1957
*Mar. 15
Oct. 1
1958
**Jun. 9, 10
***Dec. 18

VIC RESTAURANT INCORPORATED (*Plaintiff*) ..... APPELLANT;

AND

THE CITY OF MONTREAL (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Constitutional law—Municipal corporations—By-laws—Validity—Licensing of restaurants and places of amusement—Licence requiring approval of chief of police—Whether delegation of power of municipality—Charter of the City of Montreal, ss. 299, 299a, 300, 300(c).

Courts—Supreme Court of Canada—Jurisdiction—Mandamus for issuance of licence to operate restaurant—Licence would have expired prior to notice of appeal—Restaurant sold prior to argument in this Court—Whether lis remains between parties.

By-law no. 1862 of the City of Montreal, which provides for the licensing of restaurants and establishments licensed by provincial authorities to sell liquor, and which requires the prior approval of, among others, the director of the police department, is not within the powers of the City under its charter. (Taschereau, Fauteux and Abbott JJ., *contra.*)

The plaintiff company applied to the City of Montreal for a renewal of its permits to sell liquor and to operate a restaurant for the year 1955-56, as required by by-law 1862. The director of police refused his approval and the permits were not granted. The plaintiff applied for a writ of mandamus and contended that the by-law was *ultra vires*. The application was dismissed by the trial judge and by the Court of Appeal.

The appeal to this Court was first argued in March 1957, and a rehearing was ordered in October 1957. The business was sold prior to the second argument in this Court. The restaurant had been permitted to operate without a licence in the years 1955, 1956, 1957, however, some ten charges had been laid against it and were held in abeyance pending the determination of this appeal. Leave to amend was asked for the years 1955-58 inclusive.

Held (Taschereau, Fauteux and Abbot JJ. dissenting): The plaintiff was entitled to an order directing that a permit be issued for the year 1955.

Per curiam: The motion for leave to amend the conclusions of the petition should be dismissed.

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*PRESENT: Taschereau, Rand, Locke, Fauteux and Abbott JJ.

**PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson JJ.

***The Chief Justice, owing to illness, did not take part in the judgment.

Per Rand, Locke, Martland and Judson JJ.: The City of Montreal, in regards to the granting or withholding of licences, has the powers and only the powers vested in it by its charter. That charter does not authorize or purport to authorize the delegation to the director of police or to anyone else of the power to fix the terms upon which permits may be granted. The by-law is therefore in this respect beyond the powers of the council. The good government clause in s. 299 of the charter is no warrant for what is being attempted, since ss. 299 and 300 have granted specific authority to the council in respect of the matter.

The by-law contains no directions to the director of police as to the manner in which he is to exercise the discretion given to him and accordingly he could refuse to give his approval upon any ground which he might consider sufficient. For the council to say that before the licence is to be issued the director, in his discretion, may prevent its issue by refusing approval is not to fix the terms but is rather an attempt to vest in the director power to prescribe the terms upon which the right to a licence depends.

The fact that by-law 247 defines the duties of the members of the city police force to include, *inter alia,* the duty to cause the public peace to be preserved and to see that all the laws and ordinances are enforced cannot assist the position of the city in the matter of the delegation of the power vested in council. Nor is the matter affected by the language of s. 57 of the *Interpretation Act* which provides that "the authority to do a thing shall carry with it all the powers necessary for that purpose" since the power to delegate quasi-judicial functions in the matter of licences was not given to the council.

Bridge v. The Queen, [1953] 1 S.C.R. 8, followed; *Merritt v. Toronto,* 22 O.A.R. 205; *Re Kiely,* 13 O.R. 451; *Re Elliott,* 11 Man. R. 358; *Hall v. Moose Jaw,* 12 W.L.R. 693, and *Rex v. Sparks,* 18 B.C.R. 116, approved.

As the sole ground of the refusal was that the director of police had refused to give his approval, the plaintiff was, as of the date of its application for a writ of *mandamus,* entitled to an order directing that a permit be issued for the year 1955.

The fact that the licence year for which the permit was sought had expired before the appeal came before this Court did not affect its jurisdiction to declare the rights of the plaintiff. *Archibald v. De Lisle,* 25 S.C.R. 1; *Coca-Cola Co. v. Matthews,* [1944] S.C.R. 385; *Regent Taxi & Transport v. Congrégation des Petits Frères de Marie,* [1932] A.C. 295, referred to.

Per Rand and Cartwright JJ.: The portions of the by-law which require approval of the director of police are fatally defective in that no standard, rule or condition is prescribed for the guidance of the director in deciding whether to give or to withhold his approval. The effect of the by-law is to leave it to the director, without direction, to decide whether an applicant should or should not be permitted to carry on any of the numerous lawful callings set out in the by-law. The suggestion that because the director is charged with the duty of maintaining the public peace and enforcing the penal laws of the land he is thereby sufficiently instructed as to the standard to be applied and the conditions to be looked for in deciding whether to grant his approval of an application, cannot be accepted.

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The rule that this Court will not entertain an appeal if, *pendente lite*, the subject-matter has ceased to exist or other circumstances have arisen by reason of which the Court could make no order effective between the parties except as to costs, is one of practice which the Court may relax. In the special circumstances of this case, the appeal should be entertained.

Per Taschereau, Fauteux and Abbott JJ., *dissenting:* There was no delegation by the council of its legislative authority. The discretion as to what the by-law shall be should not be confused with the discretion it conferred as to its execution. In order to give full effect to ss. 299 and 300 and to extend and complete the same so as to secure full autonomy for the city and to avoid any interpretation of such sections or their paragraphs which might be considered as a restriction of its powers, the city is authorized by s. 300(*c*) to adopt, repeal or amend and to carry out all necessary by-laws concerning the proper administration of its affairs. This section derogates from the strictness of the principle generally applicable and referred to in *Phaneuf v. Corporation du village de St. Hugues,* 61 Que. K.B. 83.

The by-law gives to each director a precise direction as to the considerations which should guide him in the exercise of the authority conferred and the discharge of the duty imposed upon him by the by-law, and these considerations are none other than the special considerations presiding at the establishment of each department and governing its maintenance and effective operation. It is therefore not open to the director of a department to decide arbitrarily in the case of a request for a permit, and no exception is made in the case of the police department.

There was no conflict between by-law 1862 and the Quebec *Alcoholic Liquor Act.*

The finding of the Courts below that the refusal to approve was not arbitrary, unjust or discriminatory was not shown to have been erroneous.

There was no substance in the objection that the refusal was made by the assistant director of police.

In the present case, the question as to whether this Court should entertain the appeal is not limited to ascertaining whether the Court should adopt the practice followed in cases where there is only a question of costs to be determined but includes as well that of deciding whether the Court has the power to render a judgment different from that which the Court of Appeal could have rendered in similar circumstances. Had the fact of the sale of the restaurant been established before either the Superior Court or the Court of Appeal, as it was before this Court, those Courts would have been powerless to adjudicate on the merits of the original issue.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Prévost J. Appeal allowed, Taschereau, Fauteux and Abbott JJ. dissenting.

J. Ahern, Q.C., for the plaintiff, appellant.

[1] [1957] Que. Q.B. 1.

L. Tremblay, Q.C., and *T. Lespérance,* for the defendant, respondent.

The judgment of Taschereau, Fauteux and Abbott JJ. was delivered by

FAUTEUX J. (*dissenting*):—En avril 1955, la compagnie appelante exploitait un café-restaurant au n° 97 est, de la rue Ste-Catherine, à Montréal, ayant droit d'y servir des liqueurs alcooliques suivant un permis émis pour son bénéfice par la Commission des Liqueurs de Québec, au nom de Vincent Cotroni, l'un des directeurs de la compagnie et, à toutes fins pratiques, maître de l'établissement. Avant la fin du mois, date d'expiration des permis annuels exigés et accordés par la cité pour cette exploitation, l'appelante demanda au directeur des finances de l'intimée de nouveaux permis couvrant l'exercice financier 1955-1956, soit (i) le permis exigé par la section 20 du règlement 1862 pour toute personne qui détient un permis de la Commission des Liqueurs pour la vente des liqueurs alcooliques, et qui de fait en vend, pour consommation sur les lieux et (ii) le permis exigé par la section 8 du même règlement pour un restaurant. Cette demande de l'appelante fut accompagnée de l'offre du montant prescrit pour chacun des cas. Le règlement 1862 vise quelque soixante-et-dix cas, exercice d'activités, usage de choses ou garde d'animaux ou d'articles, où la cité exige un permis dont la demande doit, suivant la nature du permis recherché, être soumise à la considération d'un ou plusieurs services établis par la cité, soit les services d'urbanisme, de santé, d'incendie, de police ou de la division des marchés. L'article 2(B) du règlement statue qu'aucun permis ne peut être émis par le directeur des finances à moins qu'il n'obtienne l'approbation écrite de chacun des directeurs des services concernés. Le directeur du service de la police, l'un des services concernés en l'espèce, refusa son approbation et les permis ne purent être accordés.

L'appelante s'est alors adressée à la Cour supérieure par voie de *mandamus*. Alléguant dans sa demande que le règlement est en partie *ultra vires* de la cité, et que ce refus d'approbation du directeur du service de la police était illégal et arbitraire, elle a conclu à ce que le bien-fondé de ces allégations soit reconnu au jugement et qu'il soit

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enjoint à la cité et à ses officiers d'émettre les permis demandés. La cité plaida particulièrement la validité du règlement et la légalité du refus d'approbation. La Cour supérieure a rejeté les prétentions de l'appelante et cette décision fut confirmée à l'unanimité par la Cour d'appel[1]. D'où le pourvoi devant cette Cour.

A la suite d'une première audition, cette Cour formula trois questions sur lesquelles elle ordonna une réaudition. Cette réaudition eut lieu les 9 et 10 juin derniers. La première se lit comme suit:

> In view of the fact that the licence period in respect of which the *mandamus* was sought would have expired on May 1, 1956, prior to the giving of the notice of appeal to this Court, is there any issue remaining between the parties other than as to costs?

Suivant la jurisprudence citée par M. le Juge Taschereau dans *Switzman v. Elbling and Attorney General of Quebec*[2], aux pages 290 *et seq.*, cette Cour refuse d'entretenir un appel dans les cas où il ne reste autre chose à déterminer entre les parties qu'une simple question de frais; et c'est là la raison d'être de cette première question. La pertinence de cette question est devenue subséquemment encore plus manifeste en raison d'un fait posé par l'appelante elle-même quelque temps seulement avant la réaudition, soit la vente de son exploitation à Pal's Café Inc.

Vu l'avis de la majorité des membres de cette Cour sur ce premier point et que, dans mon opinion, l'appel doit, de toutes façons, être rejeté sur le mérite, je ne vois aucune utilité à discuter de la question. Je dirai, cependant, qu'à mes vues, il ne fait aucun doute qu'entre les parties,—et c'est ce qui doit nous guider dans la détermination de la question,—il ne saurait rester devant la Cour, en raison surtout de l'acte posé par l'appelante elle-même, soit la vente de son établissement, qu'une simple question de frais. Il ne s'agit pas ici d'une référence. Et les questions au mérite, y compris celle de la validité du règlement, sont clairement, dans la présente cause, devenues, entre les parties, des questions purement académiques.

