Recent Cases

PROCEDURE — INTERLOCUTORY INJUNCTION — APPEAL — SUSPENSION OF THE INJUNCTION — Articles 497, 760 C.P., *Barnett* v. *Telephone Answering Service Limited*, Unreported Judgment, Court of Appeal (Montreal), 12,505; January 14, 1970.

The following judgment of the Quebec Court of Appeal is interesting because it deals with an area which is not explicitly dealt with in the Code of Procedure — namely the effect of appeal on an interlocutory injunction. The Court unanimously held that an appeal does not suspend the injunction. While one cannot quarrel with the result in the case at bar, it is respectfully submitted that the same cannot be said for the reasoning of Mr. Justice Salvas and the problems which it raises.

Mr. Justice Brossard

Je suis d'accord avec mon collègue, monsieur le juge Salvas, et pour les raisons qu'il donne, je rejetterais l'appel avec dépens.

Il est difficile de concevoir que le législateur qui stipule qu'une injonction interlocutoire reste en vigueur nonobstant le jugement qui y met fin si appel de ce jugement final a été inscrit dans un délai de dix jours d'icelui (760 C.P.), ait voulu toutefois qu'il n'en soit pas ainsi dans le cas de l'appel de l'injonction interlocutoire elle-même et qu'il ait voulu assujettir le maintien en vigueur de cette injonction à l'obtention préalable d'une prétendue exécution provisoire (511 C.P.) en vertu de l'alinéa i) de l'article 547 C.P. relatif aux cas d'urgence exceptionnelle alors que, par sa nature même, l'octroi de l'injonction interlocutoire présuppose une telle urgence.

Mr. Justice Salvas (Rivard, J. concurring)

Le défendeur appelle d'un jugement de la Cour supérieure, district de Montréal, rendu le 4 juillet 1969. Par ce jugement la Cour supérieure, accueillant la requête de la demanderesse, condamne le défendeur pour outrage au tribunal, à une amende de $100.00 et, à défaut de paiement, à quinze jours de prison. Cette sanction n'est pas en litige.

Le 18 février 1969 la Cour supérieure, accueillant une requête en injonction interlocutoire de la demanderesse, conclut comme suit:

> "...the plaintiff's petition for interlocutory injunction is granted on the condition that the plaintiff give security in the amount of $2,000.00 and, subject to this condition, defendant is ordered and enjoined to refrain from establishing, re-establishing, opening or reopening, being engaged in, assisting or participating in, financially or otherwise, or in any other manner becoming interested in, directly or indirectly either as employee, owner, partner, agent or stockholder, director, officer,

creditor, consultant, coventurer or otherwise, any business, trade or occupation consisting of or similar to that of providing telephone answering service to customers within the City of Montreal or within thirty (30) miles of the City Hall of Montreal, the whole to remain in force until final judgment herein; the whole with costs to follow suit". (D.C. p. 9).

Dans le jugement *a quo*, le premier juge expose que le jugement du 18 février 1969 fut dûment signifié au défendeur et que ce dernier a appelé de ce jugement. Le défendeur admet qu'il a transgressé l'injonction (D.C. p. 15).

Le défendeur n'oppose qu'un seul moyen, un moyen de droit, à la requête pour outrage au tribunal. Il soutient que l'appel du jugement du 18 février 1969 a pour effet de suspendre l'exécution de l'injonction. C'est la seule question qui se pose dans le présent litige. Le premier juge y a répondu dans la négative; d'autres juges de la Cour supérieure ont répondu dans l'affirmative à la même question.

Il s'agit d'un problème de droit et il y a lieu d'en rechercher la solution dans l'analyse des dispositions régissant l'injonction et qui forment un chapitre spécial du Code de procédure civile (Livre 5, titre 1er, chapitre 3, articles 751 à 761).

Le moyen fondamental de l'appelant est basé sur l'article 497 (1er alinéa) du Code de procédure civile; il repose sur la proposition que l'injonction interlocutoire est un jugement. Je suis d'opinion, avec respect, qu'il y a là confusion. Il importe de l'éviter. Elle est, à mon avis, la source de contradictions. Cette confusion disparaissant, la question qui nous est soumise ne se pose plus.

