IN RE ARMOUR AND THE TOWNSHIP OF ONONDAGA

(1907), 14 O.L.R. 606 (also reported: 9 O.W.R. 833)

Ontario High Court, Riddell J., 26 April 1907

(Motion to appeal to Supreme Court of Canada, reported sub nom. Armour v. Township of Onondaga, infra p. 9)

Municipal Corporations--Local Option By--Law--Mode of computing Three-- fifths Majority--Qualification of Voters--Finality of Roll--Subsequent Disqualification--Deputy Returning Officers--Right to Vote--Indian Reserve--Necessity for Exclusion--Three weeks--Computation of --Inclusive of Sundays and Holidays--Irregularities in Meetings of Council--Illegality in Election of Members--Scrutiny--Non--statement of on face of By--law.

The proper mode of dealing with votes improperly cast on the submission of a local option by-law under 6 Edw. VII. ch.47 (O.), is to deduct them from the total number cast, and take three-fifths of the remainder.

The Court will not, under sec. 89 of 3 Edw. VII. ch 19 (O.), inquire into the qualification of those entered on the voters' list.

Regina, ex rel. McKenzie v. Martin, 28 O.R. 523, followed.

Objections to the following votes by reason of what had taken place after the final revision of the roll were over-ruled, and the votes held good: (1) Where two farmer's sons were assessed as owners, the father being the owner of the farm, the subsequent death of the father and the devise of the farm to one of the sons; (2) Where a farmer's son was assessed as owner, the father being the owner of the farm, the subsequent sale of the farm by the father, but who acquired another farm before the voting.

The following votes were also held good: (1) Where the son, the voter, lived with his mother, who had a life estate in the property, with a power of appointment amongst a class which included the son; (2) a farmer's son, assessed as owner and living with his father, the owner of the farm, but who subsequently became the tenant; (3) a farmer's son assessed as owner, living with his father, the owner, but carrying on a blacksmith business off the property; (4) an infant who became of age before the voting took place; (5) a farmer's son, the father and another being tenants in common of the farm; (6) where the property had been acquired after the roll had been made up, but before the final revision thereof; (7) where the property had been sold after the final revision, but another had been acquired before the date of the election.

Deputy returning officers are not entitled to vote on such a by-law; it is not necessary that they should be selected before the publication of the by- law, and their names mentioned therein, nor is it necessary to name a day for the final passing of the by-law, these being cured by 4 Edw. VII., ch. 22, sec. 8 (O.).

An Indian reserve, within the territorial limits of a township, but over which the municipal council has no jurisdiction, need not be specifically excepted in the by-law, for the municipal council must be assumed to have dealt only with the territory within their jurisdiction.

In construing the word "week," in dealing with the required three weeks' publication of the by-law, it must be taken in its ordinary acceptance, which would include Sundays and holidays, and, therefore, not necessarily seven days, exclusive thereof.

Irregularities in the meeting of the township council, or illegality in the election of the members, cannot be raised in a proceeding of this character.

Ex rel. Armour v. Peddie, ante, p. 339; *Re Vandyke and Village of Grimsby* (1906), 12 O.R. 211, referred to.

It need not appear on the face of the by-law that a scrutiny has taken place.

This was an application to quash by-law No. 201 of the township of Onondaga, a local option by-law.

The motion was heard before RIDDELL, J., in the Weekly Court, at Toronto, on April 25th, 1907.

J.B. Mackenzie, for applicant.

W.S. Brewster, K.C., for respondent.

April 26. RIDDELL., J.:--Many grounds were taken and argued most strenuously and exhaustively by the diligent and painstaking counsel for the applicant. I shall dispose of these in the order in which they were presented before me.

1. The votes for the by-law were	.....	152
Against	.....	91
In all	.....	243

The by-law required, under 6 Edw. VII., ch. 47, sec. 24 (O.), to have in its favour three-fifths of 243, or 146 votes, so it will be seen that there were 6 votes to spare.

It was argued that about 19 votes were bad, and that it required only 10 votes to be proved invalid (as 6 equals three-fifths of 10), that the majority should be wiped out. This is bad arithmetic and therefore bad law--it reminds one of the familiar calculation whereby schoolboys prove 1 equals 2.

The proper course to pursue if and when votes are proven to be improperly cast is to deduct these votes from the total and then take three-fifths of the remainder.

