Ontario Society for the Prevention of Cruelty to Animals v. Ontario Veterinary Association et al.

57 O.R. (2d) 667
[1986] O.J. No. 1314
Also reported at 34 D.L.R. (4th) 246

ONTARIO
HIGH COURT OF JUSTICE
SOUTHEY J.
18TH DECEMBER 1986

Statutes -- Subordinate legislation -- Validity -- Veterinarians' association passing by-law prohibiting members from acting as employees of humane societies except for specified purposes -- Dominant purpose to restrict competition from humane society clinics -- By-law invalid -- Veterinarians Act, R.S.O. 1980, c. 522.

Limitations -- Public authorities -- Statute permitting action against persons for act done in pursuance of statutory duty only if commenced within six months of date when cause of action arose -- Not applicable to action to have by-law of professional association declared invalid when by-law passed for unlawful purpose -- Public Authorities Protection Act, R.S.O. 1980, c. 406, s. 11.

An amendment to a by-law of the Ontario Veterinary Association, passed in 1983, under the Veterinarians Act, R.S.O. 1980, c. 522, permitted a member to practise veterinary medicine as an employee of an incorporated and lawfully operating humane society only if services were limited to spay and neuter procedures. The plaintiff operated four veterinary clinics, and evidence demonstrated that veterinarians employed by it would not continue their employment if their work was restricted to spay and neuter procedures. As a result, clinics

would have to close, and no new ones could be opened. In an action for a declaration that the by-law was invalid, held, there should be judgment for the plaintiff and the by-law should be declared invalid.

Although one of the purposes of the by-law was to deal with conflicts of interest, the dominant purpose was the limiting of competition from animal clinics operated by the plaintiff and other humane societies. Therefore, the by-law was invalid, as by-laws enacted for the purpose of limiting competition are not authorized under the Veterinarians Act.

Section 11 of the Public Authorities Protection Act, R.S.O. 1980, c. 406, limiting an action against a person for an act done in pursuance of any statutory duty unless commenced within six months after the cause of action arose, is not applicable in this case, since the dominant motive in enacting the by-law was to deal with elimination of competition. The acts complained of were not done in the intended execution of a statute, but only in pretended execution.

Cases referred to

Warne v. Province of Nova Scotia et al. (1969), 1 N.S.R. (2d) 150; G. Scammell & Nephew, Ltd. v. Hurley et al., [1929] 1 K.B. 419

Statutes referred to

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1980, c. 356

Public Authorities Protection Act, R.S.O. 1980, c. 406, s. 11

Veterinarians Act, R.S.O. 1980, c. 522

Rules and regulations referred to

Rules of Civil Procedure, Rule 23, rule 23.04(1)

ACTION for a declaration.

Ian F.H. Rogers, Q.C., and R. Kenneth S. Pearce, for plaintiff.
Donald Posluns and J. Michael Mulroy, for defendant, Ontario Veterinary Association.
Kenneth E. Wise, for individual defendants.

SOUTHEY J.:-- At issue in this case is the validity of a by-law of the defendant, the Ontario Veterinary Association (the "OVA'') providing that a member of the OVA employed by a humane society to practise veterinary medicine has a conflict of interest and is guilty of unprofessional conduct unless the member provides only spay and neuter procedures. There was evidence that veterinarians would be unwilling to be employed by the plaintiff, a humane society operating under the name "Ontario Humane Society", if their work was limited to spay and neuter procedures. The effect of the by-law, therefore, would be to prevent the plaintiff from employing veterinarians and from continuing to operate animal care clinics. The plaintiff's submission was that the object or purpose of the impugned by-law was to eliminate the OVA's clinics as competition for veterinarians in private practice, and that the by-law, therefore, was not authorized by the enabling statute, the Veterinarians Act, R.S.O. 1980, c. 522, and is invalid.

