NOVA SCOTIA COURT OF APPEAL
Citation: Porteous v. Hurley, 2006 NSCA 64

Date: 20060524
Docket: CA 258017
Registry: Halifax

Between:

Richard Porteous

Appellant

v.

Daniel A. Hurley and Norma J. Hurley

Respondents

Judges:	Roscoe, Oland, and Fichaud, JJ.A.
Appeal Heard:	May 19, 2006, in Halifax, Nova Scotia
Held:	Appeal is dismissed with costs which are fixed at $2,500 plus disbursements per reasons for judgment of Roscoe, J.A.; Oland and Fichaud, JJ.A. concurring.
Counsel:	Douglas Shatford, Q.C., for the appellant Cindy A. Bourgeois, for the respondents

Reasons for judgment:

[1] After a three day trial of a boundary dispute and action for trespass involving woodlots in Birchwood, Cumberland County, Justice Charles E. Haliburton dismissed the appellant's claim. The decision under appeal, 2005 NSSC 229, is reported as [2005] N.S.J. No. 339 (Q.L.).

[2] The trial judge concluded that the evidence presented by the parties was insufficient to establish the boundary line between the properties. The respondents' counterclaim for a declaration that they owned the 13.44 acres in dispute was also dismissed but they have not cross-appealed.

[3] The appellant submits that the trial judge erred in law by misapprehending the evidence, by reaching incorrect conclusions and inferences, and by arriving at an unreasonable decision which was not supported by the evidence.

[4] The issues raised by the appellant are essentially questions of fact. The appellant is in effect asking this court to retry the matter. That is not our role. The standard of review we must apply is as stated by Cromwell J. in **MacNeil v. Chisholm**, 2000 NSCA 31:

> [8] Finding facts and drawing evidentiary conclusions from them are roles of the trial judge, not the Court of Appeal: see Toneguzzo-Norvell v. Burnaby Hospital, [1994] 1 S.C.R. 114 at 121. An appellant cannot challenge a trial judge's findings of fact simply because the appellant does not agree with them: Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 at paragraphs 88 and 90. Findings of credibility are "... eminently a matter for the trier of fact.": see A.W. Mewett, Witnesses (1991) at page 11 - 3.
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> [9] The judge, as the trier of fact, must sort through the whole of the evidence and decide which to accept and which to reject so as to piece together the more plausible view of the facts. Many considerations properly influence this decision, including the nature of any unreliability found in a witness's testimony, its relationship to the significant parts of the evidence, the likely explanation for the apparent unreliability and so forth. The trial judge may find that some apparent errors of a witness have little or no adverse impact on that witness's credibility. Equally, the judge may conclude that other apparent errors so completely erode the judge's confidence in the witness's evidence that it is given no weight.

> [10] Making these judgments is the job of the trial judge and the Court of Appeal generally should not substitute its own judgment on these matters. An appellant alleging an error of fact must show that the trial judge's finding is clearly wrong. Not every error in findings of fact permits appellate intervention. As Lamer, C.J.C. said in Delgamuukw, supra at para 88:
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> > ... it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. The error must be sufficiently serious that it was 'overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue'. (emphasis added)

[5] Furthermore, with respect to a trial judge's weighing of the evidence, the role of the appellate court is severely limited as explained in **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235:

> 21 ... First, in our view, the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.
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> 22 Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
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> 23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our

> respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.

[6] See also **H.L. v. Canada (Attorney General)** 2005 SCC 25 at ¶ 55.

[7] We have studied the record, with particular attention to the plans and the expert evidence of the surveyors, and carefully considered the argument of the appellant. In our opinion the burden on the appellant to show reversible error on the part of the trial judge has not been discharged. The evidence amply supports the findings of fact made and the inferences drawn by the trial judge. We are not persuaded that he erred in weighing the evidence or in concluding that the evidence was insufficient to establish a boundary line.

[8] The appeal is therefore dismissed with costs which are fixed at $2,500 plus disbursements.

Roscoe, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.