COUR D'APPEL

PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

No: **500-09-000984-955**
(500-05-004882-955)

Le 20 février 1996

CORAM: LES HONORABLES VALLERAND
ROTHMAN
NUSS, JJ.C.A.

ÉPICIERS UNIS MÉTRO-RICHELIEU INC.,

APPELANTE - (requérante)

c.

LA RÉGIE DES ALCOOLS, DES COURSES ET DES JEUX,

Me RICHARD ROY

et

Me ALBERT RAYMOND,

INTIMÉS - (intimés)

et

CORPORATION BRASSERIE LAKEPORT,

L'ASSOCIATION DES BRASSEURS DU QUÉBEC,

LA BRASSERIE MOLSON O'KEEFE,

LA BRASSERIE LABATT LIMITÉE

et

LE PROCUREUR GÉNÉRAL DU QUÉBEC,

MIS EN CAUSE - (mis en cause)

LA COUR, statuant sur l'appel d'un jugement de la Cour supérieure, district de Montréal, prononcé le 5 juin 1995 par l'honorable juge André Denis, rejetant une requête en révision judiciaire présentée par les Épiciers Unis Métro-Richelieu Inc. et une requête en révision judiciaire présentée par la Corporation Brasserie Lakeport;

Après étude du dossier, audition et délibéré;

Pour les motifs exprimés à l'opinion de Monsieur le juge Rothman, déposée avec le présent jugement, auxquels souscrit Monsieur le juge Nuss, et pour les motifs exprimés à l'opinion de Monsieur le juge Vallerand également déposée avec le présent jugement:

ACCUEILLE l'appel;

INFIRME le jugement prononcé par la Cour supérieure le 5 juin 1995, et, prononçant le jugement qui aurait dû être rendu en première instance:

ACCUEILLE la requête présentée par l'appelante en révision judiciaire;

CASSE la décision rendue par la Régie des alcools, des courses et des jeux le 25 avril 1995 et **CONFIRME** sa décision rendue le 22 juin 1994;

Le tout avec dépens contre la Brasserie Molson-O'Keefe, la Brasserie LaBatt Limitée et l'Association des Brasseurs du Québec dans les deux Cours.

CLAUDE VALLERAND, J.C.A.

MELVIN L. ROTHMAN, J.C.A.

JOSEPH R. NUSS, J.C.A.

CODE VALIDEUR = FRUID0VCZ8

Me Marc-André Blanchard, avocat
Me Ann-Marie Ryan, avocate
Lafleur Brown
Procureurs de l'appelante

Me Marc-André G. Fabien, avocat
Martineau Walker
Procureur de la mise en cause
Corporation Brasserie Lakeport

Me Jacques Dufresne, avocat
Ogilvy Renault
Procureur de la mise en cause
L'Association des Brasseurs du Québec

Me Pierre Flageole, avocat
McMaster Meighen
Procureur de la mise en cause
La Brasserie Molson O'Keefe

Me Richard Wagner, avocat
Lavery de Billy
Procureur de la mise en cause
La Brasserie Labatt Limitée

AUDITION: 7 décembre 1995

COUR D'APPEL

PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

No: **500-09-001288-950**
(500-05-004888-952)

Le

CORAM: LES HONORABLES VALLERAND
ROTHMAN
NUSS, JJ.C.A.

CORPORATION BRASSERIE LAKEPORT,

APPELANTE - (requérante)

c.

LA RÉGIE DES ALCOOLS, DES COURSES ET DES JEUX,

Me RICHARD ROY

et

Me ALBERT RAYMOND,

INTIMÉS - (intimés)

et

L'ASSOCIATION DES BRASSEURS DU QUÉBEC,

LA BRASSERIE MOLSON O'KEEFE,

LA BRASSERIE LABATT LIMITÉE,

ÉPICIERS UNIS MÉTRO-RICHELIEU INC.

et

LE PROCUREUR GÉNÉRAL DU QUÉBEC,

MIS EN CAUSE - (mis en cause)

LA COUR, statuant sur l'appel d'un jugement de la Cour supérieure, district de Montréal, prononcé le 5 juin 1995 par l'honorable juge André Denis, rejetant une requête en révision judiciaire présentée par les Épiciers Unis Métro-Richelieu Inc. et une requête en révision judiciaire présentée par la Corporation Brasserie Lakeport;

Après étude du dossier, audition et délibéré;

