## MUNICIPAL BY-LAWS—ACTION FOR DECLARATION; FAILURE OF INTERNAL PROCEDURE;

### *Wiswell et al. v. Metropolitan Corporation of Greater Winnipeg, Recalled*

Although I may be accused of tardiness in waiting until now to analyze decisions which were handed down three years ago or more,[1] it so happens that they remain as relevant today for Canada in general and Manitoba in particular as if they had just been decided. For the benefit of the uninitiated and of those readers from whose memories the facts involved in these decisions may have faded, a reference in this regard to the judgment of Hall, J. of the Supreme Court of Canada will be helpful;

> "On April 13, 1962, the Council of the Metropolitan Corporation of Greater Winnipeg passed By-law 177 rezoning from 'R1' Single-Family District to 'R4A' Multiple Family District . . . land . . . situat[ed] at the North-west corner of the intersection of Academy Road and Wellington Crescent and compris[ed of] . . . approximately 3.4 acres. It is bounded on the north by the Assiniboine River, on the east by Academy Road and the approach to the Maryland Bridge, on the south by Wellington Crescent on which it fronts, and on the west by the easterly boundary of the Shrine Hospital property. The site is located [in the City of Winnipeg] immediately to the west of and adjacent to the south end of Maryland Bridge. Wellington Crescent up to Academy Road, and Academy Road itself, are both designated as major thoroughfares under the Draft Development Plan of the Metropolitan Corporation of Greater Winnipeg. Lots 43, 44 and 45 comprising approximately 1.8 acres were at all times relevant to this action owned by the late Dr. B. J. Ginsburg. Lots 40, 41 and 42 comprising the most westerly three lots of the area rezoned and forming an area of approximately 1.6 acres were at all times relevant to this action owned by Mr. Joseph Harris.
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> The appellants who are members of an unincorporated association known as the Crescentwood Home Owners Association brought action on their own behalf and on behalf of all other members of the association to have said By-law 177 of the respondent declared invalid . . . In 1956 Dr. Ginsburg obtained two [variation or variance] orders from the Zoning Board of he City of Winnipeg permitting him to erect on his property an 8-story 64 suite apartment block. The granting of these orders was opposed by the association which also unsuccessfully appealed both orders to the Municipal and Public Utility Board. The orders were for one year and were renewed from year to year ex parte and without notice to the association and were in force and effect on April 1, 1961 when the Metropolitan Corporation of Greater Winnipeg succeeded the City of Winnipeg in jurisdiction over zoning matters[1a] . . . on or about December 22, 1961, Dr.

1. (1964) 45 D.L.R. (2d) 348, 48 W.W.R. 193 (Man. C.A. rev'g a judgment of Smith J. (unreported) who had declared the by-law in question invalid), rev'd by [1965] S.C.R. 512, 51 D.L.R. (2d) 754, 51 W.W.R. 513.

1a. Under Part IV of he Act, which Part deals with the Corporation's land planning powers and by virtue of s. 78 (in connection with the interpretation of which see Singer v. Town N' Country Holding Co. Ltd. (1966) 56 D.L.R. (2d) 339 at pp. 341-3) all jurisdiction over land planning and land use control passed in 1960 when the Corporation was created from the various municipal corporations lying "within the metropolitan area and the additional zone" to the Corporation. Nonetheless, by virtue of s. 82 all town planning schemes, and zoning, building and nuisance control by-laws, etc. of the various municipal corporations within the metropolitan area and the additional zone in existence in 1960 were to continue in force, although jurisdiction to amend, alter or repeal them passed to the Corporation. Pursuant to s. 79(1) the Corporation has prepared, had approved, and has established a development plan for the area under its planning jurisdiction which it can implement by passing pursuant s. 83 and other sections the necessary zoning, building, nuisance control, subdivision control and urban renewal by-laws.

