Stadium Corporation of Ontario Ltd., I.M.G. Circus Corp., and Irvin Feld & Kenneth Feld Productions Inc. c.o.b. Ringling Bros., and Barnum & Bailey Circus v. Corporation of the City of Toronto*

[Indexed as: Stadium Corp. of Ontario Ltd. v. Toronto (City)]

10 O.R. (3d) 203
[1992] O.J. No. 1574
Action No. V141/92

Ontario Court (General Division), Divisional Court, O'Driscoll, Montgomery and Archie Campbell JJ.
June 29, 1992

*Leave to appeal to the Court of Appeal for Ontario (Morden A.C.J.O., Carthy and Weiler JJ.A.) was granted on October 5, 1992; costs shall be in the discretion of the court deciding the appeal.

Charter of Rights and Freedoms -- Freedom of expression -- Municipal by-law prohibiting keeping of exotic animals not violating s. 2(b) of Charter -- Public display of exotic animals not constituting "expression" -- Canadian Charter of Rights and Freedoms, s. 2(b).

Constitutional law -- Distribution of legislative authority -- Criminal jurisdiction -- Municipal by-law prohibiting keeping of exotic animals not representing attempt to regulate public morality and improper assertion of criminal law power -- By-law being in relation to property and civil rights within province and matters of purely local and private nature.

Municipal law -- By-laws -- Validity -- City of Toronto by-law prohibiting keeping of exotic animals being within

express power provided by s. 210, para. 1 of Municipal Act and not relating to subject matter reserved exclusively to Municipality of Metropolitan Toronto -- By-law not representing illegal use of zoning power -- Municipal Act, R.S.O. 1990, c. M.45, s. 210, para. 1.

After it received a complaint about a Siberian tiger displayed on a leash in a laneway within arm's reach of children, the City of Toronto passed a by-law that prohibited the keeping of listed exotic animals. The purpose and effect of the by-law was to prohibit and ban from the City of Toronto all exotic animal shows and all circus acts which involve exotic animals. The by-law exempted the use of exotic animals in films so long as the animals were owned by accredited institutions. The applicants moved to quash the by-law on the grounds that it infringed the freedom of expression guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms , that it represented an attempt to regulate public morality and an improper assertion of the criminal law power reserved to Parliament under s. 91(27) of the Constitution Act, 1867, that the city had no statutory authority for the by-law, that the by-law related to a subject matter reserved exclusively to the Municipality of Metropolitan Toronto, that it was enacted for an improper purpose, that it represented an illegal use of zoning power, and that the film industry exemption represented illegal discrimination and an illegal subdelegation of authority.

Held, the application should be dismissed.

The applicants adduced virtually no evidence to discharge its burden to show that the public display of exotic animals amounts to "expression" within the meaning of s. 2(b) of the Charter. They failed to establish a breach of s. 2(b).

There was no evidence that the by-law was enacted to regulate morality. Legislation governing what is unacceptable for public exhibition, if in pith and substance a matter of a local nature, does not invade the criminal law field merely because the legislation involves some degree of moral judgment. The by-law was a regulatory enactment which restricted, regulated

and under some conditions prohibited the keeping of exotic animals within the city for the purpose of ensuring the safety and protection of the public and the welfare of animals. It was therefore an enactment within provincial competence as legislation in relation to property and civil rights within the province and in relation to matters of a local and private nature.

The by-law prohibited the keeping of exotic animals whether or not cruelty was proven, and did not deal with the same subject-matter as the Criminal Code prohibitions against cruelty to animals. It was not legislation in relation to criminal law.

The by-law was within the express power provided by s. 210, para. 1 of the Municipal Act , which permits local municipalities to pass by-laws to prohibit the keeping of animals within the municipality. Section 210, para. 1 was not restricted to the keeping of animals as pets on a permanent basis in a residential setting.

The by-law did not prohibit the use of land for the purpose of exotic animal use; it was aimed at the activity of individuals, not the regulation of land use.

The City of Toronto could not enact by-laws under s. 236, para. 7 of the Municipal Act to regulate menageries and circuses. The Municipality of Metropolitan Toronto had passed a by-law to provide for the licensing of live public entertainment using animals. However, the impugned by-law was not passed pursuant to s. 236, para. 7; it was passed pursuant to s. 210, para. 1 of the Municipal Act to prohibit the keeping of animals and regulate the condition of their use. There was no conflict between the two by-laws.

