# ATTACKING BY-LAWS: ZONING AND THE TRADITIONAL RULES*

G. Keith Allen†

## FORWARD

> The classic definition of discrimination in the Province of Ontario is that of Middleton J. in *Forst* v. *Toronto* . . . 'When the municipality is given the right to regulate, I think that all it can do is to pass general regulations affecting all who come within the ambit of the municipal legislation. It cannot itself discriminate, and give permission to one and refuse it to another.' . . . 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.

These remarks by Judson J. in the Supreme Court of Canada in *Township of Scarborough* v. *Bondi*[1] indicate the difficulties inherent in endeavouring to apply the traditional municipal law rules to modern concepts.

A zoning by-law is, by its very nature, discriminatory; one owner's land may be subject to, what are in a sense, arbitrary restrictions, while his neighbour's land is not. Under the rule quoted by Judson J. from *Forst* v. *City of Toronto*[2] a by-law occasioning this result would be beyond the jurisdiction of a municipal council to enact.

The potentialities of the concept of zoning are only now becoming visible. The concept in its modern setting may serve as a useful weapon in the municipal arsenal to be applied against pollution, through the imposition of carefully drawn conditions. A concept associated to that of conditional zoning is that of planned unit development, which may also be of great assistance to the municipality in carrying out the planned development of its urban areas in a pleasing and orderly fashion.

Will the great potential of these significant changes in the zoning concept come to fruition? Will the traditional municipal

---

* This paper was submitted in partial fulfillment of the requirements for the degree of Master of Laws, Osgoode Hall-York University, 1970. Owing to its length, this paper is being published in two parts. Chapters 8 through will appear in a subsequent issue.

† G. Keith Allen, B.A., B.C.L. (U.N.B.), LL.M. (York), of the law firm of Hoyt, Mockler, Allen, Dixon and Godin, Fredericton, N.B., Lecturer in the Faculty of Law, University of New Brunswick.

1 (1959), 18 D.L.R. (2d) 161, at p. 166. For a discussion of this case see *infra* c. 10.

2 (1923) 54 O.L.R. 256, at pp. 278-279.

law rules assist or restrict their growth? An attempt will be made throughout the course of this paper to explore these traditional rules, with a view to ascertaining their applicability to these modern zoning concepts.

# PART 1

## THE FORUM AND THE NATURE OF THE SUIT

### CHAPTER 1

### APPLICATIONS TO QUASH

No ground, notwithstanding its merits, of attacking a zoning by-law, is effective unless it can be placed before a court of competent jurisdiction. In this respect, no distinction is discernible between zoning and other municipal enactments. No effective discussion of the grounds for attacking by-laws can be had without an appreciation of the problems inherent in getting such by-laws before the proper tribunal.

The problems intendent on an application to quash or a representative action will be considered in order to provide a framework within which to consider the grounds of attack. In this discussion no reference will be made to zoning per se.[3]

The application to quash is a summary method of attacking by-laws; and it is the creature of statute. Such a procedure was indeed foreign to the common law at the time of its introduction.

Prior to the creation of this procedural remedy in Ontario, in the mid 1800's, the courts had difficulty in exercising a general policing function over municipal activities. This was attributable to the difficulty encountered by any interested party in getting municipal by-laws or resolutions properly before the courts. A by-law could be subjected to scrutiny only as an ancillary matter incidental to a normal action. A plaintiff, concerned with the validity of any municipal enactment, was confounded by the forms of action and the rigidity of the judicial

3 The traditional grounds of attacking by-laws, and their relation to zoning by-laws in particular, will be examined, *infra*, Pt. 2. Some consideration will be given to the difficulties of drafting modern legislation which does not offend the rules against uncertainty and delegation. Particular attention will be given to the recent decisions of the Supreme Court of Canada in *City of Ottawa et al.* v. *Boyd Builders Ltd.*, and *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*. *Infra* c. 14. The significance of these decisions in the zoning area is not yet fully appreciated. Both cases deal with traditional grounds of attacking by-laws, but are considered of such significance as to warrant special treatment.

system. Actions could be summarily dismissed for technicial defects in procedure. The ultimate success in attacking the validity of a municipal ordinance depended on the tenacity of the plaintiff and the technical prowess of his counsel.

It was against this background that the summary procedural remedy came into being. The radical nature of the device, and its simplicity, undoubtedly accounted for much of the confusion apparent in the early decisions in actions where it was employed.

Such a statutory jurisdiction would appear to be a central and western Canadian phenomenon.[4] No equivalent procedural remedy has ever been conferred on litigants in the Maritime provinces. The right was first conferred in Ontario, appearing in a statute dealing with municipal institutions in the year 1859. That statute provided:

> In case a resident of a Municipality, or any other person interested in a By-law, Order or Resolution of the Council thereof, applies to either of the Superior Courts of Common Law, and produces to the Court a copy of the By-law, Order or Resolution, certified under the hand of the Clerk and under the Corporate Seal, and shews, by affidavit, that the same was received from the Clerk, and that the applicant is resident or interested as aforesaid, the Court, after at least eight days' service on the Corporation of a Rule to shew cause in this behalf, may quash the By-law, Order or Resolution in whole or in part for illegality, and according to the result of the application, award costs for or against the Corporation.[5]

Most of the essential requirements of that first provision have been retained to the present time, although some significant alterations, more in the nature of form than of substance, have taken place. These will be considered when the effect of judicial interpretations of the section is discussed.[6] The provision, in its modern form, appears in ss. 276-280 of the current Ontario Municipal Act.[7]

---

4 See, for example, the provisions contained in The Municipal Act, R.S.O. 1960, c. 249, ss. 276-280; The Municipal Government Act, S.A. 1968, c. 68, s. 397; Municipal Act, R.S.B.C. 1960, c. 255, ss. 237-243; The Municipal Act, R.S.M. 1954, c. 173, ss. 390-393; The City Act, R.S.S. 1965, c. 147, ss. 226-228.

5 C.S.U.C. 1859, c. 54, s. 195.

6 This discussion forms the last two-thirds of this chapter.

7 Frequent reference is made throughout this paper to the Ontario Municipal Act. The complete citation of this Act follows. Subsequent references will cite section numbers only. R.S.O. 1960, s. 249, amended by S.O. 1960-61, c. 59, 1961-62, c. 86, 1962-63, c. 87, 1964, c. 68, 1965, c. 77, 1966, c. 93, 1967, c. 55, 1968, c. 76, 1968-69, c. 74, 1970, cc. 14, 56, 86, 135.

In the latter part of the 19th century, with the creation of provinces in the Canadian West, legislators sought guidance from their more advanced sister province, Ontario, in the preparation of their own statutes. The result was the adoption, in varying forms, of the summary right to apply to quash by-laws. However, the status requirements in these provinces has tended to be more restrictive than their Ontario counterpart. The right of application is generally confined to an applicant who is an elector, as opposed to a mere resident.[8]

Another significant departure from the Ontario procedure appears both in Alberta and Manitoba. In each case the application is to a judge of the designated courts and not to the court itself. The judge, before whom an application is made in these provinces, has been held to be sitting as *personna designata*, and not as a judge of the designated court.[9] On granting the initial summons the judge is thereby seized with jurisdiction and must make the ultimate determination on the application.

An application to quash a by-law is no different from any other action, in the sense that the applicant or plaintiff must have proper status to maintain it. A lack of status in the applicant deprives the court of jurisdiction to determine the matter.[10]

The usual method of establishing status would be for the applicant merely to allege his residency in the municipality, or the fact that he is a person interested in the by-law. If this statement is unchallenged by the municipal respondent, no further or other proof thereof is necessary. If, however, in the pleadings, this fact is specifically denied, then the applicant will be required to adduce evidence to establish that he is in fact a person entitled under the Act to maintain the application.[11]

In most instances the proof of residency should not be unusually difficult. It is, of course, recognized that there may be cases where the burden will be onerous. It is not, however, proposed to consider what in law does or does not constitute residency for the purposes of this provision. The real problem presented is in determining whether an applicant is or is not a

8 In Manitoba the Ontario criteria of status is adopted. In British Columbia the applicant may be either an elector or a person interested. In Alberta only an elector is permitted to apply.

9 *Chandler* v. *City of Vancouver* (1919), 45 D.L.R. 121 (B.C. C.A.); *Doyle* v. *Dufferin* (1892), 8 Man R. 294 (C.A.).

10 *Ross* v. *District of Oak Bay* (1966), 57 D.L.R. (2d) 770 (B.C.C.A.).

11 *Re Heaslip and Town of Alameda* (1909), 11 W.L.R. 718 (Sask. Dist. Ct.).

person interested in the by-law. There is no wealth of precedent dealing with this particular question, nor do the relevant decisions establish any real criteria as to what will satisfy the requirements.

The matter to be ascertained in each case is what factor is of such significance to a non-resident as to entitle him to call into question a by-law or resolution of a municipality in which he does not reside. It seems elementary that if an applicant owns property in the municipality,[12] or has been convicted under one of its by-laws,[13] his interest is clear. On the other hand a mere deprivation of anticipated profits from the sale of a product prohibited within the municipality by by-law will not be sufficient.[14]

Although no clear principles can be extracted from the decisions, it would appear that a particular interest, as opposed to a general one, must be shown to exist, such as an interference with a common law right to carry on a particular business or profession, or a discriminatory licensing by-law of the type before the Court in *Jonas* v. *Gilbert*.[15] An interest shared by all non-residents alike would not confer the required status, unless some special injury was occasioned to the applicant. Some real and direct interference with a proprietary or civil right may in fact be essential.

An application to quash being of a summary nature, and perhaps to some extent informal, two questions with regard to the parties can arise – (1) the effect of joining an incorrect party and (2) the power of the Court to hear representations from persons not parties to the application.

Although the council of the municipal corporation is the governing body, any by-law when passed becomes a by-law of the corporation. A common law action to attack a by-law must be against the corporation. An action taken against the council for this purpose would probably be dismissed. In *Craig* v. *Town of Qu'Appelle*[16] the Court considered this objection on an application to quash. Newlands J. concluded that this was not a fatal defect, holding that on this type of application the "names of the parties is mere surplusage". The courts do not appear to

12 *In re DeLaHaye* v. *Township of the Gore of Toronto* (1852), 2 U.C.C.P. 317.

13 *Re Ottawa Electric Railway Co. Ltd.* v. *Town of Eastview* (1924), 56 O.L.R. 52 (High Ct.).

14 *Re Graham Reid & Associates Ltd. and City of Welland* (1962), 33 D.L.R. (2d) 183 (Ont. High Ct.).

15 (1880), 5 S.C.R. 356. The by-law in question discriminated against non-residents, in that they were required to pay higher license fees than persons resident within the City.

16 (1917), 10 Sask. L.R. 307, at p. 308.

be adverse to permitting amendments to correct errors of this nature.

The general rule with regard to the hearing itself is laid down by Irving J. in *MacLean* v. *City of Fernie*[17] that no person except the applicant and the municipality had any status before the court on proceedings to quash a municipal by-law.

A rigid adherence to this rule could, in some instances, result in grave injustices to proponents of a municipal by-law. On some applications to quash, municipalities have not defended, whether through neglect, inadvertance, or a feeling of futility. In this situation, following the reasoning of Irving J. in the *MacLean case*, no one would be entitled to uphold the impugned legislation before the court.

In *Re Davies and Village of Forest Hill*,[18] an application was made to quash a by-law which required the consent of adjoining property owners to the installation of a swimming pool placed closer than a specified distance to the owner's lot line. One of the property owners adjoining the applicant's lot applied to the Court to be joined as a respondent.

Wells J. stated the law applicable to such an application in these words:[19]

> The authorities are not entirely clear but in my opinion the effect of them is that where the municipality concerned does not take the responsibility of upholding its own actions as exemplified by its by-law, then at their own risk as to costs other persons who are affected by the results may in some cases be added.

Quoting from *Re Henderson and Township of West Nissouri*,[20] he also states that:[21]

> . . . where it appears that there is an interest proper to be supported, and that the withdrawal of the party by whom it has hitherto been protected leaves it practically unrepresented before the Court' . . . that is the only circumstance where a ratepayer who has rights under the statute to attack a by-law may be appointed or made a party to a proceeding with the intention of defending or upholding the by-law when it is attacked by someone else.

Presumably Wells J. did not intend to restrict the right to be added as a party to a ratepayer, but intended to include any person who could maintain an application in his own right under s. 277 of the Municipal Act.

17 (1906), 12 B.C.R. 61.

18 [1965] 1 O.R. 240.

19 *Ibid.*, at p. 246.

20 (1911), 23 O.L.R. 651 (C.A.), at p. 653

21 [1965] 1 O.R., at p. 249.

In the *Davies* case the municipality was proceeding diligently. Hence no other party needed to be added. The adding of parties in this situation is a discretionary one with the judge hearing the application, which will not be lightly upset by the court of appeal.[22]

An equally serious situation can occur where the applicant proposes to withdraw and discontinue the application. If the applicant withdraws successfully, the proceeding is terminated. The result, under the doctrine of laches applied by the courts in this area, could be to preclude any other summary application being brought.

This would be particularly unjust if the applicant is acting in a representative capacity for a number of qualified persons, and is proceeding contrary to their interests. Two proposals were advanced in *Re Ritz and Village of New Hamburg*[23] to counteract any such result. The first was suggested by Boyd C.:[24]

> When the fact is that the motion to quash is taken on behalf of a number of interested ratepayers who have combined to make the necessary deposit to answer costs, it is as a matter of course to allow any amendment of the papers so as to place that fact on record . . . if it be the fact that the motion is in truth on behalf of a number so interested, the failure of the individual put forward to give a title to the proceedings to prosecute, or his attempt to relinquish the proceedings, should not prejudice the others who seek to have the matter adjudicated.

The second proposal was advanced by Meredith J.:[25]

> In these circumstances, the Court is not powerless to prevent the bribed[26] defeat of the ratepayers' right to apply to quash the by-law. Ritz, as their agent, could be restrained from such a breach of confidence and trust. A simple and ready injunction is the order proposed . . . They may, and ought to, be empowered to continue the proceedings in Ritz's name, on the usual terms of indemnifying him against costs.

These decisions indicate that the courts will not permit

---

22 *In re Salter and Township of Beckwith* (1902), 4 O.L.R. 51 (High Ct.); *Re Cohen and City of Calgary et al.* (1967), 64 D.L.R. (2d) 238 (Alta. C.A.).

23 (1902), 4 O.L.R. 639. See also *Macdonald* v. *City of Toronto et al.* (1897), 18 P.R. 17 (C.A., Chambers).

24 4 O.L.R., at pp. 641-642.

25 *Ibid.*, at p. 643.

26 The word "bribed" used in the judgment has reference to the particular facts of the case. The evidence disclosed that Ritz had been bribed, or at least paid to discontinue the action.

rights or interests to be defeated on mere technical procedural points.

Another significant factor to any prospective applicant is the question of time. In the statutory provision of 1859, no time limit was established during which the application must be brought. The disturbing effect that could result in the municipal field from permitting the bringing of applications to quash at any time is eminently clear. As stated by Robinson C. J. in *Hodgson* v. *Municipal Council of York and Peel*:[27]

> . . . it is not unreasonable to hold, that a party seeking to set it aside directly, by the summary intervention of this court, should not delay as many years as he chooses, but should come within a reasonable time. Here nine years or more have elapsed; public expense has been incurred . . . The inconvenience to the public might be very serious . . .

In *Leddingham and Township of Bentinck*,[28] Morrison J. stated the laches rule in these words:

> In a case of this nature, it was the duty of those parties opposing the action of the council, if they thought they had grounds for seeking the aid of this court, to come promptly, and not allow a year to elapse before making an application, allowing the parties to take proceedings under the resolution, incur expenses, and impose and collect school taxes . . .

At no time did the courts lay down any ground rules for ascertaining what would or would not be considered as undue delay. In general, the various decisions merely stated that a particular time was too long to permit the courts to consider the application. The times held unreasonable are as varied as the cases, one year,[29] two years and nine months,[30] two years,[31] fourteen months,[32] eight months,[33] two months[34] and in one in-

27 (1856), 13 U.C.Q.B. 268, at p. 269.

28 (1869), 29 U.C.Q.B. 206, at p. 209. See also *Richardson and Police Commissioners of Toronto* (1876), 38 U.C.Q.B. 621; *In re Michie and City of Toronto* (1862), 11 U.C.C.P. 379. For a somewhat contrary approach see *Griffiths* v. *Municipality of Grantham* (1857), 6 U.C.C.P. 274.

29 *Cotter* v. *Municipality of Darlington* (1861), 11 U.C.C.P. 265; *Bann* v. *Brockville* (1890), 19 O.R. 409 (High Ct.); *Leddingham* v. *Township of Bentinck* (1869), 29 U.C.Q.B. 206; *Shilleto Drug Company* v. *Town of Hanna*, [1931] 3 W.W.R. 108 (Alta. Sup. Ct.).

30 *In re Drope and Township of Hamilton* (1866), 25 U.C.Q.B. 363.

31 *In re Grant and City of Toronto* (1862), 12 U.C.C.P. 357; *Bogart* v. *Town Council of Belleville* (1856), 6 U.C.C.P. 425.

32 *Hill* v. *Municipality of Tecumseth* (1857), 6 U.C.C.P. 297.

33 *Re Robinson and Village of Beamsville* (1906), 8 O.W.R. 689 (High Ct.).

34 *Re Lake and City of Toronto* (1919), 16 O.W.N. 386 (High Ct.).

stance two terms of the court.[35] If the applicant is defeated because of laches in making the application, no other direct method of attack was open to him. If there was some difficulty in getting before the common law courts, the courts of equity would grant an injunction to restrain action under the by-law until the statutory remedy could be pursued.[36] If, however, an injunction was applied for after the time when a common law court would have dismissed an application for laches, then no injunction would be granted.[37]

The policy decision of the courts not to consider an application because of the laches of the applicant is an acceptable one if taken at face value, disregarding such irrelevant comments on the motives of the applicant as are made in *Re Marchand and Town of Tilbury*.[38] The difficulty inherent in this approach is that an illegal by-law would be permitted to stand, if no other action were taken, merely because of the delay in bringing the application. The case of *Bogart* v. *Town Council of Bellville*[39] is a glaring example. The application had not been made until two years after the enactment of the by-law. Portions of same were expressly declared by the Court to be ultra vires, and hence illegal. Notwithstanding this express finding, Draper C. J. refused to direct a rule absolute to quash:[40]

> . . . where so long a delay has taken place before it was applied for, and particularly when the applicant discloses nothing to shew he sustains, or is likely to sustain, any injury[41] from this portion of the by-law.

This hardly seems sufficient justification for permitting the offending portions of the by-law to retain any semblance of vitality.

35 *Scarlett* v. *Corporation of York* (1864), 14 U.C.C.P. 161.

36 *Carroll* v. *Perth* (1863), 10 Gr. 64.

37 *Grier* v. *St. Vincent* (1867), 13 Gr. 512; *City of London* v. *Town of Newmarket* (1912), 3 O.W.N. 565 (High Ct.).

