A RE-ASSERTION OF INDIVIDUAL PROPERTY RIGHTS.

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Two recent Supreme Court of Canada cases, *St. Peter's Church* v. *Ottawa*[1] and *Costello* v. *Calgary*,[2] represent a significant statement by the Court in the area of land expropriation and individual property rights. In both cases, the decision of the Trial Judges[3] and the provincial Courts of Appeal[4] were overturned as the Supreme Court of Canada preferred the interests and rights of the property owner, over the more general interest of the public in having the land expropriated. Although both cases turn on their own particular facts and on the particular legislation involved, a general attitude toward this area of the law emerges from these judgements. These cases are interesting to look at together as a "set" as the judgements were both written by McIntyre, J.. The decisions were handed down within months of each other, and both were decided on essentially the same grounds in the same area of law.

In the *St. Peter's Church* case, a church acquired certain property apparently for the purpose of expanding the Church grounds and creating parking facilities.[5] The Church applied to the City of Ottawa for a permit to demolish a house situated on the property. In response to this application the City passed a by-law pursuant to s. 29 of the *Ontario Heritage Act*[6] which had the effect of designating the property as one of historical or architectural value. This designation required the owner of the designated property to apply to the City for written consent to demolish the building.[7] The Church went ahead and made such an application to Council.

The *Ontario Heritage Act* states in s. 34(2) that council shall consider the application and within ninety days of receipt thereof shall either consent or refuse the application, and "shall cause notice of its decision to be given to the owner..." and "to be published in a newspaper having general circulation in the municipality, and its decision is final." The *Act* then contains a deeming provision that provides:

> ... where the council fails to notify the applicant of its decision within ninety days after the notice of receipt is served on the applicant ... the council shall be deemed to have consented to the application.[8]

The *Act* further specifies in s. 67(1):

> Any notice or order required to be given, delivered or served under this Act ... is sufficiently given ... if delivered personally or sent by registered mail addressed to the person to whom delivery or service is required at his last known address.[9]

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1. (1983), 45 N.R. 271 (S.C.C.). (hereinafter referred to as *St. Peter's Church*).
2. (1983), 46 N.R. 54 (S.C.C). (hereinafter referred to as *Costello*).
3. *Re Trustees of St. Peter's Evangelical Lutheran Church and City of Ottawa* (1980), 107 D.L.R. (3d) 229 (Ont. H.C.) (*per* Craig, J.); *Costello* v. *City of Calgary* (1980), 109 D.L.R. (3d) 723 (Alta. Q.B.), (*per* Medhurst, J.).
4. *Re Trustees of St. Peter's Evangelical Lutheran Church and City of Ottawa* (1980), 118 D.L.R. (3d) 528 (Ont. C.A.); *Costello* v. *City of Calgary* (1981), 123 D.L.R. (3d) 256 (note).
5. *Supra*, n.1, at 285 (*per* Estey, J., dissenting).
6. *Ontario Heritage Act*, R.S.O. 1974, c. 122.
7. *Ibid.*, s. 34(1).
8. *Ibid.*, s. 34(3).
9. *Ibid.*, s. 67(1).

It was apparent from the evidence that no formal notice of the City's position, either by publication in a newspaper or by written notice, was given to the Church until after the ninety day period specified in s. 34(2)[10] had elapsed. There was evidence, though, that two trustees of the Board of Trustees of the Church were in attendance at a Council meeting where the City made a decision to refuse the demolition permit and also passed a by-law expropriating the property. These decisions were made within the ninety day period. Further, some of the proceedings of the meeting were published in the Ottawa daily newspaper. It also appeared that a letter was mailed by the Board of Trustees to the Council in which the Board acknowledged that the City wanted to expropriate the land.[11]

In any event, approximately four months after the Church submitted their application to demolish, they felt they had the right to demolish the building and commenced doing so. The City immediately obtained an *ex parte* injunction, preventing further demolition, which remained in effect until the litigation was finally resolved in the Supreme Court of Canada. The City commenced an action for damages against the Church, and the Church commenced proceedings for judicial review of the City's action. Both matters were heard together and the Trial Judge decided in favour of the City, holding that the Church had "actual or imputed notice of the decision of Council to refuse the demolition permit",[12] even though they did not have formal notice as a required by s. 67(1) of the *Ontario Heritage Act*. The Church appealed, but was unsuccessful as the Ontario Court of Appeal, in a unanimous judgement, also decided in favour of the City.[13] MacKinnon, A.C.J.O. speaking for the Court stated that the Church "had complete knowledge of the City's position in this matter and of its desire to conserve, under the Act, the property in issue."[14] He then stated in a rather sarcastic tone that the

> . . . rather loose approach to the proceedings [of the City] may be explained by a belief that, with the knowledge it [the City] knew the appellants [Church] had, it did not believe they would be taking a rather Pharisaical approach to what they conceived to be the letter of the law.[15]

MacKinnon, A.C.J.O. refused to take a "mechanical and rigid" approach to the statute and would not deem consent to the application to demolish — "a position directly contrary to the facts known to everyone."[16]

The matter reached the Supreme Court of Canada. McIntyre, J., writing for the majority, expressed a view of the *Ontario Heritage Act* that differed in emphasis from that expressed in the two lower court judgements. McIntyre, J. recognized that the Legislature intended that municipalities should have significant power to interfere with individual rights under the

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10. *Ibid.*
11. *Supra*, n.1, *see* p. 290 (*per* Estey, J., dissenting).
12. *Re Trustees of St. Peter's Evangelical Lutheran Church and City of Ottawa* (1980), 107 D.L.R. (3d) 229 at 232 (Ont. H.C.).
13. *Re Trustees of St. Peter's Evangelical Lutheran Church and City of Ottawa* (1980), 118 D.L.R. (3d) 524 (Ont. C.A.).
14. *Ibid.*, at 528.
15. *Ibid.*
16. *Ibid.*, at 529.

