Toronto (City) Roman Catholic Separate School Board v Toronto (City), [1925] 3 DLR 880 (JCPC)

Viscount Cave L.C.:

[1] This appeal raises some important questions as to the relative rights of a School Board acting under the Separate Schools Act of Ontario and a City Council acting under the *Municipal Act* of that Province. By virtue of the *Separate Schools Act*, the Board of Trustees of the Roman Catholic Separate Schools for the city of Toronto (who will be referred to in this judgment as the "School Board") have power to acquire or rent school sites and to build and carry on schools. By virtue of the *Municipal Act*, the Corporation of the city of Toronto is empowered to prohibit by by-law the use of land or the erection or use of buildings within any defined area for any purpose other than that of a private residence. The question is whether, in the circumstances of this case, a by-law made by the Corporation under the latter statute is enforceable in respect of a site purchased by the School Board for school purposes.

[2] In the year 1921 the School Board, having been evicted for the purpose of a street improvement from their school in St. Vincent Street, purchased two adjoining houses with gardens, being Nos. 14 and 18 Prince Arthur Avenue, Toronto, with the object of transferring their scholars to a new school to be erected on that site. No. 14 Prince Arthur Avenue was vacant, and the School Board obtained possession of that property on August 19, 1921; but No. 18 was let to tenants who were subject to a two months' notice to quit; and actual possession of that property was not obtained until the month of April in the following year. Immediately on obtaining possession of No. 14, the School Board, without depositing plans as required by the municipal by-laws then in force, made some structural alterations in the building with a view to adapting it for temporary use as a school; and subsequently — namely, on September 6 and 9, they deposited plans for these temporary alterations. Prince Arthur Avenue is a residential street, and on September 14 the residents in that street, having heard of the proposal to open a school there, appealed to the Board of Control to intervene; and that Board referred to the City Council the question of making a by-law for preserving the residential character of the street, and instructed the city architect to withhold his approval of the plans deposited by the School Board pending the consideration of this question by the Council. The School Board thereupon acted with great promptness. On September 15 their architect deposited with the city architect plans for the erection of a school extending over the site of Nos. 14 and 18 Prince Arthur Avenue, and on the same day the School Board applied to the Court for a mandamus directing the city architect to consider these plans and to grant a permit both for the temporary alterations

and for the erection of a school building upon the entire site. They also opened a school in No. 14 as altered, and by agreement with the tenants of No. 18 obtained possession of a part of the garden at the rear of that house, and caused it to be used as a playground for the scholars.

[3] On September 26 the City Council met and under the powers conferred upon them by s. 399A of the *Municipal Act*, passed a by-law (No. 8834) in the following form:

> I. No person shall use the land fronting or abutting on either side of Prince Arthur Avenue, between Avenue Road and Huron Street, or erect or use any buildings on the said land for any other purpose than that of a detached private residence.
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> II. Any person convicted of a breach of any of the provisions of this by-law shall forfeit and pay, at the discretion of the convicting magistrate, a penalty not exceeding (exclusive of costs) the sum of $50 for each offence.
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> III. This by-law shall take effect upon, from and after receiving the approval of the Ontario Railway and Municipal Board.

[4] This by-law was approved, after arguments on both sides, by the Railway and Municipal Board. The application for a mandamus, having been adjourned in the meantime, was thereupon dismissed by Middleton J.; and an appeal to a Divisional Court against this dismissal was adjourned by that Court sine die to enable the School Board to take proceedings to get the by-law quashed.

[5] Accordingly, on March 10, 1922, the School Board brought an action against the City Council and their architect, claiming to have the by-law declared invalid or inapplicable and consequential relief. On April 19, 1922, the City Council commenced an action against the School Board, claiming an injunction to restrain that Board from using in breach of by-law No. 8834 the part of its lands not used for school purposes prior to the passing of the by-law, being the front part of No. 18 Prince Arthur Avenue. The two actions were consolidated, and were tried by Middleton J., who dismissed the action brought by the School Board and granted an injunction as asked by the City Council. An appeal to the Appellate Division of the Supreme Court of Ontario against this judgment, and against the refusal of Middleton J. and the Divisional Court to grant a mandamus, was dismissed. The School Board applied for leave to appeal against the decision of the Appellate Division to the Supreme Court of Canada, and such leave was granted on an undertaking by the School Board to abandon as a ground of appeal any contention that the form of the by-law in question in the action, if it was competently enacted, did not correctly follow the statute pursuant to which it was passed, and also any contention that the Municipal Council in passing the by-law acted in bad faith.

