

# City of Ottawa v. Boyd Builders Ltd., (1965) S.C.R. 408

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Commentary

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## MUNICIPAL LAW

*City of Ottawa v. Boyd Builders Ltd.*, [1965] S.C.R. 408.

MUNICIPAL LAW — RESTRICTIVE BY-LAWS — BUILDING PERMITS — MANDAMUS — DISCRETION TO ADJOURN — GOOD FAITH.

It may be very desirable that wherever possible before adopting or amending by-laws, as those which by their very nature must interfere with property rights, the council should guard against hasty and ill considered changes, but, if it is assumed that the original by-law was passed to further what was sincerely considered to be in the public interest, it would appear to be not only the right but the duty of the council to act promptly when it is convinced that the beneficial purpose and intent of the original by-law is endangered by unsuspected errors or omissions in the enactment.<sup>1</sup>

The Supreme Court of Canada in *City of Ottawa v. Boyd Builders Ltd.*,<sup>2</sup> although confronted with a much litigated issue, rendered a decision which appears to have formulated a new trend in the procedure of municipal law today. The decision of Spence, J. places a definite limitation on the ability of a municipality to efficiently control its zoning process and for this reason the decision must be examined in some detail.

The factual situation in the *Boyd* case is reminiscent of several earlier decisions of lower tribunals where the results were equally divided. In essence, the issue involves a race between the land owner and the municipality when the possibility of undesirable land development has been left unguarded. It has been said that "the race is to the swift",<sup>3</sup> but it is questionable whether the courts should be the stewards of such a race. This race represents a contest between an individual's attempt to use the rights he has acquired through ownership of his land and the municipal authority's attempts to alter society's requirements of land use in respect to the owners' property.

It has been well understood that the land owner cannot request compensation solely because the municipality has failed to benefit his land through the implementation of zoning laws which would have increased the value of his property. The issue in this case, however, concerns a land owner, who by relying on the municipality's zoning laws (as represented to the land owner) has suffered a detriment when the municipality later decides to alter its zoning requirements and deprive the owner of his expectations concerning the use of his property. Should the land owner in this case also be denied any right to compensation for the loss he has suffered?

An analysis of the legislative intent with regard to the zoning process would appear to reveal that even such a vested right or status is not immune from attack, and such a right can be validly divested by the exercise of the statutory zoning power without compensation to the land owner.

<sup>1</sup> Cummings, L. R., Q.C., *Is Zoning Wagging the Dog*, in MILNER, J. B., *COMMUNITY PLANNING*, (Toronto: University of Toronto Press, 1963) p. 680.

<sup>2</sup> [1965] S.C.R. 408.

<sup>3</sup> *Re Upper Canada Estates Ltd. and MacNicol*, [1931] O.R. 465.

The decision of Spence, J. in this case appears to show clearly that rights which have become vested are not subject to such treatment. However, the reasons for holding that the rights have become vested as of the date of application have not been clearly expressed. Was this a decision in regard to the zoning process or was it a matter of affording compensation to an injured person?

While this note is concerned with the problems created by the apparent emasculation of the municipality's zoning power, it must be kept in mind that perhaps this was not the intended aim of Spence, J.; rather, he may have been attempting to arrive at a solution that would satisfactorily compensate the land owner for his loss. However, by making such a decision, the court has left open the possibility that individual development will proceed at the expense of town planning.

The case involves a particular parcel of land being left unzoned in a town plan by reason of a fault or ambiguity in the master zoning laws. The land in question was zoned for single family uses in 1936 under City of Ottawa By-law 8214. Shortly thereafter By-law 8214 was amended by By-law 8255 which reduced the area zoned for single family use. As a result, the particular parcel in question was left unzoned, falling into the category of land previously zoned but now located outside the sphere of the latter by-law. The area remained in this state until March of 1963 when By-law 68-63 incorporated an official plan for Ottawa. This by-law zoned the lands to allow apartment uses but by section 112 of the by-law certain prior restricted use areas were to continue. The restricted use areas that were to continue were found in Schedule A of the by-law, which included the area created by By-law 8214. The Schedule did not refer to By-law 8255 (the subsequently smaller restricted area) and therefore it remained to be determined exactly which restricted area the city wished to be continued when it established its zoning plan in the spring of 1963. Did the city mean the larger area of By-law 8214 or did it wish to adopt By-law 8214 as amended to be the continuing restrictive zone?

