STANLEY H. LIEBERMAN ....APPELLANT;

1963
*Feb. 26
Oct. 18

AND

HER MAJESTY THE QUEEN, ON THE INFORMATION OF FOSTER THURSTON, CHAMBERLAIN OF THE CITY OF SAINT JOHN .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Criminal law—Constitutional law—Sunday closing—Licensing by-law—Validity of by-law—Whether encroachment on field of criminal law—Whether in conflict with Lord's Day Act, R.S.C. 1952, c. 171—Whether in conflict with Criminal Code, 1953-54 (Can.), c. 51, ss. 160, 176—B.N.A. Act, 1867, c. 3.

The accused was charged under a by-law passed by the City of Saint John in 1908 with operating a bowling alley on Sunday. Section 3 of this licensing by-law prohibited the operation of a bowling alley between 12 midnight and 6 a.m. on weekdays, "or on Sunday". Section 4 prohibited disorderly conduct and gambling on any licensed premises. Penalties were provided for contraventions in the final section.

The accused contended that s. 3 of the by-law was invalid as being an encroachment on the field of criminal law. The charge was dismissed by a Police Magistrate on the ground that there was a conflict between s. 3 and the *Lord's Day Act,* R.S.C. 1952, c. 171. On appeal to the County Court, the accused was convicted. This judgment was affirmed by the Supreme Court of New Brunswick, Appeal Division. The accused appealed to this Court.

Held: The appeal should be dismissed.

The accused did not question the power of the City of Saint John to make by-laws for the licensing of bowling alleys within its boundaries. The matter of closing hours was also within its jurisdiction. Legislation intended to prevent the profanation of the Sabbath is part of the criminal law reserved to the Parliament by s. 91(27) of the *B.N.A. Act*. However, the impugned by-law was not primarily concerned with preserving the sanctity of the Sabbath, but was directed to the merely local matter of regulating the hours when certain licensed businesses were to close in the city of Saint John. The mere addition of the words "or on Sunday" at the end of s. 3 did not afford sufficient evidence to justify the inference that the by-law was directed towards the prevention of the profanation of the Sabbath and that it was thus beyond the ambit of provincial authority. Nor could it be said that s. 3 was inoperative as being in conflict with the *Lord's Day Act*. If the licensing power vested in the provinces by s. 92(9) of the *B.N.A. Act* was exercised in respect of a local

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

1963
LIEBERMAN
v.
THE QUEEN

matter and in a manner not repugnant to federal or provincial law, the provincial authority was entitled to attach such conditions and impose such penalties as it might see fit. The fact that these conditions were in conformity with federal legislation in no way invalidated the by-law. For the same reasons, it could not be said that s. 4 of the by-law was in conflict with ss. 160 and 176 of the *Criminal Code.*

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], affirming the conviction of the accused on a charge of operating a bowling alley on Sunday. Appeal dismissed.

John P. Palmer, for the appellant.

G. T. Clark, Q.C., and *E. J. Lahey,* for the respondent.

W. C. Bowman, Q.C., and *F. W. Callaghan,* for the Attorney-General of Ontario.

J. W. Anderson, Q.C., for the Attorney General of Alberta.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Appeal Division of the Supreme Court of New Brunswick[1] which affirmed the conviction of the appellant for keeping a bowling alley open on Sunday contrary to the provisions of a by-law duly passed by "the City of Saint John in common council convened" on the 13th of July 1908 under the authority of the Charter of that city and entitled "A law to regulate and license public billiard rooms and pool rooms and bowling alleys in the City of Saint John".

The first section of the by-law in question provides that "no person shall carry on business as a keeper of a public billiard or pool room or bowling alley without first having obtained a licence therefor", and the second section empowers the mayor of the city to grant such licences at specified fees.

The third and fourth sections read as follows:

3. No person shall keep open any public billiard or pool room or bowling alley on any week day between the hour of twelve o'clock at night and the hour of six o'clock in the forenoon, or on Sunday.

[1] (1962), 132 C.C.C. 27, 36 D.L.R. (2d) 266.

4. No person licensed under the provisions of this law to keep any such public billiard or pool room or bowling alley shall permit any drunken or disorderly person, or any keeper of a house of ill fame, to resort to or frequent the premises kept by him, in respect to which such license has been granted, or keep, suffer or permit to be kept in such premises any faro bank, rouge et noir, roulette table or any other device for gambling of any kind to be carried on therein, or suffer or permit any noise, disorderly conduct, disturbance or breach of the peace to take place therein.

