2009 CarswellOnt 4665
Ontario Court of Justice

Geil v. North Dumfries (Township)

2009 CarswellOnt 4665, 62 M.P.L.R. (4th) 294, 84 W.C.B. (2d) 461

In the Matter of an appeal under clause 116(2)(a) of the Provincial Offences Act, R.S.O. 1990, c. P.33, as amended

Jason Geil, Appellant and The Corporation of the Township of North Dumfries, Respondent

J.T. Lynch J.

Judgment: July 31, 2009
Docket: 19680/06

Counsel: D.G. Thwaites, for Appellant
E.M. Davis, for Respondent

Subject: Public; Property; Municipal

Headnote

Municipal law --- By-laws — Enforcement — Practice and procedure — Appeal

G was convicted of having violated noise by-law — G appealed conviction and sentence imposed — Appeal dismissed — There was no reason to believe that justice of peace would be unable to properly interpret reference to "any unusual noise likely to disturb inhabitants..." — Court was entitled to look at context, intent of township and public interest being protected — Findings of fact of justice of peace were not unreasonable and properly instructed trier of fact could reasonably have made same findings — Sentence showed court's denunciation of G's behaviour, in that he repeatedly and persistently violated by-law and made no attempt to remedy situation — Fine of $2,000 was not excessive or unreasonable in circumstances.

APPEAL by accused from conviction and sentence.

***J.T. Lynch J.*:**

1 This appeal is from a decision of Her Worship Justice of the Peace J. DeJong, dated September 19, 2007. Her Worship convicted the Appellant, Jason Geil, for having violated Township of North Dumfries Bylaw 908-86, s. 1, having determined that on the 3rd day of November, 2006, he committed the offence of permitting noise likely to disturb the inhabitants of the Township of North Dumfries.

2 The Appellant has appealed both his conviction and the sentence imposed by the court.

3 Both the Appellant and the Respondent provided written factums to the court, together with books of authorities in addition to attending before the court to provide oral submissions on the appeal.

4 The Appellant submits that the township noise bylaw is so vague and uncertain as to be unenforceable. He further argues that he was not afforded what his counsel has referred to as "due process", referring to a multitude of alleged procedural errors particularly as they relate to the evidence that was put before the court, and not permitted to be put before the court, during the course of the trial. Under this umbrella of due process the Appellant further argues that the court failed to direct its mind to the relevant evidence, misstated evidence and improperly applied the onus on the Crown to prove the offence beyond a reasonable doubt while at the same time imposing more than a balance of probabilities standard of proof on the defendant with respect to an exemption found within the bylaw.

5 With respect to penalty, the Appellant submits that the court erred in imposing the maximum fine pursuant to the bylaw, in the sum of $2,000.

Bylaw 908-86:

6 On July 21, 1986, the Township of North Dumfries, hereinafter referred to as the "Township", passed Bylaw 908-86. That bylaw provides as follows:

> 1. No person shall, within the corporate limits of the Township of North Dumfries, ring any bell, blow or sound any horn, shout or make any unusual noise or noise likely to disturb the inhabitants of the Township of North Dumfries or cause or permit the same to be made.
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> 2. This Bylaw shall not apply to any farming, farm-related or agricultural operation or to the use of implements of husbandry, either motorized or self-propelled.
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> 3. Every person who contravenes any of the provisions of this Bylaw shall, upon conviction thereof, forfeit and pay a penalty not exceeding (exclusive of costs) the sum of Two Thousand ($2,000.00) Dollars for each such offence and every such penalty shall be recoverable under the *Provincial Offences Act*, R.S.O. 1980, C. 400, as amended.

7 This bylaw was enacted pursuant to s. 129 of the *Municipal Act, 2001*, S.O. 2001, c. 25 which states:

> Without limiting ss. 9, 10 and 11, a local municipality may,
>
> (a) prohibit and regulate with respect to noise, vibration, odour, dust and outdoor illumination, including indoor lighting that can be seen outdoors;

8 No issue was taken with the entitlement of the Township to enact a bylaw regulating noise. Instead, the Appellant submits that ss. 1 and 2 of Bylaw 908-86 were vague and uncertain such that no reasonably intelligent person could determine the meaning of the bylaw and govern his actions accordingly. This is the first time that an objection was voiced with respect to the content of the bylaw, as this was not an issue raised at trial.