Following the purchase of the lands in August, 1963, the respondent company, on September 9, 1963, made an application for a permit to erect a nine storey apartment building in the area covered by By-law 8214 but unzoned by By-law 8255. Unfortunately the city did not realize the ambiguity of its comprehensive zoning by-laws until the date of this application. On learning of the proposed development plans, certain surrounding land owners protested to the Ottawa Planning Board. There was a discrepancy in the affidavit evidence of the president of Boyd Builders and that of the Board of Control as to the exact location of the land of these objectors. Since this discrepancy was not resolved, and in that it bears relation to the character of the area, it shall be discussed later.<sup>4</sup> Following these protests, apparently with no notice to Boyd Builders, the Ottawa Planning Board

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<sup>4</sup> See p. 8.

held a meeting on September 18 and passed a resolution that the uses in the disputed area be specifically restricted to family residences.<sup>5</sup>

This advice was conveyed to the Board of Control which recommended to City Council that By-law 68-63 should be amended "to clarify and amend the zoning in view of the fact that By-law 8214 was subsequently repealed by By-law 8255 and that this fact was not brought before council at the date of the enactment of By-law 68-63, and council therefore acted on the assumption that the area was protected as to zoning and use by By-law 8214."<sup>6</sup>

The following day (September 19) the City Council, again without any notice to Boyd Builders, adopted the recommendation and passed By-law 311-63 which specifically restricted the area to single family uses. The council directed the City Building Inspector to refuse a permit to Boyd Builders, and immediately sent notice to the Ontario Municipal Board that it was applying for approval of By-law 311-63. On September 30, the company launched a mandamus for the permit and the motion was heard on October 8 by Schatz, J. At that time the learned judge decided to adjourn the mandamus pending the decision of the Ontario Municipal Board.

The company appealed and the Ontario Court of Appeal<sup>7</sup> held that the company was entitled to the mandamus and that the judge had erred in adjourning the matter. The City's appeal to the Supreme Court of Canada was dismissed, Spence, J. affirming that the mandamus ought not to be adjourned.

Spence, J., in his reasons, relied heavily on the decision of Roach, J.A. in the Court of Appeal. This decision, in turn, rested on the earlier judgment of Roach, J.A. in *Hammond v. City of Hamilton*.<sup>8</sup> In that case Roach, J.A., after a thorough examination of relevant decisions, held that the owner has a *prima facie* right to utilize his property in whatever manner he deems fit, subject only to the rights of surrounding owners, nuisance, etc. This *prima facie* right may be defeated or superseded by rezoning if three prerequisites are established by the municipality. Firstly, there must be a clear intent to restrict or zone (usually manifest by the passing of a by-law) before the hearing of the mandamus. Secondly, it must be shown the council has proceeded in good faith, and thirdly, that the council has proceeded with dispatch.

Dealing with the first prerequisite, that there be a clear intent to restrict or zone, it is important to note the exact date by which the council must have manifested a clear intent to restrict the use of land. What is to be the cut-off point for the vesting of these *prima facie* rights—the date of hearing the mandamus, or the date of application for the permit? In this case, Spence, J. clearly states that the cut-off point is to be the date of applying for the building permit. The learned judge's reasons, however, were based on Roach, J.A.'s

<sup>5</sup> Note that the recommendation did not involve the restriction of uses on the land of Boyd Builders only, but included a much larger area.