> Ginsburg applied to the Metropolitan Corporation of Greater Winnipeg to further extend these Zoning Board orders to April 30, 1963 . . . Mr. D. J. Jessiman representing the association . . . appeared to oppose the granting of the extension of time being asked for. The Metropolitan Council overruled the objection and extended the time to April 30, 1963.
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> Meanwhile, Dr. Ginsburg had requested the Metropolitan Corporation . . . to re-zone his land from 'R1' to 'R4A'. On January 29, 1962 the Director of Planning, after a meeting of the Technical Committee, composed of staff members of the corporation, had considered the application, recommended to the Planning Committee that both the Ginsburg and Harris land be re-zoned to an appropriate multiple family dwelling category.
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> At its meeting of February 1, 1962, the Committee on Planning concurred in the recommendation of the Director and instructed the Director to proceed with the usual publication of a notice of public hearing. Subsequently, on March 1st and March 8, 1962, a notice appeared in the Winnipeg Free Press and Winnipeg Tribune advising of the meeting to be held on March 12th.
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> At the Committee on Planning meeting on March 12th no one appeared in opposition to the application for re-zoning. The Committee recommended to Council that all six lots, i.e., the Ginsburg and Harris property, be re-zoned to 'R4A' classification, a multiple-family district. Council accepted the recommendation of the Planning Committee and subsequently By-law 177 was passed on April 13, 1962. In the meantime Dr. Ginsburg had died.
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> On November 28, 1963, the appellants issued a statement of claim asking for a declaratory judgment to the effect that By-law 177 was invalid.
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> On December 18, 1963, the respondent issued a building permit to Wellbridge Holdings Limited of Winnipeg who had taken over the Ginsburg interests to erect on the lands in question a 12-storey high-rise apartment block to contain 166 suites . . . The appellants amended their statement of claim on January 20, 1964, claiming a declaration that the said building permit was invalid and should be cancelled.
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> The Crescentwood Home Owners had no notice or knowledge of Dr. Ginsburg's application to re-zone from 'R1' to 'R4A."[2]

Smith J. (as he then was) heard the action for the declaration and declared the by-law to be invalid. On appeals to the Manitoba Court of Appeal and the Supreme Court of Canada, the judgment of Smith J. was reversed and restored, respectively.[3]

First of all, I wish to underline the fact that the procedural vehicle utilized by the plaintiffs to attack the re-zoning by-laws was an action for a declaratory judgment or a declaration concerning the validity of the by-law; I wish to emphasize this because, from the reports of the appeals to the Manitoba Court of Appeal and the Supreme Court of Canada contained in the Dominion Law Reports and the Western Weekly Reports and from the language used by Freedman and Guy JJ.A. of the Manitoba Court of Appeal in their judgments, one might labour under the mistaken impression that the plaintiffs launched a motion or application to quash the by-law in question.

Second of all, and again in connection with the procedural vehicle utilized by the plaintiffs to attack the re-zoning by-law, the Supreme Court

2. Ibid, at p. 514 et seq.
3. See footnote 1, supra.

of Canada cleared up what had been an area of some doubt, namely the effect that the passing of the limitation period placed upon the use of the statutory motion or application to quash has on the use of the action for a declaration concerning the validity of a by-law.[4] In general, the question has been whether such a limitation period is designed solely to limit and encourage the prompt use of the expeditious, inexpensive and convenient statutory motion or application to quash, or whether rather such a limitation period is designed, as well, to cure some defects in by-laws.

Ian MacF. Rogers in digesting the cases on this question in his book, The Law of Canadian Municipal Corporations,[5] leaves the reader in a quandary. On the one hand, some of the cases to which he refers suggest that the passing of the limitation placed upon the use of the statutory motion or application to quash has a curative effect on voidable defects, but, on the other hand, other cases to which Mr. Rogers refers suggest that the simple passing of the said limitation period in no way precludes an attack on a by-law by some other means based upon any kind of defect.

All of the learned members of the Manitoba Court of Appeal were of the opinion that, insofar as voidable defects were concerned, the limitation period placed by The Metropolitan Winnipeg Act[6] upon the use of the statutory motion or application to quash is of curative effect and thus precludes the subsequent use of any other means of attacking a by-law on the ground of voidable defects.[7] However, four out of the five judges of the Supreme Court of Canada who heard the appeal, in dealing with this point were of the opinion that, even if the defect in question is a voidable defect, the section of The Metropolitan Winnipeg Act which places a limitation period on the use of the statutory

4. It ought to be noted that there are various wordings used in drafting these limitations and that, of course, the Wiswell decisions and this note are particularly relevant for the type of wording to be found in The Metropolitan Winnipeg Act, S.M. 1960, s. 40, as amended, s. 206(5);

> No application . . . shall be entertained unless it is made within three months from the passing of the by-law.

as opposed, for example, to the type of wording with which the Supreme Court of Alberta had to deal in Shilleto Drug Co. v. Town of Hanna [1931] 3 W.W.R. 108, [1931] 3 D.L.R. 576—see also in this connection The Municipal Government Act, S.A. 1968, c. 68, ss. 109 and 397.