9 Counsel for the Appellant refers to case law dealing with ambiguity and uncertainty in bylaws, however an analysis of those cases does not lead this court to believe that they are of assistance to his client. In *Reid's Heritage Homes Ltd. v. Guelph (City)* [2000 CarswellOnt 2907 (Ont. S.C.J.)], 2000 CanLII 22638, Justice MacKenzie of the Ontario Supreme Court dealt with a municipal noise control bylaw wherein noise was defined as "sound that is created by an activity set out in this bylaw when such sound is of a volume that it annoys or disturbs or is likely to disturb the peace, quiet, comfort or repose of any person."

10 At para. 20 of the decision, the court said:

> The Ontario authorities cited by the applicant set out the following principles with respect to the above question.
>
> (1) a municipal bylaw must be certain and definite and must contain adequate information as to the duties of those who are to obey it. In particular, the bylaws should be written with enough specificity to enable citizens to perceive their obligations in advance so that they can govern their actions accordingly. If a provision prescribing citizens' rights is not reasonably explicit, it will be unenforceable because it is vague:
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> *R. v. Sandler*, [1971] 3 O.R. 614, 21 D.L.R. (3d) 286 (C.A.); *Hamilton Independent Variety & Confectionery Stores Inc. v. Hamilton (City)* 1983, 143 D.L.R. (3d) 498 (Ont. C.A.); and, *Harrison v. Toronto (City)* (1982), 39 O.R. (2nd) 721 (H.C.J.) at page 724, 140 D.L.R. (3d) 309.

> (2) A provision in a bylaw may be unenforceable for uncertainty if it leaves citizens wondering what is in the mind of municipal officials or confers upon municipal officials unlimited discretion to lay charges based on their personal views as to the meaning of the provision; *Harrison*, *supra*, at pages 722-723.

11 While the court ultimately determined that the wording of that bylaw was void for uncertainty and could not stand, that determination appears to have turned on reference in the definition of "noise" to the words "annoys or disturbs". Justice MacKenzie made reference to this in para. 23 of the *Reid's Heritage Homes* decision, wherein concern was expressed with respect to a person being left in a state of uncertainty as to whether their music would disturb any other inhabitant, given that reference to actually disturbing any person is purely subjective.

12 In the case before this court, no similar definition exists and instead it is an objective standard which is utilized, through the words "noise likely to disturb the inhabitants" with no reference to a specific inhabitant being disturbed.

13 The Ontario Superior Court of Justice decision in *Lawrence v. Muskoka Lakes (Township)* [2005 CarswellOnt 1890 (Ont. S.C.J.)], 2005 CanLII 16587, similarly dealt with a noise bylaw, in that case again determining that the whole of a noise bylaw must be struck. In finding fault with two manners of obtaining exemptions to the noise bylaw, the court stated that "a municipality has an obligation to write a bylaw that is certain" and went on to indicate at para. 52 of the decision that "lastly, it must be remembered that uncertainty will render a bylaw invalid when a reasonably intelligent person would be unable to determine the meaning of the bylaw and to govern his actions accordingly." In determining that no objective criteria existed that would permit a "reasonably intelligent person" to assess whether or not they were entitled to an exemption from the zoning bylaw, the court in *Lawrence v. Muskoka Lakes* was applying the principles set out in the *Reid's Heritage Homes* decision and, in a similar manner, rejected a noise bylaw due to vagueness and uncertainty. The distinction that exists between the *Lawrence* case and the instant case is the same distinction that exists between our case and the *Reid's Heritage Homes* case, in that the Township of North Dumfries noise bylaw does not impose, either alone or in conjunction with an objective standard, any form of subjective standard of determination.

14 In referring to the Ontario Court of Appeal decision in *Hamilton Independent Variety & Confectionery Stores Inc. v. Hamilton (City)* (1982), 143 D.L.R. (3d) 498 (Ont. C.A.), a decision that dealt with a municipal bylaw regulating adult entertainment parlours, the Appellant points to the wording of that court at pages 507 and 508 wherein the court stated:

> 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 meaning of a bylaw is particularly important in a bylaw....