Pour les motifs exprimés à l'opinion de Monsieur le juge Rothman, déposée avec le présent jugement, auxquels souscrit Monsieur le juge Nuss, et pour les motifs exprimés à l'opinion de Monsieur le juge Vallerand également déposée avec le présent jugement:

ACCUEILLE l'appel;

INFIRME le jugement prononcé par la Cour supérieure le 5 juin 1995, et, prononçant le jugement qui aurait dû être rendu en première instance:

ACCUEILLE la requête présentée par l'appelante en révision judiciaire;

CASSE la décision rendue par la Régie des alcools, des courses et des jeux le 25 avril 1995 et **CONFIRME** sa décision rendue le 22 juin 1994;

Le tout avec dépens contre la Brasserie Molson-O'Keefe, la Brasserie LaBatt Limitée et l'Association des Brasseurs du Québec dans les deux Cours.

CLAUDE VALLERAND, J.C.A.

MELVIN L. ROTHMAN, J.C.A.

JOSEPH R. NUSS, J.C.A.

CODE VALIDEUR = FRUID0VCZ8

Me Marc-André G. Fabien, avocat
Martineau Walker
Procureur de l'appelante

Me Jacques Dufresne, avocat
Ogilvy Renault
Procureur de la mise en cause
L'Association des Brasseurs du Québec

Me Pierre Flageole, avocat
McMaster Meighen
Procureur de la mise en cause
La Brasserie Molson O'Keefe

Me Richard Wagner, avocat
Lavery de Billy
Procureur de la mise en cause
La Brasserie Labatt Limitée

Me Marc-André Blanchard, avocat
Me Ann-Marie Ryan, avocate
Lafleur Brown
Procureurs de la mise en cause
Épiciers Unis Métro-Richelieu Inc.

AUDITION: 7 décembre 1995

COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

No: **500-09-000984-955**
(500-05-004882-955)

CORAM: THE HONOURABLE VALLERAND
ROTHMAN
NUSS, JJ.A.

ÉPICIERS UNIS MÉTRO-RICHELIEU INC.,

APPELLANTS - (petitioners)

v.

LA RÉGIE DES ALCOOLS, DES COURSES ET DES JEUX,

Me RICHARD ROY

and

Me ALBERT RAYMOND,

RESPONDENTS - (respondents)

and

CORPORATION BRASSERIE LAKEPORT,

L'ASSOCIATION DES BRASSEURS DU QUÉBEC,

LA BRASSERIE MOLSON O'KEEFE,

LA BRASSERIE LABATT LIMITÉE

and

LE PROCUREUR GÉNÉRAL DU QUÉBEC,

MIS EN CAUSE - (mis en cause)

No: **500-09-001288-950**
(500-05-004888-952)

CORPORATION BRASSERIE LAKEPORT,

APPELLANT - (petitioner)

CODE VALIDEUR = FRUID0VCZ8

v.

LA RÉGIE DES ALCOOLS, DES COURSES ET DES JEUX,

Me RICHARD ROY

Me ALBERT RAYMOND,

RESPONDENTS - (respondents)

and

L'ASSOCIATION DES BRASSEURS DU QUÉBEC,

LA BRASSERIE MOLSON O'KEEFE,

LA BRASSERIE LABATT LIMITÉE,

ÉPICIERS UNIS MÉTRO-RICHELIEU INC.

and

LE PROCUREUR GÉNÉRAL DU QUÉBEC,

MIS EN CAUSE - (mis en cause)

OPINION OF ROTHMAN J.A.

Appellants Épiciers Unis Métro-Richelieu Inc. («Métro-Richelieu») and Corporation Brasserie Lakeport («Lakeport»), in separate appeals, appeal a judgment of the Superior Court rendered on June 5, 1995, dismissing their respective motions for judicial review under Art. 846 C.c.P.. Since the issues involved in both appeals are essentially the same, the present opinion will cover both.

The critical issue in these appeals is whether La Régie des Alcools, des Courses et des Jeux («La Régie»), an administrative board created under the Act respecting La Régie des Alcools, des Courses et des Jeux (R.S.Q. ch. R-6.1), had jurisdiction, under Sec. 37 of that Act, to review and revoke a decision that the Régie had previously made authorizing Lakeport to manufacture and distribute a private brand of beer «Norois», for sale in the Métro-Richelieu stores.