<sup>6</sup> Supreme Court of Canada Evidence, Exhibit "B", affidavit of Alfred Hastey, Special Report of the Board of Control.

<sup>7</sup> [1964] 2 O.R. 269.

<sup>8</sup> [1954] O.R. 209 at 221.

decision in the Court of Appeal, which in turn relied on his decision in the *Hammond* case. Although in the *Hammond* case Roach, J.A. did not definitely state the date as being that of the hearing, he cited with approval a decision of Orde, J., which interpreted the views of the Judicial Committee of the Privy Council as expressed in the *Toronto Separate Schools* case.<sup>9</sup> In the *Upper Canada Estates* case,<sup>10</sup> Orde, J. stated that the question of respective rights did not fall to be dealt with as of the date of application and deposit of plans, but was to be decided as of the date when the question comes before the court for its adjudication. Thus it has been stated and clearly followed in Ontario that the relevant time for the testing of rights is the date of hearing the mandamus.

Perhaps the view of Spence, J., that the date is that of application, is derived from his earlier decision in *Re Markity and Fort Erie*.<sup>11</sup> However, if this is the case, the learned justice appears to have later reversed such an opinion in his decision in *Re Granada Investments Ltd. v. Toronto*<sup>12</sup> where, in granting an adjournment of a mandamus, Spence, J. noted that he had found no *prima facie* right, and even if such a right existed, he would exercise his discretion and adjourn the mandamus in that a by-law had been passed prior to the date of the *hearing of the mandamus*.

The most reasoned opinion suggesting that the date of the hearing is to govern comes from the Privy Council in the *Toronto Separate Schools* case,<sup>13</sup> where Viscount Cave, L.C. stated:

It was true rights existed until the restricting by-law was passed, but the whole object (of the present Ontario Planning Act s. 30(7))<sup>14</sup> empowered the city acting in good faith to put restrictions on that right and the status of the owner is limited by the power of the city to be exercised for the protection of his neighbours.

This statement should be read in conjunction with the decision of the Supreme Court of Canada in *Canadian Petrofina Ltd. v. PR Martin and City of St. Lambert*<sup>15</sup> where Fauteux, J. stated:

. . . the appellant (land owner) contention was that it had an accrued right which could not be defeated by the subsequent by-law . . . the merit of this proposition is, I think, completely negated by the reasoning of the Judicial Committee of the Privy Council (referring to the *Toronto Separate Schools* case) . . . what was stated by Viscount Cave may be stated concisely as follows; . . . the whole object and purpose of a zoning statutory power is to empower the municipal authority to put restrictions, in the general public interest, upon the right which a land owner, unless and until the power is implemented, would otherwise have to erect upon his land such buildings as he thinks proper. Hence the status of a land owner *per se* cannot affect the operation of a by-law implementing the statutory power without defeating the statutory power itself. Prior to the passing of such a by-law the proprietary rights of a land owner are then insecure in the sense that they are exposed to any restrictions which the city, acting within its statutory power may impose.

<sup>9</sup> *City of Toronto v. Trustees of Roman Catholic Separate Schools*, [1926] A.C. 81.

<sup>10</sup> *Re Upper Canada Estates Ltd. and MacNicol*, *supra*, footnote 3.

<sup>11</sup> [1951] O.W.N. 836.

<sup>12</sup> [1955] O.W.N. 517, at 520.

<sup>13</sup> *Separate Schools*, *supra*, footnote 10, at 81 and 86.

<sup>14</sup> R.S.O. 1960, c. 296.

<sup>15</sup> [1959] S.C.R. 453, at 458.

From this it follows that, while the right to erect includes the right to receive the necessary permit for the erection of the building proposed to be erected in conformity with the law in force for the time being, the latter right is not any more secure than the former to which it is incidental, and if the insecurity attending this incidental right has not been removed by the granting of the permit, by the municipal authority acting in good faith, as in the present case, such a right cannot become an accrued right, effective to defeat a subsequently adopted zoning by-law prohibiting the erection of the purposed building in the area affected.