Act. But he also recognized that the Legislature intended to protect the property owner's rights so that it would not be at the cost of the individual property owner that Ontario's heritage would be preserved, but rather at the cost of the community at large.[17] McIntyre, J. agreed with the Courts below that a "broad and liberal construction" should be adopted with this remedial legislation, but noted that this does not mean the Court can disregard certain provisions of the Act.[18] He observed that when the whole Act is construed, s. 34 and s. 67 "protect the interests of the landowner concerned," and that these are only "procedural protections" in the face of the City's indefeasible right to designate and acquire property.[19] He noted that the City has only the smallest of duties imposed on it in order to exercise its power according to the statute, that is the making of a decision and the giving of notice.[20] The implication is that if the City cannot perform these minor requirements in the exercise of their sweeping power, then the Court will not grant the City relief when a requirement is breached.

McIntyre, J. then referred to the subsection 34(2)[21] notice as not merely a formal requirement but "one of substance". He observed that the importance of this notice provision is illustrated by the fact that subsection 34(3)[22] provides a sanction for failure to notify in the form of the deeming provision.[23] In continuing to focus on the rights of the landowner, McIntyre, J. stressed the importance of the specified time limits in that they

> ... fix and determine the commencement and duration of the period during which the landowner's rights are suspended and thereby fix the date upon which they may be reasserted.[24]

McIntyre, J. refused to equate knowledge on the part of the landowners with notice under the Act[25], which was what the Trial Judge and the Court of Appeal had advocated. He stated that the subsection 34(3)[26] deeming provision is not rebuttable, or "deemed until the contrary is proven," as such a concept is inconsistent with the framework of the Act. He therefore decided that a conclusive deeming was intended.[27] He also stated that these procedural requirements are designed to give an element of finality to the proceedings. In conclusion McIntyre, J. held that the subsection 34(3)[28] deeming provision applied, and the City was deemed to have consented to the owner's application to demolish.[29] The Church was allowed to complete the tearing down of the building and proceed with its plans for the property.

Estey, J., in dissent, pointed out the historical nature of the building to be demolished, and the fact that the Church wanted to use the land for

17. *Supra*, n. 1, at 278.
18. *Ibid.*, at 280.
19. *Ibid.*, at 281.
20. *Ibid.*
21. *Supra*, n.6.
22. *Ibid.*
23. *Supra*, n. 1, at 282.
24. *Ibid.*
25. *Ibid.*, at 283.
26. *Supra*, n. 6.
27. *Supra.*, n. 1, at 283.
28. *Supra*, n. 6.
29. *Supra*, n. 1, at 283-4.

parking facilities.[30] He stated that the s. 34(2)(d)[31] requirement that the City publish its decision on an application to demolish in a local newspaper is "directory only" and that a municipality's failure to so publish does not operate to invalidate the decision to deny the application.[32] Estey, J. explicitly equated knowledge with notice by giving the statute a "liberal interpretation", stating that he was applying the *Interpretation Act*.[33] He concluded that the Church was fully appraised of the decision and hence had received "notice" thereof, "albeit informally and not in writing."[34]

The *Costello* v. *Calgary* decision was handed down by the Supreme Court nine weeks after the *St. Peter's Church* decision. In *Costello*, the plaintiffs, a mother and daughter, owned certain land as joint tenants and co-trustees for themselves and other members of their family. The City of Calgary desired to purchase the land for the purpose of building a traffic interchange and freeway. Since no agreement could be reached with the landowners, the City decided to proceed with expropriation proceedings. A notice of expropriation was prepared in accordance with s. 24 of the Alberta *Expropriation Procedure Act*.[35] The Act requires the notice to describe the land in issue, state the date and time the by-law will be presented to council to authorize the expropriation, and state that the owner is entitled to be heard.[36] The Act requires service on the owner, not less than two weeks preceding the date when the by-law will be presented to council.[37] This period is extended to three weeks where the owner is a non-resident of Alberta.[38]

There was a dispute about service of the notice of expropriation on the mother, who was a resident of Alberta. Evidence was presented to show that Mrs. Costello had been served more than two weeks before the Council meeting, in accordance with the Act.[39] Mrs. Costello denied ever having been served. The Trial Judge made a "finding of fact"[40] that she was adequately served and McIntyre, J. did not disturb this finding in the Supreme Court.[41]

It was the adequacy of service of the notice on Mrs. Costello's daughter that became the contentious issue. At the relevant time the daughter resided in Toronto, and therefore subsection 24(5) of the *Expropriation Procedure Act* would apply requiring three weeks notice. Notice was sent to the daugh-

30. *Supra.*, n. 1, at 284-5 (*per* Estey, J. dissenting).

31. *Supra*, n. 6.

32. *Supra*, n. 1, at 292 (*per* Estey, J. dissenting). But it must noted here that the statute says: "shall cause notice . . . to be published" and not "may" (*see* S. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed., at 384-5), and that the same subsection states the decision is "final" — leading one to believe that the requirements of the subsection must be strictly complied with, as McIntyre, J. argues in the majority.

33. *Interpretation Act*, R.S.O. 1980, c. 219, s. 10 as discussed at *supra*, n.1 at 294 (*per* Estey, J., dissenting).