5. (Carswell, Toronto, 1959), vol. 2 at pp. 893-896.

6. See footnote 4, supra.

7. See (1964) 48 W.W.R. 193 at pp. 196, 202 and 210.

motion or application to quash is no bar to a subsequent action for a declaration that the by-law is invalid on account of a voidable defect.[8]

Before leaving the procedural vehicle which was utilized in the Wiswell case, two other comments ought to be made. Regrettably, subsequent to the Supreme Court of Canada judgment in the Wiswell case, the Legislative Assembly of Manitoba amended the various relevant statutes governing municipal corporations in Manitoba to bring into existence limitation periods concerning the use of the action for a declaration regarding the validity of a by-law, similar in length to those concerning the use of the statutory motion or application to quash;[9] in my estimation, the amendments unnecessarily restrict the means available for launching a frontal attack on a municipal by-law. It should be sufficient to provide legislatively for a cut-off date for attacking a by-law by any means on the ground of a voidable defect; in other words, a date ought to be set as of when all voidable defects are deemed to be cured by the effluxion of time. Insofar as void defects are concerned, these should be able to be raised at any time in or by means of any relevant proceeding including the statutory motion or application to quash; that is to say, there ought to be no limitation periods placed upon the means of attacking a by-law insofar as void defects are concerned.

And finally, in connection with the procedural vehicle utilized, Cartwright J. (as he then was) of the Supreme Court of Canada in his judgment referred to the following passage in the decision of the Court of Appeal of Ontario in Re Gordon and De Laval Co. Ltd.,[10]

> "The Municipal Act [of Ontario] . . . provides machinery for summarily determining the validity or invalidity of municipal by-laws. This machinery had not been invoked within the time limited by the Statute. This did not deprive the Supreme Court of its jurisdiction to set aside the by-law or to pronounce a declaratory decree concerning its validity . . ."

8. See [1965] S.C.R. 512 at pp. 514 and 524. In his judgment at p. 524, Hall J. made, what is to me, an incomprehensible reference to Wanderers Investment Co. v. The City of Winnipeg (1917) 27 Man. R. 450, [1917] 2 W.W.R. 197 at p. 205. I presume the learned judge was referring to the bottom of p. 205 whereat Mathers C.J.K.B. was dealing with the applicability of s. 532 of The Winnipeg Charter, S.M. 1902, c. 77 which is the counterpart of s. 394 of The Municipal Act R.S.M. 1954, c. 173.
Incidentally, Wanderers Investment Co. v. The City of Winnipeg has been cited see for example Ian MacF. Rogers, The Law of Canadian Municipal Corporations, supra, vol. 2, at p. 900) for the proposition that the action for a declaration concerning the validity of a by-law can be used as a means of attacking a by-law after the time limitation for using the statutory motion or application to quash has expired. In fact in that case the action for a declaration concerning the validity of the by-law in question was brought by the Wanderers Company before the time had expired for using the statutory motion or application to quash.
See also on this question of the availability of an action for a declaration as a means by which to attack a by-law beyond the time limited for using the statutory motion or application to quash E. C. E. Todd, The Quashing and Attacking of Municipal By-laws (1960) 38 C.B.R. 197, especially at pp. 205-6 and 215.

9. See, S.M. 1966, c. 38, s. 6 and c. 79, s. 38, and S.M. 1966-67, c. 92, s. 2: Peculiarly, the St. Boniface Charter S.M. 1953, c. 68 has never been similarly amended with the result that there is no limitation period on the usage of the action for a declaration insofar as St. Boniface by-laws are concerned. See also a note contained in (1968) 3 Manitoba L.J. 141.