And further that:

> In my view, it is no answer to the vagueness and uncertainty argument in this case to say that the bylaw 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 bylaw, the bylaw 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 bylaw.

15 It cannot be taken that this decision renders all bylaws invalid simply because they repeat, without elaboration, wording taken from the *Municipal Act*. This court instead interprets the decision as indicating that a repetition of wording from that piece of legislation is not sufficient to save an otherwise vague or uncertain municipal bylaw.

16 The determination of this court is that the objective standard found within Bylaw 908-86 is sufficiently explicit and specific such that a "well-intentioned citizen of common intelligence will not have to guess at the meaning". The fact that a court may be called upon to make a determination as to what is an "unusual noise or noise likely to disturb the inhabitants of the Township" is not fatal to this bylaw as that is a function appropriately left to a court, wherein a variety of circumstances that could not be fully canvassed in any noise bylaw, can be considered.

17 This interpretation is in keeping with the decision of the Ontario Divisional Court in *R. v. Highland Packers Ltd.*, [1978] O.J. No. 658 (Ont. Div. Ct.), wherein that court considered a noise bylaw. That bylaw prohibited the making of certain enumerated sounds, "or any other noise that disturbs any of the inhabitants of the Town of Stoney Creek." It was again the purely subjective nature of the criteria that the court took issue with, contrasting to that subjective standard wording not dissimilar from that which is found in the Township of North Dumfries bylaw.

18 At paras. 9 and 10 the court stated:

> An alleged violation of the bylaw in question would be established by proving simply that an inhabitant of the Town of Stoney Creek had been disturbed by the noise in question. A violation of a bylaw limited in scope to the general provisions of the enabling legislation could only be proved by establishing that the noise complained of was one that was likely to disturb the inhabitants. The latter case would depend upon the application of an objective standard and the defence might be that the noise complained of was not of a volume or duration such as would ordinarily disturb a reasonable person. The former case, on the other hand, would involve the application of a purely subjective standard, depending on whether or not the complaining inhabitant was in fact disturbed.
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> Because the prohibition of 'any other noise that disturbs any of the inhabitants of the Town of Stoney Creek' exceeds the enabling legislation, that provision, in my view, is illegal and void.

19 It is the determination of this court that neither s. 1 nor s. 2 of Bylaw No. 908-86 is void or unenforceable as a consequence of being too vague or uncertain, given the ability of a court to interpret legislation in various contexts. It was that interpretative role that was well summarized by P. H. Howden J. in the Ontario Superior Court of Justice case of *Neighbourhoods of Windfields Ltd. Partnership v. Death*, [2007] O.J. No. 5081 (Ont. S.C.J.). The court in that case relied heavily on the Supreme Court of Canada decision in *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), when setting out the proper approach to an attack on an enactment based on vagueness. At para. 26 of the *Neighbourhoods of Windfields* decision the court stated:

> From the above review of the recent authorities, several important aspects of a proper approach to an attack on an enactment based on vagueness are clarified.
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> (i) Whether the case involves a civil, administrative, or municipal enactment, or raises a constitutional issue, the test is the same. *Nova Scotia Pharmaceutical*, para. 70; *Consortium Developments (Clearwater) Limited v. Sarnia*, [1995] O.J. No. 1649 (Div. Ct.).
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> (ii) The enactment is impermissibly vague only if it is not intelligible and so fails to provide an adequate basis for legal debate and reasoned analysis; if it fails to sufficiently delineate any area of risk; and if it offers 'no grasp' for courts to perform their interpretive function. It is an exacting standard. (*Nova Scotia Pharmaceutical*, para. 63).
>
> (iii) The policy basis or rationale behind the test is two-fold, in that there be fair notice to citizens, and that discrimination in enforcement is to be limited. (*Nova Scotia Pharmaceutical*, para. 39); *Reference re ss. 193 and 195.1 of the Criminal Code* (Man.), [1990] 1 S.C.R. 1123)
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> (iv) Laws today are often, of necessity, framed in general terms to allow for flexible application and to not obscure the legislative purpose. Courts must be wary of using the vagueness doctrine to prevent or impede action in furtherance of the valid social objectives of the particular legislature or council. A delicate balance is required between societal interests and individual rights. (*Nova Scotia Pharmaceutical*, para. 68).
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> (v) In determining whether a law is too vague, the court must,
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> (a) consider the need for flexibility and carry out its interpretive role;
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> (b) recognize that standard of absolute certainty in legislation is impossible; and,

(c) consider that many varying judicial interpretations of a given disposition may be possible and may coexist (*Nova Scotia Pharmaceutical*, para. 28).

