VIC RESTAURANT INC. v. CITY OF MONTREAL

CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — BY-LAWS — VALIDITY — LICENSING OF RESTAURANTS AND PLACES OF AMUSEMENT — LICENSE REQUIRING APPROVAL OF CHIEF OF POLICE — WHETHER DELEGATION OF POWER OF MUNICIPALITY — CHARTER OF CITY OF MONTREAL, SS. 299, 299a, 300, 300(c).

COURTS — SUPREME COURT OF CANADA — JURISDICTION — MANDAMUS FOR ISSUANCE OF LICENSE TO OPERATE RESTAURANT — LICENSE WOULD HAVE EXPIRED PRIOR TO NOTICE OF APPEAL — RESTAURANT SOLD PRIOR TO ARGUMENT IN THIS COURT — WHETHER *lis pendens* REMAINS BETWEEN PARTIES.

I. INTRODUCTION

The recent decision of the Supreme Court of Canada, in the matter of *Vic Restaurant Inc. v. City of Montreal*,[1] has aroused considerable interest in lay circles as well as among members of the legal profession. This judgement of the nation's highest tribunal is interesting and significant from several points of view. The ruling of the court — six to three in favour of the appellant — was *a propos* the power of a municipal council to delegate its legislative authority to a city official; of greater controversy was the opinion of the Court as to what constitutes such a delegation of law-making powers. It is interesting to note that the Supreme Court reversed the judgement of the Quebec Court of Appeal,[2] which, in addition to being a unanimous judgement, had confirmed the original judgement of the trial court.[3] In so doing, the Supreme Court continued its recent and increasingly consistent habit of overruling the Quebec courts on constitutional matters.[4] This situation is unusual *per se;* but when it is added to the fact that the three Supreme Court justices who dissented in the judgement were the three Quebec appointees, and that therefore not a single Quebec judge at any level ruled in favour of the appellant, the entire issue acquires a new and somewhat intriguing, if not disturbing, significance. Finally, the decision contains some noteworthy observations with respect to the common law right of an individual to pursue the lawful trade or calling of his choice.

II. THE FACTS

The appellant company, operating a restaurant on St. Catherine St. in the City of Montreal, had applied for and been refused a renewal of the

[1][1959] S.C.R. 58.
[2][1957] Q.B. 1.
[3][1955] R.L. 540.
[4]See for example, *Roncarelli v. Duplessis*, [1959] S.C.R. 122; *Chaput v. Romain*, [1955] S.C.R. 834; *Switzman v. Elbling*, [1957] S.C.R. 285.

annual permits required under the terms of By-law 1862 of the City in order to operate a restaurant and to sell alcoholic liquor.[5] The appellant was notified that the refusal of the City Finance Director to issue the permits was based on the fact that the Director of Police had not given his written approval of the permit applications, and hence, "in conformity with the procedure set forth in By-law 1862", the permits would not be issued.

Appellant applied to the Superior Court for a writ of *mandamus* against the City of Montreal, directing the City and its competent officers to issue the permits referred to in the By-law. Appellant also alleged that those portions of the By-law making the approval of the Director of Police a necessary prerequisite to the issuance of permits and licenses were illegal and *ultra vires* the powers of the respondent; they constituted a delegation of the powers given to the respondent, and further, constituted a restraint of trade and of free enterprise.

The City, in its defence, upheld its power to prescribe conditions upon which licenses should issue; it asserted that since the duty of the Director of Police was to maintain public order, as outlined in By-law 247 of the City,[6] the Director was performing a function prescribed by the By-law in a ministerial or administrative, and not in a legislative, capacity. It was asserted that the By-law provisions referred to were *intra vires* and also that the applicant had been guilty, *inter alia,* of breaches of the closing laws and had permitted prostitutes on the premises, thereby continually breaking the law.

Superior Court dismissed the action; an appeal was also dismissed by the unanimous judgement of a Court consisting of St. Jacques, Owen and Hyde JJ.

