

RE MILLOY AND THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF ONONDAGA

(1884), 6 O.R. 573

Ontario Court of Common Pleas, Rose J., 16 July 1884

*By-law--Animals running at large--Unreasonableness--Mode of enforcing penalty—
Indians and Indian lands--Quashing amending by-law after lapse of year
from original by-law.*

By-law No. 84, passed by the township of Onondaga on 29th May, 1882, prohibited certain animals therein named running at large; and provided that, *except between the 10th May and the 1st December in any year*, it should not be lawful for the owners of any other animals, not theretofore mentioned or indicated, to allow or permit the same to run at large. A fine or penalty not exceeding \$5.00 was imposed for every offence, but the animals were not thereby to be relieved from the operation of any by-law relating to pounds or pound keepers, or for any trespass or damage committed or done by them through their being permitted to run at large. The recovery of fines and penalties, (not adding the words "and costs,") was directed to be under sec. 421, *et seq.*, of the Summary Convictions Act, with imprisonment, in the event of no distress, unless the fine or penalty and costs, including costs of committal, be sooner paid. By-law No. 97, passed on 9th July, 1883, after reciting that the object was to prevent all animals of any age or description running at large at all seasons of the year, amended by-law No. 84, by striking out the words in the words in italics. A motion to quash by-law 97 was made within a year after its passing, but after the lapse of a year from the passing of by-law 84.

Held, that the by-law was not oppressive or unreasonable as extending to all seasons of the year, in that it was no wider than the statute under which it was passed, Municipal Act, 1883, sec. 492, sub-sec 2. It was objected that the provisions in by-law 84, as to the levying fines was *ultra vires*, because that section of the Act provided a mode of recovery, *i.e.*, by sale of the animals impounded, and hence that sec. 421 *et seq.*, did not apply; but *Held*, that the objection was taken under a misconception of fact, in that the by-law was not and did not profess to be a pound by-law; and it was by no means clear that these sections would not apply to a pound by-law.

Quoere, as to the effect of the omission of the words "and costs" in the clause providing for the penalty; but as this was not taken in the rule, it was not considered.

It was also objected that the by-law should have been limited in its provisions so as not to extend to Indian lands within the township, but the learned Judge refused to quash on this ground

- (1) because the quashing a by-law is not imperative but discretionary;
- (2) and if it were quashed the original by-law would remain;
- (3) it could only be quashed as to Indians and Indian lands;
- (4) the applicant was not prejudiced, and this was not a substantial objection; and
- (5) the Indians who were alone affected were not complaining.

The cases in which an amending by-law may be moved against after the expiry of a year from the passing of the original by-law considered.

On June 20th, 1884, *H. T. Beck* obtained an order *nisi* to shew cause why by-law No. 97, of the township of Onondaga, should not be quashed with costs, upon the grounds--

1. That the amendment made by said last mentioned by-law is unreasonable and *ultra vires*, in that it prohibits the running at large in the township of Onondaga of all animals of any age or description at all seasons of the year.

2. That by-law No. 84, as amended by by-law No. 97, is unreasonable and *ultra vires*, in that section 5, as amended, imposes an absolute and unconditional duty on the owners of all animals to prevent the same from running at large.

3. That said by-law as amended is *ultra vires* and unreasonable, in that section 6 imposes a penalty upon all persons having the charge, care or control of any animals, whether as owners or otherwise, who shall permit or suffer the same to run at large.

4. That subsection 2 of section 492 of the Consolidated Municipal Act, 1883, makes special provision for levying all damages, fines, and expenses from a sale of the animals in question in case of a breach of any by-law passed under the provisions of the said subsection, and the municipality have no power to collect fines under the provisions of section 421 and following sections of said Act.

5. The Municipal Act gives a remedy *in rem* merely, and not *in personam*.

6. That by-law No. 84, as amended by by-law No. 97, is ambiguous, and the first five sections are inconsistent with section 5 as amended.

7. That the said municipality had no jurisdiction over the Indian lands situate in the said

township, and the said amended by-law should limit its provisions so as not to extend to said land, or in any way affect anything done or permitted thereon.

On June 27, 1884, *V. Mackenzie*, Q. C., supported the order.
Wilson, Q.C., contra.