34. *Supra*, n.1, at 294 (*per* Estey, J., dissenting).

35. *Expropriation Procedure Act*, R.S.A. 1970, c. 130 (since repealed and replaced by the *Expropriation Act*, S.A. 1974, c. 27).

36. *Expropriation Procedure Act*, R.S.A. 1970, c. 130, s. 24.

37. *Ibid.*, s. 24(4).

38. *Ibid.*, s. 24(5).

39. *Ibid.*, s. 24(4).

40. *Costello v. City of Calgary*, *Supra*, n. 3, at 728.

41. *Supra*, n. 2, at 61.

ter in Toronto by registered mail, seventeen days before the Council meeting, or only three days late of the time required to be given. The daughter maintained she never received this notice, even though it appeared her husband had signed the acknowledgement card which was dated as having been received four days after mailing. The daughter did not attend the meeting or make any representations regarding the proposed expropriation. The land was in fact expropriated at the Council meeting.

Three years and three months later, the mother and daughter brought an action to have the expropriating by-law declared void and to have the land re-registered in their names as they had not received adequate notice under the *Expropriation Procedure Act*. As McIntyre, J. stated in the Supreme Court, the issue reduced itself to the question:

> Does the failure of the City to comply strictly with the service requirement on one of the two owners render the by-law void or merely voidable and, if the by-law is merely rendered voidable, should it be declared void in the circumstances of this case?[42]

The Trial Judge recognized that the City did not comply with the three weeks service requirement. However, he reasoned that this irregularity made the by-law only voidable since the daughter learned of the by-law shortly after it was passed and since she waited over three years to challenge its validity.[43] He concluded that, since the by-law was voidable only, two saving provisions, one in the *Expropriation Procedure Act*,[44] and another in the *Municipal Government Act*,[45] would render the by-law valid.[46] The Alberta Court of Appeal affirmed the decision of the Trial Judge without reasons[47] and Mrs. Costello and her daughter appealed to the Supreme Court of Canada.

McIntyre, J., this time speaking for a unanimous Court, also wrote the judgement in *Costello*. In this case, as in *St. Peter's Church*, McIntyre, J. emphasized that each of these types of cases must be decided on its own facts and on the particular statutory provisions involved.[48] He then mentioned two competing views or perspectives by which courts regard this area of law. One is the reluctance of courts to interfere with a municipal enactment by an overly strict approach to the construction of the enactment in question.[49] The other is the insistence of courts that the municipality strictly comply with enabling legislation that authorizes municipalities to "exercise extraordinary powers or pass by-laws concerning taxation, expropriation,

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42. *Ibid.*

43. *Supra*, n. 40.

44. *Supra*., n. 36, s. 26(3). This section does not appear to be limited to a "voidable" enactment, but may have been intended to save a "void" or *ultra vires* enactment as well, at n. 95 *et seq*., *infra*. However, the interpretation in the *Costello* trial judgement would be correct according to the majority decision of *Hopper* v. *Foothills*, *infra*, n. 97. McIntyre J. follows the Trial Judge on this issue, *supra*, n. 2, at 67-8.

45. *Municipal Government Act*, R.S.A. 1970, c. 246, s. 397(9).

46. *Supra*, n. 40, at 728-9.

47. *Costello* v. *City of Calgary*, *supra*, n. 4.

48. *Supra*, n. 2, at 62. This is an important point, having regard to the various statutes at the federal and provincial level, that allow a body to expropriate or interfere with an individual's land and the wide variety of circumstances that could be involved in an expropriation situation; *see* E. Todd, *The Law of Expropriation and Compensation in Canada* (1976), 7-17, for a summary of the relevant statutes.

49. *Supra*, n. 2, at 62-3, where McIntyre J. quotes from Rogers, *supra*, n. 32. *See also*, the decision of Laskin, J. (as he then was) in *Walters* v. *Essex County Board of Education*, [1974] S.C.R. 481; 38 D.L.R. (3d) 693.

or other interference with private rights."[50] Because of the type of legislation involved in this case, the latter concern outweighed the former in the opinion of McIntyre, J. He reinforced this conclusion with reference to a number of cases, the most recent of which was his own judgement in *St. Peter's Church*.[51] McIntyre, J. therefore decided that the service of notice provisions contained in s. 24 of the *Expropriation Procedure Act* were mandatory, and failure to comply with them would invalidate a by-law passed at such a meeting.[52] The expropriation by-law passed by Council was therefore declared void, and incapable of being rectified by any curative provisions more than ten years after it had been passed.[53] McIntyre, J. recognized that the breach was of a minor nature. However, he stated that it should not be remedied since it would be impossible to decide at which point a breach should or should not be relieved against "where the interest of private citizens is threatened."[54] McIntyre, J. concluded:

> The line should be drawn where the Legislature chose to put it and not where individual judicial discretion may fix it on a case by case basis.[55]

The result was that the land was ordered to be re-registered in the mother and daughter's names, as owners.

