1951

*Oct. 31.
*Dec. 3.

CITY OF VERDUN (DEFENDANT).....APPELLANT;

AND

SUN OIL COMPANY LTD. (PETITIONER)..RESPONDENT.

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

Mandamus—Municipality—Refusal by Council to grant permit for erection of service station—Section 76 of municipal by-law 128 of City of Verdun gives Council discretion to grant or refuse permit—Whether such discretionary power ultra vires—Whether mandamus is right procedure to have it so declared—Whether petitioner has legal interest to bring action—Cities and Towns Act, R.S.Q. 1941, c. 233, ss. 424, 426 and 429—Arts. 50, 77 and 992 C.P.C.

The respondent, pursuant to s. 76 of by-law 128 of the City of Verdun, applied to the appellant for permission to erect a service station in the City. In the immediate locality were then already located three like establishments operated by different competitor companies. The application was rejected by a resolution of the Council of the City, notwithstanding that all the requirements of s. 76 had been fully complied with and that the Building Inspector of the City had transmitted to the Council a favourable certificate. Proceedings were then instituted by way of mandamus to challenge the validity of s. 76 in so far as it purported to give the Council a discretionary power to grant or refuse the permit, to ask that that portion of s. 76 be declared *ultra vires* the powers of the City as delegated to it under the *Cities and Towns Act* (R.S.Q. 1941, c. 233), and to compel the granting of the permission. In the Superior Court, the City was successful, but the majority in the Court of Appeal for Quebec declared null and void, as *ultra vires,* the above mentioned portion of s. 76.

Held, dismissing the appeal, that the portion of s. 76 of by-law 128 of the City of Verdun, purporting to give the Council a discretionary power to grant or refuse the permit, was *ultra vires* the powers of the City as delegated to it by s. 426 of the *Cities and Towns Act.* The municipalities, deriving their legislative powers from the provincial Legislature, must frame their by-laws strictly within the scope delegated to them; but the City, by enacting s. 76, effectively transformed its delegated authority to regulate by legislation into a mere administrative and discretionary power to grant or cancel by resolution the permit provided for in the by-law. (*Phaneuf* v. *Corp. du Village de St-Hughes* (1) and *Corp. du Village de Ste-Agathe* v. *Reid* (2) referred to).

Held further, that the City, having fought its case on the assumption, sufficiently justified by the record, that the plaintiff had a legal interest in the action, is now bound by the manner in which it conducted its defence and cannot therefore gain a new ground in law. (*The Century Indemnity Co.* v. *Rogers* (3) and *Sullivan* v. *McGillis* (4) followed).

*PRESENT: Taschereau, Kellock, Estey, Cartwright and Fauteux JJ.

(1) Q.R. (1936) 61 K.B. 83.
(2) Q.R. 10 R. de J. 334.
(3) [1932] S.C.R. 529 at 536.
(4) [1949] S.C.R. 201 at 215.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing, St-Jacques and Barclay JJ.A. dissenting, the decision of the trial judge and holding that part of s. 76 of by-law 128 of the City of Verdun was *ultra vires*.

L. J. de la Durantaye K.C. and Maurice Fauteux K.C. for the appellant. The principle laid down in *Phaneuf* v. *Corp. du Village de St-Hughes* (2) is undisputed except as to the use of the word "strictly". The legislator cannot anticipate every case down to its smallest details. Therefore, in order to be *intra vires*, a by-law need only to be within the general powers given by the Legislature.

Under the terms of Art. 426 of the *Cities and Towns Act*, if the Council could determine by by-law the locality for a particular industry, it certainly could authorize the Council to do so by resolution. If Art. 426 did not authorize the Council to enact s. 76, then Art. 424 gives the municipality powers general enough to enact it. This authority can also be found under Art. 429(22) of the *Cities and Towns Act*. The good administration of the City requires such a discretion which, the evidence reveals, was properly exercised. Furthermore, if the Building Inspector, under the terms of Art. 426 of the *Act*, has a discretion in the granting or refusing of the permit, why not the Council?

Assuming then that the Council could, in its discretion, grant or refuse the permit, the Courts cannot intervene and substitute their discretion to the Council's: *Noël* v. *Cité de Quebec* (3) and *Quinlan* v. *City of Westmount* (4).