0. [1938] O.R. 462 at p. 468.

and said,

> "In my opinion, this passage, whether or not it was strictly necessary to the decision, correctly states the law and is applicable to the circumstances of the case at bar".[11]

Depending upon what the Court of Appeal of Ontario meant and Cartwright J. understood by the term "jurisdiction to set aside the by-law". their statements may be somewhat misleading. It was clearly indicated by the Court of Appeal of Ontario in Re Clements and Toronto[12] that the courts possess no inherent original jurisdiction to quash municipal by-laws: All jurisdiction in this regard is derived from statute. Thus, failing the unlikely availability of a certiorari proceeding, once the limitation period for the use of the statutory motion or application to quash has passed, the courts are without jurisdiction to quash municipal by-laws; the jurisdiction of the courts is then limited simply to declaring upon the validity of municipal by-laws and making whatever other disposition is relevant according to the nature of the proceedings.[13]

Turning to the merits of the case, the main issue was whether or not the re-zoning by-law was invalid as a result of the failure of the Metropolitan Corporation of Greater Winnipeg (hereinafter referred to as "the Corporation") to place placards on the land involved and to hear the representations of a homeowners' association which it knew was interested in the proposed re-zoning, prior to passing the re-zoning by-law. In fact, the Corporation had advertised its intention to pass the re-zoning by-law on two separate occasions in the two principal Winnipeg daily newspapers.

It was pointed out by the Corporation that The Metropolitan Winnipeg Act was silent concerning the holding of a hearing and the giving of any notice prior to the passage of a zoning amending by-law such as the one in question.[14] However, the Corporation itself had adopted a resolution prescribing the procedure to be followed in connection with applications to amend zoning by-laws and town-planning schemes; the resolution called for a hearing by the Committee on Planning and for notice of the hearing to be given by "advertising in at least two newspapers having a general circulation in the Metropolitan Area each week for at least two weeks before the hearing" and by "notices to be posted . . . on the premises which are the subject of the proposed amendment . . . not less than 14 days before the day set for the hearing". The failure to give both types of notice in the passage of the

11. See footnote 1, supra, at p. 514.
12. [1959] O.R. 280, 19 D.L.R. (2d) 476, rev'd [1960] O.R. 18, 20 D.L.R. (2d) 497.
13. See also Todd, footnote 8, supra, at p. 198.
14. This gap, if you like, in the Act has since been remedied and I shall have more to say about that subsequently.

re-zoning by-law in question amounted to a breach of internal procedure. A defect of this nature will only be given cognizance by the courts if the particular breach of internal procedure is such as to cause a manifest injustice to occur;[15] if such is the case the by-law will be thereby rendered voidable. As mentioned earlier, it was accepted that the Crescentwood Home Owners Association, which was definitely interested in the proposed re-zoning by-law to the knowledge of the Corporation,[16] did not receive notice of the hearing on the proposed re-zoning by-law. The failure to place notices on the premises being re-zoned was probably the reason why the Association was not made aware of the proposed re-zoning by-law and the hearing in regard to it, and why the Association was not represented at the hearing and the members of the Association were thus denied the opportunity to make their views known to the members of the Committee on Planning. A clear manifest injustice was wrought rendering the by-law voidable and subject to a declaration of invalidity; I submit that it was on this legal basis alone that the case ought to have been decided.

Upon what bases on the merits did the various judges decide the case? Smith J., at first instance, first of all dispensed with the issues of whether or not the re-zoning by-law was passed in good faith and in the public interest by holding that the plaintiffs were not able, either to establish any fraud, oppression or improper motive, or to show that the by-law had not been passed in the public interest.[17] The learned judge swept aside the failure to follow internal procedure and proceeded to decide the case on the basis that in exercising the by-law making power in question the Corporation was acting in a quasi-judicial capacity, thus making relevant the rules of natural justice and particularly the audi alterem partem rule. After referring to the cases of Giese v. Williston,[18] Re Brown and Brock,[19] and Nakkudi Ali v. Jayaratne,[20] Smith J. concluded that, although in general municipal corporations are delegated legislative or administrative powers to exercise, in some instances municipal corporations are given judicial or

15. See Rogers, footnote 5, supra, vol. 2 at p. 914.

16. The interest of the Association in the zoning of the area can be gauged to some extent by the fact that the Association was comprised of a membership of between approximately one hundred and sixty or seventy people each paying a membership fee of ten dollars, and by the fact that the Association had hired a full-time secretary and retained legal counsel. The fact that the Corporation was well aware of the Association and its interest is obvious from the excerpt from Hall J.'s judgment at the outset of this note.