THE FACTS

Métro-Richelieu is a business enterprise involved in the sale and distribution of food products. Lakeport is a brewing company manufacturing and distributing beer in Ontario. Lakeport also distributes its beer in Quebec. Molson-O'Keefe and Labatt are brewers involved in the manufacture and sale of beer in Quebec and elsewhere and they hold brewing permits issued by the Régie. L'Association des Brasseurs du Québec is a non profit corporation whose object is the furtherance of the interests of its members, principally if not exclusively, Molson-O'Keefe and Labatt. The Attorney-General of Quebec, while impleaded as a mis en cause, has not appeared to contest or to support the appeals. One must take it, therefore, that the dispute involved in the appeals is essentially a commercial dispute between business corporations involved in a competitive commercial field.

On December 23, 1993, Lakeport applied to the Régie for a permit authorizing it to manufacture and distribute «house brands» or «private brands» of beer for sale in certain grocery chains in Quebec.

On June 22, 1994, after several days of public hearing, the Régie rendered a decision authorizing Lakeport to manufacture and distribute a private brand of beer to be known as «Norois», for the account of Métro-Richelieu, subject to approval of the labels.

Following that decision, Métro-Richelieu undertook the preparation of the labelling and publicity to launch «Norois» commercially for sale in its stores, and applied to a committee of the Régie for approval of its publicity, as required under the relevant regulations. On June 29, 1994, the committee refused to approve the proposed publicity, but, on review by the Régie, on July

14, 1994, the Committee's decision was set aside by the Régie and the publicity was approved.

In August of 1994, Molson-O'Keefe, Labatt and the Association applied to the Régie, under Sec. 37 of the Act, for a review and revocation of the Régie's decision authorizing Lakeport to manufacture and distribute a house brand of beer for Métro-Richelieu as well as the revocation of its decision approving the publicity proposed by Métro-Richelieu.

The two motions for review presented by Molson-O'Keefe, Labatt and the Association were heard by a different panel of the Régie in September, October and November 1994 and February 1995.

On April 25, 1995, this panel rendered a decision diametrically opposed to the first decision the Régie had rendered on June 22, 1994. It granted the application for review, revoked its decision of June 22, 1994 and refused Lakeport's application for authorization to manufacture and distribute «Norois», a private brand of beer, for the account of Métro-Richelieu. In essence, the Régie based its decision on two elements:

> «a) CONSIDÉRANT que, dans la décision du 22 juin 1994, les régisseurs ont omis de considérer et d'apprécier un élément essentiel à savoir qu'E.U.M.R. était détentrice d'un permis d'épicerie.
>
> b) CONSIDÉRANT que même si dans la décision du 22 juin 1994, les régisseurs avaient tenu compte qu'E.U.M.R. était détentrice d'un permis d'épicerie, ils auraient rendu une décision différente s'ils avaient connu les faits nouveaux et imprévisibles survenus depuis l'audition.»

Métro-Richelieu and Lakeport, who had received approval to proceed with the manufacture and marketing of their private brand of beer some ten months previously and had begun their publicity campaign to introduce the new beer into Métro-Richelieu stores, found themselves with a complete reversal by the Régie of its earlier decision, preventing Lakeport from manufacturing the new beer for sale by Métro-Richelieu.

Métro-Richelieu and Lakeport applied to the Superior Court for judicial review to attack the Régie's decision revoking the decision it had previously rendered authorizing the manufacture and distribution of «Norois» beer.

The Superior Court judge carefully examined the general principles applicable to judicial review of decisions rendered by administrative tribunals. He noted that, on any application to revoke a decision it had previously made, the Régie was bound by Sec. 37:

> «**37.** Sauf disposition contraire de la loi, la Régie peut réviser ou révoquer toute décision qu'elle a rendue et dont il n'a pas été interjeté appel:
>
> **1°** lorsque est découvert un fait nouveau qui, s'il avait été connu en temps utile, aurait pu justifier une décision différente;
>
> **2°** lorsqu'une partie n'a pu, pour des raisons jugées suffisantes, se faire entendre;
>
> **3°** lorsqu'un vice de fond ou de procédure est de nature à invalider la décision.
>
> Dans le cas visé au paragraphe 3°, la décision doit être révisée ou révoquée par une autre personne que celle qui l'a rendue.»

The judge further noted that, in revoking the decision it had previously rendered, the Régie had relied upon paragraph 1 («un fait nouveau») and paragraph 3 («un vice de fond») of Sec. 37.

The Régie's second decision that the first decision was invalidated by a fundamental defect or «vice de fond», was based upon its conclusion that, in the first decision, the board members then comprising the panel had failed to take into account and failed to appreciate that Métro-Richelieu was a grocery permit holder. The Superior Court judge was of the view that this was not an unreasonable conclusion.

