

ONTARIO

SUPERIOR COURT OF JUSTICE

**B E T W E E N:** )  
 )  
 XENTEL DM INCORPORATED, ) Stanley M. Makuch, Signe B. Leisk, Cassels  
 OUTDOOR AMUSEMENT BUSINESS ) Brock & Blackwell LLP, for the Applicant  
 ASSOCIATION, TZ PRODUCTIONS, )  
 AND GARDEN BROTHERS )  
 )  
 Applicants )  
 )  
**- and -** )  
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 )  
 THE CORPORATION OF THE CITY OF ) Mark P. Nazarewich, Office of the City  
 WINDSOR ) Solicitor, Solicitor for the Respondent  
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 )  
 Respondent )  
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 )  
 ) **HEARD:** March 22, 23, 24, 25, 30, 31, and  
 ) April 1, 2004

2004 CanLII 22084 (ON S.C.)

**Richard C. Gates**

**A. INTRODUCTION**

[1] This application is brought by Xentel DM Incorporated (the Applicant) against the City of Windsor (the City). The applicant is seeking a Declaration that City By-law No. 298-2002 (the By-law) passed by Windsor City Council (Council) is invalid and a further Order enjoining the City and its employees and agents from taking any action to enforce the By-law as it relates to the participation of an animal or animals in live public entertainment in the City.

**B. BACKGROUND**

[2] This action is based upon a by-law passed by the City which prohibits the conducting, operating, taking part in or carrying on of any entertainment whatsoever which involves the participation of exotic animals, as defined therein.

[3] Xentel is a circus producer and is responsible for the logistics of “bringing the circus to town”, such as the one involved here. It arranges the venue and obtains all the necessary permits, to ensure compliance with animal protection legislation, for the care of performers and to ensure public safety. Outdoor Amusement Business Association (“OABA”) is a trade association for the outdoor amusement industry and has more than 5000 members. The OABA is involved in establishing industry-wide safety guidelines and regulations; it lobbies governments; it established a code of ethics and assists its members to speak as one voice. TZ is a member of the OABA and is a family of circus performers, which since 1763, and has travelled all through Europe, Africa, and North America. Garden Brothers another family organization was established in 1938 and is the largest three-ring circus in North America. It is owned and operated by the third-generation of members of the Garden family and is also a member of the OABA.

[4] The Applicants contend that a vital component of the circus entertainment produced by them is the use of live exotic animal performers. They maintain that the use of exotic animals is an integral part of the traditional circus culture as well as an important feature to circus patrons.

[5] The Respondent City of Windsor passed the By-law in question, it argues, for the purpose of protecting the citizens of the City of Windsor from animal attacks, and for no other improper purpose.

[6] The By-law is as follows:

**By-law**

**A BY-LAW TO PROTECT PERSONS WITHIN THE CITY OF WINDSOR FROM HARM FROM PERFORMING ANIMALS:**

WHEREAS Section 236.7 of the *Municipal Act*, R.S.O. 1990, c. M.45 provides that a municipal council may pass by-laws prohibiting or regulating menageries, circus-riding and other like shows usually exhibited by showpersons;

AND WHEREAS the Council of the Corporation of the City of Windsor wishes to ensure the safety and well-being of its residents and visitors by prohibiting certain animal performances within its boundaries;

NOW THEREFORE, the Council of the Corporation of the City of Windsor enacts as follows:

**DEFINITION**

1. In this by-law
  - a. “animal” means a mammal, bird, reptile, amphibian, fish or insect but does not include human being.
  - b. “performance” means a circus, carnival, show, form of entertainment, exhibition, menagerie or act of showmanship.
  - c. “person” includes a corporation and the heirs, executors, administrators or other legal representatives of a person.

## PROHIBITED PERFORMANCES

2. No person may conduct, operate, take part in or carry on a performance, or assist in conducting, operating or carrying on a performance that involves the participation of an animal or animals.
3. Nothing in this by-law prohibits or restricts the following:
  - a. Displaying or showing animals in agricultural fairs;
  - b. Horse races;
  - c. Rodeos;
  - d. Magic acts using birds, domestic dogs, domestic cats, or rabbits;
  - e. Horse or pony riding;
  - f. A performance whose main object is for educational purposes and does not involve the participation or inclusion of any of the following:
    - i. Felids, except the domestic cat;
    - ii. Canids, except the domestic dog;
    - iii. Gorillas;
    - iv. Ursidae, except koala and panda bears;
    - v. Elephants;
    - vi. Rhinoceri;
    - vii. Hippopotamuses;
    - viii. Crocodilians;
    - viii. Ungulates, except domestic goats, sheep pigs cattle horses, mules and donkeys;
    - x. Hyaenas
  - g. Domestic dog or domestic cat shows.

## GENERAL

4. Where the provisions of any other by-law are inconsistent with the provisions of this by-law, the provisions of this by-law shall prevail
5. Any person who contravenes the provisions of this by-law is guilty of an offence and on conviction is liable to a fine as provided in the *Provincial Offences Act*.

At this point it would be helpful to outline the chronology of events that preceded the passing of the By-law, before proceeding to identify and discuss the issues.

## CHRONOLOGY OF EVENTS

April 29, 2002

Staff Report recommending issuance of permit subject to conditions, for Circus at Riverfront Festival Plaza.

May 6, 2002	Council Meeting which adopts Staff Report approving issuance of permit, subject to conditions. Representatives from ARK II, Youth for a Better World and Shrine Circus (TZ Productions) make deputations.
June 17, 2002	Letter from Zoo Check respecting the issue of wild animals in circuses and travelling shows.
July 8, 2002	Council Meeting. Zoo Check correspondence on agenda. Motion passed requesting legal opinion on restricting performing animal acts.
July 25, 2002	Legal Report Prepared. In and around this time, materials prepared and delivered to council by animal rights organizations.
August 21, 2002	Xentel correspondence to Council.
August 22, 2002	Outdoor Amusement Business Association correspondence to Council.
August 26, 2002	Council Meeting. Representatives from TZ Productions, Outdoor Amusement Business Association, Zoo Check, ARK II, Jazzpurr Society For Animal Protection.
September 20, 2002	Correspondence on behalf of Outdoor Amusement Business Association from Cassels, Brock & Blackwell to Members of City Council.
September 23, 2002	By-law read three times and passed.

### **C. ISSUES**

[7] While the By-law does exempt certain entertainment involving animals, including domestic cat and dog shows, rodeos and agricultural fairs, the Applicants argue that it is invalid for the following reasons:

- a) The By-law was enacted for an improper purpose; (paragraphs 9-45)
- b) The By-law unlawfully discriminates in the municipal law sense because it bans circus entertainment using exotic animals and no other entertainment, without authority or purpose.

- c) The passing of the By-law violates the doctrine of fairness by denying the Applicants' right to continue to provide exotic animal entertainment without providing them with an opportunity for a hearing; and (paragraphs 46-48)
- d) The By-law is in pith and substance an attempt to regulate public morality by banning entertainment with exotic animals and as such involves the exercise of the criminal law power exclusively vested in the Parliament of Canada pursuant to s. 91(27) of the *Constitution Act, 1897*; (paragraphs 86-103)
- e) The By-law is void for vagueness in that it exempts performances, such as agricultural fairs and those for educational purposes, without any attempt to define or establish the meaning of these terms; (paragraphs 49-85)
- f) The By-law contravenes the freedom of expression guaranteed to the Applicants and others under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) which cannot be justified under section 1. (Paragraphs 104-130)

[8] I shall now deal with all of the above issues in the same order.

**(D) ANALYSIS**

**(A) Did the City enact the By-law for an improper purpose?**

[9] The Applicants maintain that although the stated purpose of the By-law is the protection of residents and visitors, the actions of Council reveal that the true purpose of the By-law is the protection of exotic animals. Further, they argue that since the City does not have the authority to regulate for the purpose of animal welfare, the By-law is *ultra vires* and invalid.

[10] The Applicants support their position with the affidavit of Len Wolstenholm and the transcripts of various City of Windsor Council Meetings. They demonstrate, through Mr. Wolstenholm's affidavit, that in the spring of 2002 the Shriners applied for a permit to hold a Shrine Circus (the "Circus"), which included exotic animal performances, in the City at the River Front Festival Plaza. Up until this time there had never been any issues or concerns with respect to the Circus applications, and Council had previously approved these applications without controversy. The evidence establishes that the Shrine Circus had performed in Windsor for 18 years previously without any incidents whatsoever related to public safety, or for that matter, to the welfare of the animals. The evidence also establishes that Garden Brothers has operated its Circus across Canada for 54 years likewise without any incidents pertaining to its patrons. At the meeting of May 6, 2002, however, various animal rights activists attended, voicing their opposition to the Circus application on the basis that the Circus uses exotic animals for entertainment.

[11] It is, I believe, important to note that notwithstanding the concerns expressed by the animal rights' activists, Council approved the 2002 permit application. In so doing, Council

required the Circus to enter into a standard Parks Use Agreement wherein it agreed to comply with all by-laws, provide an emergency response plan, and allow random inspections by the Windsor-Essex County Humane Society. According to the transcripts and the affidavit of Len Wolstenholm, the decision to approve the Application was based upon the following information:

- a) In 2001, the Circus had been inspected by members of the Windsor Fire Department, who were satisfied with the Circus' Emergency Response Plan.
- b) The Windsor Humane Society confirmed that there had been no incidents or evidence of abuse with respect to the circus animals and,
- c) The Circus would not receive its permit unless the Police and Fire Departments approved the Emergency Response Plan.

[12] Therefore in 2001 the Circus fulfilled all conditions of application approval, and both the Police and Fire Departments were satisfied with the Emergency Response Plan. Accordingly a permit was issued and the Circus performed with exotic animals during that year, again without incident. This demonstrates that in the past the City was content with the safety measures and plans established by the Circus and approved by Police, Fire and Sanitation authorities.

[13] In 2002 another permit was routinely requested on behalf of the Shrine Circus to be held at the Riverfront Plaza between May 31<sup>st</sup> and June 2<sup>nd</sup>.

[14] A brief review of the chronology, supra, leading up to the 2002 By-law prohibiting the Circus, would, I believe, be helpful.

(1) Following receipt of the Shrine Circus request for a permit for 2002 and as a result of discussions originally held at the time it issued a permit for 2001, the City Parks Department convened a meeting on April 29, 2002 of some of the interested parties on both sides of the animal issue, including ARK II (an animal rights advocacy group) and Xentel D.M. the Circus Performance Company and one of the Applicants herein. As a result of that meeting certain agreements were reached:

- Applicants with animal acts were to inform the Windsor Essex County Humane Society so that inspections would be carried out.
- The applicants would have an emergency response plan in place that is reviewed by the Windsor Police Service and Fire Chief.
- That ARK II would provide information to the local Shrine Club for events without animals that could be explored in addition to events already conducted.