Subsidiarily, even if the City had exceeded its jurisdiction, the respondent could not by way of mandamus ask that the portion of s. 76 be declared null. There is no act or duty incumbent upon the City by-law to grant the permit (Art. 992 C.P.C.). Quite the contrary, s. 76 leaves it to the discretion of the Council. Even if that part of s. 76 is erased, there is still no stipulation of the law to oblige the Council to grant the permit. The mandamus was not the most effectual remedy as required by Art. 992 C.P.C. (*Kearns* v. *Corp. of Low* (5) relied on).

(1) Q.R. [1951] K.B. 320.
(2) Q.R. (1936) 61 K.B. 83.
(3) Q.R. 64 S.C. 260.
(4) Q.R. 23 R.L. (N.S.) 411.
(5) Q.R. 28 R.J. 498.

1951

CITY OF VERDUN v. SUN OIL CO. LTD.

Furthermore, in order to proceed by mandamus, the respondent needed to have at least an eventual interest which had to exist at the time of the taking of the action. The respondent was not at that time owner nor lessee. (*Perron* v. *Corp. du Sacré-Coeur de Jésus* (1), *Noël* v. *Cité de Québec* (2), *Clegg* v. *MacDonald* (3) and *Re Workmen's Compensation Act* (4) relied on).

G. C. Papineau-Couture K.C. and R. C. Harvey for the respondent. A power to grant or refuse at will the permit is *ultra vires*. So soon as an applicant has established fulfilment of all the requirements of the by-law, the municipality is in duty bound to grant the permit by the provisions of Art. 426 of the *Cities and Towns Act*. It matters not whether the power to issue permits is given by by-law to a designated officer or to the Council, the principle is the same. Clearly the City must proceed not by resolution but by by-law. It must follow its prescriptions and cannot alter or disregard the same. Otherwise, the Council administers and legislates by simple resolution where the governing statute orders this to be done by by-law and specifically forbids any change or alteration unless a modifying by-law is adopted by the secret vote of the interested proprietors. (*Phaneuf* v. *Corp. du Village de St-Hughes supra*). Such an arrogation of discretionary powers was condemned in clear, strong and definite language in *Corp. du Village de Ste-Agathe* v. *Reid supra*. The same principle was upheld in *Baikie* v. *City of Montreal* (5) and *Murray* v. *District of Burnaby* (6).

The City has the right to regulate and locate establishments, but this can only be done by a general by-law and not by a so-called discretion under a building by-law. When the conditions of the by-law have been complied with, a mandamus will lie to compel the granting of the permit: *Rosenfelt* v. *Biron* (7). The way s. 76 has been interpreted, it opens every door to arbitrariness, discrimination and injustice. The cases of *Jaillard* v. *City of Montreal* (8) and *Phaneuf supra* are also relied on.

(1) Q.R. 44 K.B. 400.
(2) Q.R. 64 S.C. 260.
(3) (1918) 39 D.L.R. 130.
(4) [1938] 3 D.L.R. 795.
(5) Q.R. (1937) 75 S.C. 77.
(6) [1946] 2 D.L.R. 541.
(7) Q.R. 43 S.C. 127.
(8) Q.R. (1934) 72 S.C. 112.

The respondent's interest in obtaining a permit clearly appears from a perusal of the petition and from the evidence. The appellant never raised the ground up to now of lack of interest. By-law 128, s. 76, does not restrict applications for a permit to any category of individuals. The appellant knew that an option had been obtained on the site and that considerable time and money had been spent in negotiating for the purchase of the property. The interest of the respondent is evidenced by the prejudice caused by the refusal of the permit: *Quebec Paving Co.* v. *Senecal* (1); *Gingras* v. *Corp. du Village de Richelieu* (2) and *Hyde* v. *Webster* (3).

L. J. de la Durantaye K.C. replied.

The judgment of the Court was delivered by

FAUTEUX J.—The respondent, hereinafter also called "the Company", carries on business throughout Canada and more particularly in the judicial district of Montreal, as vendor and distributor of motor fuels and oils, auto accessories, and as operator of motor vehicle service station, both as owner and lessee thereof.

Towards the end of December 1949, and pursuant to section 76 of by-law 128 of the by-laws of the appellant, hereinafter also referred to as "the City", the Company applied to the latter for permission to erect a service station and sales shop on an emplacement at the intersection of Bannantyne and Fifth Avenues in the city of Verdun. In this immediate locality were then already located three like establishments operated by different competitor companies.

