# MUNICIPAL LAW

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## I. INTRODUCTION

At the outset of this the second annual survey of recent developments in Canadian municipal law, I must note with regret the death of Professor James B. Milner last June, 1969. As most readers will appreciate Professor Milner was "Mr. Muncipal Law" in Canada at least insofar as the academic world was concerned. The contribution that he would have continued to make, particularly in the field of land planning, will be sorely missed indeed.

## II. LEGISLATION AND SOURCE MATERIALS

As I stated in the first annual survey, for obvious reasons I will not attempt to review the recent developments in municipal legislation. However, I do feel that at least I ought to draw the reader's attention to any major changes in the legislative schemes of the various provinces. In this regard, note The New Towns Act,1969,[1] and The Municipal Government Act,[2] of Alberta; The Urban Municipal Elections Act, 1969,[3] of Saskatchewan; The Expropriations Act, 1968-69,[4] of Ontario; and The Planning Act[5] and The Community Improvement Act, 1968,[6] of Prince Edward Island. It ought also to be noted that in 1967, Nova Scotia published a new set of Revised Statutes, with no change to its general municipal legislative scheme.

In regard to source materials, volume 18, number 3 of the *University of Toronto Law Journal* should be of interest to those concerned with urban renewal since it is devoted entirely to the publication of "Papers Presented at the Inaugural Seminar of the Centre for Urban and Community Studies." I also draw your attention to the *Index to Canadian Periodical Literature*[7]

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[1] Alta. Stat. 1969 c. 81.

[2] Alta. Stat. 1968 c. 68, which consolidates and repeals The City Act, The Town and Village Act, and The Municipal District Act.

[3] Sask. Stat. 1968 c. 82.

[4] Ont. Stat. 1968-69 c. 36.

[5] P.E.I. Stat. 1968 c. 40, which repeals and replaces The Town Planning Act, P.E.I. REV. STAT. c. 163 (1951).

[6] P.E.I. Stat. 1968 c. 11.

[7] THE CANADIAN ASSOCIATION OF LAW LIBRARIES, 1968, (M. Scott ed.); *see also* THE CANADIAN ABRIDGEMENT (2d ed. 1968). Note that the former service is a year by year survey while the latter is a cumulative survey.

and particularly the pages dealing with City Planning, Expropriation, and Municipal Corporations. [8]

## III. JUDICIAL DECISIONS

### A. *Powers and Duties Generally*

The reasoning of the decision in the case of *Donald v. Whitby*, [9] namely, that in exercising a by-law making power which authorizes a municipal corporation to do several things, its council need not do all of the things authorized, was applied by Chief Justice Wilson of the British Columbia Supreme Court in *Re By-Law 1865 of Vernon* [10] to the exercise of a taxation power which enabled the imposition of a tax on several types of persons. As the Chief Justice put it:

> The argument . . . is . . . that there is discrimination if the load of taxation is not evenly spread over the whole taxable class, but is imposed on only one unit of that class . . . . The municipality here is not required to impose any tax on trailers, houseboats or other dwellings not taxed as real estate, it is merely permitted to do so if it sees fit. If it did not do so, presumably the tax load on owners of real estate, holders of trade licences and other persons contributing to civic revenues would be higher than it would be if the things I have mentioned were taxed and made their contribution to civic revenues. But no one could, on this basis, argue that the refusal of the Council to tax under s. 430 [the section in question of the Municipal Act [11]] was discriminatory. I think the same sort of reasoning applies to the individual items listed in s. 430 as subject to taxation and that the Council is left free to tax trailers without also taxing houseboats and other structures not subject to taxation as real estate. [12]

The decision of Chief Justice Wilson, who refused to quash the by-law in question, was appealed successfully [13] on a ground brushed aside by the Chief Justice at first instance. The Court of Appeal concluded that, in defining the term "auto trailer," the council of Vernon had extended without authorization the particular power of taxation which had been delegated to the corporation. However, the Court of Appeal expressly agreed with Chief Justice Wilson on the question of the applicability of the decision in *Donald v. Whitby* to the implementation of the section in question and on another point that, in order to plead successfully that there had not been an "urgent and extraordinary" occasion so as to justify a speedy passage of the by-law in question as required by Vernon's procedural by-law (reading on three successive days), the onus is on the attacker to introduce evidence to prove the submission.