The final section of the by-law provides, *inter alia,* that "any person . . . who fails to comply with any of the provisions of this law shall forfeit and pay for each and every time such person shall so act in contravention of this law a penalty of twenty dollars to be sued for, prosecuted and recovered in the name of the Chamberlain of the said city for the time being before the police magistrate or sitting magistrate at the police office as provided by law . . .".

It is admitted that the appellant and one Mortimer L. Bernstein who were licensed keepers of a bowling alley on Union Street in the city of Saint John, kept the said bowling alley open on Sunday, the 23rd day of October 1960, as alleged in the Information but it has been contended throughout on behalf of the appellant that s. 3 of the by-law in question was invalid as constituting an encroachment on the field of criminal law.

This charge was dismissed by the police magistrate before whom the Information was laid on the ground that there was a conflict between s. 3 of the by-law and the *Lord's Day Act,* R.S.C. 1952, c. 171. In the course of his reasons for judgment, the learned magistrate said:

In other words, the by-law—if it were allowed to remain operative—would conflict with the federal statute, the Lord's Day Act, in the penalty to be imposed; and the penalty is always considered as part of the statute. On that basis, I would rule that section 3 of the by-law before this Court . . . is invalid or inoperative with regard to the matter of Sunday.

Keirstead C.C.J. before whom an appeal was taken pursuant to the provisions of the *Summary Conviction Act,* R.S.N.B. 1952, c. 220, convicted the appellant, he being of opinion

that the relevant provisions of the Lord's Day Act and the by-law differ in legislative purposes, legal effect and practical effect. The by-law imposes a duty, provides a regulation and control for purposes or objects whose nature and character bona fide fall within the field of provincial competence or authority.

1963
LIEBERMAN
v.
THE QUEEN
Ritchie J.

In the reasons for judgment dismissing the appellant's appeal delivered by McNair C.J. on behalf of the Appeal Division of the Supreme Court of New Brunswick, the matter was put thus:

> The restrictions in the by-law relating to Sunday operations, viewed in their context, appear intended for other purposes than to compel the observance or prevent the profanation of the Sabbath Day. Like their companion restrictions against night operations they seem in their true nature and character designed to promote purely secular purposes involving protection of the right of people in the community to rest and quiet during the prohibited periods. As such they are, we feel, within the legislative jurisdiction of the province and fit subject matter for municipal legislation.

The City of Saint John was incorporated by letters patent issued by the Governor of the Province of New Brunswick in 1785, and the Charter of that city has since been amended by over 500 acts of the New Brunswick Legislature. Under the provisions of that Charter, the common council of the city is given power to make by-laws for, *inter alia,*

> the good rule and government of the . . . inhabitants and residents of the said city and for the further public good, common profit, trade and better government of the said city . . . provided that such laws be not . . . repugnant to the laws of . . . England or of our said Province.

Since Confederation the powers so conferred are to be confined to the sphere of authority allotted to the provinces under the *British North America Act.* As was observed by Lord Watson in *Attorney General for Ontario v. Attorney General for Canada*[1]:

> Since that date, a provincial legislature cannot delegate any power which it does not possess and the extent and nature of the functions created must depend upon the legislative authority which it derives from the provisions of s. 92 other than no. 8.

It is true that s. 15 of the *Lord's Day Act, supra,* which was first enacted in 1906, provides that

> nothing herein shall be construed to repeal or in any way affect any provisions of any act or law relating in any way to the observance of the Lord's Day Act in force in any province of Canada when this Act comes into force; and where any person violates any of the provisions of this Act and such offence is also a violation of any other act or law the offender may be proceeded against either under the provisions of this Act or under the provisions of any other act or law applicable to the offence charged.

[1] [1896] A.C. 348 at 364.

In this regard, it is to be noted that although the "Charter of the City of Saint John" was enacted before Confederation, the impugned by-law was passed in 1908 and is therefore not a law which was in force at the time when the *Lord's Day Act* came into force. The power of the City of Saint John to make by-laws for the licensing of public billiard rooms, pool rooms and bowling alleys within its boundaries is not, however, questioned by the appellant.