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[5]By-law 1862 of the City of Montreal, adopted by Council on March 15, 1948 and amended by By-law 1911, provides *inter alia* that:

Art. 2(A) "Aucune personne ne possédera ou n'exploitera une industrie, un commerce ou un établissement . . . 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 au directeur" the required fee.

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.

Art. 8(a) provides for the licensing of restaurants, food establishments, etc.

Art. 20 requires "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" to obtain a license. In both cases the permit application must be approved by the Director of the Police Department.

[6]". . . It shall be his [the Director of the Police Department's] duty to cause the public peace to be preserved, to secure the protection of property, and to see that all the Laws and Ordinances are enforced. . . ."

Following the first hearing of the case before the Supreme Court in March, 1957, the Court formulated three questions on which it wished to base its subsequent hearings. The first of these was:

> In view of the fact that the license 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?

This question was given added impetus when, on February 17, 1958, it was brought to the attention of the Court that on July 18, 1957, four months after the matter was first argued before the Court and some two and a half months before the Court had issued an order directing the re-argument, the appellant had sold the restaurant in question to a company named Pal's Restaurant Inc., and that this company had taken possession of the premises and was carrying on a restaurant business there, including the sale of liquor under a permit from the Quebec Liquor Commission.

On the same date, appellant moved for leave to amend the conclusions of its petition for a *mandamus*, by asking that the City be directed to issue permits to the restaurant for the years 1955-58 on payment of the required fees. This application was supported by an affidavit showing that, while the City had refused to issue licenses 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 proceedings had been held in abeyance, apparently pending the determination of this appeal.

III. THE FINDINGS

a) *Re whether or not there was a justiciable issue before the Court*

On this question, the three Quebec justices dissented as they did on all the other issues confronting the Court in this case; the schism was complete and total. Fauteux J., speaking on behalf of Taschereau and Abbott JJ., felt that

> . . . 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.[7]

As a result of this conclusion, Mr. Justice Fauteux continued,

> . . . 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.[8]

He was therefore of the opinion that the appeal should be dismissed on this as well as on other grounds.

The majority of the Court felt otherwise:

> 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

[7] At p. 62.
[8] *Ibid.*

> 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.[9]

Locke J. based his opinion on two counts: firstly, that the appellant was entitled as of right to have the opinion of the Court on 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 or not the appellant was entitled to a permit for the year 1955; and secondly, that the very real and tangible fact that the ten pending prosecutions in the Recorder's Court in Montreal against the appellant for operating without a license in the years 1955, 1956 and 1957 were being held in abeyance pending the disposition of the appeal, with convictions on these charges inevitable if the appeal were dismissed. These factors, coupled with the appellant's right to operate another restaurant in the City of Montreal being subject to the provisions of the portions of the By-law which were within the power of the council, convinced the learned judge that the appellant had an "actual interest" in the judgement beyond the determination of costs.

Cartwright J. went even further and held that the rule prohibiting the Court from rendering judgement in a dispute where such judgement would have no "direct and immediate practical effect" was, in his opinion, a rule of practice "which the Court may relax".[10] In this particular case, he was of the opinion that the Court could and should entertain the appeal.

It is indeed difficult to understand how Fauteux J., aware of the prosecutions pending in Montreal Recorder's Court and presumably cognizant of the fact that the appellant's right to operate another restaurant at a future date in Montreal would depend in all probability on the outcome of the case, could nevertheless assert that the only issue remaining between the parties was "une simple question de frais". It is an inescapable conclusion that the appellant had a real and actual pecuniary interest in the outcome of the case precisely because of these pending prosecutions in Recorder's Court.