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[8] *See also* Adler, Book Review, 46 CAN. B. REV. 159 (1968).
[9] [1949] Ont. 44, [1949] 1 D.L.R. 361 (1948).
[10] 1 D.L.R.3d 292 (B.C. Sup. Ct. 1968).
[11] B.C. REV. STAT. c. 255 (1960).
[12] *Supra* note 10, at 295.
[13] 4 D.L.R.3d 401 (B.C. 1969).

In *Regina v. Kurata,* [14] it was necessary for Justice Stewart of the Ontario High Court to repeat what I had thought was long settled, namely, that a by-law passed by a municipal corporation not possessing the requisite legislative competence can be validated subsequently by statute by the appropriate legislature.

Section 379(1)(99) of The Municipal Act [15] of Ontario, which generally speaking empowers municipal corporations to pass by-laws "authorizing and regulating" the erection and maintenance of certain kinds of physical equipment along highways and in public places, came under scrutiny in *Re Oshawa Cable TV Ltd.* [16] The by-law in question by its title was concerned particularly with the "erection and maintenance of service wires, amplifiers and other accessory equipment on any highway in the Town of Whitby for the purpose of maintaining and operating in the Town of Whitby, a community television system for the interception, sale and distribution of television signals . . . . " [17] Mr. Justice Stark of the Ontario High Court held the by-law to be bad on three grounds: first, the town exceeded its legislative competence in not only prescribing the manner in which such equipment was to be operated, but also in requiring a permit to be obtained, and also the by-law, instead of simply regulating, involved compliance with conditions which could be made totally prohibitory; second, the by-law involved an illegal delegation of power to the town engineer; and third, the town council had reserved to itself a right to discriminate in administering the by-law. Stark concluded:

> It is my view that the authority granted to municipalities under s. 379(1), para. 99 of the *Municipal Act* is a very limited one intended to require co-operation between such companies as the applicant and the town in the laying out of its poles and cables so that the town's highways and streets and the traffic on them will be maintained and operated in an orderly manner. But this by-law gives to the town what appears to be a complete, regulatory power over the entire operations of the applicant, so much so as to easily render it impossible for this applicant or other like applicants to carry on their undertaking. [18]

He then added that, if he were wrong on the purport of section 379(1)(99) of the Municipal Act and a by-law such as the one in question was within the four corners of the section, then he would be of the opinion that this paragraph of the Municipal Act was constitutionally ultra vires the province to enact in any event.

The ever fertile field for litigation of the early closing by-law produced at least one reported case, *Regina v. Queensway Taxi (Ottawa) Ltd.,* [19] of a rather insignificant nature from the point of view of this survey. Neverthe-

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[14] [1969] 1 Ont. 710, 3 D.L.R.3d 627 (High Ct.).
[15] ONT. REV. STAT. c. 249 (1960).
[16] 4 D.L.R.3d 224 (Ont. High Ct. 1969).
[17] *Id.* at 225.
[18] *Id.* at 230.
[19] [1969] 1 Ont. 49, 1 D.L.R.3d 345 (High Ct. 1968), *rev'd* [1969] 2 Ont. 737. However, the Court of Appeal simply disagreed with the interpretation placed on the by-law in question by the trial judge.

less, I cannot resist focusing briefly on the enunciation [20] by Justice Addy of the standard judicial inclination towards the interpretation of regulatory by-laws, namely, that since such by-laws are restrictive of common-law rights they should be strictly interpreted against the municipal corporation and in favour of the individual whose rights may be curtailed. On the other side of the coin to those who may say "amen" to Justice Addy's interpretation of regulatory by-laws so as to maximize the individual's right to self-assertion are those who see this approach as slightly ironic in view of the very nature of regulatory by-laws. They are of the opinion that such by-laws ought to be interpreted liberally in favour of the municipal corporation which is supposed to represent the public interest. While my opinion may be of little importance, for what it is worth, in the interest of precise drafting and minimizing governmental interference, I agree with the approach of Addy, although I wonder whether in the not too distant future we will experience a change in judicial attitude.