Both *St. Peter's Church* v. *Ottawa* and *Costello* v. *Calgary* dealt with a breach of notice requirements by a municipality when dealing with an individual's land for some higher public purpose. The *Ontario Heritage Act* considered in the *St. Peter's Church* case, like the *Expropriation Procedure Act* considered in the *Costello* case, is enabling legislation that endows a public authority with power to interfere with a property owner's rights, even if totally against the property owner's wishes.[56]

In each case, the breach of the notice requirement was slight. In *St. Peter's Church*, the City failed to send a formal letter of its decision not to allow demolition to the landowner, yet the City had frequent dealings with the landowner and at no time did the City seem willing to let the house be destroyed. In fact, since two of the trustees attended the Council meeting where the decision not to allow demolition was made, a summary of this action was published in a local newspaper, and a letter referring to the decision was sent by the Church to Council, one can assume that the landowners knew of the City's decision. Indeed, the Trial Judge, the Ontario Court of Appeal, and Estey, J. in dissent in the Supreme Court of Canada were heavily influenced by these circumstances in disallowing the landowner's claim. In *Costello*, the City of Calgary was three days late in mailing

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50. *Supra*, n. 2, at 62-4. Note, therefore, that the *St. Peter's Church* and *Costello* decisions are really broad enough to require strict compliance with any statute that authorizes interference with private rights, although the focus of this note is limited to the more obvious expropriation legislation.

51. *Supra*, n. 2, at 67.

52. *Ibid.*, at 67-8.

53. *Ibid.*, at 68.

54. *Ibid.*

55. *Ibid.*

56. "Expropriation", the compulsory acquisition of property, is foreign to the common law and entirely statutory in origin, and, as E. Todd states in his book on expropriation, *supra*, n. 48, at 3: "Modern expropriation law and practice is directly linked with the English railway boom of the mid-nineteenth century." "Heritage legislation", which can be regarded as a specialized form of expropriation, is a relatively new development in Canadian law.

the notice of expropriation to one of the landowners, but it was not until three and one-half years later that the landowner decided to object. Nevertheless in both cases the Supreme Court held knowledge on the part of the landowners to be irrelevant and decided to hold the municipalities liable for these relatively insignificant breaches.

The most interesting aspect of the two judgements is the Court's concern and focus on the individual rights of the landowner. This focus, though of course one of the oldest and most basic tenets of our law,[57] is absent from the lower courts' judgements in both cases and from other recent cases in this area. McIntyre, J. speaks on numerous occasions of the "interests of the landowner,"[58] "protection . . . for the landowner,"[59] and the protection of the "citizen".[60] Such language leads one to wonder whether one consequence of the enactment of the *Canadian Charter of Rights and Freedoms*[61] is the spirit of "rights consciousness" that it will create in areas of law where it appears to have no direct application. McIntyre, J. justified this emphasis on the rights of the landowner through his interpretation of the statutes in question. He pointed out that the legislators have attempted to balance the interests of the public with the interests of the individual property owner, and that in some instances the interests of the property owner are to be preferred.[62] Thus these two cases demonstrate that it may not be necessary to entrench property rights in the *Charter* as the common law itself will provide sufficient protection.

One case that McIntyre, J. does not cite, but is a classic pronouncement on the sanctity of the rights of the property owner, is the English Chancery decision of Lord Westbury, L.C. in *Simpson* v. *South Staffordshire Waterworks*.[63] The case concerned a waterworks company that possessed power to expropriate land pursuant to certain enabling legislation.[64] The company deposited plans and gave notice to a landowner indicating an intention on the part of the company to construct a tunnelled aqueduct below the surface of the landowner's property. The company subsequently claimed to hold all of the landowner's land for other purposes. In holding that the company was restricted to its originally described intention, the Lord Chancellor stated:

> . . . I entirely concur in the rule laid down by Lord Cottenham at an early time in the administration of justice with regard to railway works and other works of a similar descrip-

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57. The most well known pronouncement in this area would be the *Magna Charta*, which is generally regarded as securing the personal liberty of the subject and his rights of property.

58. *Supra*, n. 1, at 281.

59. *Ibid.*

60. *Supra*, n. 2, at 68.

61. *Constitution Act*, 1982, Part I.

Property rights were expressly left out of the Canadian *Charter*, but there is talk about reaching an agreement to include them. Note that section 7 of the *Charter*, while analogous to the 14th Amendment of "due process" clause of the *American Bill of Rights*, expressly leaves out the reference to "property"; also that there is no section of the Canadian *Charter* similar to the Fifth Amendment, which states, in part, "nor shall private property be taken without just compensation." Perhaps an ingenious argument could be made that s. 8 of the *Charter*, "Everyone has the right to be secure against unreasonable search and seizure," could apply to seizure of an individual's property by an expropriating authority. *See, generally*, D.C. McDonald, *Legal Rights in The Canadian Charter of Rights and Freedoms*, (1982).

62. *Supra*, n. 1 and n. 2.

63. (1865), 34 L.J. Ch. 380; 46 E.R. 1082.

64. *Waterworks Clauses Act*, 1847, 10 & 11 Victoria, c. 17, s. 12 (U.K.).

> tion, that it is incumbent on the company to prove clearly and distinctly from the Act of Parliament the existence of the power which they claim a right to exercise, and if there is any doubt with regard to the extent of the power claimed by them, that doubt should undoubtedly be for the benefit of the landowner, and should not be solved in such a manner as to give to the company any power which is not most clearly and expressly defined in the statute.[65]

This attitude was observed in the Supreme Court's interpretation of the statutes that were in issue in the two cases under discussion, but not in the decisions of the lower court judges.

