ATTACKING BY-LAWS: ZONING AND THE TRADITIONAL RULES (Part II)

By G. Keith Allen†

CHAPTER 8

Unreasonableness

> A superintending power of a judicial character is necessary to be exercised in order to keep municipal bodies within legal and reasonable limits in the exercise of the powers delegated to them by the Legislature. There has always been such a power where English law has prevailed; without it great oppression might be exercised and great confusion created.
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> It is a description of control from which any Court to whom it is committed would rather be relieved.
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> In the nature of things, the Legislature could not exercise the control so as to meet the exigency of each particular case. It is for that and other reasons vested in the judiciary. And the judges must exercise it under the same sense of responsibility as they discharge their other duties. . . The municipal powers are not only limited, but must be reasonably exercised, and not only strictly within the limits conferred by the Legislature, but in perfect subordination to the general law of the land.[1]

These comments adequately summarize the approach adopted by the courts in relation to by-laws enacted by municipalities during the early days of their development. The remarks indicate the paternalistic attitude adopted by many of the Judges in relation to municipal institutions. It was felt that there must be some "superintending power" to pass on the merits of each ordinance.

Early judicial decisions concerning municipal enactments were affected to a considerable degree by English precedent. The English Courts were, and to a more limited extent still are, concerned with the reasonableness of local by-laws. The Canadian Courts when adopting the English "reasonableness" rule, did not take cognizance of differences in the enabling legislation in the two countries. The English legislation was couched in very general language, akin to the "peace, order and good government" clause appearing in Canadian legislation. With legislation of this character, it was imperative that some body should scrutinize by-laws enacted thereunder.

The practise in Canadian legislation has been to enumerate specific areas in which councils could exercise their legislative functions. The "peace, order and good government" clause was, and is,

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1 Harison, C.J. in *In re Thomas Brodie and Town of Bowmanville* 38 U.C.Q.B. 580; Similar remarks are made by Robinson C.J. in *In re Barclay and Township of Darlington* 12 U.C.Q.B. 86, which was followed in *In re Greystock and Municipality of Otonabee* 12 U.C.Q.B. 458. These cases were further discussed in *Terry* v *Township of Haldimand* 15 U.C.Q.B. 380; Middleton J. in *Rogers* v *City of Toronto* 33 O.L.R. 89, p. 92 reviews the historical approach to by-laws taken by the Courts, describing it as usurped jurisdiction". The history is also reviewed in *Slattery* v *Naylor* 13 A.C. 446.

of little significance. With legislation of this description it is difficult to conceive how the assumption could be drawn that the Courts were to exercise any supervisory power over municipal governments. The Court's function should only have been to confine municipalities within the terms of the enabling legislation.

Mr. Justice Riddell in *Re Angus and Township of Widdifield*[2] and *Re McCracken and United Townships of Sherborne et al*[3] pleaded for the acceptance of the view that municipal governments are legislative bodies, and should not be (when their enactments are under consideration) treated differently from superior governments.[4] This view would appear to be correct in the Canadian municipal context.

The first real judicial move toward restraining the power of the Court to invalidate by-laws for unreasonableness came with the decision in *Kruse* v *Johnson*.[5] The enabling legislation under which the impugned by-law was enacted was, in the English tradition, of a very general nature. The by-law which was under attack was one that prohibited singing within fifty yards of a house, after complaint by a resident or request by a police officer. The defendant continued with his religious meeting after having been requested to stop. The case was heard before Lord Russell of Killowen C.J. and Matthew J., who were unable to reach agreement. The Chief Justice then constituted a special Court before which the matter was reargued.

Lord Russell of Killowen C.J., in what has since proved to be a monumental decision, discussed unreasonableness and the general principles applicable to local government by-laws in these words:

> They ought to be supported if possible. They ought to be, as has been said 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. The Courts of justice ought to be slow to condemn as invalid any by-law . . . on the ground of supposed unreasonableness. I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws . . . as invalid because unreasonable. But unreasonable in what sense? If for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Courts may well say: 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But

2 24 O.L.R. 318.

3 23 O.L.R. 81.

4 The question of the reasonableness or otherwise of a statute was discussed by Lord Halsbury L.C. in *Cooke* v *Charles A. Vogeler Company* [1901] A.C. 102, where he said, "But a Court of law has nothing to do with the reasonableness or unreasonableness of a provision, except so far as it may help them in interpreting what the Legislature has said". This rule was adopted in the case of municipal by-laws in *Johnson and Stockdill* v *Grossman* [1943] 2 W.W.R. 314.

5 [1898] 2 Q.B. 91, at p. 99.

> it is in this sense, and in this sense only, as I conceive that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters that directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.[6]

The effect of the decision was to permit local governments, within the defined limits, to make a determination based on local standards and conditions, of what is or is not reasonable for their locality, without undue judicial interference.

The practicality of a change in approach by the Courts is very evident. With the development of municipal institutions into responsible legislative bodies, accountable to their electors, it would be unpardonable for the Courts to interfere with their legitimate functions.

> It was argued that the by-law was unreasonable and oppressive. The matter seems to be one pre-eminently proper to be dealt with by the local authorities, who have the best means of ascertaining the wants of the local and the travelling public. If, in the result, the public should prove to be inconvenienced by the by-law, the council would, no doubt, amend the by-law in accordance with the public desire, but, if they should refuse to do so, the electors have the remedy in their own hands, and could choose others who would.[7]

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6 These particular remarks have been accepted and applied in such cases as: *Rex* v *Awad* 11 M.P.R. 389; *The Blue Funnel Motor Line Limited* v *City of Vancouver* [1918] 3 W.W.R. 405; *The King* v *Broad* [1915] A.C. 1110(P.C.); *Clarke* v *Rural Municipality of Wawken* [1930] 1 W.W.R. 319;*Attorney-General* v *Hodgson* [1922] 2 Ch. 429; *Denning* v *Maher* 106 L.T. 846; *Re Crabbe and Swan River* 23 Man. R. 14; *Short* v *Poole Corporation* (1926) 1 Ch. 66; *White* v *Morley* [1899] 2 Q.B. 34; *Thomas* v *Sutters* [1900] 1 Ch. 10; *Re Stewart and Town of St. Mary's* 34 O.L.R. 183; The same rules as to interpretation have been advanced in *Walker* v *Stretton* 12 T.L.R. 363; In *In Re Bylaw No. 92, Town of Winnipeg Beach* 30 Man. R. 192 Dennistoun J.A. adopts the judgment in toto. He states that by-laws should, as indicated be benevolently interpreted "in so far as the health and general welfare of the community are concerned . . . "but" . . . strictly construed in so far as it derogates from private rights." O'Halloran J.A., in his dissenting judgment in *Rex* v *Woods* 73 C.C.C. 386 would restrict the benevolent interpretation principle to the peculiar situation dealt with in the *Kruse Case*. This suggestion is not supportable.

7 Maclaren J.A. in *Re Karry and City of Chatham* 21 O.L.R. 566 at p. 569. See also: *Commonwealth* v *Fowler* 28 S.W. Rep. 786; *Snell and Town of Bellville* 30 U.C.Q.B. 81; *Re Foster and Township of Raleigh* 22 O.L.R. 26. As was said by Riddell J. in *In re Hassard and City of Toronto* 16 O.L.R. 500 at p. 514: "In our little republics, every alderman is responsible to his constituents who will deal with him, according to their good will and pleasure. The people must in the long run have their way, and it is no part of the duty of the Court to interfere with the policy of the people or their representatives."

The Legislature intervened to terminate the Courts' reign as overseers of the municipal conscience. If a council was acting in good faith within the confines of its jurisdiction, the Courts were precluded from considering the unreasonableness of the by-law.[8]

With the introduction of this provision it was arguable that discrimination as a ground of attack was also abolished. In *Kruse* v *Johnson*,[9] the definition of unreasonableness included discrimination. Numerous judgments after the decision in that case, declared by-laws bad for unreasonableness because they were discriminatory.[10] The simple answer to this argument was that the Legislature had not conferred any authority on councils to discriminate.[11]

Prior to the statutory restriction against setting aside by-laws for unreasonableness, it was clearly accepted that if the by-law was strictly within the powers of the municipality, that is, being precisely within the terms of the enabling legislation, the unreasonableness of it could not be a consideration. This was a question that had already been determined by the delegating Legislature, and hence was not open to review by the Courts.[12]

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8 A section analogous to that first introduced now appears as s.242(2) of the *Municipal Act*, R.S.O. 1960, c.249. That section provides: "A by-law passed by a council in the exercise of any of the powers conferred by and in accordance with this Act, and in good faith, shall not be open to question or be quashed, set aside or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them. . ."

9 [1898] 2 Q.B. 91.

10 *Attorney-General of Canada* v *Toronto* 23 S.C.R. 514; *Regina* v *Russell* 1 B.C.R. 256; See also: *Re Bunce and Town of Cobourg* [1963] 2 O.R. 343; *In re Clay and City of Victoria* 1 B.C.R. 300. The same approach is indicated in *Montreal* v *Beauvais* 42 S.C.R. 211, where Duff J., after stating that it had been argued that the by-law was unreasonable said: "To establish this contention in any sense germane to the question of the validity of the by-law it was necessary that the respondents should make it appear that it was not passed in good faith in the exercise of the powers conferred by the Statute. . ."

11 *In Rex Ex Rel. St. Jean* v *Knott* [1944] O.W.N. 432, the Court when confronted with this argument on an application to quash simply dismissed it on the basis that the statute does not permit a discriminatory by-law. *In Rex v Paulowich* [1940] 1 W.W.R. 537, Some general comments are made on a section similar to s.242(2) of the Ontario *Municipal Act*, and their relation to this argument.

12 *Re Davis and Village of Creemore* 38 O.L.R. 240; *Winnipeg Merchandisers Limited v City of Winnipeg* [1936] 3 W.W.R. 530; *Hall v Commonwealth* 41 S.W. Rep. 2; *Re Boylan and City of Toronto* 15 O.R. 13 *Stark* v *Schuster* 14 Man. R. 672; In *re Perley 30 Man. R. 444; Re Brown and City of Calgary* 5 W.L.R. 576; *Regina* v *Gravelle* 10 O.R. 735; *Leitch* v *Town of Strathroy* 53 O.L.R. 665; *Rex* v *Awad* 11 M.P.R. 389; *Simmons* v *Malling Rural District Council* 13 T.L.R. 447; *Henderson Thriftway Petroleum Ltd.* v *Reeves* 3 D.L.R. (2d) 507;

What is the effect of the statutory provision? Unreasonableness as a consideration is only excluded if the council is acting in good faith and within its authority.[13] The section, on a strict wording suggests that bad faith must first be established before the question of the reasonablenes of the enactment can be considered. If bad faith is clearly shown the by-law is clearly ultra vires. The proper approach is to examine the reasonableness or unreasonableness of the by-law to assist in determining whether or not council was acting in bad faith.[14] Within the framework of the statutory provision, the importance of the unreasonableness rule will still be considerable, but only in an evidentiary sense.

There are numerous decisions that suggest if the results of the by-laws application to particular situations are harsh and unwarranted, then the by-law is bad for unreasonableness.[15] At first blush, this seems a plausible approach, particularly so when one considers that the statutory provision was aimed primarily at the review of municipal policy *per se*. On sober reflection it became difficult to accept this proposition. The courts must still, of necessity, review the merits of the policy decision made by council. The effect of the by-law may be looked at in determining if there has been good faith on the part of council.

Pigeon v *City of Montreal* 17 S.C.R. 495. As said by Rose J. in *Milloy and Township of Onondaga* 6 O.R. 573, "The enacting words of the by-law are not, wider than the statute, and I must not allow a lively imagination to place a limitation on the power of the municipality that the Legislature has not seen fit to impose." See also: *In re Edmonton By-law No. 1546* 10W.W.R. (N.S.) 407, *Re Karry and City of Chatham* 20 O.L.R. 178.

13 See in this respect: *Lacey v Village of Port Stanley* (1968) 1 O. R. 36.

14 *Re Howard and City of Toronto* 61 O.L.R. 563; *Re McCormick and Township of Toronto* [1948] O.W.N. 425; *In Hignell v City of Winnipeg* [1933] 3 W.W.R. 193 contracts had been refused to particular companies because they were not union or closed shops. The court considered a section similar to s. 242 (2) of the Ontario Act. The conclusion was reached, that even although the act was "unfair, unreasonable and governed by partiality", the section precluded any intervention by the Courts. This would seem to be the type of situations where the unreasonableness of the by-law could be used to show bad faith in the council.

15 An examination of the following cases is indicative of this approach: *Arlidge v Islington Borough Council* 78 L.J.K.B. 553; In *re Talbot and City of Peterborough* 12 O.L.R. 358; *Scott v Pilliner* [1904] 2 K. B. 855; *Stiles v Galinski* [1904] 1 K.B. 615; *Attorney-General v Denby* [1925] 1 Ch. 596; *Repton School Governors v Repton Rural District Council* [1918] 2 K.B. 133; *Regina v Petersky* 5 B.C.R. 549; *The King v Broad* [1915] A.C. 1110 (P.C.); *Strickland v Hays* [1896] 1 Q.B. 209; *Alty v Farrel* [1896] 1 Q.B. 636; *Heap v Rural Sanitary Authority of Burnley Union* 12 Q.B.D 617; *Kelly and City of Toronto* 23 U.C.Q.B. 426; *Re Taylor and City of Winnipeg* 11 Man. R. 420. In *Regina v Martin* 21 O.A.R. 145, it was suggested that a regulation might be so unreasonable in its results that the Court would interfere.

S.242(2) of the Ontario *Municipal Act*, [16] refers only to by-laws enacted under the provisions of that statute. This being so, a zoning by-law enacted under the *Planning Act*[17] would still be open to attack as being unreasonable. Assuming that a Court is relatively free to consider the reasonableness of such by-laws, what approach will be taken?

The authorities indicate that merely because a by-law as applied may impose a financial burden or cause inconvenience to those to whom it applies, this is not a result that would be considered unreasonable. [18]

It is difficult to envisage a by-law any more unreasonable than that considered in ***Regina Auto Court*** v ***Regina (City)***[19]. A parcel of land owned by the plaintiff was placed in a park zone. The effect was to prevent him from utilizing his land for any normal use. It also precluded, for all practical purposes, any possibility of sale, and equally resulted in a depreciation in value of the property. The plaintiff took an action for damages which was dismissed.

Graham J. appeared to consider a zoning by-law as social legislation which should be upheld if at all possible.

> Zoning by-laws are relatively new but I think it is necessary for any growing city to pass such a by-law in planning the future development of such city.

Mr. Justice Currie in *Halifax* v *Wonnacott*[20] also had occasion to consider a zoning by-law in the context of unreasonableness. After referring to the problem inherent in uncontrolled industrial development, he said at p. 505:

> . . . it is proper that municipal bodies should have such power as is proper and suitable so as to give homesteaders, . . . such quiet and enjoyment in their surroundings, such opportunities for relaxation and recreation as is possible. Therefore, also, it is proper that the Courts should assist in the enforcement of all appropriate measures which are designed for that purpose, and which are applicable to the particular cases before it. It may happen at times that some persons may be inconvenienced or financially

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16 R.S.O. 1960 c. 249.

17 R.S.O. 1960 c. 296.

18 *In re Nasmith and City of Toronto* 2 O.R. 192; *State* v *Freeman*..38 N.H. 426; *Rex* v *Shelly* 24 W.L.R. 285; *Re Maycock and City of Winnipeg* 24 Man. R. 646.
1925 W.W.R. (N.S.) 167.

19 1925 W.W.R. (N.S.) 167.

20 [1951] 2 D.L.R. 488. A number of cases show a clear adoption of this approach, for example: *Rex v McNeil* [1925] 1 D.L.R. 227; *Robert Hudson Construction Corporation Ltd.* v *Town of Acton* [1958] O.W.N. 165; *Re Brigden and Village of Port Elgin* [1934] O. W.N. 632; *Rex* v *Low Chung* 27 B.C.R. 469; *The Bell Telephone Company* v *Town of Owen Sound* 8 O.L.R. 74.

