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COURT OF APPEAL FOR ONTARIO

GALLIGAN, AUSTIN AND LASKIN JJ.A.

1995 CanLII 7021 (ON C.A.)

IN THE MATTER OF an appeal pursuant to s.131 of the *Provincial Offences Act,* R.S.O. 1990, c. P.33	)	**Jeffrey J. Wilker for the appellants**
B E T W E E N:	)	
913719 ONTARIO LIMITED and RANDY JORGENSEN	)	**R.O. Kallio and Henry R. Weilenmann for the City of Niagara Falls**
Appellants (Defendants at Trial)	)	
- and -	)	
THE CORPORATION OF THE CITY OF NIAGARA FALLS	)	
Respondent (Prosecutor at Trial)	)	**Heard: June 23, 1995**

AUSTIN J.A.:

On June 11, 1992, 913719 Ontario Limited and Randy Jorgensen (collectively referred to as "Jorgensen") were convicted of violations of two by-laws of the City of Niagara Falls (the City). Those convictions were upheld on appeal on August 11, 1993. Jorgensen appeals from the decision of August 11, 1993. Jorgensen was fined $750 on each of four counts. The City appealed from that sentence, seeking a prohibition order in addition. That cross-appeal was also

dismissed on August 11, 1993. The City cross-appealed to this court from that dismissal. The cross-appeal, however, was abandoned during the course of argument.

Leave to appeal to this court was granted by the order of Labrosse J.A. on February 16, 1994.

The by-laws in question may be referred to as the "zoning by-law" and the "adult entertainment parlour by-law." The "adult entertainment parlour" by-law, number 86-240, was passed in 1986 pursuant to the power granted to municipalities by the *Municipal Act*, R.S.O. 1980, chap.302, s.222(1) (now R.S.O. 1990, c.M.45, s.225(1)). Section 1(a) of the by-law incorporates the Act's definition of "adult entertainment parlour" as follows:

> 1. For the purposes of this by-law,
>
> (a) "adult entertainment parlour" means any premises or part thereof in which is provided, in pursuance of a trade, calling, business or occupation, goods or services appealing to or designed to appeal to erotic or sexual appetites or inclinations;

The facts may be stated very simply. In or about 1991 Jorgensen commenced business in the City of Niagara Falls. The business was that of renting and selling video films which may be described as being of the "adult" variety. He also sold magazines which might be similarly described. The premises were located on lands zoned GC for General Commercial. Among the uses permitted in such

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zoning was a retail store. The issue which is at the heart of this matter is whether Jorgensen's operation is an adult entertainment parlour or a retail store.

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Dealing first with the adult entertainment by-law, it was argued that Jorgensen's property constituted premises in which were provided, in pursuance of a business, goods, namely video tapes and magazines appealing to or designed to appeal to erotic or sexual appetites or inclinations.

In dealing with the question whether these goods appealed to or were designed to appeal to erotic or sexual appetites or inclinations, the justice of the peace who tried the case described the magazines and videos bought on the premises as follows:

> The magazine entitled 'Red Hot Couples' contains the following words on the front:
>
> > Power positions, awesome head, new unique ways to orgasm! Screwed in the stacks. Hot for doggy style.
>
> That magazine also has coloured photos of female adults. The second magazine entitled 'Hot Shots' has the following writing on the cover:
>
> > 20 bi babes put on alabe lickin show for you! No men. All nude women.
>
> It depicts a female with her legs wide apart, scantily clad with her head between her legs and tongue protruding towards her vagina.
>
> The two videos purchased, that is, Exhibit #18 and #19, depict scantily clad females plus a narrative of what one might see. Therefore, given these depictions which I

> have just outlined plus the narrative, it is open for this Court to conclude that these goods in their packaged state are designed to appeal to a sexual appetite or inclination.

This conclusion led to findings of guilt under the adult entertainment parlour by-law.

This finding was not explored on the appeal to the Provincial Court. In this court it was argued that the adult entertainment parlour by-law was void for vagueness or uncertainty and reliance was placed on the decision of this court in *Re Hamilton Independent Variety & Confectionery Stores Inc. v. City of Hamilton* (1983), 143 D.L.R. (3d) 498. Before dealing with that case it should be noted that s.225 of the *Municipal Act* deals with both "goods" and "services" and that either must be "designed to appeal to erotic or sexual appetites or inclinations" in order to fall within the ambit of the section. The Act then goes on to give some focus to "services" falling within the definition by adding the following in s.225(9):

> (9) In this section,
>
> "services designed to appeal to erotic or sexual appetites or inclinations" includes,
>
> (a) services of which a principal feature or characteristic is the nudity or partial nudity of any person,
>
> (b) services in respect of which the word "nude", "naked", "topless", "bottomless", "sexy" or "nu" or any other word or any picture, symbol

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> or representation having like meaning or implication is used in any advertisement.