- That ARK II provide information to the Windsor Essex County Humane Society that may be beneficial to the inspection staff.

(2) It was therefore recommended by the City administration that a permit be issued for 2002 to the Shrine Circus subject to it executing a City of Windsor Parks Use Agreement, which it did. The relevant clauses of this Agreement are as follows:

- To indemnify and save harmless the Corporation, from and against all damages which it may suffer and against all claims or actions which may be made against the corporation, arising from the use of the Park or from any non-compliance with or violation of the terms of this Agreement;
- To provide and maintain public liability and property damage insurance containing endorsements naming the Corporation, as an additional named insured, in the amount of \$5,000,000 satisfactory to the Commissioner of Legal and Human Resources;
- To comply with all Police, Fire, safety and sanitary laws, By-laws and Regulations of the Corporation, the Police Services Board, any Provincial or Federal authority, or made by Fire Insurance Underwriters.
- To agree to random inspections by the Windsor Essex County Humane Society and co-operate with inspection staff to allow access to these inspections.
- To have an Emergency Response Plan and to provide a copy of the plan in confidence to the Chief of Police and the Fire Chief for review, a minimum of 7 days prior to the event.

(3) Subsequently on May 26, 2002, the administration report with its conditions was approved by Council. Up to this point in time, at least, things seemed to be following the course established in previous years. However, this all started to change with the receipt by the City of a letter from Zoo Check Canada, another animal rights advocacy group, dated June 17, 2002, authored by one Kim Robinson, describing herself as Circus Campaigner. In the letter she confirmed that her concerns were primarily the welfare of circus animals and their biological and ethological (behavioural) needs.

(4) Most of the letter catalogues a number of issues relating to animal welfare. She disputes the Circus industry claim to provide an educational benefit to its patrons and states that;

“These educational claims are not based on empirical studies”

However, in a passing reference, later in the same letter on the issue of public safety, she makes a number of critical comments about safety incidents which are alleged to have occurred in Canada and around the world, without substantiating any of them or, to use her own words, providing any proof by way of “empirical studies” that would connect the issue of the use of exotic animals to the issue of public safety.

(5) From the evidence it would appear that apart from its June 17, 2002 letter, Zoo Check itself never bothered to investigate the safety issues with either the City or the Applicant Circus, nor did it examine the Emergency Response Plan required by Council from the Applicant which was executed by it and subsequently approved by the appropriate City authorities.

Zoo Check also took the position that:

“Many performing wild animals in circuses and traveling shows touring Canada endure a life characterized by emptiness, deprivation and brutality. In addition to being degraded through ridiculous performances and stunts, they suffer from extreme confinement, inappropriate social groupings and harsh, sometimes abusive training methods.”

[15] This letter as received, was noted in the Council Minutes of July 8, 2002 and as a result, Councillor Zuk requested a report be prepared concerning the legality of banning animal acts in the City. On July 25, 2002 George Wilkki, the Acting Commissioner of Legal and Human Resources, delivered a report which concluded in part, that a by-law passed for the purpose of protecting animals would be *ultra vires* the municipal authority, and the only way achieve this end would be to pass a by-law, the object of which would be the protection of the public. In that report, he stated:

It is very clear that council has been pressured by “animal rights” groups/individuals to pass a by-law to restrict animal performances mainly because of the alleged mistreatment of the animals that perform in those shows. A secondary reason put forward has been for the protection of the public.

[16] During the next few months, Council received voluminous amounts of correspondence from animal rights groups and individuals in the form of letters, e-mails and other materials urging the prohibition of animal acts due to the immorality of entertaining with exotic animals. Significantly, none of the communication received from these groups or individuals contained any evidence of a threat to public safety arising out of circus acts in the City of Windsor.

On August 26, 2002 was a further public meeting held in the City of Windsor Council Chambers at which time a number of delegations had registered in order to speak to the issue of the municipal by-law.

Toward the end of that meeting, councilor Zuk proposed a motion, which was accepted that the Administration be directed to develop a by-law that prohibited traveling animal acts within the municipality, recognizing that under the *Municipal Act* the Council have the authority to pass by-laws to prohibit or regulate circuses for the well being of its residents.

Toward the end of the dialogue between various groups and members of Council, Councillor Cassivi framed a comment, which I believe captures the essence of the discussion that had been ongoing and, as well, the intent of Council when he stated that he would support the motion on the floor;

Because I concluded really that the people of the City of Windsor have reached a level of sophistication where their entertainment no longer has to be at the expense of animal discomfort or distress.

[17] The Applicants contend, and I accept, that Council did not undertake nor did it direct its staff to do so, any consultant studies or reports on the issue of public safety and exotic animal performances. Furthermore it undertook no investigations or risk analysis on the causal connection, if any, between exotic animal performances and public safety. In short, given the nature of the issue, its profile as generated by the animal rights advocates, the narrow scope of its legal authority as defined by in-house counsel, the City failed to exercise the degree (if any) of due diligence, which the circumstances and complexities of the issue required. This failure, for the Reasons expressed below, in my view renders the By-law void as being ultra vires its authority.

[18] The Respondent conversely asserts that its By-law is *intra vires* council's authority as the City is entitled to pass by-laws pursuant to s. 236(7) of the *Municipal Act*, R.S.O. 1990, c. M.45 which states:

236. A council of a local municipality may pass by-laws regulating:  
...

7. Exhibitions of wax works, shows, etc. – For prohibiting or regulating and licensing exhibitions of wax works, menageries, circus-riding, and other like shows usually exhibited by showpersons...

[19] As this is a decision by an elected council, I must consider whether it's *intra* or *ultra vires*. In *Shell Canada Products Ltd. v. Vancouver (City)* (1993), 110 D.L.R. (4<sup>th</sup>) 1 (SCC) (“*Shell*”), Vancouver City Council decided to make a symbolic gesture against companies with business links to South Africa. It passed resolutions having the force of by-laws that the City would not do business with Shell until that company divested itself of its South African holdings. The city continued to do business with other companies having South African connections. Justice McLachlin wrote a compelling and much-followed dissent in *Shell* that stated, in essence, Courts should give a “wide berth” to elected councils when making decisions

within their authorization. While I accept this, in my view, her opinion in that case would only apply to those decisions made by council that clearly fall within its scope of authority. Justice McLachlin stated in part;

Judicial review of municipal decisions is necessary. It is important that municipalities not assume powers which have not been conferred on them, that they not violate civil liberties, that disputes between them and other statutory bodies be resolved, and that abuses of power are checked. On the other hand, it is important that the courts not unduly confine municipalities in the responsible exercise of the powers which the legislature has conferred on them.

[20] She described two different approaches to the review of municipal decisions – a “pro-interventionist” approach as enunciated in *Merritt v. City of Toronto* (1895), 22 O.A.R. 205, and a “benevolent construction” approach as described in *City of Hamilton v. Hamilton Distillery Co.* (1907), 38 S.C.R. 239. The latter she viewed as being more generous and flexible than the former. The classic definition of this approach was stated by Lord Greene M. R. in *Associated Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.) at p. 228 as follows:

It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers [and]...the court...must not substitute itself for that authority.

[21] Justice McLachlin cited this passage with approval and added:

Judicial intervention, said Lord Greene, would be justified where there was evidence of bad faith or absurdity, where the decision was unreasonable in the sense that no reasonable authority could ever have come to it. But, he said at p.230, “to prove a case of that kind would require something overwhelming....”

[22] She also stated that:

Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the “benevolent construction” which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

[23] In her dissenting opinion of that case she also stated that the benevolent construction approach serves a number of purposes, not the least of which is that courts must accord proper respect to the democratic responsibilities of elected municipal officials and the rights of those

who elect them. Justice McLachlin concluded her discussion of the issue of judicial review by stating:

It may be that, as jurisprudence accumulates, a threshold test for judicial intervention in municipal decisions will develop. For the purposes of the present case, however, I find it sufficient to suggest that judicial review of municipal decisions should be confined to clear cases. The elected members of council are discharging a statutory duty. The right to exercise that duty freely and in accordance with the perceived wishes of the people they represent is vital to local democracy. Consequently, courts should be reluctant to interfere with the decisions of municipal councils. Judicial intervention is warranted only where a municipality's exercise of its powers is clearly ultra vires, or where council has run afoul of one of the other accepted limits on municipal power.

[24] Here, the power to pass a by-law for public safety is expressly conferred, and therefore it must be viewed not by implication, but rather within the context of the circumstances which caused Council to pass it in the first place. In the case at hand, an attempt to legislate for animal welfare by clothing the By-law with the trappings of public safety without ever having undertaken even a reasonable minimum of due diligence investigation or review, is clearly in my view, ultra vires Council's power as defined in s.236(7) of the Municipal Act.

[25] The City of Windsor had the power conferred upon it by s.236(7), but the basis on which it exercised that power in passing its by-law was flawed. We are not, here, seeking to imply on a reasonable or deferential basis the power to pass a public safety by-law and therefore deference must give way to a critical analysis of Council's action and to confine its authority to the powers expressly conferred, namely, for public safety. [See *R. v. Sharma, supra*]

[26] The result of *Shell* and other decisions that follow it including *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 and *R. v. Guignard*, [2002] 1 S.C.R. 472, would indicate that the courts show considerable deference to an elected councils' decisions. However, when an elected council clearly acts outside of its authority, the scope of review by a court should not in my view be focused on deference to council but rather, on compliance with and conformity to its legislative mandate.

[27] I believe that it is also important to note the comments by Laskin J. in *Shell* where he stated:

Bad faith by a municipality connotes a lack of candour, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest: see Makuch, *Canadian Municipal and Planning Law* (Toronto: Carswell, 1983) at pages 215 to 219.) The signs of bad faith were discussed in the following passage in *Howard v. Toronto (City)*, *supra*, at pages 574-75, cited by the motion judge:

‘The Court is prohibited from quashing a by-law on the ground of unreasonableness, real or supposed, provided the council in passing it acted in good faith, but the unreasonableness of the by-law may be given in evidence to establish want of good faith in the council who passed it: (citing the Consolidated Municipal Act, 1922).

A by-law may be quashed if the council in enacting it was not using its power in good faith in the interest of the public, but simply to subserve the interests of private persons....

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 limits of its powers, is not open to review by the Court.’

[28] Sopinka J., for the majority in *Shell* also observed at page 13-14:

Generally, a municipal authority is authorized to act only for municipal purposes. In *R. v. Sharma* (1993), 100 D.L.R. (4<sup>th</sup>) 167 at page 180 (SCC), Iacobucci, J., speaking for the court, adopted the principle from Stanley M. Makuch, *Canadian Municipal and Planning Law* (Toronto: Carswell, 1983), at page 115, that as statutory bodies, municipalities

‘... may exercise only those powers expressly conferred by statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation.’