The matter of hours at which shops of a specified class shall close in particular localities in a province is *prima facie* within the jurisdiction of such province under head 16 of s. 92 of the *British North America Act*. As was said by Duff J. in *City of Montreal v. Beauvais*[1], it

is a matter which is substantially of local interest in the province and which in itself is not of any direct or substantial interest to the dominion as a whole.

It has, however, been accepted since the decision of the Privy Council in *Attorney General of Canada v. Hamilton Street Railway*[2], that legislation intended for the purpose of preventing the profanation of the Sabbath is a part of the criminal law in its widest sense and is thus reserved to the Parliament of Canada by s. 91(27) of the *British North America Act* and the immediate question raised by this appeal is whether it can be said that the impugned by-law has for its true object, purpose, nature and character the preservation of the sanctity of the Sabbath or whether it is directed to the merely local matter of regulating the hours when certain licensed businesses are to close in the City of Saint John.

In this regard, the submission for the appellant is succinctly stated in the first paragraph of the argument outlined in the factum filed on his behalf as follows:

It is submitted that the by-law in question is invalid on the ground that it purports by the simple words "or on Sunday" to deal with matters of morals or religious observance which fall within the exclusive legislative jurisdiction of the Parliament of Canada.

The prohibition against keeping public billiard rooms, pool rooms and bowling alleys open during the hours specified in s. 3 is not to be read in isolation from the rest of the

[1] (1909), 42 S.C.R. 211 at 215.
[2] [1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326.

1963

LIEBERMAN v. THE QUEEN

Ritchie J.

by-law and when the enactment is read as a whole it will be seen that the impugned section is but one of a number of regulations which the common council has imposed upon the operators of such businesses in the city of Saint John. The nature of the restrictions so imposed by the common council appears to me to reflect nothing more than the opinion of that body as to the manner in which such businesses are to be carried on for the better government of the city.

It is not to be lightly assumed that any part of the by-law is directed to a purpose beyond the legislative competence of the enacting authority and I do not think that the inclusion of Sunday in the hours of closing of these businesses necessarily carries with it any moral or religious significance.

Counsel for the appellant has called to our attention a number of cases in this Court deciding that provincial statutes designed to enforce the observance of days of religious obligation are *ultra vires,* but in each of these cases the legislation in question carried within itself clear evidence that it was directed to this end.

It appears to me to be convenient to indicate the legislation which was before the Court in each of these cases:

(i) *Re Sunday Observance*[1], in this case the Court was unable to distinguish the draft bill before them from the statute entitled "An Act to prevent the profanation of the Lord's Day" which was the subject matter of the decision in *Attorney General for Ontario v. Hamilton Street Railway, supra.*

(ii) In *Ouimet v. Bazin*[2], the very title of the Act "A Law concerning the observance of Sunday" bespoke its purpose.

(iii) *In St. Prosper v. Rodrique*[3], the legislation in question was a municipal by-law which forbade the opening of restaurants and the sale of merchandise therein on Sundays, and which contained the following preamble:

Vu qu'il importe dans l'intérêt de la paix *et des bonnes moeurs* de prohiber l'ouverture des restaurants le dimanche, et le commerce des restaurants;.

[1](1905), 35 S.C.R. 581.

[2](1911), 46 S.C.R. 502, 20 C.C.C. 458, 3 D.L.R. 593.

[3](1917), 56 S.C.R. 157, 46 D.L.R. 30.

(iv) *In Henry Birks & Sons v. City of Montreal and A.G. Quebec*[1], the impugned legislation was directed towards the closing of businesses on certain feasts of obligation of the Roman Catholic Church other than Sunday, and Kellock J. observed at page 822:

> If Sunday observance legislation was designed to enforce under penalty the observance of a day by reason of its religious significance, there is no basis for distinction, in my opinion, historically or otherwise, with respect to legislation directed to the enforcement of the observance of other days from the standpoint of their significance in any religious faith.

It seems to me that these decisions, dealing as they do with statutes the very language of which invites the conclusion that they were intended for the purpose of enforcing the observance of the religious significance attaching to the Sabbath and to other religious feasts, can have no application to the by-law now under consideration, the attack upon which is limited to the fact that the words "or on Sunday" have been added to a list of other times when certain businesses are to be closed.