The Superior Court judge was further of the view that the conclusion of the Régie as to new facts was a question of fact to be left to the appreciation of the Régie, and that the Régie's conclusion in that regard was not unreasonable.

The Superior Court dismissed the applications for judicial review presented by Métro-Richelieu and Lakeport. It is from that decision that the present appeals have been brought by Métro-Richelieu and Lakeport.

Pending the appeals, Métro-Richelieu and Lakeport presented motions for suspension of execution of the decision of the Régie of April 25, 1995. Suspension pending the appeals was granted by our colleague, Justice Jean-Louis Baudouin, on June 12, 1995. On the face of the dossier, Justice Baudouin observed:

> « À la lecture du dossier, il me paraît évident, tout d'abord, que les questions de droit que notre Cour aura à trancher sont sérieuses. Le pourvoi ne constitue pas une demande vouée à l'échec, futile, vexatoire ou dilatoire. La volte-face de la Régie sur simple demande de révision, le fait que, selon toute évidence, la Régie était au courant, lors de la première audition, que Métro-Richelieu avait un permis d'épicier, la réanalyse complète qu'elle a faite du dossier qui, du moins à première vue se rapproche plus d'un appel que d'une

> simple révision, la confusion reprochée entre la révision basée sur des faits nouveaux et sur des faits postérieurs, bref, en un mot, le retrait pur et simple d'autorisations données dix mois auparavant après pourtant une enquête que l'on doit présumer avoir été sérieuse, me convainquent des mérites ou du moins des mérites apparents de la contestation judiciaire engagée par les requérantes.»

ISSUES

In substance, this appeal raises the following questions:

1. Did the Superior Court judge err in failing to conclude that the conditions set out in Sec. 37 were conditions defining jurisdiction, and that unless one or another of these conditions was established, the Régie had no jurisdiction to review or revoke its own decisions?

2. Did the Superior Court err in failing to conclude that no «vice de fond» and no «fait nouveau» had been established?

3. Did the Superior Court err as to the use made by the Régie of its decision of July 14, 1994 concerning publicity?

4. Did the Superior Court err in failing to conclude that the Régie arrogated to itself the powers of a Court of appeal, thereby exceeding its jurisdiction under Sec. 37?

5. Did the Superior Court err in interpreting Sec. 37 of the Act?

JURISDICTION OF THE RÉGIE TO REVOKE ITS OWN DECISIONS - SEC. 37

It is well to recall, at the outset, that under Sec. 39 of the Act, the decisions of the Régie are final and not subject to appeal:

> «**39.** Sauf disposition contraire de la loi, toute décision de la Régie est finale et sans appel.»

Sec. 37 of the Act does, nevertheless, empower the Régie to review and revoke its own decisions, but only under the clearly defined conditions mentioned in that provision.

> «**37.** Sauf disposition contraire de la loi, la Régie peut réviser ou révoquer toute décision qu'elle a rendue et dont il n'a pas été interjeté appel:
>
> **1º** lorsque est découvert un fait nouveau qui, s'il avait été connu en temps utile, aurait pu justifier une décision différente;
>
> **2º** lorsqu'une partie n'a pu, pour des raisons jugées suffisantes, se faire entendre;
>
> **3º** lorsqu'un vice de fond ou de procédure est de nature à invalider la décision.
>
> Dans le cas visé au paragraphe 3º, la décision doit être révisée ou révoquée par une autre personne que celle qui l'a rendue.»

Quite clearly, Sec. 37 is the provision granting the Régie jurisdiction to review and revoke its own decisions and limiting its powers to the conditions specifically mentioned in the section. If the conditions are met, the Régie has jurisdiction to review or revoke a decision it has previously made. If the conditions mentioned in Sec. 37 are not present, it has no such jurisdiction.

Since the provisions of Sec. 37 limit the power of review of its own decisions to the cases specifically mentioned, and since the conditions in this section go to its jurisdiction to review, the standard of judicial review of its errors is correctness and not limited to those errors which are manifestly

unreasonable. A simple error in its interpretation of Sec. 37 or in its conclusion as to the presence of the conditions mentioned in the section will cause the Régie to lose jurisdiction and may give rise to judicial review.

