Osgoode Hall Law Journal

Volume 16, Number 3 (November 1978) Article 13

November 1978

Morality and Municipal Licensing: The Untouched Constitutional Issues in City of Prince George v. Payne

George H. Rust-D'Eye

Commentary

Citation Information

Rust-D'Eye, George H.. "Morality and Municipal Licensing: The Untouched Constitutional Issues in City of Prince George v. Payne." *Osgoode Hall Law Journal* 16.3 (1978) : 761-772.
DOI: https://doi.org/10.60082/2817-5069.2086
https://digitalcommons.osgoode.yorku.ca/ohlj/vol16/iss3/13

Morality and Municipal Licensing: The Untouched Constitutional Issues in City of Prince George v. Payne

MORALITY AND MUNICIPAL LICENSING: THE UNTOUCHED CONSTITUTIONAL ISSUES IN *CITY OF PRINCE GEORGE* v. *PAYNE*

By GEORGE H. RUST-D'EYE*

I. INTRODUCTION

Mr. Justice Dickson, speaking for a unanimous Court in *City of Prince George* v. *Payne*, stated that, "[t]he issue in this appeal is whether a municipal council is empowered to refuse a business licence on the basis that it seeks to protect the community's moral welfare."[1] The issue of the ambit of municipal licensing power in this area is a significant one, and the Court has not yet addressed it directly. In *Payne*, the Supreme Court reached its decision overturning the council's refusal of the licence by dealing with the issue in its most restricted sense and left the broader issue, as enunciated by Dickson J., almost totally unresolved.[2] By limiting its discussion in this way, the Court may have invited provincial legislatures to exercise a more creative approach to the granting of municipal licensing powers, and may have encouraged municipal councils to exercise a broader scope of authority under existing powers, thus setting the stage for further litigation.

II. THE CASE

On October 15, 1974 the applicant, who carried on business under the firm name of "Garden of Eden," applied to the Council of the City of Prince George for a business licence to operate an "adult boutique" in that municipality. The items sold in the boutique would include such things as "suggestive scanty undergarments," "passion oils," "life-like penis vibrators" and "prosthetic penis aids." The British Columbia Court of Appeal referred to these goods collectively as "so-called marital aids encompassing a wide range of masturbatory and erotic devices and substances not entirely consistent with heterosexual activity, let alone conducive to or in furtherance of connubial bliss."[3]

When the licence application came before the City Council, it was refused by a resolution passed with a two-third majority vote. This decision came after the Council had received representations and a petition from the

* Mr. Rust-D'Eye is a member of the Bar of Ontario and Assistant Solicitor, Legal Department, Municipality of Metropolitan Toronto.

[1] *City of Prince George* v. *Payne* (1977), 75 D.L.R. (3d) 1 (S.C.C.). The Court consisted of Laskin C.J.C., and Beetz, Dickson, de Grandpré and Ritchie JJ.

[2] The Supreme Court, in *Re Nova Scotia Board of Censors and McNeil* (1978), 84 D.L.R. (3d) 1, has recently held that provincial movie censorship legislation aimed at protecting local moral welfare does not impinge on the federal criminal law power. The decision in *McNeil* was handed down after this case comment was written.

[3] (1975), 57 D.L.R. (3d) 414 at 437, [1975] 6 W.W.R. 517 at 543.

Prince George Ministerial Association opposing the application. From the comments of the members who voted against the application, it was apparent to the courts at each level that the Council had acted on the grounds of what it considered to be public policy, and on the acceptance of the view that the existence of such a business in the municipality would be inconsistent with its moral welfare. The City's counsel acknowledged this fact and adopted the position that the Council was empowered to refuse a licence to any particular business, and that it was not unreasonable for it to act in defence of the moral quality of the City.

The licence applicant applied to the Supreme Court of British Columbia for an order quashing the resolution of the Council and for mandamus to compel the issuance of the licence.

Mr. Justice Fulton, in his judgment dismissing the application, relied on section 455 of *The Municipal Act*, which provides:

> 455. Notwithstanding anything contained in this Act or in the by-laws of the municipality, the Council may, upon the affirmative vote of at least two-thirds of all the members, refuse in any particular case to grant the request of an applicant for a licence under this Division, but the granting or renewal of a licence shall not be unreasonably refused.[4]

The learned judge accepted as a fact that the members "came to their conclusion on the basis of what they considered to be the public interest in, and their own duty as elected councillors with respect to, the maintenance and protection of moral standards in Prince George."[5] He interpreted the Council's decision as relating to the *type* of business to be carried on, not to the particular characteristics or conduct of the individual applicant or to the location of the business. (The area was zoned to permit the business and it was assumed that the business was otherwise lawful.)[6]

To Mr. Justice Fulton the issue was whether the Council acted reasonably. He held that the word "unreasonably" as used in section 455 should

---

[4] *Municipal Act*, S.B.C. 1962, c. 41, s. 455. The equivalent provision of the Ontario *Municipal Act*, R.S.O. 1970, c. 284, ss. 246(5):

> Subject to *The Theatres Act*, the granting or refusing of a licence to any person to carry on a particular trade, calling, business or occupation, or the revoking of a licence under any of the powers conferred upon a council or a board of commissioners of police by this or by any other Act, is in its discretion, and it is not bound to give any reason for refusing or revoking a licence and its action is not open to question or review by any Court.

