Judge's Decision in I.G.A. Store Closing By-Law Appeal

In the county court of Halton
Regina vs. Caldwell and Williamson

This is an appeal from the decision made by police magistrate O. S. Hollingrake on the 2nd day of February, 1955, when he imposed a penalty of $50 inclusive of costs on the accused who are joint proprietors of the IGA Supermarket and who were charged with an infringement of By-Law 427 passed by the Council of the town of Georgetown which has been effective from and after the 10th day of October, 1942, said By-law providing for the early closing of shops in the Town of Georgetown especially on Thursday afternoons from 12.30 to 5 o'clock in the forenoon of the following Friday.

I find that there has been a deliberate and planned violation of the said By-law but same was done quite openly and above board by reason of the fact that such contemplated action was advertised in the local paper, the Georgetown Herald, to the effect the accused would close the stores on Monday and open them on Thursday afternoon every week.

Corporal R. A. Beckett of the Ontario Provincial Police, the complainant, visited the business carried on by the accused on Thursday the 18th day of November, 1954 and purchased goods to the extent of $1.77 at the hour of 2.55 p.m. on that date. Corporal Beckett stated he investigated the situation as a result of complaints of certain citizens of the Town of Georgetown. I find as a fact that the accused were warned twice before the present occasion and they replied in each instance that they would be closed all day Monday but would be open all day Thursday.

It may be argued that this was the sensible thing to do because there would be comparatively few customers on a Monday and that it would be more sensible to open on Thursday towards the end of the week when people were more inclined to shop. However, the accused cannot be a law unto themselves, as By-laws are not passed to be deliberately broken. If the By-law does not conform to the modern way of doing business it is open to the accused to cause a petition to be circulated to amend this By-law.

While the presentation of a petition signed by not less than "three quarters in number of the occupiers of shops withing the municipality belonging to the class to which such application relates" —who wish to have stores in question closed, is a condition precedent to the passing of the By-law and the council has already satisfied themselves as to the sufficiency thereof, it seems superfluous to state at this stage that the petition, (which has been mislaid or lost) in this case must be produced. I must find, therefore that the decision made by the council to pass this by-law on the 6th day of October, 1942 (over 12 years ago) is final and conclusive and same cannot be attacked at this late date.

It is argued that a petition which was before the Council was insufficiently signed, or that the signed petition had been lost, and the clerk of the town of Georgetown unable to find the same. This submission is based on the assumption that the By-law was passed in pursuance of the mandatory provisions of subsection 5 of section 83 of the Factories, Shops and Office Buildings Act now RSO Chap. 126 (1951) as passed under the 1937 Statutes. It appears, however, that the By-law as shown on its face, and on the recitals therein contained was passed in pursuance of the powers granted to the Council by subsection 5 of section 83. The validity of the By-law does not turn on the sufficiency or otherwise of a petition. Re McAlpine and the village of Bancroft, 1935 O.W.N. 53. Nelson vs. City of London 1944 O.W.N. 455. The effect of the clause is that such shops (and I do not find that this By-law is ambiguous in any way) must remain closed from 12.30 p.m. every Thursday until five o'clock in the forenoon on Friday. I find that the appellants in open defiance of this By-law remained open on this particular Thursday afternoon. I find also that such By-law is not unreasonable and sets forth the classes of shops which are to remain closed.

I have not been able to find a case in point where a question of the lapse of time has been considered.

The long user of a road as a highway since the passing of the by-law without objection for many years affords sufficient ground for applying the presumption that by-law was legally passed. Street J. in Elmsley South vs. Miller 6 O.W.R. 726. While this decision is not directly in point it certainly applies by analogy.

There is a presumption in favour of regularity in the passing of a by-law. Traves vs. Nelson 7 B.C.R. 48 (28 Can. Abridgment 523); also Palmation vs. McKibbon 21 A.R. 441.

It is quite true that in the present case the preamble does not state that 75 per cent of the class of stores have petitioned, but we must not overlook the decision in the cast of Fisher vs. Vaughan 10 U.C.Q.B. 492 which held that it was not necessary to recite in a by-law all that is requisite to show the authority of the Council or regularity of proceedings. These will be presumed until the contrary is proved. This decision has been upheld by Parliament through its passing of subsection 17 of Section 83 of the Act which states as follows:

(17) "The onus of proving that an application in compliance with subsection 4 was not presented by the prescribed number of the occupiers of any class of shops shall be upon the person asserting that such application was not so presented."

That onus has not been discharged and the presumption of regularity accordingly still stands.

In the case of re White and Sandwich East, 1 O.R. 530 at page 536 it was stated the Court should not be astute in finding grounds on which a by-law might be held defective but should rather uphold the action of the body which under the law has the first right of exercising a discretion in the matter.

This by-law is not unreasonable or oppressive or in restraint of trade, having been passed under the statutory powers of Council given by the Legislature Boylan vs City of Toronto 15 O.R. 13.

The second clause of the preamble in this By-law is as follows:

"And Whereas the Council has deemed it expedient to accede to the petitions of the occupants of certain classes of shops to regulate the hours of closing etc."

A By-law which recites such a fact should, therefore, be taken to be true unless at least the recital be clearly established to be glaringly untrue, so as to afford a presumption of fraud in the proceedings of the Council Re White and Sandwich East, 1 O.R. 530.

I find that the powers of Council in the present case have been exercised honestly and bona fide and no attempt must be made at this stage to interfere with Council's constituted functions.

In Byrne vs. Town of Perth 23 O.W.N. 626 objection was taken by the applicant on a motion to quash to the effect that the Council has no power to close all shops except certain specified shops (as in the case at Bar) and that the Council could effect its object only by specifying what shops were to be closed. It was held in that case that this objection was not well founded and that "all shops" may mean all shops or any class of shops.

This appeal, therefore, will be dismissed with costs payable to the Town of Georgetown fixed at $35.00 by the appellants. Inasmuch as a fine of $25.00 was imposed on the two accused and that same is in the discretion of the convicting Magistrate and that there is nothing whatsoever to show this discretion was wrongfully exercised this Court cannot interfere with the fine that has been levied.

G. MORLEY, Judge.