38 (1917), 13 O.W.N. 14 (High Ct.), dismissed on appeal (1917), 13 O.W.N. 45 (Div. Ct.). Falconbridge C.J.K.B. dismissed an application to quash, holding that the applicant was proceeding from an improper motive, his intentions being merely to harass and embarrass the municipality, and not because of some injury he personally had sustained from it. The motives of the applicant are not a relevant consideration on any application. See in this respect *Re Cartwright and Town of Napanee* (1906), 8 O.W.R. 65 (C.A.); *Re Lamb and City of Ottawa* (1904), 4 O.W.R. 408 (High Ct.). Some comments by Meredith J. A. in *In re Duncan and Town of Midland* (1908), 16 O.L.R. 132, lend some support to the remarks in the *Marchand* case.

39 (1856), 6 U.C.C.P. 425.

40 *Ibid.*, at p. 428.

41 See *Re McKinnon and Village of Caledonia* (1873), 33 U.C.-Q.B. 502, where the same position is taken.

The refusal to grant a rule to quash a by-law on the ground of laches has some measure of reasonableness and legitimacy so long as no express statutory limit is placed on the time during which the application must be brought. The imposition of a one year limit for bringing such an application, must be taken as a statement by the legislature that an application brought within that time will be reasonable, irrespective of any inconvenience caused the municipal government. Notwithstanding this limitation, now incorporated in s. 280 of the Municipal Act, the courts still subscribe to the belief that there is a discretion to refuse the application if not brought promptly.[42]

In *Tavener* v. *Port Stanley, McManus Petroleums Ltd. et al.*[43] Laidlaw J. A., speaking for the Ontario Court of Appeal, found there had been no delay which would warrant the Court's refusing to quash. This statement necessarily implies the right of the court to exercise such a discretion. Again in *Township of Westminister and Town of Parkhill* v. *County of Middlesex*,[44] Hope J. commented as follows:

> The statutory power to quash a municipal by-law . . . is permissive in its terms . . . An unreasonable delay in moving to quash is an element to be considered. The explanation of delay by reason of negotiations . . . is not, in my opinion, a sufficient excuse.

The justification for such a position has long vanished. It is surely not asking too much to request that the courts examine the statutory provisions closely, discarding the pretence to a discretion that is clearly not given, and is no longer necessary or desirable.

It is submitted that under s. 280 of the Municipal Act there are two legitimate questions open to the court on any application – (1) when was the offending by-law passed and (2) when was the application made.

The remarks of Anglin J. in *City of Winnipeg* v. *Brock*[45] are helpful in determining the answer to the first question:

> In my opinion the phrase 'the passage of the by-law' . . . means a final enactment of the by-law by the municipal council such that no further action by it in the nature of confirmation or ratification is requisite in order to make the by-law operative or effective.

42 *Re Lake and City of Toronto* (1919), 16 O.W.N. 386 (High Ct.); *Re Marchland and Town of Tilbury* (1917), 13 O.W.N. 14 (High Ct.), affirmed on appeal; (1917), 13 O.W.N. 45 (Div. Ct.); *Re Robinson and Village of Beamsville* (1906), 8 O.W.R. 689 (High Ct.).

43 [1945] 4 D.L.R. 710.

44 [1945] O.W.N. 91, at pp. 91-92.

45 (1911), 45 S.C.R. 271, at p. 290.

When the council has done all it is required to do to make a by-law effective, it will be deemed to be passed for purposes of ascertaining the beginning of the limitation period prescribed by s. 280. Does the fact that some external approval or confirmation is necessary to instil life into the by-law extend the time limited for making applications to quash? Does the time run from the date of such approval?

In *Kuchma* v. *Rural Municipality of Tache*,[46] the Supreme Court of Canada considered a by-law which required provincial approval before becoming effective. The Act also provided that no application to quash could be entertained after the expiration of one year from the passing of the by-law. Estey J. remarked:[47]

> . . . the statutory period must be computed from the date of the passing of the by-law by which the municipality finally attains its objective, even if the by-law may not be brought into force until a later date . . . statutory provisions requiring further acts such as registration or promulgation before a by-law becomes effective and binding do not extend the time within which the application to quash may be made.

In two Ontario cases[48] the courts took the approach that, if some external body must approve the by-law, for example, a county council, an application to quash prior to their consideration was premature and should not be entertained. These would appear to be at variance with the decision of Estey J., and also with the decision of Boyd C. in *Harding* v. *Township of Cardiff*.[49]

A zoning by-law passed by an Ontario municipality is a prime example of approval being required by an external agency.[50] Such a by-law has no validity, and is not binding on any person, until approved by the Ontario Municipal Board. This approval might not be forthcoming for several years. Despite the logic of the statement of Meredith C. J. in *Re Liquor License Act*[51] that applications to quash

> can be taken only with respect to something that has, in all events, *prima facie*, the force of law

an applicant wishing to quash a zoning by-law cannot afford the luxury of awaiting the decision of the Ontario Municipal Board.

46 [1945] S.C.R. 234.

47 *Ibid.*, at p. 238.

48 *In re Choate et al. and Township of Hope* (1858), 16 U.C.-Q.B. 424; *Re Cameron and United Townships of Hagarty, etc.* (1907), 10 O.W.R. 357 (High Ct.).

49 (1882), 2 O.R. 329 (High Ct.).

50 The Planning Act, R.S.O. 1960, c. 296, s. 30(9).

51 (1913), 29 O.L.R. 475, at p. 477.

The intent of s. 280 of the Municipal Act and its relation to the jurisdiction of the court in this type of application has been a recent subject of consideration. Wells J. in *Re Clements and Toronto*[52] took the position that the section was designed merely to protect by-laws having some procedural imperfection. He felt that, if the by-law was clearly ultra vires, an application to quash could be successfully maintained at any time. This conclusion was not at all unreasonable in view of some of the previous decisions, particularly those having reference to the nature of illegal by-laws.

There is a considerable volume of judicial opinion to the effect that illegal by-laws fit neatly into one of two categories, namely void and voidable. Freedman J. A. in *Metropolitan Corporation of Greater Winnipeg* v. *Wiswell*[53] adopts the following words from Rogers on The Law of Canadian Municipal Corporations:[54]

> The courts have made a distinction between these two classes of illegal by-laws. A voidable by-law is one that is defective for non-observance or want of compliance with a statutory formality or an irregularity in the proceedings relating to its passage and is therefore liable to be quashed whereas a void by-law is one that is beyond the competence to enact either because of complete lack of power to legislate upon the subject matter or because of non-compliance with a prerequisite to its passing.

The importance of the distinction is considerable for the curative effect of a failure to quash is limited to voidable by-laws. The action in the *Wiswell* case was for a declaration that the by-law was bad. It was not a statutory application to quash. All members of the Court of Appeal were agreed that, if the by-law was voidable only, the action could not be maintained. The Manitoba equivalent of s. 280 of the Ontario Municipal Act was treated as a statute of limitations in so far as voidable by-laws were concerned.

In *Re Gordon and The De Laval Company Ltd.*[55] the Court had considered a similar argument after the time limited for applying to quash expired. Middleton J. A. held that expiry of the time limit did not deprive the Supreme Court of its jurisdiction to set aside the by-law or to grant a declaratory decree as to its validity.

An appeal of the *Wiswell* case to the Supreme Court of Canada produced some dissension as to whether the by-law was

52 (1959), 19 D.L.R. (2d) 476 (Ont.).

53 (1964), 45 D.L.R. (2d) 348 (Man.), at p. 352. The exact nature of the by-law and the grounds of attack on it are discussed, *infra*, c. 14.

54 (1959), vol. 2, pp. 893-894.

55 [1938] O.R. 462.

void or voidable. Cartwright J., with whom Spence J. concurred, concluded that the by-law was voidable. He agreed with the conclusion in the *Gordon* case that this did not thereby deprive the court of jurisdiction. With this approach the discussion as to whether the by-law is void or voidable in a common law action to attack it is of academic interest only.

Wells J. in the *Clements* case was merely following the lead of the Supreme Court. In the *Kuchma* case the application to quash was commenced three years after the passing of the by-law. Laidlaw J. A., speaking for the Court of Appeal in the *Clements* case,[56] pointed out that the summary procedure was purely statutory. Accepting this, whether the by-law is void or voidable is of no consequence on an applcation to quash, if that application has not been brought within one year of the passing of the by-law. Laidlaw J. A. said:[57]

> There is no ambiguity whatsoever in the language. The effect of it is perfectly plain. The Court is precluded from entertaining and is forbidden to entertain an application to quash a by-law not made within one year after the passing of the by-law. It is not without significance that the prohibition contained in the section is not directed to the persons authorized to make an application. It is directed to the Court, empowered by s. 293(1), to quash the by-law upon an application, and it expressly and plainly directs that the Court shall not entertain an application after the specified time permitted for making the application.

Laidlaw J. A. concluded that, despite the restriction on jurisdiction under the Act, this did not detract from the common law right to attack by-laws by an ordinary action.[58] The provisions of s. 280 cannot be circumvented by a motion for a declaration that a by-law does not apply in a given situation.[59] The attack must be made in an action commenced by a writ of summons.

A failure to comply with the statutory prerequisites for the bringing of the application will be fatal,[60] for example, not entering into the proper recognizance.[61]

---

56 (1959), 20 D.L.R. (2d) 497. See also *Re Merry and City of Trail* (1962), 34 D.L.R. (2d) 594 (B.C.C.A.); *Vandecar* v. *Corporation of East Oxford* (1878), 3 O.A.R. 131.

57 20 D.L.R. (2d), at p. 499.

58 See also *Lacey* v. *Village of Port Stanley*, [1968] 1 O.R. 36 (High Ct.).

59 *Sun Oil Co.* v. *City of Hamilton*, [1961] O.R. 209 (C.A.).

60 *Re Merry and City of Trail* (1962), 34 D.L.R. (2d) 594 (B.C. C.A.).

61 *Re Burton and Village of Arthur* (1894), 16 P.R. 160 (High Ct.).

In some of the earlier cases it was argued quite strenuously that the application must not only be served, but heard as well, before the expiration of the statutory time limit. It is now settled, at least in Ontario,[62] that the serving and filing of the necessary papers is a commencement of the application sufficient to satisfy the statute.

There would seem to be one exception to the rule on the expiration of time. In some instances the municipality must give notice of the enactment of an ordinance, and set out the time in which an application to quash must be served. If the information provided is incorrect, and necessarily leads to an application being made after the effluxion of the statutory time, the corporation will be estopped from raising any objection.[63] The rights of the applicant cannot be so easily displaced.

Since power conferred on the courts to quash is completely statutory,[64] jurisdiction other than that prescribed by the statute cannot be conferred or extended and the statutory requirements cannot be waived by the parties to an application.[65]

The motion that is served on the municipal respondent must set out the grounds of illegality.[66] If this is not done an amendment will invariably be permitted.[67] A mere allegation that the by-law is ultra vires will be considered a sufficient statement of the illegality.[68]

Under some of the earlier statutes no action could be taken against a municipal corporation until one month after the quashing of the by-law which authorized the act complained of. By dismissing an application for laches, the courts were in some instances depriving an applicant of any legal remedy for injury

62 *Re Sweetman and Town of Gosfield* (1889), 13 P.R. 293 (High Ct.); *Re Shaw and City of St. Thomas* (1899), 18 P.R. 454 (C.A.); *Bearss* v. *City of Regina* (1956), 5 D.L.R. (2d) 199 (Sask. C.A.); but see the remarks of Tysoe J. A. in *Re Merry and City of Trail* (1962), 34 D.L.R. (2d) 594 (B.C.C.A.).

63 *In re Robertson et al. and Township of North Easthope* (1888), 15 O.R. 423 (High Ct.); *Kane* v. *City of Kaslo* (1896), 4 B.C.R. 486 (Sup. Ct.).

64 *Re Major Hill Taxicab and Transfer Co. Limited and City of Ottawa* (1915), 33 O.L.R. 243 (C.A.); *Shepherd* v. *City of Montreal* (1917), 36 D.L.R. 437 (Que. Ct. of Review).

65 *Re Angus and Township of Widdifield* (1911), 23 O.L.R. 479 (Div. Ct.); *Re Merry and City of Trail* (1962), 34 D.L.R. (2d) 594 (B.C.C.A.).

66 *Re St. Boniface Charter* (1912), 22 Man L.R. 27 (K.B.).

67 *In re Town of Melville* (1952), 6 W.W.R. (N.S.) 357 (Sask. Dist. Ct.).

68 *Re Wetmore and Town of Timmins*, [1952] O.R. 13 (High Ct.).

sustained by him. The same result flows from the exercising of a discretion to quash on the merits.

In *Haynes* v. *Copeland*[69] a replevin action was started for the return of personal property levied under a local improvement by-law. Wilson J. dismissed the action, there being no illegality apparent on the face of the by-law. He stated that the proper remedy was an application to quash. The difficulty of the plaintiff was obvious. Having commenced this "abortive" action, his delay in applying to quash would be fatal to any application of a summary nature. The net result was a complete deprivation of his rights and property, with no opportunity of having his title to the goods judicially declared. In *Wilson* v. *County of Middlesex*,[70] on the other hand, Robinson C. J. felt that in many cases, if a replevin action must await the quashing of the by-law, it would be useless.

The decision of Wilson J. was consistent with the early decisions to the effect that no action of any description could be maintained until the illegal by-law was removed. It was soon apparent that such a rigid approach could place a plaintiff in an intolerable position in that his rights and property would be completely destroyed before the legality of the by-law could be determined. Despite a reluctance to consider the validity of a by-law in a collateral proceeding, it was felt that an illegal act causing injury should be halted forthwith, rather than await the determination of another application.[71] It was concluded that only in an action for damages against the corporation must the by-law first be removed.[72] This development eliminated at least one of the more glaring injustices.

As seen from s. 195 of the statutes relating to municipal institutions in 1859,[73] an applicant was required to produce a copy of the offending by-law, duly authenticated by the clerk of the municipality. The court then, in the language of the statute, "may quash the By-law, Order or Resolution in whole or in part for illegality". The wording of this section produced two results – (1) the use of the word "may" gave the court a discretion to quash the by-law, whether illegal or not, and (2) unless the illegality appeared on the face of the by-law it could not be quashed.

---

69 (1868), 18 U.C.C.P. 150. *Reid* v. *City of Hamilton* (1856), 5 U.C.C.P. 269, is to the same effect.

70 (1859), 18 U.C.Q.B. 348.

71 *Rose* v. *Township of West Wawanosh et al.* (1890), 19 O.R. 294 (High Ct.); *Malott* v. *Township of Mersea* (1885), 9 O.R. 611 (High Ct.).

72 *Hill* v. *Middagh et al.* (1889), 16 O.A.R. 356.

73 C.S.U.C. 1859, c. 54.

The conclusion that the illegality must be apparent on the face of the by-law resulted from the requirement to produce the by-law. If the alleged illegality was not apparent on the face of the by-law, there was no statutory jurisdiction to quash.[74] In addition to this limited statutory power, the court had an inherent common law jurisdiction to quash for defects in procedure or for any illegality shown by extraneous evidence.[75] These same authorities drew an important distinction between the statutory power to quash, and the common law right. While acting under the common law jurisdiction the decision to quash was discretionary with the court, whereas under the statute the duty to quash was mandatory. This important distinction has subsequently been ignored. One can only conclude that the foundation for the discretion accepted by the courts does not support the edifice erected on it.

The judgment of Burns J. in *Grierson* v. *County of Ontario*[76] is the one most often quoted as supporting the discretionary power to quash for an illegality not appearing on the face of the by-law. He stated the law in these words:[77]

> . . . the true construction to give to the powers vested in the court to quash by-laws is, that, unless the by-law be illegal on the face of it, it rests discretionary with the court, upon extraneous matters, to say whether there is such a manifest illegality that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained.

Burns J. did not refer to the statutory power of the court to quash, but to the power generally. In the same case Robinson C. J. emphatically stated that, when the illegality is shown by extraneous evidence, the jurisdiction to quash is one existing at common law, and not conferred by statute.

It was subsequently concluded that the power to quash was purely statutory and that there was such right at common law. It followed as a necessary corollary to this that the right to quash on extraneous evidence must also have been conferred by the statute. Only a portion of the early contention was dis-

---

74 *Sutherland* v. *Township of East Nissouri* (1853), 10 U.C.Q.B. 626; *Boulton and Town of Peterborough* (1858), 16 U.C.Q.B. 380; *Standley and Municipality of Vespra and Sunnidale* (1859), 17 U.C.Q.B. 69.

75 *Boulton and Town of Peterborough* (1858), 16 U.C.Q.B. 380; *In re Hill and Township of Walsingham* (1851), 9 U.C.Q.B. 310; *Grierson* v. *County of Ontario* (1952), 9 U.C.Q.B. 623 (Robinson C. J.); *Kelly and City of Toronto* (1864), 23 U.C.Q.B. 425; *Sutherland* v. *Township of East Nissouri* (1853), 10 U.C.Q.B. 626.

76 (1852), 9 U.C.Q.B. 623.

77 *Ibid.*, at p. 632.

carded, that is, the view there was a common law right to quash. The discretion previously alleged to exist under the common law right was retained. This was in the face of those same decisions which discounted any discretionary power if the motion to quash was made under the statute.

Various positions were adopted by the courts on the question of discretion. There is authority for the proposition that there is always a discretion, no matter how the illegality is shown.[78] It has even been held that the discretion to quash should not be exercised in a case where the electors had not approved a by-law as required under the Act but there was a delay in making the application.[79] In another instance, where a large number of electors was improperly prevented from voting on a by-law but the applicant was not one of them, it was held that no order should be made.[80] Neither decision is supportable.[81]

It eventually became accepted that if the illegality was apparent on the face of the by-law then it must be quashed, there being no discretion.[82] On the other hand, if the illegality was established by extraneous evidence, it rested discretionary with the court to quash or not.[83] This remains an accepted judicial position.[84]

---

78 *Lougheed* v. *District of Surrey* (1957), 22 W.W.R. 504 (B.C. C.A.); *In re Duncan and Town of Midland* (1907), 16 O.L.R. 132 (Garrow J. A.); *Re Platt* v. *City of Toronto* (1872), 33 U.C.Q.B. 53.

79 *In re Sheley and Town of Windsor* (1864), 23 U.C.Q.B. 569.

80 *Bann* v. *Brockville* (1890), 19 O.R. 409 (High Ct.).

81 See *Re Lamb and City of Ottawa* (1904), 4 O.W.R. 408 (High Ct.).

82 *Re Howard and City of Toronto* (1927), 61 O.L.R. 563 (C.A.); *Re Middleton and Township of Goderich*, [1931] O.R. 392 (High Ct.); *Simmons and Township of Chatham* (1861), 21 U.C.Q.B. 75; *Re Wetmore and Town of Timmins*, [1952] O.R. 13 (High Ct.).

