Supreme Court of Canada
Archibald v. The King, (1917) 56 S.C.R. 48
Date: 1917-11-28

Parker Archibald (Defendant). Appellant;

and

His Majesty The King (Plaintiff). Respondent.

1917: October 23; 1917: November 28.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglìn JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Statute — Construction — Mandamus — "Nova Scotia Fishing Act" — Fishing licence— Municipal corporation—2 Geo. V., c. 18 (N.S.), 6 &7 Geo. V., c. 27 (N.S.)

By sec. 2 of the "Nova Scotia Fisheries Act" of 1912 (2 Geo. V., ch. 18), every resident of the Province is given the right to go on foot along the banks of any river, stream or lake and to go on or across the same for the purpose of lawfully fishing therein except as to the land of an occupant licensed under the Act. From sec. 3, the provision that such right should not apply "to lands situate in a municipality where no by-laws imposing any licences are in force," was eliminated in 1916 (6 & 7 Geo. V., ch. 27). By sec. 6 any municipality "may by by-law provide for the issue of licences under this Act" and for regulation of the fees and by sec. 7 the clerk is required to keep a record of the licences issued and the fees paid.

Held, that the provisions of sec. 6 respecting the issue of municipal licenses cannot be construed as imperative and on the neglect or refusal of a municipal council to pass the said by-law an "occupant" may obtain the issue of a licence by a writ of mandamus.

Held also, Davies J. dissenting, that such writ may be directed to the clerk of the municipality.

Per Davies J.—The writ should have been directed to the municipal council requiring it to pass the necessary by-law.

APPEAL from a decision of the Supreme Court of Nova Scotia[1], ordering a writ of mandamus to issue against the appellant.

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The prosecutor, Hensley, was an occupant of land in the County of Halifax and entitled to a licence to fish in Indian River in said county. The County Council had never passed the by-law authorized by sec. 7 of the "Fisheries Act" for the issue of licences and regulation of the fees and on his application a writ of mandamus was issued directed to the clerk of the council ordering him to issue the licence. This appeal is from the judgment ordering the issue of the writ.

[1] 35 D.L.R. 560.

J. J. Power K.C. for the appellant.

T. S. Rogers K.C. for the respondent.

J. J. Power K.C. for the appellant. The clear intention of the Act is that a municipal by-law is necessary before a licence to fish can be granted. See *Slattery* v. *Naylor*[2].

The amendment to the Act in 1916 does not make a by-law unnecessary. *Townsend* v. *Cox*[3], at page 518; *Laird* v. *McGwire*[4]; *Reg.* v. *Freeman*[5].

T. S. Rogers K.C. for the respondent, referred to Commissioner of Public Works v. Logan[6], at pages 363-4; Attorney-General v. Horner[7], at page 257; Bradlaugh v, Clarke[8], at page 380.

THE CHIEF JUSTICE.—At first sight I thought as I suppose any one would have thought that this action was misconceived in that the mandamus should have been asked to be directed to the municipality of the County of Halifax rather than to one of the corporation's officials, namely, the appellant, the municipal clerk.

Upon consideration, however, I have come to the conclusion that the judgment appealed from is right The reference in the "Act respecting the rights of

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fishing in the Province of Nova Scotia" (Acts of 1912, ch. 15), to municipal councils, is in section 6 which provides:—

> 6 (*i*) The municipal councils may by by-law provide for the issue of licences under this Act, and fix and regulate the fees to be paid by occupants for such licences in respect to fishing rights appertaining to lands within their respective municipalities, but no fee payable for any licence issued under this Act shall exceed the sum of fifty dollars.

Now this section is *primâ facie* only permissive and in order to see whether it should be read as imperative we must consider whether any further provision essential for the working of the Act is left to be provided by the municipal councils. I do not think it is; the nature and purpose of the licences not only clearly appears in the Act, but the form of a

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[2] 13 App. Cas. 446.
[3] [1907] A.C. 514.
[4] 40 N.S. Rep. 129.
[5] 22 N.S. Rep. 506.
[6] [1903] A.C. 355.
[7] 14 Q.B.D. 245.
[8] S App. Cas. 354.

licence which "any occupant may obtain" is given in the schedule to the Act; there is provision for the dating of the licence and the period for which it shall remain in force; then it is provided that the "licence shall be issued by the municipal clerk" and there is a section imposing on him the further duty of keeping a record shewing the particulars therein set forth concerning all such licences issued, such record to be open for inspection as herein mentioned by any person without charge.

Now if the permissive section 6 were not in the Act at all there is here a sufficient machinery for carrying out the intention of the legislature without the necessity of any by-laws being passed by the council to "provide for the issue of licences." No fees can be taken unless the fees to be paid are fixed and regulated by the council, but they are in no way essential to the issue of the licence; if the council does not choose to exact any fees it is so much to the advantage of the licensee; for it is not to be supposed

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that he is to be deprived of his right to obtain a licence because the council do not exercise the right for which permission is given to fix the fees to be paid.

The Act not having imposed any obligatory duties on the council but only given permission for the exercise of rights which must be regarded rather in the light of privileges, the duties expressly imposed on the clerk of the council, the named official, must be treated as imperative and addressed to him personally. For the fulfilment of his duties he requires no authority or instruction from the council. The duties are not judicial or discretionary but purely administrative, and that being so I think a mandamus will lie to compel him to perform them and to issue a licence in a proper case.

The appeal should be dismissed with costs.

DAVIES J. (dissenting).—I think the direction given by the statute to the clerk of the municipality is dependent upon the by-law having been passed by the council providing for the issue of the licences and fixing the fees which should be paid for them.