L'injonction n'est pas un jugement, ce n'est pas une décision, c'est un ordre. La distinction s'impose entre l'injonction et le jugement qui l'accorde. Les règles relatives aux jugements, aux moyens de se pourvoir contre les jugements et à leur exécution se trouvent au Livre 2, titre 7, et aux Livres 3 et 4 (art. 457 à 732) du Code de procédure civile. Les dispositions régissant spécialement l'injonction forment, nous l'avons vu, le chapitre de l'injonction. Le premier article (751) de ce chapitre définit l'injonction en termes clairs. Il se lit comme snit:

> «L'injonction est une ordonnance de la Cour supérieure ou de l'un de ses juges, enjoignant à une personne, à ses officiers, représentants ou employés, de ne pas faire ou de cesser de faire, ou, dans les cas qui le permettent, d'accomplir un acte ou une opération déterminés, sous les peines que de droit.»

Dans les cas prévus «...une partie peut... obtenir une injonction interlocutoire» et, à cette fin, elle en fait la demande «au tribunal, par requête libellée...» signifiée à la partie adverse. «Le tribunal peut... permettre aux parties de produire une contestation écrite... et fixer une date pour l'enquête et l'audition» (C.P.C. 752, 753 et 754). Le tribunal dispose ensuite du mérite de cette requête par une décision; cette décision est un jugement. Si, par ce jugement, le tribunal «prononce» ou accorde l'injonction interlocutoire il doit, règle générale, «ordonner à celui qui l'a demandée de donner caution.... Le certificat du protonotaire attestant que le cautionnement a été fourni doit être annexé à l'ordonnance avant qu'elle ne soit signifiée» (C.P.C. 755). «L'ordonnance d'injonction interlocutoire doit dans tous les cas être signifiée à la partie adverse...» (C.P.C. 756). «Le tribunal

ou un juge peut suspendre ou renouveler une injonction interlocutoire, pour le temps et aux conditions qu'il détermine» (C.P.C. 757). «C'est là l'une des règles spéciales à l'injonction interlocutoire. Elle ne saurait certes pas s'appliquer à un jugement du même tribunal ou d'un juge de ce tribunal. S'il y a appel, le tribunal de première instance étant dessaisi temporairement de la cause» (C.P.C. 511) «...la Cour d'appel ou deux de ses juges... peuvent suspendre l'injonction provisoirement» (C.P.C. 760, 2e alinéa). Cette disposition est de portée générale. Elle ne distingue pas entre l'injonction définitive et l'injonction interlocutoire. C'est ce qu'a décidé notre cour dans l'affaire de *Mestcr* v. *Needco* (1961 B.R. 785) en vertu de l'article 969 de l'ancien Code de procédure civile que reproduit, en substance, l'article 760 du nouveau code.

Bref, le législateur distingue nettement entre le jugement qui accorde, ou prononce, une injonction et l'injonction même, notamment l'injonction interlocutoire, celle qui nous intéresse. Cette distinction est nécessaire. Autrement il faudrait admettre qu'une partie pourrait, à son gré, suspendre l'effet de cette injonction émise contre elle et dûment signifiée, tout simplement en formant appel contre le jugement qui l'accorde. Elle ferait perdre au requérant, le bénéfice de cette ordonnance ou elle l'obligerait à se pourvoir de nouveau, invoquant les mêmes faits, pour obtenir l'exécution provisoire du jugement. Je ne puis accepter cette proposition.

Dans les conclusions du jugement du 18 février 1969 la Cour supérieure accueille d'abord la requête en injonction interlocutoire à la condition que la demanderesse fournisse un cautionnement de $2,000.00 puis, sous cette condition, elle émet l'ordonnance mais elle y fait clairement la distinction entre le jugement proprement dit, disposant de la requête, et l'ordonnance, l'injonction interlocutoire.

Il est acquis aux débats que lorsque le défendeur a formé le présent appel, l'injonction avait été émise et dûment signifiée; elle était en vigueur. D'ailleurs l'appel tel que formé et soumis comporte l'admission de ces faits. Le jugement accordant la requête en injonction était donc exécuté. L'appel ne pouvait avoir l'effet de suspendre l'exécution de ce jugement; elle était accomplie. Le défendeur ne peut donc se prévaloir de l'article 497 (1er alinéa) du Code de procédure civile qui a trait à la suspension de l'exécution d'un jugement et non d'une injonction. L'injonction n'est pas une «procédure» au sens du dernier alinéa de l'article 511; c'est, je le répète, une ordonnance expressément définie à l'article 751.

L'injonction reste en vigueur nonobstant l'appel du jugement qui l'accorde, à moins qu'elle ne soit suspendue conformément à l'article 760, l'une des dispositions régissant spécialement l'injonction.

Je rejetterais l'appel avec dépens.