17. The fact that the by-law had been passed after an application by Mr. Ginsburg, which application was made at the suggestion of the Director of Planning for the Corporation, and the fact that Mr. Ginsburg was undoubtedly expected to benefit by the re-zoning were considered rightly by the learned judge to be not indicative of private interest. See the judgment of Monnin J.A. in (1964) 48 W.W.R. 143 at p. 208.

18. (1962) 38 W.W.R. 417 (B.C.S.C.), at p. 420.

19. [1945] O.R. 554 at pp. 563-4 and 567.

20. [1950] 2 W.W.R. 927 (P.C.), at p. 933.

quasi-judicial powers,[21] and that in this case the Corporation was exercising such a power, thus making mandatory the giving of adequate notice and the opportunity to make representations at a hearing. The learned judge proceeded to declare the by-law invalid on the ground that the notice given by the Corporation was inadequate.

In the Manitoba Court of Appeal three of the five judges who sat rendered judgments.[22] Freedman J.A. dealt first of all with the contention of the Corporation that it "was entitled to proceed without notice—of any kind whatever".[23] This contention was based upon two propositions, namely that (a) "the Metropolitan council, when it was enacting By-law No. 177, was engaged in a legislative function and not in a quasi-judicial act"[24] and that (b) "the governing statute does not call for notice. Hence . . . notice was not required".[25] Freedman J.A. disposed of this contention of the Corporation thusly,

> ". . . to say that the enactment of By-law No. 177 was simply a legislative act is to ignore the realities and the substance of the case. For this was not a by-law of wide or general application, passed by the Metropolitan council because of a conviction that an entire area had undergone a change in character and hence was in need of reclassification for zoning purposes. Rather this was a specific decision made upon a specific application concerned with a specific parcel of land . . . In proceeding to enact By-law No. 177 Metro was essentially dealing with a dispute between Dr. Ginsburg, who wanted the zoning requirements to be altered for his benefit, and those other residents of the district who wanted the zoning restrictions to continue as they were. That Metro resolved the dispute by the device of an amending by-law did indeed give to its proceedings an appearance of a legislative character. But in truth the process in which it was engaged was quasi-judicial in nature;"

and

> "A long line of authorities, both old and recent, establish that in judicial or quasi-judicial proceedings notice is required unless the statute expressly dispenses with it. The mere silence of the statute is not enough to do away with notice. In such cases, as has been said, the justice of the common law will supply the omission of the legislature."[26]

Freedman J.A. then proceeded to deal with the failure of the Corporation to follow its resolution prescribing the procedure to be followed in connection with applications to amend zoning by-laws and town planning schemes and concluded that:

> "The failure to post placards at the site was an irregularity in procedure. Its effect must be weighed in the light of all the circumstances. These include the fact that Metro was proceeding openly and not in secret, that it advertised in both newspapers in two successive weeks, and that it did

21. On this point Smith J. referred to Beer v. R.M. of Fort Garry (1959) 66 Man. R. 385 at pp. 399-400; Re Howard v. Toronto (1928) 61 O.L.R. 563 at pp. 577 and 579; Hodgins v. Toronto (1896) 23 O.L.R. 80 at p. 85; and Ottawa v. Wyeryha [1963] 1 O.R. 241.

22. The decision of the Court was a split decision, Monnin J.A., Miller C.J.M. (who concurred with Monnin J.A.) and Freedman J.A. formed the majority while Guy J.A. and Schultz J.A. (who concurred with Guy J.A.) dissented.

23. (1964) 48 W.W.R. 193 at p. 194.