As to the contention of Mr. Justice Fauteux that the Court was unable to render judgement because the Quebec Civil Code of Procedure requires that every judgement be susceptible of execution,[11] two replies are possible. Firstly, it would appear that the notion or concept of "execution" in art. 541 C.P. would be sufficiently broad and flexible to include a situation such as is here envisaged; thus, in effect, the "execution" would be the granting of restaurant permits retroactively for the period 1954-56 inclusively, and the automatic dismissal of the prosecutions being held in abeyance in Recorder's Court. Secondly, whether the Quebec rules of civil procedure would be applicable to a *public law* matter before the Supreme Court of Canada is a moot question; in other circumstances, where the Court has been called upon to adjudicate

[9]At p. 88, *per* Locke J.
[10]At p. 92.
[11]Art. 541 C.P.: "Every judgment must be susceptible of execution. . . ."

on a matter of substantial significance in the areas of constitutional law and fundamental rights, the Court has purposely interpreted the procedural requirements of the Civil law in an extremely liberal fashion in order that these adjectival rules should not frustrate the true purpose and effect of the substantive law.[12]

One last argument was eloquently advanced by the Court itself in its majority judgment. Locke J. asserted that the case in point was "one of general public interest to municipal institutions throughout Canada", and that it was "in the interest of the due administration of justice that this Court should now pronounce upon the matter."

b) *The merits of the case*

The two other questions posed by the Court as the basis for the re-argument dealt with the validity, i.e. the constitutionality, of the By-law in question Did the Council, in fact, delegate its authority to the Director of Police? Could the Council, in law, make such a delegation?

The Court did not divide on the second question. As Fauteux J. said:

> 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.[13]

Locke J., on behalf of the majority, was of the same opinion. He expressed his agreement with the statement of the law governing by-laws of municipal corporations as expressed by Osler J. A. in *Merritt v. City of Toronto*:[14]

> Municipal corporations, in the exercise of the statutory authority 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.

Thus the issue appeared to have boiled down to whether the portion of By-law 1862 complained of amounted to a delegation to the Director of the Police Department of legislative authority vested in the City Council. The resulting cleavage ni the Court's opinion represents two conflicting approaches to this problem that have arisen in Canadian jurisprudence. The majority of the Court found that legislative authority had in fact been conferred on the Police Director by the provisions of By-law 1862, whereas the minority judgment was of the contrary opinion.

c) *The Court's reasoning in its majority and minority judgements: an analysis*

The basis for the majority opinion in this judgement was summarized with admirable clarity and precision by Cartwright J.:[15]

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[12]See for example *Roncarelli v. Duplessis,* [1959] S.C.R. 122, and especially the attitude of the Court majority towards the requirements of art. 88 C.P.

[13]At p. 64.

[14](1895), 22 O.A.R. 205 at p. 207.

[15]At pp. 99-100.

> The impugned provisions of by-law no. 1862 appear 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 license shall issue in respect of the activities or things comprised in the 41 sections of the by-laws, many of which contain a number of sub-paragraphs which in turn include numerous activities.

He therefore concluded that

> . . . the effect of the by-law is to leave it to the Director of the Police Department, *without direction,* [emphasis mine], 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.[15a]

Locke J. was of the same opinion and concluded that the vesting of such an arbitrary and unlimited discretionary power in the Police Director was clearly contrary to law, with the result that the impugned provisions of the By-law were invalid and *ultra vires.*

The dissenting opinion of Fauteux J. seems to be based on the learned judge's feeling that the terms of the disputed By-law were of a sufficiently precise and well-defined nature, when read together with other by-laws applying to the Police Director's functions, to preclude that official from exercising a purely arbitrary or discretionary authority. He reasoned that since the By-law required only those directors of services "concerned" with the subject matter of the permit to grant their approval before such permit were issued, the implication was obvious that the director of a "concerned" department was to base his considerations of the permit application solely on those grounds that did in fact "concern" or "affect" his particular department.

> En somme, cette direction, donnée par le règlement 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.[16]

To grant such a specified right, the learned judge asserted, was a power which the City Council clearly possessed, by virtue of the powers vested in it by the City Charter. It was impossible to admit, he maintained, that the By-law conferred a legal power "à un directeur de service de décider arbitrairement de la demande d'un permis."