There were two early decisions by the Supreme Court of Canada that reflect the attitude favoured by Lord Westbury in *South Staffordshire Waterworks* and by McIntyre, J. in the *St. Peter's Church* and *Costello* cases. In 1911, in *Riopelle* v. *City of Montreal*,[66] pursuant to provincial enabling legislation,[67] the Montreal municipal Council had passed a by-law that gave an inspector power to demolish unsafe buildings after detailed notice to the landowner. In the case of one landowner's building, the Supreme Court held that notice had been insufficient. Fitzpatrick, C.J. C. stated that "the principle at issue is of the highest importance, affecting the right of property"[68] and as well:

> . . . where the legislature has thought fit to direct the doing of something which but for that direction or authority would be an actionable wrong, it is incumbent on the party who professes to exercise the power conferred by the statute to prove beyond all doubt that he strictly complied with the conditions subject to which the power has been conferred.[69]

Thus the Supreme Court would put a strong evidentiary burden on an authority that claimed power to interfere with individual property rights. In the second case, *City of Victoria* v. *Mackay*,[70] decided in 1918, Anglin, J. said of certain provincial enabling legislation that required notice of an expropriation by-law to be published in a newspaper[71]:

> [T]he statute with which we are dealing empowers taxation as well as an exercise of eminent domain. On both grounds, a strict compliance with the terms in which it authorizes the exercise of the rights conferred may be properly exacted.[72]

Both cases represented a strong statement by the Supreme Court about the sanctity of an individual's property rights when they are being interfered with by some legislative authority. The Court demanded strict compliance with enabling legislation in both *Riopelle* and *McKay*. To the extent that the *St. Peter's Church* and *Costello* decisions reflect the attitude of these early cases, they may be considered a re-assertion by the Supreme Court of the importance of the individual property owner's rights.

Other recent Supreme Court cases, prior to *St. Peter's Church* and *Costello*, place less significance on the landowner's rights. In *Costello*,

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65. *Supra*, n. 63, at 1084 (E.R.).
66. (1911), 44 S.C.R. 579.
67. Montreal City Charter, 37 Vict., c. 51, s. 123(51)(52)(Que.).
68. *Supra*, n. 66, at 586.
69. *Supra*., n. 66, at 582-3.
70. (1918), 56 S.C.R. 524.
71. *Municipal Clauses Act*, S.B.C. 1906, c. 32, s. 50 (1)(2).
72. *Supra*, n. 70, at 537.

McIntyre, J. relied on the case of *Scarborough* v. *Bondi*,[73] to support his contention that the breach of the requirement of service of notice on one of the landowners was grounds for declaring the by-law that expropriated the landowner's land void.[74] In *Bondi*, the Township of Scarborough amended an existing by-law but failed to get the approval of the Ontario Municipal Board as was required with this type of amendment, pursuant to subsection 390(9) of Ontario's *Municipal Act*.[75] A somewhat further anomolous section of the *Municipal Act*[76] expressly forbids a municipal council to exercise any power that required the approval of the Municipal Board before that approval had been obtained. Cartwright, J. held that he was "compelled by the plain words of the statute" to declare the by-law a nullity even though this might "result in great incovenience."[77] In *Costello*, McIntyre, J. felt that the "same principle" was applicable.[78]

Wiswell v. *Winnipeg*[79] is another Supreme Court of Canada case, decided prior to *St. Peter's Church* and *Costello*, that dealt with the effect of a public authority interfering with an individual's property rights. Hall, J., in the majority but speaking only for himself and Martland, J. on this point, held that the failure of a municipal council to follow its own procedural by-law and post notices of the hearing regarding the by-law on the premises in question, rendered the by-law void.[80] Hall, J. decided that the enacting of the by-law in question was a quasi-judicial act which required the Council to afford the people affected a proper opportunity to state their case, which was not done in this case.[81] Hall, J. placed emphasis on the fact that the municipality knew that the landowner would oppose the by-law in question.[82] However, in *St. Peter's Church* and *Costello*, the Court held that knowledge on the part of the parties was irrelevant. While in some respects contrary to the decisions of *Costello* and *St. Peter's Church*, *Wiswell*[83] illustrates how this area may easily involve administrative law issues such as the concept of "natural justice", and the distinction between a quasi-judicial act and a legislative function.[84]

The last decision of the Supreme Court that should be examined is *Walters* v. *Essex County Board of Education*[85]. This case involved the expro-

73. [1959] S.C.R. 444.

74. *Supra*, n. 2 at 65.

75. *The Municipal Act*, R.S.O. 1950, c. 243.

76. *Ibid.*, s. 43.

77. *Supra*, n. 73 at 448.

78. *Supra*, n. 2, at 65.

79. [1965] S.C.R. 512; 51 W.W.R. 513.

80. *Ibid.*, at 523. (S.C.R.).

81. *Ibid.*, at 523-4. (S.C.R.).

82. *Ibid.*, at 523. (S.C.R.).

83. *Ibid.*

84. Also of concern in the administrative law area, McDermid, J.A. in *Hopper* v. *Foothills*, *infra*, n. 90, referring to *Wiswell*, *supra*, n. 79, stated that the question of whether a breach of a statutory requirement, such as a notice provision, rendered the by-law void or merely voidable was still open to the Supreme Court of Canada. In *Costello*, the Supreme Court addressed this question by deciding that a breach of a procedural requirement regarding an action that affects an individual's rights will render the by-law void and not merely voidable. The void action is of course, not subject to being rectified by any saving provision. See on this H.W. Wade, "Unlawful Administrative Action: Void or Voidable," in 83 *L.Q.R.* 526 and 84. *L.Q.R.* 95.