Suivant la *Loi de la Cour Suprême,* S.R., c. 139, cette Cour peut prononcer le jugement et décerner l'adjudication ou autre ordonnance que la Cour, dont le jugement est

[1] [1957] Que. Q.B. 1.
[2] [1957] S.C.R. 285, 7 D.L.R. (2d) 337, 117 C.C.C. 129.

porté en appel, aurait dû prononcer ou décerner. L'art. 541 du *Code de procédure civile* prescrit qu'un jugement doit contenir les causes de la demande et doit être susceptible d'exécution; et l'art. 996, relatif au jugement final en matière de *mandamus,* statue que si la requête est déclarée bien fondée, le juge peut ordonner l'émission d'un bref péremptoire, enjoignant au défendeur de faire l'acte requis. Il me paraît bien évident que si le fait de cette vente s'était présenté et avait été établi, comme il l'a été devant cette Cour, au temps où la Cour supérieure ou la Cour d'appel étaient saisies de cette cause, que ces Cours n'auraient pu adjuger que sur la question de frais. Le fait de cette vente fait disparaître la raison de la demande de *mandamus* et la demande de *mandamus* elle-même. Dans le cas qui nous occupe, la question ne se limite pas à savoir si cette Cour doit adopter la ligne de conduite suivie dans les cas où il n'y a qu'une question de frais à déterminer, mais comprend également celle de savoir si la Cour a le pouvoir de rendre un jugement autre que la Cour d'appel, placée dans les mêmes circonstances, aurait pu rendre.

La situation ici est différente de celle qui se présentait dans la cause de *Switzman v. Elbling and Attorney General of Quebec, supra,* en ce que dans cette dernière, la contestation engagée par l'intervention du Procureur Général sur la validité de la loi attaquée, demeurait sujette à détermination par jugement final.

* * *

Les deux autres questions posées par cette Cour portent sur la validité du règlement et, suivant l'ordre dans lequel elles sont posées, il y sera ci-après référé comme première et deuxième question. Il convient de noter immédiatement que le règlement attaqué vise quelque soixante-dix cas où des permis sont requis, et que, suivant la preuve au dossier, il y a environ soixante-quinze mille demandes de permis faites annuellement à la cité de Montréal.

Ces deux questions sont libellées comme suit:

Does the portion of By-Law 1862 complained of amount to a delegation of legislative authority vested in the City Council to the Director of the Police Department?

If the portion of By-Law 1862 complained of amounts to a delegation of the legislative authority vested in the City Council to the Director of the Police Department, is the by-law *ultra vires* as infringing the principle stated in *Biggar's Municipal Manual,* pp. 238-239; *Meredith*

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and Wilkinson's Canadian Municipal Manual, at p. 265, and *Robson and Hugg's Municipal Manual,* at p. 347. Argument is requested as to the application of the following cases:—

Re Kiely (1887) 13 O.R. 451, *Reg. v. Webster* (1888) 16 O.R. 187, *Merritt v. City of Toronto* (1895) 22 A.R. 215, *Re Elliott* (1896) 11 M.R. 358, *Taylor v. City of Winnipeg,* 11 M.R. 420, *Hall v. City of Moose Jaw* (1910) 12 W.L.R. 693, *Rex v. Sparks* 18 B.C.R. 116, *Bridge v. The Queen* 1953 1 S.C.R. 8.

La deuxième question ne présente aucun problème. Personne, en effet, n'a songé à contester que si le conseil de la cité a, par le règlement en question, délégué à qui que ce soit une autorité législative dont seul il était nanti par la Législature, le règlement est *ultra vires* du conseil.

De plus, et en toute déférence, j'ajouterai immédiatement que les décisions mentionnées, en fin de cette question, bien que s'appuyant sur des principes généralement applicables en la matière, ne peuvent, à mon avis, avoir sur la première question posée par la Cour, aucun caractère décisif; car, ainsi qu'il apparaîtra ci-après, les dispositions de la charte de la cité de Montréal et celles de l'art. 2(B) du règlement de la cité sont toutes deux fondamentalement différentes des dispositions gouvernant l'autorité législative des municipalités concernées dans ces décisions et des règlements qu'elles ont adoptés.

Aussi bien, la seule question qui doit nous occuper, est-elle de savoir si le conseil de la cité a délégué son pouvoir législatif en édictant cet art. 2(B) du règlement 1862, ou, pour être plus précis, si, aux termes de cet article, le conseil de la cité a délégué aux directeurs des services municipaux l'autorité de faire la loi sur les conditions auxquelles un permis peut être obtenu,—ce qui impliquerait une délégation de la discrétion donnée au conseil par la Législature—ou si, au contraire, aux termes de cet article, le conseil de la cité a lui-même fait la loi sur la question, *i.e.,* indiqué ces conditions et conféré aux directeurs de services une autorité et une discrétion relatives à l'exécution de cette loi dans chaque demande de permis. Ainsi qu'il est opportunément précisé dans McQuillin, Municipal Corporations, 3rd ed., vol. 2, no. 10.40:

> There is a distinction between the delegation of power to make a law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done legally, but there is no objection to the latter.

En somme, la discrétion conférée pour faire un règlement ne peut être confondue avec la discrétion que ce règlement accorde aux fins de son exécution.

Il faut donc considérer l'autorité législative, donnée par la Législature de Québec à la cité de Montréal, en tenant compte de toute règle spéciale d'interprétation établie dans la charte par la Législature, et examiner ensuite l'art. 2(B) du règlement, en l'interprétant, non pas isolément, mais à la lumière des autres ordonnances municipales qu'il incorpore par référence expresse, afin de lui donner son sens, son esprit et sa fin véritables.

La charte de la cité.—L'art. 299 de la charte de la cité de Montréal, 62 Vict., c. 58, donne au conseil de la cité la juridiction la plus étendue pour faire des règlements "concernant la paix, l'ordre, le bon gouvernement et le bien-être général de la cité de Montréal et toutes les matières qui intéressent et affectent ou qui pourront intéresser et affecter la cité de Montréal comme cité et comme corporation, pourvu toutefois que ces règlements ne soient pas incompatibles avec les lois de cette province ou du Canada ni contraires à quelque disposition spéciale de cette charte".

L'article 300, section 22, de la charte décrète:

300. Et, sans limiter les pouvoirs et l'autorité conférés au conseil par l'article précédent, le conseil de la cité, pour les fins et pour les objets compris dans l'article précédent ainsi que pour les matières énumérées dans le présent article, a autorité:

* * *

22. Pour prescrire moyennant quel montant, à quelles conditions et de quelle manière sont octroyés les permis non incompatibles avec la loi et sujets aux dispositions de la présente charte, pourvu qu'aucun permis ne soit octroyé pour plus qu'une année;

L'article 300(*c*) décrète:

300c. Afin de donner plein effet aux articles 299 et 300, *de les étendre et de les compléter de façon à assurer la complète autonomie de la cité et à éviter toute interprétation de ces articles ou de leurs sous-sections, qui pourrait être considérée comme une restriction de ses pouvoirs,* la cité est autorisée à faire, abroger ou amender et mettre à exécution tous les règlements nécessaires concernant la bonne administration de ses affaires, la paix, l'ordre, la sécurité *ainsi que toutes les matières pouvant intéresser ou affecter de quelque manière que ce soit l'intérêt public et le bien-être des citoyens;* pourvu toutefois que ces règlements ne soient pas incompatibles avec les lois du Canada ou de cette province, ni contraires à quelque disposition spéciale de cette charte.

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Les dispositions de cet article, sur lesquelles s'appuie particulièrement le jugement de la Cour d'Appel, dérogent manifestement de la rigueur du principe généralement applicable et auquel Sir Mathias Tellier, alors juge en chef de la province de Québec, référait dans *Phaneuf v. Corporation du Village de St-Hugues*[1], dans les termes suivants:

> En matière de législation, les corporations municipales n'ont de pouvoirs que ceux qui leur ont été formellement délégués par la Législature; et ces pouvoirs, elles ne peuvent ni les étendre ni les excéder.

Dans aucune des décisions, mentionnées en fin de la deuxième question soumise par cette Cour, appert-il que les municipalités dont les règlements furent attaqués aient reçu un semblable pouvoir de la Législature. C'est là une particularité distinguant fondamentalement le pouvoir législatif de la cité de Montréal de celui de ces municipalités. La Législature de Québec ne pouvait en termes plus clairs manifester l'intention d'assurer l'autonomie complète de la cité et de prohiber toute interprétation restrictive du pouvoir législatif conféré.

Le règlement.—L'article 2(B) du règlement 1862 se lit comme suit:

> Art. 2(B) Toute personne désirant un permis en vertu du présent règlement doit faire sa demande au directeur des finances sur la formule requise. Avant l'émission d'un permis, le directeur des finances est requis d'obtenir l'approbation écrite de chacun des directeurs des services concernés. Si cette approbation écrite n'est pas donnée par tous les directeurs concernés, ledit directeur des finances informera le demandeur, par écrit, que le permis ne sera pas émis.

A la suite de l'art. 2(M), apparaît un groupe de sections numérotées de 1 à 70. Chacune d'elles mentionne soit l'exercice d'une activité, soit l'usage ou la garde d'une chose ou d'un animal, où un permis est exigé, et indique le ou les services concernés en l'espèce.

Les services dont il est question dans ces sections sont tous des services municipaux, établis sous l'autorité de la charte de la cité, soit les services de l'urbanisme, des incendies, de police, de santé ou de la division des marchés.

Ce qu'il faut entendre par les expressions "services concernés" ou "directeurs concernés", mentionnées en l'article 2(B), est très clair. Tel que généralement défini, le mot "concerné" et le mot "concerned", apparaissant respectivement dans la version française et dans la version anglaise,

[1] (1936), 61 Que. K.B. 83 at 90.

signifient "intéressé", "affecté", "interested", "affected". C'est là le sens que la Cour d'Appel d'Ontario a donné à ce mot dans *Nichol School Trustees v. Maitland*[1]. Que, dans la réglementation qui nous occupe, les expressions "services concernés" ou "directeurs concernés" signifient "services et directeurs intéressés et affectés", résulte clairement de cette relation qui, en raison des divers hasards, risques ou dangers que peut, suivant l'expérience, comporter, dans la métropole, l'exercice d'une activité déterminée, et en raison du service particulier établi pour y parer, apparaît généralement dans ces sections, entre la nature de l'activité assujettie à un permis et le service particulier qui est déclaré concerné par la demande de ce permis. C'est ainsi que pour le commerce en gros ou en détail de bois, charbon ou huile de chauffage, le conseil prescrit que les services concernés sont ceux de l'urbanisme, d'incendie et de police; et que pour l'exercice des diverses activités où entrent des produits alimentaires, c'est le service de la santé à qui l'autorité et le devoir d'enquêter sur la demande de permis sont donnés et imposés, respectivement.

Il faut attribuer un sens et donner un effet à cette sélection et à cette raison sur laquelle elle se fonde. L'intérêt qu'un service, déclaré intéressé ou affecté par une demande de permis, peut avoir en celle-ci, ne peut être autre que celui pour la promotion duquel ce service est institué et maintenu en opération sous l'autorité de la charte et des règlements où sont définies ses responsabilités propres.

