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J. M. BRIDGE.....APPELLANT;

*Apr. 30
 *May 1
 *Oct. 7

AND

HER MAJESTY THE QUEEN, ON }
 THE INFORMATION OF EDWARD } RESPONDENT.
 SKALINSKI

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal Corporation—Validity of By-law—Whether delegation of powers of Municipality to City Clerk—The Factory, Shop and Office Building Act, R.S.O. 1937, c. 194 as amended.

By-Law 6300 of the City of Hamilton, purporting to have been passed under the authority of ss. 82(3) and 82a of the *Factory, Shop and Office Building Act*, R.S.O. 1937, c. 194 as amended, provides that all gasoline service stations be closed during the period between 7 p.m. and 7 a.m. of the following day during week days and all day Sunday. The By-Law provides that the City Clerk "may, on the recommendation of the Property and Licence Committee, issue" extension permits and emergency (without defining that word) permits to authorize the service stations named therein to remain open during stated hours; it also provides that such permits be issued to stated percentages of the total number of gasoline shops "according to the records of the City Clerk" in rotation; it further provides that the Clerk shall omit from the list of those entitled to extension and emergency permits such occupiers as have "according to evidence satisfactory to the City Clerk" failed to keep their shops open as authorized.

The appellant's conviction by a justice of the peace of a breach of the by-law was affirmed by a judge of the County Court and by the Court of Appeal for Ontario. The conviction was attacked on the ground that the by-law was invalid because, inter alia, the council have delegated the legislative power conferred upon them with regard to the issue of extension permits and emergency service permits to the City Clerk and have substituted his judgment and discretion for their own.

Held (Rand J. dissenting), that the appeal should be dismissed and the conviction affirmed.

Per Kerwin, Kellock, Locke and Cartwright JJ.: The submission that as the permissive word "may" is used in s. 5 of the by-law Council have left it to the City Clerk to decide whether permits shall be issued at all, failed; the by-law must be read and construed as a whole and it is obvious from other provisions that the Clerk must issue permits in the manner laid down in the by-law.

The provisions in ss. 7(2) and 8(2), that such occupiers as "according to evidence satisfactory to the City Clerk" have failed to keep their shops open as authorized, are invalid. It is within the powers of the Council to prescribe a state of facts the existence of which shall render an occupier ineligible to receive a permit for a stated time; but express words in the enabling Statute would be necessary to give the Council power to confer on an individual the right to decide, on

*Present: Kerwin, Rand, Kellock, Locke and Cartwright JJ.

such evidence as he might find sufficient, whether or not the prescribed state of facts exists and there are no such words. However, these provisions are severable.

The submission that there is an unauthorized delegation to the Clerk of the discretionary right to decide as to the groups provided for in ss. 7 and 8 of the by-law and as to the order of rotation as between such groups, failed. The conferring of these powers on the Clerk was within the authority given to the Council by s. 82a of the enabling Statute, ". . . any by-law . . . may . . . (c) provide for the issuing of permits". The Council has provided in the by-law with sufficient particularity for the issuing of permits and the duties imposed upon the Clerk to select the occupiers to make up the respective groups and to arrange the order of rotation, are administrative and validly imposed.

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Finally, the failure to define the word "emergency" did not invalidate the by-law for uncertainty.

Per Rand J. (dissenting):—With respect to the determination of membership in the percentage groups, there was an infringement of the general requirement that no part of the legislative action or discretion reposed by the Legislature in a council could be delegated to any other body or person. In view of all the factors to be considered as to the mode of selection and order, it cannot be said that the judgment of the Council is interchangeable with that of a committee. If under a provision of the by-law, the recommendation of the committee had been placed before the Council and approved, the objection would have been met.

(As to the other submissions, Rand J. agreed with the majority).

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the conviction of the appellant for breach of a municipal by-law.

J. A. Sweet, Q.C. for the appellant.

J. D. Arnup Q.C. and J. S. Boeckh for the respondent.

The judgment of Kerwin, Kellock, Locke and Cartwright, JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal, brought by special leave, from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal from a judgment of the learned County Court Judge which in turn had dismissed an appeal from the conviction of the appellant on a charge of breach of a by-law of the City of Hamilton respecting the closing of gasoline service stations during certain hours.

In the courts below and in this court the sole ground on which the conviction was attacked was that the by-law in question is invalid.

