Raoul Blouin *(Applicant) Appellant;*

and

Jean Longtin, in his capacity as a judge of the Municipal Court of Outremont, the Municipal Court of Outremont and the City of Outremont *(Defendants) Respondents.*

1978: October 30; 1978: December 5.

Present: Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Judicial review — Municipal Court — Offence having no existence at law — Evocation and revision — Objection to statement of applicant — Code of Civil Procedure, arts. 93, 846, 847.

Municipal law — Zoning by-law — Parking spaces — City of Outremont, By-law No. 1044-1, ss. 4.1.1.5, 4.1.1.8.

Appellant was convicted by the Municipal Court of Outremont of having used his building, located in the City of Outremont (the City) contrary to the zoning by-law; he was then charged by seven separate informations with having committed the same offence. He prayed the Superior Court to authorize the issuance of a writ of evocation, pursuant to art. 846 *C.C.P.*, against these informations; by the same motion appellant also prayed that the judgment rendered against him be revised. Appellant alleged that the City lacked the necessary powers and that the Municipal Court lacked jurisdiction. The Superior Court refused to issue the writ introductive of suit, and a majority of the Court of Appeal affirmed this decision. In this Court, appellant argued primarily that the offence of which he had been convicted and with which he had been charged did not exist in law. The City, for its part, sought during the hearing to include in the record the transcript of appellant's trial in the Municipal Court.

Held: The appeal should be allowed.

The recourse in evocation or revision consists of two separate procedural stages: authorizing the writ of summons to be issued and rendering judgment on the merits of the case. At the first stage, which is at issue here, the facts alleged must be assumed to be true, and they can only be disputed through the cross-examination of the applicant (art. 93 *C.C.P.*). As the City did not do this, it cannot now produce an exhibit (the transcript) which

was not alleged in applicant's motion and did not form part of the record submitted to the trial judge.

According to the motion, the offence with which appellant is charged results from a breach of the first paragraph of a section of the zoning by-law of the City, which reads as follows:

> Permanent nature of parking spaces:
>
> The parking regulations provided by this section are continuous and compulsory in nature, and shall be in force as long as the building to which they apply continues to exist and the use made of it requires parking spaces under the provisions of this section.

This provision does not constitute an offence; it only contains a statement of principle, which sets forth the two offences mentioned in the second paragraph, and the essential aspects of which are not contained in the informations laid against appellant. The existence of a criminal offence may not be inferred; if the legislator wishes to create an offence, he must do so in clear language. The offence with which appellant was charged was not one that existed under the by-law he was alleged to have violated. Accordingly, appellant should have been granted the authorization to exercise the recourse provided in art. 846 *C.C.P.*. In view of this conclusion, it is not necessary to express an opinion on the other questions.

Sales-Matic, Ltd. v. Hinchliffe, [1959] 3 All E.R. 401, applied; *Cour des Sessions de la Paix v. Ass. Int. des Travailleurs en ponts, en fer structural et ornemental,* [1970] C.A. 512; *François Nolin Ltée v. Commission des relations de travail du Québec,* [1968] S.C.R. 168; *Dickenson v. Fletcher* (1873), L.R. 9 C.P. 1, referred to.

APPEAL against a decision of the Court of Appeal of Quebec,[1] affirming a judgment of the Superior Court which refused to authorize a writ of evocation to be issued. Appeal allowed.

Paul Normandin, Q.C., for the appellant.

Pierre Roy, for the respondents.

The judgment of the Court was delivered by

PRATTE J.—Appellant is appealing against the majority decision of the Court of Appeal of the Province of Quebec (Owen and Bernier JJ.A., with

[1] [1975] C.A. 673.

Brossard J.A. dissenting), which affirmed a judgment of the Superior Court for the district of Montreal (Chateauguay Perrault J.) refusing to appellant the authorization to exercise against respondents the recourse in revision and evocation provided in art. 846 *C.C.P.* with respect to a conviction pronounced by the Municipal Court of the City of Outremont (the Municipal Court) and seven informations laid against him in the said Court.

