C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX **C.H. 74904**

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

HER MAJESTY THE QUEEN,

Appellant

- and -

LENA DIAB and MAROUN DIAB,

Respondent

Ms. Nadine Smillie, solicitor for the Appellant.
Lena Diab, representing herself.

1992, March 4, Anderson, J.C.C.:- The respondents appeared before a Provincial Court Judge on the 29th day of May, 1991 on charges that

> being the owners of a building situated at 6380-82 Young Street, Halifax, did unlawfully suffer or permit the occupancy of the aforesaid building prior to obtaining an occupancy permit therefor contrary to section 8 of City of Halifax Ordinance Number 131, the Building Code Ordinance;
>
> **AND FURTHER** being the owner of a building situate at 6380-82 Young Street, Halifax, did unlawfully suffer or permit the use of the said building as a four-unit apartment building contrary to section 35(3) of City of Halifax Land Use Bylaw, Peninsula Area, in violation of section 122(1)9d) of the Planning Act.

The trial commenced on March 14th, 1991, continued on March 18th, 1991 and concluded on May 29th, 1991, at

which time the trial judge entered a finding of guilt on the 1st count and dismissed the 2nd count. The City of Halifax filed a notice of appeal against the order of dismissal of count No.2 on the grounds

> 1. That the decision of the Learned Trial Judge cannot be supported by the evidence;
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> 2. That the Learned Trial Judge erred in law in that she misdirected herself as to what in law constitutes "use"; and
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> 3. Such other grounds as there may appear upon a perusal of the transcript of the evidence taken at trial.

The respondents cross-appealed against the order of conviction made by the trial judge on count No.1 on the grounds

> 1. That the Learned Trial Judge misdirected herself in considering the evidence persented, and
>
> 2. Such other grounds that may appear on perusal of the transcript of evidence taken at trial.

I have read the transcript of the trial and the evidence adduced therein, I have read and considered the written submissions of counsel on the appeal and cross-appeal and have considered the arguments and authorities cited therein.

The function and duty of an appeal court has been clearly stated many times by our Court of Appeal. Mr. Justice Macdonald, Nova Scotia Court of Appeal in **Travelers Indemnity Company of Canada v. Kehoe** (1985),

66 N.S.R. (2d) 434, commented upon the respective duties of the trial and appellate court at p.437:

> This and other appellate courts have said time after time that the credibility of witnesses is a matter peculiarly within the province of the trial judge. He has the distinct advantage, denied appeal court judges, of seeing and hearing the witnesses; of observing their demeanor and conduct, hearing their nuances of speech and subtlety of expression and generally is presented with those intangibles that so often must be weighed in determining whether or not a witness is truthful. These are the matters that are not capable of reflection in the written record and it is because of such factors that save strong and cogent reasons appellate tribunals are not justified in reversing a finding of credibility made by a trial judge. Particularly is that so where, as here, the case was heard by an experienced trial judge.

After reviewing some of the relevant law, Mr. Justice Ritchie, in **Stein Estate et al. v. The Ship "Kathy K" et al.** (1975), 6 N.R. 359, at 366, pronounced:

> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied tht no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

Mr.Justice Jones in **Her Majesty the Queen v. Arthur M. Quinn**, S.C.C. 01858, October 17, 1988, stated

> In **Yebes v. The Queen**, 36 C.C.C. (3d) 417, McIntyre, J. in delivering the judgment of the Supreme Court of Canada stated at p.430:
>
> > The function of the Court of Appeal, under s.613(1)(a) of the **Criminal Code**, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judcially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence.

The trial judge considered, firstly, the matter of the occupancy permit, and she found that no occupancy permit had been issued and that the offence was complete, and found that she didn't have any power to go beyond that and determine whether or not the City was in any way wrongfully withholding an occupancy permit. Therefore she made a finding of guilt and there is no reason to disturb that finding.

With regard to the second count, the trial judge said

> ...I have had the benefit of the City's brief on that matter which I would like

> to refer to. Certainly there is no question that I find as a fact that the premise at 6380-82 Young Street, in Halifax were not used as a four-unit apartment building, that they were used as a two unit apartment, or a two unit duplex.

She went on to say

> ...I think the best evidence of intention is the purpose to which the building is presently put and since it is presently used as a duplex, I find that the intention was to use it as a duplex at the date in question. "Used" shall include arranged to be used, designed to be used and intended to be used. I think that is a decision that must be based on the facts of each case and facts of this case, there were still some work that had to be done to make the building capable of being used and I refer again to the definition of dwelling unit which uses the words, "capable of being used". So I would find that the premises, I would have a reasonable doubt as to whether the premises were arranged to be used, designed to be used, intended to be used or capable of being occupied as seperate and independent housekeeping establishments because of the fact that there was still outstanding work that had to be done to make them into that.

Having considered the evidence that the trial judge heard and understanding the duties of the appeal court judge in relation to that of the trial judge, I am satisfied on her findings of fact; and those findings of fact can be found from the evidence. There was no palpable error and the trial judge was entitled to have a reasonable doubt, therefore an acquittal should lie.

I would therefore dismiss the appeal and the cross-appeal and confirm the conviction of the occupancy matter and acquittal on the second count.

There will be no costs in this matter.

A Judge of the County Court
of District Number One