Interestingly, the Ontario Act s. 241(2) states that:

> a by-law passed by a council in the exercise of any of the powers conferred by and in accordance with this Act, and in good faith, shall not be open to question, or be quashed, set aside or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them.

[5] *Re Payne and City of Prince George* (1975), 55 D.L.R. (3d) 147 at 150, [1975] 3 W.W.R. 537 at 539.

[6] This may no longer be a safe assumption in view of the recent decision of the Ontario Court of Appeal in *R. v. Dechow* (1974), 26 C.R.N.S. 234, in which it was held that the test of obscenity laid down in s. 159(8) of the *Criminal Code*, R.S.C. 1970, c. C-34 applies to articles apparently similar to those sold by the applicant in the *Payne* case.

be interpreted as involving action based on indirect and improper motives or upon irrelevant or alien grounds indicating that in law no discretion was actually exercised. A *bona fide* exercise of discretion in deciding the balance of convenience or detriment to different persons would not be interfered with by the courts.[7] Furthermore, the Council can consider moral welfare and interests of the municipality in exercising their discretion for or against the licence applicant.[8]

Mr. Justice Fulton also held that the decision of the Council, while it had the effect of prohibiting businesses of this kind in the municipality, did not constitute the implementation of a zoning policy, which would be alien and irrelevant to the licensing function, nor a determination that the business in question is illegal in the sense of being criminal or quasi-criminal in nature.[9]

The licence applicant appealed from Fulton J.'s decision to the British Columbia Court of Appeal. The Court (McIntyre and Carrothers JJ.A., Branca J.A. dissenting) allowed the appeal and ordered the issuance of the requested writ. McIntyre J.A. stated:

> It is also well settled that a municipal council in exercising its powers must exercise them within the scope intended for their employment by the statute which gives the power . . . . It appears to me that the Council has not so acted. The licence has been refused because of Council's view that the moral welfare of the community requires protection and this is in my view an alien and irrelevant consideration in deciding whether or not a licence to carry on a business not in itself unlawful should be granted or withheld. Any power in a municipal council to regulate public morals must in my view have a definite legislative source, not shown to exist here, and it would not be exercisable by resolution in a licensing matter.[10]

Mr. Justice Carrothers, in his concurring judgment, concluded that the refusal of the licence in question, being motivated by a desire to protect public morality, was not simply the refusal of a licence to a particular applicant for a particular location, but was intended as a general prohibition against a *type* of business, namely, the sale of so-called marital aids throughout the City of Prince George. The learned Justice concluded that the Council had, in attempting to prohibit an otherwise lawful business from being carried on in the municipality, acted on a ground that was irrelevant and alien, and hence unreasonable, within the meaning of section 455.

The City of Prince George appealed to the Supreme Court of Canada. Mr. Justice Dickson, delivering the opinion of the Court, defined the issue

---

[7] *Supra* note 5, at 153 (D.L.R.), 543 (W.W.R.).

[8] *Id.* at 156 (D.L.R.), 545 (W.W.R.).

[9] *Id.* at 154 (D.L.R.), 544 (W.W.R.).

[10] *Supra* note 3, at 435 (D.L.R.), 541 (W.W.R.). At the conclusion of his judgment, McIntyre J.A. cites with approval the decision of the Supreme Court of British Columbia in *Re Active Trading and City of New Westminster* (1974), 46 D.L.R. (3d) 144, [1974] 5 W.W.R. 354, *aff'd sub nom Re Davis Industries Ltd. and City of New Westminster* (1974), 50 D.L.R. (3d) 592, [1975] 3 W.W.R. 73 (B.C.C.A.), setting aside the decision by a municipal council to refuse a municipal business licence in order to achieve a purpose that would be the proper subject of a zoning by-law, and that of the Ontario High Court in *Tresnak* v. *City of Oshawa,* [1972] 1 O.R. 727, (1971), 24 D.L.R. (3d) 144.