24. Ibid.

25. Ibid at p. 195.

26. Ibid at pp. 194-95.

> in fact hold a public hearing. In these circumstances I find it hard to say that the non-posting of placards was an error so fundamental in character as to render the by-law entirely void and rob it of any effect whatever. In my view, it made the by-law voidable only."[27]

It appears to me that the learned judge was saying that, although the Corporation breached its internal procedure concerning notice and thus made the by-law subject to a voidable defect, the notice given by the Corporation was not so inadequate as to amount to a breach of the audi alterem partem rule of natural justice and thus render the by-law void.[28]

Monnin J.A. focused upon the failure of the Corporation to follow its procedure resolution; he did not go into any characterization of the nature of the zoning by-law amending power exercised, i.e. whether the power was one of a legislative, executive (administrative) or judicial (or quasi-judicial) nature. The learned judge concluded that;

> "Failure to post placards was non-compliance with the procedural resolution but it was not so essential and fundamental as to render the by-law void. At most it was voidable".[29]

Guy J.A. in dissent centred his decision upon the quasi-judicial nature of the zoning by-law amending power exercised, and the inadequacy of the notice and the hearing; he completely ignored the failure to observe the procedure resolution. In a judgment replete with references to decided cases, the learned judge concluded that "the action of the Metropolitan council, taken in its entirety, was qusi-judicial" and involved "a disregard for the fundamental principles of justice", thus rendering the by-law void.[30]

Of the five judges of the Supreme Court of Canada who sat to hear the appeal from the Manitoba Court of Appeal, in effect only two judges gave judgments on the merits of the case. Hall J.[31] agreed with the characterization made by Freedman and Guy JJ.A. of the zoning by-law amending power in question; namely, that it was a quasi-judicial power. Therefore, "Metro was in law required to act fairly and impartially" and this it did not do in its "failure to post the placards on the

27. And thus it followed, in the opinion of the learned judge, that, the limitation period concerning the use of the statutory motion or application to quash having passed, all voidable defects were thereby cured and the action to set aside the by-law was out of time.

28. Concerning the void or voidable quality of the failure to observe the audi alterem partem rule, see S. A. DeSmith, The Judicial Review of Administrative Action (Stevens, London, 2nd ed., 1968) at p. 222 et seq.

29. See footnote 27, supra.

30. In addition, the learned judge dealt with "the question of 'public interest' " and concluded (in disagreement with Smith J. at first instance) that "the passage of [the] . . . by-law was indeed to benefit one person and had little if any regard for the public interest as a whole"—see (1964) 48 W.W.R. 193 at pp. 204-206. Monnin J.A., however, at p. 208 emphasized that "a careful perusal of the evidence satisfies me that the learned trial judge came to the proper conclusion, and that none other was available to him, when he said there was no fraud, oppression, no improper motives proven, and that the by-law was passed in good faith and in the public interest." See also Freedman J.A. at p. 197.

31. With whom, in effect, Martland, Spence and Cartwright J.J. agreed.

premises [as required by their procedure resolution] and [in] proceeding to hold hearings on Dr. Ginsburg's application to rezone in absence of the Association when Metro knew that the Association would oppose any such application and was actually opposing the extension applications at that very time".[32] The learned judge concluded that "the by-law was void in the particular circumstances."[33]

Judson J. in dissent delivered a very succinct judgment with which I can do no better than to quote directly therefrom;

> "The sole question is whether adequate notice was given. There is no statutory requirement that any notice be given. The requirements are to be found in the Metropolitan Council's own procedural resolution for amendements to zoning by-laws . . . The criticism of the newspaper advertising by counsel for the appellant is, in my opinion, without foundation. It was clear and prominent[34] and should have come to the notice of the appellants. They left the task of perusing advertising to a paid official of their association. He was away at the time of the advertising and his office assistants failed to see it. It is not disputed that there was no posting of notices on the property and that there was no resolution of Council dispensing with this, as there could have been . . . I do not think that it helps one towards a solution of this case to put a label on the form of activity in which the Metropolitan Council was engaged when it passed this amending by-law. Counsel for the municipality wants to call it legislative and from that he argues that they could act without notice. The majority of the judges prefer the term quasi-judicial. However one may characterize the function, it was one involving private rights in addition to those of the applicant and I prefer to say that the municipality could not act without notice to those affected. But I think that they gave clear, reasonable and adequate notice and that failure to direct the posting of notices pursuant to their own internal regulations, which were subject to their own control, does not affect the validity of the by-law. This by-law was within the municipal function. The failure to post notices does not go to the question of jurisdiction nor is posting a condition precedent to the exercise of the statutory power. I think that this by-law was validly enacted and was not open to any successful attack either by way of motion to quash or by way of action".[35]

To reiterate, it is my submission that on the merits the by-law ought to have been declared invalid solely on the ground that, as a result of the failure of the Corporation to observe its own internal procedure, a manifest injustice was wrought. Such a holding would obviate the necessity of characterizing the nature of the zoning by-law amending power being exercised and of considering whether or not the audi alterem partem rule of natural justice was applicable and had been breached. On this basis and with all due respect to the various learned judges who delivered written reasons in this case, I submit that with regard to the merits *the* ratio decidendi of the case is to be

32. [1965] S.C.R. 512 at p. 523.