Section 76 is entitled "Specially Restricted Buildings". Briefly, paragraph (*a*) thereof prescribes that

> Any person wishing to erect or use a building or any premises or to occupy a lot of land for . . . gasoline stations . . . shall make an application in writing to the City to do so.

Paragraphs (*b*), (*c*) and (*d*), in which the parts more relevant to this issue are underlined, may conveniently be quoted in full:—

> (*b*) *Any person who wishes* to obtain such permission shall make an application to that effect to the Building Inspector who shall transmit a copy of such application to the City Clerk. The latter

(1) Q.R. (1934) 57 K.B. 23. (2) Q.R. (1939) 66 K.B. 247.
(3) (1914) 50 Can. S.C.R. 295.

1951

CITY OF VERDUN v. SUN OIL CO. LTD.

Fauteux J.

shall give at least ten (10) days public notice of said application by means of an advertisement in at least two local newspapers, one English and one French, in which the City usually publishes its advertisements, the said notice to be also posted by the applicant in a conspicuous place on the lot of land, building or premises proposed to be used for such purpose, so that the neighboring proprietors or residents or other parties interested may have an opportunity of opposing the granting of such a permission. The above mentioned poster shall be supplied by the Building Inspector Department. No such application shall be entertained by the City unless notice thereof be previously given as hereinabove provided nor unless applicant binds himself, in writing, to equip the boilers, engines, motors or furnaces which he proposes to set up with smoke and gas consumers such as will efficiently free the same from smoke and all that may, in their use, be harmful to the public.

(*c*) Upon the receipt of any such application the Building Inspector shall inspect the lot of land, building or premises, or examine the plan of the building or premises proposed to be used for any of the purposes set forth in Section 76 of this By-Law and, if satisfied that such building or lot of land meets the requirements of this By-Law and that the permission applied for may be granted without in any way endangering life or property, he shall transmit a certificate to this effect to the City Council, *which may, at its discretion, grant or deny the permission applied for.*

(*d*) Whenever any such application is made to the Building Inspector, the applicant shall deposit at the City Treasurer's Office a sum of ten dollars ($10) to cover the cost of advertisements and other expenses incurred by the City in connection with such application.

First considered on the 14th of February 1950, and again—the Company having protested the first decision—on April 2, 1950, the application of the latter was, on each occasion, rejected by a resolution of the Council of the City. No reason for such refusal was expressed in the resolutions or, then, otherwise conveyed to the Company. It was however conceded, before this Court, by counsel for the appellant, that all the requirements of the section had been fully complied with by the Company and that the Building Inspector of the City had issued and transmitted to the Council a favourable certificate, i.e., a certificate attesting that the requirements of the by-law were met and that the permission applied for could "be granted without, in any way, endangering life or property." The refusal of the Council of the City rested, therefore, solely on the exercise of such discretion as it may have under paragraph (*c*) to grant or deny the permission applied for.

The respondent thereupon instituted proceedings by way of mandamus, challenging the validity of the section insofar as it purports to vest in the Council of the City the right to grant or deny, at its discretion, the permission applied for notwithstanding that, admittedly, all the requirements of the by-law had been met, prayed the Court to declare the same *ultra vires* the powers of the City as delegated to it under the *Cities and Towns Act* (R.S.Q. 1941, c. 233), and requested an order for the issue of a peremptory writ of mandamus to compel the granting of the permission.

Before the Superior Court, the City successfully contested these proceedings. Briefly it was held that the Court could not declare section 76 *ultra vires* the City, the evidence, in the premises, failing to reveal any abuse of powers, or unlawful or arbitrary action on behalf of the Council of the City; that the reasons—traffic density and hazards—given in defence by the City for such refusal, were well founded; and that, in the circumstances, the discretion was properly exercised.

By a majority judgment (Gagné, McDougall and Bertrand JJ.A.), the Court of King's Bench (Appellate Division) (1) declared null and void, as *ultra vires,* that portion of section 76 of by-law 128, which purports to give a discretion to the Council to grant or deny permission under the said by-law; annulled likewise the two resolutions of the Council refusing to grant a permit to the Company; and ordered the issue of a peremptory writ of mandamus. St-Jacques and Barclay JJ.A., dissented; holding, the former, that the Company had not established its right to the issue of a permit, and the latter, that the Company had not established any right or interest entitling it to bring the action.