It was common ground that by-laws enacted for the purpose of limiting competition are not authorized by the Veterinarians Act. The defence of the OVA was that the general rule against permitting a veterinarian to practise as an employee of a person who is not himself a qualified veterinarian is intended to prevent the conflict of interest which may arise when a veterinarian committed to serve an animal or its owner is in the service of a third person. The defence contended that the exception to the general rule permitted in the case of humane societies is justified in respect of spaying and neutering only because of the socially desirable result believed to flow therefrom of reducing the number of unwanted pet animals, and

that the purpose of the impugned by-law was to preserve the rule against conflicts of interest except to the extent necessary for the exception.

Background

The plaintiff is a corporation continued under the Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1980, c. 356. Its sole object under that Act is to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom. The plaintiff has 15 affiliated societies throughout the province, which are separately incorporated legal entities, and 37 branches, which are not separate legal entities. The primary obligation of the plaintiff is to enforce the law. In conjunction with its affiliates and branches, it appoints inspectors to investigate offences, performs animal protection and control services under arrangements with provincial and local governments, and operates 26 small animal shelters to house unwanted, stray or abandoned animals. The lands and buildings of the plaintiff are exempt from taxation except for local improvement and school purposes. The precise status of the plaintiff as a non-profit or charitable organization was not described in the evidence, but the plaintiff appears to be regarded as a volunteer, charitable organization, which depends on donations and government grants.

In or about 1973, the plaintiff opened an animal clinic in Scarborough. This was followed by clinics in Mississauga (1975), North York (1978), and Newmarket (1982). The declared purpose of these clinics was to provide low-cost spay and neuter procedures and to provide veterinary services to animal owners regardless of their economic circumstances. No animal was to be turned away, however. Where owners claimed to be unable to pay the normal charges for treatment, an attempt was made to determine their circumstances, without requiring a formal means test, and to make appropriate arrangements to defer payment over a period of time, or until the circumstances of the owner changed. Owners who were capable of doing so, however, were charged normal fees for veterinary services. The charging of fees to such owners produced substantial revenues

on which the plaintiff came to rely. Some members of the OVA in private practice regarded this part of the plaintiff's operations as "unfair" competition, because the plaintiff was receiving public support and tax advantages not available to them. It is abundantly clear that the provision of veterinary services for normal fees to persons having the means to pay was the principal cause of antagonism that developed between the plaintiff and the OVA.

The following events throw some light on the issue to be determined:

(1) By letter dated October 15, 1981, the OVA requested the Attorney-General for Ontario to investigate the plaintiff, its charitable status, and its use of public funds, received either directly from the public through donations or from government contracts and grants. The letter contained the following:

> The Ontario Humane Society operates three or four veterinary clinics in direct competition with privately owned veterinary facilities in the Toronto area.
>
> We question whether licensed charities should be allowed to operate profit-making businesses in direct competition with unsubsidized businesses. If these operations are designed to aid the needy or owners who cannot afford veterinary care, it would make sense, but this appears not to be the case. Taking it to its extreme, it is very easy to conceive such a system taking over entirely the dog control and the small animal veterinary industry in this province as a direct result of its tax free status.

(2) In November, 1982, Price Waterhouse Associates, management consultants retained by the Ministry of the Solicitor-General, completed a report on the organization, management and financial management aspects of the Ontario Humane Society. The report was critical of the attitude of Mr. Tom I. Hughes, executive director of the plaintiff, towards other organizations, including the OVA, with which the plaintiff was obliged to maintain working relationships. It found the quality of these relationships to be generally low,

and, in some cases, openly hostile, because of the tendency to treat other individuals and organizations with different views regarding animal welfare issues in an adversarial fashion, and to cause the plaintiff to become embroiled in conflicts on an ongoing basis. Most importantly, the Price Waterhouse report recommended that the right of the Ontario Humane Society to practise veterinarian medicine be restricted to spaying and neutering, emergency care, and any service to an animal whose owner can give evidence of economic hardship.

(3) Early in 1983, the OVA produced a report entitled "A Study and Review of the Economic and Social Benefits of Pets in Ontario". The report expressed concern about conflicts of interest that might arise for veterinarians employed by public agencies, but also complained about unfair competition for private practices from spay and neuter clinics managed by municipalities and humane societies. The report said that: "Such unfair competition is an inappropriate response to the problem of animal control."