July 16, 1884. **ROSE, J.**--This is a motion to quash by-law 97 of the township of Onondaga. This by-law amends section 5 of by-law 84. By-law 84, by section 1, repeals previous by-laws; and, by sections 2, 3 and 4, prohibits the running at large of certain animals therein named, and, by section 5, provides "*That except between the 10th day of May and the 1st day of December in any year it shall not be lawful for the owners of any other animals, not hereinbefore mentioned or indicated, to allow or permit the same to run at large.*"

Section 6 enacts "That all persons having the charge, care or control, whether as owners or otherwise, of any animals hereby prohibited from running at large, who shall permit the same to run at large contrary to the provisions hereof, shall be liable to a fine or penalty for every such offence of not exceeding \$5: and the imposition of any such fine or penalty shall not relieve such animals themselves from the operation of any by-law of the said township relating to pounds or pound keepers, for or on account of any trespass or damage committed or done by them by reason of their being so permitted and suffered to run at large."

The 7th section provides for the recovery of fines or penalties (not adding the word "costs," as in the statute), under the Summary Convictions Act; and, in the event of no distress, for imprisonment not exceeding twenty-one days, "unless such fine or penalty and costs, including costs of committal, are sooner paid.

It will be observed that neither in sections 6 or 7 are costs provided for, so that the word "such" has nothing to which it refers as to the costs. I will refer to this hereafter.

Section 8 provides for the informer giving evidence, and is a copy in part of sec. 404, R. S. O. ch. 174, omitting the clause as to wife or husband giving evidence.

This by-law was passed on the 29th of May, 1882.

By-law 97, passed on the 9th of July, 1883, amends by-law 84 by striking out from section 5 the words which I have italicized. It recites that the object is "to prevent all animals, of any age or description, from running at large at all seasons of the year."

The grounds of the motion may be said to be three. The main one is: 1. That it is oppressive and unreasonable, as extending to all animals at all seasons of the year.

2. That the provision as to levying of fines is *ultra vires*, as subsection 2, section 492, provides a mode of recovery, *i. e.*, by sale of the animals impounded; and hence the provisions of section 421 do not apply.

3. That the by-law should have been limited in its provisions so as not to extend to the Indian lands within the township.

As to the first ground. The words of the statute are (sec. 492, subsec. 2, Municipal Act, 1883), "For restraining and regulating the running at large or trespassing of *any animals*;" also, "providing for impounding them:" and then follows, "and for causing them to be sold in case they are not *claimed* within a reasonable time, or in case the damages, fines and expenses are not paid according to law.'

It will thus appear that the section provides for two things: restraining and regulating, and impounding.

The by-law we are considering does not provide for impounding, but for restraining and regulating.

The amending by-law is not a new enactment of all the provisions of the amended by-law. They remain as at first enacted, save in so far as amended. Clause 5 is alone affected. It is clear by-law 84 cannot be moved against, more than one year having elapsed since it was passed. If I am bound to quash by-law 97, by-law 84 will remain unaffected, save that clause 5 will be restored to its original condition.

It seems to me an amending by-law may be moved against after the expiry of a year from the passage of the original by-law:

1. When the original by-law is *intra vires*, but by the amendment is made *ultra vires*, or so objectionable as to demand the interference of the Court.

2. When the original by-law is objectionable, and the amending by-law extends its objectionable provisions to new objects, new territory, or over a further period of time.

Where, however, the original by-law is objectionable, and the amending by-law limits its application or makes some immaterial verbal alteration, it seems to me the Court should not interfere, as the party moving has lost his right to take the objection as against the old by-law.

To illustrate: If by-law 84 had restrained the running at large of oxen, and had contained clauses which were *ultra vires*, and the amending by-law had extended these provisions to all animals, the amending by-law should be quashed. If, however, by-law 84 restrained all animals, and the amending by-law limited it to oxen only, then the year having elapsed, in my opinion, the amending by-law should not be quashed.

There are, no doubt, other considerations, which from time to time will arise; but the above are sufficient for the present motion.

The amending by-law here extends the period of time during which all animals are restrained from running at large, so as to cover the whole year instead of about five months. No evidence has been offered that this is unreasonable, and no authority cited. I do not see that it is necessarily so. I think it may be reasonable. The statute is unlimited in its language, both as to time and animals--"any animals."