The language employed by Fitzpatrick C.J. in *Ouimet v. Bazin, supra,* at page 507, appears to me to be significant. He there said of the statute before him:

> It is impossible for me to believe that the legislature intended, by the enactment in question, to regulate civil rights. On the contrary, the evident object was to conserve public morality and to provide for the peace and order of the public on the Lord's Day. I am confirmed in this belief by the title of the Act which is described as "A Law concerning the observance of Sunday"; and, as Sedgewick J., speaking for the majority of this court, said in *O'Connor v. Nova Scotia Telephone Co.,* 22 S.C.R. 276 at page 293: "We cannot with propriety shut our eyes to the words of the title".

As I have indicated, I have reached the conclusion that the by-law here in question, entitled as it is "A Law to regulate and license public billiard and pool rooms and bowling alleys in the city of Saint John" and primarily concerned as it undoubtedly is with secular matters, has for its true object, purpose, nature or character, the regulation of the hours at which businesses of special classes shall close in a particular locality in the Province of New Brunswick which is a matter of a merely private nature in that province. As I have also indicated, I am of opinion that the mere

[1] [1955] S.C.R. 799, 113 C.C.C. 135, 5 D.L.R. 321.

1963
LIEBERMAN
v.
THE QUEEN
Ritchie J.

addition of the words "or on Sunday" at the end of s. 3 does not afford sufficient evidence to justify the inference that this by-law is directed towards the prevention of the profanation of the Sabbath and that it is thus beyond the ambit of provincial authority.

Nor do I think that it can be said that s. 3 of the by-law is inoperative as being in conflict with the *Lord's Day Act*. The licensing power vested in the provinces by s. 92(9) is not limited to the shop, saloon, tavern and auctioneer licenses specified in that section, and if that power is exercised in respect of a merely local matter and in a manner which is not repugnant to federal or provincial law the provincial authority is, in my opinion, entitled to attach such conditions and impose such penalties as it may see fit in respect to the manner in which the persons so licensed shall conduct the businesses which are the subject of such licenses. The fact that one or more of the conditions so imposed is in conformity with legislation validly passed by the federal government in no way invalidates the by-law.

What was said by Judson J. in *O'Grady v. Sparling*[1], concerning the alleged conflict between s. 55(1) of the *Highway Traffic Act* of Manitoba and s. 221 of the *Criminal Code* appears to me to have direct application to the conflict here alleged between the by-law and the Lord's Day Act. He there said at page 811:

> There is no conflict between these provisions in the sense that they are repugnant. The provisions deal with different subject matters and are for different purposes.

And later in the same paragraph:

> Even though the circumstances of a particular case may be within the scope of both provisions (and in that sense there may be an overlapping) that does not mean that there is conflict so that the Court must conclude that the provincial enactment is suspended or inoperative.

It was argued before the appeal division that the entire by-law was *ultra vires* because the provisions of s. 4 were in conflict with ss. 160 and 176 of the *Criminal Code*. As to this argument, the learned Chief Justice expressed himself as follows:

> Sections 3 and 4 of the by-law seem to us separate and distinct as to subject matter, being in no way integrated in object or purpose, and

[1] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

we feel the doctrine of severability aptly applies. Assuming, therefore, without deciding, that section 4 is constitutionally invalid its illegality does not affect the validity of section 3.

With the greatest respect, I do not share the doubts expressed by McNair C.J., as I take the view that s. 4 and the penalty which accompanies its breach constitute nothing more than another condition imposed by the city in the exercise of its right to control the manner in which these businesses shall be operated within its boundaries, and the above quoted reasoning of Judson J. in *O'Grady v. Sparling, supra,* applies with equal force to this section.

In all other respects, I am in agreement with the reasons for judgment of the Appeal Division of the Supreme Court of New Brunswick and I would dismiss this appeal but without costs.

By order of this Court, the Attorney General of Canada and the attorneys general of the provinces were served with notice of this appeal together with a copy of the factum of the appellant and the respondent and it was directed that any attorney general who desired to be heard should file a factum in this Court and serve a copy on each of the parties. The Attorney General for the Province of Alberta was, however, the only intervenant.

Appeal dismissed without costs.

Solicitors for the appellant: Teed, Palmer, O'Connell & Leger, Saint John.

Solicitor for the respondent: E. J. Lahey, Saint John.