B. *Disqualification of Municipal Councillors*

Quite apart from the legal correctness of the decision in the one noteworthy case in this area, *Hennigar v. Stevens*, [21] which deals with the appropriateness of using a quo warranto proceeding to question the election of a councillor in view of the existence of an equally adequate and effective statutorily provided remedy, the decision points out the "forms of action" approach which is taken in connection with the prerogative and extraordinary remedies and the need for one universal remedy.

C. *Attacks on By-Laws*

Mr. Justice Stark, in dealing with the application to quash in *Re Oshawa Cable TV Ltd.* to which a reference has been made, [22] first of all had to settle a preliminary objection that the non-resident company-applicant was not "a person interested" in the by-law in question within the terms of section 277(1) of The Municipal Act [23] of Ontario. The trial judge ruled against the objection, stating that, although transmission and reception of programmes under the applicant's system had not yet begun, the steps which had been taken by the applicant were sufficient to establish that the applicant had commenced his broadcasting undertaking in the town of Whitby [24] and thus was "a person interested." [25]

In interpreting the word "obtained" in section 95(1) of The Ontario Municipal Board Act [26] which provides, *inter alia*, that an appeal thereunder "does not lie unless leave to appeal is obtained from the Court within one

[20] *Id.* at 53, 1 D.L.R.3d at 349.
[21] 3 D.L.R.3d 668 (N.S. Sup. Ct. 1969).
[22] *Supra* note 16.
[23] *Supra* note 15.
[24] 4 D.L.R.3d at 226.
[25] *Id.*
[26] ONT. REV. STAT. c. 274 (1960).

month after the making of the order or decision sought to be appealed," [27] the Court of Appeal of Ontario in *Re Scarborough* [28] referred with approval to the rather incongruous [29] decision of Justice Ferguson in *Delage* v. *Papineau Roman Catholic Separate School Trustees* [30] concerning the meaning of the word "made" in legislation [31] which places a limitation period upon the use of the statutory motion to quash procedure. Ferguson, in the *Delage* case, held that the word "made" required that the notice of motion must not only be served and filed, but also it must be made returnable within the limitation period. [32] The court in *Re Scarborough* was of the opinion that the same practice applied in connection with section 95(1) of The Municipal Board Act [33] of Ontario.

Generally speaking, while it is quite clear that municipal corporations cannot pass by-laws which are discriminatory or which, especially in connection with regulatory by-laws, empower the corporation or any of its officers or employees to discriminate in their implementation, it is not so clear whether something can be done in every case where a municipal corporation only enforces its by-laws discriminatorily. However, in one rather highly publicized case [34] during the past year, the High Court of Ontario refused to grant an injunction to the city of Toronto, to which the city was otherwise entitled in connection with a breach of its zoning by-law, on the basis that the city had not "come to Court with clean hands." [35] Apparently, the city's Committee on Building and Development had created and maintained a "deferred list" which contained names of persons using premises in breach of the zoning by-law against whom no legal action of any kind would be taken or continued. [36] The trial judge held:

> In my opinion, the plaintiff municipality has acted inequitably by maintaining

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[27] *Id.* at § 95(1).

[28] [1968] 2 Ont. 580, 70 D.L.R.2d 124.

[29] See 2 I. ROGERS, THE LAW OF CANADIAN MUNICIPAL CORPORATIONS 891 (1959). Incidentally, a second edition of this work is due to be published and the current edition is out of print.

[30] [1954] Ont. W.N. 206 (High Ct. 1953).

[31] Such as The Separate Schools Act, ONT. REV. STAT. c. 368, § 66(6) (1960), which was in question in the *Delage* case, or The Municipal Act, ONT. REV. STAT. c. 249, §§ 275(3) and 280 (1960).

[32] Note that the decision in *Re* Merry, 31 D.L.R.2d 773 (B.C. Sup. Ct. 1961), was made in the light of The Municipal Act, B.C. REV. STAT. c. 255, § 240 (1960) which expressly requires such motions or applications to be "heard" within the limitation period prescribed.

[33] ONT. REV. STAT. c. 274 (1960).