20 In the case before this court, there is no reason to believe that the justice of the peace that heard the matter would be unable to properly interpret reference to "any unusual noise or noise likely to disturb the inhabitants of the Township of North Dumfries" or the farm-related exception found in s. 2. The court is entitled to look at the context, the intent of the Township and the public interest being protected and to receive evidence with respect to the particular circumstances. Accordingly, this basis for the appeal is rejected by the court.

Due Process — the Law:

21 Information alleges that the Appellant breached the noise bylaw on or about November 3, 2006. The Appellant argues that the trial court relied on information pertaining to dates other than November 3, 2006 and that it failed to direct its mind to the evidence that related specifically to that date. This court finds that not to be the case. The prosecutor called three civilian witnesses, Lisa Lair, Paulette Gole, and Grant Gole. Each of these three individuals live in close proximity to the Geil property upon which the offence is alleged to have occurred and each provided evidence relating to the date of the allegation. At pages 3 and 4 of the trial transcript Ms. Lair testified as to the noise being created by trucks attending at the Appellant's property, stating that this truck traffic ran 24 hours a day commencing in October of 2006. She indicated that by Thursday night she and her husband were unable to deal with the noise any more and that as a consequence they called Waterloo Regional Police who came out at 1:30 in the morning. She gave further evidence that on that Friday, being November 3, she contacted the bylaw officer for the township, explaining the situation.

22 Paulette Gole was asked about the truck traffic and the noise that had occurred during the week of October 30 to November 3 when charges were laid and, although no reference is found in the transcript to the year 2006, these dates are placed in context through the evidence of the other witnesses for the prosecution. Clearly, the court accepted that the witness was making reference to the week of October 30 through November 3, 2006 and at page 13 of the trial transcript Ms. Gole stated that the trucks started running around 11:00 p.m. and continued until the early morning during that week, which would therefore have included November 3, 2006.

23 Grant Robert Gole also gave evidence with respect to the week of October 30 through November 3. He gave specific evidence regarding the various noises being caused by the truck traffic in close proximity to his home, stating "this went on all night long". He also indicated, after describing the events of Monday, Tuesday and Wednesday nights that the same thing occurred on Thursday which, in the context of the other trial evidence, would mean that it occurred on November 2, 2006 into the morning of November 3, 2006. The year was in fact confirmed at page 29 of the trial transcript, when the agent representing the Appellant asked if that was the year that he was referring to and Mr. Gole responded that it was.

24 When called as a reply witness by the prosecution. Officer Cody Shipp indicated that he was called to the location on Friday morning, November 3, 2006 at approximately 1:00 a.m. regarding a noise complaint made by Lisa Lair.

25 The learned justice of the peace made reference to the evidence of each of these witnesses in determining that the Appellant had committed the offence of permitting noise likely to disturb and, although her judgment made reference to other times as well, the particular date of November 3, 2006 was included within the time frame and, as well, it was specifically referred to by the justice of the peace. The determination that similar activity had been permitted on other dates was simply in keeping with the evidence that had been heard, which evidence not only put the specific allegation in context but also was heard with respect to the issue of the exemption found in s. 2 of the bylaw. It was necessary to hear evidence regarding what had been going on at the property in advance of the November date, given the position taken by the Appellant that he was exempted as he was involved in farming, a farm-related or agricultural operation or the use of implements of husbandry, as referred to in the bylaw.