Saisi d'une demande de permis, où le service des incendies et celui de la santé sont déclarés concernés, le directeur du service des incendies comprendra sûrement que, pour donner un sens et un effet à cette réglementation, c'est au regard des responsabilités propres à son service, et non à celles qui sont propres au service de la santé, qu'il doit considérer la demande aux fins de l'approbation recherchée de lui-même.

Le règlement donne donc à chaque directeur de service une direction précise quant aux considérations qui doivent le guider dans l'exercice de l'autorité conférée et l'accomplissement du devoir imposé par ce règlement, considérations qui ne sont autres que celles qui président à

[1] (1899), 26 O.A.R. 506.

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l'institution, au maintien et à l'effective opération du service. En somme, cette direction, donnée par le réglement au directeur du service concerné, est de ne pas approuver la demande de permis si l'approuver serait promouvoir la réalisation de ces hasards, risques ou dangers que le service qu'il dirige a précisément pour mission de prévenir ou combattre. C'est là une condition que le conseil de la cité avait, en vertu des pouvoirs à lui donnés par la Législature, l'autorité d'imposer pour l'obtention d'un permis.

Aussi bien me paraît-il impossible d'admettre qu'en vertu de cette réglementation,—fondamentalement différente, dans sa structure et ses termes, des réglementations considérées dans les causes citées en fin de la deuxième question posée par la Cour,—il soit loisible à un directeur de service de décider arbitrairement de la demande d'un permis. Ce directeur est lié par la directive du conseil et, s'il s'en écarte, il n'exerce plus ni la discrétion ni la juridiction qui lui ont été conférées, et la décision qu'il prétend rendre reste assujettie au pouvoir de contrôle des tribunaux, sinon au pouvoir de contrôle du conseil de la cité sur ses propres officiers.

Le conseil de la cité a non seulement le droit d'émettre des licences, mais il a aussi celui de prélever des argents par l'imposition de taxes; et rien ne s'oppose à ce que ces deux droits soient exercés simultanément dans un même règlement. De fait, le règlement mentionne certains cas d'exercice d'activités, usage ou garde d'animaux ou d'articles, n'offrant aucun de ces risques, hasards ou dangers. Dans ces cas particuliers, il est bien évident que si on applique le règlement tel qu'ici interprété, la demande de permis, vu l'absence de ces risques, hasards ou dangers, devra nécessairement être approuvée. Aussi bien, et en tout respect, je ne vois pas que la mention au règlement de ces cas particuliers puisse justifier le rejet de cette interprétation dans tous les autres cas où—comme dans celui qui nous occupe—ces risques, hasards ou dangers sont présents et où c'est au directeur du service institué pour les conjurer ou les combattre, que doit être soumise la demande d'approbation.

A la vérité, l'appelante a admis la validité des dispositions de l'article 2(B) et des sections 8 et 20, en ce qu'elles exigent l'approbation des directeurs de tous les services y mentionnés, sauf en ce qui concerne celle du directeur du service de la police. Ce service, soumet-elle,—et c'est là, sur la question de délégation, le seul grief invoqué par elle devant toutes les Cours,—n'est l'objet d'aucun contrôle par règlement, contrairement à ce qui est le cas pour les autres services; le conseil de la cité aurait ainsi abandonné à l'arbitraire du directeur du service de la police la détermination des conditions d'obtention de permis.

Rien dans l'article 2(B) n'autorise d'en varier l'interprétation suivant qu'il s'agisse du service de la police ou d'un autre service municipal.

Comme les autres services, celui de la police est établi sous l'autorité de la charte. La section 2 du règlement no 247, règlement qui établit ce service, prescrit en partie ce qui suit, en ce qui concerne le directeur de ce service:

> Il sera de son devoir de faire maintenir la paix publique, d'assurer la protection de la propriété et de voir à ce que les lois et ordonnances soient observées et mises en vigueur. Et chaque fois que quelque infraction à une de ces lois ou ordonnances viendra ou sera portée à sa connaissance, il en fera faire une plainte régulière et verra à ce que les témoignages nécessaires soient produits pour établir la culpabilité des contrevenants ou inculpés.

L'exécution de ce devoir de maintenir la paix publique et de protéger la propriété commence, évidemment, avant que ne soient actuellement violés la paix publique et le droit de propriété. Ce devoir spécifique a donc, en particulier, autant que celui qui est imposé au directeur du service des incendies et à celui du service de santé, un caractère préventif. Et, comme c'est le cas pour les directeurs des autres services, le directeur du service de la police est, en ce qui regarde l'examen et la décision d'une demande de permis, soumis à la même directive quant aux considérations dont il doit tenir compte dans l'exercice de l'autorité et du devoir qui lui sont assignés par le règlement.

Aussi bien, la prétention que le règlement ferait, quant à lui, une exception, et lui permettrait de disposer arbitrairement et à sa convenance des demandes de permis qui lui sont référées par le règlement lui-même, me paraît intenable. Dans l'exercice de son pouvoir discrétionnaire,

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il se peut, dans son cas comme dans celui des autres directeurs de services, qu'il abuse de son pouvoir; mais cet abus ne va pas à la validité de l'établissement de ce pouvoir.

Pour terminer, sur ce point, je dois ajouter que la décision rendue par cette Cour dans *Bridge v. The Queen*[1] n'est, à mon avis, d'aucune assistance à la solution de la question qui nous occupe. Dans cette cause, le conseil de la cité de Hamilton, assumant agir sous l'autorité des arts. 82(3) et 82(*a*) d'une loi intitulée *The Factory, Shop and Office Building Act,* R.S.O. 1937, c. 194, adopta un règlement aux termes duquel il fut particulièrement décrété que le greffier de la cité devait omettre de la liste des ayants-droit de certains permis, ceux qui, "*according to evidence satisfactory to the city clerk*", avaient omis de tenir leurs établissements ouverts, tel qu'autorisé. Considérant les arts. 82(3) et 82(*a*) de la loi précitée, cette Cour a conclu à l'invalidité et M. le Juge Cartwright, parlant pour la majorité, s'en est exprimé comme suit:

> It is within the powers of the Council to prescribe a state of facts the existence of which shall render an occupier ineligible to receive a permit for a stated time; but express words in the enabling Statute would be necessary to give the Council power to confer on an individual the right to decide, on such evidence as he might find sufficient, whether or not the prescribed state of facts exists and there are no such words.

Si, pour donner à l'art. 2(B) du règlement de la cité, comme ci-dessus indiqué, son sens, son esprit et sa fin véritables, on doit adopter l'interprétation précitée, il s'ensuit que le conseil de la cité de Montréal a effectivement indiqué la situation dans laquelle un directeur de service ne doit pas donner son approbation à une demande de permis. Le conseil confère à ce dernier le droit de vérifier, dans chaque cas, si cette situation existe et la décision a prendre doit reposer "on such evidence as is sufficient" et non pas "on such evidence as he might find sufficient." De toutes façons, les dispositions des arts. 82(3) et 82(*a*) de *The Factory, Shop and Office Building Act, supra,* ne donnent, contrairement à ce qui est le cas à l'art. 300(*c*) de la charte de la cité de Montréal, aucune autorité aux cités, villes et villages ayant droit de se prévaloir de cette loi, d'étendre et de compléter l'autorité législative conférée et l'autorité de faire les règlements nécessaires pour assurer

[1] [1953] 1 S.C.R. 8; 104 C.C.C. 170, 1 D.L.R. 305

la bonne administration de leurs affaires. Aussi bien, le *ratio decidendi* dans *Bridge v. The Queen, supra,* ne saurait trouver d'application en la présente cause. Je ne crois pas qu'il y ait lieu de s'attarder à démontrer que, pour assurer la bonne administration de ses affaires et pour rendre possible l'application de ce règlement relatif à l'émission des permis, et disposer annuellement de 75,000 demandes de permis, il était nécessaire pour le conseil de la cité de conférer aux directeurs des services concernés l'autorité pour en disposer conformément à la directive donnée au règlement.

L'appelante a prétendu de plus que la section 20 du règlement 1862 subordonne l'exercice du droit lui résultant du permis de la Commission des Liqueurs, à l'approbation du directeur du service de la police et que pour autant la section est *ultra vires* du conseil de la cité vu que seule, suivant la *Loi des Liqueurs Alcooliques de Québec,* S.R.Q. 1941, c. 255, la Commission des Liqueurs de Québec a le droit d'accorder et d'annuler ce permis et d'en régir les conditions d'exploitation. L'appelante ne conteste pas, cependant, le pouvoir du conseil de la cité de réglementer et contrôler, au point de vue de l'urbanisme, de la santé et de la protection contre l'incendie, comme il l'a fait en la section 20, les restaurants bénéficiant d'un permis de la Commission des Liqueurs. Rien ne paraît justifier l'adoption d'une position différente en ce qui concerne le pouvoir du conseil de la cité de réglementer ces restaurants, au point de vue de la paix, l'ordre public, ou autres autorisés par la charte. La charte de la cité de Montréal et la *Loi des Liqueurs Alcooliques de Québec* ont été édictées par la même Législature. Il serait étonnant que la *Loi des Liqueurs Alcooliques de Québec* ait l'effet de soustraire le détenteur du permis qu'elle autorise, à la réglementation que la Législature autorise les municipalités d'adopter.

Si l'appelante avait raison, il s'ensuivrait que la Commission des Liqueurs pourrait imposer l'établissement de magasins de liqueurs alcooliques dans les quartiers résidentiels de la cité.

La proposition que le refus d'approbation serait arbitraire, partial et injuste a été rejetée par les deux Cours inférieures et le mal fondé de ce rejet n'a pas été démontré.

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L'appelante a également invoqué le fait que ce n'est pas le directeur mais l'assistant-directeur du service de la police qui a considéré la demande des permis sollicités. Le deuxième paragraphe de l'art. 1 du règlement 1862 pourvoit spécifiquement qu'en ce qui a trait à l'approbation préalable d'un directeur de service pour l'émission d'un permis, l'autorité donnée au directeur du service s'étend à toute personne dûment autorisée à le remplacer ou à agir en son nom. La preuve démontre que le directeur Leggett avait autorisé l'assistant-directeur Plante à agir en son nom.

Au mérite, étant d'avis, comme le Juge de première instance et les Juges de la Cour d'Appel, que la requête en *mandamus* est mal fondée, je renverrais l'appel avec dépens.

Quant à la motion faite par l'appelante pour amender les conclusions originaires de sa requête en *mandamus,* et à celle de Pal's Café Inc., pour obtenir la permission d'intervenir, rien n'autorisant de les accorder, je les rejetterais avec dépens.

RAND J:—For the reasons given by my brothers Locke and Cartwright I would allow the appeal and dispose of the matter as proposed by them.

The judgment of Locke, Martland and Judson JJ. was delivered by

LOCKE J.:—The charter of the City of Montreal, certain of the terms of which are to be considered in determining this appeal, is c. 58 of the Statutes of Quebec, 1899, as amended by subsequent legislation.