> affected by restrictive building laws but modern experience has shown that the disadvantages of these laws do not fall with such disproportionate weight as to make them unreasonable and unwarranted.

It was pointed out in *Nectow* v *City of Cambridge*,[21] that merely because the courts could see no discernible reason for zoning lines to be drawn as they were, this was no justification for interference.

It is evident that the Courts will not quash a zoning by-law for unreasonableness. It would only be in the exceptional case where policy decision would not be invalidated. The judges lack the expertise which is now so essential in the field of planning. This unquestionably is another reason why there will be no attempt to invalidate zoning by-laws for unreasonableness. Any other conclusion would necessarily result in zoning by the judiciary, a prospect not at all intriguing to the Courts or desirable for the community.

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[21]277 U.S. 183.

CHAPTER 9

By-laws Contrary to Public Interest

A determination of whether a by-law has been enacted contrary to public interest, requires a consideration of many of the same factors inherent in a discussion of unreasonableness. In substance, for a by-law to be invalidated on this ground, a Court must review the legislative policy of the council. The Court, and not council, in this situation would be deciding what constituted the public interest of the municipality.[1]

The early law in this area developed from the premise that municipal councils were trustees of their powers; any action that advanced the interest of an individual, as opposed to the public at large, should be restrained.[2]

The Courts have laid down certain criteria against which the public interest of a by-law can be examined. In *In re Peck and the Town of Galt,*[3] Osler J. A. commented on the by-law there under review, in these words:

> The by-law is also open on its face to another objection, viz., that it was not passed in the interests of the public, but for the benefit of a particular class or corporation. So manifestly is this the case that it provides not only that...the church shall pay all the costs and expenses incurred by the defendants in preparing and passing it, but also that it shall not go into operation until a bond has been furnished satisfactory to the Council, indemnifying them against all loss which may be incurred by reason of passing it, etc. Such stipulations as these are not found in a by-law in which the public are concerned.

Mr. Justice Dysart in *Wallace* v *Town of Dauphin*[4] suggested the following considerations to determine the question:

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1 In *Miller v Rural Municipality of Charleswood* [1937] 3 W.W.R. 686, the Court considered the question of public interest involved in a by-law permitting fur farming in a defined area. The by-law was struck down because "there can be no public need for such a change." The Court clearly was making a policy decision, as to the desirability of the change initiated by the by-law.

2 Mr. Justice Osler in *In re Morton and The Corporation of The City of St. Thomas,* 6 O.A.R. 323, said: "Corporations are trustees of their power for the general public, and when they prostitute them for the benefit of one individual at the cost of another, the general public not being interested, their action will be restrained by the Courts."

3 46 U.C.Q.B. 211. The by-law in question permitted the sale of a portion of a public square to a church, on condition that the church corporation enter into a bond to idemnify the municipality against any loss resulting from the by-law and sale.

4 [1932] 2 W.W.R. 405.

> In testing whether a by-law is passed in the public or private interest, the primary moving force behind the by-law must be looked at; and if that force emanate from a private source, and if that source is to save harmless or to reimburse the corporation in respect to all costs, and is to reap the primary direct benefit from the by-law, leaving to the public only secondary and indirect benefit we may quite safely conclude that the by-law is in private and not public interest.

Based on these decisions, it must first be determined whether the impugned by-law is one originated by council or promoted by some private individual. If the enactment is promoted by an individual, it must then be determined whether the by-law will confer only an interest on the promoter to the exclusion of the public at large. In situations where the council has utilized its legislative powers to settle a dispute between individuals, the lack of public interest is evident.[5] If council does not provide an opportunity for the opponents of a by-law to object, this will be evidence which can be considered in determining the public interest.[6]

The inherent difficulty in applying the early decisions, is a determination of what constitutes public interest. It has been held that if the private interest advanced by the by-law was paramount, even if an insignificant benefit accrued to the public, the by-law should be invalidated.[7] A similar proposition was placed before the Privy Council in *United Buildings Corpor-*

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5 Cases such as: *Hutchinson* v *Town of Sandwich* 16 O.W.N. 114, *Pells* v *Boswell et al* 8 O.R. 680, and *In re Knudsen and Town of St. Boniface* 15 Man. R. 317 afford examples of council intervention in private disputes. *In Hatton* v *City of Peterborough* 16 O.W.N. 191 the sole purpose of the by-law was to assist an institution physically located outside the municipality. The Court held that no public interest of the residents of the City was being enhanced. The case of *In re Vashon* and *the Corporation of Township of East Hawkesbury*, 30 U.C.C.P. 194 is an even more obvious example. There the promoter, who stood to gain from the passage of the by-law, was also a member of the council; it was his vote that assured its passing. In *Esquimalt Water Works Company* v *Victoria* 10 B.C.R. 193 the Court held that merely because a member of council would benefit from the closing of a road, the by-law should not be invalidated as being contrary to public interest. It must be shown that the benefit obtained was prejudicial to the public interest.

6 See *In re Bent* [1940] 2 W.W.R. 697.

7 See: *Re Weir and City of Calgary* [1907] W.L.R. 45; *Dennis v Hughes* 8 U.C.Q.B. 444; See also the comments in *Re Pelet and Township of Dover* 1 O.W.R. 792 to the effect "... that corporate powers must not be exercised for the benefit of one or two individuals at the cost of others, not necessarily at the pecuniary cost, but must not be so exercised as to put many to unnecessary inconvenience for the manifest advantage of one or two."

ation Limited v *Vancouver.*[8] This argument was summarily rejected.

> But though the operation of a by-law benefits one or more persons more than others, it does not follow that by enacting it a corporation must be taken to give any bonus, nor can a by-law be said to be outside of the power of the Council merely because steps taken in the public interest are accompanied by benefits specifically accruing to private persons. If no one could benefit from this by-law but H..., and the whole advantage to the public at large, or to other members of the public, was to be found in the consideration moving from H... to the corporation, the matter might be otherwise.

This decision confirms that it will no longer be sufficient to negative public interest merely by establishing that some individuals, more than any other, benefited from the by-law. Some more positive and concrete evidence will be required to do so. It may even be necessary to establish conclusively that council has acted in bad faith.[9] It is possible for public and private interest to coexist compatibly in the same by-law, provided the private interest is one that coincides with the public interest.[10]

In *Wallace* v *Town of Dauphin,*[11] it was declared that the public interest required to support a by-law could not be secondary. It followed that if the benefit that accrues to the public is merely ancillary to the primary objective of conferring a benefit on a private individual, the public interest essential to the validity of the by-law is not established.[12] Applying this test, it is the direct act accomplished by the by-law, such as the closing of the street, that must stand the scrutiny of the public interest test.[13]

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8 [1915] A.C. 345. Reference can also be made to: *Esquimalt Water Works Company* v *Victoria* 10 B.C.R. 193; *Upper Canada College* v *City of Toronto* 55 S.C.R. 433; *Napier* v *City of Winnipeg* 67 Man. R. 322; *Towers Marts and Properties Ltd.* v *City of St. Catharines* 34 D.L.R. (2d) 547; *Lacey* v *Village of Port Stanley* [1968] 1 O.R. 36; *In re Inglis and City of Toronto* 9 O.L.R. 562; *Re Central Burnaby Citizen and Ratepayers Association* 6 D.L.R. (2d) 511. The decision in *The Metropolitan Stores Limited* v *The City of Hamilton* [1945] O.R. 590 is also informative on this point.

9 This is clearly the implication to be drawn from the remarks made by Rose J. in *Gilmore* v *Township of Westminster* 64 O.L.R. 344. These remarks are undoubtly *obiter,* as the by-law was struck down on other grounds.

10 *Hutchison v City of Westmount* 49 S.C.R. 621 (Idington J.)

11 [1932] 2 W.W.R. 405. See also: *Re Loiselle and Town of Red Deer.* (1907) 7 W.L.R. 42.

12 It was held in *Re Edwards and The Town of Brampton* (1933) O.W. N. 635 that a conveyance to an individual of a portion of a street closed by by-law, which would result in increased construction or employment in the municipality was not sufficient to establish the public interest.

13 *Re Loiselle and Town of Red Deer* (1907) 7 W.L.R. 42.

This proposition is at variance with the decisions in *Re Mills and City of Hamilton;*[14] *Re McLean and Town of North Bay;*[15] *The Metropolitan Stores Limited* v *Hamilton*[16] and *Keily* v *City of Edmonton et al.*[17]

There is an evident parallel between the development of the law in the field of public interest with that relating to unreasonableness.The same result has been achieved in both instances, in the former through judicial development, in the latter by statute. The effect of determining public interest or the unreasonableness of a by-law are not appreciably different. In each case, the Courts must scrutinize the policy motivating the enactment. As with unreasonableness, the Courts concluded that the determination of public interest was a question best left with the municipal council familiar with local conditions.

Chief Justice Meredith in *Jones* v *The Township of Tuckersmith*[18] clearly stated the principle.

> In my opinion what is or is not in the public interest, in a case such as this, is a matter to be determined by the judgment of the municipal council, and what it determines, if in reaching its conclusion the council act honestly and within the limits of its powers, is not, and ought not to be open to review by any Court.

Similarly Mr. Justice Estey in *Kuchma* v *The Rural Municipality of Tache*[19] said:

> Upon the question of public interest, courts have recognized that the municipal council familiar with local conditions, is in the best position of all parties to determine what is or is not in the public interest and have refused to interfere with its decision unless good and sufficient reason be established.

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14 9 O.W.R. 731.

15 7 O.W.R. 355.

16 [1945] O.R. 590.

17 [1931] 1 W.W.R. 365.

18 33 O.L.R. 634. This case ultimately came before the Supreme Court of Canada (reported in 45 O.L.R. 67). It was there held that the by-law had not been enacted in the public interest. Anglin J. held the by-law bad for other reasons. No direct criticism was made of the remarks of Meredith C.J.O., he apparently having failed to interpret the evidence properly.

19 [1945] S.C.R. 234. In *Berman v Parker* (1954) 348 U.S. 26 Mr. Justice Douglas, speaking for the Supreme Court of the United States, on a constitutional issue commented on public interest in these words: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms wellnigh conclusive."

It is now evident that the significance of the public interest rule is evidentiary. An examination of the public interest will be carried out only as a means of determining if the by-law has been enacted in good faith.[20]

The discussion on zoning and unreasonableness is equally relevant to any discussion of public interet and zoning.[21]

If the original rule applied by the Courts in determining public interest were applicable to zoning, many by-laws amending the general zoning by-law, would be bad. A review of any planning commission or council agenda would indicate that a considerable number of the zoning amendments proposed originate with private individuals. It is equally true that no overriding public interest is clearly indicated.

In *Re Waterous and City of Brantford,* 22 Chief Justice Moss in considering a question of public interest said:

> If it appeared that in the public interest there was a pressing need for the change, if in the view of those acting on behalf of the city there had arisen a condition of affairs prejudicial to the general public, calling for intervention and remedy, and if, acting upon such considerations, and without reference to individuals or individual interests, it had been determined that the change must be made, the public interest should prevail and the applicant must submit.

If this test were to be applied to zoning amendment by-laws, the public interest criteria could never be satisfied.

Development of the law in this area has been such that it is extremely unlikely that any zoning by-law will be struck down for a lack of public interest *per se.* [23] Public interest in the case of zoning by-laws is one which can only be determined by a municipal council fully conversant with local conditions.

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20 *Re Mills and City of Hamilton* 9 O.W.R. 731; *Hurst* v *Township of Mersea* [1931] O.R. 290; *Napier v City of Winnipeg* 67 Man. R. 322; *Rex ex rel Lee* v *Town of Estevan et al* (1951) 3 W.W.R. (N.S.) 513; *Re Howard and City of Toronto* 61 O.L.R. 563; *Leitch* v *Town of Strathroy* 53 O.L.R. 665; *Keiley v City of Edmonton et al* [1931] 1 W. W.R. 365.

21 *Supra* p. 117-118

22 4 O.W.R. 355. This was an appeal from the judgment of MacMahon J. (reported in (1903) 2 O.W.R. 897) quashing the by-law as not being in the public interest. Moss C.J.O. held that there was no public interest being furthered by the by-law, and therefore it could not be upheld.

23 Decisions such as *Township of Scarborough* v *Bondi* 18 D.L.R. (2d) 161 and *Re North York (Restricted Area) By-law 14,067* (1960) 24 D.L.R. (2d) 12 indicate that merely because the by-law may deal only with one lot, public interest is not thereby precluded.

CHAPTER 10

Discrimination

As mentioned in the discussion on unreasonableness,[1] Lord Russell of Killowen C. J. in *Kruse* v *Johnson*[2] indicated that discrimination in a by-law was a justification for declaring such by-law unreasonable and therefore bad. From an integral part of the unreasonableness rule, discrimination in its own right has developed into an important ground of attack on by-laws.

A province can, within constitutional limitations, enact discriminatory legislation; similarly, it may likewise delegate such power to a subordinated legislature. If a municipality exercises the authority so delegated, the by-law will not be subject to attack from discrimination.[3]

In *Soon Hing* v *Crowley*,[4] Mr. Justice Field, speaking for the United States Supreme Court, indicated at p. 708 when a Court may properly consider the question of discrimination:

> The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other businesses of a different kind. The discriminations which are open to objections are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that legal right which all can claim in the enforcement of the law.

Discrimination can best be discussed by examining three general areas where it is encountered: (1) situations where the by-law imposes different restrictions, duties, fees etc., within classes, e.g., as between residents and non-residents; (2) situations where the council lays down no rules at all, but reserves to itself a discretion to permit or refuse each application; and (3) situations where the council, or a municipal official, discriminates against violators of the by-laws in the manner of enforcement.

In *Jonas* v *Gilbert*,[5] the Court was confronted with a by-law which purported to impose different license fees as between resi-

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1 Supra p. 111

2 [1898] 2 K.B. 91

3 *Re Brown and City of Calgary* 5 W.L.R. 576; *Rex* v *Low Chung* 27 B.C.R. 469; *Re Neilson Engineering Ltd. v City of Toronto* [1968] 1 O.R. 271; *In re Perley* 30 Man. R. 444.

4 113 U.S. 703; See also: *Barbier* v Connolly 113 U.S. 27; *Rex* v *Awad* 11 M.P.R. 389.

5 5 S.C.R. 356; The principles laid down in this decision have been applied in: *Rex v Paulowich* [1940] 1 W.W.R. 537; *Regina v Hoy* 38 D.L.R. (2d) 201; *Regina* v *Pipe* 1 O.R. 43; *Murphy* v *The Queen* 111 C.C.C. 91; *Rex* v *Pope* (1906) 4 W.L.R. 278; *Bateman* v *McDonald* 8 M.P.R. 558; *Rex v Pierce* 30 D.L.R. 753.

dents and non-residents carrying on business in the municipality. The enabling legislation merely gave power to license. The principles to be extracted from the judgment of Chief Justice Ritchie can be summarized as follows:

(1) The general power to tax by means of licenses involves the principles of equality and conformity, and confers no power to discriminate between residents and non-residents.

(2) A power to discriminate must be expressly authorized by law and cannot be inferred from general words.

(3) The intention of the legislature to confer the power of discrimination, must be expressly and distinctly declared in clear and unambiguous language.

These principles are not restricted to the type of legislation with which the Court was concerned, but are of general application.

Discrimination on the face of a by-law is more prevalent in licensing by-laws or in by-laws imposing taxes. The situation in *Attorney-General* v *Toronto*[6] affords an excellent example. A general discount on water rates was given by the City of Toronto to all consumers with the exception of the Government of Canada. The enabling legislation was in general terms with no express power being given to differentiate between consumers in the imposition of rates. The Chief Justice conceded that the Province had the power to delegate to the City the right to discriminate, but "... they would not be deemed to have intended to do so from a power to make by-laws expressed in general terms".

As indicated in *Soon Hing* v *Crowley*,[7] if authority is given to a municipality to regulate or impose restrictions on several classes of business, it is not discriminatory to proceed against one of those classes to the exclusion of the others. There is no differentiation in treatment — one class is subject to regulation, the other is not. It is within the framework of the by-law regulating the particular business that some discriminatory provision must be apparent.