85. *Supra*, n. 49.

priation of farm land against the wishes of the landowner involved for the purpose of building a school. Under section 8 of the Ontario *Expropriations Act*[86] an expropriating authority is required to consider the report of an inquiry officer. In this case the report of the inquiry officer was not in favour of the expropriation. Laskin, J., as he then was, held that the authority is not bound by any finding of fact or interpretation of law contained in the report, as long as they have the report before them and devote some time to its consideration. What is significant about the decision, for the purposes of this note, is the fact that the Court spoke so little about the rights of the property owner in question. Laskin, J. concentrated on strictly interpreting the legislation involved and concluded:

> [T]he board [of education] as an approving authority is neither a judicial nor a *quasi*-judicial body, but is invested with the widest discretionary power to determine, subject only to considering the inquiry officer's report, whether an expropriation should proceed. The sanction for a wrong-headed decision (absent bad faith), having regard to its duty to give reasons, is public obloquy not judicial reproof.[87].

Clearly, such language is different in emphasis from the two later decisions of the Supreme Court that are now under consideration. Laskin, J. did concede, though, that on a rare occasion it may be appropriate to fix an approving authority with a duty to hear or accept representations from owners whose lands are in danger of being expropriated.[88]

There are a few scattered lower court decisions that support the findings of the Supreme Court in *St. Peter's Church* and *Costello*.[89] Regarding the case law that is contrary to these two decisions, the most well-reasoned pronouncement in Canada is McDermid, J.A.'s dissent in *Hopper* v. *Foothills*.[90] In *Hopper*, the municipality wanted to expropriate a strip of Hopper's land to allow another landowner access to public lands. A notice of expropriation was mailed to Hopper twenty-one days prior to the Council meeting at which the by-law was to be presented to Council. Twenty-one days was the limit of the notice required under the Alberta *Expropriation Procedure Act*.[91] Hopper received the notice in Hong Kong, where he was travelling, on the day Council met and passed the expropriating by-law. One Judge in the majority held that the landowner's fundamental right to notice, "whenever personal or property rights are in jeopardy", had not been met in this case.[92] He placed emphasis on the fact that the City's officers knew that Hopper was out of the province and would appear and oppose the by-law if he could.[93] The other Judge in the majority based his decision on the statute in question. He held that s. 51 of the *Expropriation Procedure Act*,

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86. *The Expropriations Act*, R.S.O. 1970, c. 154, s. 8.

87. *Supra*, n. 49, at 699 (D.L.R.).

88. *Ibid.*

89. *See eg., Re Ostrom and Township of Sidney* (1888), 15 O.A.R. 372 (C.A.); *Re McCrae and Village of Brussels* (1904), 8 O.L.R. 156 (C.A.); *McDougal et. al.* v. *Harwich Township*, [1945] 2 D.L.R. 442 (Ont. C.A.).

90. (1976), 71 D.L.R. (3d) 374; [1976] 6 W.W.R. 610 (Alta. C.A.). In the sense that knowledge is held to be relevant to this issue of notice in a land expropriation situation, the majority and minority decisions in *Hopper* v. *Foothills* and the Supreme Court decision in *Wiswell* v. *Winnipeg*, *supra*, n. 79 support the lower court decisions of *St. Peter's Church* and *Costello*.

91. *Supra*, n. 36.

92. *Hopper* v. *Foothills* (1976), 71 D.L.R. (3d) 374, at 387-90.

93. *Ibid.*, at 388.

which deemed service on the day notice was mailed, could only be relied upon when there are reasonable grounds for believing that a notice served in that manner on a resident owner who is temporarily out of the province will afford him at least two weeks warning of the proposed by-law. In the result the by-law was declared void.[94]

McDermid, J.A., in dissent, focused on a saving provision in the Alberta *Expropriation Procedure Act*[95] that in his view precluded Hopper from bringing the action.[96] The section in question stated that when a certified copy of the expropriating by-law and the plan of survey are registered in the land registry, the land becomes vested in the municipality, and all "actions and claims in respect of the expropriation are barred" except for the former owner of the land's right to compensation.[97] McDermid, J.A. would have applied this section, even assuming that no proper notice was given to the landowner as required by the legislation.[98] McDermid, J.A. cited the general inconvenience that would result if a plan and a by-law could be set aside after registration, using the example of an expropriated road that led to a bridge.[99] The fact that the by-law was set aside and the bridge closed would result in great public inconvenience. McDermid, J.A. held that the integrity of the Land Titles System also requires this interpretation.[100] Not to allow land registered in the system to be set aside is "a matter of such importance to the public that it exceeds the rights of a single individual."[101] Also, still focusing on the rights of the landowner, McDermid, J.A. stated:

> When the rights the subsection takes away from the landowner are considered, he is still left with the right to compensation which in the end result is really the most important right.[102]

It is questionable if compensation would be "the most important right" in all cases,[103] but McDermid, J.A. is correct when he adds that even if the landowner objects, the municipality may still expropriate his land.[104] McDermid, J.A. concluded that, in specifically legislating this "barring" section,[105] the legislature must have also meant to bar the landowner's right

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94. *Ibid.*, at 384, 390.

95. *Supra*, n. 36, s. 26 (3). This section was changed when the *Expropriation Procedure Act*, R.S.A. 1970, c. 130 was replaced by the *Expropriation Act*, S.A. 1974, c. 27. The section now reads:

> Registration of the certificate of approval is conclusive proof that all requirements of this Act in respect of registration and of matters precedent and incidental to registration have been compiled with.

The word "conclusive" seems to indicate that the Alberta Legislature is attempting to avoid the effect of mistakes such as the one that voided the expropriating by-law in *Costello, supra*, n.2. On this new section *see, e.g.* the case of *Re Price and Town of Hanna* (1980), 20 L.C.R. 356 (Alta. Q.B.), where Prowse, J. at p. 360 said: " . . . where the owner has actual notice [of the intention to expropriate], I am of the opinion he is precluded by s. 21 from relying on the technical performance of conditions precedent to the registration of the certificate of approval."