The Director of Police was obliged

> . . . to cause the public peace to be preserved, to secure the protection of property, and to see that all the Laws and Ordinances are enforced.[17]

This duty, Mr. Justice Fauteux maintained, obviously did not need an actual violation of the public peace before it merited or necessitated action; it also had what the learned judge termed "un caractère préventif". It was in this sense that the Police Department was "concerned" or "affected" by an application for a permit to operate a restaurant selling alcoholic liquors. To grant

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[15a]At p. 101.

[16]At p. 68, *per* Fauteux J.

[17]By-law 247 of the City of Montreal.

such a permit might very well be equivalent, in certain circumstances, to a virtually certain violation of the law in the future and the Police Director, under these circumstances, could veto such a permit application in order to eschew a potential violation of the law.

In the case of *Re Kiely*,[18] the general rule of municipal law was first laid down in this country in definitive form; the power to grant or withhold a license, being a power of a quasi-judicial nature, cannot be delegated by the body in which it is vested, without statutory authority.

In *Merritt v. City of Toronto*,[19] a by-law of the city whose council had the power to require any person exercising any trade or calling to obtain a license, provided that no one might obtain a license as an auctioneer unless his character should be first reported on and approved by the police. This proviso was held to be *ultra vires* for it constituted an unlawful delegation of legislative or discretionary powers.

In *Re Elliot*,[20] the City of Winnipeg was empowered to pass by-laws for licensing, inspecting and regulating vendors of milk and dairies, and providing that it be a condition of any such license that the prospective 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 license to issue to such cow keeper, dairyman or purveyor of milk.

This proviso was held to be *ultra vires* as

> . . . 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.[21]

In *Hall v. Moose Jaw*,[22] a case in which the facts as well as the law were almost identical with these of the case at hand, a by-law was passed with respect to the licensing of hackmen. It provided, *inter alia*, 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.

The court held that the impugned provisions of the by-law imposed upon the Inspector or Chief of Police a "judicial" duty and then went on to say:

> 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 favorably. These officials are empowered arbitrarily to decide whether an applicant is to receive his license or not. This is

[18](1887), 13 O.A.R. 451.
[19](1895), 22 O.A.R. 205.
[20](1896), 11 Man. R. 358.
[21]*Ibid.*, at p. 363.
[22](1910), 12 W.L.R. 693. See also *Rex v. Sparks*, 10 D.L.R. 616.

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.[23]

Canadian jurisprudence is replete with instances where the delegation of powers by a municipal council, under the same terms and within the same factual circumstances as the disputed Montreal By-law provision, has been decreed unlawful. Examples of powers held to have been illegally delegated are: a by-law empowering an officer to require fire escapes in such cases as he deems proper;[24] a by-law delegating the council's power to select subjects in respect of its statutory right to impose taxation;[25] a by-law giving power to a "Committee on Public Works" to remove any building which had become a public disfigurement;[26] and a by-law authorizing the cancellation by the mayor of building permits issued under the by-law.[27]

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It would seem to be clear from the foregoing that the weight of jurisprudential evidence in Canada is overwhelmingly against the validity of By-law 1862. In particular, the decision of the court in *Hall v. Moose Jaw* appears to be so emphatic in its enunciation of the law and so directly relevant in its attendant facts to the present matter that it would seem to preclude any controversy. There are, however, several instances in which Canadian courts have ruled otherwise in virtually identical situations; and it is significant that the majority of these contrary opinions have emanated from the courts of Quebec.

For example, in the case of *Cité de Montréal v. Savich*,[28] By-law 432 of the City (of which By-law 1862 was the direct descendant) was being attacked. At the outset of its judgement the Court of Appeal was quick to uphold the general principle that a municipal council cannot delegate its discretionary or legislative powers. However, the Court did not agree that the By-law in question did, in fact, delegate such discretionary powers to the Director of Police. In the opinion of the Court the rules by which the Director of Police was to be guided in granting or withholding his approval were stated with sufficient particularity, and the Director could be overruled by

[23]*Ibid.*, at p. 697.