The report complained that such clinics were not made available only to low-income owners, and were not restricting their attention to spaying and neutering.

(4) A report by Dr. Clayton A. MacKay, commissioned by the OVA, on government-subsidized veterinary practice was produced, dated February 14, 1983. Referring to the four clinics operated by the plaintiff, the author concluded: "In my opinion, this ever expanding intrusion into private practice by unfair competition of the O.H.S. under the direction of Mr. T.I. Hughes is the most serious of all problems in this report."

(5) In a position paper submitted by the plaintiff to a liaison committee appointed by the Solicitor-General under the chairmanship of Mr. Lorne Maeck in accordance with a recommendation in the Price Waterhouse report, Mr. Hughes stated the following:

> It is the policy of the Ontario Humane Society to provide low-cost veterinary services to persons who are suffering economic hardship and are unable to afford the regular

veterinary fees. In addition, it is the policy of the Society to provide spaying and neutering of animals, at cost, to any member of the public. To achieve these goals, the Society has created four veterinary clinics and it is the intention and the policy of the Society to expand those clinics until, eventually, every animal shelter operated by the Society has a veterinary component.

. . . . .

We have, traditionally, tried to screen the people who ask for assisted veterinary services. This is accomplished by a personal interview between the animal owner and the Supervisor (not the veterinarian) who is trained to ask the appropriate questions and assess the answers. We do not reject or turn away animal owners who ask for our services and are able to pay the full fee. In most cases they are required to do so. If they are not able to pay the fee, then they are provided with the services at either reduced cost or, in some cases, at no cost at all or, in other cases, on a deferred payment system or on a "trust" basis that perhaps they will pay the whole or part of the fee in the "future". In other words, whatever arrangement is appropriate and best suits the needs of the animal owner. However, in all cases, the animal is cared for. We provide spaying or neutering "at cost" to any member of the public.

. . . . .

However, in an attempt to reach an agreement with the Ontario Veterinary Association which that body will accept and endorse and co-operate with the Society in providing veterinary services to the public, we are prepared to discuss a formula by which the Ontario Humane Society would restrict its veterinary activities to the area of veterinary services recommended by the Price Waterhouse Report. To do this, the Society would require an annual grant from the Government of approximately $37,500 for each veterinary unit we operate in the Province of Ontario. This amount represents 50% of the approximate cost of providing a veterinary "unit". This grant should be made available annually in addition to all other

operating funds or grants which the Government may make to the Society from time to time for other phases of the Society's work or for the other two phases of veterinary services referred to earlier in this memorandum.

It was acknowledged by counsel for the OVA that the amendment of the by-laws of the OVA in 1983 to introduce the provision restricting veterinarians employed by humane societies to spay and neutering procedures was precipitated by Mr. Hughes' submission to the Maeck Committee.

Before the 1983 amendment, the relevant provisions of the by-laws of the OVA were the following:

53. For the purposes of the Act, "unprofessional conduct" means:

1. Having a conflict of interest as defined by s. 54.

. . . . .

(54).-(2) A member has a conflict of interest where the member practises veterinary medicine in any kind of association with any person, including a corporation, other than in accordance with subsection 3.

(3) A member may practise veterinary medicine,

(a) as an employee or partner of another member who is engaged in the practice of veterinary medicine,

(b) as an employee of a municipal or other government or an agency thereof,

(c) as an employee of a university,

(d) as an employee of an individual, firm or corporation if, in the course of such employment, the member provides professional services only to his employer,

(e) as an employee of an individual, firm or corporation

selling animal food products or carrying on a similar business if, in the course of such employment, the member performs professional services related only to his employer's products and only,

(i) for an established customer of his employer and at the customer's farm or similar lay establishment, and

(ii) after notifying, or having taken all reasonable steps to notify, the normally attending veterinarian of both the member's intention to visit and the reasons for the visit sufficiently before the member's arrival at the farm or similar establishment that the normally attending veterinarian can reasonably discuss the intended visit with his client, and, if desirable, make reasonable arrangements to meet the member before, or at the start of, his visit in the interests of properly co-ordinated veterinary services,

(f) as an employee of an incorporated or unincorporated humane society if, in the course of such employment, the member performs professional services pursuant to a written contract that,

(i) provides clearly that the member is responsible and authorized to make all decisions relating to the quality and promotion of his services and the health of the subject animals, and

(ii) is available and produced to the Association on request therefor.