[6] On the hearing of the appeal to the Supreme Court of Canada, that Court (Idington J. dissenting) allowed the appeal and made an order that the city

architect should consider the application of the School Board for a permit to erect a school building upon the premises Nos. 14 and 18 Prince Arthur Avenue, and should grant a permit for the erection of that building in accordance with the plans and specifications left with the city architect by the Board or as the same might be amended in compliance with the by-laws of the city of Toronto respecting buildings. The reasons for this decision are to be found in the judgment delivered by Duff J. on behalf of the majority of the Court, from which it appears that the decision was based mainly upon the proviso marked (a) contained in s. 399A of the *Municipal Act* of 1921. That section, after enacting that by-laws might be passed by the councils of cities and other municipalities for prohibiting the use of land or the erection or use of buildings within any defined area or areas abutting on any defined highway or part of highway for any other purpose than that of detached private residence, provided as follows:

> (a) No by-law passed under this section shall apply to any land or building which on the day the by-law is passed is erected or used for any purpose prohibited by the by-law so long as it continues to be used for that purpose, nor shall it apply to any building in course of erection or to any building the plans for which have been approved by the city architect prior to the date of the passing of the by-law, so long as when erected it is used for the purpose for which it was erected.

[7] After referring to this proviso, the learned judge said:

> The right of the owner of land, therefore, to make use of it, subject to the existing by-laws, in the erection of such buildings upon it as he thinks proper to erect, is preserved inviolate down to the point of time when the restrictive by-law is actually passed; and thereafter, in the limited degree prescribed, in the special cases mentioned. That right, as Middleton J. held in the case already cited, includes the right to receive the necessary permit for the erection of a building proposed to be erected in conformity with the law in force for the time being. It is quite manifest that in the result, if effect be given to the judgments of the Ontario Courts, this right is denied the appellants. The by-law producing this result cannot, in view of the circumstances, in our opinion, be sustained as a valid exercise of the authority given by the statute. The protection of the existing status is a substantive element in the purpose of the enactment. The by-law, passed in the circumstances in which it was passed, necessarily had the effect (and it was so designed) of depriving the appellants of the benefit of a status of which the statute guaranteed the protection. That, in our opinion, is not according to the tenor of the authority created.

[8] The learned judge concluded by expressing a hope that, with the co-operation of all parties concerned, it might be possible to make other arrangements which would relieve the residents of the street of the very grave detriment and hardship

arising from the presence of the school, the existence of which was not disputed.

[9] With the greatest respect for the opinion of the learned judges composing the majority of the Supreme Court, their Lordships are unable to concur in this reasoning. No doubt it is true that, unless and until a by-law restricting the building upon any land is passed, the owner of the land has a right, subject to the existing by-laws, to erect upon it such buildings as he may think proper. But the whole object and purpose of s. 399A is to empower the city authority, acting in good faith, to put restrictions upon that right with a view to the protection of neighbouring owners against that "grave detriment and hardship" to which the learned judge referred; and the "status" or proprietary right of the owner is limited by the powers of the city to be exercised for the protection of his neighbours. If the reasoning of the learned judge is to be taken literally, then in every case the "status" of the building owner is to prevail, and that whether he has or has not deposited plans with a view to building upon his land; and even if the sentences quoted refer only to a case where plans have been deposited before the by-law is passed, they yet go beyond the express terms of the statute. The operation of proviso (a) is confined to cases where at the date of the passing of a by-law either (1.) a building is erected or used for a purpose prohibited by the by-law, or (2.) a building is in course of erection, or (3.) the plans for a building have been approved by the city architect; and it would appear to their Lordships to be a necessary inference from the express terms of the proviso that where plans have been deposited but not yet approved, and the building is not in course of erection, the operation of the by-law is not excluded. There may be a prima facie right to have the deposited plans approved; but if so, that right is negatived by the passing and approval of the by-law. It was suggested that the by-law was defective on the ground that the limitations contained in proviso (a) to the section should have been but were not embodied in the by-law itself; but having regard to the undertaking given by the respondents to abandon any contention that the form of the by-law did not correctly follow the statute, this argument was not open to the respondents on this appeal, and their Lordships accordingly express no opinion upon it.

[. . .]

[10] For these reasons their Lordships are of opinion that this appeal should be allowed, and that the order of the Supreme Court of Canada should be set aside and the order of the Appellate Division of the Supreme Court of Ontario restored, and they will humbly advise His Majesty accordingly. The appellants will have their costs in the Supreme Court, but, in accordance with their undertaking, they will pay the costs of this appeal.