As stated by the Chief Justice of Nova Scotia, I think it was the clear duty of the council to have made such provision and that of the clerk to have acted upon it, and issued the licence in accordance with it. But I cannot construe the Act as authorizing the clerk to issue licences free because no by-law had been passed.

In my judgment the mandamus should have issued not to the clerk to issue the licence but to the council to discharge its clear statutory duty of providing for the issue of the licences and for the fees payable on them.

I would therefore allow the appeal on this sole ground and not on those suggested by the appellant's

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counsel that the municipal council was vested with the power of determining whether or not there should be public fishing on and through an occupant's lands, or whether or not fishing licences should be granted.

I do not think any such power was conferred on the council by the statute. Their duty was simply to make regulations providing for the issue of licences and fixing the fees to be charged for them. On that being done their clerk's duty was to issue the licences in accordance with their regulations. If they refused or failed to discharge that duty they can be compelled by the court to perform it.

But their neglect or refusal does not confer upon their clerk the right or duty to issue licences without payment of any fee or at a fee he may determine, or to determine what degree of neglect on the council's part vested the right and power in him to issue the licences.

IDINGTON J.—I think the construction of the statute in question adopted by the court below in granting the relief prayed for as against the appellant, is well founded. Clearly sections 4 and 5 are independent of the rest of the statute and for the express purpose of enabling occupants, such as the prosecutor, of land, other than owners of timber land, to enjoy their own property free from the exercise of the rights given to strangers elsewhere in the statute.

Section 5 enabled such occupants to protect themselves, and section 7 enabled the public to ascertain whose lands had become so protected, and strangers were prohibited from entering thereon for fishing purposes.

Section 6 is simply a permissive power given the municipal councils named therein to derive revenue

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by fixing a fee to be paid by those concerned on obtaining the licence.

I think the appeal should be dismissed with costs.

DUFF J.—This appeal should be dismissed with costs.

ANGLIN J.—If the statute had remained as it was in 1912, a great deal might have been urged in support of Mr. Power's contention that the Legislature had left to the municipal council the right to determine whether or not the procuring of a licence should be "imposed" on the owners of several fisheries as a condition of preserving their rights. Under the Act of 1912, it was only where the council had provided by by-law for the issue of such licences that the right of fishing in inland waters bordering upon privately owned "uncultivated land," (not being "timber lands"), was conferred on residents of the province. Until the council saw fit to exercise the powers given to it by section 6, the public right did not accrue and it was unnecessary for the "owner" or "occupant" to exclude it by obtaining a licence from the municipal clerk. It would seem not improbable that under such circumstances the duty of the clerk to issue such a licence would arise only if the council had passed a by-law "imposing licences."

But the amendment of 1916 entirely changed the situation. Thereafter, the public right conferred on residents of the province exists whether a by-law under section 6 providing for the issue of licences has or has not been enacted. In order to preserve his private right and to exclude the public the owner of "uncultivated land" must now obtain a licence. The effect of the change in the statute, in my opinion, is not, as argued by Mr. Power, merely to remove a

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restriction upon the public right of fishing imposed by the earlier Act, but also to change the character of the duty imposed by section 5 on the clerks of municipal councils and to take from the councils the right to determine whether uncultivated lands of private owners or occupants should or should not be subject to the provisions of the statute—leaving it in their discretion however to "fix and regulate," within the prescribed limit, and subject to the approval of the Governor-in-Council, what fees, if any, such owners or occupants should be required to pay for the licences which section 5 requires the municipal clerks to issue. The duty of the latter to issue licences is no longer dependent upon the exercise by the

councils of their powers under section 6. Upon payment of the fees fixed by the council, if any, or, in the event of the council failing to exercise the power conferred by section 6, without payment of any fee, the clerk is obliged to issue a licence in the prescribed statutory form. Otherwise it would be left to the discretion of municipal councils to determine whether the private fishing rights of "occupants" should be conditionally preserved or unconditionally confiscated—a result which it is scarcely conceivable that the legislature contemplated.

While I think it quite probable that it was intended to impose a duty upon municipal councils to provide for the issue of licences—leaving to their discretion the amount of the fees (if any) to be exacted (within a prescribed limit)—I am not satisfied that that intention has been expressed. Although the word "may" is taken as equivalent to the word "shall" where "the doing of a thing for the sake of justice or the public good" is authorized, its *primâ facie* connotation is permissive or enabling. I am not satisfied that it is

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not so used in section 6. Having regard to section 23 (11) of the "Interpretation Act," (R.S.N.S. 1900, ch. 1), only a clear case of impelling context would justify giving it an imperative construction. The use of the word "shall" in section 5 indicates that the word "may" was used advisedly in section 6 and in a permissive or enabling sense. Moreover, there would appear to be grave difficulty in the way of curial enforcement of any such duty as it has been suggested is imposed upon the municipal councils by section 6, especially in view of the provision of subsection 2 which subjects any action taken by them to the approval of the Governor-in-Council.

> It by no means follows that because there is a duty cast on the donee of a power to exercise it, that mandamus lies to enforce it; that depends on the nature of the duty and the position of the donee. *Julius* v. *Bishop of Oxford*[9].

No such obstacle presents itself to the enforcement of the duty imposed on the clerk by section 5.

It seems to me probable that the clerk would have a right to demand indemnity from the municipal council for any expenses properly incurred by him in carrying out the provisions of ss. 5 and 7. But if not, the fact that no provision is made for such expenses does not

[9] 5 App. Cas. 214, at p. 241.

alter the imperative nature of the duties imposed upon him by the statute or deprive the respondent of the right to invoke the aid of the court to compel their performance.

Appeal dismissed with costs.

Solicitor for the appellant: Thomas Notting.

Solicitor for the respondent: T. S. Rogers.