By s. 1 the word "council", where it appears in the statute, means the council of the City, and by the opening clause of s. 299 it is provided that it shall be lawful for such council:

> to enact, repeal or amend, and enforce by-laws for the peace, order, good government, and general welfare of the city of Montreal, and for all matters and things whatsoever that concern and affect, or that may hereafter concern and affect the city of Montreal as a city and body politic and corporate, provided always that such by-laws be not repugnant to the laws of this Province or of Canada, nor contrary to any special provisions of this charter.

By the same section it is declared that the authority and jurisdiction of the council extends, *inter alia,* to "licences for trading and peddling."

Subsection 22 of s. 300 provides that, for the purposes and objects included in s. 299, the city council shall have authority, *inter alia*:

To fix the amount, terms and manner of issuing licences, not inconsistent with the law and subject to the provisions of this charter, provided that no licence shall be issued for a longer time than one year.

Subsection 79 of s. 300 declares the power of the council:

To license, regulate or prohibit musical saloons or establishments where intoxicating liquors are sold and wherein instrumental and vocal music are used as a means of attracting customers.

Section 300*c*. reads:

In order to give full effect to articles 299 and 300 and to extend and complete the same, so as to secure full autonomy for the city and to avoid any interpretation of such articles or their paragraphs which might be considered as a restriction of its powers, the city is authorized to adopt, repeal or amend and carry out all necessary by-laws concerning the proper administration of its affairs, peace, order and safety as well as all matters which may concern or affect public interest and the welfare of the citizens; provided always that such by-laws be not inconsistent with the laws of Canada or of this Province, nor contrary to any special provisions of this charter.

Under the powers thus vested in the council, by-law 1862 was enacted, providing, *inter alia,* that no person shall operate any industry, business or establishment or carry on any trade within the limits of the city without having previously applied for and obtained from the Director of Finance of the City a permit to do so and paying a stipulated amount for such permit. By subs. (*b*) of art. 2 of the by-law, it is provided that every applicant for a new permit must make an application to the Director of Finance and that, prior to issuing such permit, the director is required to secure the written approval from each of the directors of the department concerned, and that:

If such written approval is not given by all the directors concerned the said Director of Finance shall inform the applicant in writing that the permit will not be issued.

For the operation of a restaurant and of premises where alcoholic liquors are sold by a person holding a permit from the Quebec Liquor Commission, the approval is required from, amongst others, the Director of the Police Department.

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The appellant company, at the time of the commencement of these proceedings, operated a restaurant on St. Catherine Street East in the city of Montreal. Vincent Cotroni, for the benefit of the appellant company, obtained a permit to sell alcoholic liquors on the premises in question from the Quebec Liquor Commission under the provisions of the *Alcoholic Liquor Act,* R.S.Q. 1941, c. 255, for the licence years 1954-55 and 1955-56. The appellant obtained from the respondent a restaurant permit issued under the terms of s. 8-A of the above mentioned by-law and a permit to sell alcoholic liquors under s. 20 of the by-law for the licence year 1954-55. By its terms that licence would expire on May 1, 1955.

On April 18, 1955, the appellant applied for a renewal of such permits for a further period of one year. These applications were made on forms apparently prescribed by the respondent and upon each of the original applications there appears the following endorsement:

"23 Avr. 1955 refused. P. P. Plante. Police."

By letter dated June 7, 1955, the Director of Finance of the respondent wrote the appellant saying:

> The Director of Department has not given his written approval to the above mentioned application. In conformity with the procedure set forth in By-Law 1862 this permit will not be issued.

The blank before the word "Department" was not filled in but the department referred to was that of the police, as is made clear by the endorsement upon the application.

The proceedings were commenced by an application for a writ of *mandamus* directed against the City of Montreal, directing the City and its competent officers to issue the permits referred to in ss. 8 and 20 of the by-law on the grounds that those portions of the by-law making it a condition of the granting of the licences that the approval of the Director of Police be obtained are illegal and beyond the powers of the respondent, in that they constitute a delegation of the powers given to the respondent and constitute a restraint of trade and of free enterprise. The further declaration was asked to the effect that the refusal of the respondent to issue the permits was arbitrary and unjustified.

The defence aserted the power of the City to prescribe conditions upon which licences should issue, that it was the duty of the Director of Police and the police officers under him to maintain public order, and that the director, in performing the function prescribed by the by-law, was acting in a ministerial and quasi-judicial capacity and that, accordingly, no *mandamus* to the director would lie. It was denied that the provisions of the by-law referred to amounted to a delegation of power by the council and asserted that the applicant had been guilty, *inter alia,* of breaches of the closing laws and permitted prostitutes on the premises and continually violated the law.

At the trial, Leggett, the Director of Police Service, and Plante, the Assistant Director, gave evidence, the latter, of alleged breaches of the law in the above mentioned respects by the applicant, and the former to the effect that he considered these factors in refusing the approval of the application.

The matter came on for hearing before Prévost J. and the application was dismissed.

The present appellant appealed and that appeal was dismissed by the unanimous judgment of a Court[1] consisting of St. Jacques, Hyde and Owen JJ.

While the appellant sought a direction that the permits be issued, the Director of Finance, the person designated by the by-law as the official by which the same were to be issued, was not made a party to the proceedings. It was, no doubt, considered unnecessary to join the Director of the Police Department since it was the appellant's contention that the delegation of authority to that official was *ultra vires.* I mention these circumstances since they are to be considered in determining whether the proceedings taken by way of *mandamus* were appropriate if the appellant should be found to be entitled to the relief asked.

Unless the language above quoted from the first clause of s. 299 of the charte and that of subs. 22 of s. 300 distinguishes the present matter from many cases decided under various municipal Acts in other parts of Canada, the decision of the Court of Appeal in the present matter conflicts with the decisions in Ontario, Manitoba,

[1] [1957] Que. Q.B.1.

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Saskatchewan and British Columbia and, in my opinion, with the judgment of this Court delivered by Cartwright J. in *Bridge v. The Queen*[1].

As to the first clause of s. 299 giving general power to the City council to enact by-laws for the peace, order, good government and general welfare of the City, this is in effect the so-called good government clause which appears in the municipal Acts of the other provinces above mentioned. A provision to the same effect has been part of all municipal Acts in Ontario since 1858 and for varying periods of time in Manitoba, Saskatchewan and British Columbia. If, as I think to be the case, the authority sought to be vested in the Director of Police by by-law 1862 amounts to a delegation by the council of the authority vested in it by the charter, the good government clause is no warrant for what is being attempted since the Act has granted specific authority in respect of the matter by the provisions of ss. 299 and 300 above referred to: *Merritt v. Toronto*[2], *per* MacLennan J.A.; *Taylor v. People's Loan and Savings Corporation*[3], *per* Middleton J.A.

It will be seen from an examination of the by-law that the Director of Finance, by whom both permits would be issued, is forbidden to do so without the written approval of the directors mentioned. It should be said that no question arises as to the requirement that approval of the City Planning and the Health Department was not obtained. The whole controversy relates to the failure to obtain the approval of the Director of Police. As to that official, while the council was authorized to fix the "terms and manner of issuing licences", the by-law contains no directions whatever to the Director of Police as to the manner in which the discretion given to him to approve or refuse to approve applications for licences was to be exercised. Thus, the director might refuse his approval upon any ground which he considered sufficient.

In Meredith and Wilkinson's Canadian Municipal Manual, at p. 265, it is said:

> The exercise of a discretionary power vested in a council cannot, in the absence of statutory authority, be delegated.

[1] [1953] 1 S.C.R. 8 at 13, 104 C.C.C. 170, 1 D.L.R. 305.
[2] (1895), 22 O.A.R. 205 at 215, 216.
[3] (1928), 63 O.L.R. 202 at 209. [1929] 1 D.L.R. 160.

A council may, however, delegate to an officer or functionary merely ministerial matters.

In Robson and Hugg's Municipal Manual, at p. 347, the following appears:

Discretion confided to council or to the Board of Commissioners of Police cannot be delegated to others, as for example, requiring an applicant for a licence to get the consent of certain persons. *Re Kiely* (1887) 13 O.R. 451; *Rex v. Webster* (1888) 16 O.R. 187.

In my opinion, these are accurate statements of the law.

In *Re Kiely*[1], the validity of a by-law purporting to have been passed under the provisions of the *Consolidated Municipal Act 1883* of Ontario (46 Vict., c. 18) as amended by s. 9 of 49 Vict., c. 37, was questioned. By that section it was provided that the Board of Commissioners of Police might regulate and license, *inter alia,* the owners of livery stables and that the council of any city, in which there was no Board of Commissioners of Police, might exercise by by-law all the powers conferred by the section. Despite the fact that the matter was thus committed to the Board of Commissioners and that there was such a board in the City of Toronto, the council of that City passed a by-law whereby it was declared that it should not be lawful for any person to establish or keep a livery stable until he had procured the consent in writing of the majority of the owners and lessees of real property situate within an area of 500 ft. of the proposed site for such stable. Wilson C.J., by whom the motion to quash was heard, while holding that the by-law was *ultra vires* the council, said that if this were not so it was objectionable:

because it requires, as a condition precedent to the granting of a licence, that the applicant shall procure the consent of a number of persons in the neighbourhood, thus constituting these persons the judges of the right he asks, and divesting the commissioners of the power which they are required personally to exercise.

In *Regina v. Webster*[2], Ferguson J. referred to and adopted this statement of the law by Wilson C.J. in *Kiely's* case.

In *Merritt v. City of Toronto, supra,* a by-law of the city made under the provisions of s. 286 of the *Municipal Act of 1892,* which granted to the council power to require

[1] (1887), 13 O.R. 451. [2] (1888), 16 O.R. 187.

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any person exercising any trade or calling to obtain a licence, provided that no one might obtain a licence as an auctioneer unless his character should be first reported on and approved by the police.

The statute under which the by-law was passed did not vest in the council any power to require such approval as a condition precedent to the granting of a licence. Speaking generally on the powers of municipal corporations, Osler J.A. said in part (p. 207):

> Municipal corporations, in the exercise of the statutory powers conferred upon them to make by-laws, should be confined strictly within the limits of their authority, and all attempts on their part to exceed it should be firmly repelled by the Courts. *A fortiori* should this be so where their by-laws are directed against the common law right, and the liberty and freedom, of every subject to employ himself in any lawful trade or calling he pleases.
>
> The corporation has chosen to enact, first, that no one shall carry on the respectable business of an auctioneer without a license, and, second, that no one shall have a license to carry on such business unless his character shall be first reported on and approved by the police. The first is within their power; the latter as clearly is not.