as whether a municipality has the power to refuse a business licence on the grounds of protecting the community's moral welfare. A council's discretion to grant or refuse a licence must be exercised judicially, and a decision must not be based on an extraneous ground. "The common law right of the individual freely to carry on his business and use his property can be taken away only be statute in plain language or by necessary implication."[11]

The Municipal Act of British Columbia confers powers upon municipal councils to pass by-laws for dealing with various matters of municipal concern such as the prevention of nuisances, the prohibition of certain types of places of amusement, and the regulation of land use. Mr. Justice Dickson concluded that these powers, being spelled out in the greatest detail and being exercisable only by by-law, do not otherwise authorize the exercise by the Council of discretion based on moral evaluation in the decision to grant or refuse a licence. He then went on to review authorities referred to in the Courts below, and referred as well to the decision of Mr. Justice McRuer of the Ontario Court of Appeal in *Wilcox* v. *Township of Pickering*,[12] in which it was decided that it is not within the power of a municipal council to refuse to grant a licence with the sole object of restricting the user of land.

In conclusion, Dickson J. decided that the Council of the City of Prince George had sought to prohibit land use through the mechanism of a licensing regulation by refusing a licence based on the moral undesirability of *any business of this type* being carried on in the municipality. In so doing the Council had exceeded its statutory powers. The Court dismissed the appeal.

III. THE EFFECT OF THE DECISION

The judgment of the Supreme Court of Canada upholds a number of cases[13] in which it was decided that a licensing tribunal may not, under a general power to licence and regulate businesses, refuse to issue a licence solely on the basis of considerations which would be relevant to a municipal council in enacting a zoning by-law. Specifically, such a tribunal may not, where the carrying on of the business at the particular location is permitted by zoning and is otherwise lawful, refuse a licence on the ground that it is morally undesirable.

Passing reference is made in the judgment to *Re Tresnak and City of Oshawa* and *Re Smith and Municipality of Vanier*[14], each of which decided that the municipality had improperly refused a licence on the basis of moral considerations alone. Here, the Supreme Court, in deciding no more than was necessary for the disposition of the case, stopped short of entering into a discussion of the constitutional questions. It carefully refrained from decid-

---

[11] *Supra* note 1, at 4.

[12] [1961] O.R. 739.

[13] *Re Henry's Drive-in Ltd. and Hamilton Police Board*, [1969] O.W.N. 468 (H.C.); *Re Steve Polon Ltd. and Metropolitan Licensing Commission*, [1961] O.R. 810 (H.C.); *Re Cities Service Oil Co. and City of Kingston*, [1956] O.W.N. 804 (H.C.); *Re Davis Industries Ltd. and City of New Westminster*, *supra* note 10.

[14] [1973] 1 O.R. 110.

ing whether a provincial legislature could specifically confer upon a municipal council the power to prohibit the carrying on of a business in the municipality solely for the purpose of protecting the moral welfare of its inhabitants, or whether a municipal council could, under its existing licensing and other powers, enact a by-law which would accomplish this purpose.

There is a considerable body of judicial authority dealing with constitutional limitations imposed on provincial governments (and therefore on municipalities, which are their creatures) in dealing with moral issues. However, the result of this jurisprudence is not at all clear, and it does not appear that the potential constitutional aspects of a case such as *Payne* have yet been authoritatively dealt with. In view of this fact, and in view of the broad discretionary licensing and regulatory powers conferred by various provincial legislatures upon councils of municipalities, it would be useful at this point to discuss some of the issues left open by the Supreme Court.

IV. THE FUNCTION OF THE MUNICIPAL LICENSING POWER

Since Confederation, the governments of the Provinces of Canada have delegated to municipal councils and local boards of commissioners of police certain of their powers over local businesses in relation to property and civil rights, matters of a local or private nature within the province, and the raising of revenue for local or municipal purposes. In Ontario, the typical enabling provision confers upon municipal councils the authority to pass by-laws for licensing, regulating and governing a particular business or class of premises,[15] and permits the prohibition of persons from carrying on such a business or operating such premises without a licence.[16]

Generally, such power to regulate and govern is referred to as the police power,[17] or the power to maintain peace and order[18] and to prevent nuisance.[19] The licensing power, and the power to exact a licence fee, are usually exercised in conjunction with the police power, and licences may be issued subject to compliance with regulations contained in the by-law which authorizes the issuance of the licence.

This general scheme of delegation of powers has been supported by the courts, which have held that within the limits of its delegated jurisdiction and subject to the terms of its delegation, the legislative and licensing jurisdiction of municipal councils is absolute, as full and plenary as that possessed by

---

[15] For example, section 377.1 of the Ontario *Municipal Act*, R.S.O. 1970, c. 284, respecting the owners and drivers of cabs and other vehicles used for hire, and section 368(a), respecting body rub parlours.