Appellant was the owner of a residential building in the City of Outremont (the City). In October 1973 he was charged with having, on September 25 of the same year, used this building without its having the number of parking spaces required by zoning by-law No. 1044-1. In March 1974 appellant was convicted of this offence, and sentenced to pay a fine of $50 and costs. In mid-June 1974 appellant was charged, by seven separate informations, with having committed the same offence on June 5, 6, 7, 10, 11, 12 and 13, 1974.

Before the Municipal Court had ruled on the merits of these seven new informations, appellant made a motion to the Superior Court seeking that the issuance of a writ of evocation against the informations be authorized; by the same motion appellant also prayed that the judgment rendered against him by the Municipal Court in March 1974 be revised. In both cases, the recourse is that provided in art. 846 *C.C.P.*:

846. The Superior Court may, at the demand of one of the parties, evoke before judgment a case pending before a court subject to its superintending and reforming power, or revise a judgment already rendered by such court, in the following cases:

1. when there is want or excess of jurisdiction;

2. when the enactment upon which the proceedings have been based or the judgment rendered is null or of no effect;

3. when the proceedings are affected by some gross irregularity, and there is reason to believe that justice has not been, or will not be done;

4. when there has been a violation of the law or an abuse of authority amounting to fraud and of such a nature as to cause a flagrant injustice.

However, in the cases provided in paragraphs 2, 3 and 4 above, the remedy lies only if, in the particular case, the judgments of the court seized with the proceeding are not susceptible of appeal.

In his motion appellant submitted that several provisions of zoning by-law No. 1044-1 were void because they were not within the City's powers; he also submitted that the Municipal Court lacked jurisdiction to decide on the merits of the offences charged because, in issuing a building permit and an occupancy permit, the City had approved the construction and use of the building in its existing condition.

Appellant's first submission was not accepted: all the judges of the Court of Appeal and the trial judge were unanimous in the view that the relevant provisions of the zoning by-law were not void for the reason that they would be in excess of the powers of the City.

As to the second submission respecting the excess of jurisdiction by the Municipal Court, Owen J. expressed the same opinion as the trial judge when he observed:

Basically Blouin has taken the position on the motion for the issue of a writ of evocation that the Outremont Municipal Court has no jurisdiction to hear complaints that he is infringing the By-Law with respect to the number of parking spaces required because he had previously obtained from the City of Outremont a certificate attesting that the building complies with the requirements of the By-Law. This may or may not be a good defence to the complaints but it does not lead to the conclusion that the hearing of such complaints by the said judge involves any violation of the law or any abuse of authority amounting to fraud which would result in flagrant injustice.

The effect of the certificate issued prior to Appellant's occupation of the building, by the City of Outremont under Section 425 of the Cities & Towns Act, is not relevant to the motion for the issue of a writ of evocation.

Bernier J.A., for his part, considered that the Superior Court judgment should be affirmed because no manifest error was disclosed in the Municipal Court decision.

Brossard J.A., contrary to his brother judges, would have allowed the appeal and authorized the issuance of the writ introductive of suit which was sought by appellant; in his view, the [TRANSLATION] "... real crux of the case requires that the Court, and not merely the judge who is asked to issue a writ of evocation, decide, in effect, on the facts".

In this Court, appellant, while not withdrawing the submissions he had made unsuccessfully up to this point, raised two new points of law based on the facts alleged in his motion. First, he argued that the offence of which he had been convicted and those with which he had been charged did not exist in law. Then, he contended that the Municipal Court exceeded its jurisdiction when, for the purposes of its judgment on the information of September 1973, it calculated the number of parking spaces required by by-law 1044-1 on the basis of the number of apartments contained in appellant's building.

The recourse in evocation or revision consists of two separate procedural stages: authorizing the writ of summons to be issued and rendering judgment on the merits of the case. The issue here concerns the issuance of the writ of summons; the second paragraph of art. 847 *C.C.P.* provides as follows:

847. ...

The judge to whom the motion is presented cannot authorize the issuance of a writ of summons unless he is of opinion that the facts alleged justify the conclusions sought.

In *Cour des Sessions de la Paix du district de Montréal v. Association internationale des Travailleurs en ponts, en fer structural et ornemental*[2], Brossard J.A., speaking for the Court of Appeal, clearly set forth the applicable rules, at p. 514:

[TRANSLATION] ... the judge must authorize that the writ be issued if, assuming the facts alleged in the motion for issuance are proven, the conclusions sought are justified in law; otherwise, the judge must refuse to issue the writ.

