

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DIANE ROBINSON

Applicant

- and -

THE MUNICIPAL CORPORATION OF THE TOWN OF HAY RIVER

Respondent

Application to Quash Municipal By-Law No. 1599 "A".

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on June 3, 1996

Reasons filed: June 11, 1996

Counsel for the Applicant: Andrew E. Fox

Counsel for the Respondent: Steven L. Cooper

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REASONS FOR JUDGMENT

1 On September 11, 1995, the Council of the Town of Hay River enacted By-Law No. 1599. This by-law provides for the regulation and licensing of taxis, taxi owners and drivers, taxi fares, and offences and penalties for breaches of the by-law. On November 27, 1995, the Town Council enacted By-Law No. 1599 "A". This by-law amends the earlier one by adding to it provisions for the seizure of taxis being operated in contravention of the by-law. The applicant now asks this court to quash By-Law No. 1599 "A".

2 The *Cities, Towns & Villages Act*, R.S.N.W.T. 1988, c. C-8 (henceforth referred to simply as "the Act"), is very concise in setting forth the power to quash a by-law:

68.(1) Any person
 (a) resident in the municipality, or
 (b) adversely affected by a resolution or by-law,
may apply, by way of originating notice, to a judge of the Supreme Court for an order quashing a resolution or by-law of the municipal corporation.

3 There is no dispute that the applicant has standing to bring this application. There is also no dispute that, notwithstanding the lack of guidance provided by the statute, the ground on which this by-law may be quashed is "illegality". As I noted in *Duesterhus v. Yellowknife*, [1993] N.W.T.R. 144, the sole ground upon which a court may quash a by-law is illegality. Illegality, however, may take different forms. It applies nevertheless to all by-laws which can be quashed irrespective of the ground of attack.

4 In this case the applicant submits that there is neither the express statutory authority granting the Town the jurisdiction to enact this by-law nor is the authority necessarily implied from the statutory authority that is granted to it. The respondent Town submits that the by-law is a necessary and implied power within its authority to regulate taxis.

5 By-Law No. 1599 "A" amends the earlier comprehensive by-law by adding to it the following sections:

40. An officer may seize a taxi and cause it to be removed from its location to a place of storage, if the officer has reasonable and probable grounds to believe that the taxi is being operated in contravention of any provision of this By-Law.
41. Any taxi seized and impounded, as described in Section 40, shall be moved and held at the risk and expense of the owner of the taxi.
42. Any taxi that has been seized and impounded, as described in Section 40, shall not be released to the owner of the taxi until:
 - all storage & towing fees are paid in full;
 - all applicable charges or fines are paid in full; and
 - full compliance of the by-law has been shown by the owner.

6 In his submissions, applicant's counsel points out some obvious and significant implications arising from these provisions. Obviously the effect of these provisions would be to deprive the owner or operator of the taxi of possession of the vehicle. There thus could be an interruption of one's capacity to earn one's livelihood. This interruption could be temporary or it could go on indefinitely. The seizure can occur without prior notice of the intended seizure or notice of the alleged infringement of the by-law. There is no provision for an adjudication of the merits of the officer's reasonable and probable grounds. Indeed it is possible that no charge would ever be laid. Finally, the by-law potentially authorizes entry onto private property since it authorizes removal of the vehicle from "its location" without any limitation.

7 The by-law states that it was enacted under the authority of s.113 of the Act:

113. A council may, by by-law,
- (a) prohibit the operation of a taxi without the vehicle or operator or both, being licensed by the municipal corporation;
 - (b) regulate the operation of taxis;
 - (c) establish quotas for taxi licences;
 - (d) establish a tariff of minimum and maximum fares that may be charged by taxi operators;
 - (e) regulate the transfer of taxi licences;
 - (f) classify taxis for the purposes of the by-law;
 - (g) regulate the nature and location of taxi stands; and
 - (h) subject to sections 178 to 180, provide for matters relating to the issuance, suspension and cancellation of taxi licences.

8 In addition, regard must be had to other sections of the Act providing for enforcement of by-laws. These (found in Part V of the Act) provide for the appointment of by-law officers and for the use of the provisions of the *Summary Conviction Procedures Act*, R.S.N.W.T. 1988, c. S-15, to enforce by-laws. Sections 178 to 180 provide for right of notice, hearing, and appeal, respecting the suspension or cancellation of a taxi licence.