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6 23 S.C.R. 514. In *City of Hamilton* v *Hamilton Distillery Co.* 38 S.C.R. 239, the City of Hamilton undertook a similar program, the difference being that the higher water rates were imposed on the more profitable industrial concerns within the community. Mr. Justice Idington commented on the by-law in these words at p. 252: "In Hamilton they seem to apply the test of the relative profits, derivable from the different kinds of manufacturing business, or possibly the relative moral character of each, or perchance the relative economic results from the point of view of the productions of general material wealth. None of these justify in law the clear discrimination that exists in the by-law." The Court reiterated the principles stated in *Attorney-General of Canada* v *Toronto*, and concluded that the decision there given was conclusive against the by-law in this case..

7 113 U.S. 703

A typical example is where a municipality is authorized to exempt classes of business from certain tax obligations. In *Pirie and Town of Dundas*[8] the statute permitted tax exemptions to be given to specified classes of manufacturing businesses. The by-law under consideration exempted all new businesses of a certain type which met certain stated conditions. Wilson J., delivering the judgment of the Court, exemplified the objection in these words:

> The statute did not intend that every kind of manufacture should be exempted or that none of them should .... But in no case is A of the cotton or any other particular trade, to get a benefit which B of the same trade is not to get also. For this is a monopoly of the worst description, and it cannot be necessary either for the proper stimulus of trade, though it may stimulate A very wonderfully in that trade, but then only at the expense of B.[9]

The regulation of shop and service station hours has produced a myriad of decisions in which allegations of discrimination have been the predominant ground of attack. Many of the recent cases have resulted from local prejudice against what, for lack of a more apt classification, might be described as national or international retail establishments. This is particularly evident when attempts have been made to exempt from the operation of these by-laws the small neighbourhood store, even though the larger retail outlets were selling, among other things, the same merchandise.[10]

The introduction of criteria foreign to the statute to determine who must close or who is exempted is also objectionable on the principle that no expansion on the statutory requirements is permissible as their introduction would have a discriminatory result.[11]

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8 29 U.C.Q.B. 401.

9 *Ibid.*, p. 407. Moreover, O'Connor J. in *The Peoples Milling Company and Council of Medford* 10 O.R. 405 at p. 414 said: "In fact, by such exemption persons in a particular line of business who are not exempted from taxation are compelled to contribute to the advancement of others in the same line, who are in competition with themselves." In *The Carleton Woolen Co. Ltd.* v *Town of Woodstock*, 3 N. B. Eq. 138, a tax exemption to "any company" establishing a woolen mill was held to be discriminatory; the manner of levying taxes may also have a result similar to this. *Swift Canadian Co. Ltd.* v *City of St. Boniface* 5 D.L.R. (2d) 439. See also *City of Ottawa* v *Royal Trust Co.* [1964] S.C.R. 526 where it was held that it was permissible for council to draw a distinction between residential and non-residential buildings.

10 *Re Bunce and Town of Coburg* [1963] 2 O.R. 343; *City of Calgary* v *S. S. Kresge Co. Ltd.* 52 D.L.R. (2d) 617.

11 *City of Dartmouth* v *S. S. Kresge Co. Ltd.* 58 D.L.R. (2d) 229; *S. S. Kresge Co. Ltd.* v *City of Windsor* 7 D.L.R. (2d) 708. The decision in *City of Toronto* v *Elias Rogers Co.* 31 O.L.R. 167 is informative on this point. See also: *Rex ex rel. Thompson* v *Russelle* 100 C.C.C. 175.

Under a power to regulate, govern and control, regulations against a particular class cannot be imposed which have as their primary objective the advancement or protection of another trade or individual.[12] Such regulations are clearly discriminatory. It is no less objectionable to prohibit certain classes of the public from buying specified kinds of consumer goods, for example, liquor, fire works, etc.[13]

These are the basic principles against which a by-law must be examined, and the tests which must be satisfied for it to be upheld. There are numerous decisions dealing with discriminatory by-laws,[14] most of which merely reiterate and apply these general principles.

A discriminatory situation also results where a council lays down no rules, but reserves to itself a discretion to grant or refuse any application for a license or permit.

The by-law under consideration in *City of Verdun* v *Sun Oil Company Ltd.*[15] affords an excellent example of this situation. The enabling legislation gave council authority to make by-laws for regulating the construction of buildings. The by-law as enacted required the applicant to submit in writing his request for a permit. The building inspector was then required to examine the plans and certify to council whether or not they met the building requirements. The council retained the right to grant or refuse the permit notwithstanding that there may have been full compliance with all regulations. The remarks of Mr. Justice Fauteaux in the Supreme Court of Canada may be paraphrased as follows:

> The Council did nothing but leave to its discretion what it was authorized by the legislature to do by by-law. The action taken by the City 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. Once exercised, the delegated right to regulate in the matters mentioned in the Act is to be maintained at the legislative level and not to be brought down exclusively within the administrative field.

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12 *Regina v Johnston* 38 U.C.Q.B. 549; *City of Toronto v Virgo* [1896] A.C. 88; *Re Howard and Village of Swansea* [1947] O.W.N. 715.

13 *Re T.W. Hand Fireworks Co. Ltd. and City of Peterborough* 34 D.L. R. (2d) 102; *Regina* v *Levy* 30 O.R. 403. A laudatory purpose does not enhance the position of the by-law.

14 Some of these to which reference may be had are: *Re West Vancouver Service Station Closing* 120 C.C.C. 294; *Rex* v *Robinson* 94 C. C.C. 110; *Re Henry's Drive-In Ltd. & Hamilton Police Bd.* [1960] O. W.N. 468; *In re Campbell and City of Kingston* 14 U.C.C.P. 285; *Roberts* v *Climie* 46 U.C.Q.B. 264; *In re Clay and City of Victoria* (1886) B.C.R. 300; *Regina* v *Florey* 17 O.R. 715.

15 [1952] 1 S.C.R. 222; See also: *Re Martin and Fort Gary R.M.* 19 D. L.R. (2d) 578.

If the statute conferring the authority requires that such powers must be exercised by by-law, this means the enacted by-law must set forth general standards applicable to all in similar classes. The by-law in this case was not dicriminatory in it terms, but permitted unequal treatment in its administration. Neither is it, as said by Lord Russell of Killowen C.J. in *Walker* v *Stretton,*[16] "so free from doubt that 'he who runs may read' ".

The classic definition of discrimination is that given by Middleton J. in *Forst* v *City of Toronto:*[17]

> When the municipality is given the right to regulate . . . all it can do is pass general regulations affecting all who come within the ambit of municipal legislation. It cannot itself discriminate, and give permission to one and refuse it to another; and *a fortiori,* it cannot give municipal officers the right, which it does not possess, to exercise a discretion and ascertain whether as a matter of policy permission should be granted in one case and refused in another.[18]

The good intentions of the council in this situation are irrelevant, nor does it matter if they always act with propriety in exercising the discretion they have reserved to themselves. It is the potential of discriminatory conduct that is condemned.[19]

Any by-law which retains a discretion in the council, unless specifically authorized by statute, will be summarily struck down.[20] The most emphatic statement on this point is that made by Mr. Justice Wright in *City of Toronto* v *Mandelbaum:*[21]

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16 12 T.L.R. 363.

17 54 O.L.R. 256 at 278.

18 Attempts to pursue this course of conduct on the part of council was considered in: *Rex ex rel Falls v Shamrock Fuel Company* [1924] 3 W.W.R. 454; *Re Imperial Oil Limited and The City of Kingston* [1955] O.W.N. 767; As stated by Middleton J. in *Cridland v City of Toronto* 48 O.L.R. 266 at 267, "The council has power to pass laws binding on all those who are subject to its jurisdiction, but an attempt to regulate the conduct of any individual rather than to pass a general law is bad." In *Ennis* v *Rural District of Placentia* 24 M.P.R. 429 at 432 Dunfield J. said: "The general idea is that municipal legislative powers should be exercised mainly by general regulation applicable to everybody, and not by *ad hoc* decisions." The principles were also considered in *Regina* v *Moncton Building Inspector* 44 D. L.R. (2d) 300; *Bullock* v *Scarborough Township* 19 D.L.R. (2d) 680: *B.C. Electric Co. Ltd.* v *District of Surrey* 1 D.L.R. (2d) 717; *Re Ross and Board of Commissioners of Police of Toronto* [1953] 3 D.L.R. 597; *Regina ex rel Cox* v *Thomson* 9 D.L.R. (2d) 107; *Re Taylor and the City of Winnipeg* 11 Man. R. 420.

19 *Re Nash and McCracken* 33 U.C.Q.B. 181. This decision was applied in: *Regina* v *Webster* 16 O.R. 187.

20 See: *Regina* v *Jim Sing* 4 B.C.R. 338; *Town of St. Leonard* v *Fournier 3* D.L.R. (2d) 315.

21 [1932] O.R. 552 at 556.

> ... but when it purports to say that a permit may be issued at the discretion of council, it at once becomes discriminatory in its operation, and therefore invalid.

Decisions such as *Quincey* v *Kennard,*[22] *Goldsmith v City of Indianapolis*[23] *and Fischer* v *St. Louis*[24], indicate that the American Courts are not as concerned as their Canadian counterparts with the discrimination inherent in the arbitrary dispensing of permits. Brown J. in the latter case, speaking for the Supreme Court of the United States, said at p. 371:

> We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public, and upon conditions applying to the health and comfort of the neighbourhood.

Ingenuity is not the sole prerogative of those in the field of taxation. Councils having been rebuffed in attempts to retain direct control over permits and licenses have sought, with some success, to circumvent these restrictions.

In *Re Cosentino and City of Toronto*[25] and *Re Joy Oil Co. & Gillies & Toronto*[26] a system of licensing under a by-law that was general in application and regular in form was implemented. Despite evidence of the existing administrative practice of discrimination in the granting of the permits the Courts in both cases refused an application for *mandamus.* To grant the relief sought would be an unwarranted interference with the Council's discretion to administer its by-laws. There being no discrimination apparent on the face of the by-law itself, interference was not justified.[27]

The third area where discrimination is most apparent is where the council, or a municipal official, discriminates in the enforcement of a by-law. In this situation evidence is usually led to establish that persons other than the defendant who are equally culpable are permitted to violate the by-law with impunity.

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22 24 N.E. Rep 860.

23 196 N.E. Rep 525.

24 194 U.S. 361.

25 [1934] O.W.N. 715.

26 67 C.C.C. 325.

27 See Apex *Auto Supply Co.* v *City of Hamilton* 28 O.W.N. 265. *Regina v Scarborough, Ex parte Blue Sky Const. Co.* [1960] O.W.N. 535 is a further example of this type of situation. Council had authority to limit the number of service stations within the municipality. When an application was made for a permit to construct a service station, a determination was first made as to whether that particular applicant should receive it. If it was decided not to issue the permit, the by-law limiting the number of service stations was invalid, and the application denied. If the opposite decision was made, the by-law was amended and the application granted. The Court refused to grant a *mandamus* to compel the issuance of a permit. To have done so would have required council "to breach one of its valid by-laws".

In *Re Joy Oil Co. & Gillies & Toronto*,[28] McTague J. suggested that the courts might grant relief if it could be established that a by-law, though correct in form, was systematically administered so as to permit the exercise of discretion in the granting of permits. He did not offer any suggestions as to the form of the relief which might be given.

A most interesting decision, that of *City of Toronto* v *Polai*[29] has recently been given by Mr. Justice Haines in the Ontario High Court. An application was made by the City for an injunction to restrain a high density use in a single family residential zone. It was established in evidence that the City maintained a "preferred list" of properties which were immune from prosecution, some of which were in the same area as the defendant's property. Because of this obnoxious practice the defendant opposed the granting of of the equitable remedy of injunction. Mr. Justice Haines at p. 660, agreed:

> If the injunction had been granted two conditions would have been imposed: (1) the discontinuance of the preferred list practice; and (2) a sufficient time alloted for the defendant to sell her property.
>
> With the morality of the decision there can be no question; for its legality there can be no support.[30]

An appeal was taken from this judgment to the Ontario Court of Appeal, and the judgment thereon has receently been given.[31] The three members of the Court of Appeal agreed in allowing the appeal.

Mr. Justice Schroeder, discussing the refusal of the lower Court to grant the injunction requested by the City said, at p. 492:

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28 67 C.C.C. 325.

29 [1969] 1 O.R. 655.
> An injunction is an extraordinary and discretionary remedy. To obtain an injunction a plaintiff must come to Court with clean hands. He who seeks equity must do equity. In my opinion the plaintiff has acted inequitably by maintaining the 'deferred list'. The practice is secretive, it is not made known to all who might wish to avail themselves of it by the plaintiff. It is open to political abuse and law enforcement is thereby tainted with potential political favouritism. It permits the continuance of a prohibited use of one premises while prohibiting it in the immediate neighbourhood. As I said previously the practice constitutes *de facto* licensing and amendment by the Committee of the zoning by-law in individual cases. To grant the city an injunction in this case would be to sanction that practice.

30 *In Re Rex v Roulet* [1937] O.R. 912, it was argued that because of discrimination in the enforcement of the by-law the action should be dismissed. This argument was summarily dismissed.

31 [1970] 1 O.R. 483.

> **If then, the Court has no power to control directly the exercise of Council's discretion in the manner of administration of the by-law under review, can it do so indirectly by refusing to grant injunctive relief to the City except upon the condition that it exercise its powers in a manner agreeable to the Court's view. To ask this question is to answer it.**

All members of the Court agreed that although the practice of the City was discriminatory, there was an overriding public interest in the enforcement of the by-law that must be acceded to, and therefore the injunction was granted.

There was also agreement that there may be situations where the equitable remedy should not be granted. If, for example, the "administration of a by-law were tainted with corruption or where it was being enforced against only a discriminated few", the Court should not assist in the perpetuation of that practice.

A zoning by-law is discriminatory in nature. In *Forst v City of Toronto*[32] a discriminatory by-law was, by implication, defined as being one not general in nature and which affected those subject to it in an unequal manner. Chief Justice Strong in *Attorney-General of Canada* v *Toronto*[33] suggested that municipal by-laws must be uniform in their application throughout the municipality.[34]

Although a by-law must be general in nature, it will not be discriminatory because its provisions may weigh more heavily on one person than on another.[35]

The leading decision relating to discrimination in zoning by-laws is that of *Township of Scarborough* v *Bondi*.[36] The applicable by-law restricted the construction of residential dwellings to one for each one hundred feet of street frontage. The lot, of which Bondi's formed a part, was a triangular one having a frontage on two streets and was sufficient to permit the construction

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32 54 O.L.R. 256.

33 23 S.C.R. 514.

34 These remarks were explained by Newcombe J. in *City of Halifax* v *Read* [1928] S.C.R. 605 at 612. "The Chief Justice did not mean to include anything new as essential to the validity of a by-law. What he regarded as a requisite or an essential was uniformity, not in the sense of precise arithmetical equality, but as excluding arbitrary or unjust discrimination."

35 See: *Hall* v *Commonwealth* 41 S.W. Rep. 2: *Kiely* v *City of Edmonton* [1931] 1 W.W.R. 365; *Regina v Southern Garage* (1959) Ltd. 39 D.L.R (2d) 408; *United Buildings Corporation Limited* v *Vancouver* [1915] A.C. 345; *Hirsch v Town of Winnipeg Beach* 26 D.L.R. (2d) 659; *Reeve v City of Fort William* [1955] O.W.N. 207. *Re Daines and City of Toronto* 49 O.L.R. 285; *Lacey* v *Village of Port Stanley* (1968) 1 O.R. 36.

36 18 D.L.R. (2d) 161.

of four houses. Bondi owning one-half of the original lot was therefore entitled to construct two houses. The by-law was amended to prohibit the building of more than one dwelling on the lot owned by Bondi. The approval of the Municipal Board was requested and obtained. The Supreme Court quashed the by-law on a technicality relating to the approval of the by-law by the Municipal Board. Mr. Justice Judson agreed that the approval had not been properly obtained, but he also dealt with zoning by-laws and discrimination in general.