The portion of the by-law requiring the approval of the police was considered to be *ultra vires.*

In *Re Elliott*[1], a by-law of the City of Winnipeg passed under the provisions of s. 599 of the *Municipal Act,* R.S.M. 1891, c. 100, as amended by s. 17 of c. 20 of the Statutes of 1894, was considered. By that section, the council of every municipality was empowered to pass by-laws for licensing, inspecting and regulating vendors of milk and dairies and providing that it should be a condition of any such licence that the licensee should submit to the inspection of his dairy by an officer to be appointed by the council. Purporting to act under this authority, the City of Winnipeg passed a by-law which authorized the inspection of dairies by the health officer or veterinary inspector and said:

> if satisfactory to him in all respects he shall direct a licence to issue to such cow keeper, dairyman or purveyor of milk.

upon payment of a specified fee. As to this proviso, Bain J. said (p. 363):

> The inspection of dairies, etc., is purely ministerial work, and may, of course, be performed by the officials employed by the Council for that purpose. But this section hands over to the health officer a duty

[1] (1896), 11 Man. R. 358.

that is more than ministerial. It authorizes him to direct the issue of a licence without any report of the result of the inspection, or any further reference, to the Council; and an official is thus enabled arbitrarily to decide whether an applicant is to receive a license or not. This, it seems, to me, is a delegation of authority that cannot be justified; for the Council has really delegated to an official the judgment and discretion that the Legislature intended and expected that it would exercise itself.

referring, *inter alia,* to *Webster's* case above referred to.

In *Re Taylor and City of Winnipeg*[1], where the same by-law was considered, Taylor C.J. adopted the rule of construction as to the powers of municipal corporations as stated by Osler J.A. in *Merritt's* case but did not refer to the question of delegation though, as indicated by the report, that matter was argued.

In *Hall v. City of Moose Jaw*[2], the by-law considered was passed by the city under s. 95 of the Municipal Ordinance of 1903 which, by s. 95(34) empowered the council of every municipality to pass by-laws licensing, *inter alia,* hackmen. In purported exercise of this power, the by-law provided that:

no license shall be granted to any driver unless the same has been previously recommended by the chief of police for the city, he certifying to the good conduct and ability of the applicant to fill the position of hack driver.

This proviso, which was added by way of amendment to a by-law passed in 1904, was passed in pursuance of the powers thought to have been vested in the city council by ss. 184 and 187 of the *Cities Act of 1908* (c. 16). Section 184 empowered the council to make regulations and by-laws for the peace, order, good government and welfare of the city and for the issue of licences and payment of licence fees in respect of any business.

Section 187 read:

The power to license shall include power to fix the fees to be paid for licenses, to specify the qualifications of the persons to whom and the conditions to regulate the manner in which any licensed business shall be carried on, to specify the fees or prices to be charged by the licenses, to impose penalties upon unlicensed persons or for breach of the conditions upon which any license has been issued or of any regulations made in relation thereto and generally to provide for the protection of licensees; and such power shall within the city extend to persons who carry on business within and partly without the city limits.

[1] (1896), 11 Man. R. 420.
[2] (1910), 3 S.L.R. 22, 12 W.L.R. 693.

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Hall applied for a hack licence, tendering the fee prescribed by the by-law, but the chief of police reported against the application and it was refused on this ground. Johnstone J., by whom the action was tried, said in part (p. 697):

> Section 17 of by-law 64 and sec. 37 of by-law 357 impose upon the inspector or chief of police, as the case may be, a judicial duty. Upon the report of either of these officers depends the issue of a license. No licenses can be granted unless and until the inspector in one case, and the chief of police in the other, has reported favourably. These officials are empowered arbitrarily to decide whether an applicant is to receive his license or not. This is clearly a delegation of authority that cannot be justified. The council has clearly delegated to these officials named the judgment and discretion that the legislature intended and expected the council should exercise.

and referred, *inter alia,* to the cases of *Webster, Elliott* and *Merritt.*

In *Rex v. Sparks*[1], an application for a writ of prohibition to issue to the police magistrate at Victoria to prohibit the enforcement of a conviction made on an information laid against Sparks for acting as a hack driver without a licence was considered by Murphy J. By s. 3 of an Act relating to the City of Victoria (c. 46, 7 Edw. VII), the council of the city was empowered to make by-laws licensing and regulating hacks, cabs and every vehicle plying for hire and the chauffeurs and drivers thereof. The by-law passed by the city provided that all such drivers must have licences obtained from the chief of police and Sparks' application was refused on the asserted ground that he was not of good character. Murphy J. said in part (p. 118):

> One would hesitate to hold that in common understanding the regulating of the business of hack driving requires that absolute discretion be conferred upon the chief of police to prohibit anyone whom he considered not to be of good moral character from engaging therein; and if this view be correct, I think the sections of the by-law in question invalid under the principles laid down in *Merritt v. Toronto* (1895) 22 A.R. 205. The business of hack driving is not *per se* an unlawful calling. Any individual has a common law right to engage therein, and such right is in no way dependent on his previous character. If the Legislature intended to confer the power here contended for, it would (sic) easily have done so by express words. Where it has intended to confer power to prevent or prohibit the doing of certain acts, it has used apt and clear language, as appears by the words employed in subsection 2 of section 3 of the Act under discussion, being the subsection immediately preceding the one herein relied upon. Further, in said subsection 3, certain conditions are set out which may be imposed as requisites for obtaining a licence. Good moral character, as determined by the absolute discretion of the chief of police, is not amongst such conditions.

[1] (1913), 18 B.C.R. 116, 10 D.L.R. 616, 3 W.W.R. 1126.

In *Bridge v. The Queen*[1], a by-law of the City of Hamilton passed under the provisions of ss. 82 (3) and 82(*a*) of the *Factory, Shop and Office Building Act*, R.S.O. 1937, c. 194 as amended, was attacked. The by-law in question provided that all gasoline stations should be closed at specified hours but provided that the City Clerk, on the recommendation of the Property and License Committee, might issue permits to remain open during times specified in the permit. A term of the by-law said that the occupiers of such shops should be entitled to extension permits "except those occupiers who, according to evidence satisfactory to the City Clerk, have failed to keep their gasoline shops open during the whole of the time or times so authorized by such permits." A further section of the by-law said that the occupiers of gasoline shops should be entitled to emergency service permits, except those who, according to evidence satisfactory to the City Clerk, have failed to keep their shops open for emergency service only during the whole of the time or times authorized by such permits, etc. As to these provisions, our brother Cartwright, who wrote the opinion of the majority of the Court, said in part (p. 13):

> It is next submitted that the provisions in sections 7(2) and 8(2) of the by-law that the clerk shall omit from the list of those entitled to permits such occupiers as have "according to evidence satisfactory to the City Clerk" failed to keep their shops open as authorized, are invalid. With this submission I agree. It is within the powers of the Council to prescribe a state of facts the existence of which shall render an occupier ineligible to receive a permit for a stated time; but express words in the enabling Statute would be necessary to give the Council power to confer on an individual the right to decide, on such evidence as he might find sufficient, whether or not the prescribed state of facts exists and there are no such words.

While our brother Rand dissented, he agreed on this point that a delegation such as this could not be supported.

From the fact that no reference was made to any of the cases decided in other provinces in the reasons for judgment delivered by the trial judge and by the judges of the Court of Appeal[1], I assume that they were not brought to their attention.

[1] [1953] 1 S.C.R. 8, 104 C.C.C. 170, 1 D.L.R. 305.

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It is not suggested that the rules of law for the interpretation of statutes such as those incorporating cities and municipalities differ in the Province of Quebec from those which apply in the other provinces of Canada. The decision of the present matter is, therefore, of general importance throughout this country.

The language of the charter upon which the respondent principally relies is that contained in subs. (22) of s. 300 under which the city has the power:

to fix the amount, terms and manner of issuing licences.

While reference has been made to subs. 79 declaring the power to prohibit establishments where intoxicating liquors are sold and wherein instrumental and vocal music are used as a means of attracting customers, it was not in the exercise of these powers that the licences in question were refused but, as I have stated, simply by reason of the refusal of approval by the Director of Police.

The manner in which the licences are to be issued has been fixed by the by-law by vesting the ministerial act of issuing them in the Director of Finance. The power to fix the terms upon which they are to be issued has been vested in the city council. For that body to say that before the Director of Finance may issue a licence, the Director of Police, in his discretion, may prevent its issue by refusing approval is not to fix the terms, but is rather an attempt to vest in the Chief of Police power to prescribe the terms, or some of the terms, upon which the right to a licence depends. In this case, granted the necessary power had been given to the council by the charter, the by-law might, as pointed out in the judgment of this Court in *Bridge's* case, have prescribed a state of facts the existence of which should render a person ineligible to receive a permit, as by providing that none such shall be granted to persons who were guilty of repeated infractions of the city by-laws as to hours, or of the provisions of the *Quebec Liquor Act* or who permitted prostitutes to congregate on their premises or who were otherwise persons of ill repute. Nothing of this nature appears in this by-law but, as in the cases to which I have referred in the other provinces,

[1] [1957] Que. Q.B.1.

it has been left without direction to the Chief of Police to decide whether the applicant should or should not be permitted to carry on a lawful calling.

As pointed out by Murphy J. in *Rex v. Sparks, supra,* any individual has a common law right to engage in any lawful calling, subject to compliance with the laws of the jurisdiction in which it is carried on and such right is in no way dependent on his previous character.

It is pointed out in the judgment of the Court of Queen's Bench in *Stiffel v. City Montreal*[1], that the function of the police official under a by-law such as this is not merely ministerial but quasi-judicial. This was said as a ground for holding that *mandamus* would not lie against such an official. But that is not the point in the present case where the appellant contends that the portion of the by-law purporting to vest this quasi-judicial function in the Chief of Police is *ultra vires.*

Evidence was given at length at the trial as to the reasons which impelled the director and the assistant director of police to refuse the licences in the present matter. This was undoubtedly relevant to the issue that their conduct in refusing their approval was arbitrary and unjustified, but it was quite irrelevant to the legal question as to whether the portions of the by-law relied upon were *ultra vires.*

The powers conferred upon the council by subs. (22) of s. 300 cannot be distinguished from those conferred the council of the City of Moose Jaw by s. 187 of the *Cities Act* in *Hall's* case. They are no more extensive in my opinion than the powers given to the various councils by the Ontario, Manitoba and British Columbia statutes mentioned in the cases to which I have referred. The point in those cases, as in this, is that the power was not exercised by the council but delegated to some one else.

It is suggested that some support is to be gained for what is, in my opinion, clearly an attempted delegation of power from the fact that by-law no. 247 defines the duties of the Superintendent of Police and the members of the city police force. These include, *inter alia,* the duty to cause the public peace to be preserved and to see that

[1] [1945] Que. K.B. 258.

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all the laws and ordinances are enforced, but these are duties imposed either by statute or under powers given by statute upon police officers in all of the provinces to which I have referred and I am unable, with great respect, to understand how it can be suggested that this assists the position of the respondent in the matter of the delegation of the council's power.

It is further suggested that some further powers are given to the council by s. 57 of the *Interpretation Act*, R.S.Q. 1941, c. 1, which reads:

> The authority to do a thing shall carry with it all the powers necessary for that purpose.

A like provision appears in subs. (b) of s. 28 of the *Interpretation Act of Ontario*, R.S.O. 1950, c. 184, which reads:

> where power is given to any person, officer or functionary to do or to enforce the doing of any act or thing, all such powers shall be understood to be also given as are necesary to enable the person, officer or functionary to do or enforce the doing of the act or thing.

The word "person" is defined to include corporation.