Thus it is submitted that the first prerequisite for granting of an adjournment be that the municipality has manifested a clear intent to restrict the land prior to the hearing of the mandamus. If the municipality is required to have a clear intent as of the date of application this would imply a necessary change in the present attitude towards zoning and would involve wide reaching zoning freezes in order to implement some intent concerning zoning before the land owner applied for his permit. Perhaps a certain degree of "freezing" should be employed to stabilize the zoning process and allow individuals to start developing from a common denominator, subject only to the later zoning amendments of council. *Quaere*: whether council could ever win the race or would zoning become stagnant?

The circumstances of these cases present a conflict between differing policies. In deciding the relevant date at which to test the rights of the competing parties, the court must realize that it is deciding between two zoning procedures. Firstly, if the date of application is to govern, then zoning may possibly proceed on an individual basis in that the municipality, unless it develops overall zoning freezes, will consistently lose the race to the land owner. If, however, the date of the hearing governs, then the municipality will be able to develop zoning requirements on a continual and changing basis. Such a decision involves the selection of the best suited policy. If the courts should be rendering such a decision at all, they should place the greatest emphasis on the planning procedure as established by a legislature which was competently advised. For the courts to intervene strictly on the basis of legal opinion is perhaps to allow the courts to make a decision for which it is not at all qualified.<sup>16</sup>

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<sup>16</sup> As mentioned earlier, it must be remembered that the court's legal opinion was perhaps calculated, not so much to stagnate the zoning process, but was concerned rather with the due compensation of the detrimental reliance undertaken by the land owner.

For this reason Spence, J. set the date for the vesting of rights as that of the date of application for a permit. By such a decision the use became non-conforming at that date and could claim the protection offered by s. 30(7) of the Planning Act.

Such an approach has in reality over-compensated the land owner and has thwarted the development of the zoning process. Zoning was not intended to be a singular isolated action but rather a continuing mosaic which would reflect the needs of a planned society. If Spence, J.'s decision is to be interpreted as the law in regard to the planning process, then as suggested, such a decision should be left to the planners and not the courts.

If, however, this decision is to be interpreted as an attempt to recompense a land owner for loss suffered, then perhaps a new solution is necessary. It is suggested that if the rights of the land owner as against the zoning

[Footnote continued on next page]

Two of the prerequisites of *Roach, J.A.* remain to be considered. The facts of the case indicate that the municipality proceeded with the requisite dispatch. Here the City of Ottawa sent notice to the Ontario Municipal Board that it was applying for approval of By-law 311-63, on the day following the passing of that by-law. The Ontario Municipal Board hearing was to be on November 8. This would seem to be almost conclusive evidence of dispatch.

The major hurdle for the municipality to overcome was that it must have proceeded in good faith. It has been a challenging task to extract from the present judicial quagmire just what is meant by "good faith", who is to be the judge of it and is there a new test or level of good faith. It would appear from *Spence, J.*'s decision that a secondary form of good faith has evolved, one which is not based on former criteria but rather one which presents a wider test of proper procedure. If *Spence, J.* meant to formulate such a new creature it may have been more expedient for the court to clearly state such an intent, for as it now stands the existing test of good faith does not clearly fit the factual circumstances of the *Boyd* case.

