

*Case Name:*  
**Hamilton (City) v. Veri**

**Between**  
**City of Hamilton, and**  
**Victor Veri**

[2014] O.J. No. 1163

Ontario Court of Justice  
Hamilton, Ontario

**D. Dudar J.P.**

Heard: April 19 and December 6, 2013.

Judgment: March 10, 2014.

(32 paras.)

**Cases Cited:**

R. v. Sault Ste. Marie, [1978] 2 S. C.R. 1299

**Statutes, Regulations and Rules Cited:**

Evidence Act, R.S.O. 1990, c. E.23.

Planning Act, R.S.O. 1990, c. P.13.

Provincial Offences Act R.S.O. 1990, c. P.33, as amended Town of Flamborough By-law, 90-145-Z.

Township of Flamborough By-law.

**Counsel:**

L. Clayton, for the City of Hamilton.

K. Andrews, for Victor Veri.

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Decision of the Court

**1 D. DUDAR J.P.:**-- For the reasons set out below, I dismiss the charges against Mr. Veri.

## Background

**2** Victor Veri is before the Court charged pursuant to Part III of the Provincial Offences Act, with two counts under the Town of Flamborough By-law, now within the authority of the City of Hamilton, specifically:

- a. While being an occupier having care and control of the property [ ... ] a portion of which is zoned "R2-12H" (settlement residential) did unlawfully use said portion of the property for outside open storage, which use is a contravention of section 5.24 and section 7 of the Town of Flamborough Zoning By-law 90-145-Z, amended, and
- b. While being an occupier having care and control of the property [ ... ] a portion of which is zoned "A" (agricultural) did unlawfully use said portion of the said property for outside open storage of items not permitted in an A zone, which use is a contravention of section 5.20 and 5.24, and section 33 of the Town of Flamborough Zoning By-law 90145-Z, as amended

**3** For ease of reference, the relevant sections of the By-laws are set out in Appendix "A", following this decision.

**4** The matter was the subject of a number of appearances in the set date Court, and was the subject of a pre-trial. The matter was set for trial on April 19, 2013, and, in preparation for that date, Mr. Veri filed a number of motions with the Court. These included a motions for a stay, first on the basis that the charge was not filed within the six months required by the Provincial Offences Act, and secondly that the By-law was impermissibly vague. The Court ruled that it would consider these issues if necessary after all the evidence had been tendered and the matter then had to go over to a further date for completion of evidence.

**5** After completion of the evidence, counsel for the defence abandoned the pre-trial motions, and invited the Court to rule on the basis of the evidence and law.

**6** The defence position is multi-pronged and, ultimately, complex. Among other things, it relies on principles of and case law related to statutory interpretation, for the proposition that the By-law, which is complex, cannot be read as creating the offence alleged. Alternatively, the defence argues that use of the land for agricultural purposes, and attendant use for outside storage related to agricultural use, survives any by-laws being enacted. Finally, the defence argues that, inasmuch as s5.20 of the Town of Flamborough By-law is a permissive provision, that the prosecution has failed to establish that some of the conditions required for the permission(s) to apply were in fact not present.

**7** Ultimately, the prosecution argues that it has proved that open storage is prohibited on the subject lands (as they are not appropriately "agricultural", and relies on the description of the property as to size and dimensions, for the proposition that, pursuant to the Township of Flamborough By-law (which predates the Town of Flamborough Bylaw) farming is only permitted on parcels of land exceeding ten acres. As, in the prosecution view, it falls to Mr. Veri to prove any on-going use since the time of the adoption of the Township of Flamborough By-law, which Mr. Veri has failed to do, then any defence of on-going, continuous use must fail, and the By-law as it currently reads ought to be interpreted and applied strictly.

**8** I am mindful that at the end of the prosecution case, defence made a motion for non-suit, which was dismissed by the Court, as the Court found that there is evidence before the Court on each of the elements of the charged before it.

#### Evidence and Positions of the Parties

**9** The evidence in this case is largely uncontested. Mr. Veri occupies the subject lands; he is not the owner and the owner has not been charged with corresponding charges. He earns his income from farming, and, as part of his business, farms this property, as well as several others. He has done so on this property since his occupancy in the mid to late 1990s.

**10** There is evidence that the City contacted Mr. Veri prior to the current charges being laid, requesting he provide proof of continuing use of the property as agricultural. Mr. Veri did not reply to that request.

**11** Sometime in the early 2000s, he was investigated for what appear to have been related matters, however, that investigation did not lead to any charges.

**12** The current matter arose as a result of an investigation by a municipal by-law enforcement officer, who attended at the property and made observations. These observations were recorded by way of digitized photographs, covering two dates. The latter of these dates coincides with the date of the present allegations.