[34] Toronto v. Polai, [1969] 1 Ont. 655, 3 D.L.R.3d 498 (High Ct. 1968). See for example The Globe and Mail (Toronto), Dec. 7, 9, 10, and 12, 1968, and Jan. 14, Feb. 27, and Sept. 19, 1969.

[35] *Id.* at 660, 3 D.L.R.3d at 503. However, since the writing of this survey, the decision was reversed by the Ontario Court of Appeal. *See* [1970] 1 Ont. 483 (1969). Justice Schroeder held, *inter alia*, that the doctrine of "unclean hands" must relate directly to the very transaction at hand, and therefore it was not applicable in this case. Justices Jessup and Brooke held that the city's practice was discriminatory as against the appellant but dismissed the appeal stating that the public interest must prevail in such a case.

[36] *Id.* at 658, 3 D.L.R.3d at 501.

> the "deferred list." The practice is secretive, it is not made known to all who might wish to avail themselves of it, by the plaintiff. It is open to political abuse and law enforcement is thereby tainted with political favoritism. It permits the continuance of a prohibited use of one premises while prohibiting it in the immediate neighbourhood. [37]

In not granting the city its injunction, Mr. Justice Haines hastened to add:

> This does not mean that I am declaring the by-law invalid. All I am saying is that having failed to act equitably the City has precluded itself from invoking the equitable jurisdiction of this Court to restrain the breach of the by-law by the defendant. It can still prosecute for breach of the by-law in the criminal courts where the existence of the "deferred list" is no defence. Section 486 of the Municipal Act is still available to a ratepayer to take action. [38]

The judgment of Mr. Justice Ruttan in *Re Haddock*, [39] which was noted briefly in last year's survey of municipal law, [40] was appealed unsuccessfully. Of interest in the judgment of the Court of Appeal [41] is the court's review of the law concerning the meaning to be put on the phrase "may quash" which is used in the legislation creating the motion or application to quash procedure in most, if not all, of the provinces. Justice Norris, speaking for the court, said:

> I do not think that the learned trial judge intended to suggest that because of the use of word "may" he had a judicial discretion to be exercised generally. He is to be assumed to be alive to the law to the effect that where a by-law is shown to be illegal on its face, or statutory prerequisites to the council's jurisdiction had not been fulfilled, the Court has no discretion as to quashing and in such case the word "may" is to be read as "shall." [42]

### D. *Land Planning*

In *Re McMartin*,[43] the British Columbia Court of Appeal was unanimous in classifying the exercise by the city of a zoning amending by-law making power in connection with a whole area (as opposed to a single lot, as was the case in *Wiswell v. Winnipeg* [44]) as being legislative and not judicial or quasi-judicial in nature. However, only on a split decision did the court conclude that the passage of such a by-law was not tainted by the city council engaging in further consultation and in hearing a further representation after the statutorily prescribed public hearing had been held. Interestingly enough, even the two judges forming the majority of the court differed in degree on the propriety of the council, under the terms of section 566 of the Vancouver

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[37] *Id.* at 660, 3 D.L.R.3d at 503.
[38] *Id.*
[39] 59 D.L.R.2d 392 (B.C. Sup. Ct. 1966).
[40] 3 OTTAWA L. REV. 258, at 271 (1968).
[41] 5 D.L.R.3d 147 (B.C. 1967).
[42] *Id.* at 150-51.
[43] 70 D.L.R.2d 38 (B.C. 1968).
[44] [1965] Sup. Ct. 512, 51 D.L.R.2d 754. See Harvey, Casenote, 3 MAN. L.J. 66 (No. 2 1969).

Charter, [45] hearing a further representation from an interested party after the public hearing had been concluded.

*Re Kingston Enterprises Ltd.* [46] is a case involving the jockeying that can take place in Ontario in connection with section 28 of The Planning Act [47] between a developer, a municipal corporation, the relevant minister of the Crown, the municipal board and the cabinet in regard to the approval of a plan of subdivision. The case involves straightforward principles or issues of administrative law: first, the court pointed out that the applicant had an appeal procedure available which it had to exhaust before turning to the remedy sought, a declaratory judgment, and second, the court held that the Minister of Municipal Affairs was not required to hold a hearing in exercising the power delegated under section 28(11) of The Planning Act.