It was urged that this would apply to the smallest animals and the youngest. The enacting words of the by-law are not wider than the statute, and I must not allow a lively imagination to place a limitation on the power of the municipality that the Legislature has not seen fit to impose. If the municipality should attempt to enforce the provisions in an unreasonable manner, the Court could interfere.

I think this ground fails.

As to what is a domestic animal, see *Budge v. Parsons*, 3 B. & S. 382.

As to the second objection, so far as this is open on this motion, I think it is taken under a misconception of the effect of subsection 2. I have endeavoured to point this out by the mode of division above. This is not a pound by-law, nor does it profess to be; and while I am clear that the provisions of sections 421 to 428 apply to the provisions of this by-law, I by no means say they would not apply to a by-law respecting pounds. It will be time enough to examine this question when it arises.

I think this ground also fails.

I hardly see why clauses 6, 7 and 8 were enacted. Sections 421 *et seq.* cover the ground taken; and in drafting clause 7 of the by-law, as I have above pointed out, the provisions as to recovering and enforcing the fines and penalties "with costs" has been omitted.

It will be observed that section 421 only applies, "unless where other provision is specially made" therefor.

This objection is not taken in the order *nisi*, and I do nothing more as to it than to call the attention of the corporation to the possible difficulty of enforcing the payment of the costs, under the language of the by-law. The question would be a more serious one on a motion to quash a conviction.

The third objection has given me some little anxious thought.

Under the British North America Act, "Indians and lands reserved for Indians," are among the subjects over which the authority of the Dominion Parliament extends.

The Indian Act, 1880, sec. 74, provides that, "The chief or chiefs of any band in council may frame, subject to confirmation by the Governor-in-council, rules and regulations for the following subjects:

5. The prevention of trespass by cattle; also for the protection of sheep, horses, mules, and cattle.

8. The establishment of pounds, and the appointment of pound keepers.

The Indian reserve pointed at in the third objection is said to be within the township of Onondaga. The language of the by-law is general, and in terms applies to all persons within the township. This is a defect. See *Lumley on By-laws* (1877) p. 70; especially *Mayor, &c. of Guildford v. Clark*, 2 Vent. 247.

Referring to the report in that case, we find as follows:

"The by-law is said to have been: That if any inhabitant should be chosen; whereas they cannot make by-laws to bind all the inhabitants of the town, but only the freemen or members of the corporation." There was a second ground taken, and the report proceeds: "And the Court held these matters incurable." See also *Lumley on By-laws*, p. 86: "The law must not be made in respect of a matter not within the authority of the body enacting it, nor to operate upon persons or in a district not subject to their control. In technical terms, it must not be *ultra vires*." Also pp. 148 to 156 inclusive.

I think, however, I need not determine this question, for the following reasons:

The quashing of a by-law is not imperative, but discretionary. Among other cases collected in *Rob. & Jos. Digest*, pp. 2469-2471, see *re Platt and Corporation of Toronto*, 33 U. C. R. 53, 58; *McKinnon and Corporation of Caledonia*, 33 U. C. R. 502, at p. 507.

2. If I should quash this by-law, the original by-law remains.

3. If I gave effect to it at all, I should quash it only as to the Indians and Indian lands: see *re Morell v. City of Toronto*, 22 C. P. 323.

4. The applicant cannot be affected, as it cannot in any way prejudice him; and this is not the substantial objection to the by-law.

5. The Indians, who alone could be affected, are not complaining, nor is it stated that any annoyance is or has been experienced from its existence.

While I do not quash it, I would suggest that the corporation consider whether the objection is not one which it might very easily remove. It may affect other by-laws, and cannot be ignored on a motion to quash a conviction.

It was said on the argument that this amending by-law was passed in opposition to the

petition of a majority of the ratepayers. This is no ground for quashing it. If the ratepayers are not satisfied with their councillors, the remedy is in their own hands. The Courts cannot interfere.

The order must be discharged with costs.

I have derived much assistance in considering the questions as to the effect of amending by-laws or statutes from Mr. *Sedgwick's* work on the Construction of Statutory and Constitutional Law, 2nd ed., p. 68, and note to p. 162, as to the relation back to the time of original Act; notes to pp. 95; and 96, as to how far an amendment acts as a repeal notes to pp. 110 and 111, as to effect of repealing prior statutes.

I make reference to this work, as he was the only author I found who had given special attention to the subject of amending or amendatory statutes.

Order discharged.