Mr. Justice Judson, after referring to *Forst* v *City of Toronto*[37], said at p. 166:

> Although I have a firm opinion that the original and amending by-laws do not infringe this principle, I share the doubt expressed by the learned Chief Justice whether it can ever afford a guide in dealing with a restrictive or zoning by-law. The mere delimitation of the boundaries of the area affected by such a by-law involves an element of discrimination. On one side of an arbitrary line an owner may be prevented from doing something with his property which another owner, on the other side of the line, with a property which corresponds in all respects except location, is free to do. Moreover, within the area itself, mathematical identity of conditions does not always exist. All lots are not necessarily of the same frontage or depth. The configeration of the land and the shape of the lots may vary. Some lots may have frontages on two streets. These are only some of the considerations which may justify a municipality in enacting these by-laws in exercising a certain amount of discretion.[38]

The learned Judge commented on the specific question in these words at p. 165:

> I do not think that one can characterize this by-law as discriminatory merely because it points to one particular person or lot. The task of the municipality in enacting the original by-law was to impose building restriction over a fairly wide area . . . The intent and effect of the amending by-law are clear-to compel the respondent to fall in with the general standards of the neighbourhood and prevent him from taking advantage of the district amenities, the creation of the by-law to the detriment of other owners. Far from being discriminatory, the amending by-law is nothing more than an attempt to enforce conformity with the standards established by the original by-law and which have been observed by all owners in the subdivision with this one exception.

It is doubtful if this decision can be interpreted as conferring a general authority on a municipal council to undertake a program of spot rezoning. It really extends only to a situation where the amending by-law seeks to bring the land to which it relates into conformity with the standards existing in the neighbourhood.

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37 54 O.L.R. 256.

38 These views are not at all novel, in fact similar comments were made by Plaxton J. in *The City of Niagara Falls* v *Mannette* [1943] O.W.N. 599; See also: *Halifax v Wonnacott* (1951) 2 D.L.R. 488; *Re Maycook and City of Winnipeg* 24 Man. R. 646.

The decision was applied in this manner in *Re Dillabough et al and Township of Esquimalt.*[39] A general zoning by-law applied to an area in which there existed two non-conforming uses. The amending by-law related only to one of those lots, having been passed to prevent a development on that specific lot. Mr. Justice Ruttan concluded that the by-law was discriminatory, and would only come within the *Bondi* rule if both lots were included. In the action taken it was held that the council was not acting in the interests of the whole area and that they were being inconsistent and showing favouritism. The decision can be supported on the ground that the council was not acting in good faith.[40]

Mr. Justice Kelly in *Re Mississauga Golf and Country Club Ltd.*[41] has given the *Bondi* rule a very broad interpretation. The Court was there concerned with the rezoning of a lot for a service station use. The land in question had been put in a special zone established only for that property. His Lordship commented on the *Bondi Case* as follows at p. 679:

> In the light of the decision in *Township of Scarborough* v *Bondi* ... the mere fact that conditions otherwise appropriate were applicable only to a certain parcel of land can no longer be grounds for disallowing such a by-law as invalid. The test laid down in that case clearly envisages that the application in good faith to some lands only of special conditions not generally applicable would not necessarily result in a departure from the proper principles so as to require that the by-law be declared invalid.[42]

The effect of these decisions is to remove a zoning by-law from the normal application of the rule against discrimination. Similarly, no objection will be raised if special conditions are attached which are applicable only to that property, provided such conditions may be validly imposed by the council within the terms of a zoning by-law.

It is clear that council cannot place any restrictions on a property within a general zone, which conditions are not applicable to all other properties.[43] The only manner in which this can be achieved is the creation of a separate zone for the property to which the conditions are to apply.

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39 62 D.L.R. (2d) 653.

40 Mr. Justice Judson found in the *Bondi Case* that the Council had been acting in good faith. This aspect of the *Bondi Case* was considered in *Re Cohen and City of Calgary* 64 D.L.R. (2d) 238.

41 (1963) 40 D.L.R. (2d) 673.

42 It was also held in *Re North York By-law 14067* (1960) 24 D.L.R. (2d) 12 that council could rezone one lot, and that the question of ownership of that lot was not a relevant factor for the Ontario Municipal Board to consider in deciding whether to approve the by-law.

43 *Re Rosling and City of Nelson* 64 D.L.R. (2d) 82, See also: *City of Toronto* v *Solsway* (1919) 49 D.L.R. 473.

Discrimination as a ground of attack on zoning by-laws will not be particularly significant in the normal zoning situation. It can only be used as a means of proving the bad faith of the council in enacting it.

The significant result of these recent decisions is that a municipality may be better able to control development within its boundaries by the use of zoning. This can be done by the creation of special zones and the implementation of special conditions applicable thereto.

This type of approach would be applicable to a system of planned unit development.[44] It is difficult to bring this type of development within the existing framework of the accepted rule against discrimination. Traditionally it has been felt desirable to specify in the by-law all of the conditions that any development must meet to be permitted. The system of planned unit development requires the preparation of special conditions applicable only to the one project. It involves discrimination in the sense that all developments of a similar type may not necessarily be treated equally.

The decision in *Re North York By-law 14067*, 45 and in *Re Mississauga Golf and Country Club Ltd.* [46] may well be applied to enable a municipality to pursue a program of planned unit development.

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44 For a more detailed consideration of this topic, reference may be made to: Krasnowieski, Jan, *Legal Aspects of Planned Unit Residential Development, A Study,* Urban Land Institute Technical Bulletin #52, 11; Babcock, Richard F., *An Introduction to the Model Enabling Act for Planned Residential Development,* University of Pennsylvania Law Review (1965-66) Vol. 114 p. 136.

45 (1960) 24 D.L.R. (2d) 12.

46 (1963) 40 D.L.R. (2d) 673.

CHAPTER 11

Uncertainty

An essential criteria against which any by-law must be measured is certainty. In some of the early decisions dealing with applications to quash, the Courts did not appear to consider this objection serious enough to warrant intervention. Draper C. J., in *In re Smith and City of Toronto,* said:

> I am not disposed to give the slightest countenance to motions to quash by-laws on any ground such as a want of clearness of expression or a difficulty in construing or applying its provisions. If it be impossible to apply its provisions, they will remain unapplied; if they are uncertain, there may be difficulty in construing and acting upon them.[1]

Uncertainty was therefore not considered an illegality within the meaning of the statutory provision permitting applications to quash. The result of these decisions was to require the matter to be litigated in another forum.

In *Re Elliott*[2] it was suggested that if a by-law was uncertain or unintelligible then it could not be determined whether it was illegal or not. Illegality being the only ground upon which a by-law could be quashed, an application could not be granted; the by-law was merely unenforceable. The better view is that if the by-law is properly put before the Court and is judicially determined to be uncertain, it must be struck down.[3]

If a by-law has been drafted in strict accordance with the enabling legislation, it probably cannot be held to be uncertain. This is assuming that the words of the statute are utilized.[4]

The basic rule on uncertainty is that stated by Anglin J. in *The City of Montreal* v *Morgan.*[5]

> I fully recognize the force of the general rule that the language of by-laws should be explicit and free from ambiguity, and that by-laws in restraint of rights of property as well as penal by-laws should be strictly construed.[6] But the very statement of the latter rule implies that a by-law is not necessarily invalid because its terms call for construction—as does also another well recognized rule, viz., that a by-law of a public representative body clothed with ample authority should be "benevolently" interpreted and

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1 10 U.C.C.P. 225; *Hodgson* v *Municipal Council of York and Peel* 13 U.C.Q.B. 268, Robinson C. J. refused to quash a by-law for uncertainty, in view of the time which had elapsed before the making of the application.

2 11 Man. R. 358.

3 *Clarke* v *Rural Municipality of Wawken* (1930) 1 W.W.R. 319.

4 *Winnipeg Merchandisers Limited* v *City of Winnipeg* (1963) 3 W.W.R. 530.

5 60 S.C.R. 393.

6 *Regina* v *Jim Sing* 4 B.C.R. 338.

> **supported if possible... It would be going quite too far to say that merely because a term used in a by-law may be susceptible of more than one interpretation the by-law is necessarily bad for uncertainty.[7]**

The Court must first attempt to ascertain the purpose of the by-law. Mere difficulty in determining its purpose is not sufficient reason to strike it down. The language must be relatively clear and at least capable of some interpretation. The Courts should not be astute to find reasons for striking down municipal enactments;[8] an effort should at least be made to support them. If such an approach were not taken, many by-laws of rural municipalities would be invalid. The same degree of precision expected in Provincial and Federal legislation is not usually attainable in smaller municipalities.

The two considerations that should be borne in mind by the Courts are perhaps best enunciated in *Walker* v *Stretton,* [9] a decision by Lord Russell of Killowan C. J.:

> It was also safe to lay down this general proposition—that, although it was desirable that by-laws should be so free from doubt that "he who runs may read'[10] yet as even in the case of higher legislative bodies this was not always attained, the Court should strive to so construe this by-law as to give reasonable effect to the object aimed at.

The essential criteria seems to be reasonable clarity. [11] If this is achieved, barring other difficulties, the by-law will be up-

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7 Despite the statement in *The City of Montreal* v *Morgan,* 60 S.C.R. 393 that merely because a word used in a by-law may be capable of having more than one meaning it is not thereby uncertain, the Courts have not been adverse to striking down by-laws for the use of very vague or general words, for example words such as: small *(Re Bunce and Town of Cobourg* (1963)2 O.R. 343, but see *Re Harris and City of Hamilton* 44 U.C.Q.B. 641); normal business hours, *(Marilyn Investments Ltd.* v *Rural Municipality of Assiniboia* 51 D.L.R. (2d) 711); principal business, *(City of Dartmouth* v *S. S. Kresge Co. Ltd.* 58 D.L.R. (2d) 229;) the description of an area as being "the public streets adjacent to a market", has also been held bad *(Re Harris and City of Hamilton* 44 U.C.Q.B. 641); "Sabbath" has been held not uncertain, *(Re Cribbin and City of Toronto* 21 O.R. 325.)

8 *Kruse* v *Johnson* (1898) 2 Q.B. 91; *Re Goldstein and City of Windsor* 35 O.W.N. 9.

9 12 T.L.R. 363.

10 In *Scott v Pilliner* (1904) 2 K.B. 855, Lord Alverstone C. J. at p. 858, felt such enactments "should be clear and definite and free from ambiguity." In *Crowe* v *Steeper and Williams* 46 U.C.Q.B. 87, Hagarty C. J. was of opinion that "the language must be reasonable, clear and unequivocal."

11 *Blue Haven Motel Ltd.* v *District of Burnby* 52 D.L.R. (2d) 464; *In re Bent* [1940] 2 W.W.R. 697; *Nash v Finlay* 85 L.T. 682; *Regina* v *Jacobson* 6 D.L.R. (2d) 758. An interesting interpretation of a by-law that was quite uncertain in one of its provisions was made in *Leyton Urban District Council v Chew* [1907], 2 K.B. 283.

held. The fundamental prerequisite is that some indication must be given to those who are to be bound by it of the course of action they may or may not pursue.[12] It has been suggested that only when it is impossible to ascribe any meaning whatever to the by-law can it be held uncertain.[13]

The effectiveness of the by-law cannot depend on any uncertain event.[14] It must be possible to know by studying the provisions of the enactment when and under what circumstances it will be applicable.

It is quite conceivable that a by-law may be regular on its face, but still be bad for uncertainty. There may be some situations where an examination of the effect of the by-law will clearly indicate an uncertainty. In some situations it is only by conjuring up extreme examples that the problems become clearly visible. In other cases a particular factual situation may point up the difficulty apparent in giving the by-law universal application.[15] Similarly, if the effect of the by-law will or must depend on the standards of the individual determining whether or not there has been a violation of its provisions, the type of situation to which it will apply is thereby rendered so uncertain that the by-law is unenforceable.[16]

It can be argued that if the Courts undertake a determination of the effects of a by-law it may make the task of drafting valid by-laws exceedingly difficult. This would also necessitate unwarranted speculation by the Courts. Despite this argument, there is authority for saying that if the effect of the by-law, when applied, is uncertain, it will not be upheld.[17]

Accepting the principle that the Court should make every effort to interpret a by-law so as to give it life and vitality, it should be equally careful not to judicially redraft the by-law to do so.

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12 *Leach* v *City of Regina* 50 W.W.R. 129; *Kruse* v *Johnston* (1898) 2 Q.B. 91. A greater degree of clarity will probably be required if the by-law is confiscatory.

13 See for example: *St. Catharines v Hulse* [1936] 2 D.L.R. 453; *Blue Haven Motel Ltd.* v *District of Burnaby* 52 D.L.R. (2d) 464; *Esquimalt Water Works Company* v *The Corporation of the City of Victoria* 10 B.C.R. 193.

14 *Re Cloutier* 11 Man. R. 220; *Wallace v Town of Dauphin* [1932] 2 W.W.R. 405.

15 *Attorney-General v Denby* [1925] 1 Ch. 596.

16 *Rex ex rel McCorquodale v Wong* [1937] 1 W.W.R. 552.

17 *In re Clark and The Municipality of the Township of Haward,* (1885) 9 O.R. 576.

> It is one thing to say that it is the duty of the Court to interpret a by-law notwithstanding difficulties that are presented by the language employed in the framing of the by-law once the intention of the enacting body is clear, but it is quite another thing to say that the Court is at liberty to conjecture and surmise as to the intention of the enacting body and then form a new enactment to carry out the supposed intention either by adding to or subtracting from the enactment that is before the Court.[18]

Even where the intention of the by-law is clear, but the wording is not, the Courts must resist any temptation to alter it.[19] The result of implying words that are obviously omitted, is to enforce a legislative provision that has not received the sanction of the body enacting it. The Court's function is to take the by-law as it finds it, and not to correct and patch bad drafting. It would be an abuse of its powers to do so.

In a zoning by-law, it is imperative that the wording be clear and unambiguous. This type of by-law is an interference with the common law right of a person to use his property in any manner he sees fit. For this reason he must be able to determine whether or not the by-law applies to his property.[20] A mere reference in the by-law to a plan which describes the area, will not be sufficient to save the enactment unless the plan is incorporated in the by-law itself.[21]

On many occasions in recent years, municipalities have attempted to regulate specific developments through the use of the zoning by-law. Conditions relating to specific undertakings are prescribed when the zoning change is effected. In some instances a collateral agreement is entered into setting out the various conditions.[22] This type of agreement is not binding on the owner's

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18 McGillivray J. A. in *Municipal District of Springbank v Render* [1936] 2 W.W.R. 430 at 436.

19 *Re Goldstein and City of Windsor* (1928) 35 O.W.N. 9

20 *Campbell* v *City of Regina* (1967) 63 D.L.R. (2d) 188. A considerable number of decisions have dealt with problems relating to the absence or insufficiency of a description, for example: *Re Goldstein and City of Windsor* (1928) 35 O.W.N. 9; *Re Boivin and Township of Teck* [1955] O.W.N. 763; *In re Simmons and Township of Chatham* 21 U.C.Q.B. 75; *In re Sydenham School Section* (1903) 6 O.L.R. 417; *Brown* v *County of York* 8 U.C.Q.B. 596; *In re Smith and Council of Euphemia* 8 U.C.Q.B. 222; *McIntyre* v *Municipal Council of Bosanquet* 11 U.C.Q.B. 460; *Haacke* v *Municipality of Markham* 17 U.C.Q.B. 562; *Wannamaker* v *Green* 10 O.R. 457.

21 *Brown* v *County of York* 8 U.C.Q.B. 596

22 *In re North York By-law 14067* (1960) 24 D.L.R. (2d) 12, the Ontario Municipal Board attached considerable weight to a collateral agreement entered into between the municipality and a developer. McGillvray J. said: "This factor of a collateral agreement should be given no weight or consideration by the Board when weighing the desirability of giving its approval of the by-law." The decision indicates that there is no objection to a collateral agreement which in fact may supplement the zoning by-law.

successors in title, unless it is made a convenant running with the land.

One difficulty inherent in attacking conditions to a zoning by-law is largely a problem of drafting. The conditions must firstly be such as are competent for a council to enact under its zoning powers, and secondly they must be certain. It is exceedingly difficult when attempting to draft conditions to regulate an industrial complex, to avoid an infringement of the rules against uncertainty.