Municipal corporations in Ontario cannot, under sections 30(1)(1) and 30(1)(2) of the Planning Act, totally prohibit temporarily or indefinitely the use of land for any purpose. [48] This point of law was hammered home once again in the period under survey in two cases. In *Re Kerr*, [49] the township of Brock attempted to place a temporary freeze on practically all land development in order to give itself time to prepare a comprehensive restricted area by-law. The city of Belleville attempted to prohibit any use of certain lands until it had installed a sanitary sewer and system of water supply. [50] Mandamus orders requiring the issuance of building permits were granted in both cases.

The appellate jurisdiction of the Ontario Municipal Board was discussed in *Re Colicchia Construction Ltd.* [51] The Ontario Court of Appeal said:

> What the Board in effect has purported to do . . . is to disallow the decision of the Committee of Adjustments allowing the minor variance applied for . . . [from] the restrictive by-law and in place thereof grant relief to the applicant of an entirely different nature . . . — something never contemplated by the applicant, never raised before the Committee of Adjustments and never dealt with by the Committee of Adjustments—and something moreover directly in conflict with the express prohibition of the by-law in respect of which the minor variance was sought . . . the . . . Board had no power to make the order which it did . . . nor on the material before us did the Committee of Adjustments have any such power. [52]

The decision in *Regina v. Laister* [53] would have been much more interest-

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[45] B.C. Stat. 1953 c. 55. Section 566 was enacted in B.C. Stat. 1959 c. 107, § 20, *as amended*, B.C. Stat. c. 82, § 16.

[46] [1969] 1 Ont. 221, 2 D.L.R.3d 102 (High Ct. 1968).

[47] ONT. REV. STAT. c. 296 (1960).

[48] Or, to put it in the colourful words of Justice Addy, as quoted by Justice Stewart in *Re* O'Donnell, [1969] 1 Ont. 361, at 362, 2 D.L.R.3d 460, at 462 (High Ct. 1968), municipalities cannot pass by-laws so that the use of lands is "sterilized . . . to such an extent that the owner could not thereupon pasture a pig."

[49] [1968] 2 Ont. 509, 69 D.L.R.2d 644 (High Ct.).

[50] *Supra* note 48.

[51] [1968] 2 Ont. 806.

[52] *Id.* at 807.

[53] [1969] 1 Ont. 580, 3 D.L.R.3d 272 (High Ct.).

ing had there been a resolution of council before the court authorizing the letter which was sent by Tillsonberg's town clerk which in effect informed the accused that he would be able to continue with his prohibited use of his land if he complied with certain conditions. Because the letter of the clerk could not be connected with any resolution or by-law of the town council, the court held that Tillsonberg was in no way estopped from bringing proceedings against the accused for unlawfully using his land.

Lastly, in regard to judicial interpretations of particular terms used in municipal legislation, the Ontario Court of Appeal had occasion to consider the meaning of "family" as used in zoning by-laws designating zones for single-family residential use and particularly with reference to an operation utilizing single-family type homes to treat emotionally disturbed children. [54]

E. *Nuisance and Negligence*

Probably the second most bizarre case which I have had occasion to read recently [55] was that of *Cooke v. Lockeport*, [56] a nuisance action in which, in effect, both material damage and sensible personal discomfort were pleaded. The fact situation involved baseballs being hit out of the defendant's ball field onto the plaintiff's land.

In another case, the city of Portage La Prairie was taken to court for a second time [57] because of its sewage lagoon which has since been relocated as a result of, in the words of the mayor, "our litigation and experience." [58] The primary issues were again nuisance on the basis of seepage and noxious odours, and negligence with the same result following as in *B.C. Pea Growers*. [59]

Arising out of the spot re-zoning fiasco in Winnipeg which came to a head in *Wiswell v. Winnipeg* [60] with a declaration of invalidity, was an action in negligence against the metropolitan corporation by the development company, Welbridge Holdings Ltd., on behalf of whom, in reality, the corporation had attempted the re-zoning. The action was dismissed [61] on the ground that the action had been launched too late in time in terms of the applicable limitation period prescribed in The Public Officers Act; [62] the corporation is a "person" within the usage of that term in the act. As well, the action was

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[54] Regina v. Brown Camps Ltd., [1969] 2 Ont. 461.

