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No. 50 of 1994  
INSTITUTE OF ADVANCED  
LEGAL STUDIESIn the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

10 BETWEEN THE MUNICIPAL CORPORATION OF THE  
CITY OF TORONTO - - - - - APPELLANTS,

AND

WILLIAM VIRGO - - - - - RESPONDENT.

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**Case**

FOR THE RESPONDENT.

30 THIS is an Appeal from the Judgment of the Supreme Court of Canada, reported S.C.R., Vol. 22, p. 447, reversing a Judgment of the Court of Appeal for Ontario, which had confirmed the Judgment of Galt, C. J., and quashing that portion of By-Law No. 2,934 of the Corporation of the City of Toronto, which is designated thereby as sub-section 2A of section 12 in amendment of section 12 of By-Law No. 2,453.

40 1. By the British North America Act, 1867, Section 92, the legislature of the Province of Ontario had power to exclusively make laws in relation to matters coming within the classes of subjects thereafter enumerated, viz. (*inter alia*): (9) "Shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes," and by Section 91 of the same Act the exclusive legislative authority of the Parliament of Canada was to extend to all matters coming within the classes of subjects thereafter enumerated, viz. (*inter alia*) (2) "The regulation of trade and commerce."

2. By section 495, sub-section 3, R.S.O., Cap. 184, it is provided that— Record, p. 20.

"The council of any county city and town separated from the county for municipal purposes may pass by-laws for the following purposes.

## HAWKERS AND PEDDLERS.

“ 3. For licensing, regulating and governing hawkers or petty chapmen and other persons carrying on petty trades, or who go from place to place, or to other men’s houses, on foot or with any animal bearing or drawing any goods, wares or merchandize for sale, or in or with any boat, vessel or other craft, or otherwise carrying goods, wares or merchandize for sale and for fixing the sums to be paid for a license for exercising such calling within the county, city or town, and the time the license shall be in force.

“ In case of counties for providing at the discretion of the Council either the treasurer or clerk of the county or the clerk of any municipality within the county with licenses in this and the previous subsection mentioned for sale to parties applying for the same under such regulations as may be prescribed in such bye-laws. 10

“ Provided always that no such license shall be required for hawking, peddling, or selling from any vehicle or other conveyance, any goods, wares or merchandize to any retail trader, or for hawking or peddling any goods, wares or merchandize, the growth, produce or manufacture of this province, not being liquors within the meaning of the law relating to taverns or tavern licenses, if the same are being hawked or peddled by the manufacturer or producer of such goods, wares or merchandize, or by his *bona fide* servants or employees having written authority in that behalf . . . . and provided also that nothing herein contained shall affect the powers of any Council to pass bye-laws under the provisions of section 496 of this Act.” 20

3. By section 286 of the same last mentioned Statute, it is provided that no Council should have the power to give any person an exclusive right of exercising within the municipality any trade or calling, or to impose a special tax on any person exercising the same, or to require a license to be taken for exercising the same, unless authorised or required by the Statute so to do. 30

Record, p. 9.

4. Sub-section 2 of section 12 of by-law No. 2,453, passed on the 13th January, 1890, pursuant to such last mentioned section, required a license to be taken out by—

“ (2) All hawkers, petty chapmen or other persons carrying on petty trades, or who go from place to place. or to other men’s houses, on foot or with any animal bearing or drawing any goods, wares or merchandize for sale, or in or with any boat, vessel or other craft or otherwise carry goods, wares or merchandize for sale, except that no such license shall be required for hawking, peddling or selling from any vehicle or other conveyance, goods, wares or merchandize to any retail dealer, or for hawking or peddling goods, wares or merchandize, the growth, produce 40

10 “ or manufacture of this province, not being liquors within the meaning of  
 “ the law relating to taverns or tavern licenses, if the same are being  
 “ hawked or peddled by the manufacturer or producer of such goods, wares  
 “ or merchandize, or by his *bona fide* servants or employees, having written  
 “ authority in that behalf, and such servant or employee shall produce and  
 “ exhibit his written authority when required so to do by any municipal or  
 “ peace officer : nor from any pedler of fish, farm and garden produce,  
 “ fruit and coal-oil, or other small articles that can be carried in the hand  
 “ or in a small basket, nor from any tinker, cooper, glazier, harness  
 “ mender, or any person usually trading or mending kettles, tubs, house-  
 “ hold goods or umbrellas, or going about and carrying with him proper  
 “ materials for such mending.”

5. The By-law in question herein No. 2934 passed October 26th 1891 and described as “ a By-law to amend By-law No. 2453 respecting the issue of licenses ” provides that,—

Section 12 of By-law No. 2453 is hereby amended.