83 *Re Robinson and Village of Beamsville* (1906), 8 O.W.R. 689 (High Ct.); *Re Howard and City of Toronto* (1927), 61 O.L.R. 563 (C.A.); *Rex ex rel. Donald* v. *Thompson* (1929), 24 Sask. L.R. 4 (C.A.); *In re Lloyd and Township of Elderslie* (1879), 44 U.C.Q.B. 235; *Re Caldwell and Town of Galt* (1905), 10 O.L.R. 618 (High Ct.); *In re Robertson et al. and Township of North Easthope* (1888), 15 O.R. 423 (High Ct.); *Secord and County of Lincoln* (1864), 24 U.C.Q.B. 142; *Taprell* v. *City of Calgary* (1913), 5 Alta. L.R. 377 (Sup. Ct. en banc); *Re Brewer and City of Toronto* (1909), 19 O.L.R. 411 (C.A.); *Lanson and Township of Reach* (1860), 19 U.C.Q.B. 591; *Re Brown and City of Carlgary* (1906), 5 W.L.R. 576 (N.W.T. Sup. Ct.).

84 *Re Middleton and Township of Goderich*, [1931] O.R. 392 (High Ct.); *Re Wetmore and Town of Timmins*, [1952] O.R. 13 (High Ct.).

S. 277(1) of the present Ontario Municipal Act permits the court to quash for illegality. There is no longer any justification for differentiating as to the manner in which the illegality is shown. The entire problem has arisen through a misinterpretation of the section. The section does nothing more nor less than confer a jurisdiction on the courts which did not exist at common law. As stated by Meredith J. in *Cartwright* v. *Town of Napanee*:[85]

> That legislation was enacted for the purpose of creating the power to quash, not of indicating the circumstances under which the power should be exercised, nor whether the power is or is not discretionary. It means no more than that it shall be lawful for a Judge of the High Court to quash on summary motion.

If a by-law could be rectified by the council that passed it merely by enacting a new one, it usually would be permitted to stand.[86] This seems a doubtful justification for an illegal enactment.

Similarly, the courts have exercised this discretion to refuse a motion to quash when the objections to the by-law were of a highly technical nature,[87] when the objections were frivolous,[88] where there was doubt as to the validity of the objections,[89] or where there had been substantial compliance with the enabling legislation.[90]

In one instance it was suggested that, since the amount involved was trivial, the application should be refused.[91] Surely this is an indefensible position for a court of justice. In all cases where the application was dismissed because of laches or because the illegality was established by extraneous evidence,

---

85 (1905), 11 O.L.R. 69 (High Ct.), at p. 70.

86 *Re Butterworth and City of Ottawa* (1918), 44 O.L.R. 84 (C.A.).

87 *Haddock* v. *District of North Cowichan* (1966), 59 D.L.R. (2d) 392 (B.C. Sup. Ct.); *Re Jones and City of London* (1899), 30 O.R. 583 (High Ct.); *Winnipeg Merchandisers Limited* v. *City of Winnipeg*, [1936] 3 W.W.R. 530 (K.B.); *Taylor and Township of West Williams* (1870), 30 U.C.Q.B. 337; *Re Labute and Township of Tilbury North* (1918), 44 O.L.R. 522 (C.A.).

88 *In re Simmons and Township of Chatham* (1861), 21 U.C.Q.B. 75.

89 *In re Fennell and Town of Guelph* (1865), 24 U.C.Q.B. 238.

90 *Re Cameron and City of Victoria* (1905), 2 W.L.R. 387 (B.C. C.A.); *In re Huson and Township of South Norwich* (1892), 19 O.A.R. 343; *Pringle* v. *City of Winnipeg* (1951), 3 W.W.R. (N.S.) 570 (B.C. Sup. Ct.); *In re Caswell and Rural Municipality of South Norfolk* (1905), 15 Man. R. 620 (K.B.); *Grant and Township of Puslinch* (1868), 27 U.C.Q.B. 154.

91 *Re Platt* v. *City of Toronto* (1872), 33 U.C.Q.B. 53.

a proper exercise of discretion warranted its dismissal. How much less confusing the record would be if the applications had been dismissed because there had been substantial compliance with the statute, or because objections were too technical, or on some similar basis, rather than on what *prima facie* has the appearance of an arbitrary conclusion.

The applicant, like a plaintiff in any other action, must establish a sufficiently strong basis for the intervention of the court.[92]. If the illegality is clearly shown, whether on the face of the by-law, or by extraneous evidence, the applicant is entitled as of right to a decision.[93] Any other conclusion is an improper usurpation of power by the court.

Harrison C. J. in *Re Mace and County of Frontenac*[94] suggested the following principles for the guidance of the courts:

> Those who were opposed to the by-law, whether few or many, have been constrained to submit to its provisions under the belief that it was a valid by-law. Those who were in favour of it, whether few or many, have, under a similar belief, obtained the benefit of its provisions. But now, when it is apparent to all that the by-law was illegally carried, and so is an illegal by-law, it is time that the delusion under which all have been acting should be removed, and the truth be revealed and acted upon for the future.

A relatively straight forward test was advanced by Killam J. in *Hall* v. *Rural Municipality of South Norfolk*:[95]

> . . . if the circumstances are such that the by-law must be held invalid if objected to in another proceeding, it should be quashed on application.

What is the result of not quashing an illegal by-law? The summary procedure was designed to provide a simple, inexpensive and expeditious means of removing invalid legislation.[96] It is clear that a refusal to quash does not validate the questionable by-law.[97] The end result of a refusal to quash, where il-

---

92 *Napier* v. *City of Winnipeg* (1960), 67 Man. R. 322 (Q.B.).

93 There are decisions to the contrary: *In re Duncan and Town of Midland* (1907), 16 O.L.R. 132 (Meredith J. A.); *In re White and Township of Sandwich East* (1882), 1 O.R. 530 (High Ct.).

94 (1877), 42 U.C.Q.B. 70, at pp. 87-88. See also *Re Fenton et al.* v. *County of Simcoe* (1885), 10 O.R. 27 (High Ct.); *Re Stinson and Town of Fort Frances* (1918), 14 O.W.N. 196 (High Ct.).

95 (1892), 8 Man. R. 430, at p. 439.

96 *Cartwright* v. *Town of Napanee* (1905), 11 O.L.R. 69 (High Ct.).

97 *In re Revell and County of Oxford* (1877), 42 U.C.Q.B. 337.

legality is established, is more litigation, greater expense and uncertainity to all parties concerned.[98]

If the by-law is withdrawn by the municipality after the action has been commenced, the courts may treat this as an acknowledgment of illegality and award costs to the applicant.[99] No formal order will issue. The same procedure will no doubt be followed if the force of the by-law is spent, for example, the case of a by-law limited to expire at a time which has passed before the motion is heard.

It is submitted that, if the courts on a motion to quash would merely answer the following questions, an applicant could be reasonably assured of having the merits of his application determined:

(1) Has the applicant complied with all of the statutory prerequisites essential to the bringing of the application?

(2) Does the applicant have proper status to maintain the application?

(3) Is the application in time?

(4) Is the illegality clearly established?

If all questions are answered in the affirmative there are no other factors to be considered and the order quashing the by-law should issue. Laches and the manner in which the illegality of the ordinance is established are no longer relevant or legitimate considerations.

## CHAPTER 2

## ACTIONS RESULTING FROM BY-LAW VIOLATIONS

The potential problems emanating from a breach of a municipal by-law are more clearly evident through example. Based on the following example a consideration of some of these questions will be made.

In an area zoned single family residential, A maintains an expensive dwelling. A structure on adjoining property is used for the purpose of manufacturing fire works. The use is not sufficiently vexatious to constitute an actionable nuisance. The fire hazard created by such user is relatively high, and has re-

98 *Lanson and Township of Reach* (1860), 19 U.C.Q.B. 591; *Standley and Municipality of Vespra and Sunnidale* (1859), 17 U.C.Q.B. 69; *Re Milloy and Township of Onondaga* (1884), 6 O.R. 573 (High Ct.); *Re Ostrom and Township of Sidney* (1888), 15 O.A.R. 372.

99 *In re Coleman* (1859), 9 U.C.Q.B. 146.

sulted in a marked depreciation in value of A's property and a dramatic increase in his fire insurance rates. Despite numerous complaints and demands, the municipality refuses to enforce the zoning by-law. It is assumed that A has no statutory right of enforcement.

Consequent to this violation there are two clearly discernible questions – (1) can A obtain an injunction to restrain the breach of the by-law and (2) can A successfully maintain an action for compensation for the damages caused to him by the violation.

Whether A can enforce the by-law directly:

> . . . must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed . . .[100]

The mere fact that the legislation in question does not confer in express terms a right of enforcement in an individual does not of necessity preclude such a right. The statute, or by-law, must be examined in toto to determine if it was enacted for the benefit of the public at large, a particular class or an individual. If a statutory right is conferred on an individual, and no particular method of enforcement prescribed, the court will not permit the abrogation of that right. If the statutory benefit is designed for a particular class, the right of a member of that class to proceed in his own right will be much more readily implied. Even in this situation the scheme and intention of the legislation must still be determined.[101]

If the performance of certain duties are required for the benefit of a class, and no penalties for non-compliance are prescribed, the assumed intention is that the performance of these duties can be enforced by any class member. If, on the other hand, detailed penalties are prescribed by the statute for a failure to carry out the obligations, the assumed intention is that any remedy must be found within the four corners of the statute. The conclusion is that the legislature did not intend a wrongdoer to be subjected to any other penalty than that set

---

100 Lord Cairns, L.C. in *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex.D. 441, at p. 448. These remarks were accepted in *Johnston et al.* v. *Consummers' Gas Company of Toronto*, [1898] A.C. 447 (P.C.), at pp. 454-455.

101 *Johnston et al.* v. *Consummers' Gas Company of Toronto*, [1898] A.C. 447. In the *Atkinson* case, as a condition of being permitted to supply water to the community, the defendant was to perform certain defined public acts, and in default of such performance could be subjected to penalties. It was held not to be the scheme of this legislation to confer any right of action on an individual member of the community.

out.[102] As stated by Lord Halsbury L. C. in *Pasmore* v. *Oswaldtwistle Urban District Council*:[103]

> The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe* v. *Bridges* (1881), 1 B. & Ad. 847, at p. 859. He says: 'where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.'

The real determination which must be made in any action to enforce a by-law is whether or not the scheme of the legislation is to protect a class of which the plaintiff is a member.[104] The case of *Orpen* v. *Roberts*[105] is significant in this context. A by-law required a specified set back from the street line. An action was commenced for an injunction to restrain a breach of this provision. Duff J. in the Supreme Court of Canada said:

> . . . this leaves to be determined in each case whether the enactment relied upon was passed for the benefit of the person asserting the right to reparation or other relief. . . . to quote Lord Selborne in *Brian* v. *Thomas* (1881), 50 L.J.Q.B. 662, 'Where a statute creates an offence and defines particular remedies against committing that offence, *prima facie* the party injured can avail himself of the remedies so defined and no others.' But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty.

The Court concluded that it was not the intention of the legislative body to confer any right of action on an individual. The by-law was one for the public benefit.

This principle is concisely stated by Wilson J. in *Singer* v. *Town N'Country Holding Co. Ltd.*:[107]

---

102 *Orpen* v. *Roberts*, [1925] S.C.R. 364.

103 [1898] A.C. 387 (H.L.), at p. 394.

104 *Gillies* v. *Bortoluzzi* (1952), 6 W.W.R. (N.S.) 633 (Man Q.B.); *Tompkins* v. *The Brockville Rink Company* (1899), 31 O.R. 124 (High Ct.).

105 [1925] S.C.R. 364. See also *Tchaperoff* v. *City of Victoria*, [1948] 2 W.W.R. 722 (B.C. Sup. Ct.).

106 [1925] S.C.R., at p. 370.

107 (1966), 56 D.L.R. (2d) 339 (Man. Q.B.), at p. 344.

> But where, as here, a by-law is enacted in the general public interest, and a duty is cast by statute for the enforcement thereof, this last is a bar to any right which might be claimed by a property owner or other citizen to sue for such enforcement, unless such right is incorporated in the by-law itself . . .

In *Village of St. Johns* v. *McFarlan*[108] Morston J. considered the jurisdiction of the court to act:

> A Court in chancery has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done, if carried out, would be a nuisance.

It can, at the very least, be stated that a very heavy onus will be placed on any plaintiff attempting to assert any right to direct action. It would also seem to be elementary that a municipality cannot confer any such right on its residents, unless it is specifically authorized by statute so to do. Charged with the duty of enforcing the by-law, the municipality could not delegate such duty to a rate payer. A duty to prosecute involves a discretion which cannot be effectively reviewed or controlled by the courts.[109] A mandamus can only be issued to compel the performance of a duty. It cannot compel the exercising of a discretion in a particular way.

Given these principles, how is the court likely to approach a zoning by-law? What are the possibilities of a right of enforcement being given to A?

A zoning by-law is primarily a statement of municipal policy as to what is the highest and best use of land within the area administered by the corporation. To carry this policy to fruition, different uses are allocated to particular districts, and penalties imposed for violations.[110]

In view of the decisions and the nature of a zoning by-law, it seems clear that, apart from statute, A's only remedy is to work diligently at the next municipal election to obtain a more sympathetic council. A zoning by-law does create protection for a property owner, such as preventing the intrusion of objectionable uses. This proposition is one that has been accepted by the Ontario Municipal Board as justification for refusing to approve by-laws intended to introduce changes in residential areas, such as a major increase in density, or the creation of commercial or industrial uses. This is not, however, sufficient

---

108 (1876), 33 Mich. 72.

109 *Norfolk* v. *Roberts* (1914), 50 S.C.R. 283.

110 For a consideration of the principles of zoning, reference should be made to *Village of Euclid* v. *Ambler Realty Co.* (1926), 272 U.S. 365, and *Township of Scarborough* v. *Bondi* (1959), 18 D.L.R. (2d) 161 (Can. Sup. Ct.).

to import an intention into a by-law to benefit a specific class, at least to the extent of permitting them to maintain an action to enforce its provisions.

Under s. 525 of the Municipal Act of 1937 a municipality had the authority to restrain the erection and user of lands or buildings in contravention of any by-law enacted under the authority of that Act. Apart from statute, the position of the municipality was not completely free from doubt. In *District of Oak Bay* v. *Gardner*[111] the Court refused to grant a mandatory injunction for the removal of a structure erected in violation of the building by-law. It was held that the principles of public nuisance were applicable and only the Attorney-General could maintain such an action.

In 1944 s. 525 was amended to permit a ratepayer of the municipality to exercise equivalent rights of enforcement.[112] By a further amendment in 1946 the statutory right was broadened to include the enforcement of any by-laws passed under the authority of the Municipal Act.[113] The final change appeared in the general statutory revision of 1950 at which time the section was made applicable to all by-laws, whether enacted under the authority of the Municipal Act or any other special or general act.[114] This provision is now incorporated in s. 486 of the present Municipal Act.

The ratepayer in the position of A in the example could proceed immediately to enforce the by-law under s. 486 of the Municipal Act, without being in any way dependent on the action of the municipal government.[115]

The question of whether A can maintain an action for damages as a result of the by-law violation must now be considered. The act of which A is complaining is not one prohibited by the common law. The mere fact that the by-law prohibits the use A's neighbour is making of his land does not thereby create a cause of action in A. He must have status to maintain any action, or as suggested in *Tchaperoff* v. *City of Victoria*[116] the by-law must vest in him some proprietary right.

---

111 (1914), 19 B.C.R. 391 (C.A.).

112 S.O. 1944, c. 39, s. 48, amending s. 525 of R.S.O. 1937, c. 266.

113 S.O. 1946, c. 60, s. 67, amending s. 525 of R.S.O. 1937, c. 266, as amended by S.O. 1944, c. 40, s. 48.

114 R.S.O. 1950, c. 243, s. 497.

115 The effectiveness of the right is adequately demonstrated by such cases as *Powell and Ford* v. *Howard*, [1949] O.W.N. 497 (High Ct.) and *Long* v. *Roberts et al.*, [1966] 1 O.R. 771 (High Ct.).

116 [1948] 2 W.W.R. 722 (B.C. Sup. Ct.).

There appear to be certain valid reasons for not permitting civil actions based on violations of municipal by-laws. Municipal governments have power to interfere in innumerable matters which under the common law could be pursued with impunity. It is difficult to believe that the legislature should ever have intended that a violation of a local by-law would create a civil liability.[117] The situation under which rights would be thereby created would vary from municipality to municipality.[118] A mere violation without more should never be sufficient.

The proposal advanced by Hayne C. in *McCloskey* v. *Kreling*[119] is a reasonable approach to a difficult problem:

> If we assume that the ordinance gives a right of action by private persons, it can only be to those who suffer damage by reason of its violation, and this damage must be special, and not as is common to the public. The defendant's building . . . would naturally cause to others more or less of the same depreciation in value and increase of insurance rates from which it would seem the plaintiff suffers. Hence there is no damage that is special to him. Depreciation in value is not a ground of special damage . . . The injury 'must be special in character, and not merely greater in degree, than that of the general public.'

This decision does not answer specifically the question of whether or not such action is maintainable. The Court does not directly consider this problem, but merely sets out what is required if that fact is assumed. The question still remains, does a violation of a zoning by-law constitute a wrong actionable at the suit of the injured party?

The Supreme Court of Canada in *Sterling Trusts Corporation et al.* v. *Postma*[120] had occasion to consider the effect of a violation of a provincial motor vehicle act provision. An accident had resulted from the failure of the defendant to maintain lighted tail-lights on his vehicle. Cartwright J. in founding a cause of action upon the violation said:[121]

> I think it plain that once it has been found (i) that the respondents committed a breach of the statutory duty to have the tail-light lighted, and (ii) that the breach was an effective cause of the appellant's injuries, the respondents are *prima facie* liable for damages suffered by the appellant.

It can be proved by A that his neighbour has violated the

---

117 *Tompkins* v. *The Brockville Rink Company* (1899), 31 O.R. 124 (High Ct.).

118 *Hawkes* v. *Yeomans*, [1954] O.W.N. 769 (C.A.).

119 (1888), 18 P. 433 (Cal. Sup. Ct.), at p. 434-435.

120 [1965] S.C.R. 324.

121 *Ibid.*, at pp. 329-330.

zoning by-law, and that this violation was the effective cause of the injury he sustained. The test has been met.

Cartwright J. pointed out that the provision with which he was concerned was designated for the protection of other users of the highway. The only real conclusion to be drawn from the decision is that, if a statutory provision is designated for the protection of a specified class, any breach of that duty which results in an injury to a member of the class will be actionable.[122] The crux of the problem is simply the purpose for which a zoning by-law is enacted. Is it enacted for the benefit of a specified class? It is submitted that a zoning by-law is not one enacted for this limited purpose, but is one designed to further the interests of, and protect all members of, the municipality, not merely some particular segment thereof. Assuming the validity of these statements, it is submitted that a violation of a zoning by-law would not constitute an actionable wrong.