[16] S. 246(1) of the Ontario *Municipal Act*.

[17] See *Huson* v. *Township of South Norwich* (1893), 24 S.C.R. 145; *R.* v. *McGregor* (1902), 4 O.L.R. 198 (Dist. Ct.).

[18] See *Hodge* v. *The Queen* (1883), 9 A.C. 117; *Bannan* v. *City of Toronto* (1892), 22 O.R. 274 (Ch. D.).

[19] See *City of Toronto* v. *Virgo*, [1896] A.C. 88; *R.* v. *Lamontagne*, [1945] O.R. 606 (C.A.); *R.* v. *Epstein*, [1931] O.R. 726 (H.C.).

the legislature itself.[20] Since the usual delegated power is simply "to regulate and govern," and the power to refuse a licence is left almost totally to the discretion of the local council, this power is very wide indeed.

In the absence of any direct statement of intended purpose in the enabling legislation, what functions are municipalities expected to perform through licensing? The nature of the power appears to be so general as to justify the imposition of almost any restrictions as to character or competence that a municipal council might wish to set up for persons doing business within its boundaries. Indeed, a great number of functions have been authoritatively recognized as being properly within the purview of municipal licensing. Former Chief Justice McRuer, in his Royal Commission Inquiry into Civil Rights in Ontario,[21] recognized the following purposes of imposing licensing requirements aside from the raising of revenue:[22] enforcing minimum standards of competence;[23] protecting the public health; having a record of persons enjoying the privilege of a licence; and public safety. The courts of Ontario, in a number of reported decisions, have also recognized the following functions as being properly within municipal licensing and police powers: the requirement of "good character" of persons seeking licences;[24] the controlling of businesses tending to create a nuisance;[25] securing periods of quiet for persons likely to be disturbed by the business;[26] the regulation of hours of business;[27] preventing unfair competition by hawkers, pedlars and transient traders with merchants who have to pay business and property taxes;[28] restriction of the sale of dangerous substances to persons under 16 not subject to adult supervision;[29] and the requirement of proper supervision and sanitary conditions in premises.[30]

It is difficult to distinguish in principle between the municipal legislative function and the licence-granting function. Each may be exercised indepen-

---

[20] See *Re Morrison and City of Kingston*, [1938] O.R. 21 (C.A.); *Re Foster and Township of Raleigh* (1910), 22 O.L.R. 26 (H.C.), *aff'd* (1910), 22 O.L.R. 342 (C.A.); *Re Howard and City of Toronto* (1927), 61 O.L.R. 563, [1928] 1 D.L.R. 952 (C.A.); *Re Slater and Kelly Ltd.*, [1938] O.W.N. 353 (H.C.).

[21] Ont. 1 *First Report of the Royal Commission Inquiry into Civil Rights (McRuer Report)* (Toronto: Queen's Printer, 1969) at 1099.

[22] Section 246(4) of the Ontario *Municipal Act* provides:

> The licence fee may be in the nature of a tax for the privilege conferred by it.

[23] See *Re King Lee and City of Windsor* (1921), 20 O.W.N. 47 (H.C.).

[24] See *R.* v. *Yule*, [1962] O.R. 584 (C.A.); *Commodore Grill* v. *Town of Dunnville*, [1943] O.R. 142 (H.C.), *aff'd* [1943] O.R. 427 (C.A.); *Elves* v. *McCallum and City of Edmonton* (1916), 28 D.L.R. 631 (Alta. C.A.); *Re Validity of By-Law Respecting Taxi Cabs and Licensing Thereof* (1958), 122 C.C.C. 51 (P.E.I.S.C.); *City of Toronto* v. *Virgo*, *supra* note 19.

[25] See *R.* v. *Lamontagne*; *R.* v. *Epstein*, *supra* note 19.

[26] *Id.*

[27] See *Re Gregory and City of Hamilton*, [1942] 4 D.L.R. 735 (Ont. C.A.); *Re Carry and City of Chatham* (1909), 20 O.L.R. 178, *aff'd* (1910), 21 O.L.R. 566 (C.A.).

[28] See *Re Garnham's Conviction* (1915), 34 O.L.R. 545 (H.C.), *rev'd* (1915-16), 35 O.L.R. 54 (C.A.); *R.* v. *Geddes* (1915), 35 O.L.R. 177 (H.C.).

[29] See *Re T. W. Hand Fireworks Co.*, [1962] O.R. 794 (H.C.).

