

of the courts to enforce that policy if council has used reasonably clear and explicit words to give effect to its policy. According to the preamble contained in this by-law, Council of the City of Toronto determined that exhaled smoke and the smoke of burning cigarettes, cigars and pipes, constituted a health hazard or a discomfort to others, and that it was desirable for the health, safety and welfare of those other persons that smoking be regulated and in some cases prohibited. Section 26 of the by-law in my opinion is a reasonably clear and explicit expression of that policy, and I conceive it to be the duty of the court to give effect to it.

It is trite that a provision in a by-law which proscribes citizens' conduct must be reasonably explicit. If it is not reasonably explicit it will be unenforceable because of its vagueness. See Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed., vol. 1, p. 470, et seq. And while by-laws may not be as benevolently interpreted now as they once were, it remains the duty of the court, if reasonably possible, to construe a by-law to give effect to the object intended by council.

It seems to me that the true and overriding considerations were restated in the House of Lords in *Faucett Properties Ltd. v. Buckingham County Council*, [1961] A.C. 636. The following appears in the speech of Lord Cohen at p. 662:

I turn now to the third argument, namely, that based on uncertainty. I confess that this point has caused me much difficulty but upon consideration I have come to the conclusion that for the reasons so clearly stated in the opinions which will soon be delivered by my noble and learned friends, Lords Denning and Jenkins, this argument also fails. It is based in the main on the principle relating to penal provisions of a statute which was concisely stated by my noble and learned friend, Viscount Simonds, in *London & North Eastern Railway Co. v. Berriman*, [1946] A.C. 278, 313-314; 62 T.L.R. 170: in these words: "A man is not to be put in peril upon an ambiguity." This principle involves that if a statutory provision is ambiguous, the court should adopt any reasonable interpretation which would avoid the penalty, but the court should not, I think, strike a provision out of an Act on the ground of uncertainty unless it is impossible to resolve the ambiguity which it is said to contain.

And at p. 677 Lord Denning said:

I can well understand that a by-law will be held void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning. But if the uncertainty stems only from the fact that the words of the by-law are ambiguous, it is well settled that it must, if possible, be given such a meaning as to make it reasonable and valid, rather than unreasonable and invalid.

Applying those considerations to the language of s. 26 of this by-law I am quite unable to say that there is no sensible or ascertainable meaning to its words. And if it can be said that some of the words of the section, either individually or in combination, might lead to a possible ambiguity, it is my opinion that any such ambiguity

ity can be resolved by applying the ordinary English meaning of those words to the facts disclosed by the evidence in an individual case.

It is my opinion that the words of s. 26 are reasonably explicit and are not void for uncertainty.

The application is dismissed with costs.

Application dismissed.

[HIGH COURT OF JUSTICE]

City of Thunder Bay v. Potts et al.

DUPONT J.

10TH NOVEMBER 1982.

Municipal law — Landowners operating modelling school in area zoned residential — By-law allowing land within area to be used as a "school" — Construction of by-law.

The defendants operated a modelling school in a private dwelling and an adjacent building. The area in which the buildings were located was zoned for one and two family dwellings, but the by-law also allowed "a school" or "a home occupation" to be conducted on the premises. The plaintiff city alleged that the defendants were in breach of the by-law.

Held: the action should be dismissed.

The defendants could not claim to fall under the "home occupation" exemption as defined in the by-law, because there was no evidence that a modelling school could be said to be "customarily conducted entirely within a dwelling". Nor was the business "clearly incidental to the use of the dwelling for dwelling purposes", as required by the by-law.

The defendants could claim, however, to be operating "a school". As the municipality had chosen not to define the term in the by-law, it should be given a wide interpretation so as to include private vocational schools. Any ambiguity should be resolved in favour of the landowner.