Challenging the judgment of the Court of Appeal, counsel for the appellant rested his case on only two grounds.

As to the first: Counsel contented himself with asserting that, under paragraph (*c*) of the section, the Council had discretion to grant or deny the permission. Of that there can be no doubt. But the real point, successfully pleaded by the Company before the Court of Appeal, is that—and precisely for that reason and to that extent—the section

(1) Q.R. [1951] K.B. 320.

1951

CITY OF VERDUN v. SUN OIL CO. LTD.

Fauteux J.

is *ultra vires* of the City. In this respect, the Judges of the minority in the Court below said nothing, nor did counsel for the appellant, before us, make any attempt, though invited, to challenge the majority judgment of the Court of Appeal. In the appellant's factum, however, this point is dealt with and must, therefore, be considered.

That the municipalities derive their legislative powers from the provincial Legislature and must, consequently, frame their by-laws strictly within the scope delegated to them by the Legislature, are undisputed principles. In the very words of Sir Mathias Tellier, the then Chief Justice of the Province of Quebec, in *Phaneuf* v. *Corporation du Village de St-Hughes* (1):

> 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.

In the present issue, it appears, from the factum of the appellant, that sections 424, 426 and 429 of the *Cities and Towns Act*, R.S.Q. 1941, c. 233—admittedly governing the City of Verdun—are the only ones upon which any reliance is placed as authority, delegated by the Legislature to the City, to enact the portion, here in issue, of section 76 of by-law 128. The parts of the sections relied on are:—

> 424.—The Council may make by-laws:
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> 1. To secure the peace, order, good government, health, general welfare and improvement of the municipality, provided such by-laws are not contrary to the laws of Canada, or of this Province, nor inconsistent with any special provision of this Act or of the charter;
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> 426.—The Council may make by-laws:
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> 1. To regulate the height of all structures and the materials to be used therein; to prohibit any work not of the prescribed strength and provide for its demolition; to prescribe salubrious conditions and the depth of cellars and basements; to regulate the location within the municipality of industrial and commercial establishments and other buildings intended for special purposes; to divide the municipality into districts or zones of such number, shape and area as may appear suited for the purpose of such regulation and, with respect to each of such districts or zones, to prescribe the architecture, dimensions, symmetry, alignment and use of the structures to be erected, the area of lots, the proportion which may be occupied by and the distance to be left between structures; to compel proprietors to submit the plans of proposed buildings to a designated officer and to obtain a certificate of approval; to prevent or suspend the erection of structures not conforming to such by-laws and to order the demolition, if necessary, of any structure erected contrary to such by-laws, after their coming into force.

(1) Q.R. (1936) 61 K.B. 83 at 90.

429.—The Council may make by-laws:

Subsection 22. To remove and abate any nuisance, obstruction, or encroachment upon the side-walks, streets, alleys and public grounds, and prevent the encumbering of the same with vehicles or any other things;

In the formal judgment of the Court of Appeal, it is stated that section 426 above is the only provision, under the *Cities and Towns Act,* from which the authority to enact section 76 of the by-law, or a one similar, may be derived. And there is no doubt that amongst the sections quoted above and invoked in the appellant's factum, it is the only one which specially deals with the subject matter of the questioned by-law. It is common ground, it may be added, that, except in the measure in which it purports to have done so under section 76 of by-law 128, the City has not seen fit to adopt any by-law regulating the location, within the municipality, of industrial and commercial establishments, and other buildings intended for special purposes, nor did it, in any manner, attempt to divide the municipality into districts or zones.

The mere reading of section 76 is sufficient to conclude that in enacting it, the City did nothing in effect but to leave ultimately to the exclusive discretion of the members of the Council of the City, for the time being in office, what it was authorized by the provincial Legislature, under section 426, to actually regulate by by-law. Thus, section 76 effectively transforms an authority to regulate by legislation into a mere administrative and discretionary power to cancel by resolution a right which, untrammelled in the absence of any by-law, could only, in a proper one, be regulated. This is not what section 426 authorizes. Furthermore, the second paragraph of the latter section prescribes that "no by-law made under this paragraph 1 may be amended or repealed except by another by-law approved by the vote, by secret ballot, of the majority in number and in value of the electors who are owners of immoveable property situated in each district or zone to which the proposed amendment or repeal applies." This provision supports the proposition that, once exercised, the delegated right to regulate, in the matters mentioned in paragraph 1 of section 426, is to be maintained at the legislative level and not to be brought down exclusively within the administrative field, as it was in the present instance. If it was within the power of the City to do

1951

CITY OF VERDUN v. SUN OIL CO. LTD.