In most cases, as here, the problem arises with respect to the exercise of a power that is not expressly conferred but is sought to be implied on the basis of a general grant of power. It is in these cases that the purposes of the enabling statute assume great importance. The approach in such circumstances is set out in the following excerpt in Rogers, *The Law of Canadian Municipal Corporations*, supra, 64.1, at page 387, with which I agree:

‘In approaching a problem of construing a municipal enactment a court should endeavour firstly to interpret it so that the powers sought to be exercised are in consonance with the purposes of the corporation. The provision at hand should be construed with reference to the object of the municipality: to render services to a group of persons in a locality with a view to advancing their health, welfare, safety and good government.’

Any ambiguity or doubt is to be resolved in favour of the citizen, especially when the grant of power contended for is out of the 'usual range': see Rogers, *op. cit.*, at 64.1, and *Re: Taylor and City of Winnipeg* (1996), 11 Man. R. 420, per Taylor, C.J.M.”

[29] Any analysis of whether the By-law in question is *ultra vires* must consider the evidence in light of the foregoing statements by McLachlin J. in the *Shell* case.

[30] There are additional cases, which I believe are relevant to this issue. In *114957 Canada Tee (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at paragraph 21, the Supreme Court of Canada stated that the courts should accord municipal powers a liberal and benevolent interpretation, and further that only in the clearest of cases should a municipal by-law be held to be *ultra vires*. The Supreme Court in *Hudson* approved the dictum of McLachlin J. in *Shell* at paragraph 19, stating, “barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold.” This finding of the Supreme Court was recently cited with approval by the Ontario Court of Appeal in *Toronto (City) v. Goldlist Properties Inc.* [2003] O.J. No. 3931.

[31] I believe that this statement of the law accords with two other recent judgments that, while I am not bound by them, also explain the state of the law. In *Lambert v. Whistler (Resort Municipality)*, [2004] B.C.J. No. 494 (B.C. S.C.), “A municipality may enact a by-law for an ulterior purpose without necessarily invalidating the By-law, but it must act within the scope of the empowering legislation.”

[32] Moreover, in *Alberta Commercial Fisherman’s Assn. v. Opportunity (Municipality)*, [2001] A.J. No. 459 (Q.B.), Justice Murray recognized the importance of *Shell* and made several statements which I believe are germane to this case:

As creatures of statute, municipalities can exercise only those powers conferred upon them by the Provincial Legislature. The exercise of such powers is reviewable by the Court to the extent of determining whether the actions are *intra vires*. See *Shell Canada Products Ltd. v. Vancouver (City)* (1994), [110 D.L.R. \(4th\) 1](#) (S.C.C.) and *R. v. Greenbaum*, [\[1993\] 1 S.C.R. 674](#). The powers given to a municipal government must be exercised for the purpose for which they are given. Since municipalities derive their legislative powers from the Provincial Legislature, they must frame their By-laws strictly within the scope delegated to them by the Legislature. See *Verdun v. Sun Oil Co. Ltd.*, [\[1952\] 1 S.C.R. 222](#), per Fateaux, J. If there is no legislative authority for their actions, then those actions are beyond the competence of Council: See *Re Teron Developments Ltd. et al v. The City of Edmonton et al* (1977), [81 D.L.R. \(3d\) 543](#) (Alta. C.A.) affirmed [121 D.L.R. \(3d\) 760](#).

The Court has the right and the duty to ascertain if the power given to Opportunity by the Legislature was used by it for a proper purpose. If it is found that Opportunity used its by-law-making powers for an unauthorized or ulterior purpose, then such exercise of power is *ultra vires* Opportunity and the By-law

so passed will be declared invalid and quashed. See Jones and deVillars, *Principles of Administrative Law* (3rd ed.) 1999 at p. 157, *Re Teron Developments Ltd. et al (supra) and Re Regional Municipality of Ottawa-Carleton and the Municipality of Marlborough* (1974), [42 D.L.R. \(3d\) 641](#), where Mr. Justice Lacourciere at p. 649 said:

A by-law must be passed for the purpose allowed by the statute, and council must not seek, in enacting a by-law, to accomplish indirectly that which cannot be directly accomplished in the manner provided by the Legislature.

This judgment was affirmed by the Ontario Court of Appeal without written reasons (1975), [50 D.L.R. \(3d\) 68](#) n. It has also been held that the fact that Council may have had more than one purpose in enacting a by-law and that one of the purposes, even the predominant one, was beyond its power, does not render the by-law invalid if it also has an honest purpose that is within its statutory powers. See *Koslowski and Skjelvik v. Corporation of the District of West Vancouver*, [\[1981\] 4 W.W.R. 454](#) per McEachern, C.J.S.C. at (B.C.S.C.) 467 and *Falardeau v. Town of Hinton* (1983), [50 A.R. 120](#), per McFadyen, J. at p. 130. The ulterior purpose alleged in this case was an attempt to interfere with or control the fish population in the lakes within its geographical domain.

[33] Finally, the Ontario Court of Appeal in *R. v. Konakov*, (2004) 69 O.R. (3d) 97 recently held:

With respect to the appeal judge, the issue before him was whether the City had the authority to pass the By-law at issue, not whether the By-law was reasonable. The decision of *Rogers v. City of Toronto* (1915), 33 O.L.R. 89 cited with approval in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 at para. 94 stands for the proposition that, in reviewing the exercise of municipal power on the basis of jurisdiction to pass a by-law, courts ought not to assess the reasonableness of a particular exercise of municipal power. That is a different issue. Further, the doctrine of unreasonableness permitting the declaration of invalidity of municipal by-laws is a limited one such as where it can be shown that the by-law was enacted in bad faith or discriminates in a manner that was unrelated to a valid planning purpose: *R. v. Bell*, [1979] 2 S.C.R. 212; *Re H.G. Winton Ltd. and Borough of North York* (1979) 88 D.L.R. (3d) 733 (Ont. Div. Ct.). See also *Canadian Municipal and Planning Law* (Ontario: Carswell, 1983) by Stanley Makuch at 201 and 207. A by-law, otherwise enacted for proper municipal purposes, is not unreasonable or invalid merely because it contains a moral element: *Nova Scotia (Board of Censors) v. MacNeil*, [1978] 2 S.C.R. 662.

[34] The court cannot legitimize an ultra vires exercise of council's power where it merely describes its By-Law in terms of the relevant section. The pith and substance of this By-law in my view is animal welfare and not public safety. To give support to the defence argument in the *Shell* case requires, in my view, that there be some factual or contextual underpinnings which might support Council's best intentions. But as stated earlier, there was no evidence of Council having directed its mind to the causal connection between public safety and the performance of exotic animals. If anything, there is ample evidence to suggest it failed its due diligence obligation which in my view, existed in the circumstances. Expressed another way, what the By-law attempts to do is simply prohibit the activity (exotic animal performances) without responding to the core issue, namely whether public safety was adversely affected..

[35] In examining the evidence, I have also noted that many of the councillors' statements in the transcripts appear to be, and actually are, at odds with the "official" or stated purpose of the By-law. The Applicants bring these statements directly into question. I now consider the role of an elected official and how this court should examine statements made by such an official because an elected official is permitted to demonstrate an opinion or speak out regarding the subject matter before him/her. I have considered in depth the following excerpt from *Old St. Boniface Residents' Assoc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 at pg. 1197:

In my opinion the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded. The Legislature could not have intended to have a hearing before a body who had already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representation at variance with the view, which has been adopted, would be futile. **Statements by individual members of Council, while they may very well give rise to an appearance of bias, will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.** In this regard, it is important to keep in mind that **support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.** [Emphasis added.]

[36] I have also read and considered *Re McGill and City of Brantford* (1980), 111 D.L.R. (3d) 405 (Ont. H.C.J. Div. Ct.). In *Re McGill*, Justice Henry of the Ontario Divisional Court held that elected officials are permitted to be biased to a certain extent as they fulfill their elected duties. Below are several excerpts from Henry J.'s decision, portions of which I have emphasised. I will explain the reason for the emphasis later.

But the real point in each of those cases is that the Court concluded that the Council had "made an irrevocable decision to approve the proposal" and was fatally biased. This has not been demonstrated in the case at bar. **There is no convincing evidence that the members of the Brantford Council did not honestly and fairly open their minds to the objections.** They might be expected to have formed a tentative conclusion, and even to have expressed it. In this sense they were all biased one way or the other, because it was their function to take a position at all stages of development. It must be assumed that the Legislature was aware of this when it required the Council to hold a hearing. **The type of disabling bias that is referred to in the New Zealand cases is one which convinces the mind that because of the irreversibility of the steps taken, a hearing in the true sense of that term cannot be held; it is a sham.** [Emphasis added.]

Bias in the context of this case is a slippery term. Council would perforce have appeared to be in favour of the by-law. That impression must arise from Council's propelling the plan to the stage where a hearing was required under s. 446 [am. 1978, c. 101, s. 16, of the Municipal Act, R.S.O. 1970, c. 284]. That degree of commitment could easily disqualify a judicial tribunal for bias. However, because it is an inevitable element in the process of bringing a by-law to the point where a hearing is required, it does not amount to disqualifying bias. It is an element that is built into the process.

**If, however, during that process Council created by words or conduct an impression that could reasonably be seen as determination to pass or, as here, neglect any due diligence investigation, the by-law notwithstanding what might occur at the hearing, that, in my opinion would be sufficient to invalidate the hearing. That would be disqualifying bias.** [Emphasis added.]

[37] *Re McGill*, supra, was cited with approval by both the Court of Appeal and the Supreme Court of Canada in *Old St. Boniface*, supra, at pgs 1184-1185:

Huband J.A. distinguished Wiswell, supra, on the ground that it was based on a denial of the opportunity to be heard due to failure to comply with statutory notice requirements. He cited with approval the decision of the New Brunswick Court of Appeal in *Oley and Moffatt v. Fredericton* (1984), [57 N.B.R. \(2d\) 361](#), which in turn relied on *Re McGill and City of Brantford* (1980), [111 D.L.R. \(3d\) 405](#) (Ont. Dist. Ct.). That case held that Council can hold preliminary views, but must be able to hear and consider the objections honestly and fairly. Justice Huband concluded, at p. 264:

The learned trial judge specifically found that Councillor Savoie acted in what he believed to be "the best interests of his community". Whether the electors of Old St. Boniface share in his opinion of the public weal is a question that can be answered by them at the next election. But it is not for the courts to prevent Councillor Savoie from taking an open leadership role, for that is

his function as an elected representative responsible for the growth and development of the urban area. It is also his duty, of course, to be receptive to persuasion from those who hold contrary views when he subsequently considers and votes upon issues within committees and on Council itself. There is nothing in the record to suggest that Councillor Savoie functioned beyond the parameters of these lawful expectations.