In *Re Mississauga Golf and Country Club*, [23] a special zone was created for a service station, in which conditions were imposed. Two of these conditions or limitations provided as follows:

> (a) A "Van Horne" type gasoline service station constructed of Credit Valley Stone.
> (c) No commercial vehicle shall be serviced except for refuelling and emergencies not requiring the parking of any vehicle for a period longer than 15 minutes.

Mr. Justice Kelly at p. 679-680, commented on condition (a) in these words:

> Unless "Van Horne" type is a term capable of the exact recognition by some standard defined in the by-law or so generally accepted as to make definition unnecessary, the condition would appear to be a doubtful exercise of the powers of council.

As to condition (c) he said:

> Condition (c) contains a limitation on the servicing of commercial vehicles. While this may be strictly within the restriction of the use of land, whereas here it is coupled with "emergencies not requiring the parking of any such vehicle for a period longer than 15 minutes" it introduces an element of vagueness which in itself would be fatal.

These two illustrations indicate the extreme difficulty facing a municipal draftsman in preparing these conditions. The complex problem in defining a "Van Horne" service station or what constitutes an emergency may well be insurmountable.

The decision raises the question of the applicability of the traditional rules of uncertainty to a modern zoning by-law. With the difficulty inherent in stating restrictions in a manner perfectly clear to all who read, it may well be time to review and reconsider some of these traditional rules.

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[23] (1963) 40 D.L.R. (2d) 673.

CHAPTER 12

Delegation

A municipality is concerned primarily with two functions, namely, legislative and administrative. The first involves the exercising of the jurisdiction conferred upon it by the Provincial Legislature, such as enacting by-laws to put the authorized authority into effect. The second is concerned with administration of these local laws, the granting of permits, licenses, etc.

It is exceedingly clear that the administrative function cannot be dealt with by the council itself. If this was necessary, the entire local governmental process would be disrupted. Therefore, for practical reasons, there should be no objection to council delegating such functions to designated officials.

On the other hand the legislative function of a municipality is, as the name implies, the creation of local by-laws, within the terms of the delegated authority. It must be remembered that the members of council are the locally elected officials charged with the duty of carrying out a legislative program for the benefit of the locality. There is, of course, no legislative program in the Provincial or Federal sense. Party politics of some description must necessarily be part of the municipal scene for this to materialize. However, the council is charged with the responsibility of determining what legislation to enact for its jurisdictional locality. To permit a delegation of this function would depart from the principle of direct responsibility. It has always been assumed that the Legislature did not intend that the subordinate agency should have power to further delegate the legislative responsibility imposed on it.

The policy reason for not permitting delegation is stated in *Re Elliott*.[1]

> This . . . is a delegation of authority that cannot be justified; for the Council has really delegated to an official the judgment and discretion that the Legislature intended and expected that it would exercise itself. It is manifest that such a delegation of authority might result in injustice and hardship . . .[2]

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1 11 Man. L.R. 358 at 363.

2 The principle against delegation is clearly enunciated per Hodgins J. A. in *Forest* v *City of Toronto* (1923) 54 O.L.R. 256 at 275: " . . . they cannot delegate to any individual the right to perform their duty, nor can they substitute the discretion of one of their officials for their own." The comments of Dennistown J.A. in *In Re By-law No. 92, Town of Winnipeg Beach, 30* Man. L.R. 192 at 196 are also relevant on this point: "Powers which are given to a council constituted to act as one deliberative body to the end that the members may assist each other by their mayor alone." See also the judgment of Garrow. J. A. in *Russell* v *City*

There now can therefore be no question with the basic principle of non-delegation. The only real problem presented in any situation is whether or not the alleged delegation is sufficient to warrant striking down the by-law.

It is also necessary to determine, when considering an alleged delegation, if the function delegated is legislative or administrative. No clear and precise statement can be made as to what will be deemed to be a legislative or an administrative act. This is something that must be ascertained as each situation comes before the Court. The one general statement though that can be made in this respect is, that if a discretion must be exercised by the official, then in all likelihood he is exercising a legislative function.[3]

This statement can serve only as a general rule because in each instance the type or extent of the discretion involved must be examined. This does not mean then a municipal officer cannot make a decision. A building inspector, for example must decide whether or not a given plan meets the by-law rquirements, but in this situation he has no arbitrary authority to reject the plans, or to impose conditions, not present in the by-law.[4]

It was implied in the judgment of Cartwright J. in *City of Toronto* v *Outdoor Neon Displays Ltd.*[5] that a discretion can be vested in a municipal official. He stated that the by-law before the Court when properly interpreted did not confer any "uncontrolled discretion" on the inspector. It can only be assumed that it was not intended that a controlled discretion was permissible. What would be an example of a controlled discretion is difficult to conceive. An examination of the balance of the reasons for judgment bear out the conviction that a "controlled discretion" in fact would mean no discretion at all, and merely the exercising of the ministerial function of determining the adequacy of the plans in relation to the by-law. Any other approach would clearly have been in conflict with existing case law.

The type of discretion here being discussed is not to be confused with the type of ministerial discretion considered in such

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of Toronto (1908) 15 O.L.R. 484; *Hitchock* v *Galveston 96 U.S.* 341; Examples of the application of the principle can be seen in: *In re Robertson and Township of North Easthope* (1888) 15 O.R. 423; *Simon* v *Gastonguay* (1931) 2 M.P.R. 470.

3 *Re Kowal and Township of Nelson* [1953] O.W.N. 463.

4 Under s. 31 (1) (3) of *The Planning Act*, R.S.O. 1960 c. 296, council may by by-law authorize the building inspector to permit deviations from the plans, where in his judgment it is warranted.

5 [1960] S.C.R. 307.

cases as *Russell* v *City of Toronto*,[6] *Regina* v *Joy Oil Co. Ltd.*[7] and *Regina* v *Campbell*.[8] It is clear that the council could not as a body pass on each individual tax sale, supervise the location of fire prevention apparatus, or designate all of the conditions under which speeches could be delivered in a park.

Many of the delegation cases are directed at the same problem that permeates the question of uncertainty, namely the right of the individual who must comply with a by-law to know what conditions he must meet and what course of action will invoke retribution. The evil with which the Court is concerned is the uncontrolled, arbitrary power of an individual to grant or refuse the dispensation of a license or some other municipal prerogative.

The headnote to the case of *Vic's Restaurant Inc.* v *City of Montreal*[9] gives an excellent summary of the guiding principles:

> It is one thing and quite proper, for the municipal council, when authorized to pass licensing by-laws, to lay down particular rules by which the grant or refusal of a licence will be governed and to confide administration of these rules to a subordinate department. It is quite another thing, and improper, for a municipality to give a discretionary power to a subordinate department unfettered by any stipulated standard or rule by which it must be governed.

Under a by-law to regulate, control and license, it is quite clear there is no power to impose a condition similar to that considered in the *Vic Restaurant Case*,[10] or to refuse a license to a person not above moral reproach. This type of provision really has no relation to the regulation of a trade or business, no matter how desirable it may seem to be. On the other hand, if the Legislature has given authority to prescribe the qualifications of

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6 (1908) 15 O.L.R. 484.

7 [1963] 3 C.C.C. 260; The case of *Re Knox and City of Belleville* (1913-14) 5 O.W.N. 237; is also an example of a delegation of a ministerial power.

8 [1962] O.R. 1134.

9 [1959] 17 D.L.R. (2d) 81. The question with which the Court was concerned in the case was the refusal of written permission from the Chief of Police, required by the by-law, prior to the issuance of a restaurant license. The same principle is stated in such cases as: *Leach* v *City of Regina* (1965) 50 W.W.R. 129; *Rex ex rel. Taylor* v *Kemp* [1943] O.W.N. 54; *Attorney-General and Town of Truro* v *Chambers Electric Light and Power Co. Ltd.* (1913) 14 D.L.R. 883; *Re Martin and Fort Garry Rural Municipality* (1959) 19 D.L.R. (2d) 578: *Regina* v *Carland Ltd.* (1962) 38 W.W.R. 439; *In re MacKenzie and The City of Brantford* (1884) 4 O.R. 382.

10 *Rex* v *Sparks* (1913) 10 D.L.R. 616.

license applicants, it has been held that such a condition is authorized.[11]

It is now general practice to give an unlimited discretion to municipal councils to grant or refuse a license. Under these provisions, a carefully worded by-law could require a police report which, if unfavourable, could be the basis for refusing the license. If the report is sought by the licensing agency only as a source of information this will not be considered as a delegation to the reporting agency.[12]

The rules applicable to a discretion in granting a license are equally applicable to a refusal. The words of Cartwright J. in *Bridge* v *The Queen* [13] are worthy of note:

> 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.

The right to retain a license or permit, once obtained, is a right that has always been jealously guarded by the Courts. The situations under which it can be lost must be clearly defined in precise and unequivocal language. Clearly no arbitrary cancellation by an official or by council will be permitted.[14]

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11 *Elves* v *City of Edmonton* 9 Alb. L.R. 530. See also: *Re Validity of Charlottetown Taxi By-law* 122 C.C.C 51.

12 *Regina* v *Yule* (1962) 33 D.L.F. (2d) 179. In both this case and in the *Elves Case* an appeal could be taken to council on the unfavourable report. This was probably more significant than the wording of the Act to the Court in reaching the conclusion that there was no delegation. This fact clearly indicated that council was retaining control and the report was not final. In *Re Lem Yuk and City of Kingston* (1926) 31 O.W.N. 14 the Police Commissioners were required to approve the location of any business before a license could be issued although they had no authority to expressly refuse a license. It was held that this practice was not objectionable.

13 [1953] 1 S.C.R. 8 at 13. The Court found that sufficient detail had been set out in the by-law as to when permits could be issued. This being so, his function was purely administrative. Aylesworth J. A. in *Re Musty's Service Stations Ltd. & Ottawa* [1959] O.R. 342 at 349 stated the law very concisely: "Such things as the physical issuing of the permit may be delegated by municipal by-law if, but only if, the council clearly has prescribed the facts which establish eligibility for a permit."

14 The following cases are instructive on this point: *Re Foster and City of Hamilton* (1899) 31 O.R. 292; *In re By-law No. 92, Town of Winnipeg Beach* [1919] 3 W.W.R. 696.

Some reference must be made to *Rex ex rel. Fletcher* v *Joy Oil Co. Ltd.* [15] Under an early closing by-law permits to remain open could be issued by the chief constable acting with an advisory committee of council. Those eligible were selected on a rotation basis. Provision was also made for cancellation of permits for cause. Mr. Justice Laidlaw at p. 171 justified upholding the by-law in these words:

> The legislation did not intend that council should pass upon each permit, but rather should establish a system for the issuing of permits... The council of the municipality has not thereby divested itself of power to amend the by-law from time to time by way of making exceptions to it or otherwise. It has made regulations and imposed restrictions in respect of the issue of permits, and those regulations and restrictions are binding on the Committee and Constable... The council of the municipality retains control in the matter of the issuing of permits and may alter the present regulations and restrictions in such manner and to such extent as in its discretion it deems necessary or advisable.

The decision advances a novel approach to the whole question of delegation. As long as council retains the power of amendment over its by-laws, which it cannot legally abrogate, any delegation would be permissible under this rule. This is contrary to the rules developed in the delegation area. This decision may well be treated as overruled in fact, although not expressly, by *Bridge* v *The Queen.*[16]

There are three general areas in which delegation should be considered; (1) where the entire jurisdictional field has been vacated; (2) where a decision on a particular question is given to another agency or group; and (3) where a municipal official is given authority to determine the sufficiency of certain jurisdictional requirements.

Clearly council cannot delegate an entire legislative field to an individual or agency. An attempt to do so was considered in *Re Clements and Toronto.*[17] Council had given authority to the Commissioner of Parks to designate the sites to be used for parking purposes on lands under his jurisdiction. The principle enunciated in the decision of Wells J. is—there cannot be a complete withdrawal by council from a particular legislative field. It must perform such functions itself, not being free to delegate these powers to someone else.

It is not uncommon for a council, when faced with a problem that could have political repercussions, to endeavour to shift

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15 (1951) 98 C.C.C. 161.

16 [1953] 1 S.C.R. 8.

17 (1959) 19 D.L.R. (2d) 476, reversed on appeal (1960) 20 D.L.R. (2d) 497) on other grounds.

the decision making process to the shoulders of some other person or group. A good example appears in the case of *Re Kiely*.[18] The by-law in question prohibited the construction of a livery stable unless the consent of a majority of the persons residing within five hundred feet of the proposed stable was obtained. Chief Justice Wilson hesitantly concluded that the consent required by the by-law could not properly be demanded. The principle indicated in this judgment at p. 457 may be stated in this way:

> It may not be possible to require an applicant for a license to obtain the consents demanded as a condition precedent to his obtaining his license, for that is a matter in the discretion of the commissioners upon which they must be guided by their own judgement. It is somewhat of a delegation to the persons whose consent is to be exercised by the commissioners.

Mr. Justice Wells in *Re Davies and Village of Forest Hill*[19] was confronted with this same problem, only in a more modern setting. The by-law considered by him was one which under certain specified circumstances required the consent of adjoining property owners to the installation of a swimming pool. His Lordship said at p. 245:

> It is clear that a municipal council may delegate to others purely ministerial matters, but in the absence of clear statutory authority the exercise of a discretionary power vested in a municipal council cannot be delegated. The provision requiring the consent of nearby owners is an attempt to do what the law prohibits and is invalid.

Therefore council cannot delegate the actual decision making itself, but there is no objection to its obtaining advice or opinions from adjoining property owners or other persons. Chief Justice Wilson in *Re Kiely*[20] said:

> The commissioners could no doubt take an opinion from any one or from any body to enable them to decide whether the license should be granted or not, and exercise their judgment upon such information.

Similarly there is no objection to council sending an official to investigate a problem and report. This question was discussed by Meredith J. in *In Re Dundas Street Bridges*[21]:

> Council did form and express their opinion. There was no reason why council could not send a competent official to investigate and report. There was no need for them to go as a group, or individually. After obtaining it they then, upon the petition and report, their own knowledge, and all other information had, proceeded and expressed their opinion in accordance with their officer's report, except on one point where they differed from him.

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18 (1887) 13 O.R. 451. A similar situation was considered in *Regina* v *Webster (1889) 16 O.R. 187.* The principle laid down by Wilson C.J. was applied and the by-law struck down.

19 (1965) 1 O.R. 240.

20 (1887) 13 O.R. 451 at 457.

21 (1904) 8 O.L.R. 52 at 56.

Council should always make it abundantly clear that the report is only information that will be considered in the decision making process. One can only speculate on what conclusion might have been reached in the *Dundas Case* if council had not differed in that one respect from the engineers report.

Another tactic utilized by council is that of submitting questions to the electorate before making a decision whether or not to pass a particular by-law. It is assumed there is no statutory requirement to do so. If the purpose of submitting a question to the electorate is merely to obtain an expression of opinion then such course of action is not objectionable. If, however, the intention is to accept the result as binding then it would be the duty of the Court to intervene and restrain the submission of the question.[22]

With the advent of public participation in the zoning process, councils will be confronted with increasing demands for decisions to be referred to local affected groups for their opinions and recommendations. It seems, from the tenor of some of the proposals, that the proponents of community autonomy have not as yet had occasion to consider some of the legal problems inherent in their suggestions. It is clearly evident that with an urban renewal project council could not properly agree to be bound by a decision of the local residents affected. This would offend the principles enunciated in *Re Kiely*,[23] *Regina* v *Webster*[24] and *Re Davies and Village of Forest Hill*.[25]

To accept the principles inherent in the arguments in favour of public participation, is to recognize that a considerable revamping of present municipal ideas must be made. The first accepted municipal legal principle that must go is that disapproving of delegation by local councils.

