidence of

possible prejudice to the appellant.

In my opinion, the Chambers judge did not err in principle or in the exercise of his discretion, nor has the appellant proven the existence of any patent injustice as a result of the dismissal of the application to have the solicitors removed. The appeal therefrom should accordingly be dismissed.

Justice Hood allowed the respondent's motion to set aside the Notice of Trial With a Jury because, in her view, the issues respecting the interpretation of the tender documents and the contract would involve questions of law and therefore would be inappropriate for consideration by a jury. The principles applicable to a motion to strike a jury notice were reviewed by this Court in **Zinck v. Allen** (1970), 1 N.S.R. (2d) 655 where Cooper, J.A. stated at p. 667:

> It is apparent . . . that a Court of Appeal may inquire into the question as to whether or not the discretion has been exercised upon proper grounds. If, as a result, the Court is satisfied that the discretion has been exercised judicially, then there is no jurisdiction to review the exercise of the discretion even if the Court on appeal should be of opinion that it was exercised mistakenly . . .

Having reviewed the pleadings and considered the submissions of the parties, there is no reason to interfere with the exercise of discretion by the trial judge. The appeals should therefore be dismissed with costs in the amount of $1,000.00, including disbursements.

Roscoe, J.A.

Concurred in:

Jones, J. A.

Hallett, J.A.