33. Hall J. referred to the decisions in St. John v. Fraser [1935] S.C.R. 441 at p. 452, Board of Education v. Rice [1911] A.C. 179 at p. 182; Re Howard and City of Toronto (1928) 61 O.L.R. 563 at pp. 576 and 579 and Ridge v. Baldwin [1963] 2 All E.R. 66 at p. 81.

34. See also Freedman J.A., (1964) 48 W.W.R. 193 at pp. 195-196 and Smith J. at pp. 19-20 and 25 of his unreported judgment.

35. [1965] S.C.R. 512 at pp. 525-6.

found in the judgment of Monnin J.A. of the Court of Appeal of Manitoba; all of the other judges either missed or glossed over the main issue, or "over-decided" the case by fixing upon what I consider to be the superfluous issue of the audi alterem partem rule of natural justice.

Regarding the applicability of the audi alterem partem rule of natural justice, there was nothing new in the judgments of those learned judges who dealt with the matter. They all based the applicability of the rule on a characterization of the zoning by-law amending power being exercised as a judicial or quasi-judicial power. In particular, Freedman J.A. based his characterization on the fact that, in his view of the situation, in enacting the by-law in question "Metro was essentially dealing with a dispute between Dr. Ginsburg who wanted the zoning requirements to be altered for his benefit, and those other residents of the district who wanted the zoning restrictions to continue as they were".[36]

The silence of The Metropolitan Winnipeg Act concerning the procedure to be followed in the passing of zoning by-laws has been remedied. In 1964 extensive amendments were made to Part IV of the Act,[37] as a result of which an elaborate procedure now exists in the Act concerning the establishing, altering or amending of the Development Plan, and the passing of zoning by-laws. The procedure involves notice and hearing before a committee of the Corporation's council, notice and a hearing before the Minister of Urban Development and Municipal Affairs or possibly the Municipal Board and finally the approval of the Minister.[38] I wonder whether it was necessary, albeit neat and tidy, for the Legislature to have imposed on the Corporation the same cumbersome procedure to be followed in the passing of zoning by-laws as it imposed to be followed in the establishing, altering or amending of the Development Plan?

Subsequent to the decision of the Supreme Court of Canada restoring the decision of Smith J. at first instance who had declared the by-law in question to be invalid, the Corporation attempted again to re-zone the land in question in the form of By-law 1054. Pursuant to the new procedure governing the enactment of zoning by-laws,[39] the by-law was forwarded to the Minister for his approval. Of course, the Crescentwood Home Owners Association lodged an objection to the

36. Supra, see footnote 26. It ought to be noted however that in the Supreme Court, although Hall J. and the judges who concurred with him adopted the approach of Freedman J.A. in applying the audi alterem partem rule of natural justice, Judson J. seemed to be applying more the approach of Rand J. in Alliance des Professeurs Catholique de Montreal v. L. R. Bd. of Quebec [1953] 2 S.C.R. 140.

37. See S.M. 1964, c. 65.

38. See present ss. 80, 80A, 81, 79(4), 82(4), 82(4A) and 83(1A).

39. See footnotes 37 and 38.

by-law and, therefore, the Minister referred the matter to the Municipal Board in accordance with s. 81(2) of the Act. In delivering the decision of the Board, Chairman W. J. Johnston said;