If the principle in the *Sterling Trusts* case does apply it is submitted that the type of injury for which recompense can be obtained must be restricted to that indicated in the *McCloskey* case. On this approach A could not maintain an action unless he sustained some special injury not common to the public. Violations of zoning ordinances do not generally result in special injury to an individual owner. The injury sustained may be greater in degree, but this will not make it special. The situations where a violation of a zoning by-law will be sufficient to sustain an action for damages are extremely limited.

## CHAPTER 3

## NON-STATUTORY RIGHTS OF ACTION

### Declaratory Actions

It is not proposed to consider in detail the technicalities of this type of action. Some of the problems which have arisen in municipal law cases where declaratory judgments have been sought will be pointed out. Some detailed studies of the overall problems connected with this type of action are available.[123]

It is perhaps not completely correct to refer to a declaratory action as being purely non-statutory. In some jurisdictions the Rules of Court set out the situations where this type of proceeding is available.[124]

122 In *Maker* v. *Davanne Holdings Limited*, [1954] O.R. 935 (High Ct.), a nuisance action, the Court was prepared to grant an interim injunction based on a violation of the zoning by-law.

123 Reference can be made to Derril T. Warren, *The Declaratory Judgment: Reviewing Administrative Actions* (1966), 44 Can. Bar Rev. 610.

124 See, for example, Rule 604 of the Ontario Rules of Court.

The right of a resident of a municipality in New Brunswick to seek a declaration from the Court is of considerable importance. There is in that province no right to summarily attack a by-law.[125]

This type of action is equally important in Ontario where a ratepayer has permitted the time limited for quashing a by-law to expire. It is clear, as already indicated,[126] that no matter how illegal the by-law may be the right to proceed summarily is lost on the expiration of the time set out in s. 280 of the Ontario Municipal Act.

Where declaratory relief is sought, the status of the plaintiff is probably no less important than in any other action. What as a general rule will be required to establish status is set out in the judgment of Donovan J. in *Johanson* v. *City of Winnipeg*.[127]

> It must remain, however, as a basis for such petition or claim for such declaration, as it is, generally speaking, for any right of action, that the petitioner must have more than a general or political or public interest as a citizen in such by-law. It must, it seems to me, be shown that he has such a personal interest as affects or reasonably may affect him in respect of some right affecting his status, person or property.[128]

In the cases where a declaratory judgment has been sought, the interest decreed essential by Donovan J. has not always been clearly evident.[129] In the majority of these cases the ques-

---

125 *S.M.T. (Eastern) Limited et al.* v. *City of Saint John* (1945), 18 M.P.R. 374 (N.B.Ch.D.). See also *Town of St. Leonard* v. *Fournier* (1956), 3 D.L.R. (2d) 315 (N.B.), at p. 322, where Bridges J., after referring to an order made by the trial judge said: "He stated that he set it aside. With deference, I think that the most a Court in this Province can do is to declare it invalid, illegal and void."

126 *Supra*, pp. 13-14.

127 (1935), 43 Man. R. 201, at p. 203.

128 See also, on the question of status, *Youl* v. *Ewing*, [1904] I.R. 434.

129 *Pease* v. *Town of Moosomin* (1901), 5 Terr. L.R. 207; *Parsons* v. *City of London* (1911), 25 O.L.R. 172 (High Ct.); *Way* v. *City of St. Thomas et al.* (1906), 12 O.L.R. 240 (Div. Ct.). In *Maerkle* v. *British Continental Fur Co. Ltd.*, [1954] W.L.R. 1242, it was held in the English Court of Appeal that there may be situations where a declaratory judgment could be obtained by a plaintiff who had no status in the accepted sense. No suggested situations were advanced. In *S.M.T. (Eastern) Limited et al.* v. *City of Saint John* (1945), 18 M.P.R. 374 (N.B.Ch.D.), an action for a declaratory judgment was dismissed, the plaintiff's right being only one in common with the other residents of the City. The Court suggested that there must be some special right of the plaintiff's that required protection.

tion of status is not raised, although apparently it was accepted that status existed;[130] in other cases the direct concern of the plaintiff is clearly visible.[131]

In *Howson* v. *City of Medicine Hat*[132] Walsh J. considered the status of a plaintiff in an action for a declaration to quash a by-law. He resolved the question in this manner:[133]

> [The Act] expressly confers upon any elector the right to apply to quash any by-law or resolution of the council for illegality. That is exactly what this action is brought for coupled with an additional claim for relief based upon and incidental to the alleged illegality. It is true that this section[134] gives only this right to move to quash and does not in terms extend that right to the bringing of an action, but it is to my mind a recognition of the right of an elector to invoke the aid of the Court to undo an illegal act committed by the council.

The report of the decision does not indicate whether the action had been commenced before or after the expiration of the time limited for the bringing of an application to quash. If the time had elapsed, it could not be said that the Act conferred any right to quash, that right having expired. Although the approach is one not lacking in merit, it would appear to be based on a misconception of the nature of the summary application. The statutory provision was not intended to confer a status to attack by-laws by declaratory or other actions on all persons satisfying the residency or interest requirements. The right extended to such persons was for the purpose of maintaining an application to quash only.

The general conclusion to be drawn from the cases is that a plaintiff seeking a declaratory judgment must have some in-

---

130 *J. G. Butterworth Co. Limited* v. *City of Ottawa* (1919), 46 O.L.R. 49 (C.A.); *Rothschild* v. *Town of Cochrane* (1919), 16 O.W.N. 60 (High Ct.); *Re Gordon and The DeLaval Company Ltd.*, [1938] O.R. 462 (C.A.); *Battistutta et al.* v. *City of Prince George* (1967), 61 D.L.R. (2d) 637 (B.C. Sup. Ct.).

131 *Alexander* v. *Township of Howard* (1887), 14 O.R. 22 (High Ct.); *Bourgon* v. *Township of Cumberland* (1910), 22 O.L.R. 256 (Div. Ct.); *Journal Printing Co.* v. *McVeity* (1914), 33 O.L.R. 166 (C.A.); *Gesman* v. *City of Regina* (1909), 2 Sask. L.R. 50 (Sup. Ct.); *Re Pane Niagara Enterprises Ltd. and City of Niagara Falls*, [1968] 1 O.R. 287 (High Ct.); *Tonks* v. *Reid*, [1967] S.C.R. 81; *Towers Marts and Properties Ltd.* v. *City of St. Catharines* (1962), 34 D.L.R. (2d) 547 (Ont. High Ct.); *Town of St. Leonard* v. *Fournier* (1956), 3 D.L.R. (2d) 315 (N.B.C.A.).

132 (1915), 22 D.L.R. 72 (Alta. Sup. Ct.).

133 *Ibid.*, at p. 73.

134 The learned judge was referring to a section analogous to s. 277 of the Ontario Municipal Act.

terest proper to be determined. His position is not significantly different from that in any other action.[135]

Another area where the declaratory power of the court can be of great assistance is where a by-law is apparently within the proper jurisdiction of the municipality and the only question is whether the by-law applies in a given situation.[136]

Some doubt has arisen in Ontario as to the jurisdiction of the court to interpret a municipal by-law on a motion for a declaration under the Rules of Court.[137] The problem is whether a by-law is an "instrument" as that term is used in the Rules relating to this type of motion. On an application of this nature the validity of the ordinance will probably be presumed. The court will be concerned only with the interpretation of the enactment.

To date no final determination has been made on whether a by-law can be interpreted on a motion for a declaration. The comments in *Re Windsor* v. *Dapco Ltd.*[138] and *Sun Oil Co.* v. *City of Hamilton*[139] were *obiter*. The hesitancy evident in the Ontario Court of Appeal is not so apparent in the lower courts.[140]

The courts should not quibble over the right of a plaintiff to maintain a declaratory action for interpretation purposes.

The utility of a declaratory action as a means of determining the applicability of statutory provisions has long been recognized. Warrington J. in *Burghes* v. *Attorney-General*[141] justifies the action in these words:

> If the question be not decided in this way it must be left open until the plaintiff, having refused to comply, is sued for penalties, and the plaintiff would be left in

135 The question of status is considered in more detail in the discussion of ratepayers action under "Representative Actions".

136 In *Re W. J. Blainey Ltd. and City of Toronto,* [1935] O.R. 476 (High Ct.), the plaintiff sought a declaration that certain restrictions in a by-law were not applicable to his lands. The Court agreed and granted the requested declaratory judgment.

137 *Re Windsor & Dapco Ltd.,* [1959] O.W.N. 238 (C.A.); *Sun Oil Co.* v. *City of Hamilton,* [1961] O.R. 209 (C.A.).

138 [1959] O.W.N. 238 (C.A.).

139 [1961] O.R. 209 (C.A.).

140 In *Re Pane Niagara Enterprises Ltd. and City of Niagara Falls,* [1968] 1 O.R. 287 (High Ct.), Keith J. acknowledged the doubts expressed in the Court of Appeal, but considered that a declaratory action was the most convenient method.

141 [1911] 2 Ch. 139, at p. 156.

> a position of great perplexity. In my opinion, the mode adopted by the plaintiff for obtaining a decision is a very convenient one, enabling the Commissioners to be informed how far they may go, and relieving the plaintiff from the doubt and perplexity into which he has been cast.

This principle was emphatically reiterated by Farwell J. in *Dyson* v. *Attorney-General*[142]

> . . . it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty.

If a declaration is refused, an interested party must seek another method of attack, or await prosecution under the by-law. The end result is further litigation and expense.

### Representative Actions

In the municipal law context a representative action is one brought by a named plaintiff in his own right and on behalf, or as a representative, of all ratepayers of the municipality.

Early in our municipal history there was no particular difficulty in permitting a representative action. The council of the municipality was considered to be a trustee for the ratepayers. Hence any illegal act was a breach of that trust which could be enjoined by the *cestui que trust*.[143] However, in *Evan* v. *Corporation of Avon*[144] it was suggested that there are only two types of trusts with which a corporation might be involved, one of a private character, and the other of a public or general character. In the former, an individual could proceed to enforce it, whereas in the latter he could not, the matter being one which required the intervention of the Attorney-General.

The question of status is of no less significance in a representative action than in any other. The basic requirement is that stated by Lord Dunedin in *Trustees of the Harbour of Dundee* v. *D. & J. Nichol*:[145]

142 [1911] 1 K.B. 410 (C.A.), at p. 421.

143 In *MacIlreith* v. *Hart* (1908), 39 S.C.R. 657, at p. 670, Maclennan J., with whom Fitzpatrick C. J. concurred, said: "The right of the inhabitants to compel the city corporation, that is the city council, as a body, to do its duty, rests on this:—That the corporation is a trustee for the inhabitants." See also *Bowes* v. *City of Toronto* (1858), 11 Moore P.C. 463, 14 E.R. 770.

144 (1860), 29 Beav. 144, 54 E.R. 581 (Ch.).

145 [1915] A.C. 550 (H.L.), at p. 562.

> For a person to have such title [to sue] he must be a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies.

Assuming that the named plaintiff has no interest sufficient to maintain a normal action, does the fact that he purports to sue in a representative capacity enhance his position in any way? Does adoption of this procedure confer on him the necessary status? Robson J. in *Jenkins* v. *City of Winnipeg*[146] considered this question and said:

> A private person in his own right and in his own name cannot initiate the litigation, nor does the suing on behalf of all ratepayers assist the matter.[147]

As a matter of principle, it must now be accepted that an individual commencing an action to attack a by-law must himself have status or title to maintain it.

If a plaintiff can surmount the status problem no valid legal obstacle can be advanced to prevent him from suing in a representative capacity. It is, however, highly unlikely that there will be such unanimity of purpose among all ratepayers as the action would appear to convey.[148]

What interest must a plaintiff have to be considered adequate to permit the maintenance of an action to attack a municipal by-law? Any municipal ratepayer has an interest in the type of government being given by the local authority. It is not unreasonable to assume that a ratepayer has an interest in con-

146 [1941] 1 W.W.R. 37 (Man. K.B.), at p. 40.

147 In *Cowan* v. *Canadian Broadcasting Corporation*, [1966] 2 O.R. 309, at p. 315, Schroeder J. A., speaking for the Court, said: "If the plaintiff has no right as an individual to bring and maintain an action to redress an alleged public wrong, then his claim as a representative of other individuals, however numerous, who have no higher rights than he posses cannot enhance his position."

148 It was this that caused Meredith J. A. such consternation in *Beardmore* v. *City of Toronto* (1910), 21 O.L.R. 505, at p. 509: ". . . but it has long been the subject of very proper criticism that the law should allow a single ratepayer of a municipality, for ulterior and sinister purposes, to sue *in the name of all ratepayers*, although *entirely against their will and desire*, to upset any project, however desirable, and though unanimously desired by the ratepayers, with the single exception of the plaintiff. [Italics in the original.]" In *Gallagher* v. *Armstrong* (1911), 3 Alta. L.R. 443 (Sup. Ct.), a representative action was taken on behalf of all ratepayers against the members of council. The members of council were, therefore, plaintiffs by representation and named defendants. This indicates one of the conflicts inherent in this type of action.

fining his local government within the bounds of its delegated authority. In the words of Riley J.:[149]

> One would think, if not governed by authority, that the plaintiff has an interest in seeing to it that the defendant passes only valid by-laws . . .

The rules which govern the determination of the question of status are those developed in the field of public nuisance.[150] No useful purpose can be achieved by considering whether these principles should or should not have been adopted to determine the status of a plaintiff in the type of action here being considered.

Kelly C. B. in *Winterbottom* v. *Lord Derby,*[151] considering the right of an individual to require the removal of an obstruction across a path, said:

> . . . the true principle is, that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade, or calling. A mere passer-by cannot do so, nor can a person who thinks fit to go and remove the obstruction. To say that they could, would really in effect be to say that any of the Queen's subjects could.

In order to entitle a plaintiff to maintain an action, he must show a particular damage suffered by all the Queen's subjects.

In *Boyce* v. *Paddington Borough Council*[152] Buckley J. indicates two situations where status would be established:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interferred with . . . and, secondly, where no private right is interferred with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

The special damage mentioned in the second instance in this case has been qualified to some extent in *Vanderpant* v. *Mayfair Hotel Company, Limited.*[153] The damage sustained by

149 *Fransden* v. *Lethbridge (City)* (1965), 52 W.W.R. 620 (Alta.), at p. 624.

150 *Medcalf* v. *R. Strawbridge, Ltd.*, [1937] 2 All E.R. 393 (K.B.); *District of Oak Bay* v. *Gardner* (1914), 19 B.C.R. 391 (C.A.); *Code* v. *Jones and Town of Perth* (1923), 54 O.L.R. 425 (C.A.); *One Chestnut Park Road Ltd.* v. *City of Toronto*, [1964] S.C.R. 287; *Cowan* v. *Canadian Broadcasting Corporation*, [1966] 2 O.R. 309 (C.A.).

151 (1867), L.R. 2 Ex. 316, at p. 322.

152 [1903] 1 Ch. 109, at p. 114.

153 [1930] 1 Ch. 138. The case of *Crichton* v. *Township of Chapleau* (1915), 8 O.W.N. 67 (High Ct.), provides an example of an act by a municipality that caused damage peculiar to the plaintiff, a motion picture proprietor. The municipality was operating a theatre illegally in competition with the plaintiff.

the plaintiff not only must be peculiar to himself, but as well should be "direct and substantial".[154]

Armour C. J. in *Hope* v. *Hamilton Park Commissioners*[155] applied these principles in an action taken to restrain an illegal sale by the Hamilton Park Commissioners:

> . . . no one of the public has any right to complain whenever parliamentary powers, such as those conferred upon this board, have not been strictly followed or are intended to be transgressed, unless he can shew that he has an interest in preventing the doing of that which may well be called a violation of their contract with the Legislature. He must not only shew that they are committing or intend to commit a wrong, but also that the wrong complained of does occasion or will occasion loss or damage to him, that he has a special or private interest in confining them within the limits of their parliamentary powers.

It was suggested in *Heffernan* v. *Town of Walkerton*[156] and *Howson* v. *City of Medicine Hat*[157] that, if a plaintiff met the qualification required by statue to maintain an application to quash, his status in any action would be established. This suggestion has already been commented upon.[158]

---

154 The rule was succinctly stated by Judson J. in the Supreme Court of Canada in *One Chestnut Park Road Ltd.* v. *City of Toronto*, [1964] S.C.R. 287, at p. 290: "A private individual can only maintain an action for a public nuisance if he can show some particular and special loss over and above the ordinary inconvenience suffered by the public at large. Then the nuisance becomes a private one and he can sue in tort. The reason for the rule is to prevent multiplicity of actions." This was not a public nuisance case but rather an application by the municipality for an injunction to prevent the violation of a by-law. Therefore, the remarks are *obiter*. An excellent summary of the rule is also given by Schroeder J. A. in *Cowan* v. *Canadian Broadcasting Corporation*, [1966] 2 O.R. 309. See also the decision of Strong J. in *Standley* v. *Perry* (1879), 3 S.C.R. 356.

155 (1901), 1 O.L.R. 477 (C.A.), at p. 479. The decision has not been overruled despite the contrary belief of the Court in *Livingston* v. *City of Edmonton* (1915), 31 W.L.R. 609 (Alta. Sup. Ct.). It has been accepted and adopted in such cases as *Fransden* v. *Lethbridge (City)* (1965), 52 W.W.R. 620 (Alta. S.C.); *Watson* v. *Mayor of Hythe* (1906), 22 Times L.R. 245; *Attorney-General* v. *City of Toronto* (1903), 6 O.L.R. 159 (High Ct.); *Jenkins* v. *City of Winnipeg*, [1941] 1 W.W.R. 37 (Man. K.B.); *Rogers* v. *Trustees of School District No. 2 of Bathurst* (1896), 1 N.B. Eq. 266; *Hooper* v. *City of North Vancouver* (1922), 65 D.L.R. 286 (B.C.C.A.); *Robertson* v. *City of Montreal* (1915), 52 S.C.R. 30; *S.M.T. (Eastern) Limited* v. *City of Saint John* (1945), 18 M.P.R. 374 (N.B.Ch.D.), and on appeal (1946), 19 M.P.R. 103 (N.B.C.A.), *Keay* v. *City of Regina* (1912), 5 Sask. L.R. 372 (Sup. Ct.).

156 (1903), 6 O.L.R. 79 (Street J.).

157 (1915), 22 D.L.R. 72 (Alta. Sup. Ct.).

158 *Supra*, pp. 28-29.

In *Robertson* v. *City of Montreal*[159] the plaintiff, a ratepayer of the City, in a representative action attacked the validity of a by-law granting a bus franchise. A contract made as a result of the franchise was also questioned. The plaintiff was also a shareholder in a competitor of the company obtaining the franchise. The principles applied by the majority of the Court in dismissing the action were stated by Fitzpatrick C. J.:[160]

> . . . the appellant is not qualified to bring suit. A ratepayer who has not suffered any special injury, but only such as is public in its nature and affects all the inhabitants alike has no interest entitling him to bring action against the city. It is against public policy that he should be permitted to do so.