[*Re Caldwell and Toronto*, [1935] O.R. 255, [1935] 2 D.L.R. 623; *St. Catharines v. Hulse*, [1936] O.W.N. 211, [1936] 2 D.L.R. 453; *Re L.D.C.M. Investments Ltd. et al. and Town of Newcastle et al.* (1975), 8 O.R. (2d) 504, 58 D.L.R. (3d) 876; *Re Coleman and McCallum* (1913), 4 O.W.N. 1127, 24 O.W.R. 470, 11 D.L.R. 138 [revid on other grounds 4 O.W.N. 1449, 24 O.W.R., 12 D.L.R. 140]; *Re Stronach* (1927), 61 O.L.R. 636, [1928] 3 D.L.R. 216, 49 C.C.C. 336; *R. v. Hett*, [1963] 2 O.R. 471, 40 D.L.R. (2d) 133, [1963] 3 C.C.C. 1, 41 C.R. 84; *Bayshore Shopping Centre Ltd. v. Township of Nepean et al.*, [1972] S.C.R. 755, 25 D.L.R. (3d) 443, apud: *Seafarers Training Institute v. Township of Williamsburg* (1982), 39 O.R. (2d) 370, revid to]

ACTION to restrain a breach of a municipal by-law.

D. G. Nattress, for plaintiff.

S. G. Kovanchak, for defendants.

DUPONT J. (orally):—The defendants are husband and wife and are the owners of real property municipally described as 176 Rupert Street and more particularly described as Lot 15, Plan M-34, the whole of Parcel 2602 in the register for Port Arthur Freehold. Such property, basically a private dwelling, is located within the municipal corporate limits of the plaintiff Corporation of the City of Thunder Bay and is zoned "A" No. 1 and 2 Family Dwelling pursuant to Zoning By-Law No. 2877 filed as ex. No. 1.

Prior to 1965 the defendants operated a professional modelling school in a rented hall and in 1965 they purchased the property in question and continued their operation, that is of the professional modelling school, on such property. The modelling school has approximately 50 or slightly more students enrolled at any given time ranging in ages from below nine to adults. The courses extend over a period of 10 weeks and incorporate instructions in posture, physical fitness and health, application of make-up, public relations and other activities related to fashion modelling, depending on the ages of the students. The cost varies from \$85 to \$120. In some years the business is operated at a deficit; in others marginal profits are realized.

To assist in the operation of this business, the defendant, Mrs. Potts, retains the services of an additional instructor, a secretary and a cleaner. Her husband, the co-defendant, keeps the ledger and prepares the financial statements. A sign is maintained on the front lawn referring to the modelling school business. A passerby will thereby be made aware of the existence of such modelling school activities in such building.

The business operation at one point occasioned a parking problem which led to complaints from a resident in the neighbourhood. I find that such problem has been largely resolved by obtaining access to a nearby vacant lot for parking purposes from which the defendant operates a student shuttle service to the studio.

The business outgrew the dwelling. The basement, of which three-quarters was designed as a studio, features a ceiling lower than that required to permit the physical exercises of the students. It was determined that an accessory building would be required for that purpose. On August 10, 1972, the defendants applied for, and received from the plaintiff a building permit, No. 3228, a copy of which has been tendered as an exhibit. The permit correctly indicates that the property is zoned "A"; contains a statement of the nature of the construction intended, namely a two car and storage garage; and provides that such construction is "not to be used for conducting business activities".

The husband defendant testified that he advised the permit issuer of the true intent to use the property in conjunction with the model-

ling school operation. He stated that such was his explanation for the written words on the permit "not to be used for conducting business activities". He alleged he was advised that the modelling school activities were classified as a "home occupation" as understood under the by-law thereby constituting a permissible use. He does not recall who so advised him and no one was called on the part of the plaintiff to contradict the defendant's evidence in that respect.

I refer to such details as they appear to relate to the defence of estoppel originally relied upon by the defence in their pleadings. Defence counsel now advises that such defence is not being advanced or relied upon, thereby rendering most of such evidence of little significance to the outcome of this trial.