The section, though, makes no mention of "actual notice". However, this case might well have been decided differently in light of *Costello* and *St. Peter's Church*, where the Supreme Court held knowledge on the part of the landowners to be irrelevant.

96. *Supra*, n. 92, at 376-9.

97. *Supra*, n. 36, s. 26(3).

98. *Supra*, n. 92, at 377-9.

99. *Ibid.*, at 378-9.

100. *Ibid.*, at 379.

101. *Ibid.*

102. *Ibid.*

103. As, for example, where land has been in a family for generations and has great sentimental value.

104. This is the fundamental principle of the law of expropriation. *See, e.g., Expropriation Act*, R.S.A. 1980, c. E-16, s. 6.

105. *Supra*, n. 36, s. 26(3).

to bring an action if insufficient notice was given to him. Otherwise the legislature would have expressly excepted this right as the right to compensation was excepted.[106]

A provision similar to the Alberta "barring" section is found in English expropriation law and is given treatment similar to McDermid, J.A.'s dissent by the courts of England. In England, where expropriation is referred to as "compulsory purchase", if a landowner wishes to attack a "Compulsory Purchase Order", or expropriation order, he has a right to make an application to the High Court within six weeks from the date on which the notice of confirmation or making of the order was first published.[107] Under subsections 15(1) and 16 of the *Acquisition of Land Act*[108], after this six week period, a compulsory purchase order or certificate may not be questioned in any legal proceedings whatsoever.[109] This is so even in a case of fraud or bad faith,[110] or where the complainant has been given no opportunity of knowing of his right to apply to the High Court.[111]

However, under English expropriation procedure, a person with an interest in the land to be expropriated must be served with a "notice to treat",[112] similar to the notice of intention to expropriate found in Canadian legislation.[113] This "notice to treat" is classified as a condition precedent to the exercise of compulsory powers,[114] making any exercise of compulsory powers without service of the "notice to treat" *ultra vires*.[115] It has been held in England that in order for both parties to be bound by the "notice to treat", the notice must be served in accordance with the statutory requirements.[116] But it would seem, according to recent English case law, that even an *ultra vires* exercise of compulsory powers would be cured by subsections 15(1) and 16 of the *Acquisition of Land Act*. Lord Radcliffe stated in *Smith* v. *East Elloe Rural District Council:*

> I should myself read the words of paragraph 15(1) [of the *Acquisition of Land Act*] . . . as covering any case in which the complainant sought to say that the order in question did not carry the statutory authority which it purported to.[117]

It is interesting that even Lord Denning, M.R. has endorsed the above principle. In *R.* v. *Secretary of State for the Environment*, Lord Denning, M.R. agreed with the above statement of Lord Radcliffe, explicitly stating

106. *Supra*, n. 92, at 379.

107. *Acquisition of Land (Authorisation Procedure) Act*, 11 Geo. 6, c. 49, (U.K.), Sch. 1, Part IV, s. 15(1) (which, with related enactments, was consolidated in the *Acquisition of Land Act, 1981*, c. 67, which came into force on the 30 January, 1982); and *see, generally*, 8 *Halsbury's Laws of England* (4th ed.), para. 35 (hereinafter referred to as *Halsbury's*).

108. *Acquisition of Land (Authorisation Procedure) Act*, 11 Geo. 6 c. 49, Sch. 1, Part IV, (Now *Acquisition of Land Act, 1981*, c. 67, s. 25).

109. *Supra*., n. 107, 8 *Halsbury's*, para. 16.

110. In *Smith v. East Elloe R.D.C.*, [1956] A.C. 736; [1956] 1 All E.R. 855, the House of Lords held that the plain prohibition in para. 16 of the *Acquisition of Land Act*, 11 Geo. 6, c. 49, Sch. 1, Part IV, against questioning the validity of a compulsory purchase order, ousted the jurisdiction of a court to consider an attack on such an order, even where bad faith was involved.

111. *Woolett v. Minister of Agriculture and Fisheries*, [1955] 1 Q.B. 103; [1954] 3 All E.R. 529 (C.A.).

112. *Supra*., n. 107, 8 *Halsbury's*, para. 121.

113. *See, e.g., Expropriations Act*, R.S.O. 1980, c. 148, s. 6(1); *Expropriation Act*, R.S.A. 1980, c. E-16, s. 8.

114. *Supra*., n. 107, 8 *Halsbury's*, para. 121.

115. *Ibid.*; *cf.* para. 120.

116. *Ibid.*, para. 123; *Shepherd v. Norwich Corpn.* (1885), 30 Ch. D. 553, at 571-4.

117. *Supra*, n. 110, at 768.

that the paragraph would cover a case of *ultra vires* action, as well as non-compliance with regulations and bad faith.[118] Lord Denning, M.R. went on to speculate on the policy underlying the legislation:

> [W]hen a compulsory purchase order has been made, then if it has been wrongly obtained or made, a person aggrieved should have a remedy. But he must come promptly... if the six weeks expire without any application being made, the court cannot entertain it afterwards. The reason is because, as soon as that time has elapsed, the authority will take steps to acquire property, demolish it and so forth. The public interest demands that they should be safe in doing so.[119]

Thus Lord Denning, M.R. stated that the public interest involved in having land irrebuttably vested in the expropriating authority outweighs the rights of the individual landowner after the six week period in which to complain has expired. The English law as represented by the leading cases interpreting the legislation takes the opposite approach from the law in Canada where minor breaches of notice provisions may render an expropriating by-law void years after its enactment.

