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COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., GILLESE and BLAIR JJ.A.

B E T W E E N:

118143 ONTARIO INC., carrying on business as CANAMEX PROMOTIONS and NEIL RITCHIE carrying on business as AFFORDABLE PORTABLES	)	E. Marshal Green for the respondents
Plaintiffs/Respondents	)	
- and -	)	
THE CORPORATION OF THE CITY OF MISSISSAUGA	)	Michal E. Minkowski and Wendy Kwok for the appellant
Defendant/Appellant	)	
	)	Heard: June 18, 2004

On appeal from the judgment of Justice Peter H. Howden dated December 29, 2003, ruling on the determination of a question of law pursuant to Rule 21 of the Rules of Civil Procedure.

R. A. BLAIR J.A.:

Background

[1] Canamex Promotions and Affordable Portables (the respondents) are in the business of leasing or renting portable signs. The signs are located at the premises of customers who use them to advertise their products and services. This lawsuit arises out of a dispute between the respondents and the city of Mississauga over whether there is a gap in the period of time when the city's by-law regulating portable signs and the installers of those signs was operative.

[2] The dispute centres on whether the provisions of the city's By-law 301-94, regulating such signs, expired on January 30, 2001, pursuant to the "sunset" provisions of the *Savings and Restructuring Act, 1996*, and remained ineffective until a new by-law –

By-law 0054-2002 – came into force on May 1, 2002. The respondents contend this is the case. The city argues, on the other hand, that the regulatory section of By-law 301-94 remained in effect as a severable "stand-alone" provision notwithstanding the sunsetting of the licensing portion of the by-law. It therefore directed the removal of 163 of the respondents' signs from their locations.

[3] The respondents sued the city for damages, a restraining order and declaratory relief, alleging harassment and selective enforcement of the by-law. A Rule 21 motion was brought in the action for the determination of certain questions of law. On December 9, 2003 Howden J. declared – much to the relief of the respondents, who might otherwise be out of business – that By-law 301-94 as a whole was a by-law licensing businesses and that it was deemed to have expired on January 30, 2001.

[4] The city appeals that decision. Howden J. gave careful and thorough reasons, and I would dismiss the appeal, essentially for those reasons.

History of the By-laws and Legislation

[5] By-law 301-94 was enacted in 1994 to regulate portable signs and to license persons in the business of leasing or renting such signs. Its statutory underpinnings were found in subsections 210.146 (prohibition and regulation of signs) and 210.147 (licensing persons in the business of leasing or renting portable signs), and possibly s. 109[1], of the *Municipal Act*, R.S.O. 1990, c. M.45, as it then read.

[6] In 1996, however, the Legislature introduced the *Savings and Restructuring Act*, 1996 (the "SRA"). The SRA repealed most of the individual licensing enabling provisions in the *Municipal Act* and substituted a more general municipal licensing authority for what was known as the "laundry list" approach to delineating the powers of municipalities to license, regulate and prohibit conduct. Everyone agrees that the SRA was a first step in introducing sweeping new changes towards municipal enabling legislation, giving municipalities more flexibility and broadening the basis for their by-law-making authority in keeping with their enhanced responsibilities and functions in today's society. This process culminated in the enactment of the new *Municipal Act,* 2001. Subsection 210.147 of the *Municipal Act* (specifying that municipalities may pass by-laws for licensing persons who carry on the business of leasing or renting mobile signs) was repealed. However, subsection 210.46 (by-laws prohibiting or regulating signs) was not.

[1] The preamble to the By-law does not purport to rely on s. 109. However, that section stated that "The power to license, regulate or govern places or things includes a power to license, regulate or govern the trades, calling or businesses for which such places or things are used and the person carrying on or engaged in them".

[7] Subsection 24(3) of the SRA stipulated that municipal by-laws "licensing a business" would expire on the earlier of five years after the day the section came into force (January 30, 1996) or the day such a by-law was repealed by the municipality.

[8] The city did not repeal By-law 301-94 until it enacted By-law 0054-2002, effective May 1, 2002. Hence, the argument that By-law 301-94 lapsed five years after the SRA became effective, namely on January 30, 2001, and that there were no operative regulations governing the respondents' portable signs in the interim.

Analysis

[9] The city argues there is a clear distinction between that portion of By-law 301-94 prohibiting and regulating *things* (in this case, portable signs) and that portion providing for the licensing of persons who carry on the business of dealing with those things (in this case, the business of leasing mobile signs). Subsection 210.147, which authorizes by-laws for the licensing of businesses, was repealed by the sunset provisions of the SRA. Subsection 210.146, which authorizes by-laws for the prohibition and regulation of things, however, was not. The city submits the statutory underpinning for the part of By-law 301-94 regulating the respondents' signs remained in place, and therefore that part of the by-law remained in effect, notwithstanding that Part II (the licensing of businesses) was sunsetted.

[10] Howden J. rejected this argument. He concluded that By-law 310-94, taken as a whole, was a by-law licensing a business, within the meaning of s. 24(3) of the SRA, and accordingly that it expired on January 30, 2001. In doing so, he took a comprehensive approach to the interpretation of the By-law, recognizing the marked changes to the approach to granting municipal powers signalled by the SRA and culminating in the new Act, and reading the By-law as a whole in the context of these changes and of the applicable legislation, past and present.