[38] In the case before me, the Applicant has been permitted to present its Circus to the public upon satisfying the necessary conditions, that is, establishing safety plans and having these plans and procedures approved by the Fire Department and Police Department. It had done this in previous years without incident, and the Circus followed the same procedure in 2002. The difference between 2002 and any previous year was the presence of animal rights activists.

[39] It is important to note that council had approved the permit before Ms. Robinson's letter from Zoo Check arrived, at which time Councillor Zuk requested a report regarding the legality of banning animal acts in the City. The report from Mr. Wilkki, initiated by Councillor Zuk after the receipt of this letter, stated:

It is very clear that council has been pressured by "animal rights" groups/individuals to pass a by-law to restrict animal performances mainly because of the alleged mistreatment of the animals that perform in those shows. A secondary reason put forward has been for the protection of the public.

Mr. Wilkki's report was prepared for the City, and was a frank statement of the circumstances. I accept the report as evidence that the primary reason the report was prepared was to examine the City of Windsor's ability to ban animal acts and in the process thereby legislating for animal welfare.

[40] Importantly, Zoo Check did not contact the Circus or examine the Circus' safety procedures, training methods, or animal living quarters. As such, Zoo Check would not have been privy to the Circus' safety plans or emergency response procedures. The letter sent by Ms. Robinson was written out of concern for the welfare of the animals, not the welfare of the citizens of Windsor. It would certainly appear that this letter spurred counsellor Zuk into action whereby she requested a report from the City administration to explore the legality of banning animal acts in the City of Windsor.

[41] As previously discussed in *Alberta Commercial Fisherman's Assn. v. Opportunity (Municipality)*, even if Council may have had more than one purpose in enacting a by-law and that one of the purposes, even the predominant one, was beyond its power, this does not necessarily render the By-law invalid if it also has an honest purpose that is within its statutory powers. The purpose and content of the letter from Ms. Robinson and Councillor Zuk's subsequent response to that letter together with the report from Mr. Wilkki make it clear that the By-law's primary purpose was to protect the welfare of performing animals. Furthermore, statements made by Council confirm that it knew that enacting a by-law for the purposes of animal welfare was beyond its legislative purview. Because it is within Council's power to

legislate with respect to the safety of its Citizens, this ‘honest purpose’ power would save the by-law if there were a valid and driving purpose behind it.

[42] After consideration of all the evidence before me, I cannot find that the safety of the citizens of Windsor was the driving purpose behind the By-law. I am mindful of the fact that I should only intervene in the ‘clearest of cases’ and if there is a finding of bad faith. While I do believe that Council was acting in the public interest by protecting the welfare of animals and by protecting the citizens of Windsor from animal attack, I adopt the statement from *Pedwell v. Pelham (Town)*, [2003] O.J. No. 1774 (Ont. C.A.) when I say that “Council’s own subjective assessment of the character of their conduct does not resolve the problems of whether they acted in good faith in so doing.” The process by which Council reached its conclusion was flawed and demonstrates an element of bad faith. Specifically, Council did not direct Staff to consult with the Police or Fire Departments regarding the risk to public safety; Council did not direct Staff to contact the Windsor/Essex Humane Society to obtain further information as to their monitoring of the Circus Animals; Council did not examine the rate of injury experienced in rodeos, agricultural fairs, or other activities that are exempted from the By-law; Council did not examine the statistics describing the rate injuries incurred by the public as a result of circus animals. In fact, the only report before Council was the report of April 29, 2002 that recommended the approval of the Circus’ permit application and it had received the approval of the Windsor Police and Fire Services.

[43] Furthermore, statements made by Council members indicate that there was an overriding concern about the welfare of the performing animals. While Council attempted to focus on the issue of public safety, and indeed made statements that they were not satisfied with the safety plans proposed by the Circus that had been accepted in previous years, there was no basis for Council to make these statements. The process by which Council reached its decision to ban the performance of exotic animals was marked by the absence of frankness and impartiality, which are indicia of good faith. (See *Pedwell v. Pelham (Town)*, supra.) I arrive at this conclusion having regard to the fact that elected officials may make their opinions public and continue to keep an open mind about the subject matter.

[44] I find that while Council undoubtedly believed it was acting in the public interest, the manner in which it reviewed the materials in reaching this decision demonstrates a lack of good faith. I must therefore find the By-law invalid.

Therefore the answer to this question is Yes.

## **DISCRIMINATION**

**(B) Does the by-law unlawfully discriminate in the Municipal law sense because it bans circus entertainment using exotic animals and no other entertainment without authority or purpose?**

[45] As Robins J. observed in the Divisional Court reasons in the case of *H.G. Winton & North York* (1978), 20 O.R.(2d) 737,

A municipality can or may discriminate in the passage of its by-laws, but there must be a rationale basis for it, supported by a due diligence

review of the various options open to it. In that case the municipality rezoned. In that case the municipality rezoned a piece of property intended to be used for the construction of a church, to thwart the church's intended use. There was no planning reason put forward to justify this decision, which was in effect based solely on a ratepayer petition, which opposed it. On this basis therefore the Divisional Court found that the rezoning by-law was arbitrary and discriminatory and therefore could not stand. Robins J. also observed that Council had no material before it, apart from that petition, especially no report from the Planning Department including zoning studies, traffic reports and the like.

[46] As was noted by him, every zoning by-law is discriminatory in the sense that the municipality chooses the types of use it will permit in lands under its jurisdiction but there must be a rational basis to warrant such discrimination.

[47] In the case at hand, while we are not dealing with a planning by-law, nevertheless the same principles, in my view, apply

[48] The thrust of the City of Windsor's by-law discriminates between the types of animals and the types of activities that could participate in a circus.

[49] However, in order to attach some justifiable rationale to this, Council was, as has been noted, vested with an obligation of due diligence. In passing the By-law, it ignored this obligation and as well, the past practices that had been developed between the Applicants and the City. In particular, I note:

- (i) The previous years' compliance with the City's request for a Rescue Plan and its approval by the Police and Fire authorities.
- (ii) Compliance with the Parks Department Use Agreement.
- (iii) No previous reported incidents of injury in 18 years of prior operation of the Circus in Windsor.
- (iv) It attempted to discriminate between animals and activities without resort to any information on risk analysis.
- (v) It failed to consider the issue of the causal connection, if any, between exotic animal usage and public safety.
- (vi) It ignored or chose to refrain from undertaking any type of analysis of risk assessment with respect to the exotic animal-public safety issue.
- (vii) Notwithstanding the precise warning given by its own counsel, Mr. Wilkki against acting in the interest of animal welfare and his warning that Council was being "pressured" by the animal

rights activists, it shows to nevertheless receive great masses of arguably inflammatory material and submissions from them without seeking to test the credibility of any of the information.

[50] As noted in my Reasons hereafter, there was no doubt a great deal of information available, statistical and otherwise on the exotic animals-public safety issue, which was considered in the review undertaken by Mr. Stamm for the Applicants.

[51] Furthermore, on the Risk Assessment issue as it relates to exotic animals/public safety, I note in my Reasons under Issue F relating to the *Charter* the commercial insurance market has analyzed this issue and has concluded that the risk of potential spectator injury is so low that it does not even warrant a special insuring risk category or rate, to be charged to its circus operator clients. The circus industry as a whole enjoys the same risk rating as the general commercial insurance market.

[52] Therefore, while I acknowledge that the municipality here can discriminate between various interest groups and issues in the course of passing its by-laws, I adopt the reasoning by analogy of Robins J. in the *Winton* case and find that there must be reasonable and proper grounds to warrant discriminatory distinction between, as here, types of animals and types of performances in which the animals appear.

[53] When the evidence is viewed as a whole, I find that Windsor City Council was cautioned by its counsel about the limitation of its authority to legislate in this area. It effectively chose to ignore this advice. It was influenced no doubt by the passionate pleas by the Animal Rights activists who addressed Council together with the wealth of material which they provided to it. I view this material to be in the main, misleading or inflammatory. Council permitted itself to stray too far off course and went beyond the limit, where deference for its decision could be justified.

[54] Section 236.7 of the Municipal Act specifically provides the authority to council to regulate for public safety, but apart from the occasional utterance about this by one or more councilors during the debates, there is no evidence before me that it even considered the causal connection between exotic animal performances and public safety. Nor did it attempt to inform itself through its administration or by way of retention of outside experts, if necessary, to assess the issue of public safety which is the cornerstone of its legislative authority in the first place. This is the essence of at least the minimal due diligence which in my view Council was obligated in circumstances of this case, to carry out.

[55] For its part, the Applicants produced the evidence of one of its witnesses, Gary Stamm, M.A. an Economist who has education, training and experience in statistics and higher mathematics as applied to economic issues. His research includes econometric modelling and risk analysis. He has produced hundreds of such reports over the last 37 years.

[56] He notes that while the By-law would expressly permit exotic animals to appear at an Agricultural Fair or a Rodeo, there was no analysis undertaken by Council on any potential public safety issues whereas it purports (again without any analysis) to pass its By-law based on public safety. Arguably therefore, Council has discriminated against an activity, which involves exotic animals on a basis other than public safety.

[57] By consulting a number of external sources including the Ontario Coroner's office, the Insurance Bureau of Canada (I.C.B.) and the Canadian Institute for Health Information, Mr. Stamm opined that from a statistical and risk perspective, it is abundantly clear that the incidents of injury in a Circus environment is insignificant when compared, say, to reported dog bites to the general population or, injury or death to snowmobilers in Canada. All of this information and data was similarly available to the City had it chosen to access it, for consideration of the public safety issue which, as noted earlier, is the only basis upon which s.236.7 of the *Municipal Act* permits it to pass such a By-law. However, it chose not to consider this information or at least access it, before enacting the By-law.

[58] This bolsters an inference that its prime reason (the "pith and substance" factor) in passing such a By-law was for reasons of animal health and welfare, which was clearly ultra vires the municipality.

[59] Because the By-law discriminates between animals as compared to differentiating and addressing known risks, there is therefore no sustainable or rationale basis upon which it could deal with the core issue of public safety.

[60] However, if one were to assume that the discrimination between animals was justified, this too fails when one undertakes a review of the material that the activists themselves at Zoo Check and ARK II supplied to Council. Mr. Stamm testified that this material demonstrates that in the past 13 years in North America, there have been only approximately 45 incidents involving elephants, on an average of 3.5 per year in which injury or death ensued, but virtually all of these involved trainers or other Circus employees and not the general public. Similarly there were no reports of death to a member of the public in the same period of time, caused by any of the so-called big cats.

[61] On an annual basis therefore in the past 13 years, an average of 3 members of the public per year, sustained an injury at a circus compared with, in the last 7 years alone, the fact that there were 207 deaths arising out of the operation of snowmobiles in Canada.