This is merely a restatement of a long established principle of the law which is described in Maxwell on Statutes, 10th ed., p. 361, in the following terms:

> Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. *Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit.*

This is an argument that does not appear to have been advanced in any of the cases to which I have referred in the other provinces where the question to be considered has arisen. It cannot, however, assist the position of the respondent since the question is what was the power vested in the council. Since, in my opinion, the power to delegate quasi-judicial functions in the matter of licences was not given to the council, the language of the article does not affect the matter. I may add that if, contrary to the opinion expressed by Murphy J. in *Sparks'* case, the council might without statutory authority provide by by-law that no person having a bad reputation could obtain a licence to carry on business in the city of Montreal, there is no difficulty whatever in amending the by-law to say so in unmistakable terms.

As a matter of interest, I would point out that in the jurisdiction in which *Sparks'* case was decided the charter of the City of Vancouver in the matter of trade licences vests power in the city council to pass by-laws:

for prohibiting the granting of such licence to any applicant who, in the opinion of the council, is not of good character or whose premises are not suitable for the business.

The Winnipeg charter (c. 87 S.M. 1956) by s. 652(*f*) provides that the power to license or to regulate includes the power:

to require as a condition precedent to the issue of a license such qualifications on the part of the applicant as to character, fitness, equipment, previous residence in the city or other matter as the council shall prescribe.

This appeal was argued before five members of this Court on March 15, 1957, and judgment was reserved. It was thereafter decided that since none of the cases above mentioned decided in the Courts of other provinces had been referred to in the argument or considered in the Courts below that the case should be re-argued before the full Court. The foregoing portion of my reasons was dictated after the hearing in March of 1957 and before it was decided that there should be a rehearing.

It was contended on behalf of the respondent during the first argument that to give to the Director of the Police Department the right to decide whether or not a permit should be issued did not amount to a delegation of the powers vested in the council and that question has been raised again in the second argument. For the reasons above stated I consider it must be rejected. I agree with what was said by Wilson C.J., Osler J.A., Bain J. and Johnstone J. in the cases I have mentioned.

It was not contended on behalf of the respondent that these cases decided in other provincial Courts were wrong in law. While it was attempted to distinguish them and the judgment of this Court in *Bridge v. The Queen,* the argument completely failed to do so in my opinion. The City of Montreal is a municipal corporation and the council in respect of the granting and withholding of licences to persons engaged in certain classes of business has the powers and only the powers vested in it by its statute of incorporation. That statute does not authorize or purport to

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authorize the council to delegate the power to fix the terms upon which permits may be granted vested in it by ss. 299 and 300 to the Director of the Police Department or to anyone else. It is idle to suggest that such power is merely administrative. I agree with the statement of the law applicable to the construction of such statutes as it is stated by Osler J.A. in *Merritt's* case which I have above quoted. The by-law is therefore in this respect beyond the powers of the council.

As the sole ground upon which the permit of the appellant to operate its restaurant was refused was that the Director of the Police Department had refused his approval, the applicant was, as of the date of its application for a writ of *mandamus,* entitled to an order directing that a permit be issued for the year 1955.

The order of this Court directing the re-argument was made on October 1, 1957, and a further order made on November 15, 1957, required the parties to file new factums by February 1, 1958, and to be prepared to submit oral argument, including, *inter alia,* a discussion of the cases decided in the other provinces of Canada which are above referred to.

On February 17, 1958, the respondent moved before us for leave to adduce evidence by affidavit to show that on July 18, 1957, some four months after the matter had been argued before us, the appellant had sold the restaurant in question to a company named Pal's Restaurant Inc. and the latter company had taken possession and was carrying on a restaurant business on the premises and there selling liquor under a permit from the Quebec Liquor Commission.

On the same date the appellant moved for leave to amend the conclusions of its petition for a *mandamus* by asking that the judgment to be rendered should direct the City to issue permits for the restaurant for the years 1955 to 1958 inclusive on payment of the required fees. This application was supported by an affidavit showing that while the City had refused to issue licences for the years 1955, 1956 and 1957, the restaurant had been permitted to operate. Ten charges, however, had been laid in the Recorder's Court in Montreal against the applicant in respect of such operations, but these procedings had

been held in abeyance apparently pending the determination of this appeal. At the same time Pal's Cafe Inc. applied to this Court for leave to intervene in the appeal on the ground that it had succeeded to the interest of the appellant in respect of the operation of the restaurant and that it contended that the portion of the by-law above discussed was *ultra vires* the Council. Apparently the respondent had also refused a permit to the last-named company for the operation of the restaurant.

Leave was given to the respondent to adduce the further evidence above mentioned and the applications of the appellant and of the proposed intervenant were adjourned to be heard upon the further argument which was directed. The order for such argument directed that the parties be prepared to discuss the further question as to whether, in the circumstances disclosed, there was any matter remaining in dispute between the original parties to the litigation and as to whether the appeal should, on that account, be further considered.

It is necessary in dealing with this question to bear in mind that on the hearing of the application evidence was given for the respondent by the Director and the Assistant Director of the Police Department explaining the grounds upon which the permit for the year 1955 had been refused. It appears that the liquor licence for the premises was held in the name of Vincent Cotroni, a director of the appellant company, on its behalf, and according to the evidence of Plante, the Assistant Director of the Police Department, Cotroni had between the years 1928 and 1938 been convicted of various criminal offences and this fact was apparently one of the reasons which led to the refusal of the permit.

The rights of a petitioner for an order of *mandamus* are, as are the rights of the plaintiff in an action generally, to be tested as of the date of the commencement of the proceedings. Matters of defence arising, however, after proceedings are instituted, but before the answer or defence is entered may be pleaded and matters of defence arising thereafter may, with permission of the Court, be raised.

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The sale of the restaurant had not taken place when this appeal was argued before us in March 1957. At that time it was not contended that the appeal should not be entertained on the ground that the year for which the permit was sought, *i.e.*, 1955, had expired. As to this it may be further said that the year had expired before the judgment of the Court of Queen's Bench was delivered.

It is my opinion that this objection to the disposition of this appeal on its merits should not be entertained. The appellant, in my opinion, has an interest in the subject-matter of this appeal other than as to the costs of the proceedings. I may add that I do not assent to the view that even if its only interest was as to costs this Court has not jurisdiction to hear the appeal or that it should not exercise it in certain circumstances. The question of law as to whether or not the portion of the by-law requiring the consent of the Director of the Police Department was within the powers of the City Council and as to whether the appellant was entitled in the circumstances to a permit for the year 1955 are questions upon which the appellant was entitled to have the opinion of the Courts.

The appellant company, it must be assumed, is one which is entitled to carry on the business of a restaurant keeper and vendor of liquors in the City of Montreal and the evidence for the respondent to which I have referred makes it evident that so long as Cotroni remains a director and officer of the appellant a restaurant licence would not be issued to it for operations in that city. In addition, while the appellant applied for permits for the years 1956 and 1957, these were refused and 10 prosecutions are pending in the Recorder's Court in Montreal against the appellant for operating without a licence in the years 1955, 1956 and 1957. These, as I have stated, have been held in abeyance pending the disposition of this appeal and if the appeal is dismissed convictions will inevitably follow.

The question is not one in my opinion which goes to the jurisdiction of the Court, rather is it a matter of discretion and one to be decided in each case upon the facts

disclosed. In *Archibald v. DeLisle*[1], Taschereau J., who delivered the judgment of the Court, referring to the cases of *Moir v. Huntingdon*[2] and *McKay v. The Township of Hinchinbroke*[3], said (p. 14):

> What we held in those cases is that where the state of facts upon which a litigation went through the lower courts has ceased to exist so that the party appealing has no actual interest whatsoever upon the appeal but an interest as to costs and where the judgment upon the appeal, whatever it may be, cannot be executed or have any effect between the parties except as to costs, this Court will not decide abstract propositions of law merely to determine the liability as to costs.

In *The King v. Clark*[4], an application for leave to appeal from a judgment of the Court of Appeal for Ontario was refused by this Court. The proceedings were in the nature of *quo warranto* for an order that the respondents show cause why they did unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February 1943. Since the date of the judgment of the Court of Appeal, the Legislative Assembly had been dissolved. Duff C.J., in delivering the judgment of the Court refusing leave, said that since the Legislative Assembly had been dissolved a judgment in the appellant's favour could not be executed and "could have no direct and immediate practical effect as between the parties except as to costs" and said that it was one of those cases where the sub-stratum of the litigation had disappeared.

In the same year in the case of *Coca Cola Company v. Matthews*[5], the appeal was brought by leave of the Court of Appeal for Ontario on the appellant undertaking to pay to the respondent in any event the amount of the judgment and the costs of the trial, the appeal to the Court of Appeal and of the appeal to this Court. The judgment refusing to entertain the appeal was delivered by Rinfret C.J. The ground may be shortly stated as being that this Court will not decide abstract propositions of law even if to determine liability as to costs. The learned Chief Justice referred in his judgment to the decision of

[1] (1895), 25 S.C.R. 1, 15 C.L.T. 355.
[2] (1891), 19 S.C.R. 363.
[3] (1894), 24 S.C.R. 55.
[4] [1944] S.C.R. 69, 1 D.L.R. 495.
[5] [1944] S.C.R. 385, [1945] 1 D.L.R. 1.

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the House of Lords in *Sun Life Assurance Company v. Jervis*[1], where it was a term of the leave granted by the Court of Appeal that the appellant should pay the costs as between solicitor and client in the House of Lords in any event and not to ask for a return of the moneys which had been paid. Viscount Simon L.C. said (p. 113) that in his opinion the Court should decline to hear the appeal on the ground that there was no issue to be decided between the parties and said further:

> I do not think that it would be a proper exercise of the authority which this Court possesses to hear appeals if it occupies time in this case in deciding an academic question which cannot affect the respondent in any way.

In *Regent Taxi & Transport Limited v. Congrégation des Petits Frères de Marie*[2], an appeal from this Court was, by leave, brought before the Judicial Committee. It was a term of the leave granted that the appellants should pay forthwith the damages and costs to the respondent in the Courts, the same in no event to be recoverable and to pay the respondent's costs of the appeal in any event and the damages and costs awarded below had all been paid. Notwithstanding this, the Judicial Committee considered the question whether the claim of the respondent was one to which the period of prescription provided by art. 2261 of the *Civil Code* applied and decided that it did and that the action should have been dismissed, reversing the judgment of this Court.

It does not appear that this decision was brought to the attention of the Court in the case of *The King v. Clark* or the *Coca Cola* case since it is not mentioned in either.

In the present matter it is my opinion that the appellant company was entitled as of right to a declaration that the by-law in the respect mentioned was beyond the powers of the city council and to an order directing that a permit be issued for the operation of the restaurant for the year 1955. While the restaurant has been sold by it, I am further of the opinion that in view of the 10 pending prosecutions for breaches of the by-law in operating it without a licence and further by reason of its right to operate another restaurant in the City of Montreal subject

[1] [1944] A.C. 111, 113 L.J. K.B. 174.
[2] [1932] A.C. 295, 2 D.L.R. 70, 53 Que. K.B. 157.

to the provisions of the portions of the by-law which are within the power of the council the appellant has an "actual interest" within the meaning of that expression as used in *Archibald v. Delisle* and that it cannot be said that the judgment will have no "direct and immediate practical effect" between the parties except as to costs as that expression was used by Sir Lyman Duff in *The King v. Clark.*

My opinion that the matter is one for the exercise of our discretion appears to me to be supported by the language used by the Lord Chancellor in *Sun life Assurance Company v. Jervis.* The question, as I have said, is one of general public interest to municipal institutions throughout Canada. The decisions in the cases of *Kiely* and *Merritt,* the first of which was made more than 80 years ago, have been followed in the three western provinces to which I have referred and adopted, as I have pointed out, in the recognized text books on municipal law. The decision in the present case conflicts with these judgments and, in my opinion, it is in the interest of the due administration of justice that this Court should now pronounce upon the matter. Even if the only issue were as to the costs of the proceedings, it would be my opinion that in this case we should exercise the jurisdiction which we undoubtedly have.