Fauteux J.

what it did, this prohibition, prescribed in the second paragraph of section 426, would be nugatory.

The comments of Sir Melbourne Tait, then A.C.J., in *Corporation du Village de Ste-Agathe* v. *Reid* (1), quoted by Gagné J.A., and approved by McDougall and Bertrand JJ.A., are to the point. At page 337, the learned jurist, speaking for the Court of Review, said:

> A by-law is passed after certain formalities, and while in force is general in its application; it is published and is known to the ratepayers of the municipality, whereas a resolution may be passed without such publicity. Moreover, the composition of the council changes from time to time, the conditions might be changed from meeting to meeting, and the council would then have it in its power to permit one person to erect a saw-mill propelled by steam, upon certain conditions, and in a certain locality, and refuse the same rights to others.
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> * * *
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> The permission to erect and conditions would thus be subject to the mere whim of the persons who might form the council of any particular meeting . . . It (the by-law) opens the door to discrimination and arbitrary, unjust and oppressive interference in particular cases. It is not really a by-law at all, but a declaration that the council may permit the erections referred to in art. 648 upon such conditions as it may think proper to make at any particular meeting. The rights of those who may desire to erect such manufactories or machinery are left uncertain, and it appears to me this so-called by-law is drawn contrary to the elementary principles upon which an ordinance of that kind ought to be made, . . . For this reason alone, . . . I am of opinion that the judgment should be reversed . . .

These considerations are sufficient to dismiss the first ground raised by the appellant.

The second ground, advanced against the judgment of the Court of Appeal, appears in the reasons of the minority Judges (2). Briefly, it was argued before us that, there being no allegation in the declaration nor any evidence on record that it had any kind of property rights within the territory of the City and particularly on the lot of land upon which it proposes to erect a gasoline station, the Company was denuded of the legal interest required under section 77 of the *Civil Code of Procedure* to bring the action.

The section reads:—

> No person can bring an action at law unless he has an interest therein.
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> Such interest, except where it is otherwise provided, may be merely eventual.

As stated in the reasons for judgment of Gagné J.A., with whom McDougall and Bertrand JJ.A., agreed, this

(1) Q.R. 10 R. de J. 334. (2) Q.R. [1951] K.B. 320.

ground was never raised by the City at trial or even in its factum before the Court of Appeal, nor was it dealt with in the judgment of the trial Judge, but appeared for the first time in the reasons for judgment of the minority. Indeed, and having disposed of the other points in the case, Mr. Justice Gagné says:—

> Depuis que ce qui précède est écrit, j'ai reçu les notes de M. le Juge St-Jacques et M. le Juge Barcley où l'on soulève, pour la première fois, la question d'intérêt de la requérante.

It is quite true that, the provisions of section 77 of the *Civil Code of Procedure* being provisions of public order, the absence of interest to bring an action may be raised at any stage of the proceedings by the parties, or even by the Court *proprio motu*. The City, however, has fought the case on the manifest assumption that the plaintiff had a legal interest in the action, and the appropriateness of this assumption is further sufficiently justified by the material in the record. Thus, amongst other facts, it appears: that the Company has "spent considerable time and money in negotiating the purchase" of the property; that on its application for the permit, it described itself as "future owner"; that through counsel, it protested in a lengthy letter to the City the first refusal of its application and thus obtained a reconsideration of it; that the second refusal was followed by the present action. A reasonable inference of all these facts is that the Company had, when it brought its action, a *jus ad rem* with respect to the land. And there is nothing in the pleadings or on the evidence suggesting that this inference was not common ground between the parties. The City cannot now adopt, before this Court, a different view on the facts to gain a new ground in law; it is bound by the manner in which it conducted its defence. (*The Century Indemnity Company* v. *Rogers* (1). *Sullivan* v. *McGillis and others* (2)).

I would dismiss the appeal, maintain and re-affirm the conclusions of the formal judgment of the Court of King's Bench (Appellate Division); the whole, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Fauteux, Blain & Fauteux.*

Solicitors for the respondent: *Campbell, Weldon, McFadden & Rinfret.*

(1) [1932] S.C.R. 529 at 536. (2) [1949] S.C.R. 201 at 215.