[62] Mr. Stamm's evidence included information provided to a United States Congressional Hearing on the Circus Industry in 1999, which demonstrated that approximately 30,000,000 people attended a circus annually. Therefore during the past 13 years the overall attendance at circuses was in the range of 300,000,000 – 400,000,000 people. During this time the 45 incidents referred to occurred, none of which involved members of the public.

[63] Leslie Fox, representing the People for Ethical Treatment of Animals (P.E.T.A.) as well as being the acting Executive Director of Fur Bearer Defenders (to protect fur bearing animals) tendered a great deal of material to Council but admitted that neither she, nor anyone else she knew, ever analyzed any of the information or undertook a due diligence assessment of it. Therefore, as untested and patently misleading and unreliable as the material was, this is what was given to Council to assist in its deliberations She further admitted that the bulk of the information by its very nature, dealt with animal welfare and not public safety.

[64] Therefore in the context of the hearing before Council, it should have been obvious that substantially the entire focus of the animal activists delegations was animal welfare and not public safety. Added to this was the admonition from the City's own lawyer about "pressure"

from those groups. Comments made by several of the members of Council in responding to this issue during the course of its deliberations on the subject would also suggest that notwithstanding a somewhat token recognition of the public safety requirement to legitimize the By-law, Council was already directing its mind to animal rights. Once the Zoo Check letter of June 17, 2002 was received at City Hall and Counsellor Zuk requested on July 8<sup>th</sup> a legal opinion from the City Solicitor on the legality of restricting animal acts (which was provided by Mr. Wilkki on July 25<sup>th</sup> about the same time when a flood of material from the animal activists groups had been received), the wheels were set in motion. The Council was warned about the importance of the public safety issue as being the only basis to properly pass the By-law. The animal welfare/public safety issue was “front and centre” for the Council, but it effectively ignored or refused to acknowledge any obligation of a reasoned and balanced review of the issue; in other words, there was no due diligence performed although a 2 month period passed between Mr. Wilkki’s report of July 25<sup>th</sup> and September 23<sup>rd</sup> when the By-law was passed on three readings that same night. In the interim, the September 20<sup>th</sup> letter from the Applicant’s counsel put these issues squarely before Council. It might have, even at that late date deferred the matter to consider the issue and possibly undertake some independent inquiry. It chose not to.

[65] While Council can discriminate it must do so with the underpinnings of fairness and impartiality. In my view it violated these principals which are the usual indicia of good faith, in passing its By-law.

[66] Viewed from a distance, the By-law would appear to be a reaction to a well-orchestrated lobby group and Council appears to be paying little more than lip service to its fundamental public safety obligation. The consequence of its reaction, in the form of the By-law in question, in my view discriminates in the municipal law sense against the applicants and for this reason I find that the By-law in question is invalid.

Therefore the answer to this question is Yes.

**(C) Did the City violate the principles of fairness in not providing the Circus with a hearing?**

[67] Procedural fairness may be said to require a full hearing when there is an economic interest at stake, or when the business of the applicants is seriously affected. In this instance, the Applicants have failed to demonstrate that not allowing the Circus to bring exotic animals into the City of Windsor would seriously affect its business. The City of Windsor is not the only city in which the Circus performs, and the By-law does not absolutely restrict the Circus from performing using persons and domestic animals instead.

[68] As stated elsewhere in these Reasons the evidence demonstrates that Council did not consider all the evidence in passing its By-law. However, this was not a judicial decision, but rather one made by elected officials as part of an administrative process. As such, the level of fairness is not that which is expected of a Court. Nevertheless there was a minimal expectation of fairness that Council would allow the Circus an opportunity to speak and that Council itself or Administration would research and consider whether there was any causal connection between the performance by exotic animals in Windsor at the Circus, and the safety of its citizens.

[69] Therefore I find that the City did violate the principles of fairness by arriving at a decision again, marked by the absence of frankness and impartiality which are the usual indicia of good faith.

**(D) Is the By-law void for vagueness in that it exempts performances, such as rodeos and agricultural fairs and those for educational purposes, without any attempt to define or establish the meaning of these terms?**

[70] The applicant contends that the by-law is void for vagueness because:

- a) It exempts rodeos and agricultural fairs, which are undefined, without providing any guidance as to whether the ban of exotic animal performances applies to animals being displayed at these events; and
- b) It exempts performances whose “main object is for educational purposes” without any attempt to define or establish what is meant by “educational purposes.”

[71] The Applicants argue that Council enacted a by-law that purports to license and regulate, however, in so doing, Council did not use words with a precision that people could understand and follow. They state that for example, “educational purposes” can have a variety of meanings, including the demonstration of the intellect and abilities of animals.

[72] Moreover, they maintain that the By-law is unclear as to whether exotic animals can perform at agricultural fairs such as which currently occurs. Therefore it is not capable of a clear interpretation or enforcement.

[73] Conversely the Respondent asserts its by-law is not vague in that should the court interpret the By-law by attributing the ordinary meaning rule to the words in it then, there is no ambiguity or vagueness. The ordinary meaning rule states that, absent any reason to object, the ordinary meaning of the words should be used to interpret the legislation.

[74] Additionally the Respondent states that the doctrine of severability should be applied in the event that part of the By-law is found to be vague. Should this doctrine be engaged, the remaining portion, which is not vague, would be of full force and effect. In support of this, the City argues that courts should be loathe to quash an entire by-law if it is possible to sever the valid from the invalid.

[75] The concept of vagueness and the interpretative approach to be taken in determining whether a statute, regulation, or by-law is void for vagueness, has been considered by a number of sources and cases:

[76] Section 10 of the *Interpretation Act*, R.S.O. 1990 c. I.11 states:

- 10.** Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems

to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

[77] In *R. v. Loscerbo* (1994), 92 Man.R. (2d) 263 (C.A.)(WL) the Manitoba Court of Appeal was required to interpret a statute that created a quasi-criminal or regulatory offence with penal consequences. Chief Justice Scott reviewed the current authorities on statutory interpretation, with particular reference to the older doctrine of "strict construction." He defined the current approach to the problem, as articulated by Chief Justice Lamer in *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 at p. 1042:

In interpreting the relevant provisions of an Act, the express words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and purpose of the legislation: ...I am of the view that the Court of Appeal properly proceeded on this basis when it stated that the best approach to the interpretation of words in a statute is to place upon them the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction.

[78] In *R. v. Sandler*, [1971] 3 O.R. 614 at 620, the court stated:

When a municipal council purports to legislate under the powers found in the Municipal Act and thereby creates obligations to be observed by its citizens, the failure to observe which attracts punishment, it is to be expected that the by-law creating such obligations will itself be so explicit that a well-intentioned citizen seeking to observe the provisions of the by-law may, from a reading of the by-law, without the enlargements of its requirement by the order of a municipal servant, be able to satisfy himself that he has complied with its requirements.

[79] In *Good v. Jacob Y. Shantz Son & Co.* (1911), 23 O.L.R. 544 at 552 (C.A.), Garrow, J.A. defined the issue this way:

It is a general principle of legislation, at which superior legislatures aim, and by which inferior bodies clothed with legislative powers, such as... municipal councils...are bound, that all laws shall be definite in form and equal and uniform in operation, in order that the subject may not fall into legislative traps or be made the victim of caprice or of favouritism -- in other words, he must be able to look with reasonable effect before he leaps:

[80] The principles to be applied in construing or interpreting municipal legislation are succinctly summarized by Rogers in his leading text on municipal law, *The Law of Canadian Municipal Corporations*, 2d ed. (looseleaf) (Toronto: Carswell, 1971), Vol. 1, where he states, under the heading "Judicial Construction of By-Laws," at p. 474:

A by-law should be reasonably clear, definite and free from ambiguity in its language; otherwise, defective draughtsmanship may result in its circumvention by a judicial construction at variance with the intention of council or even in the by-law being declared illegal because of uncertainty.

...

The whole purpose of judicial interpretation is to determine the intent of the enacting body when it has not been clearly disclosed by its forms of legislative expression.

...

The intention of the framers of a by-law must be ascertained from the language used and the nature and purpose of the by-law itself. The object is to determine the intent of the council and give effect to it and this is the intent as expressed in the by-law and not what might have been intended but not expressed. The court should construe the by-law so as to give reasonable effect to the object aimed at and policy declared by council. It should be interpreted to give effect to the object and scheme of the by-law, and be construed reasonably having regard to the public interest.

[81] At page 475-476, Rogers continues:

The courts have taken the view that by-laws passed by local authorities are to be benevolently interpreted and are to be supported if possible, unless it can clearly be seen that a by-law is made *without jurisdiction*.

[82] In *Niagara Falls v. Chiu*, (2003), 38 M.P.L.R. (3d) 254, the Ontario Court of Justice considered legislation passed by the city with respect to “body rub parlours.” At issue was whether the impugned legislation was void for vagueness in that the actions described under “body rub” could conceivably include hairdressers, athletic trainers, baby-sitters or other service personnel. Moses, J.P. stated at paragraph 21:

The “void for vagueness” doctrine has a history based in American jurisprudence. In the United States, laws will be deemed to be unconstitutionally vague if the wording of the law:

- a) Fails to give fair notice to citizens of the prohibited conduct; or
- b) Encourages arbitrary enforcement of the law and if found as such, the law will place an individual's life, liberty or property at risk, thus violating the principle of "due process of law," a right guaranteed under the United States Constitution.

[83] Furthermore, in *R. v. Zundel*, (1987), 31 C.C.C. (3d) 97 (Ont. C.A.) the Ontario Court of Appeal outlined the void for vagueness doctrine as well as the vagueness and overbreadth doctrines as they appear in Canadian law at paragraph 25:

Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely inter-related, the wording of a statute may be so vague that its effect is considered to be overbroad.

[84] In *R. v. Canadian Pacific Ltd.*, (1995), 99 C.C.C. (3d) 97 the Supreme Court of Canada directed that in order to determine vagueness, the court must exhaust its interpretative role:

Vagueness must not, however, be considered IN ABSTRACTO, but must be assessed within the larger interpretative context developed through an analysis of considerations such as the purpose, subject-matter and nature of the impugned provision, societal values, related legislative provisions, and prior judicial interpretations of the provision. Only after a Court has exhausted its interpretative role, will it then be in a position to determine whether the provision affords sufficient guidance for legal debate.

[85] Moreover, in *Canada v. Pharmaceutical Society (Nova Scotia)*, (1992), 74 C.C.C. (3d) 289 (S.C.C.) Gonthier, J. for the Supreme Court stated:

Factors to be considered in determining whether a law is too vague include:

- a) The need for flexibility and the interpretive role of the Courts,
- b) The impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate, and
- c) The possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist...

[86] The Supreme Court in the same case also stated, with respect to overbreadth:

...over breadth remains no more than an analytical tool. The alleged overbreadth is always related to some limitation under the *Charter*. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the state, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the *Charter*.