The defendants constructed a building which, on the outside, appears to be a garage with what appears to be a normal garage door to permit car entry. Examination of the inside, however, revealed that the building was not a garage but was completely finished, with rugs, et cetera. It was not then or ever used as a garage. Its primary purpose was in carrying on the physical training associated with the modelling school operation.

Section 5 of By-law No. 2877 sets out the uses that are permissible on properties zoned "A" 1 and 2 Family Dwellings. Subsection 2 reads (I will leave out those parts that are not relevant) as follows:

5(2) No buildings or parts thereof and no land shall be used for purposes other than:

- (a) A one family dwelling.
- (b) A two family dwelling.
- (c) A church.
- (d) A school.

(1) A home occupation, provided there shall be no external evidence of any home occupation.

(p) One signboard not exceeding 12 sq. ft. in area pertaining to a business lawfully carried on upon the land or in a building or buildings situated thereon.

The first issue raised by the defence and requiring determination is whether the activities carried on by the defendants constitute "a home occupation" as understood by the by-law. The provisions of the by-law provide the following definition of "home occupation" which is relevant to the issues before the Court:

2(18) HOME OCCUPATIONS: Any use customarily conducted entirely within a dwelling and carried on by inhabitants thereof, which use is clearly incidental and secondary to the use of the dwelling for dwelling purposes, and does not change the character thereof. Clinics, hospitals, barber shops, beauty par-

lic school activities academically oriented. Such definitions evolve prior to the advent of much contemporary school activities not oriented to academic learning but related instead to the arts and vocations, although incorporating a degree of academic subjects. I can be said that what was understood by the term "school" 75 years ago may be restrictive when compared to what is conjured up by such terms in today's society. Notwithstanding, there exist definitions of some vintage that would incorporate within that term a program of instruction beyond those associated with public primary and secondary schools. I refer in particular to *Black's Law Dictionary*, 5th ed. (1979), which defines school as: "institution or place for instruction or education [including private schools]".

The *Shorter Oxford English Dictionary*, 3d ed., contains a wide variety of definitions in the traditional sense but includes the following "to send to school; to educate at school; to teach with superiority; to tutor; to chastise; to educate, train; to render wise, skillful (tractable by training or discipline); to instruct (a person) how to act to teach (a person) his part; to train or exercise . . .". The *Winsto Dictionary*, *College Edition*, which also defines the term "school"; the traditional sense of a place where instruction is given, that is a institution for learning; schoolhouse; schoolroom; and the body of pupils collectively with their teacher in any education institution includes the following definition in a figurative sense: "any channel through which knowledge, training or discipline is gained". Webster's *New World Dictionary* (1956), includes the following definition of "school": "a place or institution for teaching and learning as public school, dancing school, college or university". Webster's *Ne Collegiate Dictionary* provides the usual definition of school by reference to "schools oriented in academic instructions or learning but includes the following: "to teach or drill in a specific knowledge or skill".

In my view the broader interpretations of "school" are consistent with and supported by the trend of recent jurisprudence. In *Seafair v. Training Institute v. Township of Williamsburg*, unreported (since reported 39 O.R. (2d) 370] (September 8, 1982), my brother Smith, speaking for the Divisional Court, commented as follows (the meaning of the word "education" in the context of an assessment statute [at pp. 375-76]):

The plain and ordinary meaning of education at the turn of the century might well have approximated the definition set out in *Gurdjiff v. Gurdjiff Foundation v. Regional Assessment Commission Region No. 9 et al.* (1981), 14 M.P.L.R. 303, R.P.R. 176 Vol. 7-10, Court Decisions, Assessors Review Supplement, p. 2. Our society was elitist then and monolithic. What we must struggle with now is a definition that will take account of changing attitudes and circumstances and the proliferation of occupations and schools and of job characterizations. The world is no longer divided neatly between the educated on the one hand

lours, tea rooms and animal hospital shall not be deemed to be home occupations.