In U.E.S., local 298 v. Bibeault, [1988] 2 S.C.R. 1048, 1087, Mr. Justice Beetz described the standard of judicial review to the applied to decisions of an administrative tribunal in cases of this kind, where the powers of the tribunal are limited by statute:

> On peut je pense résumer en deux propositions les circonstances dans lesquelles un tribunal administratif excède sa compétence à cause d'une erreur:
>
> 1. Si la question de droit en cause relève de la compétence du tribunal, le tribunal n'excède sa compétence que s'il erre d'une façon manifestement déraisonnable. Le tribunal qui est compétent pour trancher une question peut, ce faisant, commettre des erreurs sans donner ouverture à la révision judiciaire.
>
> 2. Si, par contre, la question en cause porte sur une disposition législative qui limite les pouvoirs du tribunal, une simple erreur fait perdre compétence et donne ouverture à la révision judiciaire.
>
> (Emphasis added)

Sec. 37 of the Act creating the Régie empowers the Régie to review a decision it has previously made, but only in the specific circumstances mentioned in the section and subject to the conditions there required. To exercise its jurisdiction in that regard, the conditions of Sec. 37 must be fulfilled. If the tribunal reviews or revokes a prior decision when the conditions required under Sec. 37 are not met, its error is a jurisdictional error open to judicial review, and the standard of judicial review is correctness.

In his judgment, the Superior Court judge does recognize the importance of deciding whether the decision of the Régie to review its own

decision was jurisdictional in nature and that ....«La réponse à cette question permettra de décider la norme de contrôle applicable, soit la simple erreur ou l'erreur manifestement déraisonnable....». In the end, however, the judge does not specifically decide what the applicable standard of review is in this case. He simply concludes that the decision of the Régie as to both grounds under Sec. 37 was not manifestly unreasonable.

The omission by the judge to state specifically which standard of review he was applying is not, in itself, a sufficient ground for intervening in appeal. A trial judge is not obliged, in his judgment, to demonstrate that he knows the law. Nor must he specifically respond to every argument and point of law mentioned by counsel. As long as his or her conclusions are supported by the evidence and the record does not indicate that he or she has overlooked an important point, the findings should be accepted (R. v. Burns, [1994] 1 S.C.R. 656; R. v. Barrett, [1995] 1 S.C.R. 752; Willick v. Willick, [1994] 3 S.C.R. 670).

But even allowing that the judge had no legal duty, in his reasons, to state specifically which standard of review he was applying, with respect, I believe that his reasons for judgment demonstrate he was applying the wrong one.

As I have indicated above, I am of the view that the standard of review to be applied to the Régie's decision under Sec. 37 ought to have been a standard of correctness since any error by the Régie as to the fulfilment of the conditions under Sec. 37 was a jurisdictional error. For that reason, it was not sufficient for the Superior Court judge to decide that the conclusions of the Régie were not unreasonable. The judge had to decide whether the Régie's conclusions as to the existence of the 3 conditions were correct.

But, even if we were to apply a standard of manifest unreasonableness to the Régie's decision to revoke its prior decision, as the Superior Court judge appears to have done, I disagree with his conclusion that the Régie's decision was not manifestly unreasonable. In my view, with respect, the conclusion of the Régie as to the existence of a «vice de fond» in the original decision as well as its conclusion as to the existence of new facts, were manifestly unreasonable conclusions.

VICE DE FOND

The Act does not define the meaning of the term «vice de fond» used in Sec. 37 . The English version of Sec. 37 uses the expression «substantive....defect». In context, I believe that the defect, to constitute a «vice de fond», must be more than merely «substantive». It must be serious and fundamental. This interpretation is supported by the requirement that the «vice de fond» must be «... de nature à invalider la décision». A mere substantive or procedural defect in a previous decision by the Régie would not, in my view, be sufficient to justify review under Sec. 37. A simple error of fact or of law is not necessarily a «vice de fond». The defect, to justify review, must be sufficiently fundamental and serious to be of a nature to invalidate the decision.

The only «vice de fond» invoked by the Régie in its decision of April 25, 1995 to justify its review of its decision of June 22, 1994 was an alleged failure by the Régie, in that latter decision, to take into account the fact that Métro-Richelieu was a grocery permit holder:

> Suite à l'analyse de la décision rendue le 22 juin 1994, la Régie en vient à la conclusion que les régisseurs n'ont pas pris en considération le fait qu'É.U.M.R. était détentrice de permis d'épicerie dans sa décision rendue le 22 juin 1994.

> Il apparaît encore plus évident, à la lecture de la décision rendue le 14 juillet 1994, que les régisseurs n'ont pas tenu compte du fait qu'É.U.M.R. était elle-même détentrice d'un permis d'épicerie.
> .....
>
> La Régie est d'avis que si les régisseurs avaient pris en considération le fait qu'É.U.M.R. était elle-même détentrice d'un permis d'épicerie, la décision aurait été différente.

