# NOVA SCOTIA COURT OF APPEAL

**Citation:** W. B. Wells Ltd. v. Cumberland (County), 2004 NSCA 64

**Date:** 20040521
**Docket:** CA 207161
**Registry:** Halifax

**Between:**

W. B. Wells Limited

Appellant

v.

Municipality of the County of Cumberland

Respondent

| | |
|---|---|
| **Judge(s):** | Chipman, Freeman & Saunders, JJ.A. |
| **Appeal Heard:** | May 20, 2004, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed with costs of $1,700.00 plus disbursements as taxed or agreed, payable to the respondent, as per reasons for judgment of Saunders, J.A.; Chipman & Freeman, JJ.A. concurring |
| **Counsel:** | Jim O'Neil, for the appellant<br>Beryl MacDonald, Q.C., for the respondent |

Reasons for judgment:

[1] After hearing the appellant's submissions we recessed and then returned to indicate that the appeal was dismissed with reasons to follow. These are our reasons.

[2] The appellant is an incorporated company primarily in the business of growing and selling blueberries. It owns property located at 341 Highway 6, East Amherst, Cumberland County, Nova Scotia, upon which it has stored vehicles and other machinery and equipment. The appellant's property is zoned "general" which would permit any kind of use except use as a salvage yard.

[3] In the spring of 1999 the respondent Municipality's development officer, designated as the administrator responsible for the dangerous and unsightly premises provisions of the **Municipal Government Act**, S.N.S. 1998, c. 18, acting upon complaints, inspected the premises and concluded that they were unsightly. A formal notification was sent to the owner on May 14, 1999. No response was forthcoming. An order was issued by the municipality, giving the appellant until June 28, 1999 to remedy the situation. The company was charged with contravening the **Act** and with failing to comply with an order issued by the municipality. At trial in the Nova Scotia Provincial Court the appellant was convicted, but the conviction was later set aside on appeal to the Nova Scotia Supreme Court.

[4] On January 17, 2002 the municipality commenced this proceeding seeking a declaration that the property was dangerous and unsightly, pursuant to the provisions of the **Act**, and an order requiring the company to remedy the situation by removing or demolishing the allegedly derelict vehicles and other equipment and machinery.

[5] Following a trial before Nova Scotia Supreme Court Justice Glen G. McDougall, the premises were found to be unsightly and the appellant was given 60 days in which to either remove or demolish the vehicles, machinery and equipment located on its premises. In the event the appellant failed to comply, the municipality was then authorized to carry out all such necessary work and be reimbursed for its expenses in doing so.

[6] It is from this decision that the appellant now appeals.

[7] We see no merit to the arguments advanced by the appellant and find that the appeal ought to be dismissed.

[8] As was noted by McDougall, J., the principal issue was to determine whether the property was unsightly, based upon the evidence and the applicable provisions and objective standards found in the **Act**. Section 344 requires that every property in a municipality shall be maintained so as not to be dangerous or unsightly. Section 347 (1) enables a municipality to apply to the Supreme Court for a declaration that a property is dangerous or unsightly, and for an order requiring appropriate remedial action.

[9] In this case the municipality did not claim that the property was dangerous, nor argue that the vehicles, machinery and equipment parked or stored on the property had been abandoned. Rather, it based its case on the allegation that the property was unsightly in that the appellant's vehicles, machinery and equipment were derelict as that word is defined in the statute. Section 3 (r) of the **Act** provides a definition of dangerous or unsightly:

> (r) "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, . . .

[10] Section 3 (v) of the **Act** states:

> (v) "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;

[11] The necessary inquiry undertaken by the trial judge required an assessment of the evidence in order to make findings of fact which would then be considered in light of the statutory provisions to which I have just referred. Justice McDougall was very clear in his findings as is apparent from his careful review of the evidence and the statutory provisions. He said, in part:

> [9] . . . For the most part, the vehicles, machinery and equipment remained idle. They have been parked or stored for possible future use. Some of the vehicles appear to have settled into the pavement of the parking lot. Although most of the parking area is being used, the vehicles and other machinery and equipment are not placed in a haphazard manner. Other than the repairs to the broken windshields and side windows of the buses and perhaps tire replacement on one vehicle and some touch-up painting, nothing much else had been done to the vehicles. The paint on some of the vehicles, including an old fire truck, is peeling and in obvious need of either a touch-up or complete re-painting. None of the vehicles have been safety inspected nor have they been properly registered and licensed for highway use. The vehicles and other machinery and equipment are rusting and deteriorating as one would expect from the obvious lack of use. Some tires are going flat and there is evidence of past oil leakage from some of the vehicles onto the ground. One vehicle has a bucket placed beneath it to catch leaking oil or some other kind of fluid. This container has been in place for several years.
>
> [10] . . . I am satisfied that based on the evidence presented the property is unsightly. The vehicles, equipment and machinery, although not abandoned, have not been used since being placed there some four years ago. They have been simply stored with the expectation that, possibly, at some future time they could be put to use. This disuse of the vehicles, equipment and machinery and their deteriorating condition make them derelict as described in Section 3(v) of the *MGA*. In accordance with Section 3(r) of the *MGA*, property containing such derelict vehicles, equipment or machinery is unsightly. The minor repairs done by Mr. Wells have done little to preserve the condition of these chattels which continue to deteriorate.

[12] A finding of unsightliness is generally a question of fact, not of law. In **Chester (District) v. Aloni** (1996), 149 N.S.R. (2d) 86, this court considered an appeal from two lower courts' decisions convicting the appellant of a statutory offence pursuant to the then **Municipal Act**, R.S.N.S. 1989, c. 125, s. 124 which read in part:

> **124 (1)** No person shall permit property, owned or occupied by him, to be or to become partly demolished, decayed or deteriorated so as to be in a dangerous, unsightly or unhealthful condition, or shall permit to remain on any part of the property, owned or occupied by him, any ashes, junk, cleaning of yards, bodies or parts of automobiles or other vehicles or machinery, or other rubbish or refuse, so as to cause such place to be dangerous, unsightly, unhealthful or offensive to all or any part of the public.

Clarke, C.J.N.S., writing for a unanimous court, accepted that the determination of unsightliness, applying objective standards, was a finding of fact, commenting at ¶ 10:

> Mr. Aloni argued before Justice MacAdam that Judge Kennedy erred in determining the premises were unsightly. Justice MacAdam rejected the argument. It does not now appear to be in issue. Judge Kennedy made a *finding of fact* upon which there was evidence in support. He applied reasonable tests. His findings should not be disturbed. (Emphasis added)

Although decided under a different statute and in the context of a statutory offence prosecution rather than a civil action, we are satisfied the same approach ought to apply under the present **Act**, such that whether a property is unsightly is a finding of fact for the trial judge to make.

[13] An appellate court owes a high degree of deference to a trial judge's findings of fact. The standard of review for findings of fact is that such findings are not to be reversed unless it can be shown that the trial judge has made a palpable and overriding error. **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235. Having carefully reviewed the record in this case, there was ample evidence to support Justice

McDougall's findings and ultimate disposition. There is no reason for us to intervene.

[14] The appeal is dismissed with costs of $1,700.00 plus disbursements as taxed or agreed, payable to the respondent.

Saunders, J. A.

Concurred in:

Chipman, J.A.

Freeman, J.A.