The 1983 amendment was contained in By-law 121, which was approved by the members of the OVA at its annual general meeting on November 12, 1983. As a result of By-law 121, s. 54 of the by-laws, as amended, reads as follows:

54.-(3) A member may practise veterinary medicine,

. . . . .

(f) as an employee of an incorporated and lawfully-operating

humane society if, in the course of such employment, the member,

(i) only provides spay and neuter procedures, including the pre-, intra- and post-operative management usually associated with, and incidental to, such procedures, and

(ii) performs such procedures under a written contract with the employing society which provides clearly that the member is responsible and authorized to make all decisions relating to the quality and promotion of the member's professional services and the health of the subject animals.

I accept the evidence of Mr. Hughes that the veterinarians employed by the plaintiff would not continue in its employ if their work was restricted to spay and neutering procedures. His evidence to that effect was confirmed by the testimony of Dr. Moloo, Dr. Filiplic, and Dr. Clarke, all of whom are veterinarians employed by the plaintiff during the relevant period. Enforcement of By-law 121 would have had the effect, therefore, of preventing the plaintiff from operating its four animal clinics and from opening similar clinics in other cities. The obvious effect of the amendment, therefore, was to restrict competition, even if that was not its object or purpose.

The officers of the OVA have consistently maintained that the purpose of the amendment was not to restrict competition, but to eliminate the conflict of interest that arises when a person providing professional services to a client is subject to the direction or control of someone other than that client. The concern of the OVA was said to be that a veterinarian employed by the plaintiff at one of its clinics owed a duty to, or was subject to the control and direction of, his employer, whereas his sole duty as a veterinarian should be to the animal being treated, or its owner.

The OVA took the position that the plaintiff could still keep its clinics in operation, and have them available to provide low-cost or free veterinary services to the needy, by leasing the clinic facilities to the veterinarians. The veterinarians

would then operate the clinics as their own independent practices, but under arrangements whereby the humane societies would subsidize owners who were unable to pay the full fees. The OVA undertook that there would be no enforcement of By-law 121 for a year after its adoption at the 1983 annual general meeting of the OVA, in order to give the humane societies time to work out appropriate arrangements with veterinarians for the operation of their clinics.

In the year that followed November 12, 1983, there were continuing discussions between representatives of the OVA and Mr. Hughes, regarding an appropriate form of lease and agreement to cover the operation of the clinics. When no agreement on a satisfactory contract had been reached within the year, the OVA agreed at a meeting on November 21, 1984, to extend the period of non-enforcement for another 60 days, or until the end of January, 1985. There were some promising signs that the controversy might be settled by agreement. The Essex County Humane Society, an affiliate of the plaintiff, reached a tentative agreement, acceptable to the OVA, for the operation of its animal hospital by a veterinarian, Dr. Christina Watson, who was an employee. (The evidence is that the agreement was made reluctantly, however, and because the Essex County Humane Society thought it had no choice but to do so.) The Toronto Humane Society undertook by letter dated December 10, 1984, to make contractual arrangements which complied with By-law 121 by April 30, 1985. In a letter dated November 23, 1984, Mr. Hughes confirmed the verbal assurance given on November 21, 1984:

> ... that the Ontario Humane Society, together with the Essex County Humane Society and the Toronto Humane Society, are prepared to make a concerted effort to develop a satisfactory form of contract, within sixty days, which would cover the professional services provided to the societies by members of the Association and which would meet the requirements of By-law 121 as amended by the OVA in November, 1983 to the mutual satisfaction of the Ontario Veterinary Association, the Ontario Humane Society, and our affiliated societies, the Essex County Humane Society and the Toronto Humane Society.