[87] In this case, the Applicants contend that the lack of definition of certain terms renders this by-law invalid. Specifically, they assert that the lack of definition of “rodeo” and “agricultural fair” results in this law being too vague and uncertain. I cannot agree, for the following reasons:

[88] While the stated intent of the By-law here is to protect the citizens of Windsor from harm from performing exotic animals, there exists sufficient ambiguity in the By-law to cause problems.

[89] First and foremost, a circus does not neatly fall under the language of s. 236.7 of the *Municipal Act*, which includes headings of *menagerie* or *circus-riding*.

me·nag·er·ie *n.*

- a) A collection of wild or strange animals, especially for exhibition.
- b) A place where they are kept or exhibited.
- c) A diverse or miscellaneous group.

[90] This definition of menagerie is compatible with most other dictionaries, which I have consulted. Furthermore, while this definition would seem to incorporate a troupe of wild animals, passively displayed, it does not appear to contemplate an active performance by animals, as does “circus”:

cir·cus *n*

- a) A large public entertainment, typically presented in one or more very large tents, featuring exhibitions of pageantry, feats of skill and daring, performing animals, etc., interspersed throughout with the slapstick antics of clowns.
- b) A troupe of performers, esp. a travelling troupe that presents such entertainments, together with officials, other employees and the company’s performing animals, travelling wagons, tents, cages, and equipment.
- c) A circular arena surrounded by tiers of seats, in which public entertainments are held; arena.

rid·ing *v*

- a) To sit on and manage a horse or other animal in motion; be carried on the back of an animal.
- b) To be carried on something.

[91] Furthermore the By-law also contains the word *domestic*, which I will discuss with reference to the purported vagueness of it.

do·mes·tic *adj*

- a) Of or pertaining to the home, the household, household affairs, or the family.
- b) Devoted to home life or household affairs.
- c) tame; domesticated.

- d) Of or pertaining to one's own or a particular country as apart from other countries.
- e) Indigenous to or produced or made within one's own country: not foreign; native.

[92] *Menagerie*, as defined, appears to bring the by-law close to the intentions of s. 236.7 of the *Municipal Act*, however there still exists a degree of uncertainty. A menagerie is defined as a collection of wild or strange animals for exhibition. Nowhere in the definition does it discuss entertainment or feats by those animals.

[93] Moreover, there is no available definition of "circus-riding." However, when considering the definition of the two words together – circus and riding – one ends up with the absurd: one who rides on a large public entertainment or a troupe of performers. This, certainly, is not what was intended under the *Municipal Act*. What must have been contemplated was the act of riding animals within a circus context. The By-law in question does not contemplate circus riding, or the act of riding in a circus, save and except to allow horse and pony riding. Therefore, it would appear that "circus-riding", as it were, does not aid in the examination of the applicability of the By-law.

[94] That said, however, I believe that, when taken in unison, "*menagerie*" and "*circus-riding*" may sufficiently describe a circus – a collection of wild or strange animals for exhibition, during which one may sit on and manage a horse or other animal in motion.

[95] This is a tenuous explanation at best. However, in its entirety, s. 236.7 states that a municipality may pass by-laws "...prohibiting or regulating menageries, circus-riding **and other like shows usually exhibited by showpersons...**" [Emphasis added.] On this basis circuses could be included under the latter category of "other like shows". Therefore, I find that the By-law was validly passed under the *Municipal Act*.

[96] I must next consider whether the By-law is void for vagueness. There are several problems with the By-law which I will attempt to articulate.

[97] The By-law does not define several words, including:

- a) Agricultural fairs;
- b) Rodeos;
- c) Educational purposes; and
- d) Domestic.

[98] This raises several issues. Firstly, I believe that the Applicants' challenge of the meanings of Rodeo and Agricultural Fair are unfounded. Using the principles of statutory interpretation, the meaning of these terms should be determined by looking to their regular usage. This is easily accomplished when one looks at the normal definition and usage of "Rodeo" and "Agricultural" or "Agriculture" used in conjunction with "Fair". The Applicants next argue that it is unknown whether exotic animals are permitted to be used at these shows. The use of exotic animals, however, is not the issue. The By-law does not purport to regulate the use of exotic animals,

only the use of animals in performances that would cause harm to the public. Therefore I reject the challenge of these words.

[99] “Educational Purposes” is somewhat more troublesome in that the by-law does not explain what is meant by a performance for educational purposes. Again, I do not see any merit to this argument. Generally, the over breadth or vagueness argument will focus on the fact that too many groups’ rights are infringed by a by-law, or that it is over inclusive. Here, however, educational performances are only restricted by the By-law if they include certain animals that allegedly may cause harm to the public. Because the phrase “Educational purposes” may be broadly read, it serves to allow *more exclusions* to the By-law, and not to unduly restrict the freedom of more people.

[100] While counsel for the Applicants did not specifically analyze the word “Domestic”, this term requires a more in-depth examination. The word includes several concepts, some of which are, of the “home” and “tame”. Under s. 3(f)(i) of the By-law, a performance for educational purposes that includes the participation or inclusion of *Felids* may not be carried out, with the exception of the domestic cat. It may be argued that a lion trained for the purposes of appearing in circus-type shows conceivably could fall under the heading of “domestic.” As “cat” may include “any of several carnivores of the family *Felidae*, such as the lion, tiger, leopard, jaguar, etc.”, a tamed lion or tiger would fall under this category.

[101] This analysis seems to fit with the purpose of the By-law, namely, the protection of persons in the City of Windsor from harm from performing animals. If an animal is domesticated or tame, there would be lesser reason to fear that such an animal would pose a threat to the public.

[102] Therefore, a circus which involves the performance of domesticated lions and/or tigers, while probably not the intention of city council, might be legal under the By-law. If this were the end of this issue, I believe my conclusion would be that, while the by-law is flawed, it is not void for vagueness. In fact, it is specific enough to allow for only the performance by domesticated animals.

[103] Unfortunately, however, the issue does not end there. The question becomes, what then, is the result, regarding the owner of a dog or cat that is foreign in nature (a Siamese cat or Irish Setter), or one that that is not tamed or domesticated? Surely, a puppy is neither tame nor domesticated. Simply watching such a puppy nip and tug at its owner could be described as a performance. (Note that performance does not require any sort of remuneration under the By-law). Furthermore, would a Doberman Pinscher, indigenous to Germany, and therefore not a domestic dog, be prohibited from exhibiting a display of sitting for a bone or shaking a paw, if this were otherwise considered by some to be a form of entertainment?

[104] The exact definition of domestic cannot be derived from the By-law alone. The word “domestic” is used pervasively throughout the By-law, in different contexts. For example, in clause 3(d): “Magic acts using birds, domestic dogs, domestic cats, or rabbits”. This list includes two unclassified categories of animals – birds and rabbits. It is, therefore, lawful for a magician to use a Peregrine Falcon, Bald-Headed Eagle, or Canada goose in a magic act and he or she is not restricted to using pigeons. Furthermore, the rabbit need not be tame – it may be a

jackrabbit or hare. It is impossible to discern what meaning should be attributed to “domestic” using the doctrine of *eiusdem generis*, as these categories are inherently not “of the same kind”.

[105] While “domestic” is also used in other areas of the By-law, it is of no help. It states that domestic cats and domestic dogs are an exception to the By-law, as are domestic cat and dog shows.

[106] Therefore, because the word domestic is not defined, sections of this by-law become void for vagueness – namely sections: 3(d); 3(f)(i); 3(f)(ii); and 3(g).

[107] Consequently, it must be determined whether or not these sections could be severed from the By-law. Had I not found that the By-law was otherwise invalid for the reasons stated above and for reasons to follow, these sections could be severed from it, as it would not have been sufficiently affected to render it void for vagueness in its entirety.

Therefore the answer to this question is NO.

**(E) Is the By-law, in pith and substance, an attempt to regulate public morality by banning entertainment with exotic animals and as such involve the exercise of the criminal law power exclusively vested in the Parliament of Canada pursuant to s. 91(27) of the *Constitution Act, 1897*?**

[108] The Applicants argue that the “pith and substance” of the By-law can be ascertained by examining the background and circumstances surrounding the enactment, and such analysis leads to the conclusion that the by-law is an attempt to regulate public morality. Therefore they argue the City has improperly exercised a criminal law function, which is beyond its jurisdiction because pursuant to s. 91 of the *Constitution*, it is solely within the ambit of Parliament.

[109] By s.446 of the *Criminal Code*, it is an offence to cause pain, injury, or suffering to an animal or bird. The Applicants contend that the impugned by-law is really seeking to end any suffering to exotic animals by prohibiting the performances by them.

[110] The City’s position, put succinctly, is that the By-law was enacted *intra vires* the municipality’s legislative power, and the fact that the By-law contemplates moral considerations is not a reason to declare it invalid.

[111] The *Municipal Act*, R.S.O. 1990, c. M.45, s. 102, at the relevant time stated:

**102.** Every council may pass such by-laws and make such regulations for the health, safety, **morality** and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act and for governing the conduct of its members as may be deemed expedient and are not contrary to law. [Emphasis added.]

...

236. A council of a local municipality may pass by-laws:

...7. For prohibiting or regulating and licensing exhibitions of wax works, menageries, **circus-riding**, and other like shows usually exhibited by showpersons, and for regulating and licensing roller skating rinks and other places of like amusement, and merry-go-rounds, switchback railways, carousels and other like contrivances, and for imposing penalties not exceeding the amount of the licence fee on offenders against the by-law, and for levying the same by distress and sale of the goods and chattels of the showperson or proprietor, or belonging to or used in such exhibition or show whether owned or not owned by such showperson or proprietor. [Emphasis added.]

- (a) A licence shall not be granted for any such exhibition or show to be held on the days of the exhibition of any district or township agricultural society, within 275 metres from the grounds of the society, or for any such exhibition or show in or in connection with which gambling is carried on or goods, wares or merchandise are sold or trafficked in. R.S.O. 1990, c. M.45, s. 236, par. 7; 1996, c. 1, Sched. M, s. 20 (3).

[112] In *Stadium Corp. of Ontario Ltd. v. Toronto (City)*, (1992), 10 O.R. (3d) 203 (Div. Ct.) the Court quoted with approval *R. v. Fink* [1967] 2 O.R. 132 (H.C.J.):

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.

[113] Subsequently in *Rio Hotel v. New Brunswick Liquor Licensing Board*, [1987] 2 S.C.R. 59, the Supreme Court of Canada upheld the traditional view that provinces have the right under the division of powers under the Constitution Act, 1867, to enact regulations in the nature of police or municipal regulation of a merely local character to preserve in the municipality, peace and public decency, and to repress drunkenness and disorderly and riotous conduct.