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The by-law purports to be passed under the authority conferred upon the Council by section 82(3) and section 82(a) of *The Factory, Shop and Office Building Act*. These sections read as follows:—

82(3) The council of a city, town or village may by by-law require that during the whole or any part or parts of the year all or any class or classes of shops within the municipality shall be closed, and remain closed on each or any day of the week at and during any time or hours between seven of the clock in the afternoon of any day and five of the clock in the forenoon of the next following day, but no such by-law shall be deemed to apply to the sale of fresh fruit.

82a. In addition to any matter authorized by section 82, any by-law thereunder applicable to retail gasoline service stations, gasoline pumps and outlets in the retail gasoline service industry as defined in The Industrial Standards Act may,—

- (a) provide that the by-law shall apply only in the portion or portions of the municipality designated in the by-law;
- (b) require that during the whole or any part or parts of the year such retail gasoline service stations, gasoline pumps and outlets be closed and remain closed at and during any time or hours between six of the clock in the afternoon of any day and seven of the clock in the forenoon of the next following day and between six of the clock in the afternoon of Saturday and seven of the clock in the forenoon of the next following Monday; and
- (c) provide for the issuing of permits authorizing the retail gasoline service station, gasoline pump or outlet for which it is issued to be and remain open, notwithstanding the by-law, during the part or parts of the day or days specified in the permit.

The portions of the by-law relevant to the questions raised on this appeal are sections 4 to 9 inclusive reading as follows:—

Closing Hours

4. During the whole of the year, all gasoline shops shall, save as hereinafter in this By-law otherwise provided, be closed and remain closed:—

- (a) Between seven of the clock in the afternoon of each Monday, Tuesday, Wednesday, Thursday and Friday, respectively and seven of the clock in the forenoon of the next following day; and
- (b) Between seven of the clock in the afternoon of each Saturday and seven of the clock in the forenoon of the next following Monday.

Permits to Stay Open

5. Notwithstanding the provisions of section 4 hereof the City Clerk, may, on the recommendation of the Property and Licence Committee, issue permits authorizing those gasoline shops for which such permits are issued, to be and remain open, notwithstanding the By-law, during the part or parts of the day or days specified in the permit.

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6. Each said permit issued shall be either:—

(1) An Extension Permit, which shall authorize the gasoline shop for which it is issued to be and remain open, notwithstanding the By-law, during the part or parts of the day or days specified in the permit, which,

(a) In that part of the year from the first day of May until the last day of October, inclusive, shall be during the hours between seven of the clock in the afternoon and ten of the clock in the afternoon of Monday, Tuesday, Wednesday, Thursday, Friday and Saturday of the week for which the permit is issued, and during the hours between ten of the clock in the forenoon of the preceding Sunday and seven of the clock in the afternoon of the said Sunday; and

(b) In those parts of the year from the first day of November in each year until the last day of April in the following calendar year, inclusive, shall be during the hours between ten of the clock in the forenoon and five of the clock in the afternoon of the Sunday for which the permit is issued; or

(2) An Emergency Service Permit, which shall authorize the gasoline shop for which it is issued to be and remain open for emergency service only, notwithstanding the By-law, during the part or parts of the day or days specified in the permit, which, throughout the year, shall be during those hours on Sunday, Monday, Tuesday, Wednesday, Thursday, Friday, Saturday of the week for which the permit is issued, commencing at twelve of the clock in the afternoon of the preceding Saturday, when the gasoline shop for which the permit is issued would otherwise be required by the provisions of this By-law to be and remain closed.

Proportion of Extension Permits

7. (1) Extension Permits issued pursuant to the provisions of sub-clause (1) of Section 6 shall, for each week or for each Sunday as the case may be, be issued in such number as most nearly approximates twenty-five per centum of the total number of gasoline shops in the city, according to the records of the City Clerk, and shall be issued in rotation to those occupiers of gasoline shops who are entitled to Extension Permits as hereinafter provided, so that each shall receive at least one such Extension Permit in each calendar month;

(2) The occupiers of all gasoline shops in the City shall be entitled to Extension Permits, except those occupiers who, according to evidence satisfactory to the City Clerk, have failed to keep their gasoline shops open during the whole of the time or times so authorized by such permits, on more than three days or on more than one Sunday in the current calendar year, in which case the City Clerk shall, for the balance of the calendar year or for three months, whichever is the longer period, omit every such occupier from the list of those entitled to receive Extension Permits.

