MUNICIPAL LAW

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1. INTRODUCTION

In view of the fact that this is the maiden annual survey of recent developments in this particular field of law in Canada, I think that it would be appropriate if I were first of all to sketch in some background and general information before proceeding to deal with the more recent, noteworthy judicial decisions. Thus, I propose to deal initially with, what I conceive to be the composition of the field of municipal law, the general legislative approach taken by the various provinces in creating, governing and delegating powers to the local level of government, and recently published source materials other than cases.

The term "municipal law" does not enjoy universal usage and there would seem to be a significant difference of opinion concerning what the term encompasses. The term "local government law" is sometimes used as a synonym, and such subject-matters as assessment and rating, community planning, land use controls, and expropriation and compensation may or may not be considered to be part of "municipal law." This difference of usage and opinion concerning the scope of the term "municipal law" is reflected in the optional courses now offered at many of the law schools in Canada; some law schools offer a course or courses dealing with a broad range of topics such as, the nature of municipal corporations, the powers and duties of municipal corporations in general, by-laws and resolutions in general and the attacking of by-laws, planning and land use controls, assessment and rating, expropriation and compensation, and actions against municipal corporations, while other law schools offer only courses dealing with planning, land use controls, and, possibly, expropriation and compensation. In my opinion, the field of municipal law embraces all of these topics and it behooves our law schools to offer to their students courses which are, in total at least, as broadly based as possible; otherwise, students will emerge with a somewhat distorted understanding of the whole field of municipal law. [1]

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[1] In my limited teaching experience in this field, I have found that it is even desirable to include some remarks and discussion concerning the political science aspects of local government, for invariably this is a subject-matter about which most, if not all, of the students know virtually nothing.

I do not propose to attempt a survey of recent developments in municipal legislation. [2] This task would be well-nigh impossible, owing to the countless pieces of legislation in existence and enacted annually which relate to and affect the various units of local government. As Professor J. B. Milner [3] said recently: "I wouldn't have time even to mention the amendments, let alone comment." [4] Suffice it to refer the reader to the municipal affairs departments of the various provinces which may or may not publish an annual summary of such legislation. [5] However, as I indicated earlier, I do think that it would be helpful if I were at least to outline the general legislative approach taken by the various provinces in creating, governing and delegating powers to the local level of government.

II. General Legislation and Source Materials

British Columbia is divided for purposes of local government into cities, towns, villages, districts and regional districts, all of which are governed generally by the Municipal Act [6] with the exception of the city of Vancouver which has its own special act charter. [7] A number of the older municipalities such as Victoria have, in addition, some powers still extant which are contained in special acts dating back many years. The Municipal Act, *inter alia*, deals with assessment and taxation, [8] expropriation and compensation for lands required by municipalities, and land planning. [9]

Alberta is divided for purposes of local government into cities, towns, villages, counties, municipal districts, improvement districts, special areas and new towns, which are governed generally by The City Act, [10] The Town and Village Act, [11] The County Act, [12] The Municipal District Act, [13] The Improvement Districts Act, [14] The Special Areas Act, [15] and

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[2] I am using the term "legislation" here in the sense of provincial statutes, as opposed to municipal legislation in the form of by-laws passed by municipal councils.

[3] Of the Faculty of Law, University of Toronto.

[4] Upper Can. L. Soc'y Spec. Lectures: Recent Developments in the Law: *Planning and Municipal Law* 77, at 78 (1966).

[5] The Department of Municipal Affairs of Ontario publishes such a summary, and I have compiled such a summary of Manitoba legislation for the Manitoba Municipal Secretary-Treasurer's Association.

[6] B.C. Rev. Stat. c. 255 (1960).

[7] B.C. Stat. 1953 c. 55.

[8] *See also* The Assessment and Equalization Act, B.C. Rev. Stat. c. 18 (1960).

[9] *See also* The Housing Act, B.C. Rev. Stat. c. 183 (1960).

[10] Alta. Rev. Stat. c. 42 (1955).

[11] *Id.* at c. 338.

[12] *Id.* at c. 64.

[13] *Id.* at c. 215.

[14] Alta. Stat. 1965 c. 39.

[15] Alta. Stat. 1964 c. 87.

The New Towns Act [16] respectively. Assessment and taxation, expropriation procedures, land planning, housing, and urban renewal are covered in separate statutes. [17] With the enactment of The City Act in 1951 all of the individual city charters, under which all cities had theretofore operated, were repealed with the exception of the charter of Lloydminster which straddles the Alberta-Saskatchewan border. The other municipal units have never operated under individual charters. It is planned that an act to be known as "The Municipal Government Act" will replace and repeal all of the general statutes presently governing organized municipalities (*i.e.*, cities, towns, villages, counties and municipal districts).

Saskatchewan is divided for purposes of local government into cities, towns, villages, rural municipalities, municipal units and counties, which are governed by The City Act, [18] The Town Act, [19] The Village Act, [20] The Rural Municipality Act, [21] and the Municipal Unit and County Act [22] respectively. [23] The only municipalities with their own charters are Lloydminster and Uranium City. Whereas assessment and taxation and the power to expropriate land are covered in the general statutes, land planning, housing, urban renewal, and expropriation and compensation procedures are covered in separate statutes. [24] It is planned to consolidate The City Act, The Town Act and The Village Act into one Urban Municipal Act.

Manitoba is divided for purposes of local government into cities, towns, villages, rural municipalities and municipal districts, which are governed generally by The Municipal Act [25] with the exception of Winnipeg and St. Boniface which have their own special act charters, [26] local government districts and industrial townsites, which are governed generally by The Local Government Districts Act, [27] and The Metropolitan Corporation of Greater Winnipeg which has its own special act charter. [28] In regard to those municipalities governed generally by The Municipal Act, virtually all

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[16] Alta. Stat. 1956 c. 39.

[17] *See* The Municipal Taxation Act, Alta. Stat. 1967 c. 54; The Assessment Appeal Board Act, Alta. Stat. 1957 c. 2; The Municipalities Assessment and Equalization Act, Alta. Stat. 1957 c. 61; The Municipal Tax Exemption Act, Alta. Stat. 1965 c. 61; The Expropriation Procedure Act, Alta. Stat. 1961 c. 30 (power to expropriate land is delegated to municipalities under the general statutes); The Alberta Housing Act, Alta. Stat. 1965 c. 38; and The Planning Act, Alta. Stat. 1963 c. 43.

[18] SASK. REV. STAT. c. 147 (1965).

[19] *Id.* at c. 148.

[20] *Id.* at c. 149.

[21] *Id.* at c. 150.

[22] *Id.* at c. 160.

[23] *See also* The Northern Administration Act, SASK. REV. STAT. c. 412 (1965); and The Local Improvements Districts Act, *id.* at c. 151.

[24] The Community Planning Act, *id.* at c. 172; The Municipal Expropriation Act, *id.* at c. 166; and The Housing and Urban Renewal Act, Sask. Stat. 1966 c. 53.

[25] MAN. REV. STAT. c. 173 (1954).

[26] Man. Stat. 1956 c. 87; and Man. Stat. 1953 c. 68, respectively.

[27] *See also* The Local Government Districts Act, MAN. REV. STAT. c. 148.