Delegation may also be evident in areas where certain conditions must be met in order to confer jurisdiction on the council, for example, where a petition is necessary before any action can

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22 *Davies* v *City of Toronto* (1888) 15 O.R. 33. It is not proposed to enter into a discussion of the advisability and other ramifications of of the question of a referendum. Some of the considerations applicable to such an undertaking are evidenced in such cases as: *Helm* v *Town of Port Hope* 22 Gr. 273; *Vickers* v *Shuniah* 22 Gr. 410; *King* v *City of Toronto* (1903) 5 O.L.R. 163; *Burlington Public School Board* v *Town of Burlington* (1918) 44 O.L.R. 561; *Jenkins* v *City* of Winnipeg [1941] 1 W.W.R. 37; *Re Hill Rust Wine Co. Ltd. v City of Peterborough* [1940] O.W.N. 25; *Re Jones and City of Toronto* [1947] O.R. 20; *Re Lillis and City of Kingston* [1949] *O.W.N.* 30; *Re Thomas and City of Hamilton* (1938) 69 C.C.C. 299; *Re Wetmore and Town of Timmins* [1925] O.R. 13

23 (1887) 13 O.R. 451.

24 (1889) 16 O.R. 187.

25 (1965) 1 O.R. 240.

be taken. The usual statutory requirement would insist on a certain percentage of the members of the class, seeking the intervention of the municipal legislature, completing a petition to elicit that support. It is not uncommon for a procedural by-law to make provisions for dealing with petitions in this type of situation. In some instances they will provide that the Clerk will review the signatures and will then issue a certificate as to the sufficiency of them. Unless the statute specifically provides that his certificate will be final and conclusive, council cannot treat it as such. It can only be accepted as evidence of compliance with the statute. Council must still satisfy that it in fact meets the requirements of the statute. This problem could be handled in the same manner as the report in the *Dundas Case*. Any attempts to do otherwise will be held invalid as an illegal delegation.[27]

Another area where delegation appears is that in which a by-law leaves some matter or thing to be determined by some external agency, for example, a tax rate to be set by trustees of a school board,[28] or the determination of what are proper business hours.[29]

In *Re Cloutier*,[30] the City of Winnipeg passed an early closing by-law requiring among other things the closing of shops on certain specified days, including the days on which a named organization held an exhibition. It was held that the by-law was bad because it delegated to this association the power of determining the days on which shops should be closed.

Regina v *McMillan*, [31] an Ontario decision, a different approach was taken. The Court refused to follow *Re Cloutier*. Chief Justice Armour said at p. 173:

> There is no delegation of authority in providing that certain days upon which something may take place, and the fixing of which belongs to another body, shall be excepted from the operation of the by-law any more than it would have been a delegation of authority to have excepted any day appointed by the Governor-General .... for a public holiday.

It is possible to reconcile the two decisions on their facts. In *Regina* v *McMillan* the days on which closing was excepted were those on which a particular exhibition was to be held. In *Re Clou-*

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27 This situation was considered in: *Halladay* v *The City of Ottawa* (1907) 14 D.L.R. 458, and on appeal 15 O.L.R. 65; *Re Kamloops City By-law No. 990.* (1947) 2 D.L.F. 541; *Re Grei and City of Toronto* [1934] O.R. 514.

28 *R v Middleton and Township of Goderich* [1931] O.R. 392.

29 *Marilyn Investments Ltd.* v *Rural Municipality of Assiniboia.* (1965) 51 D.L.R. (2d) 711.

30 11 Man. L.R. 220.

31 (1898) 28 O.R. 172.

tier, the days in question were those on which an association would hold an exhibition. There was nothing to prevent the association in the *Cloutier Case* from holding any number of exhibitions anywhere in the Province, so that an impossible situation could develop.

If an individual deals with a committee of council, or other agency exercising delegated authority, he must ascertain if council has in fact power to delegate such authority to the committee. Council can ratify the decision of any such committee, [32] but if it does not do so, the individual has no recourse. The position of the individual was indicated in *Eastern Securities Co.* v *City of Sidney.*[33]:

> ... individuals dealing with them must at their peril ascertain that the statutory body which assumes to delegate important functions involving the exercise of discretion to committees or persons has in fact the power to delegate and that the particular person dealt with is acting pursuant to due authority so lawfully delegated.

Municipal councils in a modern society are showing increasing concern with the problems of pollution. Many industrial undertakings, if not rigidly controlled, will contribute greatly to existing problems of pollution. It is an accepted practice to attempt to prevent many of these problems through the imposition of conditions in the zoning by-law.

In urban municipalities where pollution is a significant problem, council frequently will have available to it a wealth of technical assistance.[34] From the point of view of council, a reasonable condition to impose in attempting to eliminate a potential pollution problem would be: "The developer shall install anti-pollution equipment satisfactory to the Commissioner of Works."

The Commissioner has himself, or available to him, all of the technical information necessary to determine what type of equipment will be effective to carry out the desired objective. Better results would be obtainable from pursuing this method than attempting to detail the requirements in the by-law. Clearly the suggested condition would offend against the rule of non-delegation.

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32 *Hitchcock* v *City of Galveston* 96 U.S. 341.

33 (1923) 4 D.L.R. 717 at 722.

34 In Ontario, pollution is primarily the concern of the Provincial Government. Reference may be had to *The Ontario Water Resources Commission Act* R.S.O. 1960. c. 281, and amendments thereto, and to *The Air Pollution Control Act 1967.* R.S.O. 1967 c. 2 and amendments thereto.

In a modern technological society there is considerable merit to the position taken by the Courts of the United States on the question of delegation. Brown J. speaking for the Supreme Court of the United States in *Fisher* v *St. Louis*[35] said:

> ... we see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases ... Authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority.

This rule seems better suited to the problem indicated above. The difficulty with this approach is that the municipal official may tend to be unduly restrictive, in that he may require equipment of a higher degree of efficiency than is absolutely imperative under the circumstances. This is a normal reaction, especially where his decision may become a question of public controversy. One answer may be to provide, in questions of doubt, an appeal to a panel of experts.

Approaching the rule against delegation from this direction indicates clearly its shortcomings when applied to particular modern problems. The traditional rule against delegation is found wanting when applied to special zoning conditions. Changes in this respect can only be achieved through legislative intervention.

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[35] 194 U.S. 361. See also: *Quincy* v *Kennard* 24 N.E. Rep. 860; *Schefe* v *St. Louis* 194 U.S. 373.

CHAPTER 13

Bad Faith

> The powers of the council must be exercised *bona fide* and the action of its members must not be founded upon fraud, oppression or improper motives.[1]

This principle is fundamental to the validity of any municipal enactment. If council, in passing a by-law, acts in bad faith, then such by-law must be invalidated.

The difficulty in determining what will constitute bad faith is evident from the remarks of Britton J. in *Re Hamilton Powder Co. and Township of Gloucester*:[2]

> Bad faith does not mean some particular advantage to one or more members of the council. It is not necessary to establish enmity or ill-will on the part of one or more members against a person interested in a by-law or contract. It may be bad faith without corrupt motives, and it may not be bad faith, although local feelings and prejudices influence members of a council in their action.

A by-law enacted in bad faith is a nullity,[3] and can be attacked at any time in a proper action. It is in the same position as one passed without any pretext to statutory authority. The mere effluxion of time will not validate such a provision.

What does or does not constitute bad faith is a question of fact to be determined on the evidence adduced.[4] The good faith of the council will, as a matter of law be presumed until the contrary is proved.[5]

Generally speaking the onus of proving bad faith is on the person who alleges it,[6] namely, the person applying to quash the

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1 *Re Howard and City of Toronto* (1927) 61 O.L.R. 563 (Masten J. A.) at 574 quoting *Davis v Bromley Corp.* [1908] 1 K.B.170.

2 13 O.W.R. 661 at 664. The only real certainty obtained from the decision is that if council deliberately sets about terminating a proper and valid contract, it will be considered as having acted in bad faith. In some situations, a failure to obtain legal advice may be a sufficient justification for imputing *mala fides* to the council. See: *McDonald* v *Lancaster Separate School Trustees* (1926) 31 O.L.R. 360.

3 *Kuchma* v *The Rural Municipality of Tache* [1945] S.C.R. 234; *Hewit* v *Rural Municipality of Charleswood* 66 Man. R. 1.

4 *Beemer* v *Village of Grimsby* 13 O.A.R. 225. *In Rex* v *DeClute* [1951] 4 D.L.R. 854, it was held that if an appeal was limited to a question of law, no argument could be heard on bad faith.

5 *La Ville Saint-Laurent* v *Marien* [1962] S.C.R. 580; *Re Crabbe and Swan River* (1927) 23 Man. R. 14.

6 *Re Howard and City of Toronto* (1927) 61 O.L.R. 563; *Kuchma* v *The Rural Municipality of Tache* [1945] S.C.R. 234; *Short* v *Poole Corporation* [1926] 1 Ch. 66; *Keily v City of Edmonton* [1931] 1 W. W.R. 365; *The Metropolitan Stores Limited* v *Hamilton* [1945] O.R. 590; *Re Hagen and City of Sault St. Marie* (1921) 60 D.L.R. (2d) 584.

by-law or the party raising the objection in any action. Clear and unequivocal proof will be required before the Court will intervene.[7]

Mr. Justice Spence considered the question of onus in *City of Ottawa et al* v *Boyd Builders Ltd.*[8] His Lordship stated at p. 412 that on an application for a *mandamus* to compel the issuance of a building permit, the plaintiff:

> ... could insist upon the hearing of the application for *mandamus* that the municipality manifest that it had a clear zoning plan upon which it was proceeding in good faith and with dispatch. In so far as the previous sentence puts the onus upon the municipality, I agree with counsel for the respondent that such is the effect of *Sun Oil* v *Whitby*, and the judgment of LeBell J. in *Bolton* v *Munro et al.* The judgment of this Court in *Kuchma* v *Rural Municipality of Tache*, and that of the Appellate Division in *Re Howard and City of Toronto*, fiing the onus upon the applicant should be confined to the situation where the applicant seeks to quash a by-law. There the applicant is in a position of a plaintiff and has the onus, and particularly has the onus of proving bad faith. On the other hand, where the applicant seeks a *mandamus* to which he has a *prima facie* right and the municipality seeking to defeat that *prima facie* right alleges, *inter alia*, its good faith the onus should be on it to establish such good faith.

On an application for *mandamus*, the applicant needs only to establish its *prima facie* right to the relief requested. The onus is then on the municipality to prove that the permit was refused by the council acting in good faith. In any other action, the onus is clearly on the plaintiff to establish the bad faith alleged.

It is assumed that the reference by Spence J. confining the onus of proving bad faith to a person making application to quash a by-law is not restricted to the technical meaning of the phrase "application to quash". To so restrict these words would be tantamount to suggest that in any other action attacking a by-law, council must negative an allegation of bad faith. Assuming the necessity of proving bad faith, what factors must be considered? In *Rowland* v *Town of Collingwood*,[9] Britton J. laid down three rules or criteria which the Courts may use to determine this question:

> To determine this question of *bona fides*, I must look: (1) at the object the Legislature had in view in the legislation; (2) the powers and duty of the council under it; and (3) the circumstances under which, and how and why, the council passed the by-law.

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7 *Gilmore* v *Township of Westminister* (1929) 64 O.L.R. 344; *Re Burns and Township of Haldimand* (1966) 52 D.L.F. (2d) 101.

8 [1965] S.C.R. 408. For a statement of facts in this case and a more detailed discussion of the judgement see infra pp. 190-194

9 (1908) 16 O.L.R. 272 at 273.

Initially it must be determined what the legislature intended council to achieve under the particular legislation. The second step is to determine what the council itself was endeavouring to achieve through passing a by-law under this legislation. If the objective of the council corresponds to the intention of the Legislature, and the by-law is in other respects valid, its validity is not open to question. If, however, it is apparent that council has some ulterior objective, then it may well be held that bad faith has been established.

A municipality, being a creature of statute, cannot do indirectly what it cannot do directly.[10] *Scott* v *Corporation of Tilsonburg*[11] affords an example of this principle. The council wishing to obtain a railway line, but being somewhat skeptical of the possibility of a by-law to raise the necessary money being approved by the electors (such approval being necessary to raise money for this purpose), devised what seemed to be an acceptable plan. In consideration of a local industrialist procuring the railroad at his expense, a tax exemption was granted to him. The council would thus have attained by indirect methods an object they were unable to attain directly.

Unfortunately for council, the Court of Appeal was not impressed. Chief Justice Hagerty, summarized the applicable principles in these words at pp. 237 and 240:

> I think we must always, in examining a by-law, see that it is passed for the purpose allowed by the statute, and that such purpose is not resorted to as a pretext to cover an evasion of a clear statuable duty—that it is, in short, a by-law for exemption, and not a mere pretext to cover the wrong committed by the council in applying the assets or monies of the corporation in a manner forbidden without the consent of the ratepayers . . . Releasing an individual from payment of his taxes on condition of his paying the required amount for the desired object . . . is a clear violation of duty.

The principle enunciated in this decision is necessary both for the protection of the ratepayers in general and for the individual in particular. Examples abound throughout the reports where councils have endeavoured through the use of their regulatory powers to prohibit what was considered an offensive trade or business.[12] Even where express power is given to prohibit, the Courts

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10 *The Shawinigan Hydro-Electric Co.* v *The Shawinigan Water and Power Company* [1912] 45 S.C.R. 585 (Indington J.); *Re Kamloops City By-law No. 990* [1947] 2 D.L.R. 541; *In re Caddell* [1947] 2 W. W.R. 40; *Spiers* v *Township of Toronto* [1956] O.W.N. 427; *Re Foster and Township of Raleigh* (1910) 22 O.L.R. 26.

11 13 O.A.R. 233

12 *Re Kowal and Township of Nelson* [1953] O.W.N. 463; *Rowland* v *Town of Collingwood* (1908) 16 O.L.R. 272; *In re Barclay and Township of Darlington* 12 U.C.Q.B. 86; *In re Graystock and Municipality of Otonabee* 12 U.C.Q.B. 458; *Re Lane and City of Oshawa* [1940] O.W.N. 349; The question was placed before the Court, but not found to be established in *Re Brigden and Village of Port Elgin* [1934] O. W.N. 632.

have always scrutinized very closely a by-law enacted thereunder. Even the slightest departure from the enabling legislation would be fatal to the by-law. Given this background, it is naive to suggest that a Court would grant credence to an attempt to interfere with a lawful calling by some surreptitious and devious means.

If the evidence establishes that a by-law, *prima facie,* within the authority of council, is directed at some object not authorized, bad faith will be presumed.[13]

A plaintiff attempting to establish bad faith though, will not be permitted to embark on a inquisition into the motives of each individual member of council.

> It has been frequently stated that the Courts will not inquire into the motives that may have actuated council members in passing a by-law in the absence of a special interest disqualifying a particular member from voting except where such motive has been evidenced by some overt act of bad faith.[14]

If the person attacking the by-law can show a personal interest on the part of a member of council, within the rule stated by Meredith J. at p. 236 *In re L'Abbé and Corporation of Blind River*[15], then he will be successful:

> A member of a municipal council is disqualified from voting in proceedings involving his personal or pecuniary interests; and an ordiance or resolution, passed by the concurrence of one or more members so disqualified, is void.

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13 *In re Campbell and Village of Lanark* 20 O.A.R. 372; *G. S. Skipp & Son Limited* v *Township of Toronto* [1952] O.W.N. 793; *Re Walmer Investments Ltd. and City of North Bay* [1970] 1 O.R. 109; *The Bell Telephone Co.* v *Town of Owen Sound* (1904) 8 O.L.R. 74; *In re Morton and City of St. Thomas* 6 O.A.R. 323; *Crichton* v *Township of Chapleau* (1915) 8 O.W.N. 67; *London and Northwestern Ry. Co.* v *City of Westminister* [1904] 1 Ch. 759; *Westminister Corporation* v *London and Northwestern Ry. Co.* (1905) A.C. 426; *Re Cities Service Oil Co. Ltd. and Kingston* (1956) 5 D.L.R. (2d) 126; The comments of Hogg J. A. in *Brampton Enterprises* v *Milk Board* [1956] O.R. 1, are also relevant on this point. *Hatton* v *City of Peterborough* (1919) 16 O.W.N. 191. *Vasilatos* v *City of Victoria* (1910) 15 B.C.R. 153.