It has been clear from past cases that in a motion to quash a by-law an allegation of bad faith referred to the procedure of members of council. It has long been the practice that only operations of municipal council are open to review:

[A] Municipal council is a legislative body having delegated and limited jurisdiction. When it has acted within its jurisdiction the court cannot interfere . . . the justness and fairness of its actions cannot be questioned by the court . . . when it goes beyond its jurisdiction or it is shown that members of council are corruptly seeking to advance by municipal legislation their own ends, or those of a favoured individual, the court may interfere.<sup>17</sup>

Later in the *Re Howard* and *Re Sweet*<sup>18</sup> cases *Martin, J.A.* continued to state:

power of the municipality are to become vested or protected as of the date of application, then such rights by the act of application have become a non-conforming use, in that they are immune to subsequent restrictive legislation. Thus, in refusing the permit at the date of application, the municipality should realize that the land owner has a vested right as of that date but should be allowed to continue to enact its zoning plan which will deprive the land owner of that right. The municipality should have the power to deprive the owner of such a status because status alone should not defeat the statutory zoning process. However, the municipality should realize that a loss has been suffered and should be prepared to offer compensation in that the loss was due to the reliance placed on the municipality's prior zoning laws.

It is difficult to discern exactly how the land owner ought to be compensated in that he has no contractual rights to enforce and the possibility of connecting an order of compensation to the application for mandamus appears to be remote. Therefore, it is suggested that the municipality recognize that the accrued rights amount to a non-conforming use and then the municipality could proceed to expropriate this non-conforming use under s. 30(6) of the Planning Act. Such a procedure would allow the municipality to protect its zoning process and at the same time provide compensation for the land owner. This solution unfortunately opens up the difficult problem of valuation on expropriation, but such an issue cannot be discussed at this time.

<sup>17</sup> *Re Howard and City of Toronto; Re Sweet and City of Toronto*, 61 O.L.R. 563.

<sup>18</sup> *Ibid.*

Unless the illegality complained of appears on the face of the by-law or the statutory prerequisites to exercising jurisdiction have not been fulfilled . . . the court has a discretion to refuse to quash and as a matter of discretion the court ought not to interfere with the construction of a work within the competence of council save in very exceptional circumstances . . . the power of council must be exercised bona fide and action of its members must not be founded upon fraud, oppression or improper motives.<sup>19</sup>

Thus it would appear that bad faith consists in improper actions on the part of council members. In the *Boyd* case, however, such ingredients were not present; rather the land owner relied solely on the fact that he had not been notified of council's impending actions. This, standing by itself, was alleged to amount to bad faith on the part of council.

It should be noted, however, that although notice is a relevant factor, it is not conclusive, and the lack of such by itself is not *prima facie* bad faith.<sup>20</sup> In the *Howard* and *Sweet* cases Mastin, J.A. felt it proper and courteous that notice be given but held that the real test of good faith involved indirect motives and in the absence of such he could not find mala fides. In a concurring judgment Rowell, J.A. stated that the court should interfere if it were shown that the municipal councillors had abandoned all honest attempts at legislation and were completely seeking the prostitution of their legislative powers to advance the ends of some members of council or some favoured individual.<sup>21</sup>

It was stated by Spence, J., relying on the judgment of Roach, J.A. in the Court of Appeal,<sup>22</sup> that the express purpose of By-law 311-63 was to defeat Boyd Builders' right to a permit and for that reason council was taking sides and acting in bad faith. If council were taking sides their actions might well be set aside. In *Re Bridgeman v. City of Toronto*<sup>23</sup> McRuer, C.J.H.C. held that if the city were taking sides or proceeding otherwise than in the ordinary exercise of its function, then the mandamus ought not to be adjourned. However, interfering with council's discretion as to public interest is a different matter. Spence, J. himself stated in the *Granada Investments* case:

It is always possible to attempt to allege that any legislative body was moved too much by noisy protests from particular persons appearing before them, but I do not think a court should be called upon to determine the wisdom of council's action.<sup>24</sup>

The criteria to decide whether council is taking sides involves restrictions enacted against a particular individual and not merely the fact that the individual's land falls in a restricted area. The respondent company contended that bad faith was to be determined solely on the time when the municipality decided to act. But is this, by itself, a satisfactory criteria? Surely the more fundamental test

<sup>19</sup> *Ibid.*, 574.

<sup>20</sup> *Ibid.*, 577.