[55] The top honour must go to Soon v. Jong, 70 D.L.R.2d 160 (B.C. Sup. Ct. 1968).

[56] 3 D.L.R.3d 155 (N.S. Sup. Ct. 1969).

[57] Roberts v. Portage La Prairie, 2 D.L.R.3d 373 (Man. Q.B. 1968). The previous occasion had been Portage La Prairie v. B.C. Pea Growers Ltd., 43 D.L.R.2d 713, 45 W.W.R. (n.s.) 513 (Man. Q.B. 1963), *aff'd*, 49 D.L.R.2d 91, 50 W.W.R. (n.s.) 415 (Man. 1964), *aff'd*, [1966] Sup. Ct. 150, 54 W.W.R. (n.s.) 477 (1965).

[58] 2 D.L.R.3d at 374-75.

[59] [1966] Sup. Ct. 150 (1965).

[60] *Supra* note 44.

[61] Welbridge Holdings Ltd. v. Winnipeg, 4 D.L.R.3d 509 (Man. Q.B. 1969).

[62] MAN. REV. STAT. c. 213, § 21(1) (1954).

barred by section 394 of The Municipal Act [63] because the by-law in question had never been quashed or repealed as required by the section before such an action as that brought by Welbridge could be launched; the by-law had been declared invalid only. Finally, in obiter, the court dealt with the merits of the case and pointed out, after referring to the decision in *Hedley Byrne & Co. v. Heller*, [64] that: "[t]here is no duty on a municipal corporation to continue its zoning regulations without change unless or until it assumes responsibility for the continuance of that zoning by the issuance of a building permit [65] or by some other like action which creates a special relationship. Once this occurs a duty is imposed on the corporation, but there was no such relationship here." [66]

The *Hedley Byrne* decision was the basis of another decision, *Windsor Motors v. Powell River*. [67] This time its application resulted in the municipal corporation being held liable for the damage flowing from the incorrect advice given by its licence inspector to an officer of a company seeking guidance on where it could locate its business.

There was of course the predictable case concerning the question of misfeasance or nonfeasance. [68] And finally, insofar as this section is concerned, there were two cases of note on the question of negligence and whether a municipal corporation is an occupier of land in specific circumstances. [69]

### F. *Miscellaneous Cases*

There were three useful cases which dealt with the question when and by whom an action can be brought in connection with municipal by-laws. Two of the cases concerned the ever difficult question of the right of a ratepaper or ratepayers to bring an action, [70] and the other case grappled with the question of when an action lies at the behest of an inhabitant or ratepayer against another person or a municipal corporation for the breach of, or failure to

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[63] *Id.* The act was made applicable to the corporation by § 206(4) of The Metropolitan Winnipeg Act, Man. Stat. 1960 c. 40.

[64] [1964] A.C. 465.

[65] Here, the corporation, after initially refusing to issue a building permit under the re-zoning by-law because the by-law was before the courts, only issued a permit on the order of the Board of Adjustment. The board is unconnected with the corporation despite the fact that it is created under The Metropolitan Winnipeg Act and the fact that it is housed in the corporation's premises. *See also* Krauchi v. Charlottenburg (Ont. Jan. 6, 1969, unreported), [1969] Can. Current L. 116, concerning township responsibilities for acts of a committee of adjustments. Pursuant to the permit, Welbridge had done some work on the building site by the time the re-zoning by-law was declared invalid and the permit was thus revoked.

[66] *Supra* note 61, at 520.

[67] 4 D.L.R.3d 155 (B.C. 1969).

[68] Cox v. Sydney Mines, 4 D.L.R.3d 241 (N.S. Sup. Ct. 1969).

[69] Jones v. Calgary, 3 D.L.R.3d 455 (Alta. Sup. Ct. 1969), and Palmer v. Saint John, 3 D.L.R.3d 649 (N.B. Sup. Ct. 1969).