[30] See *Re King Lee and City of Windsor*, *supra* note 23.

dently, but generally the scope allowed to them and the limitations imposed upon them are the same. For example, the courts have upheld the refusal to grant a licence where the tribunal took into consideration a validly enacted restricted land use by-law.[31] Generally, the conclusion has been that the municipal council's discretion to define the public interest should be supported, if possible, since elected representatives are in the best position to be aware of local conditions, and to deal with these by making policy decisions within the scope of their delegated authority.[32]

Notwithstanding the rather general and ill-defined scope of municipal licensing and regulatory powers, there are a number of limitations imposed by law upon these powers. For example, the courts will strictly construe municipal by-laws that interfere with common law rights of citizens, particularly the right to carry on one's lawful business;[33] encroachment on such rights must be based upon explicit statutory language.[34] A province cannot delegate to a municipal council powers that are not granted to it under the *British North America Act*.[35] Thus, in matters of purely local or private nature or in relation to property and civil rights within a province, the provincial legislature is supreme, and can delegate all or some of its powers to municipal councils.[36] Municipal councils cannot, however, under general licensing and regulatory powers, enact by-laws that conflict with provincial legislation or that encroach upon a field already completely occupied by the province.[37] However, where there is no such conflict, persons may be subject to both sets

---

[31] *Re Tenenbaum and Board of Health of City of Toronto*, [1955] O.R. 44 (H.C.), *aff'd* [1955] O.R. 622 (C.A.); *Dennis* v. *Township of East Flamboro*, [1956] O.W.N. 282 (C.A.). Other examples include *Re Dyke and McEachern and Village of Port Credit*, [1950] O.W.N. 651 (H.C.), where the court took into account various allegations contained in a police report as to the character of the applicant; *Waddington* v. *City of Toronto* (1922), 22 O.W.N. 398 (H.C.), where the applicant failed to meet a twelve-month residency requirement; *Re Szabo and Metropolitan Licensing Commission*, [1963] 2 O.R. 426 (H.C.), where the applicant had tried to evade the requirements of the taxicab licensing by-law by entering into licensing contracts; *Re Powell and Windsor Police Commissioners*, [1968] 2 O.R. 613 (H.C.); and *Sunshine Valley Co-operative Society* v. *Grand Forks*, [1949] 2 D.L.R. 51, [1949] 1 W.W.R. 162 (B.C.C.A.), where a troubled atmosphere existed which might have led to disorder and violence if the activity sought to be licensed were carried on.

[32] See *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; *Re Foster and Township of Raleigh*, *supra* note 20; *Re Howard and City of Toronto*, *supra* note 20.

[33] See *Merritt* v. *City of Toronto* (1895), 22 O.A.R. 205; *Brampton Jersey Enterprises* v. *Milk Control Board of Ont.*, [1956] O.R. 1 (C.A.); *Re Oshawa Cable T.V. Ltd. and Town of Whitby*, [1969] 2 O.R. 18 (H.C.); *Re Ottawa Electric Ry. Co. and Town of Eastview* (1924), 56 O.L.R. 52 (H.C.); *R. ex rel. Collins* v. *Pugliese* (1953), 107 C.C.C. 38 (Mag. Ct.); *City of Toronto* v. *Virgo*, *supra* note 19; *Re Stronach* (1927), 61 O.L.R. 6 (C.A.).

[34] *R.* v. *Johnston* (1876), 38 U.C.Q.B. 549; *R. ex rel. Collins* v. *Pugliese*, *supra* note 33.

[35] *A.G. Ont. and A.G. Canada* v. *Distillers' and Brewers' Assoc. Ont.*, [1896] A.C. 348; *Re Bright and City of Toronto* (1862), 2 U.C.C.P.

[36] See *Hodge* v. *The Queen*, *supra* note 18; *R.* v. *McGregor*, *supra* note 17; *Huson* v. *Township of South Norwich*, *supra* note 17; *Bedard* v. *Dawson*, [1923] S.C.R. 681, [1923] 4 D.L.R. 293, [1923] 3 W.W.R. 412, 40 C.C.C. 404.

[37] See *Re Aston and Metropolitan Toronto Licensing Commission*, [1966] 1 O.R. 51 (H.C.); *Re Morrison and City of Kingston*, [1938] O.R. 21 (C.A.).

of legislation.[38] Furthermore, a municipal by-law may not unlawfully discriminate between persons affected by it, nor provide the potential for such discrimination,[39] nor may it leave the decision in any particular case up to the uncontrolled discretion of council or its licensing tribunal.[40] A municipal council also may not refuse a licence, or enact a by-law permitting such refusal, on grounds that are extraneous to the purpose of the enabling legislation.[41]

Such limitations on municipal licensing power are not always mutually exclusive. For instance, the authority that prevents a municipality from refusing a licence for zoning reasons is an example of the principle that a licence cannot be refused for reasons extraneous to the purpose of the enabling legislation. The "zoning" limitation, as the decision of the Supreme Court of Canada in *Payne* confirms, is also based on the principles that a municipal council may not exercise a legislative power not specifically conferred upon it by provincial legislation, and that the council in its capacity of licence-granting tribunal cannot exercise a power not given to it either by statute or by a duly enacted by-law.