<sup>21</sup> *Ibid.*, 580.

<sup>22</sup> [1964] 2 O.R. 269.

<sup>23</sup> [1951] O.W.N. 472, at 473.

<sup>24</sup> *Re Granada Investments Ltd. v. Toronto*, [1955] O.W.N. 517, at 520.

involves a consideration of the direction in which the restrictions were aimed, and not the time when they were enacted. If the by-law were directed to prohibit an individual's particular commercial use in an area, while expressly permitting other commercial uses, then this would appear to be bad faith or discrimination. Such was held by Gale, J. in *Re Skyway Drive-In Theatres Ltd. v. Township of London*<sup>25</sup> where the learned justice refused to adjourn a mandamus in that the by-law was passed expressly to defeat the owner of the drive-in, without regard to the protection of the area involved. Thus, the council was taking sides, not merely because the decision favoured one side (this is the result of any decision) but because the council was stating a belief that was conceived prior to the issue being decided. This was not a decision pertaining to land use but rather concerned with a specific land user.

Can the same be said of By-law 311-63; was it directed against Boyd Builders alone? Council did not act on any personal motives but adopted a recommendation of the Ottawa Planning Board. The evidence before the court presented the issue of whether the Planning Board acted on protests of owners within 300 feet of Boyd's lot or on protests within 300 feet of the area involved. The Planning Board's report stated that it received a petition from the majority of land owners within 300 feet of the area<sup>26</sup> affected by By-law 311-63. The affidavit of the president of Boyd Builders stated that the Board had acted on petitions from only the area within 300 feet of his lot; therefore, the by-law was directed to prohibit only his land use and not to maintain the area land use. If this issue had been resolved it might have aided the decision with regard to the intentions of council. It should be noted that on cross-examination the president admitted that the area re-zoned contained a considerable number of properties not owned by his company. It appears that the complaint was not so much that this area alone was singled out for restriction but the time at which the restriction was imposed.<sup>27</sup>

Even if it were found that the council was acting in bad faith in not notifying Boyd Builders of its actions, is such conduct reviewable by the courts on a motion for mandamus? The lack of good faith and the consequential illegality of the by-law can certainly be reviewed in a motion to quash a by-law, but should this conduct be scrutinized via mandamus? In *Joy Oil v. Gillies*<sup>28</sup> Rowell, J.A., in reserving judgment on a mandamus until proceedings were taken by direct action to quash the by-law, stated:

Re the importance of the question it would be reasonable and convenient that the validity of these sections should be tested in proceedings directly attacking their validity.

The ultimate question still remains whether it is the function of the court or an administrative agency to judge the correctness of the council's by-laws. The Ontario legislature via the Planning Act

<sup>25</sup> [1947] O.W.N. 489, at 490.

<sup>26</sup> Supreme Court of Canada Evidence, *Boyd Builders* case, p. 41.

<sup>27</sup> *Ibid.*, p. 28.

<sup>28</sup> [1937] 2 D.L.R. 559, at 560.

s. 30(9), (10)<sup>29</sup> has established that by-laws of this type are not to be effective until approved by the Ontario Municipal Board. Further the Ontario Municipal Board Act s. 92<sup>30</sup> has given the Board jurisdiction to decide on any factual matters (good faith) within its competence, and such a decision is to be binding and conclusive. In addition to these powers, s. 35 of the Municipal Board Act has decreed that the Board is to have *exclusive* jurisdiction over matters conferred on the Board by that Act or by any other act of the legislature (i.e. Planning Act s. 30(9), (10)). It is submitted that the legislature intended that the Ontario Municipal Board was to be the first review tribunal with provision for a further appeal.<sup>31</sup> The Municipal Act s. 277<sup>32</sup> also provides that a resident may apply to a Supreme Court judge to quash a by-law for illegality. Thus it would appear that there are two methods of attack open to the land owner and by not directly moving to quash he should then wait the decision of the Municipal Board and finally appeal if not satisfied with the legality of the proceedings.

