NOVA SCOTIA COURT OF APPEAL

Citation: *Dalrymple v. Halifax (Regional Municipality)*, 2017 NSCA 6

Date: 20170118
Docket: CA 448249
Registry: Halifax

Between:

Charles Dalrymple and Angela Dalrymple

Appellants

v.

Halifax Regional Municipality

Respondent

Judges:	Fichaud, Farrar, and Bryson, JJ.A.
Appeal Heard:	November 24, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bryson, J.A.; Fichaud and Farrar, JJ.A. concurring
Counsel:	David A. Grant, for the appellants Randolph Kinghorne and Shawnee Gregory, for the respondent

Reasons for judgment:

[1] Charles and Angela Dalrymple operated an unlicensed salvage yard on the Clam Bay Road in the Halifax Regional Municipality. The property is divided into two lots. One abuts the public road. The Dalrymples' home and a large two-bay garage are located on this lot. The second lot is behind the first and is fenced off, and not visible from the public road.

[2] Responding to a complaint, a Municipality Compliance Officer visited the Dalrymple property on May 27, 2013. He considered that the property did not comply with the Municipality's *Charter*, proscribing Dangerous or Unsightly Premises. He issued four Notices of Violation relating to debris and derelict vehicles on each lot. The Notices gave the Dalrymples time to clean up their property, following which a re-inspection would be conducted.

[3] On June 21, 2013, the property was re-inspected. Some cleanup had occurred. Mr. Dalrymple impeded the compliance officer in the completion of his inspection. The officer was not permitted access to the rear lot.

[4] On June 26, 2013 the officer returned, accompanied by the RCMP. He served the Dalrymples with four Orders to Remedy, corresponding with the four Notices of Violation previously issued on May 27.

[5] The Dalrymples appealed the two Orders to Remedy relating to the rear parcel of the property. No appeal was filed with respect to the property fronting the public road.

[6] Because the Dalrymples were working to obtain proper permits to allow operation of their salvage business, the Municipality withdrew the two Orders to Remedy relating to the rear parcel. The appeal of those Orders to Remedy did not proceed.

[7] On May 21, 2014, the Dalrymples filed an application in Supreme Court seeking an injunction restraining the Municipality from entering their land and removing anything from it, and various declaratory relief.

[8] HRM's *Charter* permits the Municipality to enter and remediate property which fails to comply with Orders to Remedy. In this case, enforcement was suspended pending outcome of the Dalrymples' application to Court.

[9] The Honourable Justice Glen McDougall dismissed the Dalrymples' application. He found it constituted a collateral attack on the Orders to Remedy previously issued which had not been appealed. He agreed with the Municipality that the Municipality's *Charter* was violated even when some debris would not be visible from the road. He did not agree with the Dalrymples that inspection of their property constituted an unreasonable search in violation of s. 8 of the *Canadian Charter of Rights and Freedoms*. Further, he found that remediating the property was not an "unreasonable seizure", as contemplated by s. 8 of the *Charter of Rights* (2015 NSSC 243).

[10] The Dalrymples raise six inter-related grounds of appeal, some of which are consolidated in their factum. I would re-order the grounds as follows:

> Did the judge err in holding that:
>
> (1) the application was a collateral attack on the un-appealed Orders to Remedy?
>
> (2) the Dalrymples lacked standing to seek declaratory relief?
>
> (3) the properties were unsightly or dangerous in view of their use as a salvage yard?
>
> (4) the legislation was not overbroad?
>
> (5) the Municipality's proposed remediation did not offend s. 8 of the *Charter* (unreasonable search and seizure)?

Collateral Attack

[11] The Municipality's *Charter* authorizes issuance of an Order to Remedy Dangerous or Unsightly Premises. Any such order may be appealed after it is made. Although the Dalrymples questioned whether they had been served with the Orders to Remedy the front parcel, Justice McDougall found as a fact that they were appropriately served. Citing the Supreme Court in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, the judge found that the Dalrymples were indirectly and collaterally attacking the unappealed Orders to Remedy.