In the *Payne* case, the Court was not called upon to go beyond these basic licensing principles in order to reach its conclusion, and therefore refrained from doing so. As it turned out, the approach by counsel and the Court to the issue raised did not render it necessary for either the Government of British Columbia or the Federal Government to intervene. However, it is submitted that, had the constitutional issue been raised—namely, does the *British North America Act* confer upon the provincial legislatures the power to authorize a municipal council to refuse to issue a business licence solely on the basis of moral considerations—such intervention would have been appropriate. This is due to the fact that a decision adverse to the Province on this point, while it would not invalidate section 455 of *The Municipal Act,* which is a general power, would impose a constitutional limitation on its use and, to that extent, would declare the legislation *ultra vires.*

---

[38] See *Commodore Grill* v. *Town of Dunnville, supra* note 24; *Re McCormick and Township of Toronto,* [1948] O.W.N. 425 (H.C.); *R. ex rel. Dixon* v. *Knapman,* [1953] O.W.N. 541 (C.A.); *R. ex rel. Taylor* v. *Kemp,* [1943] O.W.N. 54 (H.C.); *R. ex rel. St. Jean* v. *Knott,* [1944] O.W.N. 432 (H.C.); *R.* v. *Marvo System of Dry Cleaning Ltd.,* [1953] 2 D.L.R. 560 (H.C.), *rev'd* [1953] 3 D.L.R. 480 (C.A.).

[39] See *R. ex rel. Wheatley and Donald B. Allen Ltd.* (1975), 11 O.R. (2d) (Div. Ct.); *Frost* v. *City of Toronto* (1923), 54 O.L.R. 256 (H.C.); *Bullock* v. *Township of Scarborough,* [1959] O.W.N. 297 (H.C.); *Re Joy Oil Co. and City of Toronto,* [1937] O.R. 243 (H.C.), [1937] 2 D.L.R. 559 (C.A.); *Re Mobile Ad. Ltd. and Borough of Scarborough* (1974), 5 O.R. (2d) 303 (C.A.); *City of Montreal* v. *Morgan* (1920), 60 S.C.R. 393.

[40] See *Re Nash and M'Cracken* (1873), 33 U.C.Q.B. 181; *Re Neon Products Ltd. and Borough of North York* (1974), 5 O.R. (2d) 736 (C.A.); *R.* v. *Webster* (1888), 16 O.R. 187 (Ch. D.); *Township of York* v. *Smith,* [1951] O.W.N. 570 (H.C.).

[41] See *Re Bolan and City of Oshawa* (1974), 4 O.R. (2d) 197 (H.C.); *Ross* v. *Toronto Board of Police Commissioners,* [1953] O.R. 556 (H.C.); *U.P.S. Ltd.* v. *Metropolitan Licensing Comm.* (1976), unreported (Div. Ct.); *Re Rosenberg and Metropolitan Toronto Board of Health,* [1939] O.W.N. 32 (H.C.); *Brampton Jersey Enterprises Ltd.* v. *Ontario Milk Control Board, supra* note 33; *Bullock* v. *Scarborough, supra* note 39; *Re Kendrick and Ontario Milk Control Board,* [1935] O.R. 308 (C.A.).

IV. MORALITY AND THE POWER TO ENACT CRIMINAL LAW

There are statements by courts in a number of cases that could be interpreted to support the proposition that morality may be considered "a matter of exclusive legislative authority of Parliament.[42] It is clear that Parliament alone can define crime and enumerate the acts that are to be prohibited and punished in the interests of public morality,[43] and that criminal law (in its widest sense) is reserved for the exclusive legislative jurisdiction of Parliament.

This, however, does not necessarily lead to the conclusion that "morality" is a class of subject matters dealt with *exclusively* by section 91 or 92 of the *British North America Act*.[44] It would appear that there is authoritative jurisprudence leaving open to the provincial legislature some jurisdiction through the exercise of their powers under paragraphs 13 and 16 of the Act, to confer upon local municipal councils the power to prevent the operation in their municipalities of activities they consider to be immoral.