[2] [1970] C.A. 512.

In *François Nolin Limitée v. Commission des relations de travail du Québec* [3], Pigeon J., giving the opinion of this Court, said at p. 170:

> [TRANSLATION] ... And so that issuance of the writ cannot be obtained on the basis of frivolous allegations, the new Code allows the applicant to be cross-examined on his affidavit (art. 93).

In the case at bar, appellant's motion was accompanied by his affidavit attesting to the truth of the facts alleged in the motion. Respondents did not cross-examine appellant on "the truth of the facts sworn to in the affidavit" (art. 93 *C.C.P.*). It follows, therefore, that for the purposes of this first procedural stage, the facts alleged must be assumed to be true without any further evidence being either necessary or indeed admissible at this stage. There can be no question of considering facts other than those so assumed to be true.

For these reasons, this Court denied the motion made by the City during the hearing for leave to include in the record the transcript of appellant's trial in the Municipal Court pursuant to the first information of October 1973, on which he was convicted. This exhibit was not alleged in applicant's motion and did not form part of the record submitted to the trial judge. To have allowed the City to dispute the truth of the facts alleged in the motion at this stage, other than through the cross-examination of the applicant—which did not take place—would have been to confuse the two procedural stages mentioned above.

The first new ground raised by appellant was that the Municipal Court lacked jurisdiction because the offences with which he was charged, and of which in one case he has been convicted, was not an offence known to law.

The wording of each of the informations laid against appellant is identical except for the date on which the offence was allegedly committed; in each case, appellant was charged with having, on the date specified:

[3] [1968] S.C.R. 168.

[TRANSLATION] used the building situated at 25 Avenue Vincent d'Indy in Outremont, on lots 32-13 and 30-120 of the official cadastre of the parish of Côte-des-Neiges, while the same lacked the parking spaces required by section 4.1.1.5 of By-Law 1044-1, thus having contravened section 4.1.1.8 of By-law 1044-1 of the City of Outremont.

Section 4.1.1.5 of the by-law requires that there be one parking space for each apartment.

Section 4.1.1.8, under which appellant was charged, reads as follows:

[TRANSLATION] 4.1.1.8 Permanent nature of parking spaces:

The parking regulations provided by this section are continuous and compulsory in nature, and shall be in force as long as the building to which they apply continues to exist and the use made of it requires parking spaces under the provisions of this section.

It is therefore unlawful for the owner of a "usage" [customary right] authorized by this by-law to dispense in any way whatsoever with the parking spaces and the loading and unloading spaces required by this section. It is also unlawful for any person, partnership or corporation to use, without complying with the requirements of this section, a building which, because of an alteration that may have been made to it or a subdivision of land, no longer has the required parking spaces.

Any building not in compliance with this by-law in this regard shall be demolished.

The parties differed as to the scope of the first two paragraphs of this section: in appellant's view, each of the two sentences in the second paragraph creates an offence; respondents maintain that the first paragraph also creates an offence, and this is the offence with which appellant was charged.

It has always been acknowledged that the existence of a criminal offence may not be inferred; if the legislator wishes to create an offence, he must do so in clear language: his intention to do so cannot be presumed. Blackstone observed (1 *Bl. Comm.* 88 (Hargr. ed.), note 37):

The law of England does not allow of offences by construction, and no cases shall be holden to be reached by penal laws but such as are within both the spirit and the letter of such law.

In *Dickenson v. Fletcher*[4], Brett J. wrote, at p. 7:

> Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty.

