

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Smedley, 2008 NSSC 397

Date: 20081022

Docket: SH 293530

Registry: Halifax

Between:

TREVOR J. SMEDLEY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Judge: Chief Justice Joseph P. Kennedy

Heard: September 10, 2008, in Halifax, Nova Scotia

Oral Decision: October 22, 2008

Written Decision: January 6, 2009

Counsel: Trevor J. Smedley, in person
Joshua Judah for the Respondent

By the Court:

[1] This is an appeal by the defendant/appellant from an oral decision given by Judge Jamie S. Campbell of the Provincial Court on February 20, 2008.

[2] The matter involves a charge under a section of the *Land Use By-Law* that applies to Beaver Bank, Hammonds Plains and Upper Stewiacke - all of those communities being within the Halifax Regional Municipality.

[3] Specifically, Mr. Smedley was charged that he did:

... allow the use of an accessory building for the keeping of livestock, contrary to s. 4.12(a)(ii) of the *Land Use By-Law*.

[4] The defendant/appellant was also charged on a second count under that *By-Law*, however, that count was stayed by the trial judge upon conviction on the first count. There is more to be said about that second count later on.

[5] The defendant/appellant, Mr. Smedley, his spouse and children keep 13 chickens in a residential area - Stillwater Lake, which apparently is within those communities named in the *By-Law*.

[6] The trial judge found as fact that these chickens are pets of that family - they're pets - that's what the trial judge found. The property in question was found by the trial judge to be a well-maintained family home with a large lot - a 2.6 acre lot.

[7] On that property is a chicken coop - a luxury chicken coop - described as aesthetically pleasing and immaculately clean by the trial judge. It is 100 feet from the nearest property line.

[8] These chickens are not kept for commercial purposes. The trial judge found that they are not kept for meat and the eggs that they lay are not sold - those eggs are an incidental benefit of keeping these pet chickens.

[9] They are not just any chickens - they are special chickens. They are heritage chickens that are brought to this province from Quebec. The trial judge found that they are in every way inoffensive. There is no excessive or even noticeable noise, no odour. The way in which they are kept is not unsightly. The chickens remain on their property seemingly doing no harm to either the aesthetic qualities or the quiet enjoyment of the property of the immediate neighbours. So finds the trial judge.

[10] However, the property on which those chickens are located is in an R-1 residential zone and in May of 2007, the Halifax Regional Municipality received an anonymous complaint from some busybody - my word - about those chickens being kept in that residential zone. As it was required to do, it investigated and the result was this charge.

[11] The *By-law* provides at Section 4.12 that accessory uses, buildings and structures shall be permitted in any zone but not to be used for the keeping of livestock except where agriculture is permitted.

[12] The trial judge states correctly that agriculture is not a permitted use within the R-1 residential zone so accessory buildings may not then be used in that zone to keep livestock. As the trial judge put it, “if these chickens are livestock, they may not be kept in an accessory building in that zone”.

[13] Livestock is defined by Section 2.35 of the *By-Law* as meaning:

... horses, cows, pigs, sheep, goats and fowl, whether or not they are kept for commercial purposes.

[14] So, the question for the trial judge was, are these pet chickens fowl? The defendant/appellant urged upon the trial judge the purposive approach to the interpretation of that legislation - the interpretation of that word “fowl”. The appellants maintain that the keeping of these chickens as pets is not an agricultural use. I’m quoting the trial judge - “keeping pets, such as dogs, cats or parrots is certainly not an agricultural use, despite the fact that it involves the handling of animals”. The appellants argued before the trial judge that keeping pet chickens should be no different from keeping a pet dog or cat.

[15] The trial judge states at paragraph 23 of his decision:

If that position were accepted, and the keeping of pet chickens were not agricultural, then the family would be permitted to keep their pets. They would not be able to keep them in an accessory building however. The result would be that one could keep chickens in one’s house, but not in another building.

The trial judge points out that that would be a strange result.

[16] Judge Campbell admitted, at paragraph 24, a compelling logic to the line of argument put forward by the appellant.

... Keeping a pet is not an agricultural use. If keeping pet chickens is not an agricultural use, why would keeping them in an accessory building only be permitted in a zone where agricultural uses is permitted?

[17] On the basis of this logic, the trial judge continues, “chickens must not be livestock and in order to not be livestock, they must then not be fowl”. It is a logic of moving backwards from the definition of livestock.