Mr. Justice Salvas in an attempt to circumvent article 497 C.P.[1] draws a fundamental distinction between the injunction and the judgment ordering it. The learned judge states that the injunction is an order, not a decision or a judgment. It stands independent of the judgment ordering it. However, in Mr. Justice Salvas' view, the

[1] Article 497 C.P. provides that: "Saving the cases where provisional execution is ordered, an appeal regularly brought suspends the execution of judgment."

judgment is executed by the service of the injunction, "elle était accomplie", and therefore article 497 C.P. cannot apply to suspend the judgment's execution.

Even if one is willing to accept the distinction drawn by the learned judge, it is submitted that consequences implicit in the reasoning used are a cause for concern. If it is the service of the injunction that executes the judgment and prevents article 497 C.P. from applying, then an appeal instituted before service will render the article applicable and therefore the injunction would not remain in force.

It is thus submitted that the above judgment, if followed, would result in precisely that state of affairs which it tries to rectify and prevent — the suspension of an interlocutory injunction by appeal. The injunction would in effect be suspended everytime the party against whom it was ordered, outraces the bailiff and files an appeal before he is served. Moreover, as Mr. Justice Brossard points out in his notes, if an interlocutory injunction remains effective notwithstanding a final judgment dissolving it (providing there is an appeal within ten days), then *a fortiori*, an interlocutory injunction that is granted should not be suspended by an appeal.[2] One must also note that a final injunction remains in effect notwithstanding an appeal.[3] The above reasons, it is suggested, would have been sufficient to dispose of the matter and would have avoided the aforementioned difficulties.

R.S.

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[2] Article 760, C.P.
[3] *Ibid.*

CRIMINAL LAW — OBSTRUCTION — PEACE OFFICER IN EXECUTION OF DUTY — ARRESTING OFFICERS EMPLOYING GROSSLY EXCESSIVE FORCE — FRIEND OF ARRESTED MAN PROTESTING — RIGHT OF ACCUSED TO KNOW REASON FOR ARREST AND TO GIVE EXPLANATION — DUTY OF OFFICERS TO LISTEN TO ACCUSED'S STORY UNLESS LATTER'S MANNER UNREASONABLE. *Regina* v. *Long,* (1970) 8 C.R.N.S. 298.

The accused's right to be promptly informed of the reason for his arrest has for a long time been accepted as a fundamental human right and is recognized as such in the *Canadian Bill of Rights.*[1] In the recent case of *Regina* v. *Long,*[2] the British Columbia Court of Appeal [3] not only insisted upon this right but also established that the prisoner, or someone speaking on his behalf, may question the peace officer's charge at the time of the arrest if the latter is made without a warrant.

The accused, in the present case, was appealing his conviction by a magistrate of having unlawfully obstructed a peace officer in the execution of his duty.[4] The facts out of which the arrest was made can be briefly stated as follows:

Richard Long, a companion of the accused,[5] was arrested without a warrant by Constables Wilding and McLachlan for dangerous driving. The two constables were then joined by two more policemen and the four then used a considerable amount of force to put Richard Long in the police wagon — McLaclan even admitting having struck Long in the face.

It was during this scuffle that the appellant interfered by questioning the officers, and according to the testimony of the police, by telling Richard Long that he did not have to get into the police vehicle. Appellant admits having told the constables to let Long go and that there was no need to hit him, however, he

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[1] 1960 S.C. c. 44, s. 2(c)(i).

[2] (1970) 8 C.R.N.S. 298.

[3] Davey C.J.B.C., Robertson and Nemetz JJ.A.

[4] Presumably under *Criminal Code* s. 110(a), although no section was specifically referred to by the Chief Justice. It is interesting to note that the Court did not refer to its own decision in *Regina* v. *Solowoniuk, et al,* (1960) 129 C.C.C. 273, in which it acquitted the appellants as they had been charged and convicted of "unlawfully" obstructing a police officer in the execution of his duty rather than "wilfully" obstructing, as required by s. 110(a) of the *Criminal Code.*

denied any physical interference. There was no question but that the constables had the right to arrest appellant's companion for dangerous driving without a warrant, although he was later acquitted of that charge.

At the trial, the magistrate found the appellant guilty of having interfered with the police in the execution of their duty by persisting in his questions and remarks. Hence, he must have been satisfied that there was only vocal interference and that there was no physical obstruction.