In this case a simple calculation shews that it requires a reduction of 16 votes from the successful side to overcome the majority, thus:

Votes for by-law, 152 minus 16	.....	136
Votes against by-law	.....	91
Total	.....	227

Three-fifths of 227 equals 137 (136.2). Whereas, if only 15 be struck off, we have

votes for the bylaw, 152 minus 15	.....	137
Votes against by-law	.....	91
Total	.....	228

Three-fifths of 228 equals 137 (136.8), and the vote is sufficient.

I do not find it necessary to consider anew the question whether I have the power of examining into the propriety of the various names being on the voters' list, or whether I am not bound, under sec. 89 of the Act of 3 Edw. VII., ch. 19, to hold that no such inquiry may be entered into. That is decided by such cases as *Regina ex rel. McKenzie v. Martin* (1897), 28 O.R. 523.

It is claimed, however, that many should never have been on the list at all, and that many who may properly have been on the list at the final revision lost their qualification before the election. I shall pursue so far as necessary the latter inquiry.

No. 14, it is said, though entered on the list as owner, was in reality only a "farmer's son," living with his father, the real owner. After the final revision, but before the day of the election, his father died and left him the land whereby he became an owner in fact. I think that as an intending voter may select any form of oath of those given in the statute (see sec. 116), and that no others are to be required of him, once his name is on the voters' list, he may vote, if he can truly take any form. No. 14 could truly swear that *at the date of the election* he was in his own right a freeholder, etc., as the form in sec. 112 requires.

No. 15 is entered as an owner, though it is said that he also was in the same position as his brother just mentioned. He received no property by the will, but he could swear that at the date of the final revision, etc., the deceased was actually owner of the land, and that he (No. 15) was his son and had resided on the property for twelve months next before the said day, etc., as required by sec. 115.

It is to be noted that the Act does not require the farmer's son to live with the owner of the farm, but on the farm: sec 86 (1) *Fourthly*; and sub-sec. (b) seems to contemplate a case in which the father may be dead.

No. 54. Here the son is entered as owner with his father of certain land, though it is alleged that he should have been entered, if at all, as a farmer's son. The father sold his land after the final revision, but before the election. No. 54 can still honestly take oath, sec. 115, the form not requiring the farmer to continue to be the owner of the farm after the final revision.

No. 315. This voter is living with his mother on land for which he and others are assessed as owners. The mother has an estate for life in this farm with power to appoint to class of whom No. 315 is one. She is, therefore, an "owner," as she is the "proprietor of an estate for life." No. 315 then is a farmer's son. No. 314 is in the same condition. No. 311 is entered also as an owner, though it is said he should have been entered as a farmer's son. He became a tenant, and it is argued that therefore he lost his status as a farmer's son, as a "farmer's son" can only by the statute be a person "not otherwise qualified to vote." But he cannot lose his status without becoming otherwise entitled to vote, and I find no suggestion in the statute that one who has been a farmer's son at the time of the final revision and who can honestly take his oath in sec. 115 loses his right to vote as a farmer's son by acquiring property as tenant or as owner.

No. 321. Under age at the time of the final revision and for more than 60 days thereafter, but of age at the time of the election. This vote is good. All the forms of oath contain the clause "that you *are* . . . of the full age of 21 years." I may say, in passing, that this was so held in the *South Perth Election Case* (1899), 2 Ont. Elec. Cas. 144, by Street and Meredith, JJ.

No. 59. Actually lives with his father upon the farm of the latter, though he does no work, it is said, on the farm, but carries on business for himself as a blacksmith in the hamlet of Onondaga. The statute does not require the son of a farmer to work on the farm, but only to reside on the farm, in order to qualify as a "farmer's son." If No. 59 were a sluggard and lived on the farm and on his father, he might be allowed to vote; and I do not think the statute penalizes industry.

No. 76. Nos. 74 and 75 are owners in common of a farm. No. 76 is the son of one of these, and it is objected that as Nos. 74 and 75 together are the owners of the land, No. 76 could not qualify unless he were the son of both. This argument I do not accede to. An owner is a person who is proprietor in his own right of an estate for life or any greater interest in any land--it does not exclude all but those having the whole fee simple. No. 74 is such an owner, and may have his sons put on the voters' list without resort to the polyandry of Thibet.

No. Jos. D., put on after the first roll was made up, admittedly has qualification at the time of the final revision and of the election, as he received a conveyance of his land on 30th June. In any case, he "at the date of the election" was a freeholder, and that is sufficient.

No. 139. Assessed as owner, but sold out after the final revision. He, however, acquired other property, and so at the time of the election could take the oath in sec. 112.