[28] Man. Stat. 1960 c. 40.

of them have, in addition, their own individual special act charters. Supplementary to The Municipal Act and the special act charters of Winnipeg, St. Boniface and the Metropolitan Corporation of Greater Winnipeg are such other statutes as The Planning Act, [29] The Expropriation Act, [30] and The Housing and Renewal Corporation Act. [31] Assessment and taxation are covered by The Municipal Act and the charter of The Metropolitan Corporation of Greater Winnipeg.

Ontario is divided for purposes of local government into cities, towns, villages, counties and townships, all of which are governed generally by The Municipal Act,[32] and the Municipality of Metropolitan Toronto which has its own special act. [33] Supplementary to these statutes are such other statutes as The Assessment Act, [34] The Expropriation Procedures Act, [35] The Housing Development Act, [36] and The Planning Act. [37]

New Brunswick is divided for purposes of local government into cities, towns, villages and potentially local service districts, all of which are governed generally by the Municipalities Act. [38] Prior to 1966 there was a Towns Act, a Villages Act and a Counties Act, along with numerous special acts or charters relating to particular cities, town and villages. These special acts and charters remain in force but the new Municipalities Act prevails over them in the case of an inconsistency or conflict. Counties disappeared with the enactment of the new Municipalities Act. Supplementary to the Municipalities Act are such other statutes as the Community Planning Act [39] and the Land Compensation Board Act. [40] Municipal assessment and taxation are under provincial jurisdiction. [41]

Nova Scotia is divided for purposes of local government into cities, towns, counties and districts, villages, and special commissions. The cities, Halifax, Sydney and Dartmouth, are governed generally by their own

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[29] Man. Stat. 1964 c. 39, which is applicable only to municipalities outside of the planning jurisdiction of the Metropolitan Corporation of Greater Winnipeg.

[30] MAN. REV. STAT. c. 78 (1954). This act deals with procedures; power to expropriate land is delegated to municipalities in The Municipal Act and the various charters.

[31] Man. Stat. 1966-67 c. 24.

[32] ONT. REV. STAT. c. 249 (1960).

[33] *Id.* at c. 260.

[34] *Id.* at c. 23. *See also* The Municipal Act and The Municipality of Metropolitan Toronto Act.

[35] Ont. Stat. 1962-63 c. 43. Power to expropriate land is delegated in The Municipal Act and The Municipality of Metropolitan Toronto Act.

[36] ONT. REV. STAT. c. 182 (1960).

[37] *Id.* at c. 296.

[38] N.B. Stat. 1966 c. 20.

[39] N.B. Stat. 1960-61 c. 6.

[40] N.B. Stat. 1964 c. 6. Power to expropriate land is delegated in the Municipalities Act.

[41] *See* The Assessment Act, N.B. Stat. 1966 c. 110; and the Real Property Tax Act, *id.* at c. 151. The passage of these statutes followed the report of The New Brunswick Royal Commission on Finance and Municipal Taxation (The Byrne Commission) in 1964.

charters. [42] Towns are now governed generally by the Towns Act,[43] although originally each town had its own charter. Counties and districts (which are really simply subdivided counties) are governed generally by the Municipal Act. [44] Villages are governed generally by the Village Service Act [45] and the smallest municipal units, the special commissions, are governed generally by their own individual special acts. Recently, five regional areas near Halifax have been incorporated by special pieces of legislation, and in size and powers they fall somewhere between special commissions and villages. Supplementary to all of these general statutes, and individual special acts and charters, are such other statutes as the Assessment Act, [46] the Housing Development Act, [47] the Municipal Housing Corporation Act, [48] and the Town Planning Act. [49]

Prince Edward Island is divided for purposes of local government into the city of Charlottetown, which is governed generally by its own private act of incorporation, [50] towns, which are governed generally by The Towns Act [51] with the exception of Summerside, which has its own private act of incorporation, [52] and villages, which are governed generally by The Village Service Act. [53] Those rural areas of the province not falling within the territorial limits of Charlottetown or any town or village are governed, generally speaking, by the province. Assessment and taxation, and expropriation and compensation, are covered in the general acts and charters; land planning is dealt with in a separate statute. [54]

Newfoundland is divided for purposes of local government into the cities of St. John's and Cornerbrook, which are governed generally by their own special act charters, [55] towns, rural districts and local government areas, which are governed generally by The Local Government Act, [56] and local government communities, which are governed generally by The Community Councils Act. [57] In addition there is the corporation of the St.

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[42] N.S. Stat. 1963 c. 52; N.S. Stat. 1903 c. 174; and N.S. Stat. 1962 c. 67, respectively.

[43] N.S. REV. STAT. c. 293 (1954).

[44] N.S. Stat. 1955 c. 7.

[45] N.S. REV. STAT. c. 307 (1954).

[46] N.S. Stat. 1966 c. 3 which applies to all towns, counties and districts (counties and districts are usually the tax collectors for villages and special commissions). The city charters contain their own assessment and taxation provisions.

[47] *Id.* at c. 7.

[48] N.S. Stat. 1967 c. 13.

[49] N.S. REV. STAT. c. 292 (1954).

[50] P.E.I. Stat. 1948 c. 43.

[51] P.E.I. REV. STAT. c. 162 (1951).

[52] P.E.I. Stat. 1959 c. 46.

[53] P.E.I. REV. STAT. c. 171 (1951).

[54] The Town Planning Act, *id.* at c. 163.

[55] NFLD. REV. STAT. c. 87 (1952) and Nfld. Stat. 1958 c. 25, respectively.

[56] Nfld. Stat. 1966 c. 31.

[57] Nfld. Stat. 1952 c. 1.

John's Metropolitan Area [58] which is in effect a local improvement district under The Local Government Act. Supplementary to The Local Government Act are The Urban and Rural Planning Act, [59] which, *inter alia*, deals with expropriation and compensation, and The Assessment Act. [60] The special act charters of both St. John's and Cornerbrook cover assessment and taxation, expropriation and compensation and land planning. [61]

Quebec is divided for purposes of local government into cities, towns, villages, parishes and townships, and counties. Whereas cities and towns are governed generally by the Cities and Towns Act, [62] the other units of local government are governed generally by the Quebec Municipal Code. [63]

If a thorough understanding of the organization of local government in Canada is desired, there is no scarcity of reading material available on the subject. [64]

Finally by way of introduction, in regard to source materials, I shall at this juncture simply footnote some of the more recently published Canadian books and specialized Canadian journals, [65] and refer later, when I am dealing with the recent judicial decisions, to some of the more recent, relevant Canadian articles. As well, I ought to mention the special lectures of Professor Milner, to which I earlier referred; these lectures dealt with recent developments in planning and municipal law and were delivered in 1966 as part of the continuing legal education programme of the Law Society of Upper Canada. [66] Although Professor Milner was primarily concerned with the Ontario situation, I draw the attention of the reader to these lectures as the most recent general survey of developments in municipal law. Incidentally, as will become readily apparent to anyone who

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[58] The St. John's (Metropolitan Area) Act, Nfld. Stat. 1963 c. 72.

[59] Nfld. Stat. 1965 c. 28.

[60] Nfld. Stat. 1958 c. 18.