The basis of the public policy referred to in the previous statement evidently was that:[161]

> It would be difficult for the public business to be carried on at all if every individual in a city with a population of half a million persons could sit in judgement on all the actions of the civic authorities and any crank were at liberty to drag them at anytime before the courts. The city would never be free from litigation with its attendant expense when, as would probably be often the case, the complainants were men of straw.[162]

Iddington J. made an impassioned plea for the right to maintain the action. He presented what might be considered the other side of the public policy coin.[163]

> If the municipal authorities keep within their powers they have nothing to fear. If they exceed them the sooner it is determined the better.[164]

In *Dilworth* v. *Town of Bala*[165] in the Supreme Court of Canada some significant comments were made concerning a

159 (1915), 52 S.C.R. 30. The decision has not received universal acceptance. Carrol J. in *Warner-Quinlan Asphalt Co.* v. *City of Montreal* (1915), 27 D.L.R. 540 (Que.), after reviewing the case said: ". . . it must be admitted that our jurisprudence thus far uniform becomes seriously perturbed, though not actually done away with". These remarks were prefaced by the statement that prior to this decision actions such as that in the *Robertson* case could be brought.

160 52 S.C.R., at p. 31.

161 *Ibid.*, at p. 32.

162 A similar view had earlier been expressed in *Tanton* v. *City of Charlottetown* (1906), 1 East L.R. 282 (P.E.I. Sup. Ct.).

163 52 S.C.R., at p. 55.

164 Harrison C. J. in *Re Revell and County of Oxford* (1877), 42 U.C.Q.B. 337, at pp. 347-348, when referring to an illegal by-law made a similar suggestion: ". . . the sooner it is out of the way the better for all, except those interested in the maintenance of imposture."

165 [1955] S.C.R. 284.

ratepayer's right of action. In the judgment of Rand J., with whom Kellock and Cartwright J. J. concurred, the following remarks appear:[166]

> The right of a ratepayer to bring a municipal corporation into court as a means of asserting the illegality of corporation action affecting its property or civil rights, and indirectly the interests of ratepayers, is not challenged. It assumes that the organ of the corporation created to speak and act for all who are comprised within it is disregarding its duty; and the purpose and effect of the proceeding is to compel the execution of that duty. The right of the ratepayer arises from the delinquency of the corporation . . . If the corporation, of its own accord, has taken appropriate action, the basis of the interposition by a ratepayer, a breach of duty, does not arise. It is the primary right and duty of the corporation itself to repudiate *ultra vires* action and it is this right and duty which are brought before the Court for enforced action. The right of the ratepayer is thus accessory to that of the corporation; the substantive matter remains in the relation between the corporation and the third party.

At first blush these remarks appear to be a radical departure from the very rigid application of the general rule in the *Robertson* case. There is at least a strong basis for argument that the rigidity of the general rule should now be relaxed. An examination of the decision indicates quite clearly that the remarks are *obiter*, albeit from a source entitled to great respect.

It is implicit in the remarks that any ratepayer may summon his municipal corporation before the courts to prevent the corporation from pursuing an ultra vires course of conduct. If the corporation takes the appropriate action to repudiate its illegal act, the basis for any ratepayer's action will be removed.

The manner in which these remarks will be applied by the courts confronted with this problem is not clearly evident. Stark J. considered the decision in *Bongard* v. *Town of Parry Sound*.[167] He appears to have treated it as a reiteration of the general and accepted principle.

The probable approach will be to confine the remarks to the particular facts of the case. It cannot be overlooked that an ultra vires expenditure of money was involved. Although the decision appears to offer a very real potential for relaxation of the rigid rules surrounding this type of action, there is no real justification for optimism. The basic rule is too solidly entrenched to be displaced other than by legislation.

166 *Ibid.*, at pp. 288-289.
167 [1968] 2 O.R. 137.

The one exception to the general rule is that accepted in *MacIlreith* v. *Hart*.[168] The expenses of the Mayor of Halifax attending a convention had been paid by the City. No legislation authorized a payment of this nature. An action was commenced by a ratepayer for the return of these moneys after the council refused to permit the corporate name to be used for this purpose. An objection was raised to the status of the plaintiff, it being contended that only the Attorney-General could bring such an action.

Davies J. accepted the general rule that the action could not be maintained unless the plaintiff had sustained some peculier damage:[169]

> The peculiar damage sustained by the ratepayers as the result of such misappropriation, arise out of the increased rates which they will have to pay by reason of the misappropriation of the moneys of the corporation. It matters not whether the damage be great or small, unless indeed the whole transaction was so trivial that the court would refuse to interfere on that ground . . . As ratepayers they seem to me to have suffered special and peculiar damage to themselves distinct from the public damage which the Attorney-General has the sole right to represent, and, as a result of such special and peculiar damage, have a right to sue in their own name . . .

Although the judgment proceeds on the basis of the special and peculiar damage sustained by the ratepayer, it is now accepted that an action in this situation is an exception to the general rule.[170] It seems evident that the exception will not be extended. Duff J., who had concurred in the decision of Davis J. in the *MacIlreith* case, expressed grave doubts in the *Robertson* case about the correctness of that decision.

In the situation in the *MacIlreith* case, the corporation itself would normally be the proper plaintiff. Indeed it has been held that the pleadings must allege that the corporation was requested to act and refused.[171] Clearly, if the council that authorized the illegal expenditure was still in office, it would have been an empty form to request action.[172] It has been held that

168 (1908), 39 S.C.R. 657.

169 *Ibid.*, at pp. 663-664.

170 *Cluff* v. *Cameron* (1922), 22 O.W.N. 245 (High Ct.); *Paterson* v. *Bowes* (1853), 4 Gr. 170; *McDonald* v. *Lancaster Separate School Trustees* (1914), 31 O.L.R. 360 (High Ct.); *Black* v. *Ellis* (1906), 12 O.L.R. 403 (Div. Ct.); *Wilkie* v. *Village of Clinton* (1871), 18 Gr. 557; *Wallace* v. *Town of Orangeville* (1884), 5 O.R. 37 (High Ct.); *Corning* v. *Town of Yarmouth* (1913), 12 D.L.R. 683 (N.S. Sup. Ct.).

171 *Black* v. *Ellis* (1906), 12 O.L.R. 403 (Div. Ct.).

172 See *Pease* v. *Town of Moosomin* (1901), 5 Terr. L.R. 207 (Sup. Ct.).

if the council refuses to take the action requested it should be joined as a party defendant.[173]

In the *MacIlreith* case Davies J. differentiated between the interest of the ratepayers and that of the public at large.[174] If the illegal expenditure had affected all residents of the municipality rather than the ratepayers as a distinctive class, the action could not have been maintained.

On the reasoning adopted by Davies J. an argument could be made to support an action against a zoning by-law. It could be argued that the interest of the property owners and occupiers is one which is separate and distinct from the interest of the residents generally. But the problem in differentiating between these respective interests would seem to be insurmountable.

Duff J. in *Smith* v. *Attorney-General of Ontario*[175] recognized that the arguments accepted in the *MacIlreith* case are equally applicable to other situations. He pointed out that the decision in the *MacIlreith* case did not rest on any clearly defined legal principle, and should not in any event be extended. Considering these remarks, the position of a plaintiff attacking a zoning by-law will not be enhanced by the decision in the *MacIlreith* case.

The right of a ratepayer in the United States to question any municipal act which would result in any illegal expenditure of money or increase in debt seems to have been accepted by the courts with much less difficulty than in Canada.[176]

A plaintiff who has seen the time limited by s. 280 of the Municipal Act expire, and who cannot bring himself within the rules outlined previously, has only one remedy. He must elicit the support of the Attorney-General, who as the chief law officer of the Reigning Monarch "files his information to see that right is done to his subjects who are incompetent to act for themselves".[177]

The Attorney-General is under no obligation to act when requested to do so. The matter is one entirely within his dis-

173 *Eddy* v. *Millmine* (1920), 52 D.L.R. 312 (Ont. C.A.).

174 In *Hooper* v. *City of North Vancouver* (1922), 65 D.L.R. 286 (B.C.C.A.), the view was taken that no distinction could be drawn between the ratepayers and the public generally sufficient on which to found an action.

175 [1924] S.C.R. 331.

176 See *Crampton* v. *Zabriskie* (1880), 101 U.S. 601.

177 Davies J. in *MacIlreith* v. *Hart* (1908), 39 S.C.R. 657, at p. 665.

cretion which is not open to review in any court.[178] If he refuses to lend his name to the action, no other avenue or recourse is open to the party requesting it. As indicated by Lord Halsbury in *London County Council* v. *Attorney-General*,[179] his decision may be the subject of political criticism or control, but not to judicial scrutiny. Any attempt to circumvent the refusal of the Attorney-General to exercise his discretion, such as joining him as a party defendant, will be repelled by the courts.[180]

Although the court cannot direct the Attorney-General to lend his assistance, it has not been adverse to laying down ground rules for him to follow:[181]

> It would, in my opinion, have been most improper in the Attorney-General to have thrown any impediment to prevent the applicant from using his name. I conceive that any opposition on his part to the use of his name would have been quite unprecedented, and so, in a sense unconstitutional; for a Minister of the Crown has no right to exert his influence except according to the accustomed methods. Whenever any question arises in which a civil right or remedy is sought by an individual . . . against any corporation or body of men . . . it is the plain duty of the Attorney-General . . . receiving a proper indemnity as to costs — to act entirely without regard to any political or other influences, and to leave the doors of the established tribunals entirely open and unobstructed — nay, to remove any real or fancied impediments in the approaches to such tribunals. And though there is, of course, no precedent for such a case, it is probable that if any Minister should so far forget his duty and attempt to misuse his power, then the Court might hold that any individual inhabitant might sue on behalf of himself and all. Otherwise, by a combination of purely political or personal grounds, e.g. between a Minister and a Municipality, . . . the gravest and most enduring infractions of Acts of Parliament might be placed beyond redress.

The refusal of the Attorney-General to lend his name to the proceedings necessarily means the matter cannot be taken before the courts. It is clear that the failure to have his consent will not be fatal if it can be obtained after the commence-

178 *London County Council* v. *Attorney-General*, [1902] A.C. 165 (H.L.).

179 [1902] A.C. 165 (H.L.).

180 *Grant* v. *St. Lawrence Seaway Authority*, [1960] O.R. 298 (C.A.).

181 Begbie C. J. in *Anderson* v. *City of Victoria* (1884), 1 B.C.R. (Pt. 2) 107, at p. 108. See also *Affleck et al.* v. *City of Nelson* (1957), 10 D.L.R. (2d) 442 (B.C. Sup. Ct.).

ment of the action.[182] All proceedings will be stayed until it is filed with the court.[183]

Iddington J. in *Robertson* v. *City of Montreal*[184] had little faith that the Attorney-General could always be relied on to act properly. He preferred to place his trust "upon the vigilance of the ratepayers". Anglin J., in the same case, commented in these words:

> I should, however, deem it a misfortune if such an action as this could not be maintained by a ratepayer. Having regard to the many difficulties in the way of securing intervention by the Attorneys-General, a very useful, if not in many instances, the only practical safeguard in this country against improper exercise of their powers by municipal corporations would be taken away.

Assuming the co-operation of the Attorney-General, when will his assistance be a prerequisite to the maintenance of any action? If the injury occasioned to the plaintiff results in some peculiar and special injury to him, he can maintain the action in his own right, whereas, if his injury is one common to all members of the public, he must obtain the assistance of the Attorney-General.

In *Evan* v. *Corporation of Avon*[185] it was suggested that anything in the nature of a public trust must be enforced by the

182 *Rogers* v. *Trustees of School District No. 2 of Bathurst* (1896), 1 N.B. Eq. 266; *Robertson* v. *Wilson* (1915), 31 W.L.R. 708 (Alta. Sup. Ct.). In *S.M.T. (Eastern) Limited* v. *City of Saint John* (1945), 18 M.P.R. 374 (N.B.Ch.D.), on appeal (1946), 19 M.P.R. 103 (N.B.C.A.), the action was merely dismissed. A new action was taken in the name of the Attorney-General. See *Attorney-General of N.B.* v. *City of Saint John* (1948), 22 M.P.R. 389 (N.B.C.A.). In *Keay* v. *City of Regina* (1912), 5 Sask. L.R. 372 (Sup. Ct.), it was stated that the amendment could not be granted subject to such approval being obtained.

183 *Jenkins* v. *City of Winnipeg*, [1941] 1 W.W.R. 37 (Man. K.B.); *Fransden* v. *Lethbridge (City)* (1965), 52 W.W.R. 620 (Alta. Sup. Ct.).

184 (1915), 52 S.C.R. 30, at p. 46.

185 *Ibid.*, at pp. 69-70.

186 (1860), 29 Beav. 144, 54 E.R. 30 (Ch.). This decision has been generally accepted. See *Watson* v. *Mayor of Hythe* (1906), 22 Times L.R. 245; *Tanton* v. *City of Charlottetown* (1906), 1 East L.R. 282 (P.E.I. Sup. Ct.); *Merritt* v. *Chesley* (1888), N.B. Eq. C. 324; *Rogers* v. *Trustees of School District No. 2 of Bathurst* (1896), 1 N.B. Eq. 266. The Court in *Brogdin* v. *Bank of Upper Canada* (1867), 13 Gr. Ch. 544, reviewed the *Evan* case. Although inclined to follow it, the Court, in view of the decision in *Patterson* v. *Bowes* (1853), 4 Gr. Ch. 170, could not do so. The *Evan* case was considered and rejected in *Shrimpton* v. *City of Winnipeg* (1900), 13 Man. R. 211 (K.B.).

Attorney-General. The extent of the class interested in that trust was not a factor to be considered. In *Stockwell* v. *Southgate Corporation*[187] Porter J. suggested that it was only in those situations where the whole country was affected that the Attorney-General must be a party. These decisions approach the problem from diverse directions. In the first, no consideration is given to the size of the public group involved; and in the second, the nature of the matter attacked is not examined.

In *Livingstone* v. *City of Edmonton*[188] the Court did not consider the Attorney-General a necessary party where the matter in question was not of provincial interest, but only of local municipal concern.[189] This is consistent with the approach in the *Stockwell* case.

What is the public interest with which the Attorney-General is concerned? Is it the abhorrence occasioned at seeing municipal ratepayers subjected to an illegal by-law? The answer to this last question must clearly be no. The Attorney-General, as chief law officer within his territorial jurisdiction, must uphold that respect of law so essential to the maintenance of existing institutions. It is a matter of great public concern in any democratic society that agencies exercise delegated authority only within the confines of their limited powers. Any continuous violation of those powers must inevitably lead to disrespect for the entire governmental system, no matter how minute the segment of the public directly affected. It is this overriding interest that concerns the Attorney-General.

An action by the Attorney-General, on the relation of a ratepayer, serves the same function as an application to quash brought by an individual pursuant to s. 277(1) of the Ontario Municipal Act. Assuming status, the application to quash is brought as of right. No appraisal of the merits of the application is made prior to trial. The only restraint imposed on an applicant is the security requirement.[190]

When the Attorney-General is requested to lend his name to any proceeding, he must determine whether the situation is of such importance as to justify his intervention. If a conclu-

187 [1936] 2 All E.R. 1343.

188 (1915), 31 W.L.R. 609 (Alta. Sup. Ct.).

189 The same view was taken in *Gallagher* v. *Armstrong* (1911), 3 Alta. L.R. 443 (Sup. Ct.); *District of Oak Bay* v. *Gardner* (1914), 19 B.C.R. 391 (the dissenting judgment of McPhillips J. A.); *Smith* v. *Township of Raleigh* (1882), 3 O.R. 465 (High Ct.); *Steeves* v. *City of Moncton* (1914) 42 N.B.R. 465 (Ch.D.); *Attorney-General and Spalding Rural District Council* v. *Garner*, [1907] 2 K.B. 480.

190 Any person applying to quash a by-law must enter into a recognizance in the amount of $100.00.

sion favourable to the applicant is reached, the Attorney-General has no further responsibility. The proceedings will be styled in his name at the relation of the private individual. The individual relator has the sole conduct of the action, and will pay or receive costs in accordance with the ultimate determination made by the court. The interest or status of the relator is no longer in issue.[191] The position of the relator vis-à-vis the municipal respondent is not enhanced through the intervention of the Attorney-General; the allegations must still be proved.[192]

It is submitted that s. 280 of the Ontario Municipal Act, which restricts the time for the bringing of an application to quash to one year, should be amended. If the applicant alleges that the offending by-law is void, as opposed to only voidable, he should be entitled to have the merits of his contention determined at any time. If his application is sustained, the by-law should be quashed. This would effectively eliminate the difficulties inherent in the present situation.

# PART 2

## GROUNDS FOR ATTACKING BY-LAWS

### CHAPTER 4

### GENERAL CONSIDERATIONS

There are several criteria by which the validity of any by-law may be tested. The fundamental issue initially is getting the by-law before a court of competent judisdiction in order that it may be examined against one or more of these. A by-law may be obviously bad, but there is little, if any, satisfaction in this knowledge if an individual does not have the status required to invoke the aid of the court.

If it is possible to apply to quash the by-law or to bring a direct action attacking it, both of which methods have been previously discussed,[193] then the arguments against the offending enactment will be heard and determined.

The discretion invoked to dismiss an application to quash when the illegality of a by-law is shown by extraneous evidence has been discussed.[194] There was some attempt to import a

191 *Attorney-General and Spalding Rural District Council* v. *Garner*, [1907] 2 K.B. 480.

192 *Attorney-General* v. *City of Toronto* (1903), 6 O.L.R. 159 (High Ct.); *London County Council* v. *Attorney-General*, [1902] A.C. 165 (H.L.); *Attorney-General* v. *Harris*, [1961] 1 Q.B. 74 (C.A.).

193 *Supra*, cc. 1 and 3 respectively.

194 *Supra*, c. 1.

similar discretion into other types of actions where the validity of a by-law was in issue. In *Rex* v. *Laforge*,[195] a prosecution of an offence under a by-law, the Court would not concede the right to prove the illegality of that by-law by extraneous evidence where such illegality was not apparent on the face of the by-law. Fortunately these comments do not appear to have received general acceptance. A fundamental consideration when a by-law is under attack is that some person's liberty or property is invariably involved. No mere technicality, such as the manner in which the illegality of the by-law is established, should be permitted to uphold any illegal municipal action.

In *Hall* v. *City of Moose Jaw*[196] the Court described some of the procedures by which by-laws had been attacked:

> The validity of a by-law may be incidentally questioned otherwise than by motion to quash, namely, by a motion to quash a conviction made thereunder . . .[197] or in an action of replevin; . . .[198] or for a mandamus;[199] in an action for an injunction to restrain the breach of the by-law,[200] or to restrain the municipality from taking proceedings thereunder . . .[201] or a declaration that the by-law is invalid, or incidentally upon the trial of an action.