The allegations of illegal discrimination failed because the evidence provided a rational basis to differentiate between animal use in films and animal use in circuses.

R. v. Thompson, [1957] O.W.N. 60, 117 C.C.C. 269, 9 D.L.R.

(2d) 107 sub nom. R. ex rel. Cox v. Thomson (C.A.), distd

Other cases referred to

Howard v. Toronto (City) (1928), 61 O.L.R. 563, [1928] 1 D.L.R. 952 (C.A.); Institute of Edible Oil Foods v. Ontario (1989), 71 O.R. (2d) 158 (note), 45 C.R.R. 378 sub nom. Institute of Edible Oil Foods v. Ontario (Milk Marketing Board), 64 D.L.R. (4th) 380 (note), 36 O.A.C. 394 (C.A.); McNeil v. Nova Scotia (Board of Censors), [1978] 2 S.C.R. 662, 44 C.C.C. (2d) 316, 84 D.L.R. (3d) 1, 25 N.S.R. (2d) 128, 19 N.R. 570; Nordee Investments Ltd. v. Burlington (City) (1984), 48 O.R. (2d) 123, 13 D.L.R. (4th) 37, 27 M.P.L.R. 214, 4 O.A.C. 282 (C.A.) [leave to appeal to S.C.C. refused (1985), 58 N.R. 237, 9 O.A.C. 79]; Oshawa (City) v. 505191 Ontario Ltd. (1986), 54 O.R. (2d) 632, 14 O.A.C. 217 (C.A.); Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 74 O.R. (2d) 164, 2 C.R.R. (2d) 327, 45 C.P.C. (2d) 1 (C.A.); R. v. Bell , [1979] 2 S.C.R. 212, 98 D.L.R. (3d) 255, 10 O.M.B.R. 142, 9 M.P.L.R. 103, 26 N.R. 257; R. v. Fink, [1967] 2 O.R. 132, [1967] 3 C.C.C. 187, 50 C.R. 345 (H.C.J.)

Statutes referred to

Canadian Charter of Rights and Freedoms, s. 2(b)
Constitution Act, 1867, ss. 91(27), 92(13), (16)
Criminal Code, R.S.C. 1985, c. C-46
Judicial Review Procedure Act, R.S.O. 1990, c. J.1
Municipal Act, R.S.O. 1990, c. M.45, ss. 210, para. 1, 236, para. 7
Municipality of Metropolitan Toronto Act, R.S.O. 1990, c. M.62, s. 214
Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36
Planning Act, R.S.O. 1990, c. P.13

APPLICATION to quash a city by-law prohibiting the keeping of exotic animals.

Stanley M. Makuch and Frederick F. Coburn, for applicants.

Susan L. Ungar and Leslie H. Mendelson, for respondent.

Clayton C. Ruby and Lesli Bisgould, for proposed intervenors, Ontario Society for the Prevention of Cruelty to Animals, Zoocheck Canada, Animal Alliance of Canada and Canadian Federation of Humane Societies.

M. David Lepofsky, for Attorney General for Ontario.

The judgment of the court was delivered by

ARCHIE CAMPBELL J. (orally):--

The application

The applicants move by judicial review to quash a City of Toronto by-law that prohibits the keeping even on a temporary basis of 26 categories of exotic animals including elephants, lions, armadillos, crocodiles, swans, walruses, badgers, opossums, sloths and the like.

The facts

The City of Toronto in 1986, for the purpose of prohibiting the keeping of exotic animals as pets, enacted a by-law which prohibited anyone from keeping an exotic animal. The by-law exempted certain areas of the city such as the Toronto Humane Society Building, hospitals and certain institutions of higher learning.

A city councillor in 1991 received a complaint about a Siberian tiger working in a strip show at Jilly's Tavern. The tiger, when offstage, was displayed on a leash in a laneway near Queen and Broadview. Children approached it within arms length and a neighbourhood dog attracted the tiger's attention.

After a great deal of political debate the city at the urging

of the councillor and others, on the basis of public safety and animal welfare generally, including the preservation of endangered species, amended the by-law. The focus of the debate turned largely on the pros and cons of exotic animal acts and circus shows using exotic animals.

The effect of the new by-law, and its obvious purpose, is to prohibit and to ban from the City of Toronto all exotic animal shows and all circus acts which involve exotic animals. The by-law, as amended, added elephants and perissodactylous ungulates to the list of prohibited animals, prohibited the keeping "either on a temporary or permanent basis", exempted those areas of the city used by the film industry provided the movie animals were owned by accredited institutions, and exempted areas used for educational programmes provided the educational animals were owned by accredited institutions.