Of the above I cannot see the slightest doubt in Nos. 14, 59, 76, 139, 311, 314, 315, 321, or No. J. D.--9 in all; and but little in Nos. 15 and 54. Objection was taken to 20 names and also to the 2 deputy returning officers, in all 22. There can, I think, be no doubt as to 9, leaving 13 as possibly doubtful. So that, even if we were to give all these as voting for the by-law, the necessary three-fifths has been obtained.

2. As to the deputy returning officers, it is said that they voted and that under 3 Edw. VII., ch.19, sec 351, the provisions of sec.179 are excluded in voting in such by-laws as this, and that sec. 179 is the only section which can be found giving deputy returning officers the right to vote. It is answered that sec. 347 of the Act of 1903 contemplates that the deputy returning officers shall have the right to vote. I do not think so. Section 347 is simply sec. 347 of the R.S.O. 1897, ch. 223. This R.S.O. ch. 223 contained a sec. 351 in the same terms as the present sec. 351, but without the words "except sec. 179," these words having been introduced by 3 Edw. VII., ch. 18, sec. 74. The amendment of 1903 takes away from the deputy returning officers the right to vote on such by-laws as this which they enjoyed before that amendment. The sec. 347 was not amended, and still applies to cases of elections where the deputy returning officer may vote. But the number of deputy returning officers is only two, so that the result of the election is still to give three-fifths of the electors voting in favour of the by-law.

3. It is said that this by-law, being for the township of Onondaga, should be considered as intended to be in force throughout the whole township; that a considerable portion of the township is an Indian reserve, and therefore the by-law is *ultra vires*. It is sufficient to say that it is not contended that this by-law is or can be valid in the Indian reserve, and it never was intended to apply to the Indian reserve; and the by-law must be considered as applying to the territory within the jurisdiction of thc council: *McLeod v. Attorney-General*, [1901] A.C. 455. At p. 459: "They were only legislating for those who were actually within their jurisdiction." See also *Re Milloy and Township of Onondaga* (1884), 6 O.R. 573, 579; *Re Metcalfe* (1889), 17 O.R. 357. It was argued that some of the voters might have thought that liquor selling was to be by

this by-law prohibited in the reserve, and so voted for it. I decline to believe that any voter could be so simple and guileless.

4. The deputy returning officers were not selected before the by-law was published, and therefore as their names were not mentioned in the by-law, it is invalid: *Re McCartee and Township of Mulmur* (1900), 32 O.R. 69.

This seems to be cured by 4 Edw. VII., ch. 22, sec. 8 (O.).

5. And it does not name a day, etc.

This is also covered by the amendment just mentioned.

6. The newspaper in which the notice is published is described as the "Brantford Courier," whereas, it is alleged, the real name is "The Courier." This objection, trivial as it is, proves on the production of the paper itself to be unfounded: while the display head is "The Courier," the sub-title is "Brantford Courier."

7. The voting was within less than three weeks after the first publication of the by-law. This is arrived at by applying sec. 203 which provides that for the purposes of secs. 137 to 201 Sunday and holidays shall be excluded, and by casting out Sundays and holidays, and dividing the remaining number of days by 7, the quotient is less than 3. But the statute does not say 3 times 7 days, but 3 weeks, and that period is well known. No doubt the Legislature might say that 3 weeks for the purpose of their legislation should be 21 days excluding Sundays, etc., or 210 days, or 2,100 days, but so far that has not been done, and still a week is from Sunday morning to Sunday morning or Monday morning to Monday morning.

8. Irregularities took place, it is said, in the meeting of the council.

This objection is not open to the applicant: *Re Vandyke and Village of Grimsby* (1906), 12 O.L.R. 211; even if such irregularities existed in fact, which I am far from asserting or thinking.

9. While it is admitted that a scrutiny took place in fact, no notice is taken of any scrutiny upon the face of the by-law, and therefore it must, for the purpose of this motion, be considered that no scrutiny did take place; and this being so, the date of the final passing of the Act was too late. It is admitted that if there had been no scrutiny the passing was too late, but it is contended that there is no necessity for the fact of a scrutiny appearing on the face of the by-law. I agree in that contention.

10. The council are not legally a council at all--they were not legally elected.

This objection is disposed of adversely to this applicant in *Rex ex rel. Armour v. Peddie* (1907), *ante* p. 339.

I have read the Master's judgement, approve of it, and have nothing to add. And in any case, this is not open to the applicant here: *Re Vandyke and Village of Grimsby*, 12 O.L.R. 211.

11. The councillors did not take the proper declaration.

This objection is also covered in the cases just cited.

This motion fails on all grounds taken, and must be-dismissed with costs.