26 This court finds that no error was made pertaining to the date of the alleged offence.

27 The Appellant argues that hearsay, and double hearsay, evidence was admitted through witnesses called by the prosecution including Officer Shipp. Upon reading the full transcript of this trial proceeding it is clear that there were numerous occasions when hearsay evidence was advanced for the truth of its content. In large measure, this was as a consequence of unsophisticated witnesses who were obviously not familiar with the rules of evidence and it flowed into the proceeding generally absent objection by the agent representing the Appellant. The inclusion of that evidence in the trial proceeding ought not to have occurred, however in large measure the failure of the Appellant's agent to object appears to have been as a consequence of a conscious decision not to take issue. That agent was capable of, and did, raise the issue of hearsay on some occasions during the course of the trial but was not consistent in doing so. The presiding justice of the peace made reference to at least some of the inappropriate evidence but appears to have taken the source of that information into account in rendering her decision. Given the abundance of appropriate evidence available to the trier of fact and the determination of this court that the reliability of the trial's result was not compromised, this court determines that no prejudice has occurred resulting from the introduction of hearsay evidence in this instance.

28 The Appellant also argues that photographs were admitted into evidence without proper foundation, proof and identification, despite there having been no objection to their admission at trial. The transcript indicates that the Appellant was provided with copies of the photographs in advance of the trial and no issue was taken, either in cross-examination of the witnesses that identified the photographs, or through any other means, with respect to the accuracy of the photos or any concern regarding a misleading of the court. It was clear from the trial evidence that the photographs were of the subject property and provided the court with little more than the physical layout of that property including the existence of a berm which was being created by the Appellant. Mr. Geil himself took no issue with the content of the photos when he viewed them in giving his evidence. Any error that may have existed with respect to their introduction would not, in these circumstances, impact on the reliability of the trial's result and in the context of this appeal this objection, even coupled with other procedural irregularities, does not form a sufficient basis upon which to grant an appeal.

29 Officer Cody Shipp was called by the prosecution as a reply witness and the Appellant argues that errors occurred in that he had been present in court during the giving of evidence by others, in the face of an order excluding witnesses, that some of his evidence was hearsay and that some of his evidence went beyond proper reply evidence. The Appellant further argues that the court erred in not permitting evidence of the defendant in response to the evidence of Officer Shipp.

30 The calling of a witness in reply, contrary to an order excluding witnesses, does not prohibit a court from hearing that evidence. Instead, the court hearing that evidence, in this case from Officer Shipp, has to assess the evidence in light of what other evidence the reply witness has heard. In this case the transcript indicates that Constable Shipp was not present for the giving of evidence by other prosecution witnesses and instead only heard evidence tendered by witnesses called by the defence. That, in itself, alleviates much of the concern with respect to accepting his evidence and, if there is a potential conflict or concern then the court is able to assess weight to that portion of the testimony which might be tainted by that which was heard. With respect to the giving of hearsay evidence, counsel for the Appellant points to two portions of the transcript, the first at pages 56 and 57 and the second at pages 63 and 64. In the first instance, there is no question but that the officer was reporting to the court that which other individuals had said. In particular, this related to whether or not Mr. Geil and his wife had received correspondence from the Township regarding noise being created and the need to discontinue it. In fact, there was not much new in this evidence given the testimony of the Appellant and his wife, Janet Bratton. There was no denial that documentation had been delivered by the Township. Instead their evidence related to whether or not they had read the letter. At pages 63 through 64 of the transcript, during cross-examination, Officer Shipp was asked by the agent for Mr. Geil about a conversation that had occurred between the bylaw officer, Mr. Denney, and police Sergeant Mercer. In responding, Officer Shipp made it clear on the record that he did not have firsthand knowledge of the conversation when he stated, "And then he contacted the solicitor and he received — my understanding was that I mean again this is third hand to me.", to which Mr. Geil's representative responded, "Okay." and, with that approval, the officer went on to indicate what he understood to have occurred with respect to complaints, looking into the bylaw, contacting a solicitor, receiving a legal opinion and then attending at the property to provide Mr. Geil with the letter earlier referred to. At that point the officer again made it clear that he did not have firsthand knowledge when, in concluding his response to Mr. Jackson, he stated, "That's my understanding but again I'm getting that information is third hand

as far as I'm concerned.". Continuing on at page 64 of the transcript the Appellant's agent, Mr. Jackson, then made inquiry as to what Mr. Denney had told Sergeant Mercer, summarizing what he believed to be the information and asking Officer Shipp if it was correct. This witness then responded. "I'd be putting words in Mr. Denney's mouth." Mr. Jackson did not ask further what had been said by others but instead asked the officer what he himself had placed in his statement. In response to that the officer provided his understanding as to what had occurred regarding the Township's solicitor issuing a letter.