[24]*Taylor v. People's Loan and Savings Corp.*, (1928), 63 O.L.R. 202.

[25]*Quebec v. Grand Trunk Railway*, (1899), 8 Q.B. 246.

[26]*Simon v. Castonguay*, [1931] 2 D.L.R. 75.

[27]*Re By-law 92, Winnipeg Beach*, [1919] 3 W.W.R. 696.

[28](1939), 66 K.B. 124. See also *Paré v. Cité de Québec*, (1929), 67 S.C. 100, where a by-law of that city similar to By-law 1862 of Montreal was attacked. The court again conceded that a municipal corporation cannot delegate its powers, but denied that the terms of the by-law did in effect constitute such a delegation. The court seemed to feel that the ability of the council to revoke the powers which it vested in the Director of Police preserved the ministerial quality of the powers thus conferred, and prevented their absolute or arbitrary exercise by the Director of Police.

the Court if he exercised his power unreasonably or arbitrarily; this seemed to the Court to preclude the fact that he had been delegated a legislative power.

In the case of *Stiffel v. Cité de Montréal,*[29] the Court upheld the right of the Director of Police to withhold his approval of an application for a permit (as required by By-law 1643 of the City) to open a billiard parlor. The Court seemed to assume the validity of the By-law and simply considered whether or not the Police Director acted in an abusive or arbitrary manner. Since, in the Court's opinion, he had "exercised a reasonable discretion", the application by the plaintiff for a writ of *mandamus* compelling the City and its competent officers to issue the permit was dismissed.

In the case of *Jaillard v. City of Montreal,*[30] Greenshields C. J. appears to have assumed the validity of By-law 432 (mentioned *supra* in the *Savich* case) which provided *inter alia* that no permit or license would be granted without the written recommendation of the superintendent of police and the inspector of buildings. The learned judge found for plaintiff, but on the grounds that the officer had acted arbitrarily and unreasonably in refusing to grant the permit.

> It is a well-known principle that a discretionary power given to a public officer must be exercised not capriciously or arbitrarily. . . .[31]

This statement clearly implies that a discretionary power can be delegated.[32]

In *Vic Restaurant Inc. v. City of Montreal,* the Quebec Court of Appeal[33] adhered closely to the line of reasoning prevalent in the above Quebec cases. Owen J., who with Hyde and St. Jacques JJ., constituted the Court, admitted that

> . . . a very wide discretion is given to the Director of Police in deciding whether or not his written approval should be given with respect of these applications.

But the learned judge nevertheless felt that

> . . . this does not mean that the liberty of the citizen is thereby curtailed. In the event of the Director of Police refusing to give his written approval, the matter can be brought before the Courts . . . by a *mandamus* and the Courts can decide

[29][1945] K.B. 258.

[30](1934), 72 S.C. 112.

[31]*Ibid.*, at p. 114.

[32]It is interesting to note *en passant* that the Court found the police officer's action in refusing to approve the license application to have been unreasonable and arbitrary because the officer had decided not to approve it on the advice of the parish curé; thus the officer substituted the judgment and discretion of another for his own and the Court was of the opinion that . . . if the authority to exercise that discretion is delegated to an officer of the City . . . that discretion should be exercised by the officer and not by another.

Here the implication is even clearer to the effect that the City can delegate its discretionary powers. The statement recognised the general rule prohibiting such delegation but why the judge was willing to except the City from the application of this rule is not revealed at any point.

[33][1957] Q.B. 1.

> whether there was cause for withholding the written approval or whether the Director of Police was acting in an arbitrary manner.[34]

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Canadian jurisprudence on this issue leads inexorably to the conclusion that two conflicting schools of thought have arisen; the one claiming that the delegation of discretionary powers by a municipal council to its officers is *ipso facto* unlawful; the other admitting that the delegation is invalid in principle, but at the same time so restricting the rule's applicability as virtually to nullify its effect. Generally, Quebec courts have inclined to the latter view, whereas courts of the common law provinces and the Supreme Court have upheld the former. Thus a distinct dichotomy exists in the present state of Canadian law on this point.