In commenting on this "functional principle", whether it is within the jurisdiction of the courts or elected council to decide on the correctness of by-laws, Ferguson, J.A. in adjourning the mandamus in the Court of Appeal decision in the *Separate Schools* case, stated:

The city council is elected by the people and better qualified to pass on any question whether or not the erection ought, in the light of all surrounding circumstances, to be permitted, than any judge could possibly be.<sup>33</sup>

Remember also that Spence, J. himself stated earlier:

But I do not think a court should be called upon to determine the wisdom of council's action. It should simply leave it to the ordinary democratic process for the council to be responsible to the ratepayers who elected members of the council.<sup>34</sup>

The Supreme Court of Canada has expressly commented on this functional principle where in *Kuchma v. Rural Municipality of Tachee* Esty, J. stated:

Upon the question of public interest the courts have recognized that the municipal council, familiar with local conditions, is in the best position of all parties to determine what is or what is not in the public interest and have refused to interfere with its decision unless good and sufficient reason be established . . . immediately connected with the question of public interest is the allegation of bad faith.<sup>35</sup>

It would appear that council and not the court is in a better position to decide on zoning by-laws. The problem of granting a mandamus in these cases is that the developer is setting the zoning standards in conflict with those expressed by the local representatives.

<sup>29</sup> R.S.O. 1960 c. 296.

<sup>30</sup> *Ibid.*, c. 274.

<sup>31</sup> *Ibid.*, c. 274, s. 95(1).

<sup>32</sup> *Ibid.*, c. 249.

<sup>33</sup> *Toronto v. The Roman Catholic Separate Schools* (1920-21), 21 O.W.N. 17, at 18.

<sup>34</sup> *Re Granada Investments Ltd.*, *loc. cit.*, *supra*, footnote 24.

<sup>35</sup> [1945] S.C.R. 234, at 243.

Spence, J.'s comments in the *Boyd* case indicate that it was scarcely contemplated that the Ontario Municipal Board would subsequently approve By-law 311-63 in view of the court's decision.<sup>36</sup> If the by-law fails to get Board approval or if approved and the affected land is exempted from its operation, the land owner in either case is pursuing a zoning standard contrary to the intended plan.

Here indeed there is a race and if the council were to find itself in a tight situation, having refused a permit because it wishes to protect the status it must act quickly to prevent "grave hardship and detriment" from besetting the area. On the facts council reacted quickly, not notifying the land owner of its actions, but acted to preserve the character of an area it believed (from reports of the Planning Board and the Board of Control) should be protected. The municipality also argued that it was clarifying its own previously approved by-law. This purpose clearly was stated in the Report of the Board of Control and can be inferred from the inherent ambiguity of Schedule A of By-law 68-63. There was no evidence of *mala fides* with regard to this claim by the council. A similar claim was before the Supreme Court in the *Canadian Petrofina* case where Fauteux stated:

That the city was acting in bad faith is not supported. The declared purpose of the by-law is to remove any possible ambiguity, as to its interpretation as invariably given in the past by the city.<sup>37</sup>

Was the City of Ottawa merely trying to clear up an ambiguity that existed due to the context of Schedule A or was it trying to pass new legislation with regard to land use? The fact that By-law 8214 was subsequently amended in By-law 8255 did not vitiate the clear intent of council that the area encompassed by By-law 8214 was to continue as a restricted use zone. The existence of By-law 8255 presented the possibility of a different interpretation of council's intent and should not by itself decide that council's intent was merely to restrict this smaller area.<sup>38</sup>

In such a tight situation the council must decide whether to give notice to all of a public hearing, allowing the land owner the opportunity to advance his mandamus and win the race or to pass the by-law without notice. Sacrificing the requirement of notice the municipality at least stays in the race and the land owner can still object at the Municipal Board level. It is suggested that this latter method was contemplated by the legislature. The by-law requires the Board's approval and all interested parties must then be notified and afforded a full hearing. If it is then found from the land owner's evidence that the council has not acted in the best interests of the

<sup>36</sup> [1965] S.C.R. 408; see also *Re Bridgeman v. Toronto*, [1951] O.W.N. 472, where following the report is a letter from the O.M.B. declining to approve a by-law discredited by the court.