31 The hearsay evidence provided by Officer Shipp ought not to have gone in as it did, however given the other evidence available to the court, and considered by the court in its reasons, this court determines that there has been no prejudice to the Defendant through its inclusion. As well, much of the hearsay evidence was obtained at the specific request of the Appellant's representative, in the face of the witness indicating that he had no direct information, and this court, like the trial court, is entitled to assume that reasonable judgment was being exercised by that representative. It may well have been that some advantage to the Appellant/Defendant was being sought, whether or not that advantage materialized, or the other evidence was being placed in context. In any event, the irregularity that occurred cannot be said to have impacted on the reliability of the decision. That determination holds true despite the fact that the evidence of Officer Shipp also contained information which was beyond that which ought properly to have been introduced as reply evidence. At page 52 of the transcript counsel for the Township indicated a desire to call the officer to provide reply evidence, "solely to deal with the submissions that were made for the first time by Mr. Geil with respect to communications made by the police". That evidence was in fact forthcoming from the officer, however there was additional information sought by counsel, and obtained, with respect to trucks on the property, the level of noise created by the operation and noises from other locations in the vicinity. Cross-examination then followed wherein Mr. Jackson, on behalf of the accused, sought out the hearsay evidence already considered by this court.

32 The Appellant takes the position that he ought to have been permitted to respond to the reply evidence of Officer Shipp. Whether or not reply evidence is appropriately called is always a matter of judicial discretion and in this case the learned justice of the peace did consider the request made by the Appellant and denied leave to call that further evidence. At pages 72 and 73 of the transcript Her Worship stated that the relevance of Officer Shipp's testimony itself was "minimal at best" and that the court would rely primarily on the testimony of the other witnesses. The Appellant's representative at the trial did not indicate a particular area in the officer's evidence that he sought to address through further evidence from the defendant and the presiding justice of the peace was entitled to exercise her discretion not to have the witness re-called.

33 The Appellant submits that the presiding justice of the peace misstated evidence in the giving of her reasons. Although no specific references to this were made in the Appellant's factum, there were examples cited in oral submissions. Counsel for the Appellant referred to the Honourable Justice of the Peace as having erred in reciting the evidence of Ms. Bratton as to when she and Mr. Geil actually moved into the property. Counsel is correct in that regard as page 17 of the transcript of the judgment refers to Ms. Bratton finally admitting that they did not move into the property until November of 2006, however that does not match the evidence heard by the court. In examination-in-chief Ms. Bratton provided that same date and she did so again when questioned directly by the court.

34 Counsel also referred to a reference by the justice of the peace to the evidence of Mark Hermann regarding concrete being placed on Mr. Geil's property, then covered with top soil. A review of the transcript indicates that questions were being asked of this witness not only with respect to the Geil property but also with respect to Mr. Hermann's own farm, and that although Mr. Hermann testified with respect to fill going into the Geil property, the reference to concrete fill and then top soil over top was in fact a reference to the Hermann property. Regarding the decision of Her Worship, this appears not to have played a role, despite having been mentioned by the court.

35 The next example cited by Appellant's counsel, wherein he suggested that evidence was misstated or misunderstood, also related to the evidence of Mr. Hermann. At page 18 of the court's decision the justice of the peace indicated that Mr. Hermann was shown a photograph of the subject property where there had been in-filling and that Mr. Hermann acknowledged that he would not be able to farm it as it currently existed. In fact, that is exactly what Mr. Hermann indicated in his testimony, although in responding he also stated that it takes years and that it had in fact been a three or four year project on his own property. The view of this court is that nothing turns on this, as the court was not making a determination that it was impossible to ever farm the land, and instead simply repeated the evidence of Mr. Hermann that as the filled-in portion of the property currently

existed it could not be farmed. Her Worship also stated at page 28 of her decision that "Nothing is going to be farmed on CP Rail property that Mr. Geil has improved.". Counsel submits that there was no evidence of this, however it is reasonable for a court to take judicial note of the fact that rail line property is not agricultural property. The evidence heard with respect to the CP Rail property was that the Geil land had previously sloped down towards it, causing water to move in that direction. As a consequence of a significant amount of fill having been put on the Geil property in that area, the CP Rail land has now been improved in that it is no longer subject to runoff. None of that evidence is contrary to what Her Worship indicated when she made the point that the improvement to the CP Rail property did not relate to farming that property.