On January 3, 1985, Mr. Hughes sent to the OVA a draft of a

proposed agreement between the plaintiff and its veterinarians for the leasing and operation of its clinics. When the OVA replied on January 14, 1985, that it was impressed with how close the first draft came to meeting the requirements of By-law 121, but that there were a "few" clauses that would not be satisfactory (actually eight), Mr. Hughes replied that his board of directors had instructed him to advise that the plaintiff was not prepared to accept any further amendments to the proposed form of contract, and that the plaintiff would commence legal proceedings unless assured by the OVA that By-law 121 would not be implemented. The OVA replied by expressing disappointment at Mr. Hughes' "sudden about face", but did not give the assurance demanded. This action followed. An interlocutory injunction was granted by R.E. Holland J. on July 4, 1985, restraining the defendants until trial from taking any steps or proceedings to enforce By-law 54 as amended by By-law 121.

The issue and the relevant law

The action was brought against the OVA and the individuals who were members of the council of the OVA when By-law 121 was passed on October 5, 1983. There were 10 individual defendants by the time the trial commenced. Counsel for the plaintiff explained in his opening at trial that the plaintiff was asserting three causes of action against the defendants arising out of the enactment of By-law 121:

(1) knowingly inducing breaches of the contracts of employment between the plaintiff and the veterinarians employed by the plaintiff;

(2) conspiracy to injure;

(3) deliberate abuse of public office.

On the ninth day of the trial, leave was granted to the plaintiff under Rule 23 to discontinue the action against all individual defendants, but with the provision under rule 23.04(1) that such discontinuance would be a defence to any subsequent action against such individual defendants arising

out of the facts giving rise to this action. The order permitting discontinuance provided that the parties against whom the action was discontinued were entitled to their costs, but provided that submissions would be heard in due course as to whether a Bullock order should be made respecting those costs if the action succeeded against the OVA.

The trial then proceeded with the sole issue being whether By-law 121 was invalid, either as a deliberate abuse of public office, or because it was unauthorized for any other reason. Mr. Posluns fairly conceded that the by-law could not be justified on the ground that it was a legitimate attempt to limit competition. It was that concession which led me to say at the beginning of these reasons that it was common ground that the by-law was not authorized by the Veterinarians Act, if it was enacted for the purpose or with the object of limiting competition.

A by-law may have authorized as well as unauthorized purposes, however. I am satisfied in this case that one of the purposes of By-law 121 was to deal with conflicts of interest. On the other hand, I am also satisfied that the limiting of competition was not only the necessary effect, but also one of the purposes, of enacting By-law 121. This is a case in which plural purposes are present.

Mr. Rogers referred me to de Smith's Judicial Review of Administrative Action, 4th ed. (1980), at p. 329, where five separate tests for such cases are derived from the existing case-law. The appropriate test to be applied in this case, in my judgment, is the second one mentioned in de Smith, namely, what was the dominant purpose for which the by-law was passed. This was the test selected by Cowan C.J.T.D. in Warne v. Province of Nova Scotia et al. (1969), 1 N.S.R. (2d) 150.

What was the dominant purpose of the OVA in passing By-law 121?

I am quite satisfied on the evidence that the effect of By-law 121, if enforced, would be to prevent the plaintiff from operating its existing animal care clinics and from opening new ones, because it would be unable to hire veterinarians who

would be content to do only spay and neutering procedures in respect of animals brought to those clinics. I am also quite sure that the council and the members of the OVA who passed By-law 121 knew that this would be the result of enforcing the by-law. The question is whether the purpose of achieving this result was to deal with conflict of interest situations, or was to eliminate the plaintiff as a competitor. If both purposes existed, was the latter the dominant purpose?