[61] *See also* The Housing Act, Nfld. Stat. 1966 c. 87.

[62] QUE. REV. STAT. c. 193 (1964).

[63] Que. Stat. 1916 c. 4, as amended. *See also* QUE. REV. STAT. cs. 169-98; and R. TELLIER, MUNICIPAL CODE (1936) (with jurisprudence); J. VIAU, ACTS AND JURISPRUDENCE CONCERNING CITIES AND TOWNS (1967); and C. CODEBECQ, EXTENSION JURIDIQUE DES LOIS MUNICIPALES (1967).

[64] D. CRAWFORD, CANADIAN MUNICIPAL GOVERNMENT (1958); T. PLUNKETT, MUNICIPAL ORGANIZATION IN CANADA (1955); T. PLUNKETT, URBAN CANADA AND ITS GOVERNMENT (1968) (a second edition of MUNICIPAL ORGANIZATION IN CANADA); H. CLOKIE, CANADIAN GOVERNMENT AND POLITICS (1st ed. 1946); H. BRITTAIN, LOCAL GOVERNMENT IN CANADA (1951); D. ROWAT, YOUR LOCAL GOVERNMENT (1965); M. DONNELLY, GOVERNMENT OF MANITOBA ch. 9 (1963); R. ROSS, LOCAL GOVERNMENT IN ONTARIO (2d ed. 1962); E. HANSON, LOCAL GOVERNMENT IN ALBERTA (1956). *See also* the contributions in JOURNAL OF CANADIAN PUBLIC ADMINISTRATION.

[65] I. ROGERS, THE LAW OF CANADIAN MUNICIPAL CORPORATIONS (1959) (2 volumes to which there is published annually a cumulative supplement); H. MANNING, ASSESSMENT AND RATING (4th ed. 1962); D. HORSLEY, ASSESSMENT AND TAXATION SERVICE (1961) (a current loose-leaf service manual); J. MILNER, COMMUNITY PLANNING, A CASEBOOK ON LAW AND ADMINISTRATION (1963); G. CHALLIES, THE LAW OF EXPROPRIATION (1963).

[66] *See supra* note 4.

refers to these lectures, they draw upon or assume knowledge of special lectures delivered in earlier years [67] and, therefore, they all form a useful continuum.

III. Judicial Decisions

Turning now to the cases, I propose to deal with them under headings which more or less approximate the topics listed earlier in my remarks concerning law school courses in municipal law. I have not surveyed assessment and rating cases; this was purely a matter of space and this area will receive special attention next year.

A. *Powers and Duties, Generally*

Being creatures of statute, municipal corporations possess, generally speaking, only those powers and duties expressly given to them by constitutional statutory enactment, and it follows that they must exercise their powers in the manner which has been statutorily prescribed. In connection with the delegation of most powers, it is expressly required that they be exercised by by-law. To provide for situations where no manner of exercise is prescribed, the various provinces have taken one of two precautionary steps in their general legislation; namely to provide either that in such a situation the power be exercised by by-law or that in such a situation the council of the corporation can choose to exercise the power either by by-law or by resolution.

Ontario is one of those provinces which has taken the former precautionary step; municipal councils in Ontario are statutorily required to exercise the powers of the corporation by by-law unless it is otherwise expressly provided. The failure to observe this fundamental requirement will always be fatal to the exercise of a power by a municipal council in Ontario and this was underlined in two recent decisions. The city of Ottawa by resolution purported to approve, on behalf of the municipality, the execution of a proposed lease of municipal lands by the city to the Central Canada Exhibition Association. On an application to quash the resolution, [68] Mr. Justice Lieff found that, notwithstanding the fact that the lease purported to permit the association to use the lands for certain revenue raising purposes ancillary to the main use to which the association might lawfully place the park and the fact that the city agreed to assume all municipal realty taxes that might be levied from time to time against the association, the proposed lease was within "the contractual capability of the parties thereto"; however, the resolution was quashed on the ground that the council

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[67] Upper Can. L. Soc'y Spec. Lectures: Municipal Law (1956); *Id.*, Expropriation and Compensation (1958); *Id.*, Contracts for the Sale of Land (1960), especially The Lawyer's Role in the Development of a Subdivision 147-49, and Land Use Control at 181-220.

[68] *Re* Whitton, [1967] 2 Ont. 509, 64 D.L.R.2d 265 (High Ct.)

could only approve the lease by by-law. Lieff did refer with approval to the principle enunciated by Mr. Justice Hodgins in *Re Butterworth*, namely, "that when the subject legislated upon is clearly within municipal authority, and the objection is merely to the mode in which the particular power has been exercised, and that defect can be remedied by further or different action, the by-law should not be quashed unless it is clear that the method adopted cannot be supported in any view of the matter," [69] but found that "more than the mode of exercising the municipality's powers is being objected to. The applicant's objection goes right to the core of the resolution and attacks its very existence as a legal instrumentality." [70]

The seemingly irrepressible borough of Etobicoke sought again to restrict the erection of "election signs" pursuant to section 379(1) of the Municipal Act [71] of Ontario which provides: "(1) By-laws may be passed . . . : (122) For prohibiting or regulating the erection of signs or other advertising devices and the posting of notices on buildings or vacant lots . . . ." On an application to quash, Mr. Justice Richardson was of the opinion that the legislature could not have intended section 379(1)(122) to apply to election signs on private home property, particularly in view of section 153(3) of the Election Act [72] which expressly provides for "the dissemination at any time by any means, by a candidate or his agent, of political information." [73]

Another somewhat similar abortive attempt to regulate freedom of expression was the provision in a by-law passed by Toronto which provided that "no person shall . . . use language or engage in any form of conduct which is likely to stir up hatred against any section of the public distinguished by colour, race, religion, ethnic or national origin in a City Park." In *Regina v. Beattie*, [74] Mr. Justice Hartt, on an appeal by way of a stated case, affirmed the lower court's acquittal of the accused on the ground that, although the provision of the by-law in question may have been passed for the purpose of protecting parks and the park-using community from repugnant and injurious conduct, the words used in drafting the provision were wide enough to permit the provision to be used for other purposes.

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[69] 44 Ont. L.R. 84, at 89, 45 D.L.R. 426, at 430 (1918).

[70] *Supra* note 68, at 518, 64 D.L.R.2d at 274. *See also* Ross v. Cobden, [1967] 2 Ont. 325, 63 D.L.R.2d 390 (High Ct.), particularly at 328 and 393 respectively.

[71] ONT. REV. STAT. c. 249 (1960).

[72] *Id.* at c. 118.

[73] *Re* Millard, [1968] 1 Ont. 56, 65 D.L.R.2d 414 (High Ct. 1967). The judge noted the decision in McKay v. The Queen, [1965] Sup. Ct. 798, 53 D.L.R.2d 532, wherein "the Supreme Court of Canada found that under similar circumstances the borough could not prohibit signs in federal elections." In connection with the *McKay* decision, *see* Milner, *supra* note 4, at 100.

[74] [1967] 2 Ont. 488, 64 D.L.R.2d 207 (High Ct.).