The definition that I have just referred to contains the words "any use customarily conducted entirely within a dwelling". Originally, the defendants carried on their business in a rented hall. There is no evidence before the Court suggesting that an operation of this sort, as described by the evidence, is one that can be said to be "customarily conducted entirely within a dwelling". I find the evidence consistent with the contrary.

In addition, the definition encompasses the words "and carried on by the inhabitants thereof". The evidence has established the business is carried on not only by the inhabitants but also by hired personnel who do not inhabit the premises.

The definition further requires that the use of the dwelling not change its character as a dwelling in that its use in the business "is clearly incidental and secondary to the use of the dwelling for dwelling purposes". It is questionable, indeed, whether the integrity or character of the dwelling in question has remained intact. The degree of activity and the commercial sign on the lawn advertising the modelling school operation strongly suggest that the character of the dwelling has been changed.

I have thus concluded that the modelling school and the premises described by the evidence does not constitute a "home occupation" as contemplated by the by-law.

The next issue for determination is whether the activity carried on by the defendants is a permissible use of the property as a "school" as that term is understood in para. 5(2)(d) of the by-law.

"School" is not defined in the by-law. It is argued by the plaintiff that such term ought to be restricted in interpretation to schools as defined in the *Education Act*, R.S.O. 1980, c. 129. Such definition is provided for by s. 1(1) ¶49 of that Act, which reads as follows:

49. "school" means,

- i. the body of public school pupils or separate school pupils or secondary school pupils that is organized as a unit for educational purposes under the jurisdiction of the appropriate board, or
- ii. the body of pupils enrolled in any of the elementary or secondary school courses of study in an educational institution operated by the Government of Ontario,

and includes the teachers and other staff members associated with such unit or institution and the lands and premises used in connection therewith;

It is common ground between counsel that the operation of the defendants constitutes a private vocational school and clearly would not be included within the above statutory definition.

Considerable reliance has been placed upon definitions of "school" which are restricted to and describe elementary and secondary pub-

(lawyers, doctors, etc.), and the great mass of the unskilled on the other. After advancing to and beyond the stage of the artisan, we now understand the word "calling" as no longer being the private domain of the cleric, the politician, and other well-established high profile professions. The gardener, chauffeur, seafarer, sanitation engineer, artist, all follow vocations or callings and they pursue their own particular life's work. *Royal Choral Society v. Inland Revenue Com'rs*, [1943] 2 All E.R. 101, held that a body of persons established for the purpose of raising the artistic state of the country is established for educational purposes. We cannot countenance the treatment of plumbers, pipefitters or papermaker, who assure essential services in organized society, as belonging to classes that attract less deference because their members are involved in a more utilitarian activity. They cannot be assumed to be making less of a contribution, nor can we assume that the Legislature intended to discriminate in that way. He added [at p. 376]:

In my view, each case must be approached in an effort to find whether the institution is a *bona fide* school, not a sham or a cloak. The word education should then be given the kind of broad interpretation which it has in common parlance. If a place has students, physical facilities, teachers or instructors, a curriculum designed to further the advancement in life of those in attendance so that they might better pursue their vocation or life's work, it should be held to be an institution (seminary) for educational purposes.

The modelling school operated by the defendants has been, for several years, registered as a vocational school under the *Private Vocational Schools Act*, R.S.O. 1980, c. 392. That Act defines "private vocational school" as meaning:

1(c) . . . a school or place at which instruction in any vocation is offered or provided by class room instruction or by correspondence, other than a college of applied arts and technology, a university recognized by the Ministry of Colleges and Universities or a school or course of instruction maintained under any other Act of the Legislature;

Vocation is also defined under the Act as follows:

(f) . . . the skill and knowledge requisite for employment in any vocation prescribed by the regulations.

Examination of the scheme of that Act reveals that the operator of a private vocational school is required to register under that Act in order to operate such school. The parties have agreed that the school operated by the defendants is covered by the terms of the Act.