[12] As described in *Garland*, the collateral attack doctrine is part of the court's inherent jurisdiction to control abuses of process, (also see *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at ¶ 22, 34). The rule against collateral attack

extends to collateral attacks on constitutional grounds: *Carpenter Fishing Corp. v. Canada*, 2002 BCCA 611 at ¶ 8. The Dalrymples did not appeal the Orders to Remedy their front lot. But they argue that their premises were not dangerous or unsightly. They also add new arguments about why the Municipality's *Charter* is unconstitutional.

[13] The judge had a discretion whether to apply the collateral attack doctrine in this case. The Dalrymples have not shown that he committed an error of principle or that a patent injustice results from his decision.

[14] Related to this ground of appeal, the Dalrymples have sought an order from this Court compelling the Municipality to hear appeals of the Orders to Remedy the front parcel, served more than three years ago. They do not explain what jurisdiction there is to order such a remedy and none is apparent. *Mandamus* is available to compel performance of a public duty owed to an applicant, (*Sand, Surf and Sea Ltd. v. Nova Scotia (Transportation and Public Works)*, 2005 N.S.J. 340, aff'd 2006 N.S.J. 301 (N.S.C.A.)). There is no such public duty in this case.

Standing to Seek Declaration

[15] The judge, on his own motion, determined that the Dalrymples lacked standing to seek a declaration. Another process was available to them. They could have appealed the Orders to Remedy. The Dalrymples protest that this issue was not raised or addressed before the judge. Because the judge went on to consider the merits, it is unnecessary to comment on whether the Dalrymples lacked standing.

Premises Not Unsightly

[16] The Dalrymples argue that the property really was not dangerous and unsightly and should not be subject to remedial action by the Municipality owing to its use as a salvage yard. Here it will be convenient to elaborate on the "unsightly or dangerous" premises regime set out in Part XV of the Halifax Regional Municipality's *Charter*. Section 3(q) describes "dangerous or unsightly":

> "dangerous or unsightly" means partly demolished, decayed, deteriorated or in a state of disrepair so as to be dangerous, unsightly or unhealthy, and includes property containing

(i) ashes, junk, cleanings of yards or other rubbish or refuse or a derelict vehicle, vessel, item of equipment or machinery, or bodies of these or parts thereof,

(ii) an accumulation of wood shavings, paper, sawdust, dry and inflammable grass or weeds or other combustible material,

(iia) an accumulation or collection of materials or refuse that is stockpiled, hidden or stored away and is dangerous, unsightly, unhealthy or offensive to a person, or

(iii) any other thing that is dangerous, unsightly, unhealthy or offensive to a person, and includes property or a building or structure with or without structural deficiencies

(iv) that is in a ruinous or dilapidated condition,

(v) the condition of which seriously depreciates the value of land or buildings in the vicinity,

(vi) that is in such a state of non-repair as to be no longer suitable for human habitation or business purposes,

(vii) that is an allurement to children who may play there to their danger,

(viii) constituting a hazard to the health or safety of the public,

(ix) that is unsightly in relation to neighbouring properties because the exterior finish of the building or structure or the landscaping is not maintained,

(x) that is a fire hazard to itself or to surrounding lands or buildings,

(xi) that has been excavated or had fill placed on it in a manner that results in a hazard, or

(xii) that is in a poor state of hygiene or cleanliness;

[17] "Derelict vehicles" are described in paragraph 3(u):

(u) "derelict vehicle, vessel, item of equipment or machinery" includes a vehicle, vessel, item of equipment or machinery that

> (i) is left on property, with or without lawful authority, and
>
> (ii) appears to the Administrator to be disused or abandoned by reason of its age, appearance, mechanical condition or, where required by law to be licensed or registered, by its lack of licence plates or current vehicle registration;

[18] Courts interpret legislative words "…in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament", (*Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, ¶ 21; *R. v. Hicks*, 2013 NSCA 89 at ¶ 19). Section XV of the Municipality's *Charter* is part of the Municipality's enabling legislation, S.N.S. 2008, c. 39, as amended.

