

Date: 19971120

Docket: C.A. 141738

NOVA SCOTIA COURT OF APPEAL

Cite as: MacDonell v. M&M Developments Ltd., 1997 NSCA 194

**BETWEEN:**

JOSEPH A. MacDONELL	)	Appellant in person
	)	
Appellant	)	
	)	
- and -	)	
	)	Richard S. Niedermayer
	)	for the Respondent
M&M DEVELOPMENTS LIMITED,	)	
	)	Robert W. Wright, Q.C.
Respondent	)	for the Third Party
	)	
- and -	)	
	)	
MCINNES COOPER & ROBERTSON, a	)	
registered partnership and MICHAEL I. KING	)	Application Heard:
	)	November 20, 1997
Third Parties	)	
	)	Decision Delivered:
	)	November 20, 1997
	)	
	)	
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**BEFORE:** THE HONOURABLE JUSTICE FREEMAN  
THE HONOURABLE JUSTICE HALLETT  
THE HONOURABLE JUSTICE BATEMAN

**HALLETT, J.A.: (Orally)**

This is an application to the Court for an Order striking Ground 2 of an Amended Notice of Appeal filed by the plaintiff/appellant following a decision of Justice Saunders of the Supreme Court to grant a non-suit motion in a proceeding involving a land dispute. The motion was granted on the ground that the plaintiff and his predecessors, through whom he claimed title, failed to assert, within a reasonable time, a claim to the lands the defendant, M&M claimed ownership.

The trial judge found that this failure constituted laches which he held absolutely barred the plaintiff's claim to the lands.

Ground 2 of the Amended Notice of Appeal states:

2. Although the learned Trial Judge made no detailed analysis of the competing chains of title, the Appellant accepts that the learned Trial Judge, in barring the Appellant's claim on the ground of laches, found the Appellant or the heirs or successors in title to Edward C. McDonell to have had good paper title.

In the event that this Honourable Court finds that the learned Trial Judge did not so find, the Appellant appeals the finding of the learned Trial Judge in that he erred in not finding that Edward C. McDonell held title to the islands in question which subsequently passed to his heirs or successors in title.

In making the non-suit motion, M&M did not prejudice its right

to call evidence in support of its claim to ownership of the land in question if the application had been refused by the trial judge (**Civil Procedure Rule 30.08**).

### **First Paragraph of Ground 2**

With respect to the assertion in the first paragraph of Ground 2, the trial judge did not make an analysis of the competing chains of title. He did not make a finding that the plaintiff or the heirs or successors in title to Edward C. McDonell had good paper title.

### **Second Paragraph of Ground 2**

With respect to the second paragraph of Ground 2, if this Court, on the hearing of the appeal by the plaintiff, which is scheduled for January 13, 1998, were to decide that the trial judge erred in granting the motion, this Court could not decide if the trial judge erred in not finding “that Edward C. McDonell held title to the islands in question which subsequently passed to his heirs or successors in title”. The

reason being that, the evidence and the submission of the defendant M&M, respecting its paper title, and evidence respecting acts of possession by M&M and its predecessors were not advanced by M&M prior to the motion for non-suit having been granted. Under the circumstances, even if the appeal is successful, this Court could not grant the relief sought by the plaintiff in the second paragraph of Ground 2 as M&M has the right to adduce evidence and make submissions to support its claim to the lands. It is not for this Court to consider this issue before a trial has been concluded.

Accordingly, Ground 2 is struck from the Amended Notice of Appeal.

On the appeal, we will determine if the trial judge erred in granting the non-suit motion.

Hallett, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.