It would be extremely difficult to attempt a definition of "morality" for the purpose of clarifying the relationship between morality and the criminal law. As Lord Atkin noted in *Proprietary Articles Trade Ass'n* v. *A. G. Can.*:

> The criminal quality of an act cannot be discerned by intuition, nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality —unless the moral code necessarily disapproves all acts prohibited by the state, in which case the argument moves in a circle.[45]

---

[42] Middleton J., in the majority judgment of the Ontario Court of Appeal in *Re Morrison and City of Kingston, supra* note 37, stated:

> Matters of morality are generally dealt with by the Parliament of the Dominion. The *Criminal Code* deals with most moral questions. More specific questions are dealt with by the *Opium and Narcotic Act*, and other familiar legislation. These topics are entirely removed from the sphere of legislation of municipal councils.

In *A.G. Ont.* v. *Koynok*, [1941] 1 D.L.R. 548 (H.C.), Kelly J. stated at 554:

> The protection of public morals is not a matter of local or private nature.

Similarly, Pennell J., in a recent decision, *Re Smith and Municipality of Vanier*, [1973] 1 O.R. 110, noted that

> . . . it is said that the Council was induced to refuse the application for a licence on grounds of morality, that is to say, it was anxious to protect the citizens from having immoral films shown within the corporate boundaries of the municipality. If this be true, then the Council exceeded its jurisdiction. Matters of morality are generally dealt with by the Parliament of Canada.

This last statement may be considered *obiter*, since Pennell J., in granting the mandamus for a licence on the ground of lack of good faith by the council, deliberately refrained from directing an issue as to whether the application had been refused by reason only of the council's concept of morality and their anxiety to protect the citizens from an exhibition of immoral films. In *Payne*, the Supreme Court referred to this decision in passing, but as mentioned, did not deal with the constitutional issue in its decision. Galligan J., in a similar decision in *Tresnak* v. *City of Oshawa, supra* note 10, did not deal specifically with provincial powers in the field of morality.

[43] See *Russell* v. *The Queen* (1882), 7 A.C. 829 at 839; *Johnson* v. *A.G. Alta.*, [1954] S.C.R. 127; *Hodge* v. *The Queen, supra* note 18; *Bedard* v. *Dawson, supra* note 36.

[44] 30 & 31 Vict., c. 3 (U.K.).

[45] *Proprietary Articles Trade Ass'n* v. *A.G. Can.*, [1931] A.C. 310 at 324.

The courts have thus frequently found themselves dealing with legislation which may be based on morality, but which may or may not be criminal law. The aspect doctrine of constitutional law has provided the courts with a tool for dealing with concurrent provincial and federal legislation. As the Privy Council stated in *Hodge* v. *The Queen*:

> . . . [S]ubjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91 . . . .
>
> If, as their Lordships have decided, the subjects of legislation come within the powers of the provincial legislature, then No. 15 of section 92 of the *British North America Act*, which provides for "the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section", is applicable to the case before us and is not in conflict with No. 27 of section 91 [the criminal power law] . . . .
>
> The provincial legislature . . . had also power to delegate similar authority to the municipal body which it created, called the Licence Commissioners.[46]

Following this, the Ontario Court of Appeal has invalidated provincial legislation that prohibited with sanctions such conduct as gambling at a racetrack[47] or the procuring of hotel lodging by an unmarried couple.[48] On the other hand, courts have upheld as constitutionally valid provincial legislation adding a civil consequence to a conviction under the *Criminal Code*.[49] For example, in *Bedard* v. *Dawson*, the Supreme Court of Canada upheld provincial legislation providing for the closing of a house for all purposes after a conviction of any person in respect of such house under the disorderly house provisions of the *Criminal Code*.[50] The provincial legislation was supported on the basis that it deals with property and civil rights, by providing for the suppression of a nuisance and of conditions giving rise to crime, and not with criminal law by aiming at the punishment of crime.

It would appear that provincial legislation that creates an offence and imposes a penalty for conduct that is already a crime, or is *contra bonos mores*, is *ultra vires*, but that in some circumstances, the courts will uphold provincial legislation that has the effect of preventing conduct for the protection of public morals.

There appears to be no decided case where a court has upheld a licence refusal made solely on the grounds of moral considerations. However, there are authoritative decisions, including the recent *McNeil* case,[51] which could support the conclusion that a provincial legislature could confer such a power upon a local licensing tribunal, or permit a municipal council to do so. For example, it would appear that a municipal tribunal may refuse to grant a licence to a person who has been convicted of criminal or other offences,

---

[46] *Supra* note 18, at 130-31.

[47] *Re Race-Tracks and Betting* (1921), 49 O.L.R. 339 (C.A.).

[48] *R.* v. *Hayduk*, [1938] O.R. 653 (C.A.).

[49] See *McDonald* v. *Down*, [1939] 2 D.L.R. 177 (Ont. H.C.); *P.E.I.* v. *Egan*, [1941] S.C.R. 396; *Ross* v. *Registrar of Motor Vehicles*, [1975] S.C.R. 5, 42 D.L.R. (3d) 68.