One of the reasons for this divergent attitude of the Quebec Courts may be traced to "administrative necessity". This type of reasoning is best exemplified by the statement of Barclay J. in the *Savich* case:

> 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 director of police is not in reality a delegation of authority but a matter of legitimate prudence.[35]

This statement was quoted with approval by the Court of Appeal in the present case and the attitude expressed therein seems to represent a considerable segment of judicial thought in Qubec, as well as among the Supreme Court justices who hail from Quebec.[36]

With respect, it is submitted that this attitude ought not to be encouraged in our courts. While it is true that the dictates of efficiency demand a delegation of authority in the running of the affairs of a large, complex and modern municipal government, it is equally true that the law is clear and unequivocal in its rule that no such delegation can take place without express authorization to do so. *Potestas delegata non est delegari.* The authors have unanimously agreed on this principle and on its particular applicability to the powers granted to municipal councils.[37] The principle, it is submitted, should be even more strictly applied to situations in which the rights of individuals are concerned; to relax unduly the rigidity of the law in such cases is to endanger or even,

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[34]*Ibid.*, at p. 22.

[35]*Supra*, footnote 28, p. 131.

[36]See Fauteux J. at p. 22 of the Supreme Court Report.

[37]Rogers, I. MacF., *The Law of Canadian Municipal Corporations*, says at p. 327: "Councils are sometimes specifically authorized by statute to vest certain discretionary powers in officials, but, in the absence of such express right, the council itself must exercise all discretionary powers." See also the Municipal Code of Quebec, sec. 65: "The city council must directly exercise the powers conferred upon it by this Code; it cannot delegate them."

in extreme cases, to nullify these rights. In the common law tradition, any individual has a right to engage in any lawful calling. If that right is to be limited by a municipal requirement that an individual acquire a permit or license before he will be allowed to engage in such lawful calling, such requirement should be interpreted restrictively, and in such a manner as not to deprive the individual of his common law rights. This line of reasoning is perhaps best summarized by the statement of Osler J. A. in *Merritt v. City of Toronto*:[38]

> 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.

It would thus appear that reasons of "administrative necessity" — the legal counterpart of, or euphemism for, the infamous "raison d'état" — do not provide a satisfactory basis for a liberal interpretation of a city's powers to delegate its legislative authority. If a city wishes to possess such powers, there would, in law, be nothing to prevent it from petitioning the Legislature to grant same; or, alternatively, granted the necessary power of delegation had been given the council by the city charter, a by-law might very well have prescribed definitively a state of facts the existence of which would render a person ineligible to receive a permit. Such criteria were not *written* into the Montreal By-laws; but they were *read* into them by the courts of the Province, in a sort of *ex post facto* justification of what doubtless was an arbitrary decision of the Police Director — arbitrary, that is, in the sense of having been arrived at on purely subjective grounds or criteria.

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There is yet another factor which may account for the conflict in judicial opinion as to the validity of by-laws granting wide discretionary powers to Police Directors *et al.* It will be noted that in all the Quebec cases cited, except one, the City of Montreal was involved as defendant. Some Quebec judges[39] are of the opinion that the powers granted to the City of Montreal are so formidable and sweeping that they (a) render the by-laws in question *intra vires,* and (b) differentiate Montreal from most other municipal corporations whose statutory powers are more confined.

It is respectfully submitted that this argument cannot be maintained. As Locke J. points out, article 299 of the Montreal Charter, which gives the general power to the City Council to enact by-laws for the peace, order, good government and general welfare of the city, is the so-called "good government clause" which appears in the municipal acts of the other provinces. Furthermore, the

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[38] *Supra,* footnote 14, at p. 207.