The Court here is concerned with a potential restriction to a private property owner's right to enjoy his or her property as he or she wishes. Of course, such restriction may be imposed by statute or by-law but only if the language which purports to restrict such rights leaves no reasonable doubt of its meaning. In *Re Caldwell and Toronto*, [1935] O.R. 255, [1935] 2 D.L.R. 623 at 626, Mulock C.J.O. said:

If there is any doubt upon this subject [the meaning of a by-law], the doubt must

be resolved in favour of the land owner. He not to be subject to have his property practically expropriated without compensation unless the situation is free from all doubt.

Similarly, in *St. Catharines v. Hulse*, [1936] O.W.N. 211, [1936] 2 D.L.R. 453 at 456 he said:

The Court should not give effect to language of a confiscatory character if its meaning admits of reasonable doubt.

More recently, the Divisional Court, in *Re L.D.C.M. Investments Ltd. et al. and Town of Newcastle et al.* (1975), 8 O.R. (2d) 504 at 511, 58 D.L.R. (3d) 376, adopted the following principle from Rogers, *Law of Canadian Municipal Corporations* (1959), vol. 2, p. 703:

If the expressions in By-laws . . . are of doubtful meaning as they relate to the lands in question, that doubt must be resolved in favour of the . . . [land owners.]

The Courts have, on occasions, held that a statute or by-law which purports to restrict rights of enjoyment normally vested in an owner of a property must be strictly construed. In *Re Coleman and McCallum* (1913), 4 O.W.N. 1127, 24 O.W.R. 470, 11 D.L.R. 138 [reversed on other grounds 4 O.W.N. 1449, 24 O.W.R. 754, 12 D.L.R. 140], Lennox J. said (at p. 1131 O.W.N.):

. . . statutes, and a fortiori by-laws, purporting to control or take away rights ordinarily incident to ownership, quasi-expropriation without payment, confiscation as it is often called, must be construed strictly, and the meaning must not be left in doubt — they must be definite and certain to all intents.

Grant J.A. expressed a similar view in *Re Stronach*, 61 O.L.R. 636, [1923] 3 D.L.R. 216, 49 C.C.C. 336 (App. Div.), stating (at p. 640 O.L.R.):

The law is . . . well established that common law rights are not held to have been taken away or affected by a statute, or by-law passed under its authority, unless it is so expressed in clear language, or must follow by necessary implication, and in such cases only to such an extent as may be necessary to give effect to the intention of the Legislature thus clearly manifested.

As Roach J.A. stated, in *R. v. Heit*, [1963] 2 O.R. 471 at 474, 40 D.L.R. (2d) 133, [1963] 3 C.C.C. 1:

It is a fundamental rule in the construction of by-laws in restraint of rights of property that they should be strictly construed . . .

Similarly, in *Bayshore Shopping Centre Ltd. v. Township of Nepean et al.*, [1972] S.C.R. 755 at 764, 25 D.L.R. (3d) 443, Spence J. said:

. . . a man's property is his own which he may utilize as he deems fit so long as in such utilization he does not commit nuisance, entrap the unwary or act in breach of statutory prohibitions, and therefore by-laws restrictive of that right should be strictly construed.

The corporate municipality, when drafting the existing zoning by-law, was free to define the term "school" for its purposes or describe in the list of permissible uses, the type of schools intended to be covered by such by-law. It chose to use the unrestricted term "school" which term, according to the above definitions and the contemporary use of that term, casts a very wide net. In my view the term "school" undefined or unrestricted as contained in the by-law, encompasses the type of schooling activity carried on by the defendants.

I have considered the term "school" in the context of the by-law as a whole in order to determine its true meaning. The municipality has, no doubt, attempted to create a relatively high standard residential community and intended to restrict the type of schools that might be permitted to those that would not detract from the residential nature or character of the residential community to be created. There is still, however, a degree of uncertainty relating to the type of schools contemplated by the term or those to be excluded or whether the type operated by the defendants is among those intended to be excluded. Such uncertainty must be resolved in favour of the defendants.