[50] *Supra* note 36.

[51] *Re Nova Scotia Board of Censors and McNeil*, *supra* note 2.

on the ground that the applicant's character does not warrant the granting to him of the privilege permitted by a licence.[52] However, a New Brunswick court decided that in the absence of such a conviction, a licence cannot be refused on the basis of conduct covered by the *Criminal Code*.[53] It has also been held that a licence may be refused in circumstances where there is good reason to suspect that disorder or violent acts (which might or might not constitute a criminal offence) will occur.[54]

Judicial support has also been given to by-laws requiring licensed premises to be closed on Sundays, where such provisions were passed as part of a scheme for the regulation of businesses, and did not treat the acts prohibited as constituting a profanation of the Lord's Day.[55] The Ontario Court of Appeal has supported a by-law prohibiting the keeping of various slot machines and other amusement devices on licensed premises, on the ground that the by-law did not stigmatize the forbidden games as improper, criminal or immoral, but is a simple regulation within the competence of the local council.[56] Finally, some recent decisions have supported municipal by-laws which require, as part of a scheme to licence and regulate body rub parlours, that all persons providing a body rub be clothed in nontransparent outer garments covering the body between the neck and the knees.[57]

It would appear that such cases are all examples of judicial support for municipal initiative under general licensing and regulatory powers conferred upon them in areas which may also be the subject of federal criminal law power.

V. CONCLUSION

The Supreme Court of Canada, by its decision in the case of *City of Prince George* v. *Payne*, has left open the question of whether provincial legislatures have the power to confer upon municipalities the power to refuse

---

[52] *Re Validity of By-law Respecting Taxi-Cabs and Licensing Thereof*; *R.* v. *Yule*; *Commodore Grill* v. *Town of Dunnville*; *Elves* v. *McCallum and City of Edmonton*, *supra* note 24.

[53] *Town of St. Leonard* v. *Fournier* (1956), 3 D.L.R. (2d) 315 (N.B.C.A.).

[54] *Re Powell and Windsor Police Commissioners*; *Sunshine Valley Co-operative Society* v. *Grand Forks*, *supra* note 31.

[55] *Re Gregory and City of Hamilton*, *supra* note 27; *R.* v. *Top Banana Ltd.* (1974), 4 O.R. (2d) 513 (H.C.); *R.* v. *Epstein*, *supra* note 19.

[56] *Re Deronin and Town of Cornwall*, [1940] O.W.N. 384.

[57] See *R.* v. *Foster*, (May 28, 1976, unreported), *per* Griffith J. (Ont. H.C.); *Re Vancouver Charter and City of Vancouver* (June 15, 1976, unreported), *per* Munroe J. (B.C.S.C.), *aff'd* (Jan. 6, 1978, not yet reported) (B.C.C.A.); and *Re Cal Investments and City of Winnipeg*, (Feb. 6, 1978, not yet reported), *per* Freedman J.A. (Man. C.A.) at 9:

> In our view the City . . . was doing no more than attempting to regulate the trade or business of massage parlours—something which the governing Act clearly empowered it to do.

The Supreme Court of Canada has refused leave to appeal in the last two cases.
See also *Re City of Vancouver Licence By-law 4957* (1978), 5 B.C.L.R. 193 (B.C.C.A.), which supported a municipal body rub parlour licensing by-law that included a provision requiring attendants to "cover up."

a licence solely on the basis of "moral considerations." However, in *Nova Scotia Board of Censors* v. *McNeil*,[58] the Supreme Court upheld a movie and theatre censorship and licensing scheme. Although the dissenting judgment of Laskin C.J.C. (concurred in by Dickson J., who wrote the *Payne* judgment) emphasized the morality aspects of the scheme, the majority's emphasis (*per* Ritchie J.) was on the broader provincial right to regulate business. The Court further stated that ". . . the determination of what is and what is not acceptable for public exhibition on moral grounds may be viewed as a matter of a 'local and private nature in the Province' within the meaning of s. 91(16) of the *B.N.A. Act*. . . ."[59] Importance is thus placed on the fact that the moral considerations are brought in under a larger valid provincial scheme of regulation. The "pith and substance" of the regulations are in relation to the regulation of business, for example, while the moral considerations merely *touch upon* the larger provincial purpose.

It would appear then that there is substantial judicial support for the exercise by municipal councils of such licensing and regulatory powers in areas which may also for some purposes come within the jurisdiction of the federal Parliament. This "provincial aspect" of morality appears to be supportable, but it will require further provincial and municipal initiative before a case similar to *City of Prince George* v. *Payne* will enable the Supreme Court to settle this issue.

---

[58] *Supra* note 2.

[59] *Id.* at 28.