The improper delegation of powers by municipal councils is apparently an inevitably recurring problem; another decision in the continuing series was that of Mr. Justice McIntyre in *Regina v. Horback.* [75]

Another ever fertile field for litigation seems to be the closing or early closing by-law. The Early Closing By-Law of Dartmouth prescribed certain closing hours and, in addition, provided that those hours did not apply "to a shop in which the principal business carried on is that of . . . [eight specified businesses]." In *Dartmouth v. S.S. Kresge Co.,* [76] on appeal from an injunction granted against the S.S. Kresge Co., Mr. Chief Justice Ilsley, with the concurrence of Justices Pottier and Coffin, held that the by-law was invalid and unenforceable by reason of uncertainty which arose from the bald use in the by-law of the term "principal business." The Chief Justice said : "The term principal business is not defined and it is not possible for a person occupying a shop to know what determines whether a business is the principal business or not." [77]

The Chief Justice referred to the former Ontario legislation, [78] which statutorily required that a shop in which two or more trades were carried on had to be closed for all trades during the hours when it was required to be closed by any by-law for the purpose of that trade which was its principal trade (without defining the term "principal trade"), and to the several Ontario cases in which this legislation was considered. The Chief Justice was not to be sidetracked by the fact that the Ontario Court of Appeal had never objected to the use of the term "principal trade" in this legislation for, as he pointed out, the consequences of uncertainty in a statute and uncertainty in a by-law are not necessarily the same. Chief Justice Ilsley also referred to the decision of the Manitoba Court of Appeal in *Marilyn Investments Ltd. v. Assiniboia.* [79] In that case the Manitoba Court of Appeal held that the words "normal morning hours of opening," as used in a by-law which provided : "All shops shall remain closed between the hours of 6:30 o'clock in the afternoon and normal morning hours of opening . . . ," rendered the by-law void for uncertainty.

Mr. Justice Pottier delivered a judgment of his own, besides concurring with Ilsley, in which he reviewed most of the cases ever decided in Canada relating to closing by-laws [80] and the relevant legislation of several

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[75] 64 D.L.R.2d 17 (B.C. Sup. Ct. 1967). The judge reviewed and referred to a number of the leading cases on sub-delegation, *id.* at 22-23, including another such recent decision in Regina v. Pride Cleaners & Dyers Ltd., 49 D.L.R.2d 752 (B.C. Sup. Ct. 1964). *See also* Marilyn Invs. Ltd. v. Assiniboia, 51 D.L.R.2d 711 (Man. 1965) and Milner, *supra* note 4, at 93-97.

[76] 58 D.L.R.2d 229 (N.S. 1966).

[77] *Id.*

[78] ONT. REV. STAT. c. 249, § 379a(8) (1960) as enacted by Ont. Stat. 1961-62 c. 86, § 43; *see also* Ont. Stat. 1964 c. 68, § 10 and Ont. Stat. 1965 c. 77, § 28.

[79] *See supra* note 75.

[80] Including the recent decisions in *Re* F. W. Woolworth Co., [1965] 1 Ont. 41, 46 D.L.R.2d 602 (1964) and Calgary v. S.S. Kresge Co., 52 D.L.R.2d 617 (Alta. Sup. Ct. 1965).

of the provinces. He cautioned the reader that it must be realized when reading the decisions *re* closing shops that each case is dealing with a special statute or a special by-law, and that in many cases the statute or by-laws are not the same. Justice Pottier was of the opinion that the by-law in question was not only invalid for uncertainty, but also invalid on the ground of discrimination.

The other noteworthy decision concerning closing by-laws was of the Saskatchewan Court of Queen's Bench in *Demkiw v. Canada Safeway Ltd.* [81] By virtue of sections 244 and 246 of the City Act [82] of Saskatchewan, hours of closing are statutorily prescribed and the power to vary these hours is delegated to city councils. By virtue of section 245 of the act, however, neither the statutorily prescribed closing hours nor the closing hours prescribed by any city council can affect any shop in which the principal trade or business carried on is one of or a combination of any of a number of trades or businesses which are expressly listed. This closing legislation is to be contrasted with the closing legislation in some of the other provinces wherein the power is delegated to municipal councils to specify which classes of shops are to observe what closing hours. It was pointed out in the *Demkiw* case that, in a prosecution for failure to observe prescribed closing hours, section 702 of the Criminal Code is applicable in the Saskatchewan legislative approach, but not in the other legislative approach. Thus, in Saskatchewan the onus is on the defendant shop to prove that it is entitled to remain open by virtue of the statutory exemption, whereas in Ontario, for example, the burden remains on the prosecution to establish that the defendant shop falls within the class of shops which must remain closed during the hours in question. The court in *Demkiw* referred to and distinguished the recent Ontario case of *F.W. Woolworth Co. v. Hamilton.* [83]

It seems that there are always a number of miscellaneous cases; two of these will be discussed at this point. In the case of *Regina v. Nite-Glow of Canada,* [84] Judge Willmott pointed out that where a municipal council, pursuant to the power delegated to all municipal councils in Ontario to prohibit or regulate the erection of signs and other advertising devices, chooses not to prohibit signs in an area but rather simply to regulate them, though the council can require a permit to be obtained in connection with the erection of a sign to ensure compliance with its regulations, it cannot revoke such a permit at its whim but only for non-compliance with its regulations.

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[81] 59 D.L.R.2d 654 (Sask. Q.B. 1966).

[82] SASK. REV. STAT. c. 147 (1965).

[83] *See supra* note 80. *See also* in connection with closing or early closing by-laws, Milner, *supra* note 4, at 90-93.

[84] [1966] 1 Ont. 57, 52 D.L.R.2d 409 (County Ct. 1965).

In pith and substance the decision in *Regina v. New Westminster* [85] was concerned more with constitutional than municipal law; the decision of the Supreme Court of British Columbia, affirmed on appeal by the British Columbia Court of Appeal, was that a federally incorporated company is subject to any constitutionally valid law enacted by a province and thus, in turn, to any municipal by-law validly enacted pursuant to such provincial law. [86]

B. *Disqualification of Municipal Councillors*

There were a surprising number of cases in which the legal right of a mayor, reeve, councillor or alderman to sit on council or to continue in office was questioned. The most interesting of these cases, *Regina ex rel. McLean v. Whitton*, [87] arose out of the application to quash a by-law of the city of Ottawa to which reference was made earlier. The application to quash had been launched by Charlotte Whitton; subsequently, a motion was brought for an order that she thereby had forfeited her right to sit as an alderman on the city council, for it was said that by her action she had contravened section 35(1) (q), (r) and (s) of the Municipal Act. [88] Clause (r), which was the particularly applicable provision to the case, reads as follows :

> The following are not eligible to be elected a member of a council or entitled to sit or vote therein : . . . a person who, either himself or by or with or through another, has any claim, action or proceeding against the corporation, but this clause does not apply with respect to any moneys paid or payable to a member of a council under section 203, 212, 405, 406 and 407 or 409 or under section 7a of The Planning Act or with respect to assessment appeals under The Assessment Act or the Local Improvement Act. [89]

Mr. Justice Ferguson, on an appeal from a dismissal of the motion by Judge Macdonald, thought that Miss Whitton's application or motion to quash could be classified as either a "proceeding" or an "action" against the corporation within the meaning of section 35(1)(r).