I would allow this appeal and set aside the judgment of the Court of Queen's Bench and of Prévost J. The appellant should have its costs throughout, other than those dealt with in the succeeding paragraph.

I would dismiss the application of Pal's Restaurant Inc. to intervene, with costs, and the application of the appellant for leave to amend the conclusions of its petition, with costs, to be set off against those awarded against the respondent.

CARTWRIGHT J.:—The facts out of which this appeal arises and the course of the litigation are set out in the reasons of my brothers Locke and Fauteux, which I have had the advantage of reading.

The question arises *in limine* whether we should entertain the appeal in view of the facts that the licence the issue of which the appellant sought to compel by *mandamus* would have expired on May 1, 1956, prior to the giving of

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notice to appeal to this Court and that prior to the second argument in this Court the appellant had sold the restaurant in respect of which the licence was required.

It is a rule that this Court will not entertain an appeal if, *pendente lite,* the subject-matter of the litigation has ceased to exist or other circumstances have arisen by reason of which the Court could make no order effective between the parties except as to costs. A recent illustration of the application of the rule is *The Queen ex rel. Lee v. Estevan*[1], in which the oral reasons of the Court are not reported. In that case the Court of its own motion declined to hear the appeal as the licence in respect of which a *mandamus* was sought would have expired some months previously.

However, the rule is, in my opinion, one of practice which the Court may relax. In the case at bar the appeal is brought under s. 36(*b*) of the *Supreme Court Act,* the appeal being from a final judgment of the highest Court of final resort in the province in proceedings for *mandamus,* so that the right of appeal is not dependent on the amount or value of the matter in controversy in the appeal, and no question of jurisdiction arises. The question of law raised for decision is an important one, as is stressed in the reasons of the learned judges in the Courts below, and there have been two arguments, the second of which was called for by the Court after it was apparent that the licence period had already expired. In these special circumstances I agree with the conclusion of my brother Locke that we should entertain the appeal.

The portions of by-law no. 1862 with which we are directly concerned are as follows:

Article 2.—Dispositions générales.

A) Aucune personne ne possédera ou n'exploitera une industrie, un commerce ou un établissement, ne pratiquera ou n'exercera une profession, un commerce ou une activité, n'utilisera un véhicule, un appareil ou une chose, ou ne gardera un animal ou un article ci-après mentionnés dans les limites de la cité de Montréal, à moins d'avoir préalablement demandé et obtenu du directeur des finances un permis à cet effet et payé audit directeur le montant apparaissant en regard de l'activité, de l'animal ou de la chose assujetti à un permis.

[1] [1953] 1 D.L.R. 656.

B) Toute personne désirant un permis en vertu du présent règlement doit faire sa demande au directeur des finances sur la formule requise. Avant l'émission d'un permis, le directeur des finances est requis d'obtenir l'approbation écrite de chacun des directeurs des services concernés. Si cette approbation écrite n'est pas donnée par tous les directeurs concernés, ledit directeur des finances informera le demandeur, par écrit, que le permis ne sera pas émis.

* * *

D) Nonobstant toute disposition contraire, le directeur des finances, sur paiement de l'honoraire requis, peut renouveler tout permis en vigueur à la fin de l'exercice précédent, à moins qu'avis ne soit reçu le ou avant le ler avril ou avant l'émission du permis de l'un des directeurs concernés dans chaque cas, que ce permis ne doit pas être renouvelé.

Penalties are provided for breaches of any provision of the by-law.

The by-law sets out 70 sections some of which contain numerous sub-divisions. In these sections the nature of the activity or thing in respect of which a licence is required and the "departments concerned" are specified.

The appellant applied for licences under clause (*a*) of s. 8 and under s. 20 of the by-law. These read as follows:

Section 8.

a) Restaurant, établissement de produits alimentaires, épicerie en détail, établissement de détail où l'une quelconque des marchandises suivantes est vendue: bonbons, tabac, cigares, cigarettes, produits alimentaires de quelque genre que ce soit et/ou breuvages non alcooliques.

Approbation: urbanisme,
police, santé
Période: annuellement
Transportable: oui
Honoraire: $10.00

* * *

Section 20.

Toute personne qui détient un permis de la Commission des Liqueurs de Québec pour la vente de liqueurs alcooliques, et qui de fait en vend, pour consommation sur les lieux.

Approbation: urbanisme,
incendie, police, santé
Période: annuellement
Transportable: oui
Honoraire: $200.00

Both applications were refused on the ground that the approval of the Director of the Police Department had not been secured.

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The appellant in its *requête* asked the Court, in part:

AUTORISER l'émission d'un bref d'assignation mandamus dirigé contre la Cité de Montréal; sur le mérite DÉCLARER que les mots suivants du paragraphe 2, du règlement 1862 de la cité intimée se lisant comme suit:

"Si cette approbation écrite n'est pas donnée par tous les directeurs concernés, ledit directeur des Finances informera le défendeur que le permis ne sera pas accordé."

et les mots dans le paragraphe 8a dudit règlement:
"Approbation: police";
et les mots dans le paragraphe 20 dudit règlement:
"Approbation: police".

sont nuls, illégaux, *ultra vires* des pouvoirs de l'intimée en ce qu'ils constituent une délégation du pouvoir donné à l'intimée par la loi d'imposer des conditions et restrictions sur l'émission des permis; et comme constituant une entrave au commerce et à la libre entreprise; ORDONNER à la Cité intimée et à ses officiers compétents en la matière d'émettre à la requérante, Vic Restaurant Incorporé, les permis prévus par les sections 8 et 20 dudit règlement 1862, dont elle a demandé l'émission . . .

In view of the manner in which the appeal was presented it seems to me that there is only one question upon which we should express an opinion, that is whether the portions of the by-law which require, as a condition precedent to the issue of permits of the sort applied for by the appellant, the approval of the Director of the Police Department are *ultra vires* of the Council. The argument of the appeal appeared to me to proceed on the assumption that the impugned portions, if *ultra vires,* were severable from the remainder of the by-law and that the provisions requiring the approval of the Directors of the other departments mentioned in s. 8(*a*) and s. 20 were valid. I wish to make it clear that I express no opinion as to the correctness of either of these assumptions.

Turning to the merits of the point which we are called upon to decide, it will be observed that the learned judge of first instance, Prévost J., after examining *Bridge v. The Queen*[1], *Cité de Montréal v. Savich*[2] and certain passages in McQuillin on Municipal Corporations, 3rd Edition, reaches the conclusion that there is no invalid delegation of the authority of the Council because the rules by which the Director of the Police Department is to be guided in

[1] [1953] 1 S.C.R. 8, 104 C.C.C. 170, 1 D.L.R. 305.
[2] (1938), 66 Que. K.B. 124

granting or withholding his approval are stated with sufficient particularity in by-law no. 247 of the respondent concerning the Police Department and in "toutes les lois pénales du Canada et de la Province ainsi que toutes les ordonnances municipales relatives à l'ordre public ou aux bonnes mœurs". The learned judge goes on to hold that it is unnecessary to recite all such laws in the by-law as it is implicit in its terms that the Director shall be guided by them. He says in part:

> Il suffit, dans l'opinion de cette Cour, d'exiger dans le règlement l'approbation du directeur de police pour, par le fait même, dire qu'il doit dans l'octroi ou le refus de son approbation, considérer si celui qui sollicite le permis opère ou non l'entreprise dans le respect des lois et de l'ordre public.

In the Court of Queen's Bench[1], all three of the learned justices wrote reasons in which after the examination of a number of authorities they reached the conclusion that *Cité de Montréal v. Savich, supra,* was rightly decided and that there was nothing in the subsequent jurisprudence which permitted the Court to depart from that decision.

The *Savich* case dealt with by-law no. 432 of the City of Montreal, the predecessor of by-law no. 1862 from which it does not appear to differ in any particular material to the question which we have to decide. The case was decided by a Court composed of Sir Mathias Tellier C.J. and Bernier, Galipeault, St-Jacques, and Barclay JJ. One of the considérants in the judgment of the Court reads as follows:

> Considérant que cette disposition du règlement numéro 432 adopté par la cité de Montréal, qui décrète qu'aucun permis (licence) ne sera accordé par le trésorier de la Cité pour les salles de danse, de concert, de réunions, de représentations théâtrales, d'exhibitions de vues animées, et tout lieu d'amusement quelconque, à moins d'une recommandation écrite du surintendant de police et de l'inspecteur des bâtiments conjointement, ne comporte pas de délégation d'un pouvoir discrétionnaire qu'il appartient au conseil de la Cité d'exercer lui-même;

In the course of his reasons Tellier C.J. says in part:

> Il est incontestable qu'un conseil municipal n'a pas le droit de déléguer ses pouvoirs discrétionnaires, soit en tout soit en partie; il doit les exercer lui-même.
>
> Mais je ne vois aucune délégation de pouvoir dans la disposition citée ci-dessus.
>
> Tout ce qui y est prescrit, c'est que le trésorier de la Cité ne devra pas accorder de permis, sans une recommandation, c'est-à-dire sans un rapport favorable, du surintendant de police et de l'inspecteur des bâtiments.

[1] [1957] Que. Q.B. 1.

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La raison de cette recommandation ou de ce rapport favorable se conçoit facilement: l'intérêt public veut qu'il ne soit accordé de permis, pour une salle de danse, une salle de concert, une salle de réunions, une salle de théâtre, qu'à des personnes recommandables et pour des salles ayant la sécurité et les conditions hygiéniques voulues.

Pas de permis, de la part du trésorier, sans une recommandation ou un rapport favorable. Mais le conseil n'a rien abdiqué de ses pouvoirs. Rien ne l'empêche, lui, le maître, de s'enquérir des raisons de ses deux officiers ou préposés, quand ceux-ci ont cru devoir ne pas accorder la recommandation demandée.

St-Jacques J. says in part:

La licence n'a pu être émise par le trésorier, qui est l'officier désigné par le règlement à cette fin, parce que le chef de police a refusé de donner un certificat d'approbation.

Cette condition imposée par le règlement ne me paraît pas conporter une délégation de pouvoirs qui appartiennent au conseil ou au comité exécutif seulement.

It should be noted, however, that both of these learned judges and Bernier J., who agreed with Barclay J., also based their decision on the ground that the respondent had not asked for the annulment of the impugned provisions of the by-law.

Barclay J., with whom Galipeault J. agreed, says in part:

The learned trial Judge found that this by-law was *ultra vires* and that the City had no right to confer any discretionary power on the Chief of Police. With great respect, I do not agree in that conclusion.