20 2. (a) “ No person named and specified in sub-section 2 of this section  
 “ (whether a licensee or not) shall after the 1st day of July 1892, prosecute Record, p. 10.  
 “ his calling or trade in any of the following streets and portions of streets  
 “ in the City of Toronto.”

the streets named are in fact and are found by Galt C. J. to be the principal streets of the City.

30 6. The Respondent submits that the By-law is clearly bad as to “ tinkers,  
 “ coopers, glaziers, harness menders, or any persons usually trading or mending  
 “ kettles, tubs, household goods or umbrellas, or going about and carrying with  
 “ them proper materials for such mending,” as they are outside the section of  
 the Act under which the Appellants claim authority to pass their By-law. On the prohibited streets a man cannot have his window mended without subjecting the glazier to the risk of six months imprisonment, he cannot buy a newspaper on any one of these streets, nor can he purchase matches, boot laces or other small articles which are now frequently sold.

7. The Respondent submits that the bye-law is invalid and *ultra vires* in that it affects persons who by statute are exempt from its provisions. No license is required for manufacturers and producers, persons selling to retail dealers and others, but the Bye-law affects persons whether licensees or not ; whereas it is provided by section 495, sub-section 3, of the Municipal Act that the provision is not to apply to manufacturers, producers and others.

40 8. The Respondent submits that the bye-law is also contrary to the provisions of sections 286 of the Municipal Act, by which municipalities are restrained from interfering with traders except when expressly authorized. The

words in the enabling section are "licensing, regulating and governing." The words are coupled together and not used disjunctively. The powers of licensing and regulating are to be conjoined and not to be exercised separately, so as to enable the municipality to regulate where it cannot license.

9. The sub-section of the Municipal Act contained the exceptions and provisos therein mentioned in order, apparently, that no question could be raised as to whether it trenched on the powers of the Dominion Parliament contained in the said B.N.A. Act, section 91, sub-section 2, as to the regulation of trade and commerce. Apart from licensing, the section of the Municipal Act cannot confer the power of regulating trade, for such power is not *intra vires* of the Provincial legislature. The bye-law in question prohibits the sale of certain articles on certain streets of the city, and is therefore regulative of "trade and commerce" within section 91 of the B.N.A. Act. 10

See *Frederickton v. The Queen*, 3 S.C.R. 507 at 541  
*Reg. v. Justices of Kings*, 2 Cart. 499  
*De St. Aubyn v. La France*, 2 Cart. 392

where it is laid down that the Provincial legislature cannot directly or indirectly prohibit the sale of articles of commerce.

10. Market Gardeners more especially who cultivate their gardens or raise their stock on land lying outside the municipality, are seriously prejudiced by the by-law. Their chief mode of disposing of their produce and stock in a city of such a large area as Toronto, is by going from house to house, and from retail dealer to retail dealer selling unrestrictedly in the untrammelled manner intended by the Legislature. But as is pointed out in the judgment of Mr. Justice Gwynne—"All the persons named in the first proviso of Section 495 are, if the sub-section 2a of Section 12 of the by-law under consideration be good, deprived of their right to carry on within the prohibited streets, constituting a very large portion of the City of Toronto, their trades and callings their right to carry on which, in the entire City is recognised, affirmed and confirmed to them by the proviso." 20 30

Record, p. 45.

11. The power delegated to the subordinate authority, is one of regulation, not of prohibition. The Act delegating the authority should be strictly construed, especially where it interferes with the common law rights of individuals. Such delegation of authority is not to be enlarged beyond the words of the Section to enable subordinate bodies to exercise powers with which it might be dangerous to entrust them and which are not within the meaning and intent of the statute, for by extending the area of restriction the council might practically prohibit trade. A by-law for regulating and governing should not restrict vendors altogether from the principal streets of the city, but might lawfully provide for the time and manner in which the streets may be used, so as to prevent nuisances. 40

See *Dick v. Badart*, 10 Q.B.D. 387

12. Wherever the power to prohibit is granted by the Ontario Municipal Act, it is granted in apt terms the words "prohibit," "prevent" or "suppress" being used. See section 489, sub-section 25, and the references in the judgment of Mr. Justice Gwynne to other clauses where these words are used. Record, p. 46.

13. The by-law in question has no such qualification as "so as to be a nuisance,"

See *Everett v. Grapes*, 3 L.T.N.S. 669

and does not profess to deal with nuisances, nor is there any explanation given of the reasons for passing it

- 10            See *Johnson v. Mayor of Croydon*, 16 Q.B.D. 708  
                  *Munro v. Watson*, 57 L.T.N.S. 366  
                  *Chamberlain v. Conway*, 5 T.L.R., 44, s.c. 53 J.P. 214  
                  *Re Nash and McCracken*, 33 U.C.R. 181 at 188  
                  *McKnight v. Toronto*, 3 Ont. R. 284  
                  *Re Davis v. Clifton*, 8 U.C.C.P. 236

The English cases above cited are under the English Municipal Corporation Acts, where power granted is more ample than that granted by the Ontario Municipal Act.