[114] The issue before the Supreme Court of Canada in *Rio* was whether conditions regarding acceptable levels of nudity and the rules for staging like events, that were attached to licences granted by the Liquor Licensing Board trespassed on the federal criminal power. The basis for the argument was that there were similar provisions in the *Criminal Code* that dealt with nudity and indecent or obscene performances in theatre, and as such, the conditions as legislated by the province infringed on the criminal power. In rejecting these arguments, Dickson C.J.C. enunciated a two-stage inquiry. First, it was necessary to classify the legislation either as a valid provincial Act or a colourable attempt to legislate on matters restricted to Parliament. In so doing, Dickson C.J.C. was required to classify the "matter" of the impugned

law. Secondly, it was necessary to determine to what extent the legislation conflicted with validly enacted federal law, in this case the *Criminal Code*. In particular, the paramountcy doctrine provides that to the extent that validly enacted provincial law is in direct conflict with validly enacted federal law, the provincial legislation is inoperative.

[115] In *Rio*, the Court held that the legislation was *intra vires* the province, and that there was no direct conflict between the licence conditions precluding nude entertainment and various provisions of the *Criminal Code*, notwithstanding some overlap. The double aspect doctrine, which provides that federal and provincial Legislatures may create laws that overlap to some extent provided that there is no direct conflict in the application or enforcement of the respective laws, was held to be applicable in *Rio Hotel*, *supra*. In the end, the provincial regulatory scheme relating to the sale of alcohol in the province could operate concurrently with the federal *Criminal Code* provisions without difficulty.

[116] In *Re Ontario Adult Entertainment Bar and Municipality of Metropolitan Toronto*, [1997] O.J. No. 3772 (C.A.), the Ontario Court of Appeal had to determine whether a by-law which addressed “public concerns for the health and safety of the public and the women employed in these businesses” engaged the paramountcy doctrine as it was alleged to have encroached on the criminal law power. The appellant in *Re Ontario* argued that *Rio*, *supra*, had to be read in light of the Supreme Court decision in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, in which the Court struck down a provincial enactment which provided that certain medical procedures, including abortion, could not be performed outside of hospitals.

[117] Finlyson J.A. in *Re Ontario*, *supra*, distinguished Sopinka J.’s decision in *Morgentaler*. In *Morgentaler*, the provincial legislation was “virtually indistinguishable” from that used by the *Criminal Code* in describing abortion. Accordingly, the by-law in *Morgentaler* was held to be regulating morality and was clearly, in pith and substance, a criminal law enactment. In the *Re Ontario* case, however, Finlyson J.A. held that the impugned by-law was enacted for valid provincial objects, namely the regulation of business in the interests of health and safety, and as well as the prevention of crime. The Court here held that the B-law was regulatory and could not be said to be an attempt to legislate over morality, although an ancillary effect of that regulation was to touch on matters of morality.

[118] In accordance with Dickson’s analysis in *Rio*, I must first classify the legislation either as a valid provincial Act or a colourable attempt to legislate on matters restricted to Parliament. In doing so, I must examine the pith and substance of the legislation. With this in mind, it is helpful to use the Windsor Council’s debates as guidance, as Courts often refer to Hansard when attempting to determine Parliament’s intention. In this case, there is conflicting evidence as to the real intention of Council. Some statements made, clearly indicate an intention to legislate with respect to the welfare of the animals, while others indicate an intention legislate with respect to the safety of the spectators. The second is firmly within the ambit of the Council, while the first is *ultra vires* council.

[119] In the case at hand, as in *Stadium Corp.*, *supra*, 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, s.102 of the

*Municipal Act*, as it then was, allows for limited regulation of public morality as it relates to the residents of a municipality.

[120] In *McNeil v. Nova Scotia (Board of Censors)*, [1978] 2 S.C.R. 662, Ritchie J. for the Supreme Court of Canada stated:

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.

[121] In *Stadium Corp., supra*, A. Campbell J. stated at p. 211:

The by-law is a regulatory enactment that 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*.

[122] A. Campbell J. further stated at p. 211:

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.

[123] As such, although the By-law in question does touch on public morality, being the humane treatment of exotic animals, the By-law, in and of itself, does not appear to infringe on the federal criminal law power. The By-law also appears not to condemn or punish ill treatment of animals and likewise it should not be found unconstitutional on this ground. Should it be found that Council did intend to regulate the treatment of animals, then the By-law usurps the federal criminal power by attempting to sanction such behaviour, and as such, the document of paramountcy would make it unconstitutional.

[124] However, in the text *Municipalities and Canadian Law: Defining the Authority of Local Governments* (Saskatoon, Saskatchewan: Purich Publishing, 1996) Felix Hoehn suggests at pp. 165-166 that:

Even in those jurisdictions where a general power to prohibit a land use is expressly conferred, the prohibition of a use may still be ultra vires if it is discriminatory or in bad faith. Similarly, if a general ban of a use is motivated by considerations of morality, then it may be ultra vires as an infringement of

the criminal law power. One might, for instance, speculate that an absolute prohibition of strip clubs may be motivated more by moral objections to the use than by objections strictly related to land use planning.

[125] This excerpt was cited with approval in *Konakov*, supra. In the case before me there is ample evidence that the by-law was primarily motivated by considerations of animal welfare and an examination and assessment of any evidence to support the public safety purpose of s.236(7) was virtually ignored by Council in reaching its decision. Therefore, in accordance with my earlier discussion of the evidence, I find that the resulting ban on the performance of circus animals was primarily (or in pith and substance) motivated by considerations of morality, and is therefore ultra vires Council as an infringement of the criminal law power.

Therefore the answer to this question is Yes.

**(F) Does the By-law contravene s. 2(b) of the Charter? If so, is the by-law saved by s. 1 of the Charter?**

[126] The Applicants submit that performances using animals constituting a unique form of artistic expression, is therefore a protected form of expression under the *Charter*. Further, they argue that the nature of that expression, being economic, does not remove the activity from the category of a constitutionally protected expressive activity.

[127] The Respondent relies on *Stadium Corp. of Ontario Ltd. v. Toronto (City)* (1992), 10 O.R. (3d) 203 (Div Ct.). It is important to note that the Ontario Court of Appeal did not make any pronouncements on the *Charter* issue at the appellate level as Grange J. stated “I believe we should not pronounce upon it because, as Mr. Lepofsky has argued and the Supreme Court of Canada has held, constitutional issues should not be addressed unless required for the resolution of the issues.” Furthermore, the Divisional Court in *Stadium Corp.* noted that although the Applicant in that case argued that the by-law was passed to prevent the dissemination of an intellectual message, it adduced 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. Such is not the case here. The Applicants here have provided evidence and expert opinion that the Circus is a culture best viewed through the expressive performances of both its human and animal performers. As such, there is no basis on which I should accept as final the Divisional Court decision of *Stadium Corp.* Nor should I rely on a judgment that was overturned at the Appellate level where the issue at the heart of this case was not examined by that Court.

[128] There are several reasons and rationales for guaranteeing the freedom of expression. First and foremost is the protection of expression in its role as an instrument of democratic government. Peter Hogg mentions other rationales for the constitutional protection of freedom of expression in the text *Constitutional Law of Canada*, 4<sup>th</sup> ed. (Toronto: Carswell, 2002) at pp. 995-996 and those include the protection of freedom of expression as an instrument of truth, and as an instrument of personal fulfilment.

[129] In *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927 at p. 977, the majority of the Supreme Court of Canada stated:

...(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated...

[130] Where government action is challenged under s. 2(b), the first step that the court must take is to ascertain whether the activity for which *Charter* protection is being claimed, may properly be characterized as falling within freedom of expression. Thus, I must determine whether a circus conveys or attempts to convey a meaning, having expressive content which *prima facie* falls within the scope of a guarantee. The evidentiary burden lies with the Applicants to establish that the activity of possessing and displaying and performing with exotic animals is "expression" within the meaning of the *Charter*, s. 2(b), in the sense that it conveys meaning or a message which has been suppressed by the by-law.

[131] The Supreme Court of Canada considered the meaning of the term "expression" in *Irwin Toy*, supra, stating at p. 968; "Activity is expressive if it attempts to convey meaning." In *Constitutional Law of Canada*, supra, Peter Hogg expands on this definition stating that because most human activity combines expressive and physical elements, very little activity will not be protected by the *Charter*. In fact, as stated in *Irwin Toy*, supra, only activity that is "purely physical and does not convey or attempt to convey meaning" will not be protected. Hogg continues stating at p. 968, "Obviously, all forms of art are sufficiently communicative to be protected: novels, plays, films, paintings, dances, and music."

[132] Moreover, the principle of content neutrality whereby s. 2(b) protects expression regardless of its message, means that s. 2(b) extends *Charter* protection to activity that is arguably undeserving of protection. See *R. v. Zundel*, [1992] 2 S.C.R. 731.

[133] In *605715 Saskatchewan Ltd. v. Saskatchewan (Liquor and Gaming Licensing Commission)* (1999), 192 D.L.R. (4<sup>th</sup>) 150, leave to appeal dismissed, [2000] S.C.C.A. No. 555, a corporation operated a nightclub in which female dancers disrobed until they were entirely nude. This activity violated s. 54(1)(b) of The Alcoholic Control Regulations, 1994, R.R.S. c. A-18.01, Reg. 3, which stipulated that it was a term of every liquor permit that the permit holder not allow a striptease performance on the premises to which the permit related. The corporation's liquor licence was suspended as a result. While the suspension was ultimately upheld, the Saskatchewan Court of Appeal held that nude dancing was a *Charter* guaranteed expressive activity, stating:

The Supreme Court of Canada has consistently held the guarantee of freedom of expression must be given a generous interpretation. In *Libman v. Quebec (A.G.)*, [1997] 3 S.C.R. 569 at 591-592, 151 D.L.R. (4<sup>th</sup>) 385, Cory J. said: The Court favours a very broad interpretation of freedom of expression in order to extend the guarantee under the *Canadian Charter* to as many expressive activities as possible. Unless the expression is communicated in a manner that excludes the protection, such as violence, the Court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(b) of the *Canadian Charter*.

[134] Later in *R. v. Guignard*, [2002] 1 S.C.R. 472, the court confronted the issue of commercial expression where it stated at page 483:

In applying s. 2(b) of the *Charter*, this Court has recognized the substantial value of freedom of commercial expression. The need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information. Thus, in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 766-67, this Court rejected the argument that commercial speech was not subject to the constitutional guarantee:

[g]iven the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the *Canadian Charter* should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the *Charter*.