Mr. Justice Ferguson pointed out that "[a]lthough there are many cases dealing with s. 35(1)(q) there seems to be an absence of decided cases interpreting cls. (*r*) and (*s*) but Judges and text writers have said many times speaking generally of cls. (*q*), (*r*) and (*s*) . . . that their object is to prevent from being elected or sitting or voting as a member of a council any one whose personal interest might clash with that of the corporation." [90] He expanded on the object or principle behind clauses (q), (r) and (s) and I think that his exposition warrants repetition :

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[85] 50 D.L.R.2d 277 (B.C. Sup. Ct. 1965), *aff'd*, 55 D.L.R.2d 613 (B.C. 1965).

[86] *See also* Regina v. Karchaba, 52 D.L.R.2d 438 (B.C. 1965).

[87] [1968] 1 Ont. 128, 65 D.L.R.2d 568 (High Ct. 1967).

[88] ONT. REV. STAT. c. 249 (1960).

[89] *Id.*

[90] *Supra* note 87, at 132, 65 D.L.R.2d at 572.

> The principle is as old as democratic Government. When the governing body has by the vote of a majority of its members decided on a course of action, that decision must be accepted by all members. Those who are not prepared to accept the result must resign. It is a rule enforced—at least up to the present time—ruthlessly in higher echelons of Government everywhere. If the member is of a mind to continue his opposition outside the governing body he must resign. The reason is plain, the implications are plain from the principle mentioned. He who has entered into a contract where his interests conflict with the interests of the body in which he sits, where he is to derive a personal benefit at that body's expense, cannot stand indifferent between himself and that body, that is the mischief the cl. (*q*) seeks to prevent.
>
> Clause (*r*) recognizes that disputes bias and differences can arise in ways other than by way of contract. If a member has brought action against the corporation or has an existing claim outstanding, it is hardly possible to accept the proposition that he will co-operate with his colleagues or administer the affairs of the municipality judicially. Rights may be established by procedures which do not require a lawsuit; they may be established by procedures laid down by statute or rule. In such procedures the municipality or corporation may be the object of attack as violent as in any action or lawsuit. So it is not an acceptable theory that the member engaged in such proceeding could bring unbiased judgment to bear on the municipality business, and likewise it is not thought that the counsel and solicitors acting in such claims, actions and procedures against the corporation could exercise unbiased judgment with reference to the corporation's business. This is the mischief which cls. (*r*) and (*s*) seek to prevent.
>
> It is not argued that the member who refuses to accept the decision of the council must remain silent. He may, of course, carry on his campaign of opposition outside Council, but if he does so it is clearly the intention of the Legislature that he disqualifies himself, he forfeits his rights to sit and vote, he vacates his seat.[91]

Mr. Justice Ferguson was of the opinion that there is at least one difference between clauses (q) and (r), namely that, while by definition personal interests will be involved in contraventions of clause (q), the interests involved in contraventions of clause (r) may be personal or they may be simply the general interests of the public. Ferguson could not agree with Macdonald that in order for clause (r) to be contravened a personal interest had to be involved. In any event, as Ferguson pointed out: "It would be impossible to say that a person who launches a proceeding against the corporation and carries the proceeding through to judgment, does not have a personal interest [if it is only to the extent of the costs involved] which conflicts with the interest of the corporation."[92]

In the course of his judgment, Ferguson referred to the recent decision of Mr. Justice Moorhouse in *Re Election of Collins, ex rel. Foot-*

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[91] *Id.* at 132-33, 65 D.L.R.2d at 572-73.

[92] *Id.* at 135, 65 D.L.R.2d at 575. *See also* in connection with this decision, an editorial, "Then the law is wrong," The Globe and Mail (Toronto), Oct. 27, 1967, at 6.

winkler. [93] That case involved a bus operator who, as an employee of London, Ontario and as a union official, had entered into contractual agreements with the city. Moorehouse held that through these personal interests Mr. Collins had disqualified himself for election to the city council by virtue of section 35(1) (q).

In regard to the other recent cases concerning the disqualification of municipal councillors, I shall simply collect them for the interested reader in a footnote. [94]

C. *Attacks on By-laws* [95]

The inclusion of this heading and the grouping under it of the following cases deserve a brief explanation, in view of the fact that much of the litigation in the municipal law field involves an attack on a by-law and the fact that my general format is to review the recent decisions under headings according to the nature of the by-law in question. The cases under this heading deal with the means of attack and with grounds in general.

In *Re Rosling,* [96] a case involving an application to quash a zoning by-law in part, a preliminary objection was raised to the effect that the proceedings were not properly constituted in that the applicant was asking for an order to show cause why a writ of certiorari should not issue to the city. The applicant, however, had given notice to the city that an application would be made to dispense with the actual issue of the writ of certiorari and to quash that part of the by-law in question. Mr. Justice Macdonald held that, from the point of view of procedure and the form used, the applicant had complied with the statutory requirements for making an application to quash and that the application was "not impaired by the surplusage of words relating to a writ of certiorari." [97]

Lacey v. Port Stanley [98] was reported as an "action for an order to quash" certain expropriation by-laws passed by the village; however, it would seem that the proceeding was really an action for damages in which,

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[93] [1967] 2 Ont. 41, 62 D.L.R.2d 334 (High Ct.).

[94] Regina *ex rel.* Wright v. Martin, [1966] 2 Ont. 12, 55 D.L.R.2d 399 (County Ct. 1965) in which it was held that an insurance agent through whose office the municipality arranges its insurance is not disqualified; Regina *ex rel.* Anderson v. Hawrelak, 53 D.L.R.2d 353 (Alta. 1965) which was a straightforward case of disqualification due to an interest in a contract with a municipality. Another, possibly the final, chapter was written in the Tonks and Township of York affair—*see* Tonks v. York, [1967] Sup. Ct. 81, 59 D.L.R.2d 310 and Milner, *supra* note 4, at 106. There were, as well, a number of cases dealing with the participation in the passage of by-laws of councillors who had a conflict of interest, Starr v. Calgary, 52 D.L.R.2d 726 (Alta. Sup. Ct. 1965); Marilyn Invs. Ltd. v. Assiniboia, 51 D.L.R.2d 711 (Man. 1965); *Re* Blustein, [1967] 1 Ont. 604, 61 D.L.R.2d 659 (High Ct.). *See also* Milner, *supra* note 4, at 105-07.

[95] For a useful general article on this subject, *see* Todd, *The Quashing And Attacking of Municipal By-laws,* 38 CAN. B. REV. 197 (1960).

[96] 64 D.L.R.2d 82 (B.C. Sup. Ct. 1967).