On a close reading of the legislation involved in *St. Peter's Church* and *Costello* and the lower court judgements in those cases, it is clear that both of McIntyre, J.'s judgements better interpret and apply the legislation involved. As McIntyre, J. himself pointed out, to construe the legislation other than as he does is to misconstrue or ignore certain provisions.[120] McIntyre, J. went further to explain that according to the legislation involved, the expropriating municipalities should be held liable for these technical breaches of notice requirements since the individual property rights of the landowner are infringed if the expropriating authority is not forced to strictly comply with any enabling legislation.[121] Due to this emphasis on the rights of the landowner in these two cases, one tends to forget that in a case such as *Costello*, the City would be able to start the whole expropriation procedure over again. However, in that case well over ten years had elapsed since the initial expropriation attempt, and perhaps work had already been done on the land in question during the three year period before the expropriation by-law was attacked. The landowners would again, of course, have a right to be heard, but the City could go ahead and expropriate the land over the landowners' wishes as long as the City assiduously followed the requirements placed on them. The compensation factor would have to be considered afresh, and perhaps the award would be higher, but as long as the City genuinely wanted to expropriate the land in question there is really nothing the landowner could do. In the *St. Peter's Church* case the landowners were allowed to demolish the building in question. The land losing its value to the city to expropriate, the landowners could go ahead with their plans for the land. But one must ask, what if the house in question had been of greater historical importance and not already partially demolished,[122] and therefore even greater in the public interest to have maintained? Would the

118. *R.* v. *Secretary of State for the Environment*, [1977] Q.B. 122; [1976] 3 All E.R. 90 (C.A.).

119. *Ibid.*, at 96 (All E.R.).

120. *Supra.*, n. 1, at 280-1.

121. *Ibid.*, at 282-4; *supra*, n. 2 at 67-68.

122. It is very interesting to note that the Church and property in question are very close to the Supreme Court and that the partially demolished house presented quite an eye-sore.

court still be as willing to support the interests of the individual landowners? The question arises whether the greater harm is to the public in the delay encountered in the development and use of the land in question, or as in the *St. Peter's Church* case, the destruction of an historical home.

These considerations and those outlined by McDermid, J.A. in *Foothills*[123] and by Lord Denning, M.R. in *R.* v. *Sect. of State for the Environment*,[124] make it apparent that the approach favoured by McDermid, J.A. in *Foothills*,[125] by the lower court judgements in these cases,[126] and by the English law is more sensible. Consequently legislation should be introduced in Canada, or given effect if already in force,[127] similar to the English legislation that allows for a short period in which to apply for review of the expropriation order and after which the land irrebutably vests in the expropriating authority. Alternatively, legislation that provides that breaches of a small and technical nature, where the parties involved had actual notice, should not result in voiding the expropriation by-law. In both cases, legislation could provide that breaches may be remedied through compensation. The existence of such legislation in these cases might have saved a house of historical importance and prevented at least a ten year delay in the City of Calgary's land development plans.

Nevertheless, these cases have important consequences for municipalities and anyone who is contemplating attacking a municipal decision. If the act of the municipality, or the failure to act as in the *St. Peter's Church* case, concerns an interference with individual property rights, all requirements in the enabling legislation must be strictly complied with. Even a minor breach, such as in the cases at hand, may be grounds for having the municipal enactment declared a nullity. This principle applies even years after the enactment in question was passed, as 'no time curing' provisions will have any effect if the enactment is declared void. Thus, municipalities must be more astute than ever to abide by all the requirements placed upon them when acting in this area. Disgruntled landowners for their part have these clear pronouncements by the Supreme Court to rely on when attacking expropriating by-laws.

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123. *Supra*, n. 92, at 375-9.

124. *Supra*, n. 118, at 96 (All E.R.).

125. *Supra.*, n. 92, at 375-9.

126. *Supra.*, n. 3, and n. 4.

127. *See, eg.*, the Alberta provision, quoted at note 95, and s. 13 of the Federal *Expropriation Act*, R.S.C. 1970, 1st Supp., c. 16, which reads:

> Upon the registration of a notice of confirmation,
>
> (a) the interest confirmed to be expropriated becomes and is absolutely vested in the Crown; and
>
> (b) any other right, estate, or interest is, as against the Crown, . . . thereby lost to the extent that such right, estate, or interest is inconsistent with the interest confirmed to be expropriated.

The Ontario *Expropriations Act*, R.S.O. 1980, c. 148, at first appears more liberal than the English and Alberta types of expropriation legislation. This is seen in s. 45 of the Ontario Act:

> Any application to set aside or quash any proceeding or step taken under this Act shall be made within thirty days . . ., but this section does not apply where the applicant was entitled to and not given notice of the proceeding or step or where the proceedings or step was a nullity.

But then see s. 10(1) where failure to serve a notice of expropriation on the owner "does not invalidate expropriation," and s. 25 (4) where, again, failure to serve a notice does not invalidate the expropriation. Both subsections in their specificity override the more general s. 45 and demonstrate an intention on the part of the Ontario legislators not to let minor or trifling omissions void an otherwise valid expropriation by-law.

The *Ontario Heritage Act*, R.S.O. 1980, c. 337, s. 36(2), allows a municipality to expropriate land "[s]ubject to the *Expropriations Act*. . . ."