THE CITY OF MONTREAL (DEFENDANT) ..... APPELLANT;

AND

JOSEPH P. BEAUVAIS AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

1909
* May 5.
* May 28.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

*Constitutional law—Legislative jurisdiction—"Early closing by-law" —Municipal affairs—Property and civil rights—Local or private matters—Regulation of trade and commerce—B.N.A. Act,* 1867, *s.* 91, *s.-s.* 2; *s.* 92, *s.-ss.* 8, 13, 16—57 *V. c.* 50 (*Que.*).

Provincial legislation authorizing a municipality to regulate the closing of shops of a particular character within its limits, is a subject which falls within the classes of matters enumerated as being within the exclusive jurisdiction of provincial legislatures under sub-section 13 or sub-section 16 of section 92 of the "British North America Act, 1867," and is not an interference with the exclusive legislative jurisdiction of the Parliament of Canada conferred by the second sub-section of section 91 of that Act.

Unless a by-law, enacted in good faith under the authority of the Quebec statutes, 57 Vict. c. 50, and 4 Edw. VII. c. 39, appears to be so unreasonable, unfair or oppressive as to be a plain abuse of the powers conferred upon the municipal council it should not be set aside.

Judgment appealed from (Q.R. 17 K.B. 420) reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Montreal(2), which maintained the plaintiffs' action with costs.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Idington, Duff and Anglin JJ.

(1) Q.R. 17 K.B. 420. (2) Q.R. 30 S.C. 427.

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The action was to set aside a by-law of the City of Montreal, enacted under the authority of the statutes of the Province of Quebec, 57 Vict. ch. 50, and 4 Edw. VII. ch. 29, and providing that all shops and places or business, with certain exceptions, within the city where merchandise was offered for sale by retail, should be closed at seven o'clock in the afternoon on certain days of each week, throughout the year, and should remain closed until five o'clock on the following mornings. At the trial Mr. Justice Archibald gave judgment in favour of the plaintiffs and his decision was affirmed by the judgment now appealed from.

The questions at issue on the appeal are stated in the judgment of Mr. Justice Duff now reported.

*Atwater K.C.* and *J. L. Archambault K.C.* for the appellant.

*Bisaillon K.C.* and *H. R. Bisaillon* for the respondents.

THE CHIEF JUSTICE.—This appeal is allowed with costs. I concur in the opinion stated by Mr. Justice Duff.

GIROUARD J. also agreed with the opinion stated by Duff J.

IDINGTON J.—Whatever possible implications may rest in the words "regulation of trade and commerce" as used in the "British North America Act," section 91, sub-section 2, I do not think, having regard to the scope and purposes of that Act, they ever were in-

tended to cover powers of legislation of the purely local and municipal character in question herein.

Nor do I find the by-law in question either exceeds the power given by this legislation or infringes any of the principles of reasonableness or impartiality often applied as tests of what a by-law must conform to in order to avoid any abuse of a statute conferring the authority to make by-laws.

I think the appeal should be allowed with costs.

DUFF J.—The principal question raised by this appeal concerns the competency of the legislature of Quebec to pass section 1 of 57 Vict. ch. 50, and section 1 of 4 Edw. VII. ch. 39. The last named enactment merely authorized the imposition of a penalty for breaches of by-laws passed under the first named, which is in the following words:

> In every city and town, the municipal council may make, amend and repeal by-laws ordering that during the whole or any part of the year, stores of one or more categories in the municipality be closed and remain closed every day or any day of the week, provided the times and hours fixed and determined for that purpose by the said by-laws shall not be sooner than seven o'clock in the evening and later than seven o'clock in the morning.

Applying the established canon the first step in examining the constitutional validity of this legislation is to ascertain whether the subject matter of it *primâ facie* falls within any of the categories which as subjects of legislation are assigned to the provinces by section 92 of the "British North America Act"; that is to say, whether reading the provisions of that section, as they stand without reference to section 91 the given subject-matter falls within one or more of those categories.

The judgment of the Judicial Committee in *Attor-*

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*ney-General for Ontario* v. *Attorney-General for Canada*(1), at pages 363 and 364, makes it plain that the power given to the provinces by sub-section 8 of section 92

> simply gives (to quote Lord Watson's words) provincial legislatures the right to create a legal body for the management of municipal affairs. * * * The extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the powers of section 92 other than 8.