**13** Mr. Veri's evidence leads to the conclusion that most, if not all of the items giving rise to the allegation of outside storage are related to his farming activities. While the relationship of some of these items to farming activities may be less than obvious, even the prosecution's witness was unable to establish with any certainty that they were not.

**14** The prosecution's "ace in the hole", as it were, would be the property record for the subject property, establishes that the subject property comprises less than ten acres. This was presented to the Court in the form of a printout of a computer screen from what is presumably a City of Hamilton computer system, which records, among other things, data on the size and dimensions of the property. There was no objection to this document being tendered in evidence, in spite of it being neither certified nor subject to notice to the defence pursuant to the Evidence Act. Mr. Veri acknowledged under oath that the contents of that document appear to be correct.

**15** It is unclear whether the screen shot and the data it contains refers to the entirety of the property or one of the two areas which are zoned separately, one being agricultural, and the other - previously zoned agricultural.- zoned residential with a "holding" designation.

**16** The current by-law allows properties which have been the subject of re-zoning, to continue to be used in the same way as would have been allowed under the prior zoning classification. It appears that the Town of Flamborough zoning provisions (presented to the Court again as a simple photocopy of a By-law said to be an extract from the Town of Flamborough as it would have been in effect in the early 1990s, and not by way of certified copy) permitted farming only on lands of ten acres or more.

**17** The defence produced a witness, Michael Schmidt, Mr. Veri's neighbour. He gave unchallenged evidence that the subject lands were used for agricultural uses from at least 1973, when he occupied his current residence.

**18** On the strength of the Town of Flamborough By-law as it stood at the time that Mr. Veri first occupied the lands, the City of Hamilton now argues that farming is not a permissible use, since the subject lands fall below the ten acre threshold required for such use. No evidence was called or tendered as to whether there were any prior zoning restrictions, how they may or may not have affected the use of the land, or whether any provision similar to that in the current Planning Act, which in effect allows use of lands to continue pursuant to any prior zoning, if and when zoning classifications may have changed in the past.

**19** Section 5.19 (b) of the Town of Flamborough By-law reads:

Nothing in this By-law shall ...

- (b) prevent the use of any land, building, or structure for any purpose prohibited by the By-law if such land, building or structure was legally used for such purpose on the day of the passing of the By-law, so long as it continues to be used for that purpose ...

**20** This language mirrors s.s.34(9) of the Planning Act, to the same effect.

**21** In spite of the position taken by the City of Hamilton in this prosecution, there is no evidence that Mr. Veri has ever been prosecuted for impermissible use of the lands he occupies, nor that the owner has ever been so charged.

#### Court's Analysis

**22** There are a number of questions that impinge on the outcome of this case. They include:

- a. Whether the charge as laid is founded on an actual charge-creating provision in the By-law or simply a permissive provision
- b. The impact of the current zoning classification of the lands
- c. Whether the re-zoning of a portion of the lands from "A" to "R2-12(h)" plays a material role in the permitted use of all or part of the property
- d. Whether the impugned items stored outside on the property are properly related to agricultural uses,

**23** To start, I want to deal with whether the By-law actually creates an offence or operates in the nature of either a permission or a restriction. This flows from the fact that the By-law describes to what uses a property may or may not be put, depending on the zoning. Without conducting a detailed analysis of the wording of the By-law itself and all the principles of statutory interpretation presented by the parties, I am satisfied that the intent of the By-law is to RESTRICT uses of land by zoning decisions. To find otherwise would be to negate the by-law and render it ineffectual.

**24** That said, the fact that a portion of the land has been re-zoned from A to R2-12(H) has the potential to complicate matters. Notwithstanding that the prosecution position holds that the current zoning of Residential Settlement (R2) holds, it is clear to me that the clear language of s.4(5) results in the effective zoning continuing as A; the H designation remains to this date. The clear wording of s.4(5) protects uses existing at the time of the zoning being amended.

**25** While no submissions were made on the point, it emerges as common ground between the Prosecution and defence that the offence is one of strict liability, pursuant to the principles in *R. v.*

Sault Ste. Marie. As such, the Prosecution need simply prove the actus reus, and the defence may seek to be excused from liability on the basis of the defence of due diligence, or some limited additional grounds.

**26** In some cases, such as this one, the law may also provide a statutory defence, in the form of an exception, authorization or authority that favours the defendant. In such cases, the POA provides that the burden of proof that an exception, authorization or authority favours the defendant lies with the defendant'.

**27** In this case, the defence rests on the proposition that the defendant falls within the exception permitting outside storage of items related to agriculture, by virtue of the Bylaw itself. However, this argument is complicated by the various iterations of by-law enactments that relate to the subject property. Specifically, the Prosecution contends that going back to a time prior to the occupancy of the lands by Mr. Veri, the lands could not be properly used for agriculture, as the old Township of Flamborough By-law required that lands to be used for agricultural purposes must exceed ten acres in size. Therefore, any use, unless permitted by operation of the Planning Act or particular By-law enactments, would be illegal (legal, non-conforming use).