[19] The Dalrymples' front lot was littered with apparently disused and inoperable vehicles, construction materials, automotive parts, equipment, machinery, wheels, tires and the like. Photographs amply corroborate the Municipality's testimonial evidence to this effect.

[20] The Dalrymples say that the condition of the property must be related to its business use and that section XV of the *Charter* should be applied with that use in mind, *Colchester (County) v. Spencer*, 2004 NSSC 156, at ¶ 23 and *Doucette v. Halifax (Regional Municipality)*, 2015 NSSC 151, at ¶ 56 where Justice Moir said, in part:

> … So, a junkyard in a place zoned for junkyards is not unsightly just because it is a junkyard. It has to be unsightly as junkyards go …

[21] The Dalrymples' use of their property as a salvage yard can only provide a contextual basis for interpreting Section XV of the *Charter* if that use was legal at the relevant time. They claim to have since received a salvage yard permit from the Provincial Department of the Environment. That evidence is not before the Court, but in any event they did not have such a permit when the Municipality issued its Orders to Remedy, nor when Justice MacDougall considered the Dalrymples' application.

[22] Related to this argument is a submission that "dangerous or unsightly" does not apply to "items behind the fence", presumably in the back lot. But the Orders to Remedy only applied to the front lot which is not behind any fence.

[23] The Dalrymples then advance this argument about alleged legal and factual errors by the judge:

> The evidence clearly shows that on the front lot the material was inventory of sorts and was maintained in a reasonable fashion for that business. The vehicles were identified as not being abandoned and were used in the course of his business. The construction material such as trusses were ready for sale and reuse. The appellants submit that the trial judge made a palpable and overriding error of fact in finding that the business was restricted to the rear lot only and then consequently was in error when he applied the definition of unsightly or dangerous to the inventory because he was not using a salvage yard or recycling yard standard in coming to the conclusion. Had he applied this then he would have concluded that there was no breach of the statute.

[24] Here the Dalrymples accuse the judge of making findings that he did not make and incorrectly answering questions which they did not ask and he did not answer. The judge was not asked to make factual findings of unsightliness. The Dalrymples' application sought declarations of invalidity of ss. 358 (1), (2) and (3) and 362 (1) and (2) of the Municipality's *Charter* (power to remediate) and a declaration that the statutory definition of "unsightly" was limited to what could be viewed by the public and was "objective", not arbitrary.

[25] The judge answered the questions asked. He found that the foregoing sections of the Municipality's *Charter* did not violate s. 8 of the *Canadian Charter of Rights and Freedoms* (¶ 40 below).

[26] He agreed that the test for unsightly and dangerous premises was objective, citing *Aloni v. Chester (District)*, 1996 NSCA 83. He disagreed that "dangerous or unsightly" must be visible to the public in order to violate the statute, citing *Delport Realty Ltd. v. Halifax (Regional Municipality)*, 2010 NSSC 290, at ¶ 24 and 25. A perusal of the definition of "dangerous or unsightly" reveals that it is much broader than what may be offensive to the eye – public or otherwise. Rather, the statutory language speaks of the offensive *condition* or state of the property. He made no errors of law in so finding.

Overbroad Legislation – *Charter of Rights*

[27] Confusing different *Charter* rights, the Dalrymples contend that the Municipal authority to enter and sell their personal property is a breach of the *Charter* because it is "overbroad" for the purpose intended.

[28] The concept of overbroad legislation is linked to s. 7 of the *Charter* which provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[29] That legislation could be "overbroad" first appeared in *R. v. Heywood*, [1994] 3 S.C.R. 761. Generally, it means that state action goes beyond what is necessary to accomplish the statutory purpose. It is described as one of the principles of fundamental justice, referred to in s. 7 of the *Charter*, and thus forms the basis for a finding of unconstitutionality regarding laws affecting life, liberty, or security of the person.