The prohibited animals include:

All Marsupials (such as kangaroos and opossums)
All Non-human Primates (such as gorillas and monkeys)
All Felids, except the domestic cat
All Canids, except the domestic dog
All Viverrids (such as mongooses, civets and genets)
All Mustelids (such as skunks, weasels, otters, badgers) except the domestic ferret
All Ursids (bears)
All Artiodactylus Ungulates, except domestic goats, sheep, pigs and cattle
All Procyonids (such as raccoons, coatis and cacomistles)
All Hyaenas
All Pinnipeds (such as seals, fur seals and walruses)
All Snakes of the families pythonidae and boidae
All Venomous Reptiles
All Ratite Birds (such as ostrichs, rheas, cassowaries)
All Diurnal and Nocturnal Raptors (such as eagles, hawks and owls)
All Edentates (such as anteaters, sloths and armadillos)
All Bats
All Crocodilians (such as alligators and crocodiles)
All Anseriformes (such as ducks, geese, swans)

All Galliformes (such as grouse, pheasant, turkeys)
All Arachnids (such as tarantulas)
All Perissodactyloous Ungulates (except the domestic horse, mule and ass)
All Elephants
All Pinnipedia (such as seals, sea lions and walrus)
All Cetacea (such as dolphins, whales and porpoises)
All Sirenia (such as manatees and dugongs)

Intervenor status

Intervenor status is sought by the Ontario Society for the Prevention of Cruelty to Animals, Zoocheck Canada, Animal Alliance of Canada, and the Canadian Federation of Humane Societies. They agree with and adopt the evidence provided by the City of Toronto and they have no additional evidence to provide. Counsel for the Attorney General appears as of right pursuant to the Judicial Review Procedure Act , R.S.O. 1990, c. J.1.

It appears from the factums that the proposed intervenors agree with the legal perspective of the City of Toronto, although the proposed intervenors would advance arguments of a general constitutional nature somewhat more sweeping than those advanced by the respondent city and the Attorney General.

The proposed submissions arguably go somewhat beyond those of the city and the Attorney General in relation to the inherent nature of the use of wild animals in captivity, the effect of that use on the social values protected by the constitutional guarantees of free speech and the scope of that right, and the effect of international treaties, although the latter point is not referred to in the factum filed by the intervenor.

Although the proposed intervenors would seek to make somewhat more sweeping constitutional arguments they do not appear, on a close examination of the respective factums, to add significantly to the legal position of the City of Toronto and the Attorney General. There are some differences in emphasis, for example, in the way the Attorney General (at paras. 19 and 20) and the city (at para. 62) and the proposed intervenor (at

para. 13) cast the argument that the applicants have not satisfied the burden to identify some meaning expressed by wild animal entertainment shows. Although the arguments are cast in somewhat different language they depend upon essentially the same legal logic. A close comparison of the proposed intervenor's factum compared to the respondents' factums, shows nothing more than some arguable difference in emphasis.

Although the proposed intervenors in their factum refer to a partial list of provincial legislation in relation to animals, those references simply underline arguments made by the city and the Attorney General. In any event that factum has been filed and the court has the benefit of the reference to those statutes and to the few additional cases sought to be referred to by the proposed intervenors.

In respect of the factual matters in issue on this application the intervenors demonstrate a complete identity of interest with the City of Toronto. They offer no additional evidence. In fact some of the material filed by the city consists of the affidavit evidence of individuals associated with the proposed intervenors.

Motions to intervene require consideration not only of the proposed intervenors' interest in the issue between the parties but also the likelihood they can make a useful addition or contribution to the resolution of the case as it is put legally by the parties: Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 74 O.R. (2d) 164, 2 C.R.R. (2d) 327 (C.A.), per Dubin C.J.O. at p. 167 O.R., p. 330 C.R.R.

Proposed intervenors must be able to offer something more than the repetition of another party's evidence and argument or a slightly different emphasis on arguments squarely by the parties. The fact that the intervenors are prepared to make somewhat more sweeping constitutional arguments does not mean they will be able to add or contribute to the resolution of the legal issues between the parties.

Because the proposed intervenors have no evidence and no

really different legal arguments to add to the position of the City of Toronto and the Attorney General, it is unlikely that they would be able to add any useful contribution to the resolution of this application. The motion to add the proposed intervenors is therefore dismissed.