[39] See Fauteux J. at p. 64 of the Supreme Court Report.

general license power conferred upon the Montreal City Council by article 300 sec. 22 of the Charter cannot be distinguished from that conferred on the City Council of Moose Jaw by sec. 187 of the Cities Act of 1908;[40] the *Hall* case[41] is therefore indistinguishable from the present one. "General omnibus or catch-all provisions of this nature are a common feature of most municipal statutes."[42] Section 260 of the Municipal Act of Ontario is, in substance and effect, synonymous with article 300 (c) of the Montreal Charter; it provides that councils are authorized to "pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act, as may be deemed expedient and are not contrary to law . . ."

It is therefore difficult to determine how and why the dissenting judgement differentiated Montreal's powers from those of most other Canadian municipalities.

* * *

One last point deserves comment. It will be recalled that Fauteux J. felt that By-law 1862, read in conjunction with the duties of the Director of Police mentioned in By-law 247, outlined with sufficient detail the standards or rules by which the Police Director was to govern himself in the exercise of his discretion to grant or withhold approval of a permit application. The learned judge expressed the belief that the Police Director was duty-bound to exercise such discretionary authority solely on the basis of whether or not his approval would lead to those hazards, risks and dangers that his department was supposed to prevent or combat. This principle seems to be salient in the minds of most of the Quebec judges who adjudicated the cases cited since they continue to assume the validity of the by-laws and then proceed to determine whether the powers granted to the Police Directors by such by-laws were exercised arbitrarily and/or unreasonably, i.e. beyond the criteria tacitly imposed.

Cartwright J., in reply to this suggestion, noted some of the varied and indeed quaint activities or callings for which a license approved by the Police Department is required — including, *inter alia*, a dealer in canaries, an embalmer, a phrenologist and a bicycle. On the basis of such evidence, the learned judge concluded that

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[40]Sec. 187: "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 fee 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 . . ."

[41]*Supra*, footnote 22.

[42]Rogers, I. MacF., *op. cit.*, at p. 313.

> . . . 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 . . . would of necessity be so wide and vague as to be valueless.[43]

* * *

In connection with this issue, an interesting distinction was made by Fauteux J. between the present case and that of *Bridge v. The Queen*.[44] In the latter case, the validity of a by-law of the City of Hamilton was attacked. The by-law provided that all gasoline stations should be closed at specified hours, but also 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 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", failed to keep their shops open as authorized. The court held that this provision 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 — was invalid.

> 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.[45]

The majority of the Supreme Court, in the present case, found the decision of *Bridge v. The Queen* to be directly applicable.

> While it was attempted to distinguish the judgement of this Court in *Bridge v. The Queen*, the argument completely failed to do so . . .[46]

Fauteux J., however, felt that the *Bridge* case was distinguishable from the present matter, apparently with respect to the degree of arbitrariness assigned to an official in each case. The by-law of the City of Hamilton, reasoned Fauteux J., provided that the City Clerk could act on *such evidence as he might find sufficient*. This, the learned judge continued, was not the situation envisaged in the Montreal By-law. If one gave to By-law 1862 its true "sens", "esprit", and "fin véritable", it followed, to his mind, that the City Council had effectively and for all intents and purposes indicated the grounds on which the director of a service was to withold his approval of a permit application. The Council had simply given to this official the right to verify, in each case, if those conditions did in fact exist and to act on *such evidence as is sufficient*.

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[43]At p. 100.

[44][1953] 1 S.C.R. 8.

[45]*Ibid.*, at p. 13, *per* Cartright J.

[46]At p. 85, *per* Locke J.

When this case was argued before the Quebec Court of Appeal, that tribunal used the same reasoning as Fauteux J. to distinguish it from the *Bridge* case. Hyde J.[47] felt that the City Clerk, acting under the provisions of the Hamilton By-law, was "beyond the reach of *mandamus* because a Court could not presume to say what was 'satisfactory' to him." Refusal by the Chief of Police under the terms of the Montreal By-law was, on the other hand, "subject to control by *mandamus*, as the Court is not deprived of the power of determining whether the decision was in abuse of his power or was arbitrary or capricious."