To the proceedings enumerated in this judgment might also be added an action for the return of moneys paid under a by-law,[202] and a review of a conviction by certiorari.[203]

If the validity of the by-law is in issue on a prosecution of

195 (1906), 12 O.L.R. 308 (Div. Ct.).

196 (1910), 3 Sask. L.R. 22 (Sup. Ct.).

197 *The Queen* v. *Osler* (1872), 32 U.C.Q.B. 324; *Rex* v. *Van Norman* (1909), 19 O.L.R. 447 (High Ct.); *Re Hickey* (1955), 111 C.C.C. 373 (B.C. Sup. Ct.); *Rex* v. *Laforge* (1906), 12 O.L.R. 308 (Div. Ct.); *Regina* v. *Cuthbert* (1880), 45 U.C.Q.B. 19; *Upton* v. *Brown* (1912), 3 W.W.R. 626 (Alta. Dist. Ct.); *Lee Gee Wing* v. *Amor* (1909), 10 W.L.R. 383 (B.C. Co. Ct.); *Regina* v. *Bowman* (1898), 6 B.C.R. 271 (Sup. Ct.); *Rex* v. *Standard Fuels Ltd.* (1943), 81 C.C.C. 61 (Ont. Co. Ct.), on appeal (1944), 82 C.C.C. 357 (Ont. C.A.).

198 *The Niagara Falls Suspension Bridge Company* v. *Gardner* (1869), 29 U.C.Q.B. 194.

199 *Re Joy Oil Co. & Gillies & Toronto* (1936), 67 C.C.C. 325 (Sup. Ct.). On appeal (1937), 68 C.C.C. 57 (Ont. C.A.), the Court reserved judgment until a summary application to quash could be brought, taking the view that this was too important a question to be decided on an indirect application.

200 *Regina ex rel. Andrews* v. *Lennox* (1953), 107 C.C.C. 179 (Ont. C.A.).

201 *Sampson* v. *City of Kingston*, [1941] O.W.N. 248 (High Ct.).

202 *Campbell* v. *Halvorsen* (1918), 11 Sask. L.R. 58 (Sup. Ct.).

203 *Rex* v. *Sun Chang* (1909), 14 B.C.R. 275 (Sup. Ct. en banc); *Regina* v. *Petersky* (1897), 5 B.C.R. 549 (Sup. Ct.).

a violation under it, the time at which the objection is raised may be of importance. Most provinces under their Summary Conviction Act provide that, if an appeal is based on an objection to an information, no judgment shall be given in favour of the appellant for any defect therein in substance or form, unless that objection was taken at the trial.[204]

In *Upton* v. *Brown*[205] the Court permitted an objection to the validity of the by-law to be raised, notwithstanding the fact that such objections had not been raised before the tribunal of first instance. In *Regina* v. *Bowman*,[206] on the other hand, the Court refused to consider such an objection.

In *Regina* v. *Koven*[207] the New Brunswick Court of Appeal held such an objection to be more than one of substance or form. Since the by-law was a nullity, the defendant was charged with an offence unknown to the law.

Regardless of the possibility of success before the tribunal of first instance, the grounds for appeal should be laid at this stage. The decision in *Regina* v. *Koven* seems to offer the most sensible approach to this problem.

Any discussion of attacks on by-laws should also be concerned with the probable results of discovering some illegality. Must the entire by-law be struck down, or need the bad parts only be eradicated? Some decisions compare a by-law to the "curate's egg", if bad in part it is bad throughout. This position does not acknowledge any right of severance.

The correct method of approaching this question of severance, it is submitted, was stated by the Supreme Court of the United States in *Connolly* v. *Union Sewer Pipe Company*:[208]

> If different sections of a statue are independent of each other, that which is unconstitutional may be disregarded, and the valid section may stand and be enforced. But if an obnoxious section is of such import that the other sections without it cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative.

Draper C. J. in *In re Michie and City of Toronto*[209] stated the same principle albeit in somewhat more colourful language:

> It appears that the debentures themselves were issued in conformity to the statute, not in compliance with this

204 See, for example, the Summary Convictions Act, R.S.N.B. 1952, c. 220, s. 53, as enacted by S.N.B. 1960, c. 72, s.9.

205 (1912), 3 W.W.R. 626 (Alta. Dist. Ct.).

206 (1898), 6 B.C.R. 271 (Sup. Ct.).

207 (1962), 39 D.L.R. (2d) 203.

208 (1901), 184 U.S. 540 (Harlan J.), at p. 565. The Court had under discussion the constitutional validity of a statute.

209 (1862), 11 U.C.C.P. 379, at p. 386.

> illegal provision in the by-law. The other portions of the by-law are independent of the fourth section, and it would have been, as I think, a legal and effectual by-law if this fourth clause had not been introduced. We may, I think, lop off this rotten limb, and leave the tree to which it was attached in full vitality. It is unnecessary to its existence, and to its bearing the fruit it was intended to produce . . . the defect is confined to the fourth section, and does not vitiate the rest . . .

Before any portion of a by-law can be severed, it must be determined if the invalid portion is an integral part of the whole. If such be the case, the entire enactment must fall.[210] This principle was applied by Kerwin J. in *Long Branch* v. *Hogle*.[211] The Court was there concerned with a by-law to restrict an area to residential uses. The penalty provision was contrary to the enabling legislation:[212]

> As Middleton J. A. stated in *Morrison* v. *Kingston*, [1937] 4 D.L.R 740 (Ont.), at p. 745, a part of a by-law found invalid must be clearly severable in order to uphold the remainder but that condition exists here where the only part found invalid is the additional penalty imposed by the second sentence of para. 2 of the bylaw. That additional penalty is not so bound up with the provision in para. 1 as to form part of the scheme adopted by the council of the municipality.

If the substantial portion of the by-law is illegal, it will be struck down on principle.[213] The decisions do not give any

210 A practical application of this rule can be seen in *Re Taylor and Town of Port Stanley* (1918), 14 O.W.N. 108 (High Ct.); *Re Hay and Town of Listowel* (1897), 28 O.R. 332 (High Ct.); *Rex* v. *McIlree*, [1950] 2 W.W.R. 1100 (B.C.C.A.); *Re McCormack and Township of Toronto*, [1948] O.W.N. 425 (High Ct.); *The King* v. *Morris* (1922), 56 N.S.R. 1 (Sup. Ct. in banco); *The King ex rel. Best* v. *Veinot* (1939), 14 M.P.R. 27 (N.S. Sup. Ct. in banco); *In re Clay and City of Victoria* (1886), 1 B.C.R. (Pt. 2) 300 (Sup. Ct.);*Rex* v. *Labovitch* (1933), 41 Man R. 393 (K.B.); *In re Clark and Township of Howard* (1885), 9 O.R. 576 (High Ct.); *Riches* v. *Richmond Township*, [1933] 3 D.L.R. 437 (B.C.C.A.); *The King* v. *Penner*, [1930] 1 D.L.R. 834 (Man. C.A.); *Regina* v. *Russell* (1883), 1 B.C.R. 256 (Sup. Ct.); *Strickland* v. *Hayes*, [1896] 1 Q.B. 290; *Robert Hudson Construction Co. Ltd.* v. *Town of Acton*, [1958] O.W.N. 165 (High Ct.); *Re Musty's Service Stations Ltd. & Ottawa*, [1959] O.R. 342 (C.A.); *Rex* v. *VanNorman* (1909), 19 O.L.R. 447 (High Ct.); *Verein Teutonia in Windsor* v. *Township of Sandwich West* (1961), 28 D.L.R. (2d) 706 (Ont. C.A.); *Rex* v. *Smeed's Security Storage Limited*, [1941] 2 W.W.R. 197 (Sask. C.A.); *Re Harper and City of St. Thomas*, [1939] O.R. 525 (High Ct.); *Bridge* v. *The Queen*, [1953] 1 S.C.R. 8.

211 (1948), 92 C.C.C. 147 (Can.).

212 *Ibid.*, at p. 150.

213 *Town of St. Leonard* v. *Fournier* (1956), 3 D.L.R. (2d) 315 (N.B.C.A.); *Re T. W. Hand Fireworks Co. Ltd. and City of Peterborough* (1962), 34 D.L.R. (2d) 102 (Ont. High Ct.).

clear indication as to whether the reference to the word "substantial" necessitates a qualitative or quantitative analysis of the illegal portion vis-à-vis the whole. If the by-law would be in such truncated form, after removing the illegal portion, that it would not have been passed by council in that form, it must be held bad in its entirety.[214]

In *City of Chatham* v. *The Sisters of St. Joseph*,[215] Robertson C. J. considered the problem of severing an illegal portion of a zoning by-law:

> These by-laws for imposing building restrictions usually set up a scheme which is designed and adopted as a whole and . . . it is from the very nature of the by-law a delicate operation for the Court to sever one part of such a by-law from the rest with any assurance that what is left of it sets forth any scheme that the council had put in operation.

In this case the Court had serious reservations concerning the ability of the Court to quash only a portion of a zoning by-law. Such by-laws in Ontario require the approval of the Municipal Board. To quash any provision of such a by-law would be tantamount to amending it without the approval of the Board. This question was raised in *Long Branch* v. *Hogle*,[216] but the Supreme Court of Canada avoided any conclusive determination. The issue was the validity of a provision for which there was no requirement of Municipal Board approval. Even assuming the efficacy of the argument against severability, the provision could be removed without affecting the entire validity of the by-law. However, it is doubtful if this argument will be upheld when a direct decision becomes essential.

If in any scheme set up under a zoning by-law some illegality is discovered in a portion of the by-law, the entire by-law should not, and probably will not, be struck down. This is particularly true if the provisions relating to any one district are complete or virtually so.

Bearing these considerations in mind, the criteria against which by-laws are tested will be examined. The applicability and the desirability of applying these criteria to zoning by-laws will be examined. It will be presumed in this discussion that the applicant or plaintiff has the required status to maintain the action.

---

214 *Nelson* v. *City of London*, [1944] O.W.N. 455 (High Ct.); *Re Bunce and Town of Coburg*, [1963] 2 O.R. 343 (C.A.); *Regina ex rel. Courneyea* v. *Pawych* (1960), 25 D.L.R. (2d) 222 (Ont. High Ct.).

215 [1940] O.W.N. 548 (C.A.), at p. 554. A similar view was expressed in *Carrick* v. *Corporation of Point Gray*, [1927] 2 W.W.R. 684 (B.C.C.A.).

216 (1948), 92 C.C.C. 147.

## CHAPTER 5

## ULTRA VIRES

When examining various judical pronouncements on municipal by-laws, it is apparent that the basis on which such enactments may be struck down are many and varied. They include bad faith, uncertainty, discrimination, delegation and ultra vires.[217] There appears to have developed a view in the cases that these grounds are individual and distinct. The fact of the matter is that the only legitimate basis for declaring a by-law invalid is excess of jurisdiction.

The fundamental question is whether the by-law is or is not ultra vires. The answer to this question may in fact involve difficult questions of interpreting the enabling legislation or the by-law purposely enacted under it. The ordinary rules of statutory construction are utilized,[218] but in addition certain ground rules have been developed by the courts in considering the validity of by-laws. In each case the by-law will be declared ultra vires because of a violation of certain of these rules. Essentially the courts are declaring the intention of the legislature which granted the powers to the municipality. For example, it is assumed that the legislature would not intend delegated authority to be exercised in a discriminatory fashion in the absence of express language to the contrary. It is the extent of the jurisdiction delegated to the municipal council that must be determined in each case. The only legitimate reason for striking down a by-law is because the action of the council is ultra vires.[219]

For discussion purposes, the grounds on which a by-law may be attacked will be considered as separate and distinct. Ultra vires will, therefore, be considered in its most elementary form, that is, non-compliance with the enabling legislation. The

217 The various grounds of attack are set out and briefly discussed in *Re Howard and City of Toronto* (1927), 61 O.L.R. 563 (C.A.).

218 For a discussion of these rules, reference may be had to Craies, *On Statute Law*, (6th ed., 1963), and Maxwell, *On the Interpretation of Statutes*, (12th ed., 1969).

219 This is supported by Warrington L. J. in *Short* v. *Poole Corporation*, [1926] Ch. 66, at p. 91. "My view then is that the only case in which the Court can interfere with an act of a public body which is, on the face of it, regular and within its powers, is when it is proved to be in fact ultra vires, and that the references in the judgments to bad faith, corruption, alien and irrelevant motives, collateral and indirect objects, and so forth, are merely intended when properly understood as examples of matters which if proved to exist might establish the ultra vires character of the act in question."

general powers of a municipality under the "peace, order and good government" clause of the Ontario Municipal Act[220] will also be examined.

The municipality is not a free agent within its territorial jurisdiction, but must confine its activities strictly within the provisions of the enabling legislation.[221] As stated by Spence J. in *Regina* v. *Jeffs*:[222]

> Manifestly there must be some limitation on this power of self-government; otherwise the results would be chaos. The first and most obvious limitation is found in the limitation imposed upon the power of the province itself by the British North America Act. The province has not itself universal power of legislation, and its creature, the municipality, can have no higher power. A second, and for many purposes of limitation of equal importance, is that where the Provincial Legislature has itself undertaken to deal with a certain subject matter in the interest of the inhabitants of the province, all legislation by the municipality must be subject to the provincial enactment. A third limitation is, I think, to be found in the express enactment of the Municipal Act.

The legislative capacity of the province must be one of the factors to be considered when the validity of a by-law is under attack. This can arise either where a provincial statute confers specific judisdiction on the municipality or where the municipality purports to act under a general power to enact by-laws for the health, safety, morality and welfare of the inhabitants of the municipality.[223] In the first instance then it is the provincial statute that must be subjected to scrutiny; in the second it is the by-law.[224]

Let us assume that the enabling legislation clearly purports to authorize the enactment of a particular by-law. The by-law will be invalid if the enabling statute is invalid. One approach that may be used to determine the constitutional validity of the

---

220 See also Municipalities Act, S.N.B., 1966, c. 20, s. 7 and 1st Schedule.

221 *Canadian Freightways Ltd.* v. *City of Calgary* (1967), 61 D.L.R. (2d) 253 (Alta. Sup. Ct.).

222 (1959), 30 C.R. 24, (Ont.), at pp. 28-29. See also the judgment of Middleton J. A. in *Re Morrison and City of Kingston*, [1938] O.R. 21 (C.A.); *Regina* v. *Tkachuk* (1960), 35 C.R. 293 (Sask. Magis. Ct.).

223 See, for example, the Ontario Municipal Act, s. 243.

224 In many cases the by-law will be attacked both on the ground that the province has no authority to delegate the legislative power under which the by-law is enacted, and alternatively that the by-law is bad in any event. This was the approach taken in *City of Montreal* v. *Beauvais* (1909), 42 S.C.R. 211.

statute is to examine its "pith and substance". The object of this approach is to determine the evil or problem to which the statute is directed.

If the statute is designed for "the promotion of public order, safety or morals", it will be presumed as one which *prima facie* invades the field of criminal law and not concerned with a legislative objective within the fields allocated to the province by the British North America Act.[225] The fact that the statute is concerned with these matters does not necessarily conclude the question; it is quite possible that provincial statutes which in fact promote "public order, safety or morals" may have sufficient relation to provincial objects as to be sustainable. If, incidental to the attainment of a statute's principal objective, a sanction is imposed, this is not enough to invalidate it.[226]

It is also quite conceivable that a provincial enabling statute is constitutionally valid, but a by-law enacted thereunder is void as being in substance an invasion of the federal legislative domain.[227]

The case of *McKay* v. *The Queen*[228] is of interest in considering these questions. The appellant was charged with a violation of a by-law relating to signs in that he had placed an election sign on his property contrary to the by-law. The enabling legislation conferred authority on municipal governments to regulate and prohibit the posting of signs. The Court dismissed the information, holding that on a proper interpretation of the by-law it had no application to this case.

The point is that in this instance the enabling legislation was general. If the Court had held the by-law was authorized

225 *Regina* v. *Keefe* (1890), 1 Terr. L.R. 280 (Sup. Ct.); *Regina* v. *Shaw* (1891), 7 Man. R. 518 (K.B. en banc). Criminal power is vested in the federal government under s. 91(27) of the British North America Act, whereas the province under s. 92(13) has jurisdiction over "property and civil rights".

226 For a consideration of other rules of constitutional interpretation see LaForest, G. V., *Disallowance and Reservation of Provincial Legislation*, (1955); Laskin, Bora, *Canadian Constitutional Law*, (rev. 3rd ed., 1969).

227 As stated in *Regina ex rel. Barrie* v. *Stelzer* (1957), 15 D.L.R. (2d) 280 (Man. C.A.), at p. 287: "The real and only purpose . . . [of the by-law provision] is to prevent children from having the easy access to cigarettes . . . This is a praiseworthy motive but it is . . . an 'attempt to improve on an Act of Parliament' . . . It may be that the provisions of that Act are inadequate to supress the evil of tobacco-using by children but it is not within the competence of provincial or municipal authorities to 'put teeth' into the criminal law."

228 [1965] S.C.R. 798. See also *Re Millard and Borough of Etobicoke*, [1968] 1 O.R. 56 (High Ct.).

by it, the enabling legislation as well would be invalid. Following the well-known principle, the Court interpreted the enabling legislation as authorizing only the enactment of by-laws within the province's constitutional capacity.

A municipal government, like an ordinary citizen, is bound by the general law of the province in which it is located.[229] It is accepted that local governments can pass by-laws which are supplementary, but not contrary, to the general law.[230] The general law in this sense would include – (1) federal legislative preserves, whether utilized or not, (2) provincial statutes, and (3) the common law.

Even where the municipality has been given express power to enact by-laws dealing with a specified subject, if the province at some later time enacts comprehensive legislation dealing with the same subject matter, the powers of the municipality will be deemed to have been revoked.[231]

The principle on which this is based is one dating back to antiquity. It is assumed that the legislature could not be of two minds at the same time. If a later statute is repugnant to a former, the legislature must be taken as having changed its mind and the later statute will govern.[232] This principle is equally applicable to municipal enactments. However, revocation by implication is never to be presumed. In fact the proper presumption is to the contrary.[233] Before such revocation will be implied, the two statutes must be judicially determined to be incapable of standing together.[234] If the two statutes are, in pith and substance, concerned with two different situations, both will stand.[235]

229 *In Re Brodie and Town of Bowmanville* (1876), 38 U.C.Q.B. 580.

230 See, for example, *Thomas* v. *Sutters*, [1900] 1 Ch. 10 (C.A.); *White* v. *Morley*, [1899] 2 Q.B. 34; *Regina ex rel. Neale* v. *Nendick* (1958), 14 D.L.R. (2d) 39 (B.C. Sup. Ct.).

231 *Regina* v. *Jeffs* (1959), 30 C.R. 24 (Ont. Cup. Ct.).

232 *Bourgon* v. *Town of Cumberland* (1910), 22 O.L.R. 256 (Div. Ct.); *Re Pane Niagara Enterprises Ltd. and City of Niagara Falls*, [1968] 1 O.R. 287 (High Ct.).