36 Appellant's counsel takes the position that the trial court assessed the credibility of both the Appellant and Ms. Bratton based on denials and contradictions without referring to specific instances and chose the evidence of Officer Shipp, based in large measure on hearsay, over the evidence of those two other witnesses. This is all referred to on pages 28 and 29 of the court's decision and, with all due respect to the trial court, there appears to be a focus on an area which was not relevant to the determination to be made by the court. The issue being addressed by the justice of the peace at that point in her decision related to whether or not correspondence from the Township had been received by Mr. Geil and his spouse, yet this court is unable to determine just how that relates to whether or not there was any unusual noise or a noise likely to disturb the inhabitants of the Township. Nor does it relate to whether or not Mr. Geil falls within one of the bylaw exemptions. Although an assessment of credibility may take into account a determination as to whether or not the correspondence was received and/or read, Her Worship appears to have been addressing credibility ultimately as it related to the Township correspondence. There were contradictions in the evidence of Mr. Geil and Ms. Bratton relating to the correspondence, apart entirely from anything that Constable Shipp may have said, however as it was referenced, an assessment of credibility in order to determine whether the letter had been received or read was not a relevant issue. In this regard the trial court appears to have embarked on an unnecessary determination.

37 Her Worship also referred, at page 29 of her decision, to photographs showing activity continuing after November 3, contrary to a direction from the Township to cease operations. What may have occurred following November 3, 2006 is of course not relevant to the trial court's determination of guilt. This court takes little from the reference to that time period other than the indication of the trial court that Mr. Geil remained of the belief that his activity fit within the bylaw exemption. That of course was an issue to be determined by the court and reference to Mr. Geil's position, although not inappropriate, did not advance the determination.

38 It is argued that the trial court also erred in "failing to direct that the Township Bylaw Enforcement Officer be called or otherwise draw an adverse inference against the Municipality in not calling a key witness and thus providing the Appellant of the opportunity to cross-examine".

39 There is, of course, no obligation on the Township to call any particular witness and in this case it is clear from the transcript that the bylaw enforcement officer was present on scene only after the fact. The Appellant similarly chose not to call this individual and, in these circumstances, this court is unable to determine what adverse inference could be drawn. Accordingly, this objection is entirely without merit.

40 The final alleged error relates to the justice of the peace "failing to properly apply the onus on the Crown". This submission is simply not borne out by the evidence or the trial judgment. The court found that a prohibited noise had occurred, on a repeated basis, and in particular that it had occurred on the date in question. Little, if any, issue was taken with respect to that at the trial, the focus of the defence instead being on the farm exemption. With respect to that exemption, although counsel for the Appellant argues in his factum that the justice of the peace "imposed the wrong standard of proof on the defendant, namely by requiring that the evidence must be "clear and convincing" as opposed to on the "balance of probabilities", that does not accurately reflect the decision of Her Worship. At pages 22 and 23 of her decision, Madam Justice De Jong referred specifically to s. 47(3) of the *Provincial Offences Act*, which states:

> The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

41 The onus is therefore placed on the Appellant with respect to s. 2 of the bylaw, being the exempting section, and in that regard Her Worship made reference to case law dealing with the onus, indicating not only that the exemption burden was on the defendant, but also that the onus on the defendant was "on a balance of probabilities". When she referred to a "clear and convincing basis" it was in referring to submissions by Township Council as to the burden, without accepting that submission, and with a further reference to the actual burden of proof. There is nothing ambiguous in this and Her Worship was accurate in her characterization of the burden on the defendant.