The problem presented here is very similar to that which was the subject-matter of a decision by the Queen's Bench Division in *Sales-Matic, Ltd. v. Hinchliffe*[5], in which the question was whether an offence had been created by a provision of the Act which declared all lotteries to be illegal. Lord Parker C.J., speaking for the Court, said the following at p. 402:

> ... Section 21, which is the opening section of Part 2 of the Act dealing with loteries and prize competitions, is very short and is to this effect:
>
> "Subject to the provisions of this Part of this Act, all lotteries are unlawful."
>
> The sole question is: Do those words, as the magistrates have held, create an offence? ...
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> Section 21 is followed by s.22, which sets out a number of offences in connexion with lotteries. Section 22 (1) is in this form:
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> "Subject to the provisions of this section, every person who in connexion with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere ..."
>
> Then follows a number of things such as printing tickets, selling tickets, using premises, causing or procuring certain matters; and s.22 (1) provides that in all those cases the doer shall be guilty of an offence. The penalties are laid down by s.30, which provides that a person guilty of an offence under any section contained in Part 2 shall be liable on summary conviction and on indictment as there set out.
>
> . . .
>
> Going back to s.21, it is, in general terms, declaring all lotteries to be unlawful. It is, to my mind, a novel way of declaring something to be an offence. One may test it in this way: Always supposing that the intention was to create an offence or offences by those words, what are they? Is it saying that anybody who conducts a lottery or promotes a lottery is guilty of an offence? Is it saying that anybody who partakes in a lottery is guilty

[4] (1873), L.R. 9 C.P. 1.

[5] [1959] 3 All. E.R. 401.

of an offence? It seems to me that the proper construction of the section is that it is a declaration that all lotteries are unlawful, and then, owing to the difficulty of saying what is meant by promoting or conducting or being concerned with a lottery, the legislature goes on, by s.22, to declare a number of matters, which are connected with the promotion and form part of the promotion and conducting of a lottery, to be offences. ... In my opinion, s.21 does not create an offence, and accordingly, this appeal succeeds.

This reasoning must be applied to the case at bar.

The first paragraph of s. 4.1.1.8 of by-law 1044-1 does not constitute an offence: it contains a statement of principle, from which may logically be derived the two offences created by each of the two sentences contained in the second paragraph which uses the words "It is therefore unlawful ..." and "It is also unlawful ..." . If the first paragraph created a general offence, it is hard to see the need to specify the two offences described in the second paragraph, since the latter would necessarily be included in the former. It would also follow that the only purpose of the second paragraph would be to give two specific examples of a general offence that would be described in the first paragraph. This is an interpretation which I do not find acceptable, especially in penal matters.

As the first paragraph does not create an offence, it cannot be used as the basis for the informations laid against appellant.

Two separate offences are created by the second paragraph: they are described in the first and second sentences respectively.

The offence described in the first sentence consists essentially in "dispensing in any way whatsoever with the parking spaces". Clearly, this is not the offence with which appellant is charged: he is charged with having "used the building ...".

The other offence mentioned in s. 4.1.1.8 is that described in the second sentence of the second paragraph:

[TRANSLATION] ... It is also unlawful for any person, partnership or corporation to use, without complying with the requirements of this section, a building which,

because of an alteration that may have been made to it or a subdivision of land, no longer has the required parking spaces.

The offence described in this provision consists of two essential factors: (i) the fact that the building does not have the required number of parking spaces, and (ii) the fact that the lack of sufficient parking spaces is the result of a subdivision of the land or alterations to the building.

For there to be an offence, the lack of sufficient parking spaces must result from an alteration to the building or a subdivision of the land; the use of a building not having the required number of parking spaces is not by itself an offence.

None of the informations laid against appellant mentioned even indirectly this second feature of the offence, dealing with the cause of the lack of parking spaces. Appellant was charged with having contravened s. 4.1.1.8 of by-law 1044-1; the offence with which he was charged under the informations was not one that existed under the by-law he was alleged to have violated.

Under such circumstances, appellant should have been granted the authorization to exercise the recourse in revision and evocation provided in art. 846 *C.C.P.*

In view of this conclusion on the merits of the first submission of the appellant, it is not necessary for me to express any opinion on the other questions discussed before the Court.

I am therefore of the opinion that the decision of the Court of Appeal and the judgment of the Superior Court should both be reversed, and that the issuance of the writ introductive of suit in evocation and revision should be authorized; I am also of the opinion that appellant is entitled to his costs against the City of Outremont in this Court and the Court of Appeal, but costs in the Superior Court should follow the outcome of the case.

Appeal allowed.

Solicitors for the appellant: Gurman, Marcovitch & Aumais, Montreal.

Solicitors for the respondents: Viau, Bélanger, Hébert, Mailloux, Pinard, Denault & Legault, Montreal.