For these reasons the action is dismissed with costs.

Action dismissed.

(HIGH COURT OF JUSTICE)

Regina v. Musitano

STEELE J.

8TH OCTOBER 1982.

Criminal law — Procedure — Trial by judge and jury — Attorney-General directing trial by judge and jury — No notice given to accused — Fairness doctrine not to apply to Attorney-General's discretion — Criminal Code, R.S.C. 1970, c. C-34, s. 498.

Constitutional law — Charter of Rights — Presumption of innocence — Attorney-General directing trial by judge and jury — Action not contrary to Charter — Canadian Charter of Rights and Freedoms, s. 11(d).

The applicant was charged with conspiracy to possess explosive substances with intent to cause explosions likely to cause serious bodily harm or death. Although all of his co-accused elected trial by judge and jury, the applicant elected trial by judge alone. The Attorney-General, acting under s. 498 of the *Criminal Code*, R.S.C. 1970, c. C-34, and without notice to the applicant, directed that his trial be by judge and jury. The applicant sought an order quashing the indictment.

Held: the application should be dismissed.

In exercising the discretion conferred by s. 498 of the *Criminal Code* the

Attorney-General is not required to give an accused notice and an opportunity make representations. The "fairness" doctrine established in *Nicholson v. Halmead-Norfolk Regional Board of Com'rs of Police et al.*, [1979] 1 S.C.R. 311, has application.

Furthermore, the action of the Attorney-General did not contravene s. 11(d) of *Canadian Charter of Rights and Freedoms*. A direction that a trial be before a judge and jury does not infringe nor deny the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[*Re Saikaly and The Queen*, (1979), 48 C.C.C. (2d) 192; *Johnson v. Inglis et al.* (1980), 17 C.R. (3d) 250, 52 C.C.C. (2d) 385; *Re Warren and The Queen* (1981), C.C.C. (2d) 65, 22 C.R. (3d) 58, apud; *Nicholson v. Haldimand-Norfolk, Region Board of Com'rs of Police et al.*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, 23 N. 410, 78 C.L.L.C. 14, 181, distd; *A.-G. Can. v. Inuit Tapirisat of Canada et al.* [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304; *R. v. Müller*, unreported (August 25, 1982), refd to]

EDITORIAL NOTE: An appeal from this decision to the Ontario Court of Appeal was dismissed (MacKinnon A.C.J.O., Martin and Houlden JJ.A.) October 28, 1981. The following was endorsed on the Appeal Record: "The appeal is dismissed for reasons given by the learned Motions Court judge. Mr. Bowly referred us to s. 7 of the Charter of Rights and noted that the Motions Court judge did not deal with application to the facts of this case. In our view the procedures followed by the Attorney-General did not infringe the provision of s. 7."

APPLICATION for an order in the nature of *certiorari* and for order under s. 24(1) of the *Constitution Act*, 1982 quashing indictment of an accused.

John D. Bowlby, Q.C., and *George S. Gage*, for applicant.
John C. Pearson, for the Crown.

STEELE J.:—This is an application in the nature of *certiorari* to quash an indictment of the accused to the extent that his trial required to be tried by judge and jury. The accused and others were charged with conspiracy to possess explosive substances with intent to cause explosions likely to cause serious bodily harm or death. The applicant elected trial by judge alone pursuant to s. 4 of the *Criminal Code*, R.S.C. 1970, c. C-34, whereas all his co-accused elected trial by judge and jury. Subsequently, one co-accused, Vanderkooi, pleaded guilty and, at his sentencing, a statement of facts was alleged to be presented in open court which included a purported link between the applicant and an organized crime group, and that these were subject to a prominently displayed newspaper article. In addition, in an unrelated trial, the judge sentencing the accused therein heard evidence of purported expert testimony pertaining to alleged operations of organized crime which was given extensive press coverage. At the show-cause hearing the present accused, an order was made prohibiting the publication of names.