The issues

The applicant moves by way of judicial review to quash the by-law on the grounds that it infringes the freedom of expression secured by the Canadian Charter of Rights and Freedoms , s. 2(b), that it represents an attempt to regulate public morality and an improper assertion of the criminal law power reserved to Parliament under s. 91(27) of the Constitution Act, 1867, that the city has no statutory authority for the by-law, that the by-law relates to a subject matter reserved exclusively to the Municipality of Metropolitan Toronto, that it was enacted for an improper purpose, that it represents an illegal use of zoning power, and that the film industry exemption represents illegal discrimination and an improper subdelegation of authority.

The Charter, s. 2(b) -- Freedom of expression

The evidentiary burden is upon the applicants to establish that the action of possessing and displaying exotic animals is "expression" within the meaning of the Charter, s. 2(b), in the sense that it expresses some kind of meaning or a message, and that the purpose or effect of the by-law is to abridge freedom of expression by suppressing the communication of some particular meaning or message on account of its content.

The applicant submits that the by-law was passed, in part, to prevent the dissemination of the intellectual message allegedly conveyed by exotic animal shows and the use of exotic animals in circuses that animals are subservient or demeaned in their relationship with humans. Although the applicant disavows this message, the applicant adduces no evidence that there is in fact any constitutionally protected message communicated through the medium of exotic animal shows or exotic animals in circus acts.

The corporate applicants have not established that they are attempting, through the medium of exotic animal use, to convey any message to any audience.

Although the applicant's material says that exotic animal acts constitute an exciting and entertaining form of artistic endeavour and that the relationship between animals and humans "wholly transcends the commonplace images of human society and the animal world", there is no evidence of the content of any ideas associated with the entertainment. The applicant did file some supplementary material, the admissibility of which is strongly resisted by the city, which adds slightly to the bald statement of artistry and refers to "circus culture". Even if we were to hold the supplementary material admissible, the applicant's evidence amounts to no more than a bald statement of subjective opinion, unsupported by any objective evidence or systematic body of knowledge tending to show that exotic animal shows are a form of artistic expression or symbolic speech that expresses, in fact, some kind of meaning or message.

The applicants have not demonstrated any expressive content or shown the infringement of any expression or message. They have not led any evidence to demonstrate that:

> . . . the freedom of expression asked for in this case furthers the purposes for the guarantee of the freedom as suggested by the Supreme Court of Canada . . . i.e., search for truth, contribution to formulation of beliefs or to the effective operation of democratic institutions or the fulfilment of individual autonomy or of self-validation.

Institute of Edible Oil Foods v. Ontario (1989), 71 O.R. (2d) 158 (note), 45 C.R.R. 378 sub nom. Institute of Edible Oil Foods v. Ontario (Milk Marketing Board) (C.A.), at p. 159 O.R., p. 380 C.R.R. The applicant has adduced virtually no evidence to discharge its burden to show that the public display of exotic animals amounts to "expression" within the meaning of Charter s. 2(b). As Cory J.A. said in Nordee Investments Ltd. v. Burlington (City) (1984), 48 O.R. (2d) 123, 13 D.L.R. (4th) 37 (C.A.), at p. 127 O.R., p. 41 D.L.R.:

> . . . in this case, there is simply not sufficient evidence available to base a decision upon an interpretation of the Charter.

The applicants have not established any breach of freedom of expression secured by Charter s. 2(b).

Criminal law: Public morality

There is no evidence that the by-law was enacted to regulate morality in the sense of preventing the moral corruption of circusgoers. Even if there is some element of public morality in the by-law, that does not make it subordinate legislation in relation to criminal law. Legislation governing what is unacceptable for public exhibitions, if in pith and substance a matter of a local nature, does not invade the criminal law field merely because the legislation involves some degree of moral judgment:

> Needless to say, every regulatory enactment which is declaratory of some unlawful conduct can be said to advance some notion of public morality. Yet, just because public morality is advanced by an enactment does not mean that the statute must inevitably fall within the confines of the federal criminal law power.

R. v. Fink, [1967] 2 O.R. 132, [1967] 3 C.C.C. 187 (H.C.J.), per Haines J. at p. 136 O.R., p. 191 C.C.C.

> In a country as vast and diverse as Canada, where tastes and standards may vary from one area to another, 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. 92(16) of the B.N.A. Act, and as it is not a matter coming within any of the classes of subjects enumerated in s. 91, this is a field in which the legislature is free to act.