Proportion of Emergency Service Permits

8. (1) Emergency Service Permits issued pursuant to the provisions of sub-clause (2) of section 6 shall, for each week, be issued in such number as most nearly approximates five per centum of the total number of gasoline shops in the city, according to the records of the City Clerk, and shall be issued in rotation to those occupiers of gasoline shops who are entitled to Emergency Service Permits as hereinafter provided;

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(2) The occupiers of all those gasoline shops in the city shall be entitled to Emergency Service Permits, who file notice in writing with the City Clerk that they wish to receive the same, except those occupiers who, according to evidence satisfactory to the City Clerk, have failed to keep their gasoline shops open for emergency service only during the whole of the time or times so authorized by such permits, on more than three days in the current calendar year in which case the City Clerk shall, for the balance of the calendar year or for three months, whichever is the longer period, omit every such occupier from the list of those entitled to receive Emergency Service Permits.

Schemes of Rotation

9. Schemes of rotation of Extension Permits or of Emergency Service Permits or both, submitted by the majority of occupiers of gasoline shops in the City of Hamilton may be considered by the Property and License Committee in coming to a decision for recommending issuance of such Extension Permits or Emergency Service Permits or both.

It was contended on behalf of the appellant that no power to pass the by-law in question could be derived from section 82a, quoted above, as that section uses the words "... in the retail gasoline service industry as defined in the Industrial Standards Act" and while section 82a came into force on March 31, 1948, the amendment to the *Industrial Standards Act* which defined "retail gasoline service industry" did not come into force until May 1, 1948. It is not necessary to consider what weight this argument would have had in regard to the validity of a by-law passed pursuant to section 82a between March 31, 1948 and May 1, 1948. In my opinion, it became untenable after May 1, 1948, and the by-law with which we are concerned was passed on October 25, 1948.

Counsel for the appellant argues that the by-law is bad on the ground that the council in the provisions dealing with the issue of extension permits and emergency service permits have delegated to the City Clerk the legislative power conferred upon them and have substituted his judgment and discretion for their own.

In support of this it is first submitted that as the permissive word "may" is used in section 5 of the by-law Council have left it to the City Clerk to decide whether permits shall be issued at all; but the by-law must, of course, be read and construed as a whole and it is obvious from other provisions that the Clerk must issue permits in

the manner laid down in the by-law. It is only necessary to refer by way of example to the opening words of sections 7(2) and 8(2);—

7 (2) The occupiers of all gasoline shops shall be entitled to Extension Permits. . . .

8 (2) The occupiers of all those gasoline shops in the city shall be entitled to Emergency Service Permits, who file notice. . . .

It is next submitted that the provisions in sections 7(2) and 8(2) of the by-law that the clerk shall omit from the list of those entitled to permits such occupiers as have “according to evidence satisfactory to the City Clerk” failed to keep their shops open as authorized, are invalid. With this submission I agree. It is within the powers of the Council to prescribe a state of facts the existence of which shall render an occupier ineligible to receive a permit for a stated time; but express words in the enabling Statute would be necessary to give the Council power to confer on an individual the right to decide, on such evidence as he might find sufficient, whether or not the prescribed state of facts exists and there are no such words. In my opinion, however, these provisions are severable and if the by-law is otherwise valid it may stand with the words quoted above in this paragraph deleted from sections 7(2) and 8(2).

It is next submitted that there is an unauthorized delegation to the City Clerk of the discretionary right to decide (i) which occupiers shall compose the groups most nearly approximating twenty-five per centum of the total number of gasoline shops (under section 7) and most nearly approximating five per centum of such total (under section 8) and (ii) the order of rotation as between such groups. I am unable to agree with this submission. In my opinion the conferring of these powers on the City Clerk is within the authority given to the Council by the words of section 82a of the enabling Statute, “. . . any by-law . . . may . . . (c) provide for the issuing of permits”. The Council has laid down in the by-law (i) the times during which the permits shall authorize occupiers of gasoline shops to remain open (ii) the proportion of total occupiers who shall make up the groups entitled to receive permits for each Sunday and for each week (iii) that the permits shall be issued to such groups in rotation (iv) that all occupiers shall be entitled to receive permits except those who have failed to remain

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open in accordance with the permits received by them (v) that the occupiers so failing shall cease to be entitled to permits for a time defined in the by-law. The Council has thus provided with sufficient particularity for the issuing of permits and, in my opinion, the duties imposed upon the City Clerk, (i) to select the occupiers to make up the respective groups, and (ii) to arrange the order of rotation, are administrative and are validly imposed.