[18] Although the trial judge referred to that logic as compelling, he goes on to say, however, making a finding that for purposes of this *By-Law* certain chickens are not fowl would be “a brazen affront to whatever semantic certainty and consistency the language can claim. The purposive approach to interpretation does not allow for interpretations that set dictionary definitions and common usage both on their heads”.

[19] The trial judge says at paragraph 27 - “where one interpretation brings about a workable and practical result that interpretation should be preferred over one that does not. The meaning adopted must however be one that the wording will reasonably bear.”

[20] Paragraph 29:

Clearly the drafters of the legislation sought to maintain the residential character of the neighbourhood by prohibiting commercial poultry operations. Equally clearly, they sought to prohibit the keeping of fowl on a noncommercial basis. The defendants argue that the line should be drawn there. It would be unfair if the bylaw prevented the keeping of pet chickens who do no harm to anyone. Because of that, these chickens should not be included in the definition of fowl.

[21] The trial judge, at paragraph 30:

The bylaw uses the word 'fowl'. Can fowl be interpreted, using a purposive approach, as including commercial and noncommercial chickens but not pet chickens? The word fowl is variously defined as including all birds, or domestic chickens, or domesticated and wild gallinaceous birds. Gallinaceous birds are heavy bodied largely ground feeding wild or domestic birds.

[22] I continue with the trial judge at paragraph 31:

Nothing in the definition of fowl makes a distinction among the uses to which the birds are put. The domestic chicken and the wild turkey, as well as many other birds, are included in the classification. They are fowl whether they are kept for commercial production, for home consumption, for show, for pleasure or are in fact wild birds. Whether a bird is or is not a fowl does not depend on the use to which it may be put or the manner in which it is kept.

So says the trial judge.

[23] He continues:

[32] To exclude pet chickens from the word fowl would not only disregard the common meaning of the word but would create a distinction that the word simply would not reasonably bear. ...

...

[35] The bylaw prohibits the keeping of livestock in accessory buildings in an area unless an agricultural use is permitted in that area. Livestock includes fowl. Chickens, regardless of their use or status, are by every definition fowl.

[24] He continues, paragraph 36:

Chickens, whether they be commercial chickens, noncommercial chickens, or clean and inoffensive pet chickens can be kept in accessory buildings only where agricultural uses are permitted.

...

[40] Exception activities from those prohibitions is a task for the legislators and is the role of the court only when the rules of legislative interpretation reasonably provide for it. Here, a liberal and purposive approach to interpretation of the bylaw would not allow the court to stand the definition of a common word on its head and cause it to mean something that it clearly does not.

[25] Paragraph 43:

These domestic chickens are fowl. They cannot be kept in an accessory building in a zone that it is not zoned agricultural. The defendants are guilty as charged on the first count.

[26] The trial judge found the defendants guilty on count number one.

[27] The defendant/appellant, Mr. Smedley, appeals the conviction on that count on the basis - firstly, that the trial judge was in error in finding that these chickens were fowl under the *By-Law*; and secondly, that the trial judge was in error in finding that the chickens were livestock under the *By-Law*.

Standard of Review

[28] I am satisfied that the trial judge's determination in this matter - those determinations that are put for review in this appeal are interpretations of statute and questions of law. No dispute as to facts in this situation - dealing with questions of law. On questions of law the trial judge must be right. The standard is correctness. Of the literally hundreds of cases that make this clear, I cite only our Court of Appeal in *Secunda Marine Services Ltd v. Liberty Mutual Insurance Company*, 2006 NSCA 82, Mr. Justice Saunders of our Court of Appeal - no question what the standard is - correctness, has to be right.

[29] As to the suggestion that the trial judge was in error, was wrong in finding that chickens are fowl, the first proposition put to this appeal court, the appellant, Mr. Smedley, argued that these chickens are not fowl. He cites before me a definition of “fowl” - I don’t know whether he set it before the trial judge or not, but he cites it before me - the Oxford English Dictionary defines “fowl” as “any of the various gallinaceous birds chiefly kept for eggs or flesh”. The pets kept by the appellant are heritage breed chickens chosen for their aesthetic qualities and their temperament. Such chickens are not kept for eggs or flesh. So says the appellant, the ordinary meaning of the word “fowl” does not include the appellant’s pet chickens.

[30] With respect, I do not find that this definition contradicts the finding of the trial judge that chickens are fowl. It is true that chickens are chiefly kept - when chickens are kept - chiefly kept for eggs and flesh. These chickens were not, but their captivity is exceptional, not the norm. Their being within the definition of “fowl” is not affected by the fact that they were not part of what is usually the case when chickens are kept chiefly for eggs or flesh. This captivity is exceptional, not the norm, and I do not believe that the definition in any way affects the determination of the trial judge.