McNeil v. Nova Scotia (Board of Censors), [1978] 2 S.C.R. 662

at p. 699, 44 C.C.C. (2d) 316 at pp. 345-46, per Ritchie J.

The by-law is a regulatory enactment which restricts, regulates, and under some conditions prohibits the keeping of exotic animals within the city for the purpose of ensuring the safety and protection of the public and the welfare of animals. It is therefore an enactment within provincial competence as legislation in relation to property and civil rights within the province and in relation to matters of a local and private nature within the meaning of heads 92(13) and 92(16) of the Constitution Act, 1867.

The by-law prohibits the keeping of exotic animals whether or not cruelty is proven, and does not deal with the same subject matter as the Criminal Code prohibitions against cruelty to animals. It is not legislation in relation to criminal law and does not intrude upon any area occupied by Parliament.

Statutory authority: City of Toronto

Section 210, para. 1 of the Municipal Act, R.S.O. 1990, c. M.45, permits local municipalities to pass by-laws to prohibit the keeping of animals within the municipality or defined areas of the municipality:

> 210. By-laws may be passed by the councils of local municipalities:
>
> NIMALS AND BIRDS
>
> 1. For prohibiting or regulating the keeping of animals or any class thereof within the municipality or defined areas thereof and for restricting, within the municipality or defined areas thereof, the number of animals or any class thereof that may be kept by any person, or that may be kept in or about any dwelling unit or class of dwelling unit as defined in the by-law.
>
> (a) In this paragraph and paragraphs 2, 3, 4, 6 and 7, "animal" includes birds and reptiles. ("animal")

The impugned by-law prohibits the keeping of certain animals within the municipality and defined areas within it. The words of the by-law track directly the words of the enabling legislation. The by-law is within the express power provided by s. 210, para. 1 of the Municipal Act. Nothing in the words of s. 210, para. 1 suggests that it is restricted, as the applicant suggests, to the keeping of animals as pets on a permanent basis in a residential setting. The legislature uses the word "animals", not the words "animals as pets in a residential setting". Because the by-law is so expressly and directly authorized by the plain words of the enabling statute it is unnecessary to deal with subtle principles of statutory interpretation and construction such as statutory context, noscitur a sociis , implied powers, expressio unius, and the like.

Zoning power

The applicant argues that the subject matter of the by-law is a matter for the Planning Act, R.S.O. 1990, c. P.13. The by-law, however, does not prohibit the use of land for the purpose of exotic animal use; it prohibits the keeping of exotic animals except in connection with some activities such as medical research, higher learning, and film-making. The by-law is aimed at the activity of individuals, not the regulation of land use.

Circuses and trained animal shows and the general use of animals in public entertainment are permitted uses in the by-law and may continue so long as they do not use any of the exotic animals prohibited in the by-law.

This is not a case like R. v. Thompson, [1957] O.W.N. 60, 117 C.C.C. 269 sub nom. R. ex rel. Cox v. Thomson (C.A.), per LeBel J.A. at p. 63 O.W.N., pp. 273-74 C.C.C., where the by-law did not just prohibit or regulate activity on land, but went much further and directed itself against something essential to the earning of a livelihood by a person who lived off the land. Even if the by-law does have some of the characteristics of a zoning by-law, nothing requires that it conform to the Planning Act so long as it is otherwise authorized: Oshawa (City) v.

505191 Ontario Ltd. (1986), 54 O.R. (2d) 632, 14 O.A.C. 217 (C.A.), at p. 637 O.R., p. 221 O.A.C.

Metropolitan Toronto Circus By-law

Section 236, para. 7 of the Municipal Act empowers municipalities to license and regulate menageries, circuses and like shows. The Municipality of Metropolitan Toronto has passed By-law 20-85 to provide for the licensing of live public entertainment using animals. Section 214 of the Municipality of Metropolitan Toronto Act , R.S.O. 1990, c. M.62, provides:

> 214. Where a by-law of the Licensing Commission passed under a provision of the Municipal Act or any other Act is applicable to an area municipality, any by-law of the area municipality passed under the same provisions of the Municipal Act or any other Act has no effect and the area municipality does not have power to pass such a by-law while the by-law passed by the Licensing Commission is in effect in such area municipality.

The City of Toronto therefore cannot enact by-laws under s. 236.7 of the Municipal Act to regulate menageries and circuses.