<sup>37</sup> [1959] S.C.R. 453, at 457.

<sup>38</sup> *Sun Oil Company Ltd. v. Town of Whitby*, [1957] O.W.N. 362. Laidlaw, J.A. expressly noted that council in this case was not contemplating a municipal plan which would prohibit the erection of service stations at that time and place. Could it be said that Ottawa had a plan which contemplated the restriction on land use and was merely trying to clarify it?

community, the by-law will be refused and the builder is entitled to his permit. But if it be found that the council has acted in the public interest, all circumstances being considered, then the character of the area has been validly protected. When a party's rights are affected justice demands that he be given the opportunity of stating his position. Must this opportunity always precede action by the municipal authority? Perhaps the weight of the possible detriment to the area is so great that policy considerations suggest that the hearing be after the municipality's action, allowing the municipality to keep a foot in the door. From Roach, J.A.'s prerequisites, if the council has not acted by the date of the mandamus hearing, then it would be impossible to refuse the application and the race would be lost to the developer. Proceeding on the concept that a full hearing is afforded the land owner at the Municipal Board, the developer has not lost the possibility of protecting his status and at the same time the municipality can attempt to protect actions which it feels are in the public interest. Such a procedure appears to have been expressly approved in Ontario by Wells, J. in *Re Loblaw's Groceteria Co. Ltd. v. Town of Brockville*<sup>39</sup> where, finding no *animus* toward the land owner himself, granted an adjournment of a mandamus and stated:

It would seem to me what has to be considered here is the general interest of the inhabitants of Brockville, as evidenced by the decision of council, and the right of the appellant company, and that these rights are in the process of being dealt with in the normal course of events by the Municipal Board, and that until that has been done, the courts should not intervene, especially by so drastic a remedy as mandamus.<sup>40</sup>

Here the courts have sought to interfere in the normal process and have developed a concept of bad faith resulting from lack of notice alone. Lack of notice itself has been previously held not to amount to bad faith.<sup>41</sup> However, by placing the Boyd decision alongside the Supreme Court's decision in *Wiswell v. Metropolitan Winnipeg*<sup>42</sup> it would appear that notice must not be given before council is able to take any action, despite the fact that this requirement places the municipality in a severely prejudicial position. Does the race then have a foregone conclusion?

This protection of the land owner's existing status now carries the weight that the Privy Council expressly denied to it. Spence, J.'s decision allows the individual land owner to outrace the municipal planners and may well open the way to individual "planning". This position appears to have been exactly the fear that possessed Fauteux, J. to comment in the Canadian Petrofina case:

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<sup>39</sup> *Re Loblaw's Groceterias Co. Ltd. v. Town of Brockville*, [1955] O.R. 258.

<sup>40</sup> *Ibid.*, p. 260.

<sup>41</sup> *Re Wright and Burlington*, [1959] O.R. 183 (Ont. C.A.), Schroeder, J.A. at 185.

<sup>42</sup> (1965) 51 D.L.R. (2d) 754 (S.C.C.) in which failure to post notice of a hearing on land involved, as required by Winnipeg's own procedural requirements, was sufficient to vitiate the by-law. The court commented that the lack of notice as required was sufficient to void the by-law and they did not have to deal with the allegations of bad faith and lack of public interest. Both the trial court and the C.A. found good faith and public interest, so it is interesting to note how Spence, J. connects mere lack of notice (even with no procedural requirement) with allegation of bad faith.