- 20            14. The second proviso of the said section 495, sub-section 3, shews by inference that the legislature intended by section 495, to preserve the rights of the persons therein named to carry on their trade, so long as they did not cause obstruction or nuisance.

15. The restrictions imposed by the by-law amount to a practical prohibition. This is clearly shewn by the Affidavits filed on behalf of the Respondent. See Affidavits of W. Virgo, Joseph Pocock, Samuel Fieldhouse, Samuel Brooks, Harry Walker, Oliver Spanner and W. B. Weller. Record, pp. 5, 6 and 7.

16. For examples of by-laws held invalid on account of their interference with trade, see cases cited in judgment of Gwynne, J. and also the following:

*Harrison v. Godman*, 1 Burr, 12 at 14.

- 30            17. The by-law is not shewn to be for the public benefit. The uncontradicted evidence is that the public are inconvenienced by the by-law. See Affidavit of O. Spanner, who deposes that the usefulness of itinerant vendors is impaired, and housekeepers inconvenienced by being hindered in purchasing at their doors. Record, p. 7

18. The by-law is unreasonable, and unfair to merchants on unprohibited streets, as merchants on other streets are not exposed to the competition

of hawkers and peddlers. The by-law is thus passed principally to favor shopkeepers on certain streets.

See Reg v. Pipe, 1 O.R., 43.

where Mr. Justice Osler says :—“ A by-law so unequal in its application is *ultra vires* of the Corporation. They had no more power to create exceptions of this sort, than to confine the operation of a by-law to a particular ward.

19. The reference to section 503 sub-sections 3 and 4 of the Municipal Act contained in the petition of the Appellants for leave to appeal is misleading. This section is declared to be “ subject to the restrictions and exceptions contained in the last preceding six sections.” The six sections with section 503 are grouped together under the headings of “ Markets ” and expressly provide that after the hour of 9 o'clock in the forenoon between 1st April and 1st November and after the hour of 10 o'clock in the forenoon between 1st November and 1st April, sales may be made anywhere without restriction. The first sub-section of section 503, provides for the establishment of markets, and the succeeding ten sub-sections (including the sub-section cited by the Appellants), are all for the purpose of giving the powers specified as incidental to bye-laws regulating markets and streets, and lots adjacent thereto, and do not affect hawkers and peddlers. The evident inference from the use of the word “ prevent,” in an enactment relating to the establishment and regulation of markets, and the omission of that word in the enactment respecting peddlers is, that there was a clear intention to limit the power to prevent to the market enactment which as pointed out is only applicable to certain hours of the day.

See *City of Burlington v. Dankwardt*, Sup. Ct.,  
Iowa, Oct. 26th, 1887 (73 Iowa 170),

Record, p. 30.

which decided that the provisions of Code Iowa, section 456, that cities shall have power to establish and regulate markets ; does not empower a city council to make an ordinance forbidding the peddling of meats. “ An ordinance which is designed merely to prevent peddling meat does not appear to us to be an ordinance to establish and regulate markets, it seems to be an ordinance designed to favour private butchers' shops in the city.”

20. The Respondent submits that the order of the Supreme Court of Canada quashing part of the by-law in question was right for the reasons set forth in the judgments of the Honorable Mr. Justice Gwynne and the Honorable Mr. Justice King, and for the following among other

## REASONS.

1. The amending by-law affects all persons “ named and specified ” in the original by-law. These persons include numerous

classes of dealers, besides hawkers and peddlers, and include persons over whom the by-law can have no control.

2. The by-law is invalid and *ultra vires* in that it affects persons who by Statute are exempt from its provisions. No license is required for manufacturers and producers, persons selling to retail dealers and others, but the by-law affects persons *whether licensees or not*.
3. The power given to the Municipality to "license, regulate and govern," does not include a power to prohibit.
4. The power of restriction (if any) given to the Municipality is only as auxiliary to the power to abate or prevent nuisances, but the by-law is not aimed at nuisances, nor is any attempt made to justify it under this power.
5. The restrictions imposed by the by-law amount to a practical prohibition, which is not necessary for the attainment of the purposes for which the by-law is authorised.
6. The by-law is *ultra vires* as it is in restraint of trade.
7. The by-law is *ultra vires* in that it is unreasonable, and is not shown to be for the public benefit.
8. The by-law is passed in the interests of some of the store-keepers and merchants, and discriminates between them and the merchants on other streets.

HORACE E. AVORY.

E. E. A. DU VERNET.

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