[11] The main thrust of the motion judge's reasoning is found in the following passages from his decision, at paras. 15-19:

> [15] The 1996 amendments to the *Municipal Act* in the *Savings and Restructuring Act* marked a significant step toward a new order of municipal powers to licence and regulate. Instead of a lengthy litany of powers to regulate and licence by categorizing and listing the activity or thing regulated, the 1996 amendments codified licencing capability into a general licencing power for use by municipalities under any licence-enabling section of that or any other Act (section 257.6). In other words, the few individual licencing

provisions left after the 1996 amendments largely derived from traditional police-power or environmental sources and concerns, but they also were consolidated with the new general grant of licencing authority. It recognized that regulation is inherently bound up with most, if not all, proper and effective licencing schemes, including the ability to regulate business premises and the equipment and other personal property used or kept for hire in the business. The broadened municipal power to licence businesses including the business site or premises was noted and construed by Molloy J. of this court in particular circumstances in *Citipark Inc. v. Hamilton (City)* [2000] O.J. No. 4796. (Municipal licencing conditions requiring barriers, drainage control and residential-protective lighting for parking lots were upheld, but not re landscaping and fencing). The policy trend evident from the legislation was, where possible, to move to a more unified broad source of licencing and regulatory power as part of a major re-ordering and enlarging of overall municipal functions and responsibility.

[16] The changes in 1996 were continued and further consolidated in the new *Municipal Act*, SO 2001, C25.

[Here, the motion judge cited at length from C.J. Williams and J. Mascarin, *Ontario Municipal Act 2001 and Commentary*, pp. 40-41, Butterworths Canada Ltd., 2002, indicating that "the legislation represents a significant step in the right direction for municipalities by replacing the concept of prescriptive delegation with a new model based on broad and flexible grants of authority that are balanced with various control measures to ensure public accessibility and participation as well as municipal accountability and transparency"].

[17] In enacting by-law 301-94, clearly the defendant City drew on both sections 210.146 and .147 of the pre-1996 *Municipal Act*. The preamble in the by-law is persuasive evidence on that point. It produced a comprehensive regulatory scheme for sign installers and sign usage and locations with the objectives of minimizing traffic hazards and limiting sign usage in order to preserve the integrity of the urban landscape. *Read contextually and purposively in light of council's own expression of its intent in the by-law's preamble, the by-law itself does not support the*

> *characterization of it as introducing two separately based, separately directed legislative regimes. The City did not produce two schemes; it produced one scheme to control those in the business of renting mobile signs as well as the signs themselves by licence and permit.* Some of the provisions do not deal directly with licencing of sign installers *but the licencing of those businesses was deemed by council as essential to its broad objectives*. It is particularly noteworthy in the sections dealing with sign permission and restriction that in virtually every case, not only the person erecting the portable sign, but also the "licencee acting as his agent" is included. This extends to liability of the licencee, as well as a property owner where a sign contravenes the by-law, to prosecution and fine. . . . [emphasis added]
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> [18] The key points here are the context to section 24(3) within the 1996 amendments, the purpose of which was to restructure municipal powers generally in a more comprehensive manner, and the lack of legislative competence within sub-section 210.146 alone in respect of several provisions outside part 2 of By-law 301-94.
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> [The motion judge then went on to list several provisions from other parts of the by-law that in his view could not be supported by the provisions of subsection 210.146, but that were located in other portions of the by-law apart from part 2 (the licencing of businesses portion), and most of which were lawfully justifiable under the authority of the lapsed subsection 210.147].
>
> [19] By-law 310.94 includes provisions for licencing sign leasing businesses as well as controlling their signs as an overall sign control scheme. There is no reason to look at By-law 301-94 as only one of its parts.
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> [21] Having considered all of these aspects, in light of the evidence and submissions before me, I find that By-law 301-94 is a by-law licencing a business, within the meaning of section 24(3) of the *Savings and Restructuring Act*.

[12] I agree with this reasoning. In my view, the issue is not whether, taken in isolation, the still existing authority of subsection 210.146 could justify the portion of the by-law prohibiting and regulating the signs; rather, the issue is whether By-law 301-94, taken as a whole, is a by-law "licensing a business". The motion judge found that it was a by-law licensing a business. His interpretation of the by-law in this regard, and his

conclusion the "regulation is inherently bound up with most, if not all, proper and effective licensing schemes, including the ability to regulate business premises and the equipment and other personal property used or kept for hire in the business", was plausible, in keeping with the objectives of the legislation in question, reasonable and just: see Ruth Sullivan, *Driedger on the Construction of Statutes* (Butterworths: Toronto) 3rd edition 1994, at p. 131 (now 4th edition, at p. 3).

[13] I would therefore uphold the motion judge's finding that By-law 301-94, taken as a whole, is a by-law licensing a business, and that it therefore expired on January 30, 2001. There being no other city by-law in its place until May 1, 2002, there was no operative by-law regulating and governing the respondents' portable signs in the city of Mississauga during the intervening fifteen-month period.

[14] Given the foregoing conclusion, it is not necessary for the determination of the appeal to deal with the issue of whether part 2 of By-law 301-94 (dealing specifically with the licencing of businesses) can be severed from the by-law, leaving the portion of the By-Law dealing with the regulation of signs, and the rest of the by-law, in force.

Disposition

[15] For the foregoing reasons, I would dismiss the appeal.

[16] Counsel have filed written submissions as to costs, which I have reviewed. I would award the respondents their costs of the appeal, on a partial indemnity basis, fixed in the amount of $10,000, inclusive of fees, disbursements and GST.

"R.A. Blair J.A."
"I agree R.R. McMurtry C.J.O."
"I agree E.E. Gillese J.A."

Released: October 13, 2004