14 Schroder J. A. (dissenting) in *Re Burns and Township of Haldimand* (1966) 52 D.L.R. (2d) 101 at 103. See also: *Re Foster and Township of Raleigh* (1910) 22 O.L.R. 26, and *United Buildings Corporation* v *City of Vanvouver* [1915] A.C. 345.

15 (1904) 7 O.L.R. 230; Some other decisions which are informative on this question are: *George* v *Ontario Amiesite Co. Ltd.* (1926) 31 O.W. N. 4; *In re Vashon and Township of East Hawkesbury* 30 U.C.C.P. 194; *Re Baird and Village of Almonte* 41 U.C.Q.B. 415; *Elliott* v *City of St. Catharines* 18 O.L.R. 57; *Buffington Wheel Co.* v *Burnham* 60 Iowa 493; *Re Bluestein and Borough of North York* (1967) 61 D.L.R. (2d) 659; *Starr* v *City of Calgary* (1966) 52 D.L.R. (2d) 726; *Tonks v Reid* [1967] S.C.R. 81; *Regina ex rel Wright v Martin* (1966) 55 D.L.R. (2d) 399; *In Kennedy* v *Thussalon* [1960] O.W.N. 478, the Court refused to quash the resolution, even though the Reeve

If the interest of the member of council whose motives are questioned is no different from that of any other ratepayer in the municipality, or in the area affected by the by-law, then such interest is not one that will disqualify him.[16] His interest must be "immediate, particular and distinct from the public interest".[17] Apart from this rather obvious situation the motives of the individual members are not open to inquiry.

It would seem that bad faith, like any other objectionable feature, may be applicable to only a portion of a by-law, so that a severance of the tainted part will be permitted.[18] If the council's prime motivation is one of bad faith, then surely the entire enactment should fall, and not merely that portion which affects the person against whom it was directed. It is difficult to conceive how one dissects bad faith.

If *mala fides* is not established on the part of council, assuming that the by-law is otherwise valid, then it is necessarily above reproach:

> ... in the absence of *mala fides* on the part of the majority of the members of the council, the Court had no right to interfere.[19]

After discounting *male fides,* the question of whether the by-law is a proper one is a political question which can only be determined by the elected representatives, and their judgment is conclusive, at least until the next election.

The particular applicability of bad faith to a zoning by-law will be considered in detail in the discussion of *The City of Ottawa et al* v *Boyd Builders Ltd.*[20]

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obviously came within the rule. This was justified on the basis that the amount was small, and the Reeve was acting in good faith, and only one member voted against the resolution. To say the basis for the decision is questionable, is an understatement. The case of *Re Robertson and Township of Colborne* (1912) 4 O.W.N. 274 also represents an unwarranted departure from the rule.

16 *Elliott* v *City of St. Catharines* (1909) 18 O.L.R. 57. See also: *Re McLean and Township of Ops* 45 U.C.Q.B. 325; *Buffington Wheel Co.* v *Burnham* 60 Iowa 493; *Steckart* v *City of East Saginaw* 22 Mich. 104; *Re Bluestein and Borough of North York* (1967) 61 D.L.R. (2d) 659.

17 *Elliott* v *City of St. Catharines* (1909) 18 O.I.R. 57.

18 *Re Hazen and City of Sault St. Marie* (1967) 60 D.L.R. (2d) 584.

19 *George* v *Ontario Amiesite Co. Ltd.* (1926) 31 O.W.N. 4 (Grant J.) at p. 7. See also to the same effect: *Larry* v *Village of Port Stanley* [1968] 1 O.R. 36; *Re Burns and Township of Haldimand* (1966) 52 D.L.R. (2d) 101; *Short* v *Poole Corporation* [1920] 1 Ch. 66; *Re Foster and Township of Raleigh* (1910) 22 O.L.R. 26; *Re Hammond* [1950] 4 D.L.R. 26; *Keily v City of Edmonton* [1931] 1 W.W.R. 365; *Re Robertson and Township of Calborne* (1912) 4 O.W.N. 274. The remarks of Meredith C.J.O. in *Jones* v *Tuckersmith* (1915) 33 O.L.R. 634 are also applicable.

20 [1965] S.C.R. 408; Infra pp. 191-195.

CHAPTER 14

The Impact of *Ottawa et al* v *Boyd Builders Ltd.* and *Wiswell et al* v *Metropolitan Corporation of Greater Winnipeg* on Zoning.

The Supreme Court of Canada in 1965 made two significant decisions in the zoning law field. These cases, *Ottawa et al* v *Boyd Builders Ltd.*[1] and *Wiswell et al* v *Metropolitan Corporation of Greater Winnipeg*,[2] emanated from zoning situations in the cities of Ottawa and Winnipeg respectively. Both related to zoning amendment by-laws and not to the creation of general zoning schemes.

Both decisions are concerned with procedural questions relating to zoning and also with bad faith on the part of council. In view of the probable significance of the judgments in these cases it seems desirable to treat them separately rather than attempt to integrate them into a general discussion dealing with specific grounds of attacking by-laws.

Although the decisions are important in the discussions of zoning by-laws in any Province, it is proposed, for purposes of illustration, to restrict the discussions to an examination of zoning by-laws under the Ontario procedure.

To one not versed in the intricacies of the Ontario procedure of creating zoning by-laws, the first exposure is something of a revelation.

The power to enact zoning by-laws is one conferred on municipalities in Ontario under the provisions of s. 30 (1) (2) of *The Planning Act*.[3] By-laws passed pursuant to these provisions are not legally binding and enforceable until approved by the Ontario Municipal Board.[4]

There is no requirement in *The Planning Act* for the giving of notice to interested persons, of a council's intention to consider the passing of a zoning by-law, or for an amendment thereto. If the proposed zoning amendment necessitates a change in the official plan, the Planning Board must hold a meeting. Again there is no notice requirement.[5] In a province which, by statute, pro-

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1 (1965) S.C.R. 408.

2 (1965) S.C.R. 512.

3 R.S.O. 1960 c.296.

4 See s. 30 (9) of *The Planning Act* R.S.O. 1960 c. 296.

5 Under s. 10 (1) (b) of *The Planning Act* R.S.O. 1960 c.296, the planning board is required to hold public meetings and publish information for the purpose of obtaining the participation of the inhabitants in the planning area. This relates to considerations regarding the proposed official plan.

vides a summary method of quashing by-laws and permits ratepayers to take action to enforce them, there seems to be a contradiction in not providing some notice to those same ratepayers directly affected by a zoning by-law.

A zoning by-law may, without notice to anyone, be given all three readings at one meeting. If in the opinion of council the situation so warrants. The by-law then goes before the Ontario Municipal Board for approval where notice that the municipality intends to apply for approval must be given under rules of procedure promulgated by the Ontario Municipal Board.[6] Once there, it will be approved, rejected or altered within several months or years, depending *inter alia* on the nature of the change in zoning under consideration.

The effect of this procedure is to require opponents of the change to make their representations before a non-elected administrative Board. The Board is not amenable to public pressure as would be the elected council. Thus the opponents of a by-law have been deprived of one of their primary weapons, that of public pressure.

It is against this background that *Boyd Builders Case* must be considered. It is first proposed to consider the law as it stood prior to these decisions.

The problem which came before the Court in the *Boyd Case* is the type that usually arises where an owner of property applies to the building inspector for a permit to construct a building for a particular use, for example, a high rise apartment building. As a result of the application in this case, a public outcry developed and council intervened on the side of the residents and enacted a restrictive by-law preventing the use. The permit refused, the only alternative left to the developer was to commence an application for a *mandamus,* to compel the issuance of the permit.

Mandamus is a form of relief encrusted with technicalities. Before commencing an application, the applicant must be certain that all preliminary requirements for *mandamus* have been met. It will be imperative on him to establish his right to the remedy requested.[7] In *Karavos* v *The City of Toronto,*[8] four prerequisites to the issuance of a writ of *mandamus* were laid down:

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6 See: The Ontario Municipal Board's rules of procedure. Rule 1. Notice must be given to property owners within 400 feet of the affected property. Objections may be sent to Council and must be considered by it. It is customary to hold a meeting to consider any objections. The consideration given the by-law at this meeting is popularly known as fourth reading.

7 *The Queen* v *The Guardians of the Lewisham Union* (1897) 1 Q.B. 498.

8 (1948) O.W.N. 17.

> (1) A clear legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced;
> (2) The duty whose performance it is sought to coerce by *mandamus* must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform;[9]
> (3) The duty must be purely ministerial in nature, plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers.
> (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy.[10]

A *mandamus* can be issued to direct the carrying out of a duty even if that duty when exercised will involve a discretion. The Court, however, will not direct the manner in which that discretion shall be exercised, i.e. the manner in which the decision must be made.[11]

The issuance of the writ of *mandamus* is discretionary with the Court. It is a judicial discretion and must be:

> ... exercised *bona fide*, not influenced by extraneous or irrelevant consideration, and not arbitrary or illegally. If the discretion is exercised it must be as a result of something connected with the right itself, and not something extraneous thereto.[12]

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9 If the plans required by the by-law are not fully complete, the building inspector can refuse the permit. See, such cases as *Re Old Park Investments Limited and Toronto* (1955) O.W.N. 630; *Dunn* v *The Board of Education of the Town of Windsor* (1885) 6 O.R. 125; *Ellerby* v *Winnipeg* (1929) 38 Man. R. 621; *Frankel* v *City of Winnipeg* (1913) 23 Man. R. 296; *Regina* v *Toronto Ex parte 94 Crescent Road Ltd.* (1961) O.W.N. 129; On the general question of meeting the conditions necessary for *mandamus* see: *Re Hamilton Dairies Ltd. and Dundas* (1927) 33 O.W.N. 113; *Re Williams and Brampton* 17 O.L.R. 398; *Rex ex rel Lee* v *Town of Estevan* (1951) 3 W.W.R. (N.S.) 513; *Re Provincial Board of Health and City of Toronto* 46 O.L.R. 587; *Re Peck and County of Peterborough* 34 U.C.Q.B. 129; *The Queen* v *The Guardians of the Lewisbam Union* (1897) 1 Q.B. 498; *Re Ucci and Toronto* (1955) O.W.N. 647; *Re West Nissouri Continuation School* 38 O.L.R. 207.

10 The refusal does not need to be in express words, provided it is clear the municipal officer has no intention to carry out his duty. This is apparent from the following decisions: *In re Township Clerk of Euphrasia* 12 U.C.Q.B. 622; *The King ex rel Mathie* v *Hewitt* (1941) 3 D.L.R. 802; *Re West Nissouri Continuation School* 25 O.L.R. 550.

11 *Smith v Chorley Rural Council (1897)* 1Q.B. 678; *Elves v City of Edmonton* 9 Alta. L.R. 530; *Re Dundass and Municipality of Chilliwack* 1 W.L.R. 94.

12 *O'Connor* v *Jackson et al* (1943) O.W.N. 587; See also: *Re Cosentino and The City of Toronto* (1934) O.W.N. 715.

The Court in some instances has ordered the permit to be issued subject to the technical requirements of the by-law being met.[13] This seems contrary to rules under which the discretion to issue the writ should be exercised. Surely it would be impossible for the applicant to show that he was legally entitled to the permit unless all of the by-law requirements had been met. The fact that there would be no point in complying exactly with the provisions of the by-law should not be accepted as a legitimate excuse for not so doing.

Mandamus clearly is not a remedy that readily will be granted. It must be apparent that the applicant has no other means of asserting his rights.[14] It is equally clear that if compliance is not shown with the prerequisites laid down in the *Karavos Case* the application will be denied. The result of such refusal in the situation indicated would be a sufficient delay to enable the municipality to have the by-law approved by the Municipal Board.[15]

A serious problem usually arises in these situations where the municipality requests that the application be adjourned *ine die* pending consideration by the Municipal Board. The Court is then faced with an attempt to balance the public rights against the private rights of the property owner.

McRuer C.J.H.C. in *Re Bridgman and Toronto*,[16] sets out the private rights involved.

> Every one has a right to use his property in any way that he sees fit, so long as he does nothing that will be a legal nuisance to his neighbours. That is a common law right. It is a question of liberty that is to be jealously guarded by the Courts, and while one's rights may be affected by proper legislative action, until that is done, one's personal common law rights are to be strictly guarded.

Prior to the decision in the *Boyd Builders Case*, if an effective by-law was passed at any time prior to the adjudication by the Court, the applicant's rights would be lost.[17]

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13 *Williams* v *St. Andrews* (R.M.) 61 W.W.R. 552; *Ziff* v *Township of Bertie* (1953) O.W.N. 236; *Re Dawnburt & London* (1961) O.W.N. 239; *Re Cooksville Company Limited and York* (1953) O.W.N. 849; The issuance of the writ was stayed until the specifications were amended to meet the by-law. *Regina v Gibson. Ex parte Cromiller* (1959) O.W.N. 254. See also; *Parsons v St. John's Municipal Council* 10 Nfld. R. 195.

14 *See Regina v City of East Kildonon, Ex parte Towns et al. Kildonan* 50 D.L.R. (2d) 381.

15 If the by-law has already been approved by the Board, *mandamus* cannot be granted.

16 (1951) O.R. 489.

17 *Upper Canada Estates Ltd. and MacNicol* (1931) O.R. 465; *Toronto* v *Trustees of the Roman Catholic Separate Schools of Toronto (1926)* A.C. 81; *Bolton* v *Munroe and Township of Sandwich East* (1953) O. W.N. 53; *Re Skyway Drive-In Theatre Limited and London* (1947) O. W.N. 489.

If the situation was one primarily involving a conflict between separate groups of property owners, assistance granted to one group as opposed to the other through the use by council of its legislative powers would result in bad faith being imputed to council. Bad faith also could be imputed if council proceeded on its own initiative only as a result of the particular application. If bad faith were present, the Court would not grant an adjournment to permit time for the by-law to be considered by the Board.[18]

As indicated in the Chapter on bad faith,[19] no inquisition is permitted into the motives of the individual members of council. As stated by Spence J. in *Re Granada Investments Limited and Toronto*,[20]

> Many individuals took sides, on the matters but it is not the conduct of individuals with which the court is concerned, but the conduct of council. It is always possible to allege that any legislative body was moved too much by the noisy protest from particular persons appearing before them, but a Court should not be called upon to determine the wisdom of the Council's action.

In some cases, council would pass a resolution refusing the permit; the object being to permit time to prepare and pass a by-law. At this time no decision of any description had been reached, and no action would have been forthcoming if an application had not been made for a permit. If council pursued this course, the Court would refuse any requested adjournment on the basis that there was nothing for the Municipal Board to consider.[21] The one exception was where no by-law had been passed, but council was proceeding diligently and in good faith with the preparation of a general zoning by-law. If the result of these labours was nearing

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18 *Re Markham Developments Limited and Scarborough* [1954] O.W.N. 81; *Re Cooksville Company Limited and York* [1953] O.W.N. 849; *Re Skyway Drive-In Theatres Limited and London* [1947] O.W.N. 489; *Re Greene and Ottawa* [1951] O.W.N. 674; *Re Beaver Lumber Company and London* [1951] O.W.N. 23; *Re Bridgman and Toronto* [1951] O.R. 489; *Re Kensington Industries Inc. and Toronto* [1955] O. W.N. 652; *Sun Oil Company Ltd.* v *The Town of Whitby* [1957] O. W.N. 362.

19 Supra pp. 173-180

20 [1955] O.W.N. 517.

21 *Bolton* v *Munroe and Township of Sandwich East* [1953] O.W.N. 53; *Re Dawnburt & London* [1961] O.W.N. 239; *Ziff* v *Township of Bertie* [1953] O.W.N. 236; *Re Bala Investments Co. Ltd. and Hamilton* [1969] 2 O.R. 490; *The Murray Co. Ltd.* v *District of Burnaby* [1946] 2D.L.R. 541. It is also true that if the council is endeavouring to achieve some other object, no adjournment will be granted to permit them to obtain approval; *Roseburgh* v *The Township of North Grimsby* [1952] O.W.N. 745.

fruition the Court would grant the required time to obtain the Board's approval.[22]

In *Hammond* v *Hamilton*,[23] Roach J. A. discussing the question of adjournment where no by-law had been enacted, said none should be granted:

> ... unless the council of the municipality prior to the motion for *mandamus* coming on for hearing before the judge, has clearly made a decision to restrict the land against the type of building described in the application for the permit ...