While, in principle, municipal corporations cannot delegate their administrative or constitutional powers, there are exceptions to this rule. Owing to the increasing complexity of modern society and the multiplicity of matters which require a municipality's attention, it has become practically impossible to provide in laws and ordinances specific rules and standards to govern every conceivable situation. To require the recommendation of a building inspector or of a director of police is not in reality a delegation of authority but a matter of legitimate prudence. I am more at ease in thus deciding because this very provision has been before the Court of Review in a case of *Waller v. City of Montreal,* 45 S.C. 15. The then Mr. Justice Greenshields dissented, but not on the ground that the by-law was *ultra vires.* He has since stated in a case of *Jaillard v. City of Montreal* 72 S.C. 112, that he had no fault to find with the delegation to the Chief of Police of the discretionary power to recommend the isue of a licence. There is a similar decision by the late Sir François Lemieux in *Paré v. City of Québec,* 67 S.C. 100.

In *Waller v. Cité de Montréal*[1], an application was made for *mandamus* to compel the issue of a licence for a second-hand dealer. The by-law provided: "qu'aucun tel permis ne sera accordé à moins d'une recommandation écrite du

[1] (1913), 45 Que. S.C. 15.

surintendant de police." The judgments again stress the point that the by-law was not attacked. de Lorimier J. says in part:

La validité du règlement de l'intimée n'est pas mise en question par le requérant.

* * *

Quant au règlement, je le crois extrêmement sage et de tout point valide.

* * *

Il est possible que le règlement aille trop loin, qu'il soit opportun de le changer et les moyens de le faire ne font pas défaut, mais, encore une fois, tant qu'il reste en force, il doit recevoir son application.

Tellier C.J. says in part:

Mais laissant de côté cette question de forme, il faut reconnaître que le règlement de la cité est parfaitement raisonnable dans ses dispositions et spécialement dans celles qui exigent un certificat du surintendant de police. Il est juste, il est sage qu'on soit renseigné sur les mœurs et la conduite de celui qui veut exercer le négoce dont il s'agit dans cette cause et personne n'est mieux qualifié pour donner ce renseignement que le fonctionnaire désigné au règlement.

The majority were of opinion that the refusal of approval by the superintendent of police was not shown to be arbitrary. Greenshields J. dissenting was of opinion that the refusal was arbitrary and that a *mandamus* should be granted.

In *Jaillard v. City of Montreal*[1], Greenshields C.J. appears to have assumed the validity of the by-law and his reasons deal only with the question whether the refusal of approval was arbitrary.

In *Paré v. City of Quebec*[2], the validity of a by-law similar to the one with which we are concerned was attacked. Sir François Lemieux C.J. says in part:

Les corporations municipales n'ont pas, non plus, le pouvoir de déléguer et de se dépouiller de leurs fonctions gouvernementales ou constitutionnelles, de manière à perdre le contrôle sur tels pouvoirs, car il est de principe que les corporations municipales ne doivent jamais perdre le contrôle sur tels pouvoirs.

Mais les corporations municipales, pour leur bon fonctionnement, pour l'administration de leurs affaires, dans l'intérêt de la paix et de la moralité publiques, ont droit de déléguer à leurs officiers les pouvoirs ministériels, ceux de simple administration ou de police.

La délégation de tels pouvoirs s'impose et ne peut être restreinte, surtout dans les cas où il s'agit de la paix et de la moralité publiques.

[1] (1934), 72 Que. S.C. 112. [2] (1928), 67 Que. S.C. 100.

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Si la loi contraignait les corporations municipales à exercer, comme corps, tous les pouvoirs ministériels, ceux de simple administration, ou de police, il en résulterait des inconvénients, des retards préjudiciables à l'intérêt public.

La délégation à des officiers compétents, dans les cas ci-dessus, n'est pas irrévocable, ni absolue, car la corporation municipale n'ayant pas le pouvoir de perdre le contrôle de ses pouvoirs administratifs, a toujours le droit de révoquer les décisions ou actes faits par ses officiers, en vertu de la délégation. Ce pouvoir de révocation est une garantie contre toute décision absolue ou arbitraire de la part des officiers.

In *Stiffel v. Cité de Montréal*[1], referred to in the reasons of St. Jacques J., once again the validity of the delegation to the Director of Police was assumed.

Galipeault J. says at p. 259:

Et il n'est pas soutenu non plus que la Cité, parlant par son conseil, n'avait pas le droit de déléguer en l'espèce les pouvoirs qu'exerce chez elle d'une façon particulière le directeur du service de la police.

On ne contredit pas non plus que ce dernier exerce plus que des pouvoirs ministériels et qu'il jouit de discrétion pour accorder ou refuser un permis relatif à la tenue d'une salle de billard.

I have examined all the cases referred to in the reasons of the learned justices in the Courts below and it is clear that the validity of the delegation with which we are concerned has been decided in some of them and assumed in others. In none of these cases does the decision appear to have turned on the peculiar wording of the charter of the City of Montreal. All of them appear to me to assume the validity and the application to the council of the City of Montreal of the general rule stated by Tellier C.J. in *Cité de Montréal v. Savich, supra,* at p. 128, in the passage which I have already quoted:

Il est incontestable qu'un conseil municipal n'a le droit de déléguer ses pouvoirs discrétionnaires, soit en tout soit en partie; il doit les exercer lui-même.

For varying reasons, some of which appear in the passages I have quoted above, they hold that the rule does not invalidate those portions of by-law no. 1862 which require the approval of the Director of the Police Department as a condition precedent to the issue of certain licences. With the greatest deference, I find myself unable to agree that any of the reasons assigned are sufficient to prevent the application of the general rule.

[1] [1945] Que. K.B. 258.

The applicable rule of law is, in my opinion, correctly stated in the following passages in McQuillin on Municipal Corporations, 3rd ed., vol. 9, p. 138:

> The fundamental rules that a municipal legislative body cannot delegate legislative power to any administrative branch or official, or to anyone, that it cannot vest arbitrary or unrestrained power or discretion in any board, official or person, or in itself, and that all ordinances must set a standard or prescribe a rule to govern in all cases coming within the operation of the ordinance and not leave its application or enforcement to ungoverned discretion, caprice or whim are fully applicable to the administration and enforcement of ordinances requiring licenses or permits and imposing license or permit fees or taxes.

and at pp. 141 and 142:

> Administrative, fact-finding, discretionary and ministerial functions, powers and duties as to licenses, permits, fees or taxes in connection therewith can be and usually are delegated by ordinances to boards and officials. But as stated in the preceding section, any discretion vested in them must be made subject to a standard, terms and conditions established by the licensing ordinance, which must govern the board or official in granting or denying the license or the permit.

These principles accord with the judgment of this Court in *Bridge v. The Queen, supra,* in which the delegation, by by-law, of certain powers to the City clerk was upheld only because the council had provided with sufficient particularity how that official was to proceed in issuing the permits. I refer particularly to the following passage in the report at pages 13 and 14:

> The Council has laid down in the by-law (i) the times during which the permits shall authorize occupiers of gasoline shops to remain open (ii) the proportion of total occupiers who shall make up the groups entitled to receive permits for each Sunday and for each week (iii) that the permits shall be issued to such groups in rotation (iv) that all occupiers shall be entitled to receive permits except those who have failed to remain open in accordance with the permits received by them (v) that the occupiers so failing shall cease to be entitled to permits for a time defined in the by-law. The Council has thus provided with sufficient particularity for the issuing of permits and, in my opinion, the duties imposed upon the City Clerk, (i) to select the occupiers to make up the respective groups, and (ii) to arrange the order of rotation are administrative and are validly imposed.

The impugned provisions of by-law no. 1862 appear to me to be fatally defective in that no standard, rule or condition is prescribed for the guidance of the Director of the Police Department in deciding whether to give or to withhold his approval. It is expressly provided that if that approval is withheld no licence shall issue in respect

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of the activities or things comprised in 41 sections of the by-law, many of which contain a number of subparagraphs which in turn include numerous activities.

I am unable to accept the suggestion that because the Director of Police is charged with the duty of maintaining the public peace and enforcing the penal laws of Canada, of the Province and of the municipality he is thereby sufficiently instructed as to the standard to be applied and the conditions to be looked for in deciding whether to grant his approval of an application.

Out of the hundreds of activities and things for the exercise or possession of which a licence is required the right to which depends on securing the approval of the Director of Police I will mention a few at random with the number of the section in which they are found: a wholesale dealer in coal (10(*a*)), a dealer in canaries (11(*a*)), an itinerant musician (12(*f*)), a second-hand dealer (18(*a*)), an operator of a practice golf range (25(*b*)), a pawn-broker (30), a real estate broker (34), a rooming-house (39), a laundry agent (41), a barber shop (45), an embalmer (49), a phrenologist (57), a common-carrier (61), a bicycle (68).

Any general standard or rule which could be arrived at inductively from a consideration of the multifarious activities and things enumerated in the 41 sections referred to in association with the duties resting upon the Director of the Police Department under by-law no. 247 and the penal laws mentioned above would of necessity be so wide and vague as to be valueless.

The difficulty of formulating any such rule from the suggested sources is illustrated by the differing views expressed in several of the cases to which I have referred above as to what the duties of the Director are. Of these, I will refer to only two.

In the case at bar, Prévost J. in the passage already quoted from his reasons would state the rule by which the Director should be guided as follows:

il doit dans l'octroi ou le refus de son approbation, considérer si celui qui sollicite le permis opère ou non l'entreprise dans le respect des lois et de l'ordre public.

With this may be contrasted the words of Galipeault J. in *Stiffel v. Cité de Montréal, supra,* at p. 259:

> Cest à tort que le demandeur soutient que toute la discrétion du chef de police se limite à la personne du tenancier, et qu'il ne saurait être question pour lui d'empêcher un requérant de bonnes mœurs n'ayant pas de dossier judiciaire l'incriminant, d'ouvrir et de maintenir une salle de billard dans une zone ou un territorie où les commerces ne sont pas prohibés.
>
> Il est bien certain, comme on l'a décidé bien des fois, que les lois et règlements de police d'une cité ne se limitent pas au caractère de l'individu requérant; ses devoirs de police consistent bien à assurer l'ordre et la paix publique, mais ils incluent aussi la protection de la santé publique, la suppression des nuisances, l'assurance du bien-être, du confort et de la tranquillité de la population.

In my respectful opinion neither of these passages states a rule sufficiently definite to be of value, but my purpose in quoting them is to indicate the impossibility of formulating from the available sources, any clear or certain rule. I agree with my brother Locke that the effect of the by-law is to leave it to the Director of the Police Department, without direction, to decide whether an applicant should or should not be permitted to carry on any of the lawful callings set out in the 41 sections referred to above.

For these reasons I am of opinion that the impugned provisions of by-law no. 1862 are invalid.

I would allow the appeal, set aside the judgment of the Court of Queen's Bench and that of Prévost J. and direct that the respondent pay the costs of the proceedings throughout other than the costs of the appellant's motion to amend the conclusions of its petition, which motion should be dismissed with costs. I would dismiss the application of Pal's Restaurant to intervene with costs.

Appeal allowed with costs, Taschereau, Fauteux and Aboott JJ. *dissenting.*

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