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The Niagara Falls by-law contains the same definition as the statute with the exception that the word "nu" is omitted. That word was not in the 1980 Act.

Neither the Act nor the Niagara Falls by-law gives any such focus to the meaning of the expression "goods designed to appeal to erotic or sexual appetites or inclinations."

The *Hamilton* case involved the same section of the *Municipal Act* as this case. The Hamilton by-law was concerned with controlling adult entertainment parlours by way of regulation and licence rather than by way of zoning as in the present case. The Hamilton by-law followed the language of the Act except in defining "goods." Section 221(a) of the Act defined "goods" as follows:

> (9) In this section,
> ...
> "goods" includes books, magazines, pictures, slides, film, phonograph records, prerecorded magnetic tape and any other reading, viewing or listening matter; ("biens")

The Hamilton by-law defined goods as including only "magazines". The Hamilton by-law defined "erotic goods" as "goods appealing to or designed to appeal to erotic or sexual appetites or inclinations." The Niagara Falls by-law does not define goods

at all. Nor does it expressly define "erotic goods" but the same result as in the *Hamilton* case is achieved by incorporating the statutory definition of adult entertainment parlour.

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The Divisional Court declared the relevant parts of the Hamilton by-law invalid. The City appealed and this court dismissed the appeal. Speaking for the five-judge court, Lacourcière J.A. said, in part, at pp.505-508:

> In my opinion, the principal flaw in the appellant municipality's attempt to license and control the sale of 'erotic' magazines is the vagueness and lack of certainty in the definition of 'erotic' goods. As pointed out earlier, the only definition of such goods in the by-law is taken, verbatim, from the definition of 'adult entertainment parlour' in s.368b(9)(a). In relation to services appealing or 'designed to appeal to erotic or sexual appetites or inclinations', the Legislature and the by-law have been specific enough to include services of which a principal feature or characteristic is the nudity or partial nudity of any person or services advertised in a certain way. In relation to goods, there is no definition, amplification or description of what magazines are meant to be included *in the general words* 'appealing to or designed to appeal to erotic or sexual appetites or inclinations.'
>
> Dictionary definitions of 'erotic' are as follows:
>
> 'Pertaining to love, or the act of love-making or sexual desire'—The Canadian Law Dictionary by Datinder S. Sodhi, 1980;
>
> 'Relating to sexual passion; lustful; having the quality to arouse sexual drive'—Stedman's Medical Dictionary, 4th Lawyer's ed., 1976;
>
> 'Of or pertaining to the sexual passion; treating of love; amatory'—The Shorter Oxford English Dictionary, 1973;

'Tending to arouse sexual desire'—The American Heritage Dictionary of the English Language, 1970;

'1. Of or arousing sexual feelings or desires; having to do with sexual love; amatory.

'2. Highly susceptible to sexual stimulation' —Webster's New World Dictionary, 2nd ed., 1976.

It is impossible for a store owner reading this by-law to decide whether he is in fact selling 'erotic' magazines covered under it. I was surprised to hear Mr. Vickers state during his argument that a store selling 'Playboy' and 'Penthouse' magazines would not come under Class 'A' regulations. If these well-known magazines are not covered by the by-law's broad definition, how is the Class 'A' licence holder to determine what publications are covered and required to be wrapped and placed beyond the reach of children?

The duty of a municipal council in framing a by-law is to express its meaning with certainty, 28 Hals., 4th ed., p.731, para. 1329:

> 1329. *Byelaws must be certain.* A byelaw must provide a clear statement of the course of action which it requires to be followed or avoided, and must contain adequate information as to the duties and identity of those who are to obey, although all the information need not be apparent on the face of the byelaw. However, if the words of the byelaw are ambiguous but their meaning can be resolved to give a reasonable result the courts will give effect to that result. Any penalty provided must also be expressed with certainty.

The obligation of clarity is to enable every citizen to understand the by-law in order to comply with it. ...

...