With respect, it is submitted that this distinction drawn between the *Bridge* case and the present matter cannot be maintained. The reasoning applied by Mr. Justice Fauteux begs the question. He points out that the Police Director is to proceed "on such evidence as *is* sufficient" and not "on such evidence as *he might find* sufficient"; but who is to determine the sufficiency of the evidence? Surely it is the Police Director himself who is empowered by the By-law to decide whether or not the evidence "is sufficient" and to act accordingly. Is this not simply a circuitous way of stating that the Police Director is to act when *he* finds the evidence to be sufficient. Someone must of necessity make a decision as to the sufficiency of the evidence. The Council has not done so under the terms of the By-law, because no standards or criteria for measurement or determination are even mentioned in it; nor does the Council make the decision and then instruct the Police Director to carry out his administrative duties. It is the Police Director himself who both *decides* and *acts*. The "act" may be purely "ministerial" in nature, but the "decide" is unquestionably discretionary.

The interpretation of the *Bridge* case by the Court of Appeal is difficult to understand. It surely cannot be maintained, as the Court apparently tried to do, that the City Clerk of Hamilton had been granted such a sweeping mandate that, even if it were proved that he acted arbitrarily, capriciously and in abuse of his rights, the courts would be powerless to upset his decision. Hyde J. nevertheless, maintains that this *unlimited* quality of the City Clerk's powers constituted the *ratio decidendi* of the case and that "the Court did not discuss the larger aspects of delegation now before us". But is it not self-evident that the powers of the City Clerk were no more, no less than those of the Montreal Police Director; both were granted a broad measure of discretionary, i.e. legislative authority, within which they could enforce their own legislative will. It was, in both instances, only when they exceeded themselves, and stepped beyond the wide area of discretion granted to them, that the Courts could reverse their decisions. The ruling that the discretionary authority of these officers cannot be exercised beyond certain limits is obviously a corollary of the fact that it can be exercised at all; and the By-law granting the power to exercise such discretionary authority is, in both of these cases as in every other case where no statutory right to do so exists, *ultra vires* and illegal.

[47][1957] Q.B. 1 at p. 20.

IV. SOME TENTATIVE CONCLUSIONS

Whether or not the decision of the nation's highest tribunal in *Vic Restaurant Inc. v. City of Montreal* will unify Canadian jurisprudence and law on the problem of what constitutes an illegal delegation of powers by a municipality, is a moot question. Hitherto, the courts of the common law provinces had, for the most part, adhered strictly to the legal maxim of *delegatus non potest delegare* and had invalidated such delegation unless the enabling statute *expressly* conferred the power to do so. On the other hand, the decisions of the courts of the province of Quebec on this issue have been characterized by the payment of lip service to the principle, followed by a justification of derogations from that principle on the grounds of a variety of factors, mostly centering about practical considerations such as reasons of "administrative necessity". In the process, the common law rights of the citizens of the municipalities concerned to carry on a lawful trade or calling have been often overlooked, intentionally or otherwise.

The *Vic Restaurant* case saw the Supreme Court of Canada render a decision affecting a Quebec municipality of no small consequence and thus may have finally resolved the conflict in judicial opinion. Nevertheless, it is conceivable that in future cases of this nature, the courts of Quebec may return to the long-established jurisprudence of that province and may distinguish the *Vic Restaurant* case, in the same way as they distinguished *Bridge v. The Queen*. This possibility is lent further credence and support when it is recalled that all three justices of the Supreme Court who acquired their legal training and experience in Quebec, dissented from the majority of the Court in the *Vic Restaurant* case, and instead affirmed the decisions of lower courts and completed the unanimity of Quebec-bred judges on this matter.

The tendency of modern governments, at the municipal as well as at other levels, has been increasingly to regulate the private affairs and to intervene in the private activities of their citizens. Under such circumstances, it would be a dangerous practice, it is submitted, to continue the policy of Quebec's courts and to countenance the delegation of what they themselves admit to be "very broad powers" to an official who is not in any direct way responsible to the electorate.

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