**28** The Prosecution's supposed "ace in the hole" does little to buttress its case. The defence clearly admits that the property is less than ten acres in size. However, this does not negative the proposition that the current use is a continuing use and thereby protected by operation of each of the appropriate generations of the municipal By-laws (as enacted by the Township, the Town and now the City) as well as the provision in the Planning Act, which permit previous legal uses to survive any re-zoning decisions.

**29** Mr. Veri's evidence only of the use of the land since his occupancy is informative. Mr. Veri cross-examined extensively; however, there was no effort to elicit any evidence that he had changed the use of the lands in any significant way. Accordingly, I conclude that the lands were previously used for farming and have continued to be so used, having regard to the following:

- a. Mr. Veri was previously investigated for what may well have been similar facts without any ensuing charges brought against either him or the property owner for a period exceeding a decade,
- b. Mr. Veri gave uncontested evidence that he has continuously farmed the property since his occupancy
- c. Mr. Schmidt gave evidence that the lands were used for agricultural uses for at least two decades prior to Mr. Veri's occupancy
- d. there is no evidence that Mr. Veri was required to make significant changes to the property to allow him to begin his farming activities
- e. there is no evidence that Mr. Veri or any predecessors was ever prosecuted for non-conforming use
- f. it is unclear when the R2-12(H) zoning was applied (to a portion of the property)
- g. the land was and continues to be zoned "A" (agricultural) in part although a portion of the lands have now been re-zoned as R2-12(H)
- h. the Town of Flamborough By-law which supplanted the earlier Township of Flamborough By-law, did not incorporate the ten acre minimum set out for agricultural uses and replaced it with a new minimum area for agricul-

tural uses (other than livestock) of two thousand square metres, which converts to roughly one half acre; the subject portions of the property exceed the one half acre requirement.

**30** On the last point, applying the principle that laws must be read in the current tense, even if the use were not permitted under the Township of Flamborough By-law, it would have become permissible under the replacement Town of Flamborough By-law.

**31** I find Mr. Veri's evidence credible and compelling. In all the circumstances, I am satisfied that Mr. Veri's use of the lands for farming activities would constitute a continuing, nonconforming use, if indeed I am wrong in respect of what zoning restrictions apply to the subject lands.

**32** Further, Mr. Veri's evidence is clear that the storage referenced is related to farming, and such storage is permitted as an exception under the current by-law. The prosecution's witness gave no evidence to the contrary.

D. DUDAR J.P.

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Appendix "A" - Excerpts from the Town of Flamborough  
By-law 90-145-Z

SECTION 4 - Zones

4.5 HOLDING ZONES (H)

Notwithstanding any other provisions of this By-law, where the zone symbol on Schedules A-1 to A-48 inclusive has the suffix (H), no lot shall be used or no building or structure shall be erected, located or used therein except for the following purposes until the suffix (H) has been removed from the zone symbol by a by-law passed pursuant to Sections 34 and 35(4) of the Planning Act, R.S.O. 1983, Chapter 1, as amended from time to time:

- (a) Existing Uses; and,
- (b) General provisions in accordance with the provisions of Section 5 hereof.

SECTION 5 - General Provisions

5.20 OPEN STORAGE

Except where permitted by the zone provisions as set out for any zone, open storage shall be permitted in accordance with the following general provisions:

- (a) no open storage shall be permitted in any front or exterior side yard except within an Agriculture A zone;
- (b) all open storage areas shall be screened from view from any street or from any Residential zone with a planting strip or wood screen fence, or combination thereof, except for an open storage area in conjunction with a permitted agricultural use; ... (c) and (d) which are not material to this discussion

## SECTION 7 - Settlement Residential Zone R2

No person shall use any lot or erect, alter or use any building or structure within any Settlement Residential Zone - R2 except in accordance with the following provisions or as otherwise specified in the provisions of Subsection 7.3.

## SECTION 33 - Agricultural Zone A

No person shall use any lot or erect, alter or use any building or structure within any Agricultural Zone - A except in accordance with the following provisions or as otherwise specified in the provisions of Subsection 33.3.

### 33.1 PERMITTED USES

- (a) Accessory Open Storage
- (b) Agriculture
- (c) Conservation
- (d) Office of One Physical or Mental Health Practitioner, Physician or Dentist located within the residence of the Medical Practitioner, which shall be a Single Detached Dwelling.
- (e) One fruit and/or vegetable stand, for the sale of seasonal products grown on the property.
- (f) One Help House
- (g) Single Detached Dwelling

### 33.2 ZONE PROVISIONS

- (a) Lot Area (minimum):
  - (i) Livestock Agricultural uses.....2 hectares
  - (ii) All other uses.....2000 square metres

1 See s. 47(3) of the Provincial Offences Act.

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