[97] *Id.* at 84.

in addition, a request was made for a quashing order. Although the limitation period had passed for making an application to quash the by-laws in question by way of an originating notice of motion, Mr. Justice Lieff stated that this did not affect "the present action which was commenced by the issue of a writ of summons." [99]

There were some other recent decisions concerning attacks on by-laws from the procedural point of view which require only a passing reference. *Re Davies* [100] and *Re Cohen*, [101] *inter alia*, dealt with the question of when a ratepayer who wishes to defend or uphold a by-law may be added as a party to proceedings involving an attack on the by-law. In *Battistutta v. St. George*, [102] Mr. Justice Brown, of the British Columbia Supreme Court, considered the scope of section 240A(1) of The Municipal Act [103] of British Columbia which embodies a recent attempt by the provincial legislature to limit the use of an action for a declaratory order as an alternative to an application to quash. [104] Manitoba enacted similar but more comprehensive legislation following the successful use in *Wiswell v. Metropolitan Corporation of Greater Winnipeg* [105] of an action for a declaration of invalidity, after the limitation had passed for making an application to quash the by-law in question. Lastly, *Haddock v. North Cowichan* [106] is a useful case concerning the attitude with which judges ought to approach the hearing on an application to quash a municipal by-law.

Bad faith on the part of a municipality in the enactment of a by-law was raised in at least three cases; Mr. Justice Macdonald, of the British Columbia Supreme Court, in *Ingledew's Ltd. v. Vancouver* [107] collected and reviewed most, if not all, of the leading cases on bad faith. [108]

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[98] [1968] 1 Ont. 36, 65 D.L.R.2d 291 (High Ct. 1967).

[99] On the merits, the request for the quashing order, which was denied, was based upon the improper passage of the by-laws in question from the point of view of the order in which they had been passed, failure to describe adequately what was being expropriated, unreasonableness and discrimination; in dealing with these grounds, Justice Lieff said nothing new.

[100] [1965] 1 Ont. 240, 47 D.L.R.2d 392 (High Ct. 1964).

[101] 64 D.L.R.2d 238 (Alta. 1967).

[102] 61 D.L.R.2d 637 (B.C. Sup. Ct. 1967).

[103] B.C. REV. STAT. c. 255 (1960) as amended by B.C. Stat. 1962 c. 41.

[104] *See also* Harvey, Note, 3 MAN. L.J. 143 (1968).

[105] [1965] Sup. Ct. 512, 51 D.L.R.2d 754. On the merits, the Supreme Court held that the by-law in question was invalid, on the ground that a municipal council is engaged in a quasi-judicial function when it sits to consider an application for a rezoning of specific pieces of property and, thus, it must act according to the rules of natural justice which, *inter alia*, require adequate notice to those who may be affected by the rezoning.

[106] 59 D.L.R.2d 392 (B.C. Sup. Ct. 1966).

[107] 61 D.L.R.2d 41 (B.C. Sup. Ct. 1967).

[108] *See also Re* Hagen, [1967] 1 Ont. 364, at 372, 60 D.L.R.2d 584, at 592 (Dist. Ct. 1966); and *Re* Burns, [1965] 2 Ont. 768, 52 D.L.R.2d 101. In addition, *see* Ottawa v. Boyd Builders, [1965] Sup. Ct. 408, 50 D.L.R.2d 704.

In the past, doubt has existed as to whether or not uncertainty of meaning rendered a by-law invalid. [109] Recent decisions, however, without exception have recognized uncertainty of meaning as a void defect. [110]

There was one noteworthy case involving discrimination. [111]

D. *Expropriation*

It may be that expropriation and compensation together really form a separate field of law and, incidentally, a field in which there has been a great deal of interest recently from the point of view of reform; [112] however, it is usually covered in law schools in local government or land planning courses for one or more of several reasons upon which I shall not elaborate.

Municipal corporations are but one example of the numerous administrative entities to which the power to expropriate land has been delegated. Generally speaking, the power to expropriate land will be contained in the general statute governing the particular administrative entity in question and the procedures for exercising the power and for fixing the compensation will be contained either in the same statute or in a separate statute which deals with procedures and compensation generally in connection with all administrative entities to which the power to expropriate land has been delegated.

For this year at least, I propose to deal only with those expropriation and compensation cases which, during the period under review, were significant from the municipal law point of view. There were only two such cases. In *Re Circuit House Ltd.*, [113] an application was made to quash two expropriation by-laws which simply stated in conformity with the enabling legislation [114] that the lands were "expropriated and taken for the purposes of the Corporation." It was submitted by the applicant that,

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[109] *See* I. ROGERS, THE LAW OF CANADIAN MUNICIPAL CORPORATIONS 918-19 (1959). *See also* on the one hand cases such as *Re* Smith, 10 U.C.C.P. 225 (1859); *Re* Elliott, 11 Man. 358 (1896); Walker v. Stretton, 12 T.L.R. 363 (K.B. 1896); and *Re* Daines, 49 Ont. L.R. 285 (County Ct. 1921) which were not in favour of the existence of such a ground for quashing by-laws, and on the other hand cases such as *Re* Harris, 44 U.C.Q.B. 641 (1879); *Re* Cloutier, 11 Man. 220 (1896); Montreal v. Morgan, 60 Sup. Ct. 393 (1920). *Re* Goldstein, 35 Ont. W.N. 9 (Weekly Ct. 1928); Wallace v. Dauphin, 40 Man. 474 (K.B. 1932); *Re* Wong, 45 Man. 137 (1937); and Hirsch v. Winnipeg Beach, 26 D.L.R.2d 659 (Man. 1961) which were in favour of such a ground.

[110] *See* Marilyn Invs. Ltd. v. Assiniboia, 51 D.L.R.2d 711 (Man. 1965); Dartmouth v. S.S. Kresge Co., 58 D.L.R.2d 229 (N.S. 1966); and *Re* Neilson Engineering Ltd., [1967] 2 Ont. 271, 66 D.L.R.2d 218 (High Ct.).

[111] Re Dillabough, 62 D.L.R.2d 653 (B.C. Sup. Ct. 1967).

[112] *See* Todd, *Winds of Change and the Laws of Expropriation* 39 CAN. B. REV. 542 (1961); BRITISH COLUMBIA ROYAL COMM'N ON EXPROPRIATION REPORT (1961-63 Clyne Comm'n); ONTARIO SELECT COMMITTEE ON LAND EXPROPRIATION REPORT (1962); THE ONTARIO LAW REFORM COMM'N ON COMPENSATION FOR EXPROPRIATION REPORT (1967); and an address by Archie Micay concerning work done on a proposed re-enactment of The Expropriation Act of Manitoba, 36 MAN. B. NEWS 83 (1966).

[113] [1968] 1 Ont. 737, 67 D.L.R.2d 555 (High Ct.).

[114] In this case, The Municipal Act, ONT. REV. STAT. c. 249, § 333(1) (1960).

on the authority of the decision in *Municipal Council v. Campbell*,[115] the court could go behind an expropriation by-law to determine whether indeed the lands were expropriated and taken for municipal purposes, and with this submission Mr. Justice Lieff, of the Ontario High Court, agreed. He said: "I find that the Court must ascertain the true purpose of the expropriation and for that purpose may look at reports, documents, resolutions and minutes relating to the taking of the land by the municipality in order that I may adjudicate upon its true intent. Indeed, this was the action taken . . . in *La Rush v. Metropolitan Toronto & Region Conservation Authority* . . . ."[116] The remarkable feature of the other expropriation case,[117] to which I wish to refer, was the variance in opinion between Justices MacKay and Kelly, on the one hand, and Mr. Justice Laskin, on the other hand, concerning whether pursuant to section 333 of the Municipal Act of Ontario a municipal council can exercise the power to expropriate land, particularly when the municipality wishes to take more land than is actually needed, in two stages or whether section 333 requires a single exercise of the power to expropriate; that is to say, can a municipal council utilize more than one by-law in exercising its power to expropriate under section 333?[118]

E. *Land Planning*[119]

The task of attempting to chronicle the recent developments in this area of municipal law is virtually impossible for two reasons, namely the area is so vast and complex, and the legislative approach to land planning and land use control varies so much from province to province. Nonetheless, there were some sixteen or more cases worth noting during the period under review.