It is exceedingly difficult to see how this conclusion could reasonably have been asserted by the Régie or how its conclusion could have been considered reasonable by the Superior Court judge. It would have been impossible for the Régie, in rendering its decision of June 22, 1994, to have ignored the fact that Métro-Richelieu was a grocery permit holder, for the following reasons:

Firstly, it must be recalled that it is the Régie itself that issues these permits and presumably maintains the appropriate records and registers of permit holders.

Secondly, and far more importantly, the fact that Métro-Richelieu was a permit holder was specifically put in evidence before the Régie during the hearings on which its decision was based. And even more graphically compelling, in its decision of June 22, 1994, the Régie specifically refers to the fact that Métro-Richelieu is a permit holder.

At the outset of its decision of June 22, 1994, under the title «Motifs de la convocation», the Régie notes from a previous decision with respect to Lakeport's application to manufacture private brands of beer:

> [...] La Régie devra déterminer lors d'une demande la nature et l'étendue du <u>lien entre le détenteur du permis d'épicerie et le détenteur du permis industriel</u> qui fabrique une marque maison.
>
> (Emphasis added)

The decision of June 22, 1994 further notes specifically:

> Pour ces raisons, la Régie en vient à la conclusion qu'il n'existe pas d'intérêt corporatif entre l'intervenante EUMR, détentrice de permis d'épicerie et la requérante Lakeport, détentrice d'un permis industriel.
>
> (Emphasis added)

There are a number of other references in the decision, all of which indicate clearly that the Régie was fully aware, in rendering its decision of June 22, 1994, that Métro-Richelieu was a grocery permit holder (I think it would be unnecessary and fastidious to quote these at length; they may be found at pages 583, 585 and 592 M.A., vol. III).

It would have been very difficult for the Régie not to be aware that Métro-Richelieu was a grocery permit holder. There was uncontradicted evidence to that effect and the submissions of counsel during argument made it absolutely clear.

Mr. François Bessette, Métro-Richelieu's Director of Development for Western Quebec, testified:

Q. Est-ce qu'elle détient des magasins corporatifs qui portent un autre nom que Su

R. Non.

Q. Est-ce qu'à votre connaissance, ces magasins corporatifs détiennent des permis d'épicerie, au sens de la Loi ...(interrompu)?

R. Oui, ils en détiennent.

Q. Au sens de la Loi sur les Permis ...(interrompu)?

R. Oui, ils en détiennent.
PAR LA PRÉSIDENTE

Q. D'Alcool.
PAR ME BLANCHARD

> **Q.** D'Alcool, je m'excuse.
>
> **R.** Oui. Les magasins Super C. détiennent des permis d'alcool, oui.
>
> (Emphasis added)

During argument, counsel for Métro-Richelieu stated:

> [...] Métro-Richelieu est détentrice elle-même de magasins corporatifs et ces magasins corporatifs là sont détenteurs de permis d'épicerie.
>
> (Emphasis added)

The fact that Métro-Richelieu was the holder of a grocery permit was not contradicted in evidence and it was not disputed by Molson-O'keefe, Labatt or the Association. It certainly came as a surprise to no one to learn that Métro-Richelieu was a grocer and that it held a permit or permits for the sale of beer in its stores.

Accordingly, the Régie's conclusion, in its second decision, that the panel, in its first decision, had failed to take into account that Métro-Richelieu was a grocery permit holder and that this constituted a vice de fond or substantial defect within the meaning of Sec. 37 constituted an error in jurisdiction, and, in my view, a manifestly unreasonable error at that. On any standard of review, this error justified review and intervention of the Superior Court.

NEW FACTS

As a second ground under Sec. 37, the Régie, in its decision of April 25, 1995, concluded that the earlier decision of June 22, 1994 was open to review and revocation because new facts had been discovered which, if known in

good time, might have justified a different decision. The Superior Court accepted this conclusion as not unreasonable:

> Est-il besoin de souligner que l'appréciation de faits nouveaux est essentiellement une question de faits. Cette appréciation est laissée aux tribunaux de première instance. La Régie a déterminé que l'ensemble des éléments mis en preuve relatifs à la commercialisation et à la structure de prix de la bière Norois n'avait pas été dévoilé aux premiers régisseurs et qu'il s'agissait là de «faits nouveaux», crédibles et pertinents qui ont eu lieu ou ont été connus depuis l'émission de l'ordonnance ou de la décision.
>
> La régie a considéré que ces faits étaient survenus postérieurement à la décision du 22 juin 1994 et qu'il n'était pas prévisible au moment de l'audition initiale vu le fait qu'EUMR et Lakeport avaient été plus que laconiques sur ce sujet. On avait même lié que quelque publicité que ce soit puisse être faite par EUMR, limitant ainsi tout contre-interrogatoire de la part des opposants. Appliquant à nouveau les enseignements de la Cour suprême, la Cour ne saurait voir dans cette conclusion le caractère déraisonnable qui justifie l'intervention des tribunaux supérieurs.