> "The Board does not regard the proposed rezoning to be an integral part of a broad planning scheme designed to improve the welfare and amenity of Greater Winnipeg generally. It follows, therefore, that only those considerations and principles that are relevant in the local community need be reviewed in reaching a decision.
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> The Board is satisfied that if the proposed rezoning is approved it must inevitably lead to further similar encroachments and ultimately the whole of that neighbourhood will lose its character as a single family dwelling area. The Board considers that such a change should not be thrust on an unwilling community except in the case of extreme and compelling circumstances.
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> Are there then any extreme or compelling circumstances as would justify the proposal in any event. Since the owner of the Harris property is opposed to the change and the hospital under present zoning may properly and legally be continued as a non-conforming use only the Ginsburg property could be said to derive any direct benefit from the proposed change.
>
> The decision then must be reached by weighing the welfare of the individual on the one hand against the welfare of the whole community on the other. While there will no doubt be situations from time to time where the extreme hardship to an individual may outweigh minimal hardship to the whole community they will be the exception rather than the rule. Since in this case the Board finds no such extreme hardship or compelling circumstances the welfare of the neighbourhood must prevail and the by-law as presented is accordingly rejected."[40]

The decision of the Board raises several queries. What were the territorial boundaries of "the whole of that neighbourhood" which the Board envisioned as in danger of losing "its character"? In the immediate area of the Ginsburg property in fact there are two hospitals, two service stations, one synagogue, one Lutheran Church, a home converted for the use of a Masonic club, several vacant lots, a large Roman Catholic girls' school and as many duplexes as single family dwellings! It is not clear whether the Board considers the Corporation to possess the power to "spot zone", which from the wording of the relevant enabling sections they most certainly do possess.[41] And finally, the decision of the Board raises the general question of the propriety of placing external quality control or watchdog over the Corporation in the exercise of its zoning powers: Ought not the Corporation's Council to know far better what is in the interests of the general or local community within its territorial borders than the Municipal Board?

Before I can end this saga, I must refer to two further events which have taken place concerning the Ginsburg property. Firstly, a reference ought to be made to the decision of Hunt J., of the Manitoba

40. See Order No. MP 18/66.
41. This is not to say that "spot zoning" is a desirable means of land use control.

Court of Queen's Bench, in the case of Wellbridge Holdings Ltd. v. The Metropolitan Corporation of Greater Winnipeg,[42] wherein the plaintiff[43] alleged that the Corporation was negligent in enacting By-law 177 in that it failed to give proper notice. The learned judge held against the plaintiff on the grounds that the action was barred by virtue of s. 21(1) of The Public Officers Act[44] and s. 394 of The Municipal Act.[45]

Secondly, in illustration of the old adage that it is an ill wind that blows no one any good, since the thwarting of the attempts to enable the location of an apartment building on the Ginsburg property, the Maryland Street bridge has been condemned. In order to facilitate the construction of a new bridge, the Ginsburg property is being expropriated.

CAMERON HARVEY*

## POTENTIAL UNCONSCIONABILITY AND THE UNCONSCIONABLE TRANSACTIONS RELIEF ACT[1]

*Brock Acceptance Company v. Abe Klassen and Henry Klassen*[2]

Matas J., of the Manitoba Court of Queen's Bench held in this as yet unreported case that a loan to a businessman to finance the purchase of a gravel truck is unconscionable even where there is no pressure upon the borrower to borrow and where the lender actually tries to dissuade the borrower from proceeding with his enterprise.

The defendant Abe Klassen, intending to enter the gravel hauling business, and requiring a truck, approached the plaintiff for the purpose of financing the purchase of the truck. He was advised by the plaintiff not to proceed but he was determined. The following are the particulars of the loans finally arranged:

42. Which at the time of writing was unreported.

43. The plaintiff, having leased Ginsburg property, inter alia, had obtained a building permit, entered into financial commitments and done some work towards the erection of a high-rise apartment on the property, subsequent to the enactment of the by-law in question.

44. S.M. 1960, c. 30. In interpreting the term "persons" in s. 21(1) Hunt J. referred to The Interpretation Act R.S.M. 1954, c. 128, s. 23(1)(32) (sic—the learned judge ought to have referred to S.M. 1957, c. 33, s. 23(1)(34)) and to Koshurba v. R.M. of North Kildonan and Popiel (1965) 51 W.W.R. 608 (Man.Q.B.).

45. R.S.M. 1954, c. 173 which is made relevant to by-laws of the Corporation by s. 206(4) of The Metropolitan Winnipeg Act; the by-law in question had never been quashed—it simply had been declared invalid!

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1. S.M. 1964 (2nd S.) c. 13, as amended.

2. Decided March 25, 1969.