There is nothing, however, in either the *Cities, Towns & Villages Act* or the *Summary Conviction Procedures Act*, that expressly authorizes seizure as an aspect of the enforcement of taxi by-laws.

9 Respondent's counsel argues that the principal purpose of By-Law No. 1599 "A" is to prohibit the operation of a taxi that is not properly licensed. It is a regulatory measure intended to effect the temporary removal of a vehicle from use. Authority is claimed to be found in the prohibition and regulation powers granted by subsections (a) and (b) of s.113 of the Act.

10 It is trite to say that municipalities, being creatures of statute, have only such authority as given by the enabling statute. For a by-law to be valid the authority for it must be found in the enabling legislation expressly or by necessary inference. The governing principles were outlined by Iacobucci J. in *R. v. Greenbaum*, [1993] 1 S.C.R. 674, at pages 687 - 688:

Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute...

As Davies J. wrote in his reasons in *City of Hamilton v. Hamilton Distillery Co.* (1907), 38 S.C.R. 239, at p. 249, with respect to construing provincial legislation enabling municipal by-laws:

In interpreting this legislation I would not desire to apply the technical or strict canons of construction sometimes applied to legislation authorizing taxation. I think the sections are, considering the subject matter and the intention obviously in view, entitled to a broad and reasonable if not, as Lord Chief Justice Russell said in *Kruse v. Johnson* [[1898] 2 Q.B. 91], at p. 99, a "benevolent construction," and if the language used fell short of expressly conferring the powers claimed, but did confer them by a fair and reasonable implication I would not hesitate to adopt the construction sanctioned by the implication.

Accordingly, a court should look to the purpose and wording of the provincial enabling legislation when deciding whether or not a municipality has been empowered to pass a certain by-law. As Ian Rogers has noted in *The Law of Canadian Municipal Corporations* (2nd ed. 1971), at p. 388, a somewhat stricter rule of construction than that suggested above by Davies J. is in order where the municipality is attempting to use a power which restricts common law or civil rights.

11 The provisions of By-Law No. 1599 as a whole are regulatory in nature. The ability to license and regulate taxis is a necessary component of civic administration. There are aspects of public safety and convenience involved in such regulation. Such licensing powers should therefore not be made subject to an overly strict construction (especially considering the presumption of validity attaching to this inquiry). A wide scope should be allowed to municipal councils to legislate for the peace and welfare of the community: *Elves v. Edmonton* (1916), 9 Alta. L.R. 530 (C.A.)

12 In this case, after reviewing the enabling legislation and the impugned by-law, I have concluded that there is neither the express authority nor a necessarily implied authority validating the seizure power assumed by the municipality.

13 As I have already noted, there is no express authority in the *Cities, Towns & Villages Act* or in the *Summary Conviction Procedures Act* authorizing municipalities to use seizure as a means of enforcement. There are provisions in the *Cities, Towns & Villages Act* for councils to pass by-laws enabling an officer to direct a person to do something or refrain from doing it (s.173), or to take some action that a person neglected to take and charge the expense back to them (s.181), or, specifically with respect to taxi licences, to take proceedings on notice to suspend or cancel a licence (s.178). But there

is nothing in s.113 or any other part of the Act that authorizes a municipal council to enact a seizure enforcement measure.

14 I note that the *Motor Vehicles Act*, R.S.N.W.T. 1988, c. M-16, also grants to municipalities the power to regulate vehicles and use of highways as outlined in Part XII of that Act. The seizure of vehicles, however, is not one of those powers, that being found in Part VIII of that Act.

15 I have also concluded that the statute does not confer a seizure power by any fair or reasonable implication. First, one must keep in mind that By-Law No. 1599 "A" has the effect of interfering with private property rights and thus must be more strictly construed. Second, the Act and the by-law already contain express enforcement provisions. Any other enforcement mechanisms should be clearly authorized. Counsel for the applicant refers me, by analogy, to the case of *In re By-Law No. 92, Town of Winnipeg Beach*, [1919] 3 W.W.R. 696 (Man. C.A.), where it was held that the power to regulate and to penalize by way of fines does not imply the power of forfeiture. The power to create a forfeiture of property is one which must be expressly given to the municipality by the enabling legislation. It was held there that such an extraordinary power is not to be inferred where the legislation has provided other means of enforcing by-laws. In my opinion the analogy is an appropriate one for this case.