Standard of Review — Conviction:

42 Subsection 120(1) of the *Provincial Offences Act*, R.S.O. 1990 states:

> On the hearing of an appeal against a conviction or against a finding as to the ability, because of mental disorder, to conduct a defence, the court by order,
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> (a) may allow the appeal where it is of the opinion that,
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> (i) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
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> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
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> (iii) on any ground, there was a miscarriage of justice; or
>
> (b) may dismiss the appeal where,
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> (i) the court is of the opinion that the Appellant, although the Appellant was not properly convicted on a count or part of an information, was properly convicted on another count or part of the information,
>
> (ii) the appeal is not decided in favour of the Appellant on any ground mentioned in clause (a), or
>
> (iii) although the court is of the opinion that on any ground mentioned in sub-clause (a)(ii) the appeal might be decided in favour of the Appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

43 It is not the role of an appeal court to retry a case or to effectively substitute its own view of the evidence for that of the trial justice. The test for appellate review of the reasonableness of the verdict is whether, on the evidence, a properly instructed trier of fact acting judiciously could reasonably make the findings, notwithstanding another possible rational explanation. *R. v. 1353837 Ontario Inc.*, [2007] O.J. No. 433 (Ont. C.J.) at para. 74.

44 As pointed out in this decision, some errors were made in summarizing evidence that had been heard and in permitting both the counsel and the agent at the trial to elicit evidence which was not relevant to the determinations to be made, was improperly given or amounted to hearsay. Despite these errors, this court finds no errors regarding decisions on questions of law nor does it find that a substantial wrong or miscarriage of justice has occurred. The findings of fact made by the justice of the peace were not unreasonable and a properly instructed trier of fact, acting judiciously, could reasonably make the same findings. Accordingly, the appeal with respect to conviction is dismissed.

Sentence:

45 The Appellant has also appealed the trial decision with respect to sentence, submitting that the court erred in imposing the maximum fine pursuant to s. 3 of the bylaw. The fine imposed was one of $2,000. In particular, the Appellant submits that the court failed to properly consider the authorization and acquiescence of the Township to the Appellant's ongoing work prior to the date of the offence, failed to have regard to the fact that there is a set fine for this offence of $78.75 pursuant to Part I of the *Provincial Offences Act* and, finally, that the court essentially imposed a penalty for prior "offences" for which the defendant had never been charged.

Standard of Review — Sentence:

46 Subsection 122(1) of the *Provincial Offences Act* states:

> Where an appeal is taken against sentence, the court shall consider the fitness of the sentence appealed from and may, upon such evidence, if any, as it thinks fit to require or receive, by order,
>
> (a) dismiss the appeal; or
>
> (b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted, ...

47 In *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.), a decision of the Supreme Court of Canada, Mr. Justice Iacobucci, speaking for the court, said at pp. 209 — 210:

> An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been. The formulation of a sentencing order is a profoundly subjective process: the trial judge has the advantage of having seen and heard all the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

48 The court went on to refer to the judgment of *R. v. Muise (No. 4)* (1994), 94 C.C.C. (3d) 119 (N.S. C.A.), at pp. 123-124:

> My view is premised on the reality that sentencing is not an exact science, it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the only basis upon which courts of appeal review sentencing when the only issue is whether the sentence is inadequate or excessive.

49 In this case the presiding justice of the peace stated that the penalty needed to show the court's denunciation of the behaviour of the defendant, in that he had repeatedly and persistently violated the bylaw and made no attempt to remedy the situation. While there was no evidence before the court that Mr. Geil had ever been convicted of a similar offence, there certainly was evidence that the behaviour complained of had been ongoing for a considerable period of time and that despite complaints, the Appellant was prepared to continue causing the noise to be created. These are factors that the court was entitled to consider when determining the quantum of fine to be imposed, as was the fact that the noise resulted from a very planned and deliberate course of action on the part of the defendant to improve his own circumstances at the expense of his neighbours.

50 The maximum fine available to the court, in the sum of $2,000, might not have been the level imposed by this court had it heard the trial of this matter, rather than the appeal, but it cannot be said that a fine in the sum of $2,000 is excessive in all of the circumstances. It certainly reflects what the Justice of the Peace indicated was the primary sentencing consideration, that of denunciation.

51 As this court finds that the fine was not excessive and was not unreasonable in the circumstances, the appeal against sentence is also dismissed.

Appeal dismissed.

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