It was finally argued that the by-law is bad for uncertainty in that it fails to state what constitutes an emergency. On this point I am in agreement with Roach J.A. (1) and would respectfully adopt the following passage from his reasons:—

There will be full compliance with sec. 6 (1) (2) of the by-law, which deals with an emergency service permit, if such permit simply states in the terms of the by-law that it is issued for emergency service only, and the Clerk is not called upon to define the scope of such emergency service. If an occupant of a service station to whom an emergency service permit is granted extends service which those charged with the responsibility of enforcing the by-law consider amounts to more than an emergency service, they may consider it their duty to prosecute the occupier, and on a trial on that charge it will become the duty of the Court trying the accused to determine whether or not the circumstances in fact amounted to an emergency. The failure to define the words does not invalidate the by-law.

In the result the appeal fails and should be dismissed. If the question before us had been whether the by-law was valid *in toto* it might have been necessary to consider whether there should be any apportionment of costs in view of it being held that the words above quoted in sections 7(2) and 8(2) of the by-law are invalid but severable, but since the question actually to be decided is whether the conviction is good or bad I think the respondent is entitled to costs.

I would therefore dismiss the appeal with costs.

RAND, J. (dissenting): This appeal is concerned with the validity of a by-law of the city of Hamilton providing for the closing of gasoline stations. The statute under which the council acted was *The Factory, Shop and Office Building Act*, c. 194, R.S.O. 1937. Sec. 82(3) of that Act, as amended, enacts:—

The council of a city, town or village may by by-law require that during the whole or any part or parts of the year all or any class or classes of shops within the municipality shall be closed, and remain closed on each or any day of the week at and during any time or hours between

six of the clock in the afternoon of any day and five of the clock in the forenoon of the next following day, but no such by-law shall be deemed to apply to the sale of fresh fruit.

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Sec. 82a deals specifically with service stations and other places of gasoline sale, and by clauses (b) and (c) any bylaw enacted under sec. 82 may:—

- (b) require that during the whole or any part or parts of the year such retail gasoline service stations, gasoline pumps and outlets be closed and remain closed at and during any time or hours between six of the clock in the afternoon of any day and seven of the clock in the forenoon of the next following day and between six of the clock in the afternoon of Saturday and seven of the clock in the forenoon of the next following Monday; and
- (c) provide for the issuing of permits authorizing the retail gasoline service station, gasoline pump or outlet for which it is issued to be and remain open, notwithstanding the by-law, during the part or parts of the day or days specified in the permit.

The by-law contained the following provisions:—

4. During the whole of the year, all gasoline shops shall, save as hereinafter in this Bylaw otherwise provided, be closed and remain closed:—

- (a) Between seven of the clock in the afternoon of each Monday, Tuesday, Wednesday, Thursday and Friday, respectively, and seven of the clock in the forenoon of the next following day; and
- (b) Between seven of the clock in the afternoon of each Saturday and seven of the clock in the forenoon of the next following Monday.

5. Notwithstanding the provisions of section 4 hereof the City Clerk may, on the recommendation of the Property and License Committee, issue permits authorizing those gasoline shops for which such permits are issued, to be and remain open, notwithstanding the By-law, during the part or parts of the day or days specified in the permit.

Sec. 6 provided for Extension Permits to remain open from the first day of May until the last day of October between seven and ten o'clock p.m. on week days and from ten a.m. to seven p.m. on Sundays, and a slight modification in the Sunday opening for the remainder of the year; and for Emergency Permits for emergency service only throughout the year.

By sec. 7(1) Extension Permits were for the week or Sunday as the case might be, in such number

as most nearly approximates twenty-five per centum of the total number of gasoline shops in the city, according to the records of the City Clerk,

and they were to be issued in rotation in order that each station should receive at least one permit in each calendar month.

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By s.s. (2):—

The occupiers of all gasoline shops in the city shall be entitled to Extension Permits, except those occupiers who, according to evidence satisfactory to the City Clerk, have failed to keep their gasoline shops open during the whole of the time or times so authorized by such permits, on more than three days or on more than one Sunday in the current calendar year, in which case the City Clerk shall, for the balance of the calendar year or for three months, whichever is the longer period, omit every such occupier from the list of those entitled to receive Extension Permits.