In convicting, the magistrate ruled that:

> ...when police officers are arresting anybody and handling prisoners no friend or passer by or person standing around should take any action even by words or questioning the police as to what they were doing or why they should be doing it.[6]

The Court of Appeal, however, reversed the magistrate and quashed the appellant's conviction. Davey, C.J.B.C. speaking for a unanimous court held that:

> I have no hesitation in saying that when a police officer is proceeding to arrest without a warrant, he ought to listen to any statement the prisoner may seek to give in a reasonable manner about the charge upon which he is being arrested.... I do not suggest that failure to listen invalidates the arrest, but only that a prisoner or someone speaking for him is entitled to know the reason for his arrest and to make such a statement in answer to it, and that an exercise of that right cannot be converted into obstruction unless it be intemperate, unduly persistent, irrelevant or be made in an unreasonable manner.[7]

This case is important as it reverses an earlier decision of the British Columbia Court of Appeal in *Rex* v. *Goodman*.[8] In that case, Goodman was convicted in the Vancouver Police Court of wilfully obstructing a peace officer under *Criminal Code* s. 168.[9] He had asked the driver of a taxi, in which he was a passenger, to let him off at a point where vehicles were not permitted to stop. When a police officer asked the driver what he was doing and began writing a "ticket", the appellant told the officer that it was he who was to blame and not the driver.

In dismissing the appeal, Robertson, J.A.[10] held that:

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[5] Perhaps a relative as well, as he and the appellant share the same family name.

[6] (1970) 8 C.R.N.S. 298, at p. 301.

[7] *Ibid.*, at p. 302.

[8] (1951) 2 W.W.R. 127.

[9] 1927 R.S.C. c. 36; now s. 110.

[10] Robertson, J.A. also sat in the *Long case*.

> ...it was clearly obstruction when the appellant told the officer to "leave the taxi driver alone", and continued to shout at the officer under the existing circumstances. The fact that the officer, by reason of the appellant's shouting and conduct, was forced to leave the driver and go to the curb of itself shows obstruction, in my view.[11]

Although there is little jurisprudence in this area, the cases which have been decided have set down conflicting rules. In *Titus* v. *Kinch*,[12] the Supreme Court of Prince Edward Island quashed the appellant's conviction of obstructing a police officer. Saunders, J. held that:

> ...a reputable citizen, as the appellant undoubtedly is, has every right to express his opinion, or even to criticize the conduct of an officer. The evidence shows clearly that there was no assault committed, nor threat made, and that the appellant did not in any way attempt to prevent the officer from performing his duty or to induce anyone else to do so. I am at a loss to see that an expression of opinion constitutes an obstruction, or amounts to resisting or interfering with an officer.[13]

This rule was not followed by the Quebec Superior Court in *Pelletier* v. *Cité de Rivière-du-Loup*.[14] Here, plaintiff was convicted of obstructing a police officer when he told his friend, (a suspect) not to reply to the police officer's questions. In dismissing plaintiff's action for damages for illegal arrest, Boulanger, J. held that:

> Pour entraver un agent de police dans l'exécution de ses fonctions, il n'est pas nécessaire de l'assaillir. Il suffit de mettre obstacle à l'accomplissement des devoirs de l'agent, de lui causer de l'obstruction et de l'opposition et de lui nuire,... [L]e demandeur a certainement entravé le constable Bourgoin quand il est intervenu pour empêcher Mailloux de parler, de donner au constable en service et en uniforme des renseignements sur la personne en charge de l'automobile et pour lui en remettre les clés.[15]

While the recent case of *Regina* v. *Long* [16] now settles the law in favour of permitting the accused person, or someone speaking on his behalf, to question the police officer at the time that he is arrested, the fact that there is absolutely no sanction if the arresting officer refuses to listen or answer questions about the charge makes this right more illusory than real.

A.A.M.

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[11] (1951) 2 W.W.R. 127, at p. 132.
[12] (1934-35) 8 M.P.R. 359.
[13] *Ibid.*, at p. 362.
[14] [1947] C.S. 344.
[15] *Ibid.*, at p. 347.
[16] (1970) 8 C.R.N.S. 298.

MUNICIPAL LAW — BUILDING PERMIT — OWNER PLANNING CONSTRUCTION OF COMMERCIAL SHOPPING CENTRE ON LANDS — BUILDING PERMIT FOR FOUNDATIONS ISSUED IN THE AFTERNOON OF THE PASSING OF THE NEW PLANNING AND IMPLEMENTING BY-LAWS — WHETHER MANDAMUS LIES AGAINST CITY ON BALANCE OF EQUITIES. *Regina* v. *City of Barrie et al; Ex parte Bernick* [1970] 8 D.L.R. (3d) 52.

To what extent can someone's right to build be defeated by subsequent legislation?