With great respect, however, to the learned judges below who have taken the opposite view it appears to me that in the sense above indicated the subject-matter of the legislation in question falls within either sub-section 13 or sub-section 16; whether it falls within sub-section 13 may be a more debatable question, but, assuming it does not, then I must say I have great difficulty in finding any sound reason for holding that it is not a "local matter" within sub-section 16. The latest authoritative pronouncement respecting the criterion to be applied in ascertaining whether a given subject-matter of legislation falls within sub-section 16 is to be found in the judgment delivered by Lord Macnaghten, on behalf of the Judicial Committee, in *Attorney-General of Manitoba* v. *Manitoba Licence Holders Association*(2), at page 79:

> The judgment (meaning the judgment of the Privy Council in *Attorney-General for Ontario* v. *Attorney-General for Canada*(1)) therefore as it stands (says his lordship) and the report to Her late Majesty consequent thereon shew that in the opinion of this tribunal matters which are "substantially of local or of private interest" in a province—matters which are of a local or private nature "from a provincial point of view," to use expressions to be found in the judgment—are not excluded from the category of "matters of a merely local or private nature," because legislation dealing with them, how-

(1) [1896] A.C. 348. (2) [1902] A.C. 73.

ever carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.

It seems clear that the matter of the hours at which shops of specified classes shall close in particular localities in the Province of Quebec 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. Such being the case it is made clear in the passage quoted that we may leave out of consideration any of the indirect and collateral effects so strongly dwelt upon by counsel for the respondent which may be supposed to result from the legislation.

We have still to consider whether the enactment falls within any of the classes of legislation committed to the Dominion by the "enumerative heads" of section 91. Counsel for the respondent vigourously argued that it is an invasion of the field defined by sub-section 2, "The Regulation of Trade and Commerce." If the enactment were in its essential character an attempt to regulate trade and commerce within the meaning of that sub-section then, of course, it could not be sustained as an exercise of any of the provincial powers of legislation. A province cannot (it is probably needless to say) by simply restricting the operation of it territorially, validly enact legislation that, in its real scope and purpose, deals with a subject committed exclusively to the Dominion. *Union Colliery Co.* v. *Bryden*(1).

The meaning of the words "regulation of trade and commerce" in sub-section 2 of section 91, was con-

(1) [1899] A.C. 580, at p. 587.

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sidered by *The Citizens Insurance Co. of Canada* v. *Parsons*(1), at pages 112 and 113, and they were there held not to extend to the regulation of the contracts of a particular business or trade in a single province. Without defining the limits of the authority conferred their lordships expressed the view that the words quoted

> would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion.

It would not, I think, be consistent with the views indicated by their lordships in this case (or with their subsequent decisions in the cases to which I have already particularly referred) to hold that legislation regulating the hours of the closing of shops of one or more classes in a particular province any more than legislation regulating the hours of labour in particular kinds of employment in one province alone would fall within the scope of the powers conferred by sub-section 2.

The by-law in question is also impugned as unreasonable and oppressive. To establish this contention in any sense *germane* to the question of the validity of the by-law it was necessary that the respondents should make it appear either that it was not passed in good faith in the exercise of the powers conferred by the statute or that it is so unreasonable, unfair or oppressive as to be upon any fair construction an abuse of those powers. *Slattery* v. *Naylor*(2); *Kruse* v. *Johnson*(3).

(1) 7 App. Cas. 96. (2) 13 App. Cas. 446.
(3) [1898] 2 Q.B. 91.

In the last mentioned case Lord Russell of Killowen said, at page 99:

I do not mean to say that there may not be cases in which it would be the duty of the court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide; for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested.

In this case I can see nothing in any of the circumstances relied upon indicating that the municipal council have exceeded the bounds of the discretion which the law has committed to them.

ANGLIN J.—I agree with Mr. Justice Duff.

*Appeal allowed with costs.*

Solicitors for the appellant:
*Ethier, Archambault, Lavallée, Damphouse, Jerry & Butler.*
Solicitors for the respondents: *Bisaillon & Brossard.*