The impugned by-law is not passed pursuant to s. 236, para. 7 of the Municipal Act to regulate circuses or menageries. It is passed pursuant to s. 210, para. 1 of the Municipal Act to prohibit the keeping of animals and regulate the conditions of their use.

The metro by-law and the city by-law have different purposes and effects. The former regulates licence fees, hours of operation, insurance requirements and other commercial aspects of the carrying out of the circus business and has nothing to do with the keeping of animals. The latter prohibits and regulates the keeping of exotic animals generally, whether in a circus or a home or any other place, either privately or commercially.

The city by-law prohibiting the keeping of animals is not

made pursuant to s. 236, para. 7 of the Municipal Act for the purpose of regulating circuses. It is made pursuant to s. 210, para. 1 of the Municipal Act for the purpose of prohibiting and regulating animal use and possession.

The two by-law regimes rest on different sources of authority. They are passed for different purposes. They have different effects. Nothing in either by-law affects the operation of the other by-law. There is no conflict between the by-laws.

Provincial legislation

The impugned by-law does not conflict with the Ontario Society for the Prevention of Cruelty to Animals Act , R.S.O. 1990, c. O.36, which specifically contemplates and refers to other laws in Ontario pertaining to the welfare and prevention of cruelty to animals.

Improper purpose

The by-law was proposed on grounds of public safety and animal welfare. The by-law was triggered by a public complaint about a Siberian tiger displayed on a leash in a laneway within arm's reach of children. Much of the political debate about the by-law centred on the issues of animal welfare and public safety in relation to circuses, proper matters of city concern under the general rubric of the regulation and prohibition of animals. The applicant has not discharged its burden of proof in that city council acted dishonestly or for an improper purpose. It is appropriate in this context to quote the words of Mr. Justice Masten in Howard v. Toronto (City) (1928), 61 O.L.R. 563, [1928] 1 D.L.R. 952 (C.A.), at p. 575 O.L.R., p. 965 D.L.R., quoted by Spence J., in R. v. Bell, [1979] 2 S.C.R. 212 at p. 222, 9 M.P.L.R. 103 at p. 113:

> What is or is not in the public interest is a matter to be determined by the judgment of the municipal council; and what it determines, if in reaching its conclusion it acted honestly and within the limit of its powers, is not open to review by the Court . . .

. . . . .

> The question of the relative balance of convenience or detriment to different persons is a matter which the Legislature has committed to the consideration and determination of the municipal council, and their judgment on that question, if bona fide exercised in what they believe to be the public interest, will not be interfered with by the Court . . .

The film exemption

The by-law, although it prohibits the use of exotic animals in circuses, permits their use in films through exemption 20 so long as the animals are owned by zoological parks accredited by the Canadian Association of Zoological Parks and Aquaria.

The applicant says this discriminates unlawfully against circuses.

The respondent adduced evidence that the use of exotic animals in films does not attract the same public safety and animal welfare concerns as the use of exotic animals in circuses.

There is an evidentiary basis to support a good faith conclusion that the keeping of animals in connection with films is a different kind of activity from the keeping of animals in connection with circuses. In distinguishing between the use made of animals in circuses and films the council discriminated between different uses made of animals. The discrimination is not against circuses qua circuses, but against the kind of use that circuses make of animals, as opposed to the kind of use that films make of animals. The power to distinguish and discriminate between the kind of animal use made by circuses and the kind of animal use made by films is nothing more than the exercise of the express power in s. 210, para. 1 to prohibit and regulate the keeping of animals.

The allegation of illegal discrimination fails because the evidence provides a rational basis to differentiate between

animal use in films and animal use in circuses.

The accreditation condition in the film exemption is no more a subdelegation than is a by-law requiring that fire safety equipment comply with the standards of a national board of fire underwriters or a national fire protection association.

The accreditation condition in the film exemption represents administrative regulation through the adoption of an objective externally defined technical standard of animal care quality, not subdelegation of legislative or enforcement authority to the members of any particular group.

Conclusion

The applicants have not discharged the onus of demonstrating the illegality of the by-law. The application is dismissed.

As to costs the Attorney General does not seek costs. Ordinarily costs would follow the event. However, we are mindful of the fact that the City Solicitor refused to certify the legality of the film exemption which was regarded by the proponents of the entire by-law scheme as essential for its passage in council. Because the legislative scheme depended upon a provision known to the city to be legally disputable and in the view of its legal advisor at least questionably the city invited a court challenge, took a calculated risk and should bear its own costs. There will be no order as to costs.

Application dismissed.