In the case of *Regina* v. *City of Barrie et al*,[1] the Ontario Court of Appeal was met with this fact situation. The Respondent owner had given instructions for the preparation of plans for the construction of a commercial shopping centre which he proposed to build on his land. Two months later, the city published a new official plan which had the effect of re-zoning the Respondent's land to residential uses. Notwithstanding this plan, of which he had knowledge and had spoken out against, the Respondent, four months later, applied for a building permit to construct his proposed commercial shopping centre. He obtained his permit which was issued only for the construction of the foundations. The permit for the construction of the superstructure had to be approved by the Department of Labour before it could be issued. This approval was obtained that same day and so the Respondent re-delivered his plans to get the permit. He was then told that the chief building inspector was out of his office and that he would be issued the permit the next morning.

That very same evening the City Council gave first and second readings to the proposed official plan and to the by-law required to implement it. A by-law re-zoning the Respondent's land was also given three readings and enacted. The next morning, the Respondent was refused his superstructure building permit. He sought an application for an order of *mandamus* which was granted. This is an appeal from that decision.

The appeal was dismissed in the Ontario Court of Appeal, Mr. Justice Laskin and Mr. Justice Jessup delivering the opinions of the Court.

Neither the by-laws nor the official plan had any legal effect until approved by the Ontario Municipal Board, an approval which

[1] [1970] 8 D.L.R. (3d) 52.

had not been obtained at the time of the seeking of the second permit. However, this was not an end to the matter, for it appears that there does not necessarily have to be a by-law in order to justify the refusing of a building permit. The Court cited the case of *City of Ottawa et al* v. *Boyd Builders Limited*[2] where Mr. Justice Spence said:

> An owner has a *prima facie* right to utilize his own property in whatever manner he deems fit subject only to the rights of surrounding owners *e.g.* nuisance, etc. This *prima facie* right may be defeated or superseded by rezoning if three prerequisites are established by the municipality: *a)* a clear intent to restrict or zone existing before the application by the owner for a building permit; *b)* that council has proceeded in good faith; *c)* that council has proceeded with dispatch.[3]

Whether this *prima facie* right has been defeated depends on the discretion of the Court. Mr. Justice Lieff in the Court of first instance evidently thought that the *prima facie* right had not been defeated and granted the *mandamus* order. Mr. Justice Laskin agreed and said:

> I do not think that it was clear here that there was a manifested intention to pass the particular rezoning by-law before the application for building permit was made.[4]

Mr. Justice Jessup however, did not agree. He said:

> However, in my opinion, all of the elements mentioned by Spence, J. as justifying the defeat of an owner's *prima facie* right are present in this case.[5]

He did assert, however, that since injustice would not result if Mr. Justice Lieff's discretion were not interfered with, he would not alter the lower Court Judge's decision.[6]

Therefore the appeal was dismissed.

It is interesting to note from this judgment that it is clear that if a by-law rezoning an area has been passed and approved of before a permit is sought no permit will be issued. However, even though there be no effective and valid by-law re-zoning the area, if the authorities have shown a clear intent to re-zone, have proceeded in good faith and in dispatch then a permit may be refused. Moreover when a builder seeks *mandamus* upon being

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[2] [1965] S.C.R. 408.

[3] *Ibid.*, at p. 410.

[4] *Supra*, n. 1, at p. 53.

[5] *Ibid.*, at p. 58.

[6] See *McKinnon Industries Ltd.* v. *Walker* [1951] 3 D.L.R. 577 where it is stated, at p. 579: "...an Appellate Court should not interfere unless it is clearly satisfied that the discretion has been wrongly exercised either because the Judge has acted upon some wrong principle of law or because on some other grounds the decision will result in some injustice being done..."

refused his permit, the Municipal Board may seek an adjournment of the order until it can pass an effective rezoning by-law.

In the light of this decision it will be interesting to see what, short of a by-law will qualify as a 'clear intent to restrict or zone'. Here the City had made public a plan which re-zoned the lands several months before the Respondent sought his permit yet even that did not qualify to defeat the owner's *prima facie* right.[7]

L.N.K.

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[7] In order for an Ontario builder to be absolutely certain that his right to build will not be defeated by a subsequent by-law, it appears that he should get his plans approved by the municipal architect or building inspector as soon as they are ready. S. 30(7) (b) of the *Planning Act*, R.S.O. 1960, ch. 296 says that if this is done no by-law subsequently passed can effect him. See *Mapa et al* v. *Township of North York and Beckett* [1967] S.C.R. 172 where S. 30(7) (b) of the *Planning Act*, R.S.O. 1960, ch. 296 is interpreted.