[31] Otherwise I find no fault with the trial judge's finding that chickens are indeed fowl. It is a finding dictated by common usage and reason and would be the proper conclusion using the purposive approach or any other approach to statute interpretation. There is no question in my mind but that when the *By-Law* uses the word "fowl" it means "chickens", together with other common fowl.

[32] The trial judge was, I believe, manifestly correct in so concluding.

[33] As to the second ground of appeal - the suggestion that the trial judge was in error when he found that the chickens were livestock - with respect, it was the municipality that determined that chickens - fowls - are livestock for purposes of the *By-Law*. Once the trial judge finds that the chickens are fowl, then they become livestock for purposes of the *By-Law* - it's not the trial judge, but the municipality that defines chickens as livestock.

[34] Once the trial judge, as indicated, found those chickens were fowl, the legislation dictates.

[35] I do not find that the trial judge made any errors in determining that chickens are fowl. That said, they are therefore livestock under s. 2.35 and so cannot be kept in an accessory building in an R-1 residential zone.

[36] The appeal against conviction of Count 1 fails.

[37] As indicated, the defendant/appellant was also charged by a second count that he did keep livestock, contrary to s. 3.5(a) and 6.1 of the *Land Use By-Law* for Beaver Bank, Hammonds Plains and Upper Sackville within the HRM (Halifax Regional Municipality) pursuant to s. 205(1) of the *Municipal Government Act*.

[38] Clearly both the defendant/appellant and the municipality and the city, acting as the Crown, clearly both the defendant/appellant and the Crown are of the belief that the trial judge also entered a conviction on the second count. The defendant/appellant also included that count in his appeal before this Court.

[39] I find that no such conviction was entered by the trial judge. The trial judge did not find the appellant guilty on the second count. He stayed the second count at the

request of the municipality. I quote from the trial judge's decision at paragraphs 43 and 44:

[43] ... The defendants are guilty as charged on the first count.

[44] At trial the Crown noted that a conviction was sought on the one charge and that the second would be stayed. A conviction will be entered on the first count. The second count is stayed.

[40] He does not state that the sentencing on the second count is stayed, he says that the second count is stayed - unequivocal. Then why do the parties believe that there was a conviction on the second count and why do I have an appeal before me on the second count? Because after that clear decision was rendered the trial judge became involved in a conversation with the parties while still on the bench during the course of the sentencing process on the first count.

[41] I will review that conversation - necessary that I quote at length from the transcript of the conversation to address this controversy.

[42] After the trial judge, having clearly entered a conviction on one count and one count only and just as clearly staying the second count, the following occurs:

[1] MR. SMEDLEY: I guess I think I do have one question I'm not sure. So we've been found guilty of keeping livestock in an accessory building. So if we're ordered to comply is it just that we're no longer is it that it requires you to no longer keep them in an accessory building? Is that I'm I'm trying to find out what we're being requested to do at the end of this.

[2] THE COURT: The decision's been made and it's a guilty finding with regard to that first charge. As to further interpretation of it I've got to be careful about going beyond that.

[3] MR. SMEDLEY: So we don't have a decision on the charge of whether or not this is an accessory use of or not.

[4] THE COURT: The first charge I believe is the

[5] MR. SMEDLEY: is the keeping of the chickens

[6] THE COURT: in an accessory building

[7] MR. SMEDLEY: an accessory building. But the other one is just whether you're allowed to keep them period.

[8] THE COURT: Well that charge has been stayed, yes but

[9] MR. JUDAH: Your Honour it would be the City's position that chickens could not be kept on the property at all. I don't know if it was your inclination to convict on both. If we are going to be heading to an appeal or something maybe both of those issues do have to be heard so if maybe adjust the dates and convict on both. If that's your inclination it's certainly the City's intention that the chickens have to be removed from the property. You can't just put them in the garage or something like that.

[10] MR. SMEDLEY: I guess we'd like to get an answer to both of those so that we know what it is we have to do. I don't know what we have to do to do that I'm a little uncertain here.

[11] MR. JUDAH: I suspect that if we're in a situation that in two months time where the chickens are now residing in the garage we'll all be back here unfortunately. I don't know that for sure but I suspect we might end up down that line.