Counsel for Lakeport and Counsel for Métro-Richelieu submit that the facts alleged to be «faits nouveaux» cannot be characterized as newly discovered within the meaning of Sec. 37 since they were not even in existence until after the decision of June 22, 1994 - essentially the promotion and marketing of the new beer by Métro-Richelieu after the permit was authorized.

The text of Sec. 37 does suggest that, to constitute a «new fact» or «fait nouveau» justifying review by the Régie, the new fact had to relate to a circumstance or event that existed at the time of the decision although its existence was then unknown. From the text, it does not appear that a new fact relating to a subsequent event or circumstance would have been intended to justify review.

The English text of Sec. 37 refers to «....a new fact is discovered which, if it had been known in due time....».

The French text reads: «Lorsque est découvert un fait nouveau qui, s'il avait été connu en temps utile....».

It is not easy to imagine how a fact or event which did not exist at the time of the original decision could have been discovered in time to change the nature of the decision or how it could have been known at a time when it did not yet exist.

But even assuming, without deciding, that the expression «fait nouveau» used in Sec. 37 includes not only facts which existed at the time of the decision but also facts that occurred subsequently, I do not see how the facts relied upon by the Régie in its decision of April 25, 1995 can be characterized as new facts or how they could give rise to a review or revocation of its previous decision.

The entire purpose of the hearing on which the decision of June 22, 1994 was based was to determine whether Lakeport should be authorized to manufacture a «house brand» or «private brand» that would be sold by Métro-Richelieu in its stores and in the stores of its franchisees. From the very nature of a «house brand» or «private brand», everyone knew or ought to have known that this beer, although manufactured by Lakeport, would be promoted and sold by Métro-Richelieu under its own brand name. Grocery chains advertise and sell a great number of products under their own «house brand» names and not under the names of the manufacturers of these products.

The original decision of June 22, 1994, in my view, makes it amply clear that the Régie was well aware of the meaning of a «house brand» or «private brand» and that it was also aware that the beer manufactured by Lakeport for Métro-Richelieu would be promoted and marketed by Métro-Richelieu. In my view,

the promotion by Métro-Richelieu of its own house brand of beer was inherent, entirely foreseeable, and foreseen.

The evidence before the Régie was uncontradicted that it was to be Métro-Richelieu and not Lakeport that would be advertising and promoting the product.

William Sharp, the President of Lakeport, testified:

Q. Who will be responsible for advertisement of the product?

A. Lakeport takes no responsibility of advertising for the product on private label. It is done by the supermarket, and it's all within the guidelines of whatever the laws would be in each province in Canada, wherever the supermarket.

Serge Racette, Métro-Richelieu's director of development of private brands, testified:

Q. Qui va être en charge de la publicité du produit marque maison de bière Métro Norois?

R. E.U.M.R.

Q. Et qui ... (interrompu).

R. Par le fait même, moi.

Q. Et qui va être en charge du plan de mise en marché?

R. E.U.M.R. et la division des marques maison.

Q. Par votre entremise?

R. C'est ça.

This evidence was not contradicted. In addition, counsel for the Association appeared to acknowledge in argument before the Régie that it would be Métro-Richelieu that would be promoting the private brand beer:

> Qui a le contrôle sur la promotion, la publicité? Lakeport? Non, Métro. Monsieur Racette, dans son témoignage au tout début du Contre - de l'Interrogatoire, oui, à des questions de Maître Blanchard, «qui va être en charge de la publicité du produit» dit Maître Blanchard, «marque maison de bière Métro ou Norois?» Réponse «Épiciers Unis Métro-Richelieu.» Juste un peu après «et qui va être en charge du plan de mise en marché? E.U.M.R., c'est-à-dire Épiciers Unis Métro-Richelieu et la Division de marques maison.
>
> Qui - et je continue l'énumération, qui a le contrôle sur la commercialisation et la mise en marché? On vient de le voir, c'est aussi Métro.