[70] Bongard v. Parry Sound, [1968] 2 Ont. 137 (High Ct.), and Barber v. Calvert, 8 D.L.R.3d 274 (Man. Q.B. 1969).

enforce, a municipal by-law.[71]

The decision in *Applewood Dixie Ltd. v. Mississauga*[72] should be of interest to Ontario readers of this survey for it put to rest any doubts that may have existed as to whether or not a municipal corporation or its public utilities commission is the proper body to acquire land by expropriation for waterworks and other purposes, pursuant to the relevant sections of The Municipal Act[73] and The Public Utilities Act.[74]

Further to the passing reference which I made in last year's survey[75] to the Supreme Court of Canada decision in *Ottawa v. Boyd Builders,*[76] I wonder whether the Court was correct in suggesting that, in that case, the onus was on the municipal corporation to establish that it had been acting in good faith. On the facts, the municipal corporation had passed a prohibitive by-law between the time when the applicant for the order of mandamus had been refused a building permit by the city and the time when the mandamus came on for hearing; at the time of the hearing, the by-law had yet to be approved by the Ontario Municipal Board. According to section 30(7)(b) of The Planning Act[77] of Ontario, only plans approved "prior to the day of the *passing*"[78] of a prohibitive by-law are protected. Thus, while it could be said that at the time of the applicant's original application for the issuance of a building permit the applicant was prima facie entitled to the permit, by the time of the hearing of the application for the order of mandamus requiring the city to issue the permit, the applicant was no longer prima facie entitled to the permit due to the passing of the prohibitive by-law in question. Therefore, I submit that the onus should have been on the applicant to establish clearly, in order to obtain the order which he was seeking, that the municipal corporation in passing the prohibitive by-law had been acting in bad faith. The opinion of the Supreme Court of Canada, however, is that the court ought to grant an order of mandamus in such a situation if the municipal corporation is unable to establish that it was acting in good faith. Quite clearly in the situation where there is no prohibitive by-law in existence at the time of the hearing of a mandamus application, the entire onus should be on the municipal corporation to demonstrate why the order should not be issued to give effect to the prima facie right to a permit to which the applicant is entitled. The approach of the Supreme Court in this regard seems to have been followed by Justice Keith in *Bala Investments Co. v. Hamilton,*[79] athough probably on its facts the decision was justifiable on the ground that the municipal corporation was acting in bad

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[71] Diana Restaurant Ltd. v. Saint John, 3 D.L.R.3d 443 (N.B. Sup. Ct. 1969). *See also* Thordarson v. Zastre, 70 D.L.R.2d 91, at 98 (Alta. 1968).

[72] [1969] 2 Ont. 467.

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

[74] ONT. REV. STAT. c. 335 (1960).

[75] 3 OTTAWA L. REV. at 277.

[76] [1965] Sup. Ct. 408, 50 D.L.R.2d 704.

[77] ONT. REV. STAT. c. 296 (1960).

[78] *Id.* § 30(7)(b) (emphasis added).

[79] [1969] 2 Ont. 490 (High Ct.).

faith. [80]

Mr. Justice Pennell, in *Ransome v. Woodstock*, [81] provides the law teacher and law student, in a brief judgment, with an excellent example of interpreting the words used in a particular section in the context of other sections within the statute in question which are *in pari materia.* The question was whether the term "highway" as used in section 443(1) of The Municipal Act [82] of Ontario includes a "sidewalk" for the purpose of the limitation placed on the liability of municipal corporations for non-repair under section 443(2). [83]

The last case to which I wish to make but a brief reference in this survey is that of *Webb v. Edmonton.* [84] While the main issues in the case are those of unjust enrichment and quantum meruit, there are some municipal law aspects to the case which the reader may find interesting.

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[80] *See also* Texaco Canada Ltd. v. Oak Bay, 68 W.W.R. (n.s.) 373 (B.C. Sup. Ct. 1969).

[81] 3 D.L.R.3d 507 (Ont. High Ct. 1969).

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

[83] *See also Re* By-Law 1865 of Vernon, 4 D.L.R.3d at 401, regarding the use to which a recital or a preamble of a by-law can be put in interpreting the by-law.

[84] 3 D.L.R.3d 123 (Alta. 1969).