Through the years the Ontario legislature has always accorded a protected status to lands or buildings used in a manner contrary to a restricted area or zoning by-law if the non-conforming use antedates the passing of the by-law and so long as continuity of the same non-conforming use can be proven regardless of whether there has been a change of ownership in the lands or buildings.[120] Equally, until 1954 and the decision in *Trafalgar*

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[115] [1925] A.C. 338, at 342.

[116] *Supra* note 113, at 746, 67 D.L.R.2d at 564.

[117] *Re* Tweed Realty Ltd., [1968] 2 Ont. 126, 68 D.L.R.2d 287.

[118] Those concerned with the extra-territorial power of rural municipalities in Saskatchewan to expropriate land might look at Regina v. Friesen, 58 D.L.R.2d 381 (Sask. Q.B. 1966).

[119] There are a few articles of which the reader ought to be aware: Milner, *An Introduction to Master Plan Legislation*, 35 CAN. B. REV. 1125 (1957); *An Introduction to Zoning*, 40 CAN. B. REV. (1962); *An Introduction to Subdivision Control Legislation*, 43 CAN. B. REV. 49 (1965); *The Lawyer's Role in Land-Use Planning*, 5 ALTA. L. REV. 119 (1966-67) (this article deals exclusively with Alberta). *See also supra* note 67; Milner, *supra* note 4, at 111-55; TENTATIVE PROPOSALS FOR THE REFORM OF THE ONTARIO LAW RELATING TO COMMUNITY PLANNING AND LAND USE CONTROLS, (prepared by Milner for the Ontario Law Reform Commission).

[120] Presently, *see* The Planning Act, ONT. REV. STAT. c. 296, § 30(7) (1960).

v. Hamilton, [121] it had always been assumed that a restricted area or zoning by-law was valid and binding on a subsequent purchaser of lands or buildings to which such a by-law applied, regardless of whether or not the purchaser had notice of the by-law and even though the lands or buildings involved might enjoy the protected non-conforming use status.

In the *Trafalgar* case the Court of Appeal of Ontario held that a restricted area or zoning by-law was an instrument affecting the use of land within the meaning of section 74(1) of the then Registry Act [122] and that therefore, in connection with a sale of lands or buildings to which such a by-law applied, unless such a by-law was registered on title it was fraudulent and void against a subsequent purchaser, for valuable consideration without actual notice of it. The Ontario legislature overcame the *Trafalgar* decision in part through the Registry Amendment Act, [123] section 10 of which provided in effect that a restricted area or zoning by-law did not have to be registered on title to be effective against subsequent purchasers for value without notice. The effect of section 10 [124] was eased by section 11(1) [125] which provided that, notwithstanding, a restricted area or zoning by-law would not apply to lands, buildings or structures which were being used on March 19, 1954 for a purpose prohibited by the by-law, by a person who had purchased the lands for value and without actual notice of the by-law. Unfortunately, the legislature, in elaborating upon the application of section 11(1), used language which raised doubts as to whether or not section 11(1) applied to successors in title of the owner-purchaser who as of March 19, 1954 satisfied the conditions of section 11(1). In *Regina v. Fulton*, [126] the Court of Appeal of Ontario cleared up this confusion by holding that such successors were entitled to the benefit of section 11(1).

Another non-conforming use case went to the Supreme Court of Canada. The issue in *Mapa v. North York* [127] was the scope of section 30(7)(b) of the Planning Act [128] of Ontario which provides that no restricted area or zoning by-law applies "to prevent the erection or use for a purpose prohibited by the by-law of any building or structure the plans for which have prior to the passing of the by-law been approved . . . ." The facts confronting the Court in the *Mapa* case were that the appellants had had the plans for the foundations of their proposed building approved,

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[121] [1954] Ont. 81, [1954] 1 D.L.R. 740.

[122] ONT. REV. STAT. c. 336 (1950), now ONT. REV. STAT. c. 348, § 76(1) (1960).

[123] Ont. Stat. 1954 c. 83.

[124] NOW ONT. REV. STAT. c. 348 § 76(3) (1960).

[125] This § remains in force today on its own; it was not included in the Registry Act in the 1960 revision and consolidation of the Statutes of Ontario.

[126] [1968] 1 Ont. 342, 66 D.L.R.2d 405 (1967).

[127] [1967] Sup. Ct. 172, 61 D.L.R.2d 1.

[128] *Supra* note 120.

but not the plans for the superstructure, before the township passed a by-law the object of which was to prohibit the very type of development the appellants had in mind.

In *Re Rosling*,[129] Mr. Justice Macdonald held that, pursuant to the Municipal Act[130] of British Columbia, section 702(1), a municipal council can divide the whole or a portion of the area of the municipality into zones and prescribe for each zone "as many different uses for the land and buildings therein as it sees fit. But whatever uses are prescribed apply to all the land within the zone. Council may not prescribe a use limited in application only to certain parcels of land in the zone and not applying to all the rest of the land in that particular zone."[131] It follows that, in order to change the permitted uses for particular parcels of land within a zone, the council of a municipality must change the zoning.

In connection with master planning, the Saskatchewan Court of Appeal in *Campbell v. Regina*[132] had to decide whether or not zoning by-laws can vary slightly from a planning scheme or master plan. Sections 21 and 22 of the Community Planning Act,[133] empowered a municipality to create "a community planning scheme for the direction of the future physical development . . . of the municipality or any part thereof [in the form of a] written statement or report containing such maps, drawings, statistical information, documents and other material as may be necessary to illustrate the manner of development proposed . . . and setting forth the means and steps necessary to carry out the proposed development." The court held that the act "requires information to be provided [by a scheme which is] general in form or outline and not specific in detail" and that, therefore, a zoning by-law will not be invalidated by the fact that, in providing specific detail, it varies slightly from a scheme.[134]

There were a number of cases in which interpretations were made of terms used in planning schemes and zoning by-laws. The Ontario Court of Appeal and the Supreme Court of Canada, in *Jones v. Wilson*,[135] deliberated upon the meaning of the term "private residences or duplex dwellings." Mr. Justice Wilson, of the Manitoba Court of Queen's Bench, in an obiter dictum in *Singer v. Town N'Country Holdings Co.*[136] considered

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[129] *Supra* note 96.

[130] B.C. REV. STAT. c. 255 (1960).

[131] *Supra* note 91, at 87.

[132] 63 D.L.R.2d 188 (Sask. 1967).

[133] SASK. REV. STAT. c. 172 (1965).

[134] However, the court declared the by-law in question invalid on the ground of the inadequacy of the notice which had been published in connection with the passage of the by-law; the description of the area in the municipality affected by the by-law was accurate but couched in terms which would not be interpreted with any degree of certainty by an interested and concerned layman on a reasonable reading.