[12] THE COURT: It may be prudent Mr. Smedley to review I have a written copy of the decision for you to review. And give some thought to it on what you want to do in terms of compliance with the decision. I don't want to go beyond what I've said. There's some danger in doing that and I'm not inclined to do it at this point. With regard to the sentencing itself the City is asking for a fine of \$1000. I guess at this point I would leave it to you if you wish to have the sentencing set for another day. I'm happy to re-schedule that. If you want to proceed today I'm happy to do that.

[43] I'll skip to paragraph 14 of the transcript:

[14] THE COURT: What the City is seeking is either a direction to you to comply or your undertaking that you will comply. And the compliance is that you cannot keep the chicken in an accessory building. I suppose it's open to you as Mr. Judah said to take them out of the accessory building and to put them in your basement. And then we'd be in a issue is keeping the chicken in the basement an agricultural use. All you need to do I think is to read the decision and you might well have some insight into what the potential decision would be.

[44] Speaking of the potential decision on the second count. Skip to paragraph 19:

[19] MR. JUDAH: I just, I agreed Mr. Smedley that we really do need a decision on the second charge. Because it's the City's position that not only can you not keep it in an accessory building you can't keep livestock in an R1 zone at all. It's just not a permitted use.

[20] THE COURT: I don't think it's necessary for me to reserve to do that. The reason the second charge was stayed is because the City asked to have it stayed. In this case clearly chicken are fowl. The keeping of fowl as I indicated the wording of the by-law makes it quite clear that keeping fowl is an agricultural use so keeping fowl whether it be an accessory building or other is an agricultural use so there would be a conviction entered on both if the City were seeking.

[45] Mr. Judah then says:

[21] And just for the record the reason we are suggesting to stay one of the charges is purely for sentencing purposes.

[46] So, it would seem that the parties interpret the entirety of that conversation and particularly that last portion of the conversation as the judge convicting on the second count.

[47] That count, remember at that point, is stayed - the judge has just stayed that count. The trial judge does not then go on, firstly to remove the stay, secondly to enter a conviction on the second count, and thirdly then to ask the Crown if it wishes him to stay the passing of the sentence on the second count. The transcript continues

after having had that last conversation and speculating as to the outcome in relation to the second charge, the trial judge says:

[22] Yes I understand that. To use the football analogy fairly Mr. Judah didn't want to pile on but if you want him to pile on it sounds like he's prepared to do that if you ask for it.

[23] MR. SMEDLEY: I do understand that. But we need some clear idea of what it [sic] we're required to do.

[48] And finally the Court says:

[24] I think the answer clearly for me is while I have a great deal of sympathy with your situation and I want to underscore that a great deal of sympathy for your situation I'm not entering into the urban chicken debate. But I am saying that you can't keep the chickens.

[49] I am sure that that statement added to the belief on the part of the parties that there was a determination on the second count. There wasn't.

[50] The trial judge, in my mind, is trying to give Mr. Smedley some guidance as to whether he can legally continue to keep those chickens on that property in any manner and that's all Mr. Smedley wants to know. The trial judge is trying to give him some guidance.

[51] In so doing, the trial judge suggests that he would have entered a conviction on both counts if that is what the City is seeking. But he never does do that. He never does that - rather he moves into his football analogy and then declares that he is not entering into “the urban chicken debate” before stating for the benefit of the confused Mr. Smedley that he can’t keep the chickens.

[52] A conviction on a criminal or quasi-criminal charge is, of course, a serious matter. It must be definitively and unequivocally stated by a trial judge.

[53] There was no conviction on that stayed second count entered here. Therefore, there cannot be an appeal on the second count. There is no appeal before me on that count - you cannot appeal a conviction that was never accomplished.

[54] Late in my consideration I noted that the appellant, Mr. Smedley, had submitted that by finding that the chickens were fowl that the trial judge violated his freedom of expression. I believe that that ground of appeal was subsequently withdrawn. If that was the case, that was a good decision - to withdraw it.

[55] Clearly the trial judge did not want to convict in this matter - he did not want to take those chickens from those children. However, he was correct in determining the matter as he did.

[56] Likewise, I'm sorry to see those pet chickens go - they would seem to create pleasure for this family without there being any evidence of harm to anyone.

[57] My function, though, is to critique the trial judge and the trial judge as finding as he did on the first count was right.

[58] The appeal on the one count - the first count - is dismissed.

[59] There was never before me an appeal on the second count. There was never a conviction on that second count. That count remains stayed by that trial judge. I do not speak of it further.

[60] The appeal is dismissed.