It was manifestly unreasonable, therefore, to conclude that Métro-Richelieu's promotion of the beer subsequent to the decision of June 22, 1994 constituted a «fait nouveau». It was in evidence before the Régie that this would be the case. Counsel for the Association, in his argument before the Régie, not only did not attempt to dispute it, he invoked it for his own purposes. And further, from its decision of June 22, 1994, the Régie was perfectly aware that «Norois» was to be promoted and advertised as a private brand. It is inconceivable that the Régie, in rendering its decision, could have been unaware that the beer would be advertised by Métro-Richelieu? The promotion of the beer by Métro-Richelieu was clearly foreseeable, and foreseen, when the decision was rendered. The subsequent promotion of the beer by Métro-Richelieu could not possibly constitute a «fait nouveau».

The conclusion of the Régie in its decision of April 25, 1995 that there were «faits nouveaux» justifying review of the previous decision under Sec. 37 of the Act was an error relating to its jurisdiction. It was also a manifestly unreasonable error, in my respectful opinion. On both counts, the Régie's error gave rise to judicial review. Here again, I believe the Superior Court erred in declining to intervene.

CONCLUSION

Shortly put, I believe that the Régie's error in undertaking to review the decision it had rendered 10 months earlier was jurisdictional in nature since the requirements of Sec. 37 of the Act were not satisfied. The standard of judicial review was therefore correctness. In my view, the Superior Court erred in refusing to quash the Régie's decision of April 25, 1995.

I am further of the view that, even if the Régie's error were not jurisdictional in nature, its conclusion that the conditions under Sec. 37 of the Act were satisfied, was a manifestly unreasonable one giving rise to judicial intervention.

Having come to these conclusions, I do not feel it necessary to consider the remaining grounds of appeal urged by appellants.

I would therefore allow the appeals, set aside the judgment of the Superior Court rendered on June 5, 1995, and, proceeding to render the judgment that should have been rendered in first instance, I would grant appellants' motions for judicial review, quash the Régie's decision of April 25, 1995 and confirm its decision of June 22, 1994, the whole with costs against Molson-O'Keefe, Labatt and l'Association des Brasseurs in both courts.

MELVIN L. ROTHMAN, J.A.

COUR D'APPEL

PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

No: **500-09-000984-955**
(500-05-004882-955)

CORAM: LES HONORABLES VALLERAND
ROTHMAN
NUSS, JJ.C.A.

ÉPICIERS UNIS MÉTRO-RICHELIEU INC.,

APPELANTE - (requérante)

c.

LA RÉGIE DES ALCOOLS, DES COURSES ET DES JEUX,

Me RICHARD ROY

et

Me ALBERT RAYMOND,

INTIMÉS - (intimés)

et

CORPORATION BRASSERIE LAKEPORT,

L'ASSOCIATION DES BRASSEURS DU QUÉBEC,

LA BRASSERIE MOLSON O'KEEFE,

LA BRASSERIE LABATT LIMITÉE

et

LE PROCUREUR GÉNÉRAL DU QUÉBEC,

MIS EN CAUSE - (mis en cause)

No: **500-09-001288-950**
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CORPORATION BRASSERIE LAKEPORT,

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ÉPICIERS UNIS MÉTRO-RICHELIEU INC.

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LE PROCUREUR GÉNÉRAL DU QUÉBEC,

MIS EN CAUSE - (mis en cause)

OPINION DU JUGE VALLERAND

Ainsi que le signale mon collègue Rothman, le premier juge, après avoir fait état de la difficulté, n'a pas expressément statué à savoir s'il s'agit d'**une question de droit [... qui] relève de la compétence du tribunal** ou d'**[une] question [... qui] porte sur une disposition législative qui limite les pouvoirs du tribunal.** (**U.E.S., local 298 c. Bibeault** que cite mon collègue. Mais il a indiscutablement appliqué au cas la norme de l'**erreur déraisonnable**, ce qui revient à dire qu'il a choisi la première branche de l'alternative. À tort, à mon avis, et cela pour les motifs qu'énonce mon collègue.

Mon collègue conclut que la Régie a commis des erreurs déraisonnables; je suis tenté de le suivre mais, la prudence étant la mère de la sagesse, je me contenterai de constater qu'il s'agit, à tout le moins, de simples

erreurs qui, vu la norme applicable, suffisent pour forcer l'intervention de la Cour supérieure et, faute qu'elle soit intervenue, la nôtre.

CLAUDE VALLERAND, J.C.A.