[135] The Supreme Court continued at page 484:

The decisions of this Court accordingly recognize that commercial enterprises have a constitutional right to engage in activities to inform and promote, by advertising. As we know and can attest, sometimes with mixed feelings, the ubiquitous presence of advertising is a defining characteristic of western societies. Usually, it attempts to convey a positive message to potential consumers. However, it sometimes involves comparisons and may even be negative. On the other hand, consumers also have freedom of expression. This sometimes takes the form of "counter-advertising" to criticize a product or make negative comments about the services supplied. Within limits prescribed by the legal principles relating to defamation, every consumer enjoys this right. Consumers may express their frustration or disappointment with a product or service. Their freedom of expression in this respect is not limited to private communications intended solely for the vendor or supplier of the service. Consumers may share their concerns, worries or even anger with other consumers and try to warn them against the practices of a business. Given the tremendous importance of economic activity in our society, a consumer's "counter-advertising" assists in circulating information and protecting the interests of society just as much as does advertising or certain forms of political expression. This type of communication may be of considerable social importance, even beyond the merely commercial sphere.

[136] Generally, the term "expression" embraces all content of expression irrespective of the particular meaning or message sought to be conveyed and no matter how offensive and obnoxious the message. Evidence led by the Applicants indicates that circus life constitutes a distinctive culture, one aspect of which is the unique bond and integration between humans and different species of animals. Jennifer Johnson, an anthropologist who has experience travelling

with and researching circuses has testified that circus performances with exotic animals “challenge everyday notions about the relationships between humans and animals, evoke emotion and educate spectators as to the intelligence, skills and characters of the animal performers, as well as provide circus performers with the opportunity to express their distinct culture.” Therefore, the activity in a Circus arguably attempts to convey a meaning, and at this point in the analysis, the line is drawn only at the type of activity or expression that incites violence.

[137] The above statement made by Ms. Johnson in her affidavit bears directly on another point; that freedom of expression protects not only the expressor, but also the public, which is the recipient of the expression. (See *Irwin Toy*, *supra*, p.612). Therefore, circus performers have a right to express their distinct culture, as does the general public to experience the fruits of that distinct culture.

[138] As such, I find that circus performances, including those performances featuring animals, are protected under s. 2(b) of the *Charter*.

[139] In my view, the purpose of the by-law here was to restrict expression. Any activity that conveys meaning or that attempts to convey a meaning is protected. (See *Irwin Toy*, *supra*, at p. 607.) Circus performances attempt to convey a meaning, be it the communication of its distinct culture, the process by which animals and humans can co-operate, or human mastery over animals. Any of the above demonstrates an example of an attempted communication of a message to the public and the expression of this message by the performers. Any regulation or law that curbs these performances necessarily restricts that expression. Therefore, I find that the By-law contravenes s. 2(b) of the *Charter* since it denies the Applicants the opportunity of expressing ideas relating to any of the above messages.

[140] Having found that the By-law violates s. 2(b) of the *Charter*, the freedom of expression, I must now determine whether the By-law is saved by s. 1 of the *Charter*. The onus lies on the municipality to justify its restriction. Because s.1 is being invoked by the City of Windsor for the purpose of justifying a violation of the *Charter* protected freedom of expression, a high degree of probability will be required which should be cogent and persuasive to justify such violation to the Court. (See *R. v. Oakes*, *supra*, p.138).

[141] To establish that a restriction is justified, the City of Windsor must determine: (See *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (SCC)).

1. Whether the legislation is trying to achieve a sufficiently important objective to justify limiting a *Charter* right.
2. Three part proportionality test:
  - a. Is there a rational connection between the legislation and it’s objective?
  - b. Is there minimal impairment? (**Main Focus**)
  - c. Overall proportionality?

[142] At page 486-489 of *Guignard*, supra, the Supreme Court Stated:

In *Sharpe*, supra, McLachlin C.J. summarized the onus imposed on the public authority under s. 1 of the *Charter* as follows. To justify the intrusion on free expression, a government must demonstrate, through evidence supplemented by common sense and inferential reasoning, that the impugned law meets the tests set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, and refined in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *Thomson Newspapers Co. v. Canada (Attorney General)*, supra. The goal of the impugned law must be pressing and substantial. The law must be proportionate to the goal in the sense of furthering the goal, being carefully tailored to avoid excessive impairment of the right, and productive of benefits that outweigh the detriment to freedom of expression. (See *Sharpe*, at para. 78; P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at pp. 35-16 and 35-17; H. Brun and G. Tremblay, *Droit constitutionnel* (3rd ed. 1997), at pp. 930-36; M. Rothstein, "Section 1: Justifying Breaches of *Charter Rights and Freedoms*" (1999-2000), 27 Man. L.J. 171.)

In this case, in addition to denying that the constitutional guarantee had in any way been violated, the respondent argued, in the alternative, that its by-law was justified under s. 1 of the *Charter* on the ground that it was designed to prevent visual pollution and driver distraction. The justification process is not limited to the objective defined. The other tests must also be met, including demonstration of a rational connection, minimal impairment and proportionality.

[143] In this case, the purported objective of the By-law is to protect the residents and visitors by prohibiting certain animal performances within its boundaries. As enunciated by Dickson C.J. in *Oakes*, supra, the protection of Windsor's residents and visitors from animal attacks that could otherwise have been prevented is a "pressing and substantial" concern. Further, the security of the public is a "collective goal of fundamental importance." As such, I find that the objective of the By-law is sufficiently important to justify limiting the Circus' s. 2(b) *Charter* right.

[144] However, having found that the objective of the By-law is sufficiently important to justify restricting a *Charter* right, I must now examine the By-law in light of the three-part proportionality test as defined in *Oakes*, supra.

[145] The first element of that proportionality test is determining whether the By-law is "rationally connected" to the objective of the law. As stated in *R. v. Edwards Books and Art* [1986] 1 S.C.R. 103 at p. 139, "The requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to suit its purpose." Furthermore, as stated in *Oakes*, supra, the by-law must not be "arbitrary, unfair, or based on irrational considerations."

[146] At first glance, the By-law appears to be at least connected to the objective that banning the use of potentially dangerous exotic animals from public performances within the

City limits should result in the increased safety of Windsor's residents and visitors. However, in this instance, the By-law has been based on irrational considerations. Council passed the By-law without examining the actual danger, if any, posed to the residents and visitors of the City. As stated in *Constitutional Law of Canada*, supra, Peter Hogg states at p. 891, "The essence of rational connection is a causal relationship between the objective of the law and the measures enacted by the law." In this case, City presented no scientific evidence of any causal relationship between the total prohibition of exotic animal performances in circuses and public safety. Furthermore, counsel for the City concedes that there is no evidence of any harm suffered by a resident or visitor of Windsor by a circus animal. While the Respondent City argues that proof of actual harm is not necessary, I remain unconvinced that sufficient evidence was considered by Council to arrive at the decision to ban the performances in question.

[147] The Applicants' evidence demonstrates to the contrary that, for example, in *North America* in 1999 approximately 30,000,000 people attended circuses with no reported incidents of injury to any patrons whereas in the same year 4,700,000 people suffered a dog bite.

[148] Furthermore, the Commercial Insurance market has analyzed the risk of spectator injury at circus performances and on a risk assessment basis has deemed this risk to be so low as not to warrant a special insuring risk category or rate, to its circus operator clients. In other words, the circus industry enjoys the same risk rating as the general commercial insurance market, as for instance, that rating enjoyed by the operator of a doughnut store against the chance of a customer falling on his business premises.

[149] The Applicants also argue that Council did not consider the comparative risks to the public with respect to rodeo events, agricultural fairs or other of the by-laws exceptions. Simply banning some animals and not others for the purposes of public safety, without either an actual analysis of the potential risk issue, or at least some clear reason to do so based on evidence, does not satisfy the rational-connection test. Therefore I conclude that there is no rational connection between the By-law and its objective.

[150] The second stage of the test, being the minimal impairment issue, also known as least drastic means, requires that the impugned law should impair the right in question "as little as is reasonably possible." (See *R. v. Edwards Books and Art*, supra.) In determining whether the By-law minimally impairs the freedom in question, I must give deference to the legislative choice so long as that choice is within a "margin of appreciation" as defined in *Edwards Books*, supra. which is, according to Hogg in *Constitutional Law of Canada*, supra, at p. 897 "a zone of discretion in which reasonable legislators could disagree while still respecting the *Charter* right."

[151] On the issue of minimal impairment, had Council examined the actual risk and public safety issue using a reasonable degree of evidence and concluded that a risk existed, then this by-law could be considered to have minimally impaired the rights of the Applicants, as it does not ban the Circus outright, only the performance by certain animals. However, Council did not examine actual evidence of injury, nor did it embark on any inquiry to gather evidence to support its conclusion. As there is no rational evidence upon which Councils' decision was based, it cannot be said that this by-law was either a reasonable solution or that it only minimally impaired the Applicants' freedom of expression.

[152] The requirement of proportionate effect is the final step in the three-part proportionality test, which requires, according to Dickson C.J. in *Oakes*, supra, “a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of ‘sufficient importance’”. Lamer, C.J. rephrased this test in *Dagenais v. CBC*, [1994] 3 S.C.R. 835 at p. 889 stating:

...[T]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.

[153] Again, had Council arrived at the decision to ban the performances of exotic animals using sufficiently probative evidence, the effect of this by-law would likely be proportionate to the restrictions placed upon the Circus. The by-law does not prevent the Applicants from expressing the circus culture through the use of non-exotic animal and human performances. Thus, contrary to the Applicants’ submission, the Circus’ freedom of expression is not completely limited and would be proportional to the salutary effects of public safety. However, because the By-law was passed for the ulterior purpose of animal welfare the Respondent City failed to provide at least a reasonable degree of evidence to causally link exotic animal performances to public safety. There was insufficient examination of any evidence to rationally support the secondary purpose of protection of the public and therefore I cannot find a proportional relationship between the deleterious and salutary effects of the measures.

The answer to this question is Yes.

## DISPOSITION

[154] In conclusion, I find that the City of Windsor By-law was *ultra vires* Council and must be struck down for the reasons given. Should I be mistaken with respect to my application of McLachlin J.’s dissent in *Shell*, I find that in any event the By-law violates the Applicant’s s. 2(b) *Charter* right in that there is no rational connection between the By-law and its objective as there is no evidence that the animal performances in question create a danger to the public.

[155] The Applicants shall have their costs. If the parties are unable to agree I may be spoken to.

(Original signed by Richard Gates J.)

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Richard C. Gates  
Justice

**Released:** September 7, 2004

COURT FILE NO.: 03-CV-000781

*ONTARIO*

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

XENTEL DM INCORPORATED, OUTDOOR  
AMUSEMENT BUSINESS ASSOCIATION, TZ  
PRODUCTIONS, AND GARDEN BROTHERS

Plaintiff

- and -

THE CORPORATION OF THE CITY OF  
WINDSOR

Defendant

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**REASONS FOR JUDGMENT**

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Richard C. Gates, Justice

**Released:** September 7, 2004

2004 CanLII 22084 (ON S.C.)