[30] The Dalrymples have not argued s. 7 of the *Charter*, and those rights are not engaged in this case. Their argument is that the power to enter private property and destroy or sell chattels is more than is necessary to achieve the statutory purpose. They submit that "a simple penalty imposed after conviction of a charge under the statute should be enough to achieve compliance". The Dalrymples characterise the power to remediate as "unreasonable".

[31] It is hard to imagine why the power to enter and remediate would be included in the statute if this proposition were true. In this case, entry and seizure would naturally follow from the Dalrymples' failure to act on the Orders to Remedy so the necessity for this power seems apparent on the facts.

[32] Surely if compliance is a reasonable legislative goal, it is reasonable to provide that it occurs. Penalties for non-compliance and the power to remedy non-compliance are different things. The former penalizes non-compliant behaviour; the latter ensures compliance. In any event, "overbreadth" is not a relevant analytical tool in this case because it arises from a s. 7 *Charter* argument which the Dalrymples have not raised.

Section 8 of the *Charter* – Search and Seizure

[33] The Dalrymples further submit that any entry on their premises to remove allegedly offensive material would constitute an illegal search and seizure and offend their rights under s. 8 of the *Canadian Charter of Rights and Freedoms*.

[34] Section 8 of the *Charter* provides that "everyone has the right to be secure against unreasonable search or seizure". This section does not protect any

purported "property" rights, but rather privacy interests. See, for example, Hogg, *Constitutional Law of Canada*, 5th ed, Supplemental Volume 2, pp. 48.5 and following.

[35] The Municipality's *Charter* authorizes warrantless entry onto private property:

> 362 (1) The Administrator may, for the purpose of ensuring compliance with this Part, enter in or upon any land or premises at any reasonable time without a warrant.
>
> (2) Except in an emergency, the Administrator shall not enter any room or place actually being used as a dwelling without the consent of the occupier unless the entry is made in daylight hours and written notice of the time of the entry has been given to the occupier at least twenty-four hours in advance.

[36] Section 8 of the *Charter* does not protect against *any* search or seizure, but only those which are "unreasonable". It is immediately obvious that much regulatory legislation, both at the provincial and federal level, would become extremely difficult to enforce if prior authorization to enter and inspect property were always required to ascertain regulatory compliance.

[37] As the judge recognized, constitutional scrutiny of regulatory legislation may be diminished owing to the salutary effects of the social purposes addressed and the modest intrusions upon privacy and penalties involved. The Supreme Court makes these points in *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] 2 S.C.R. 406:

> [9] The federal and provincial legislatures have, in a number of statutes, included powers of inspection similar to those whose validity is challenged by the respondents in the present case. These statutes deal with areas as diverse as health, safety, the environment, taxation and labour. The common thread is found in their underlying purpose: ***harmonizing social relations by requiring observance of standards reflecting the sometimes delicate balance between individual rights and the interests of society. Inspection -- or the threat of it -- especially if it is done without notice, is a practical means of encouraging such observance.*** […]
>
> [13] It is thus impossible, without further qualification, to apply the strict guarantees set out in *Hunter v. Southam Inc.*, *supra*, which were developed in a very different context. ***The underlying purpose of inspection is to ensure that a regulatory statute is being complied with.*** It is often accompanied by an

> information aspect designed to promote the interests of those on whose behalf the statute was enacted. The exercise of powers of inspection does not carry with it the stigmas normally associated with criminal investigations and their consequences are less draconian. ***While regulatory statutes incidentally provide for offences, they are enacted primarily to encourage compliance. It may be that in the course of inspections those responsible for enforcing a statute will uncover facts that point to a violation, but this possibility does not alter the underlying purpose behind the exercise of the powers of inspection.*** The same is true when the enforcement is prompted by a complaint. Such a situation is obviously at variance with the routine nature of an inspection. However, a complaint system is often provided for by the legislature itself as it is a practical means not only of checking whether contraventions of the legislation have occurred but also of deterring them.
>
> [15] In view of the important purpose of regulatory legislation, the need for powers of inspection, and the lower expectations of privacy, a proper balance between the interests of society and the rights of individuals does not require, in addition to the legislative authority, a system of prior authorization. Of course the particular limits placed on the inspection scheme must, so far as possible, protect the right to privacy of the individuals affected. […]
>
> [Emphasis added]