233 *Grand Trunk Railway Co. of Canada* v. *Robertson* (1907), 39 S.C.R. 506; *Goldsmith* v. *City of Indianapolis* (1935), 196 N.E. 525 (Ind. Sup. Ct.); *Barker* v. *Edger*, [1898] A.C. 748 (P.C.).

234 *Regina* v. *Canada Safeway Limited* (1955), 16 W.W.R. 331 (Alta. C.A.); *Way* v. *City of St. Thomas* (1906), 12 O.L.R. 240 (Div. Ct.); *Regina* v. *Haigh and Haigh* (1953), 107 C.C.C. 294 (B.C. Co. Ct.).

235 *Regina* v. *Kessler* (1961), 38 W.W.R. 655 (B.C. Magis. Ct.).

A practical application of this principle is shown by the remarks of Bird J. A. *In re Vancouver Incorporation Act*:[236]

> . . . the intent of the Legislature, as expressed in section 7 of the Milk Act, is to prescribe in positive and affirmative terms standards of fitness of milk for human consumption, applicable throughout the Province . . . Assuming that the sections of the city Act relied upon do give power to . . . forbid the sale of raw . . . milk . . . I think that those powers are repugnant to and inconsistant with the provisions of the Milk Act. In those circumstances, in my opinion, the Milk Act must be taken to have repealed by implication such powers, if any, as the council may have had under the city Act to legislate in respect of pasteurization of milk.

The most elementary example of an ultra vires by-law is where the council is empowered to do A and in fact does B. There is no doubt of the result in such a situation; the by-law must be struck down. This is what, on an application to quash, is known as a defeat apparent on the face of the by-law,[237] an area in which no discretionary power to refuse the application is admitted. No useful purpose can be achieved by entering into a prolonged and belabored review of the many cases dealing with this elementary situation.[238]

The enabling legislation may be drawn in such fashion that it is difficult, if not impossible, to draft and enact by-laws which can effectively implement the powers conferred. Such difficulty will not exhonerate the municipality from strict compliance.[239]

---

236 (1945), 62 B.C.R. 114 (C.A.), at pp. 127-128. See also the dissenting judgment of O'Halloran J. A. in *Rex* v. *Woods* (1939), 73 C.C.C. 386 (B.C.).

237 *Attorney-General* v. *Campbell* (1872), 19 Gr. Ch. 299.

238 Examples of this situation are found in such cases as *Rex* v. *Storie*, [1930] 3 W.W.R. 366 (Alta. C.A.); *Ross* v. *The Queen*, [1955] S.C.R. 430; *Regina* v. *On Hing* (1834), 1 B.C.R. (Pt. 2) 148 (Sup. Ct.); *City of Halifax* v. *Clusen* (1886), 13 N.S.R. 521 (Sup. Ct. in banco); *Craig* v. *Town of Qu'appelle* (1917), 10 Sask L.R. 307 (Sup. Ct. en banc); *Regina* v. *Smith* (1899), 31 O.R. 224 (Div. Ct.); *Re Howard and Village of Swansea*, [1947] O.W.N. 715 (C.A.); *Wiener and Anderson* v. *County of Elgin*, [1947] O.W.N. 360 (High Ct.); *City of Toronto* v. *Elias Rogers Co.* (1914), 31 O.L.R. 167 (C.A.), *Rex* v. *Doll* (1907), 6 W.L.R. 512 (Terr. Sup. Ct.); *Rex ex rel. Thompson* v. *Russelle* (1951), 100 C.C.C. 175 (Ont. C.A.); *Rex* v. *Wakeley* (1943), 80 C.C.C. 368 (B.C. Co. Ct.); *Re Kowal and Township of Nelson*, [1953] O.W.N. 463 (High Ct.); *Regina ex rel. Dixon* v. *Knapman*, [1953] O.W.N. 541 (C.A.); *Re Chappus and Town of La Salle* (1928), 62 O.L.R. 140 (High Ct.); *Re McLeod and Town of Kincardine* (1876), 36 U.C.Q.B. 617; *Re Cardwell and Graham and Township of Asphodel*, [1953] O.W.N. 967 (High Ct.).

239 *Regina* v. *Horback* (1967), 64 D.L.R. (2d) 17 (B.C. Sup. Ct.).

A municipal ordinance may be held ultra vires even where there is express power to enact a by-law encompassing the same subject matter. If, for example, a by-law recites the basis for its authority, the validity of that by-law must be determined on the court's interpretation as to whether the statutory provision recited does in fact confer the authority alleged. If the provision referred to in the by-law does not confer the authority, the by-law will be ultra vires. It is not permissible to rely on any other provision which expressly confers such authority.[240] From the standpoint of the municipality it would be desirable never to refer to the statutory power under which the by-law is enacted. This is particularly so in view of the principle enunciated by Rose J. in *Re Croome and City of Brantford*:[241]

> . . . the law is well settled that if the by-law states no particular power as its basis, it will be judicially regarded as emanating from that power which would have warranted its passage.

A municipality cannot enact a by-law under an express statutory provision with the sole purpose of carrying out some ulterior objective. Attempts have been made by imposing peculiar regulations dealing with the construction and placement of service station buildings to restrict the area in which they could be established. The courts took the position that this was really an attempt to regulate and control the use of land. The municipality was really endeavouring to avoid the more rigid controls required for the implementation of zoning by-laws. Since the restrictions were not enacted for the purpose intended by the legislature under the relevant provision they were illegal.[242]

A traditional approach of municipal governments when confronted with the task of defending doubtful by-laws has been to depend on the "peace, order and good government" clause. S. 243 of the Ontario Municipal Act provides:

> Every council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act as may be deemed expedient and are not contrary to law . . .

Middleton J. A. in *Re Morrison and City of Kingston*,[243] after setting out some of the restrictions on municipal powers,

---

240 *Melton* v. *City of Calgary* (1953), 10 W.W.R. (N.S.) 428 (Alta. Dist. Ct.); *Regina* v. *Reed* (1886), 11 O.R. 242 (High Ct.). But see *Applewood Dixie Ltd.* v. *Town of Mississauga*, [1969] 2 O.R. 467 (C.A.).

241 (1884), 6 O.R. 188 (High Ct.), at p. 193.

242 *Re Cities Service Oil Co. Ltd. and City of Kingston* (1956), 3 D.L.R. (2d) 126 (Ont. High Ct.).

243 [1938] O.R. 21, at p. 26.

dealt with the section of the then Municipal Act analogous to the present s. 243:

> Very few subjects falling within the ambit of local government are left to the general provisions of s. 259 . . . These express powers are, I think, taken out of . . . s. 259 . . . matters of 'health' are generally regulated by The Public Health Act, . . . matters of 'safety' are covered by a multitude of Acts . . . matters of 'morality' are generally dealt with by the Parliament of the Dominion . . . These topics are entirely removed from the sphere of legislation of municipal councils. The power to legislate for the 'welfare' of the inhabitants is too vague and general to admit of definition. It may mean so much that it probably does mean very little. It cannot include powers that are otherwise specifically given, nor can it be taken to confer unlimited and unrestrained power with regard to matters in which a conditional power only is conferred upon the subsidiary legislature.

It is apparent, not only from the *Morrison* case, but from the authorities generally, that very little latitude will be accorded to municipal governments under the "peace, order and good government" clause.[244] If some specific authority or grant of power is not conferred, a council would have great difficulty in justifying its by-law under the general clause. It would seem that no by-law dealing with a subject not included with the scope of municipal concern, no matter how advantageous or desirable it may be, will be supported.[245] The courts are not inclined to extend municipal powers by implication. [246] Additional powers will not be implied unless it is clear beyond question that the legislature intended such powers to be given.

In New Brunswick municipalities are usually given authority to pass by-laws for the "peace, order and good government" of the municipality. Certain specific powers are then enumerated with the provision that these are not to restrict the gener-

---

244 *Regina ex rel. Collins* v. *Pugliese* (1953), 107 C.C.C. 38 (Ont. Magis. Ct.); *Hayes* v. *Thompson* (1902), 9 B.C.R. 249 (Sup. Ct.); *Tavener* v. *Port Stanley*, [1945] 4 D.L.R. 710 (Ont. C.A.); *Re City of Berlin and County Judge of County of Waterloo* (1914), 33 O.L.R. 73 (High Ct.); *Rex* v. *Kite* (1949), 8 C.R. 278 (B.C. Co. Ct.); *Re Goudie and City of Kitchener* (1922), 22 O.W.N. 380 (High Ct.); *Re Davies* v. *Municipality of Clifton* (1859), 8 U.C.C.P. 236; *Rex* v. *Mustin* (1940), 74 C.C.C. 364 (Ont. Sup. Ct.). On the question of health, the decisions from the lowest to the highest Court are interesting in the case of *Village of Forest Hill* v. *Metropolitan Toronto*, [1955] O.R. 889 (High Ct.), [1956] O.R. 367 (C.A.), (1957), 9 D.L.R. (2d) 113 (Can. Sup. Ct.).

245 *Cornwall* v. *Township of West Nissouri* (1875), 25 U.C.C.P. 9.

246 *McLean and Town of Cornwall* (1871), 31 U.C.Q.B. 314.

ality of the general power.[247] This type of provision, at least *prima facie*, would seem to be much broader in scope than the Ontario provision. There does not appear to be any specific decision in New Brunswick in which this clause has been dealt with so the matter is still one of some speculation.

The specific powers in the New Brunswick provision are deemed to be included within the "peace, order and good government" provision, but do not restrict or qualify those general powers. Can the special powers given under such a provision be supplemented by the general clause, so as to extend the authority specifically given?

An attempt was made to justify this approach by the City of Montreal in *Vic Restaurant Inc.* v. *City of Montreal*.[248] The only restriction placed on the general powers of the City was the requirement that its by-laws be subject to the Charter and subordinate to the general laws of the province and country. The section expressly provided that the general powers were to be in addition and supplementary to the specific powers granted. Locke J. rebuffed the City's attempt to rely on the "peace, order and good government" clause. He held that, since the power under which the City purported to act was specifically granted, the general provision could not be relied on to supplement those specified powers.[249]

Despite the generality of the "peace, order and good government" clause, it will not be construed as supplementing the specific powers enumerated, and cannot be used to bolster a doubtful enactment. It seems equally certain that a New Brunswick court charged with interpreting the more general "peace, order and good government" provision will adopt the same confining approach as its Ontario counterpart. The section will not be construed as conferring unlimited powers, but, on the contrary, its application will be restricted so that what the municipality will be permitted to do, and what it appears from the statute to be able to do, will be two totally dissimilar things.

For the advocates of local autonomy the interpretation which has developed concerning the "peace, order and good government" clause is a most undesirable one. From a realistic point of view the approach is meritorious. Municipalities, at

247 See, for example, Municipalities Act, S.N.B. 1966, c. 20, s. 7 and 1st Schedule. This is not something peculiar to New Brunswick. An examination of various statutes and city charters would disclose many similar approaches throughout the country.

248 (1958), 17 D.L.R. (2d) 81 (Can. Sup. Ct.).

249 See also *Regina ex rel. Cox* v. *Thompson* (1957), 9 D.L.R. (2d) 107 (Ont. C.A.); *Regina* v. *Anderson* (1958), 27 C.R. 237 (Alta. Dist. Ct.).

least in thinly populated rural areas, do not have ready access to the advice so essential to implementation of a comprehensive legislative program which will not only be effective, but also contain the necessary safeguards for the protection of the inhabitants. It is not politically feasible for the province to grant unlimited autonomy to the large municipal agglomerations which now exist. The intendant result could be a political entity rivaling the province itself in authority and autonomy.

Ultra vires zoning by-laws will be treated no differently than other such municipal enactments.

## CHAPTER 6

## NON-COMPLIANCE BY COUNCIL WITH INTERNAL PROCEDURE

It is usual for most municipalities to have a procedural by-law. These usually relate to a variety of matters — from the manner of handling petitions[250] to the procedure which must be followed in enacting by-laws. Frequently there is a provision that no by-law can be given all three readings at any one meeting.[251] This is to enable sober second thoughts on an intended course of legislative action. This type of provision can usually be waived by the unanimous consent of the members of the council.

What is the effect of a failure to comply substantially, or at all, with the procedural by-law?

Before considering this question, it is perhaps desirable to consider the nature of a by-law, that is, what is its effect when passed. Coady J. in *McIsaac* v. *British Columbia Electric Co. Ltd.*[252] states:

> A by-law of the municipality is a statute just as much as any statute by the provincial Legislature or of the Parliament of Canada, providing it is within the statu-

250 Under some provisions a petition may be required as a prerequisite to council having jurisdiction to pass a particular by-law. The procedural by-law may deal with the manner in which the signatures are to be verified, among other things.

251 In New Brunswick this is a statutory requirement. See S.N.B. 1966, c. 20 s. 13(2).

252 [1951] 1 D.L.R. 523 (B.C. Sup. Ct.), at p. 525. See also *Grand Junction Railway Co.* v. *County of Peterborough* (1882), 8 S.C.R. 76 (judgment of Gwynne J.); *Speakman* v. *City of Calgary* (1908), 1 Alta. L.R. 454 (Sup. Ct. en banc); *Rex* v. *Calbic* (1920), 61 D.L.R. 203 (B.C.C.A.); *City of Victoria* v. *Meston* (1905), 11 B.C.R. 341 (Sup. Ct. en banc); *Regina* v. *City of East Kildonan, Ex parte Towns* (1965), 50 D.L.R. (2d) 381 (Man. Q.B.).

> tory authority granted to the municipality. Within the power granted, the municipalities have complete jurisdiction to legislate with respect to all matters within the ambit of the empowering legislation. The legislative enactments of a municipality are commonly referred to as 'by-laws' but it matters not by what name the legislation is described. Once the by-law is passed it is as much legislation in force as any other statute law.

It is elementary that a proper by-law, enacted with all due solemnity, is effective for the purposes for which it was intended and will be enforced by the courts, the same as any other legislation. Bearing in mind the effect of a by-law, what has been the approach by the courts where a procedural by-law has been disregarded?

In cases such as *Re Wilson and Town of Ingersoll*,[253] *In re By-law No. 8078 of the City of Winnipeg*,[254] and *Reaman* v. *Winnipeg*[255] the Courts held that a failure to comply with the procedural by-law was a proper objection and, when properly attacked, the by-law so enacted should be struck down.

Notwithstanding the merits of these decisions, they must now be taken as being at variance with the weight of judicial opinion,[256] and must be considered as overruled. The general principle is that no departure from any procedural by-law will be fatal.[257] If the procedure is laid down by statute, the situation is different. In that situation a failure to comply will result in the courts striking down any by-law so passed.[258]

253 (1894), 25 O.R. 439 (High Ct.).

254 (1914), 6 W.W.R. 576 (Man. K.B.).

255 (1914). 17 D.L.R. 582 (Man. K.B.).

256 *Re Howard and City of Toronto* (1928), 61 O.L.R. 563 (C.A.); *City of Toronto* v. *Phillips* (1931), 40 O.W.N. 492 (High Ct.); *Rannard Shoe Limited* v. *City of Winnipeg*, [1937] 1 W.W.R. 539 (C.A.); *Re Caldwell and Town of Galt* (1905), 10 O.L.R. 618 (High Ct.); *Re Kelly and Town of Toronto Junction* (1904), 8 O.L.R. 162 (High Ct.); *Re Jones and City of London* (1899), 30 O.R. 583 (High Ct.); *Wilson* v. *Town of Ingersoll* (1916), 38 O.L.R. 260 (High Ct.); *Re Brewer and City of Toronto* (1909), 19 O.L.R. 411 (C.A.); *Village of Merritton* v. *County of Lincoln* (1917), 41 O.L.R. 6 (C.A.); *Re Maycock and City of Winnipeg* (1914), 24 Man. R. 646 (K.B.); *Re Armour and Township of Onondaga* (1907), 14 O.L.R. 606 (High Ct); *Shilleto Drug Company* v. *Town of Hanna*, [1931] 3 W.W.R. 108 (Alta. Sup. Ct.); *Re Cameron and City of Victoria* (1905), 2 W.L.R. 387 (B.C. Sup. St. en banc); *Lougheed* v. *District of Surrey* (1957), 22 W.W.R. 504 (B.C.C.A.).

257 *In Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512, there was a violation of the procedural by-law relating to the posting of notices. The Court found the by-law bad for other reasons.

258 *Re Rural Municipality of Macdonald* (1894), 10 Man. R. 294 (Q.B.); *Boiley* v. *La Corporation de St.-Henri de Taillon* (1920), 61 S.C.R. 40; *In Re Local Option By-law of Rural Municipality of Rosedale* (1948), 56 Man. R. 108 (K.B.).

The reason the courts have not insisted on strict compliance with a procedural by-law is simply because of a lack of desire to become embroiled in the internal squabbles of the council. The officer presiding over the council meeting is the authority to whom an appeal on procedure must be made. If not satisfied with his ruling, an appeal can be made to the entire council. The courts have never considered themselves as an appellate court from decisions of council, at least on questions of procedure.

The decisions indicate that the rule is one of general application. In *Hirsh* v. *Town of Winnipeg Beach*[259] Miller J. A. indicated that, since the members of council who were present did not object, any procedural defect would not be fatal.

In *Heffernan* v. *Municipal Corporation of Walkerton*[260] Street J. was more emphatic:

> . . . the provisions of the [procedural] by-law . . . are binding upon the council, and can be insisted upon by any member, and a by-law passed in disregard of its provisions, and of the protest of the minority should not be supported, when it is properly attacked.

As indicated in both of these decisions, there must be some protest by a member of the council. It may well be that only a councillor would have status to question the by-law under these circumstances.

Throughout the cases the attitude has been that procedural by-laws are concerned only with a matter of internal regulation of council business and therefore objections to their violation are open only to council members. No cognizance seems to have been taken of the fact that the procedure is laid down by by-law. It is an accepted fact that the Crown is not bound by statute, unless made expressly subject thereto, but no similar exemption has been extended to a municipality. It has always been assumed that a by-law could only be amended by proper legislation specifically enacted for that purpose. Merely by ignoring or disregarding the by-law the situation will not be altered. The council has no higher or greater right to disregard or violate a by-law than does any individual resident subject to its control. The only right enjoyed by it, which is foreign to the individual, is the right of alteration.

An argument might possibly be made that, by passing a by-law contrary to the provisions of the procedural by-law, the council has by implication revoked the procedural requirements. Revocation by implication will usually only be effected where the two enactments deal with the same subject matter. The

---

259 (1961), 26 D.L.R. (2d) 659 (Man.).
260 (1903), 6 O.L.R. 79, at p. 86.

intention could not be imputed to council of revoking the requirements. The argument would not be an acceptable one.

A great deal may depend on the form in which the by-law is drafted. If it is merely directory, non-compliance should not be fatal. If, on the other hand, it is in mandatory terms, one would be inclined to adopt the view of Henry J. in *Wright* v. *Incorporated Synod of the Diocese of Huron*[261] that anything done contrary to it is void. To countenance a disregard of one by-law by the municipality is to do so in other areas as well.