16 The extraordinary nature of any delegation of search and seizure powers is illustrated by the case of *Re Hamilton Independant Variety & City of Hamilton* (1983), 143 D.L.R. (3d) 498 (Ont. C.A.). The court there was reviewing the validity of a municipal by-

law regulating adult entertainment parlours. The provincial legislation, by what is referred to below as s. 368b, empowered municipalities to pass such by-laws and, as part of the enforcement powers, provided that an officer may enter and inspect premises. The City, in its by-law, extended the power to one of seizure of records as well. In striking down that portion of the by-law, Lacourciere J.A., on behalf of a five-judge panel of the court, wrote (at pages 509-510):

Subsection (5) of s.368b gives the right to municipal officials or to a peace officer who has reason to suspect that a breach of any provision of the by-law has occurred to enter the adult entertainment parlour at any time of the night or day "for purposes of carrying out the enforcement of" the by-law. Section 19(3) of the by-law seeks to extend this power by granting to the officials or to a constable the right "at any time [to] remove any paper, document, record, book or other writing for inspection or review or for use in the courts".

Freedom from unreasonable search and seizure is an historic common law right recently reaffirmed by the Supreme Court of Canada in *Colet v. The Queen*, [1981] 1 S.C.R. 2, 119 D.L.R. (3d) 521, 57 C.C.C. (2d) 105. This right is now enshrined in s.8 of the *Canadian Charter of Rights and Freedoms* which is the supreme law of Canada. Section 8 provides that:

8. Everyone has the right to be secure against unreasonable search or seizure.

Mr. Vickers now concedes and I am satisfied that the Legislature did not intend, in s.368b(5), to delegate to municipal councils the authority to infringe this common law right by allowing municipal officials to enter the premises day or night, without a warrant or reasonable and probable cause, and to remove whatever they deem necessary. I would go further and hold that ss. 19 and 20 of the by-law are unauthorized. In contrast to other subsections of s.368b, s-s.(5) does not grant to a municipality any authority to enact by-laws with respect to entry; it does not delegate the authority to regulate entry or search and seizure. On the contrary, s-s.(5) itself defines the conditions of entry for purposes of carrying out the enforcement of the by-law. Nor can the authority to enact these sections be implied from the general powers contained in s.368b of the *Municipal Act*. The Legislature has specifically regulated entry: the municipality has no authority to enlarge or modify the statutory right of entry or to grant additional powers of search and seizure. In my view, ss. 19 and 20 should be severed and struck from the by-law.

17 In the case before me there is nothing in the legislation to support the view that seizure is a necessary incident of the enforcement of the taxi by-law. If the concern is

over unlicensed operators or vehicles, then there are provisions in the legislation for suspension and cancellation proceedings. If the concern is over unsafe vehicles being on the road, then there are seizure provisions in the *Motor Vehicles Act*. There may be good reasons for a municipality to have the power to seize unlicensed or unsafe taxis; there is simply no authorization for it in the enabling legislation.

18 Even if there was an implied power to seize, the provisions of By-Law No. 1599 "A" are still defective. At common law, before a police officer can seize goods without a warrant, the officer must have reasonable and probable grounds for believing that a crime has been committed and that the item in question is either the fruit of the crime, or is the instrument by which it was committed, or is material evidence to prove the crime. The item must not be kept any longer than is necessary to complete the investigation or to preserve it for evidence at a trial: *Ghani v. Jones*, [1970] 1 Q.B. 693 (C.A.); *Ramia v. Burgess* (1980), 53 C.C.C. (2d) 384 (N.S.C.A.).

19 The by-law provides no time limit on the period of seizure and no mechanism for review. It can usefully be compared to the seizure provisions found in sections 294 to 301 of the *Motor Vehicles Act*. By that statute, an officer may seize a vehicle required for evidence by a warrant or without a warrant if the officer finds a person contravening the Act. But if a prosecution is not commenced the seizure terminates after 15 days. A seizure may be effected in exigent circumstances but it is in effect for only 24 hours and it must be made on notice. Finally, the owner of a vehicle seized may apply to a territorial judge for an order terminating the seizure. All of these safeguards are noticeably missing

from By-Law No. 1599 "A". These defects, being contrary to basic common law principles, are sufficient to invalidate the by-law.

20 For the foregoing reasons, an order will issue quashing By-Law No. 1599 "A".
Costs may be spoken to if necessary.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 11th day of June, 1996

Counsel for the Applicant: Andrew E. Fox

Counsel for the Respondent: Steven L. Cooper

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