[38] Justice Saunders affirmed regulatory authority to inspect without a warrant, in furtherance of a statutory purpose in *R. v. Hicks*, 2013 NSCA 89:

> [46] This brief overview of the scope and purpose of the *Act* serves to highlight the Legislature's clearly stated objectives of protecting the environment for the greater good while at the same time respecting private interests. In my respectful view, the interpretation I have placed upon the impugned words in this case recognizes the laudatory result achieved by permitting inspection – or the threat of it – without notice, as a practical means of encouraging compliance for the sake of the community at large while, at the same time, maintaining a proper balance between the public interest and the individual's right to privacy as described by the Supreme Court of Canada in *Comité paritaire, supra*.

[39] The Municipality's *Charter* does not make it an offence to have unsightly premises – rather it may be an offence to fail to remedy unsightly premises. The evidence was that the Municipality seeks cooperative resolutions with property owners. If an owner disagrees with an Order to Remedy, an administrative appeal is available. Penal consequences are a last resort, confined to perennially recalcitrant offenders.

[40] The judge was plainly satisfied that the statutory power to inspect was further to a legitimate regulatory purpose:

> [59] The regulatory inspections of the Dalrymple property conducted by Mr. Oliver were clearly searches within the meaning of s. 8 of the *Charter*. The inspections were authorized by law, being s. 362 of the dangerous and unsightly premises provisions of the HRM Charter. I am satisfied, based on the authorities, that these provisions are reasonable, and maintain an appropriate balance between HRM's interests and the individual's right to privacy. The provisions allow warrantless entry and inspection of a property owner's yard, where there is a reduced expectation of privacy, while requiring a court order to enter a dwelling where the owner declines to provide consent.

[41] The judge found that the power of inspection did not offend s. 8 of the *Charter*. He made no error in so concluding.

[42] The Dalrymples augment their submissions on unreasonable search by complaining that a *seizure* of their property would also be a breach of s. 8. In this case, the Municipality's proposed actions were designed to remediate problems already identified in the Orders to Remedy, which the Dalrymples had ignored.

[43] The Municipality's *Charter* authorizes remediation against non-compliant property owners:

> 356(1) Where a property is dangerous or unsightly, the Council may order the owner to remedy the condition by removal, demolition or repair, specifying in the order what is required to be done.
>
> [. . .]
>
> 358(3) Where the owner fails to comply with the requirements of an order within the time specified in the order, the Administrator may enter upon the property without warrant or other legal process and carry out the work specified in the order.

[44] Plainly, this language furthers the purpose of the statute and ensures compliance with the legislation. It is not designed to, nor does it authorize, the collection of evidence. Any potential "seizure" of property would have been incidental to remediation. As with the power to search, it was reasonable to provide for remediation to ensure statutory compliance. Of course, any proposed remediation would have to be carried out in a reasonable manner.

[45] Related to the foregoing argument, the Dalrymples argue that the orders are "invalid because they fail to specify with any accuracy the steps required to be taken by the appellant to meet the requirements of the inspector". Reference to one of the Orders to Remedy adequately addresses this submission:

> […] You are hereby ordered to remedy the condition of the property by removing the accumulation of debris, including but not limited to assorted automotive parts, wheels, tires, construction materials, equipment, machinery, scrap wood, metal and plastic, glass, tools, doors, windows, fixtures, gas and oil tanks, cloth, tarpaulin, siding, shelves, foam, buckets, dog feces, litter, and scattered debris so as to leave the property neat and tidy and environmentally compliant and in safe condition […]

[46] The foregoing was prefaced with reference to the specific PID lot number of the Dalrymples' property, on the Clam Bay Road. The description is colourfully corroborated in the photographs exhibited to the Municipality's affidavits.

[47] This submission is without merit.

Disposition

[48] I would dismiss the appeal, and award costs to the Municipality of $1,000, inclusive of disbursements.

Bryson, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.