The need to reaffirm the necessity of explicitness and specificity so that the 'well-intentioned citizen' of common intelligence will not have to guess at the

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> meaning of a by-law is particularly important in a by-law purporting to license and regulate the sale of magazines.
>
> ...
>
> In my view, it is no answer to the vagueness and uncertainty argument in this case to say that the by-law incorporates the exact definitions of the *Municipal Act*. While the definition in an enabling legislation may deal in generalities when broadly granting the power to enact a by-law, the by-law itself must be sufficiently specific to enable the proposed licensee to perceive his obligations in advance. The mere repetition of the formula or definition in the *Municipal Act*, without specifying particulars, fails to give any indication of the scope of the by-law.
>
> ...
>
> The portions of By-law 79-144 as amended dealing with Class 'A' licences have left the store owners without any guide as to the kind of magazines it purports to cover, because of the vague and uncertain definitions or the absence of definitions of what constitutes erotic goods. I would therefore declare invalid those portions of the by-law dealing with Class 'A' licences for adult entertainment parlours in that they do not meet the requirement of certainty.

Whatever certainty of meaning the trial judge may have had in the instant case, the language of Lacourcière J.A. is directly applicable to the words "erotic or sexual appetites or inclinations" in the Niagara Falls adult entertainment parlour by-law. As indicated by Lacourcière J.A., the fact that those words are taken from the statute is of no assistance. I would therefore declare invalid those parts of Niagara Falls by-law 86-240 dealing with "goods" in that they do not meet the requirement of certainty. The part of the by-law on which Jorgensen was found guilty having been declared invalid, the finding of guilt must be set aside.

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Jorgensen was also found guilty of violating the zoning by-law, number 79-200 on the basis that he was carrying on in an area zoned General Commercial, a use not permitted in such an area, namely an adult entertainment parlour.

The uses permitted in a General Commercial area are set out in s.8.2.1 of the by-law. Those uses include in s. 8.2.1(hh) a "Retail Store". "Retail Store" is defined in s.2.51 as meaning "a building or part of a building in which goods, wares, merchandise, substances or articles are offered or kept for sale at retail but does not include any establishment otherwise defined or classified in this By-law;"

Jorgensen's operation is clearly in a building or part of a building and has goods kept for sale at retail. Those characteristics would bring it within the definition of "retail store." The next question is whether his operation is excluded by the words "but does not include any establishment otherwise defined or classified in this by-law." This involves determining the significance of the words "defined" and "classified."

Section 1.4 of the by-law deals with underlined words. It reads as follows:

> UNDERLINED WORDS: Words which are defined in section 2 of this By-law have, in most cases, been underlined where they appear elsewhere in this By-law. The underlining is for the purpose of assisting persons in interpreting this By-law but shall not be deemed to form a part of this By-law. The definitions in section 2 shall

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> apply and govern whether or not the defined word or words is or are underlined elsewhere in this By-law.

To illustrate, the word building, which appears in s.2.51, was underlined. The word building is defined in s.2.11 of the by-law. The expression "adult entertainment parlour" is found in the zoning by-law but it is neither underlined nor defined. I conclude from this analysis that Jorgensen's operation is not precluded from being a "retail store" by reason of being an "establishment otherwise defined ... in this by-law."

It was also argued that the defining of adult entertainment parlour in the *Municipal Act* was sufficient to exclude it from "retail store." That argument must fail because what s.2.51 requires is an "establishment otherwise defined ... in this By-law." (Emphasis added.)

Dealing with the word "classified" is not quite as easy. The term is not defined in the general definition section nor did counsel point out any other part of the by-law where it was defined. Counsel stated during the course of the oral argument that it had to do with the classification of zones and referred to p.21 of the by-law. On this page is found s.3.1 which is entitled "CLASSIFICATION OF ZONES." That section divides up the municipality into various classes of zones such as residential, commercial, institutional, industrial, agricultural and other. There does not appear to be anything in the by-law which would suggest that an adult entertainment parlour is an establishment "classified" in the by-law.

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I conclude therefore that Jorgensen's operation is a retail store within the meaning of s.2.51 of the by-law and that as a retail store is a permitted use within General Commercial areas and this is a General Commercial area, Jorgensen is not in violation of the zoning by-law. Accordingly, those convictions must be set aside.

The appeal is therefore allowed and the cross-appeal is dismissed as abandoned. The findings of guilt and convictions registered below are set aside and any fines paid are ordered to be remitted forthwith.

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913719 ONTARIO LIMITED and RANDY JORGENSEN

Appellants (Defendants at Trial)

- and -

THE CORPORATION OF THE CITY OF NIAGARA FALLS

Respondent (Prosecutor at Trial)

J U D G M E N T

Released: July 27, 1995

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