Under this decision, if the by-law was passed even after the *mandamus* application was commenced, it could be argued that the council had made a decision prior to the hearing and hence the application for *mandamus* must be dismissed. These remarks should not be removed from their factual context. The court was dealing with a situation where no by-law at all was in existence, and the requested adjournment was merely to enable one to be passed and ultimately approved by the Municipal Board.

No matter what the situation or the reasons for its request, the Court should be most reluctant to grant any adjournment.[24] As said by Orde J. A. in *Re Upper Canada Estates Ltd. and MacNicol*:[25]

> The race would seem to be to the swift in these matters, and the goal is not reached merely when the application for the permit is made, or even when the proceedings for a *mandamus* are launched but only when the matter comes to be dealt with by the Court.

By granting the adjournment, the Court is entering the race on the side of the municipality. It should only be the rare and exceptional situation where the Court should intervene to terminate that race.

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22 *Re Ucci and Toronto* [1955] O.W.N. 647; *Spiers* v *The Township of Toronto* [1956] O.W.N. 427; *Re Kerr and Township of Brock* [1968] 2 O.R. 509; *Re Robertson and the City of Toronto* [1934] O.W.N. 429; *Re Marckty and Town of Fort Erie* [1951] O.W.N. 836; *Re Loblaw Groceterias Co. Ltd. and Brockville* [1955] O.W.N. 258; *Bondi* v *Township of Scarborough and Butler* 19 D.L.R. (2d) 90; *Thompson* v *The Township of London* [1956] O.W.N. 886; *Wright and Griffey* v *Town of Burlington* 17 D.L.R. (2d) 537; *Re Aiken and City of Toronto* [1943] O.W.N. 518; *Re Granada Investments Limited and Toronto* [1955] O.W.N. 517.

23 [1954] O.R. 209.

24 *Re Metro Oil Ltd. and Toronto* [1935] O.R. 137; *Hammond* v *Hamilton* [1954] O.R. 209.

25 [1931] O.R. 456; An appeal from this decision was dismissed without reasons [1933] 2 D.L.R. 528. See also the remarks of Kingstone J. in *Re S. E. Lyons and Toronto* [1933] O.W.N. 330

When the *Boyd Builders Case* came before the Supreme Court of Canada in 1965, some aspects of the law in this area were still unsettled. A short resumé of the factual situation in the *Boyd Builders Case* should first be indicated. Boyd, being interested in developing certain land as an apartment site, first obtained assurances that there were no by-law restrictions which would prevent this type of development. The land was acquired and the plans prepared. On September 9, 1963 an application was filed for a permit.

After the filing of the application, a call to arms was issued by the residents of the area. On September 18 the Planning Board met to hear the protests of those residents, and at the conclusion of the hearing recommended to council that a restrictive by-law be passed. On the following day the council met, considered the recommendation, and gave all three readings to a restrictive by-law. Boyd had no knowledge of either of these meetings. The application for *mandamus* was dated September 30, 1963 and was issued after the Board of Control had directed the building inspector not to issue a permit. Schatz J., on the return date of the application, granted an adjournment to permit the matter to go before the Municipal Board. The Court of Appeal allowed the appeal primarily because of bad faith on the part of council.

> 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 re-zoning 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, and (c) that council has proceeded with dispatch.[26]

Mr. Justice Spence, speaking for the Court, first set out the common law and the manner in which those rights could be lost. The law as stated in this portion of the decision will effectively prevent a council from summarily intervening in a dispute between property owners. The applicant, on the other hand, must be astute enough to keep his ultimate plans concealed until he is ready to make his building permit application.[27]

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[26] It is no doubt small consolation to the Roman Catholic Separate School Board to know that if Middleton J. had applied the law on application for *mandamus* brought by the Board nearly forty-five years ago as it should have been applied, it would never have been necessary for the Board to enter the hallowed halls of the Privy Council, and there lose a school. Although the Separate School was not mentioned by Spence J. the effect of his judgment will be to prevent the recurrence of that situation.

[27] A council proceeding in good faith and with dispatch with a general plan for the area involved will still be protected. *Re Loblaw Groceterias Co. Ltd. and Brockville* [1955] O.W.N. 258 is a good example; *Re Bala Investments Co. Ltd. and Hamilton* [1969] 2 O.R. 490 indicates that the remarks of Spence J., in this respect will be applied with the same clarity in which they were given.

The other aspect of the case which must be considered is that of good faith generally, that is, apart from the onus of proving it. On the general question of bad faith, a portion of the judgment of Roach J. A. in the Court of Appeal was adopted.

> It passed that by-law for the express purpose of defeating appellant's *prima facie* right to the permit. It yielded to the protests of some of the other owners in the immediate neighbourhood for whom the Planning Board was 'Sympathetic'. It passed that by-law without any opportunity having been given to the appellant, which was so vitally interested, to make any representations concerning it. Everything that was done to defeat the appellant's *prima facie* right was done behind its back for the obvious purpose of avoiding embarrassment that the appellant's protestation on its own behalf might cause. It is difficult to think of any stronger evidence of bad faith.

As Spence J. said in supplementing these remarks:

> The relevant cases may be summerized by stating the most important indicia of good faith in these matters are frankness and impariality.

The clear and unequivocal implication to be drawn from these remarks is that if a council passes a zoning by-law affecting a small area of land without giving the owner an opportunity to be heard, bad faith will be imputed to the council. Similarly, if the only purpose of the by-law is to defeat an existing right, the same motives will be imputed. This decision will undoubtedly contribute to a greater respect for individual rights on the part of municipal councils.

The only question not adequately dealt with in this case concerns the effect of an approval by the Municipal Board of the by-law before a decision in the *mandamus* application. This was of no significance in the case as the Municipal Board had indicated that no further consideration would be given to the by-law pending the decision of the Court. *Boyd Builders* was also prepared to take its chances with any possible problem in this respect. *Mapa* v *Township of North York,*[28] may be of some assistance when the problem arises for final determination. The ultimate question will be: is the decision of the Court granting a *mandamus* in this type of situation tantamount to an approval within the terms of s. 30 (7) of *The Planning Act,*[29] so as to confer on the owner the protection afforded to a non-conforming use?

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28 [1967] S.C.R. 172. The applicant for a building permit had received approval for his foundation plans. A restrictive by-law passed which would restrict his development. It was held that the approval of the zoning and not the plans was what was intended by s. 30 (7) of The Planning Act.

29 R.S.O. 1960 c.296.

The other part of the important Supreme Court duo of 1965 is the case of *Wiswell et al* v *Metropolitan Corporation of Greater Winnipeg*.[30] A review of the facts there shows that in 1956 Dr. Ginsburg obtained two orders permitting construction of a sixty-four unit apartment building. The granting of these orders had been opposed by a ratepayers association in the area, of which Wiswell was a member. These orders were effective for a period of one year and were subsequently renewed *ex parte* each year until 1961 when all zoning matters were assumed by Metropolitan Winnipeg. In December of 1961 Dr. Ginsburg applied for a further extension and a hearing on such application was held in early January. This application was also opposed by the ratepayers association; however the extension was granted. Unknown to the ratepayers, the Doctor had applied for a re-zoning of the property in late December of 1961.

Under its procedural by-law the City, prior to the hearing of objections on any zoning by-law, must give notice. This was to be done by advertising in two issues of a newspaper having general circulation in the area and by posting notices on the property concerned. The advertisement appeared in the newspaper but no notice was posted on the property.

The ratepayers group was unaware of the hearing, not having seen the notices. As a result, no one appeared to oppose the re-zoning by-law, which was ultimately passed. It is also significant that the Corporation gave express notice to the solicitors for the Doctor and suggested they attend the hearing. No similar courtesy was extended to the solicitor for the ratepayers group. The trial judge declared the by-law bad for lack of notice. The Manitoba Court of Appeal reversed this decision primarily on the ground that the by-law was voidable and hence validated by the curative provisions of the statute. From the majority decision of that Court an appeal was taken to the Supreme Court of Canada.

The crux of the decision is contained in the passage adopted by Hall and Marland J. J. from the judgment of Freedman J. A. in the Court of Appeal.

> In proceeding to enact the by-law, Metro was essentially dealing with a dispute between Ginsburg who wanted the zoning requirements to be altered for his benefit, and those other residents who wanted the zoning restrictions to continue as they were. The Metro resolved the dispute by the device of an amending by-law did indeed give to its proceedings an appearance of a legislative character. But in truth the process in which it was engaged was quasi-judicial in nature.[31]

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30 [1965] S.C.R. 512.

31 *Ibid.*, at p. 520

A great body of rules has been developed to assure that any judicial inquiry all parties involved will receive a fair and impartial hearing. These rules incompass not only the procedure involved but also the conduct required from those who preside. As has often been said, it is not only important that justice be done, it must also appear to be done.

> If there are circumstances so affecting a person in a judicial capacity as to be calculated to create in the mind of a reasonable man, a suspicion of his impariality, those circumstances are sufficient to disqualify him even though in fact, no bias exists, that it is important that there be not even a suspicion that there has been an improper interference with the cause of justice and it is sufficient that the circumstances give rise to reasonable apprehension.[32]

Of equal importance to any quasi-judicial hearing is the right to be heard. If people are unaware that their rights are being determined, or being present are refused the right, or an adequate opportunity of presenting their case and refuting the material adduced in opposition, it cannot be said that the tribunal has acted properly.[33]

The discretion vested in the council must be exercised judicially.

> A discretion does not empower a man to do what he likes merely because his is a mind to do so — he must in the exercise of his discretion do not what he likes, but what he ought.[34]

The council, after hearing submissions, is not bound to decide on the preponderance of evidence. It must, of course, grant a fair hearing to any persons appearing before it and cannot proceed on

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32 Donnelly J. in *Re Aston and Metropolitan Licensing Commission* 52 D.L.R. (2d) 403 at p. 406; See also Viscount Cave L.C. in *Frame United Brewers v Bath Justices* [1926] A.S. 586 at p. 590. *Beer v Rural Municipality of Fort Gary* 16 D.L.R. (2d) 316; *The Queen* v *Millidge L.R. 4 Q.B. 322.*

33 This basic principle and an example of its practical application can be seen in the following cases: *The King v London County Council* [1918] 1 K.B. 68; *Re Cohen and City of Calgary* 64 D.L.R. (2d) 238; H. *Lookoff v City of Vancouver* 67 D.L.R. (2d) 119; *Regina v City of Calgary Ex parte Sanderson* 53 D.L.R. (2d) 447; *Advance Glass & Mirror Co. Ltd.* v *Attorney-General of Canada* [1949] O.W.N. 451; *Melton v City of Calgary* 10 W.W.R. (N.S.) 428; It has also been held that a Planning Board is not generally acting in a judicial capacity. *Dobson and Dobson v City of Edmonton* 19 D.L.R. (2d) 69. It is equally evident that in some situations the Board will be so acting.

34 *Lord Sumner Roberts* v *Hopwood* [1925] A.C. 578

any predetermined course.[35] It is at liberty however, to consider matters of policy in reaching its final decision; indeed in a zoning matter, it must always in the final analysis make a policy decision.

In the *Wiswell Case* all members of the Supreme Court were agreed that the City was acting judicially. There was some disagreement as to whether the by-law was void or voidable. This was really an academic exercise, as it was concluded that the determination of such a question could have no bearing on the outcome. The offence of which the City was guilty was that of not giving the ratepayers notice, thereby depriving them of the right to be heard. As stated by Mr. Justice Hall:

> It was not merely the failure to post the placards, but the manifest ignoring of the fact known to it that the Association would oppose the by-law, and that the Association had been advised by letter that the orders had been extended, leaving it with no reason to believe or expect that concurrent applications to re-zone were at the same time being processed without its knowledge.

To have held that a strict compliance with the procedural by-law was imperative would have upset a considerable body of law.[36] If the failure to post the placards had been the only question it is unlikely that the plaintiffs would have been successful.

It also seems apparent from the decision that if the council was dealing with a large area of land, it would in all probability be acting legislatively.[37] In this situation the formalities surrounding a quasi-judical hearing are not applicable, and the Court would not intervene.

The question which requires consideration in Ontario is that posed by Keith J., in *Re Bala Investments Co. Ltd. and Hamilton:*[38]

> The question is: whether or not the municipal corporation without in anyway advertising its intention to do so prior to an application for a building permit being filed has the right *ex post facto* to change the rules under which the applicant acquired his property without any prior notice of its intention to do so or even serious consideration of such an intention.

If the council in enacting a zoning by-law is acting as the final arbitrator in a dispute between private individuals then the *Wiswell* decision should apply. There was no provision in the en-

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35 *The King v Port of London Authority* [1919] 1 K.B. 176. Reference can also be made to: *Re Frank Brothers Ltd. and Hamilton Board of Police Commissioners* [1967] 2 O.R. 284; *Re Henry's Drive-In Ltd. & Hamilton Police Bd.* [1960] O.W.N. 468; Some general comments on the whole range of the question appear in *Stoates* v *Borough of Washington* 44 N.J.L.R. 605.

36 See *supra*, Chapter 6 pp. 89-94.

37 See: *McMartin and Gage v City of Vancouver* 65 W.W.R. 385.

38 [1969] 2 O.R. 490, at P 495.

abling legislation under which the by-law in the *Wiswell* case required notice to be given. Thus, the mere fact that no statute or procedural by-law requires notice to be given will not enhance the position of the municipality. It will be deemed to be acting in a quasi-judicial capacity, and as a necessary corollary to the right to be heard is the necessity of having notice of the hearing. What constitutes sufficient notice must always be a question of fact. It was on this point alone that Judson J. disagreed with the other members of the Court in the *Wiswell* case.

If the council proceeds with a zoning by-law for the sole purpose of depriving a property owner of his right to use his property in a specific manner, under the *Boyd Builders* decision bad faith will be imputed to the council, and the by-law will be struck down. If, in resolving what is basically a dispute between property owners, they ignore the rights of one groups to the dispute by not giving notice of the intention to consider the by-law, the *Wiswell* case will apply, and the by-law will be held bad.

The real question concerns what will constitute sufficient notice. Generally speaking, publication of the required notice in a newspaper having general circulation in the area will be sufficient. If, however, as in the *Wiswell Case* there is a past history of contact between the dissident landowners and the City, a direct notice by letter or otherwise may be essential.

The effect of these two cases will undoubtedly be considerable. The position of property owners has been greatly enhanced. These decisions have injected into the law some of the essential features the omission of which, even to the casual observer, is blatantly obvious.

SUMMARY

Because of the practical and significant problems which often arise in the initiation of an action, a review of some of some of these problems has been attempted, in order to ascertain the real difficulties facing a person wishing to attack a by-law. Any prospective litigant must first be apprised of the possibilities of his suit being summarily dismissed, either for lack of status or other technical reasons. Only having surmounted this not inconsiderable obstacle can the merits of the action be determined.

Once properly before the forum, all of the traditional grounds of attacking by-laws can be invoked. An attempt has been made to examine these rules and their applicability to zoning by-laws.

To indicate more precisely the matters considered, the major conclusions reached will be set out in point form.

1. No discretion is vested in the Courts to dismiss an application to quash a by-law on the grounds of laches or for the manner in which the illegality is proved under s. 277 of the Ontario Municipal Act, decisions to the contrary notwithstanding.

2. S. 280 of the Ontario Municipal Act should be amended to permit the bringing of an application to quash at any time if the by-law is absolutely void.

3. Only in exceptional circumstances will a violation of a zoning by-law be a sufficient basis for an action for damages.

4. The traditional grounds of attacking by-laws when examined in relation to zoning by-laws, in particular, are not always strictly applicable. This is particularly true in relation to such rules as those against uncertainty, discrimination and delegation.

5. The recent decisions of the Supreme Court of Canada in *City of Ottawa et al v Boyd Builders Ltd.* and *Wiswell et al v The Metropolitan Corporation of Greater Winnipeg* have the combined effect of protecting a property owner from the arbitrary rezoning of his land for the sole purpose of prohibiting his development of that land, without at least affording him an opportunity to be heard before council.