[135] [1967] 1 Ont. 227, 60 D.L.R.2d 97 (1966), *aff'd*, [1968] Sup. Ct. 554, 68 D.L.R.2d 273.

[136] 56 D.L.R.2d 339 (Man. Q.B. 1966).

a by-law which permitted "restaurant, tea room, cafe or lunch counter" uses, with the proviso that there be "no entrance to such places of business except from the inside of the building and that no sign advertising such uses . . . be visible from outside the building"; in addition, the by-law permitted "accessory uses when located on the same lot." Wilson was of the opinion that the by-law was not contravened when the entrance to a restaurant was from a vestibule of a building, that a delicatessen use is an accessory use to the operation of a restaurant, and that while the by-law proscribed advertising in connection with a restaurant use, no such proscription was repeated in connection with accessory uses, and thus advertising would be permissible in connection with them. [137] Other terms subjected to judicial scrutiny were "front line" as used in a zoning by-law, particularly in connection with a piece of shoreline property; [138] "affect" as used in the Town Planning Act [139] of Nova Scotia when it requires a two-thirds majority to amend or to repeal a zoning by-law if a protest is presented by a certain percentage of ratepayers "affected" by the proposed amendment or repeal; [140] "development" in the sense of a change of use; [141] "site" as used in The Planning Act [142] of Manitoba in regard to when a building permit is required; [143] and "warehousing and storage within enclosed buildings." [144]

Finally in the area of land planning, a passing reference ought to be made to the decision of the Ontario Court of Appeal in *Re Cloverdale Shopping Centre Ltd.* [145] The court expounded upon the function and power of the Ontario Municipal Board in considering for approval an amendment to an official plan which had been referred to the Board by the Minister of Municipal Affairs. [146]

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[137] Since the inception of planning legislation and the zoning by-law the argument has raged as to whether they ought to be interpreted strictly and conservatively because they constitute an interference with and restriction on the common-law rights of individuals, or whether they ought to be interpreted liberally because they are passed in the public interest to secure community amenity. *Compare* in this regard Mr. Justice Wilson in Singer v. Town N'Country Holdings, *supra* note 136, at 346-47 *with* Judge Tyrwhitt-Drake in *Re* Township of Esquimalt, 46 D.L.R.2d 763, at 768 (B.C. County Ct. 1965).

[138] *Re* Township of Esquimalt, *supra* note 137.

[139] N.S. REV. STAT. c. 292, § 16(4), (1954).

[140] *Re* Clarendon Dev. Ltd., 50 D.L.R.2d 521 (N.S. 1965).

[141] Regina v. Grandview Holdings Co., 53 D.L.R.2d 276 (B.C. County Ct. 1965). The court referred to Regina v. Rutherford's Dairy Ltd., [1961] 1 Ont. W.N. 146 (High Ct.) and Regina v. Nimak Inv. Ltd., [1965] 1 Ont. 96, 46 D.L.R.2d 712 (High Ct. 1964).

[142] Man. Stat. 1964 c. 39.

[143] *Re* Williams, 65 D.L.R.2d 203 (Man. Q.B. 1967).

[144] Oriole Lumber Ltd. v. Markham, [1968] Sup. Ct. 549, 68 D.L.R.2d 239.

[145] [1966] 2 Ont. 439, 57 D.L.R.2d 206.

[146] *See also Re* Uram, 58 D.L.R.2d 742 (Alta. 1966), wherein the Appellate Division of the Alberta Supreme Court considered the nature of decisions made by the various planning bodies in the province and the power of a judge of the Supreme Court on an appeal from an order of the Provincial Planning Advisory Board, in the light of § 3 of The Planning Act, Alta. Stat. 1963 c. 43. The court was not able to come to a unanimous decision.

F. *Miscellaneous Cases*

Misfeasance or non-feasance—that is a perennial question in connection with municipal corporations. There were at least two cases involving allegations of negligence on the part of municipal corporations or their employees which ended in a dismissal of the action on the ground that what was involved was non-feasance as opposed to misfeasance. [147]

Invariably too, there are several nuisance actions every year against municipal corporations which provide, if nothing else, interesting and sometimes amusing fact situations upon which law teachers can examine harried students insofar as this aspect of the law relating to land use control is concerned. The period under survey provided at least two such cases. [148]

There were two useful cases in which the question was discussed of what constitutes a "reasonable excuse" for failing to give a municipality proper notice in connection with an action for damages against the municipality. [149]

The question of when the courts ought to exercise their discretion and adjourn an application for a writ of mandamus ordering the issuance of a building permit was one which was raised in several Ontario cases during the 1950's. Although the matter seemed to have been put to rest by Mr. Justice Roach in *Hammond v. Hamilton*, [150] in 1965 in *Ottawa v. Boyd Builders* [151] the question was raised again and this time the case went to the Supreme Court of Canada. The Supreme Court, in deciding the appeal, adopted the reasoning of Roach in the *Hammond* case.

Mr. Justice Milvain, of the Alberta Supreme Court, was mainly concerned in *Canadian Freightways Ltd. v. Calgary* [152] with the power of

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[147] Neabel v. Ingersoll, [1967] 2 Ont. 343, 63 D.L.R.2d 484 (High Ct.); Miller & Brown Ltd. v. Vancouver, 59 D.L.R.2d 640 (B.C. 1966). *See also* Daigle v. Edmunston, 63 D.L.R.2d 79 (N.B. 1967) which dealt with the vicarious liability of a municipal corporation for damage caused by work done by municipal employees in the course of their employment despite the absence of an authorizing by-law or resolution of the council.

[148] Plater v. Collingwood, [1968] 1 Ont. 81, 65 D.L.R.2d 492 (High Ct. 1967) which involved claims based upon both sensible personal discomfort and material damage; River Park Enterprises Ltd. v. Fort St. John, 62 D.L.R.2d 519 (B.C. Sup. Ct. 1967).

[149] River Park Enterprises Ltd. v. Fort St. John, *supra* note 148; Wakefield v. Rockwood, 52 D.L.R.2d 737 (Man. Q.B. 1965).

[150] [1954] Ont. 209, [1954] 2 D.L.R. 604.

[151] [1965] Sup. Ct. 408, 50 D.L.R.2d 704.

[152] 61 D.L.R.2d 253 (Alta. Sup. Ct. 1967).

cities in Alberta to license trucks and trailers as opposed to businesses and persons; the case is of interest, as well, as an example of the use of recitals as an aid in interpreting by-laws.

And lastly, there were three cases which I shall footnote only for, although they involved municipal councils or officials they are cases concerning judicial review of administrative action generally. [153]

[153] Rockandel v. Vancouver, 59 D.L.R.2d 304 (B.C. 1966), in which the issue was whether there had been a denial of natural justice; Hlookoff v. Vancouver, 65 D.L.R.2d 71 (B.C. Sup. Ct. 1967), in which the issue was the proper exercise of discretionary power; Ross v. Oak Bay, 50 D.L.R.2d 468 (B.C. Sup. Ct. 1965), in which, again, the issue was whether there had been a denial of natural justice in the passage of a by-law—interestingly, the municipality concerned was admonished by the court for not appearing to defend the by-law in question.