It is submitted that, if the procedural by-law is in mandatory form, council must follow it on pain of having its enactments struck down. By passing such a provision, council has held out to the residents of the municipality the manner in which business will be conducted. If the provisions can be arbitrarily abandoned, the rights of a resident may be abrogated. It is only too obvious that councils, particularly in Ontario, have given zoning by-laws all readings at one meeting merely for the purpose of defeating the rights of an applicant for a building permit.[262] These rights could be more adequately safeguarded if at least substantial compliance with the procedural by-law was treated as a prerequisite to a valid enactment.

## CHAPTER 7

## NON-COMPLIANCE WITH STATUTORY PREREQUISITES

It is not uncommon for enabling legislation to require the doing of some specific act before a council is seized with jurisdiction to implement its provisions.[263] The court is continually confronted with situations where there has been varying compliance with these prerequisites.

If the attack on the by-law is made pursuant to statutory proceedings to quash, the applicant will be confronted with the discretionary power of the court. The illegality resulting from non-compliance with a statutory prerequisite could only be shown by extraneous evidence. In the early years of the development of this procedure, illegality could not be established in this manner. It was only by means of an incidental attack that the by-law could be effectively attacked.

One question which always arises is how conclusive must the evidence be before the courts will hold that a statutory con-

261 (1885), 11 S.C.R. 95.

262 See, for example, *City of Ottawa et al.* v. *Boyd Builders Ltd.*, [1965] S.C.R. 408.

263 In some instances petitions are required before council can act. In these situations the sufficiency of the petition filed must be considered. In some jurisdictions notice of intention to consider the passing of a by-law must be published.

dition has not been complied with. The onus is always on the person alleging the non-compliance even though many of the facts essential to establish it are known only to the municipal officials.

Perhaps the most expeditious manner of determining the development of the law with regard to statutory conditions is to examine one type of prerequisite. The development in one area is similar to that in all others. One of the early statutory requirements with which the courts were concerned was that of notice.

In *Lanson* v. *Township of Reach*[264] it was recognized that the purpose of giving notice of the intended consideration of a by-law was to enable interested persons to appear and object. If the notices were not clear and precise, they would serve no useful purpose. In that case the Court in its wisdom left the applicant to raise the objection on a prosecution for nuisance resulting from the obstruction of a road allowance. A similar conclusion was reached in *Re Standley and Municipality of Vespra and Sunnidale*.[265] The material difference in this case was that the applicant was very much aware of what was transpiring. In fact he had been heard by council. There was also some evidence that notice had been given.

The early approach seemed to be to ask whether the object of the legislative condition has been obtained, not whether the statute has been strictly complied with. If it was obvious that the plaintiff was aware that the by-law was going to be considered, he could not later suggest that the notice published was improper.[266] Once it was shown that no notice or no proper notice as required by the statute had been given, a burden was cast upon the municipal respondent to establish that the non-compliance had not affected the result.[267] This would seem in most cases to be an impossible burden.[268]

264 (1860), 19 U.C.Q.B. 591.

265 (1859), 17 U.C.Q.B. 69.

266 *Re Robinson and Village of Beamsville* (1906), 8 O.W.R. 689 (High Ct.).

267 As stated by Riddell J. in *Re Begg and Township of Dunwich* (1910), 21 O.L.R. 94, at p. 99, quoting Osler J. A. in *Re Pickett and Township of Wainfleet* (1897), 28 O.R. 464, at p. 467: " 'the onus of proving that the omission to comply with' the statutory direction 'has not affected the result is upon the respondents.' " See also *Re Angus and Township of Widdifield* (1911), 24 O.L.R. 318 (Div. Ct.).

268 *In re Young and Township of Binbrook* (1899), 31 O.R. 108 (Div. Ct.), where a large number of voters were improperly prevented from voting, it was held that the onus had been met. The most that could be expected is that all of the disqualified voters would have voted against the by-law. When the number of votes, equal to the number of disqualified voters, were added to the negative votes cast, there were still sufficient on the affirmative side to approve it. No consideration was given to the effect that the improper act of the municipal officials may have had on other voters.

Much of the early uncertainty and perhaps laxity in requiring strict compliance with the statute stemmed from the uncertainty of the court itself in the area of summary applications to quash. For example, in *Wannamaker* v. *Green*[269] where it was necessary for the plaintiff to prove a by-law to substantiate his claim, strict proof was required by Armour J.:

> It is to be borne in mind that this is not the case of an application by the defendants to quash the by-law in question where the Court might or might not give effect to the objection as to posting up and publication, although I think they ought; but it is the case of a plaintiff bringing an action which he can maintain only by establishing this to be a valid by-law, and to do this it is necessary for him to shew that the conditions precedent to the right of the council to pass this by-law have been complied with.

The approach taken on a summary application is perhaps best stated in *In Re Caswell and Rural Municipality of South Norfolk*:[270]

> On an application, therefore, to quash a by-law the consideration of the questions to be determined should be undertaken in the spirit and with the object of ascertaining whether there has been a substantial compliance with all the requirements of the statute, and not of finding some slight or trival departure on which to hinge a decision adverse to the validity of the by-law.

and further in the same decision:[271]

> Where, however, there has been a virtual compliance with the statute and the departures complained of have been rather from the letter than from the spirit of the enactment, the court has discretion in determining whether there has been a sufficient compliance, and whether effect should be given to the objections on an application to quash.

If the validity of a by-law was incidental to the creation and maintenance of a private right, the plaintiff was required to prove that the municipality had complied strictly with the statutory requirements. On an application to quash, if substantial compliance was shown, the application would be dismissed. In some circumstances in this proceeding certain presumptions might be made against the applicant. If it was established that he had been involved in instigating the introduction and passage of the by-law, then he would be deemed to have waived

---

269 (1885), 10 O.R. 457, at p. 468. A similar approach was taken in *Winter* v. *Kcown* (1863), 22 U.C.Q.B. 341. There seems to be no presumption in favour of the validity of the by-law when a plaintiff must prove it to make out his case.

270 (1905), 15 Man. R. 620 (K.B.), at p. 623. See also *Re Johnston and Township of Tilbury East* (1911), 25 O.L.R. 242 (C.A.).

271 15 Man. R., at pp. 622-623.

the benefits of the statutory requirements.[272] The doctrine of estoppel might also involved against the applicant. It must now be taken as settled that an applicant cannot be estopped from relying on a statutory condition.[273]

In some situations, even if the enabling legislation has not been complied with, the courts refuse to strike down the by-law. This has occurred in cases where the effect of the by-law is spent,[274] where substantial amounts of money have been raised under it,[275] where the defect could be rectified by it being repassed and the conditions met, or where there was no intention to violate the statute but an innocent mistake was made.[276]

After years of uncertainty, the position became solidified at least in relation to enactments resulting in an interference with property or other common law rights. With regard to this type of by-law, the law as stated by Strong J. in *O'Brien* v. *Cogswell*[277] has been accepted:

> The general principle applicable to the construction of statutes imposing and regulating the enforcement of taxes for general and municipal purposes are well settled. Enactments of this class are to be construed strictly, and in all cases of ambiguity which may arise that construction is to be adopted which is most favourable to the subject. Further, all steps prescribed by the statute to be taken in the process either of imposing or levying the tax are to be considered essential and indispensable unless the statute expressly provides that their omission shall not be fatal to the legal validity of

---

272 See the judgment of Meredith J. A. in *Re Johnston and Township of Tilbury East* (1911), 25 O.L.R. 242.

273 Garrow J. A. in *Re Johnston and Township of Tilbury East* (1911), 25 O.L.R. 242, was extremely doubtful if estoppel could apply. See also *Township of McKillop* v. *Township of Logan* (1899), 29 S.C.R. 702 (judgment of Strong J.); *Tonks* v.*Reid*, [1967] S.C.R. 81; *White* v. *Rural Municipality of Louise* (1891), 7 Man. R. 231 (K.B.).

274 *Grant and Township of Puslinch* (1868), 27 U.C.Q.B. 154.

275 *Boulton and Town of Peterborough* (1858), 16 U.C.Q.B. 380.

276 *Re Vandyke and Village of Grimsby* (1906), 12 O.L.R. 211 (Div. Ct.); *In re Huson and Township of South Norwich* (1892), 19 O.A.R. 343.

277 (1890), 17 S.C.R. 420, at pp. 424-425. See also *Wanderers Investment Company* v. *City of Winnipeg* (1917), 27 Man. R. 450 (K.B.); *In re Huson and Township of South Norwich* (1892), 19 O.A.R. 343; *Re Ostrom and Township of Sidney* (1888), 15 O.A.R. 372; *Re Greig and City of Toronto*, [1934] 457 (High Ct.); *Cassis* v. *St. Thomas*, [1943] 1 D.L.R. 623 (Ont. Sup. Ct.); *In re Robertson and Township of North Easthope* (1899), 16 O.A.R. 214; *Springfield Farm Developments Ltd.* v. *Rural Municipality of North Kildonan* (1965), 53 D.L.R. (2d) 95 (Man. Q.B.).
O.R. 514 (High Ct.); *Wannamaker* v. *Green* (1885), 10 O.R.

> the proceedings; in other words, the provisions requiring notices to be given and other formalities to be observed are to be construed as imperative, and not as merely directory, unless the contrary is expressly declared.

An allegation of non-compliance with a condition precedent to jurisdiction must be subjected to the principles enunciated in the *O'Brien* case. If the non-compliance is established, the by-law must be struck down.

An examination of the decisions dealing with the publication of notice of intention to consider a by-law indicate how strict a compliance with the statute will be exacted by the courts. In *Re Ostrom and Township of Sidney*[278] Osler J. A. said:

> That notice is to be given in the prescribed manner to the persons who may be prejudicially affected by the act, in order, it may be supposed, to enable them to deliberate upon the course they will adopt in reference to it and unless both the first and last days are excluded they do not get a whole month for that purpose.

The notice requirement will not be met unless it is clear and explicit. As stated in *In re Birdsall et al. and Township of Asphodel*:[279]

> A general announcement that the council intended to pass a by-law for this purpose conveys no information to the public as to when it is to take place in a month or six months or at any future time the council may choose to take the matter up . . .
>
> . . . the Legislature must have certainly meant by the words used to have required a time to be named at which those interested could attend and be heard . . . any person desiring to be heard would be bound to obtain by personal inquiry the necessary information, which I think the statute required the council to give to him in the published notices.

The courts accepted the proposition that the legislature meant exactly what it said, and it was not for the courts to consider the wisdom of these provisions. Many of the earlier decisions indicating that strict compliance with the statute will

---

278 (1888), 15 O.A.R. 372, at p. 377. See also *Hall* v. *Rural Municipality of South Norfolk* (1892), 8 Man. R. 430 (Q.B.). The technical requirements of the publication are described in cases such as *In re Coe and Township of Pickering* (1865), 24 U.C.Q.B. 439; *In re Miles and Township of Richmond* (1869), 28 U.C.Q.B. 333; *Town of Dauphin* v. *Cottick* (1959), 21 D.L.R. (2d) 719 (Man. C.A.). The *Coe* and *Miles* cases were reluctantly followed in *Brophy and Village of Gananoque* (1876), 26 U.C.C.P. 290.

279 (1880), 45 U.C.Q.B. 149, at pp. 152-153. See also *In re Laplante and Town of Peterborough* (1884), 5 O.R. 634 (High Ct.).

not be necessary are explained on the basis that it was not established that a notice had not been given.[280] In cases where the applicant had actually appeared before the council but there was some doubt as to the requirements having been met, the applicant's appearance was treated as confirming the fact of proper notice. It is now acknowledged that the function of the courts is to ascertain if there has in fact been strict compliance with the condition precedent. On any application to quash a by-law it will be presumed, until the contrary is shown, that all statutory prerequisites to the passing of the by-law have been complied with.[281]

If notice is required by the statute, it is not necessary for the applicant to prove that he has been injured by the lack of notice or that some different result would have necessarily followed the giving of proper notice.[282]

Any condition which must be met in order to confer jurisdiction on council must be strictly complied with, and any failure to do so will be fatal.[283] In this respect, notice is no different than any other condition precedent. For example, if a petition is necessary before council has authority to pass an early closing or other by-law, and the required number of signatures are not appended thereto, or the proper person has not initiated the petition, any by-law passed in pursuance to the petition will be bad.[284] Similarly, if the by-law which is finally enacted is different from the action requested in the petition, this will also prove to be fatal.[285] If the council has jurisdiction to pass the by-law without the necessity of a petition, the en-

280 *Re Ostrom and Township of Sidney* (1888), 15 O.A.R. 372; *In re Birdsall et al. and Township of Asphodel* (1880), 45 U.C.Q.B. 149.

281 *Lafferty* v. *Municipal Council of Wentworth and Halton* (1851), 8 U.C.Q.B. 232.

282 As stated in *Re Cross and Town of Gladstone* (1905), 15 Man. R. 528, at pp. 534-535: "It may be, and probably is, the fact that all interested parties really knew in advance of the intention to have the third reading on the 5th of June. But in face of the requirements of the statute I cannot assume that they so knew, or even that, if they did know, those requirements could be treated as immaterial."

283 *Rex ex rel. Donald* v. *Thompson* (1929), 24 Sask L.R. 4 (C.A.); *Re Howard and City of Toronto* (1928), 61 O.L.R. 563 (C.A.); *Township of Waterloo* v. *Town of Berlin* (1904), 8 O.L.R. 335 (judgment of Garrow J. A.); *In re Salter and Township of Beckwith* (1902), 4 O.L.R. 51 (High Ct.).

284 *Halladay* v. *City of Ottawa* (1907), 14 O.L.R. 458 (High Ct.), on appeal (1907), 15 O.L.R. 65; *Re Greig and City of Toronto*, [1934] O.R. 514 (High Ct.); *City of Sarnia* v. *McMurphy* (1920), 47 O.L.R. 496 (C.A.); *Township of McKillop* v. *Township of Logan* (1899), 29 S.C.R. 702.

285 *Cassis* v. *St. Thomas*, [1943] 1 D.L.R. 623 (Ont. Sup. Ct.); *Rex ex rel. Donald* v. *Thompson* (1929), 24 Sask L.R. 4 (C.A.).

actment itself is not bad simply because a petition originating the legislation is defective.[286]

A zoning by-law is an interference with the common law right to enjoyment of property. Therefore, any prerequisite or statutory conditions precedent will be strictly construed and enforced.

In Ontario there are no statutory prerequisites which must be met before a zoning by-law can be passed. This is not the situation in all other provinces.

In New Brunswick, for example, the Community Planning Act[287] sets out a number of prerequisites. Before a council can enact any zoning by-law a notice must be published of its intention so to do. In addition, the notice must specify at what particular council meeting objections will be heard. This is clearly a condition precedent which must be complied with in order to confer any jurisdiction to enact a zoning by-law.

When notice is given, the area subject to the proposed enactment is described. For example, let us assume that council proposes to rezone a large tract of land. A valid notice is published describing the affected properties. After having heard objections, it is decided not to rezone the entire property described. Can an area smaller than that described be rezoned without the necessity of a new notice?

That a larger area than that described could not be rezoned is clear.[288] Equally true is the fact that no different zone from the one advertised can be created. In the situation mentioned, the zone remains the same, only the applicable area is different. It is difficult to conceive of any valid objection to council proceeding in this manner. No one has been mislead or prejudiced. All those whose property might be affected were notified. In this situation, if the notice was proper, there would seem to be no sufficient reason why the council could not proceed and deal with the smaller area.

Another possible problem can also be demonstrated through example. Let us assume that an agreement has been made with an industrial concern. One of the conditions of the industry establishing in the city is the rezoning of a particular parcel of land, which the city through council undertakes to do. Would a zoning by-law enacted under these circumstances be valid?

It is an accepted principle of law that a body which is the recipient of delegated legislative powers cannot abrogate those

286 *Re McAlpine and Village of Bancroft*, [1935] O.W.N. 53 (High Ct.).

287 S.N.B. 1960-61, c. 6, as amended by 1963 (2nd sess.), c. 13; 1964, c. 18; 1965, c. 12; 1966, c. 152; 1968, c. 21.

288 *White* v. *Rural Municipality of Louise* (1891), 7 Man. R. 231 (Q.B.).

powers and thereby decline to carry out its proper powers and duties.[289]

A situation similar to that outlined above came before the British Columbia Court of Appeal in *Vancouver* v. *Registrar, Vancouver Land Registration District.*[290] Davey J. A., with whom Sloan C. J. concurred, answered the problem in this way:

> . . . the City bound itself without reservation or qualification [to rezone]. . . . By so doing the City bound itself, and thereby the council (through whom it must act) to disregard all objections to its passage, though the objectors had a statutory right to have their objections considered and determined upon their merits when the by-law was presented for hearing. The agreement impaired the discretion vested in the council by the *Town Planning Act* for the protection of the competing and conflicting interests of property owners affected by the proposed amending by-law and the interests of the community as a whole. By authorizing the City to enter into this agreement, the council abdicated its statutory duties, and bound itself, through the City, not to carry them out as required by law.

The decision clearly indicates that a council cannot do any act which will have the effect of depriving it of the power to effectively carry out its statutory duties. On the basis of this case it would seem that, given a situation similar to that in the example, an applicant could successfully attack the rezoning by-law.

Under the New Brunswick Community Planning Act any application to rezone must be referred to the Planning Commission for an opinion. Council is not bound by that opinion but, if it enacts a by-law which does not conform to that opinion, the by-law must be passed by a two-thirds majority of the full council.

This is an illustration of some of the possibilities open to a person attacking a zoning by-law for failing to comply with the conditions precedent. It is submitted that if there is not strict compliance with these provisions any by-law enacted must be struck down. [To be concluded]

---

289 *Town of Eastview* v. *R. C. Episcopal Corporation of Ottawa* (1918), 44 O.L.R. 284 (C.A.); *Town of Cobalt* v. *Temiskaming Telephone Co.* (1919), 59 S.C.R. 62; *Ayr Harbour Trustees* v. *Oswald* (1883), 8 A.C. 623 (H.L.); *Montreal Park and Island Ry. Co.* v. *Chateauguay and Northern Ry. Co.* (1904), 35 S.C.R. 48; *Staffordshire and Worcestershire Canal* v. *Birmingham Canal* (1866), L.R. 1 H.L. 254; *Re Merry and City of Trail* (1962), 34 D.L.R. (2d) 594 (B.C.C.A.). The comments in the following cases are also of interest on this point: *Re Sandwick West Township*, [1960] O.W.N. 387 (High Ct.); *Blair* v. *Chicago* (1906), 201 U.S. 400; *Knoxville Water Company* v. *Knoxville* (1906), 200 U.S. 22; *Stourcliffe Estates Co., Ltd.* v. *Corporation of Bournemouth*, [1910] 2 Ch 12 (C.A.).

290 [1955] 2 D.L.R. 709, at pp. 712-713.