The most telling evidence against the contention that concern about conflicts of interest was genuinely an important reason for the enactment of By-law 121, is that the OVA had amended its by-laws in 1979 to deal specifically with the conflict of interest concern, by providing that every veterinarian employed by a humane society must have a written contract, available for inspection by the OVA, which provided that the veterinarian was responsible and authorized to make all decisions relating to the quality and promotion of his services and the health of the animals. No reason was established in the evidence as to why that provision could not have been enforced and made to deal effectively with the conflict of interest problem, if one really did exist. The evidence is that the veterinarians employed by the plaintiff did not have such contracts. If the OVA was unaware of this fact until 1983, as was suggested, it is a reasonable inference that the OVA did not much care about ensuring compliance with its by-law. When the OVA discovered in 1983 for the first time, as was claimed, that the provision regarding contracts of employment was being ignored, I think it would have been more appropriate to discipline the veterinarians involved or to require compliance, if the real concern was conflicts of interest, rather than putting the humane societies out of business.

Mr. Posluns advanced five reasons why the OVA might genuinely have believed in 1983 that its 1979 by-law dealing with the conflict of interest problem affecting humane society employees was not working. I understood his argument to be that these five reasons supported the inference that the 1983 amendment was directed to remedying the conflict of interest situation, and not primarily to the limitation of competition. I found none of them convincing. I shall deal with them one by one.

First: It was not clear to the OVA until 1983, that the plaintiff's clinics would not be restricted to needy clients and that they would accept full-fee paying clients.

I do not understand why this realization would have heightened concern about the conflict of interest problem. It is surely just as important that there be no conflict of interest in the case of the treatment of animals of needy persons as it is in the case of animals of owners able to pay full fees.

Second: It was only in Mr. Hughes' submission to the Maeck Committee, dated June 20, 1983, that the plaintiff made clear its intention to expand its clinics throughout the province.

If conflict of interest was a factor of real significance, I think some attempt would have been made to enforce the 1979 by-laws, which were specifically directed to that problem. The fact that the correcting by-law was enacted only after the OVA became aware of plans for a province-wide expansion of the clinics is, in my judgment, more indicative of a concern about competition than a concern about conflict of interest.

Third: It was not necessary for the plaintiff to employ veterinarians in order to cause veterinary services to be supplied with such assistance for needy owners as could be afforded and was deemed appropriate. For example, there was the lease arrangement made between the Essex County Humane Society and Dr. Christina Watson. Thus, there would be no restriction on competition, it was agreed, because these other arrangements could have been used.

It appears to me that the OVA by enacting a by-law that would prevent the plaintiff from employing veterinarians had gone just about as far as it could go in eliminating competition from that direction. The next step would have been to prevent the humane societies from leasing animal hospital facilities and equipment to the veterinarians. The fact that the OVA left it open to the plaintiff and other humane societies to do what any other person could do, namely, to lease an animal hospital

facility to a veterinarian, is not very cogent evidence that the OVA was not concerned with competition from the plaintiff when it enacted the by-law requiring the plaintiff to get out of the animal clinic business.

Fourth: Evidence was given of instances where animal care had suffered at humane society clinics, particularly that of the Toronto Humane Society, because of intervention by lay persons in the management.

If these instances, or any other similar instances, were really of significance in leading to the enactment of By-law 121, I would have expected to find some reference to them in the proceedings and reports of the OVA at the time. They were not mentioned. I find more significant the evidence that the OVA was told in 1983 by the veterinarians employed by the plaintiff that they were not subject to interference by lay people in their work as veterinarians.

Fifth: The requirement under the 1979 by-laws for written contracts guaranteeing professional independence of veterinarians employed by humane societies was not complied with.

That this was the case, and that the OVA either did not know about it, or, knowing, took no steps to insist on compliance, raises a powerful inference that the OVA was not really concerned with the conflict of interest problem. I have dealt with this point earlier, because I regard it as being very damaging to the position now taken by the OVA as to its purpose in enacting By-law 121.