Similar provision was made by sec. 8(1) for the issue of Emergency Permits for each week and in such number as most nearly approximated five per centum of the total number of gasoline shops in the city, which were to be subject to a like rotation. These permits, also, were not to be continued to those who, according to "evidence satisfactory to the City Clerk," had "failed to keep their gasoline shops open for emergency service only during the whole of the time or times authorized by such permits, on more than three days in the current calendar year," for the balance of the year or for three months, whichever might be the longer period.

And by sec. 9:—

Schemes of rotation of Extension Permits or of Emergency Service Permits or both, submitted by the majority of occupiers of gasoline shops in the City of Hamilton may be considered by the Property and License Committee in coming to a decision for recommending issuance of such Extension Permits or Emergency Service Permits or both.

Mr. Sweet argued the invalidity of the by-law on several grounds. Conceding that if the council laid down all essential features of the scheme administrative details could be left to a committee or an official, he contended that no part of the legislative action or discretion reposed by the legislature in the council could be delegated to any other body or person and that in three respects of substance that had been done here. They were, first, in the determination of membership in the 25 per cent groups and the order of the permits; secondly, that the clerk could, on evidence "satisfactory to him", refuse to continue Extension and Emergency Permits to those who had failed to keep their stations open as stipulated; and finally, that the provision for an Emergency Permit, without more, was too vague.

With Mr. Sweet's proposition there can be no quarrel; and where, as here, the right to trade as and when one pleases is involved, its restriction must be justified by action

within the clear intention of the legislature. But there are other considerations of policy which, at times, are raised to qualify that right and in the legislation before us we have a familiar example. The object of the powers entrusted is, primarily, the health and general welfare of employees by limiting the hours of labour, but of course in a non-discriminatory impingement on the businesses affected. The question is whether the general requirement has been infringed.

Once it is provided that only 25 per cent of all stations are to be open on extended hours for weekdays or Sundays, the ascertainment of those to be allocated to the different groups and their order may involve the consideration of a great variety of matters. The object of these exceptions from the general prohibition is public service. Unless the determination of the composition of the groups and their open periods is by a rule of thumb, as by lot or alphabetical order, the consideration, for that purpose, of the geography of the city or its traffic currents or volume, or of the periods of greater or less demand, and, I have no doubt, of other pertinent factors, may lend itself to an exercise of significant judgment: at least I feel unable to say that it cannot.

A precise equalization of participation in this privilege, even with the rotation, is quite impossible of measurement or accomplishment, and nothing better than a substantial or a rough equality could be hoped for. In view of that, can it be said that the judgment of the council as to the mode of selection and order is not interchangeable with that of a committee? For example, some traffic arteries may, no doubt, be the routes of the greatest volume of automobile operation on Sundays or holidays: could a committee's judgment prejudice stations in the groupings? or in the order of their rotation? Is it an answer that it would be a most inconvenient detail to thrust on the council, or that the council would, in all likelihood, adopt the committee's recommendation? Other like possibilities might be suggested. Can it be said with confidence that any imbalance in either respect would be corrected in the course of the year? Is it possible to say that no group selection basis could have the opposite effect of perpetuating a handicap?

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Mr. Arnup viewed the working out of the groups and periods as little more, in substance, than an exercise in mathematics, and at first I was disposed to agree with him. But the further examination of the question discloses so many possible significant factors and circumstances underlying the practical decision, that I am reluctantly driven to a conclusion I would prefer to avoid. If under a provision of the by-law the recommendation of the committee had been placed before the council and, after consideration, approved, the objection would have been met.

On the other points, I agree that to leave it to the clerk to declare the fact of being closed during the currency of a permit on evidence "satisfactory to him" is objectionable; but it is a severable provision, and that phrase can be eliminated leaving the matter as one of fact. The clerk must indeed make his own decision when a renewal of the permit is called for, but it would be open on an application for a mandamus to challenge his finding on the ground that it was not supported by evidence.

The final ground of vagueness I would reject. An emergency may arise out of such a variety of circumstances and be of such a nature as to defy precise definition. Whether, in any case, the occasion was one of emergency would, then, also, be a question open to a court, in which the problem of determining whether it did or did not come within the scope of the word as used would be a simple task compared with the formulation of a definition.

I would allow the appeal and set aside the conviction.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. Sweet.*

Solicitor for the respondent: *A. J. Polson.*