Dr. Harvey Grenn, registrar of the OVA since 1982, stated flatly that competition from humane society clinics had nothing to do with the enactment of By-law 121. Mrs. Peggy Knapp, public interest representative on the council of the OVA at the time, was equally categorical in her denial that competition was a factor. Dr. Avery Gillick, president of the OVA from November, 1982 to November, 1983, also denied that the real object of By-law 121 was to reduce competition. He said the concern of the OVA was with the employer-employee relationship

between the plaintiff and its veterinarians and how that impacted upon the veterinarian-client relation. He never saw the by-law as limiting competition.

I do not doubt that Dr. Grenn, Mrs. Knapp, and Dr. Gillick are scrupulously honest persons in the general conduct of their personal and professional affairs, but I am unable to accept their evidence that the concern about competition from the plaintiff's clinics was not a factor in the enactment of By-law 121 by the council and members of the OVA. I am sure that much lip service was paid to the concern about conflicts of interest, but I am satisfied on the balance of probabilities, from the evidence given at trial, that the dominant purpose of enacting By-law 121 was, to the knowledge of the persons voting for it, to eliminate competition from animal clinics operated by the plaintiff and other humane societies.

I am also satisfied that By-law 121 is invalid on three of the other four tests propounded by de Smith. The three other tests that would also be fatal to By-law 121, in my judgment, are:

> (1) What was the true purpose for which the power was exercised?
>
> . . . . .
>
> (3) Would the power still have been exercised if the actor had not desired concurrently to achieve an illicit purpose?
>
> . . . . .
>
> (5) Was any of the purposes pursued an unauthorized purpose?

The by-law can only be upheld, in my judgment, if the fourth test propounded by de Smith is the correct one to apply, namely:

> (4) Was any of the purposes pursued an authorized purpose? If so, the presence of concurrent illicit purposes does not

affect the validity of the act.

In my judgment, the fourth test is not the correct one to apply in this case.

Public Authorities Protection Act

This action was commenced on April 11, 1985. By-law 121 was approved by the annual general meeting of the OVA held on November 12, 1983. The OVA raises by way of defence s. 11 of the Public Authorities Protection Act, R.S.O. 1980, c. 406, which reads as follows:

> 11(1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

The plaintiff did not lead evidence at trial to prove damages, probably because the interlocutory injunction prevented interference with the operation of the plaintiff's existing clinics. After the action was discontinued against the individual defendants, the sole remaining issue between the plaintiff and the OVA was the validity of By-law 121. If the plaintiff succeeds, the appropriate remedy will be a declaration that the by-law is invalid.

Counsel did not refer to any authority in which s. 11 of the Public Authorities Protection Act has been relied on to bar an action for a declaration that a by-law was invalid. If the section is applicable in such a case, it does not provide a good defence in the case at Bar because of my finding as to the dominant motive in the enactment of the by-law. Having found that the dominant motive in enacting the by-law purporting to deal with conflict of interest was the elimination of competition, it necessarily follows, in my judgment, that the

Public Authorities Protection Act provides no defence for the following reasons given by Scrutton L.J. in G. Scammell & Nephew, Ltd. v. Hurley et al., [1929] 1 K.B. 419 at p. 427:

> To require the application of the Public Authorities Protection Act, the acts must be acts not authorized by any statute or legal justification, but acts intended to be done in pursuance or execution of some statute or legal power. It would appear, therefore, if illegal acts are really done from some motive other than an honest desire to execute the statutory or other legal duty and an honest belief that they are justified by statutory or other legal authority; if they are done from a desire to injure a person or to assist some person or cause, without any honest belief that they are covered by statutory authority, or are necessary in the execution of statutory authority, the Public Authorities Protection Act is no defence, for the acts complained of are not done in intended execution of a statute, but only in pretended execution thereof.

Disposition of case

For the foregoing reasons, there will be an order declaring that By-law 121 is invalid. Leave is granted to amend the prayer for relief in the statement of claim accordingly. The plaintiff is entitled to its costs of the action against the OVA. Counsel may arrange to speak to me if the plaintiff seeks a Bullock order in respect of the costs of the individual defendants.

Judgment for plaintiff.