1964
*Nov. 10, 12, 13
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Apr. 9

GORDON BLANCHARD WISWELL, WILLIAM ARTHUR JOHNSTON AND GERALDINE MARY WILSON, suing on behalf of themselves and of all other members of the Crescentwood Home Owners Association (*Plaintiffs*) ....APPELLANTS;

AND

THE METROPOLITAN CORPORATION OF GREATER WINNIPEG (*Defendant*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal corporations—Zoning by-law—Failure to comply with Council's procedural resolution—Action for declaration of invalidity of by-law—Whether action barred by limitation period—The Metropolitan Winnipeg Act, 1960 (Man.), c. 40, s. 206(4) [am. 1962, c. 97, s. 29(a)](5) [en. 1962, c. 97, s. 29(b)].

The appellants were successful at trial in an action asking for a declaration that an amending zoning by-law passed by the respondent was invalid. The trial judgment was reversed on appeal, two members of the Court dissenting. The Metropolitan Council's procedural resolution for amendments to zoning by-laws required that notices of hearings be advertised in at least two newspapers and that notices be posted by the applicant for an amendment on the premises which were the subject-matter of the proposed amendment. The required notice was published in two newspapers but no notices were posted on the premises. A home owners association to which the appellants belonged and which was known by the respondent to be opposed to the application did not see the newspaper advertisements and had no notice or knowledge of the application.

The majority in the Court of Appeal held that even if the notice was defective for lack of posting, the most that could have been made of this omission was to find that the by-law was voidable only and not void, that under s. 206(5) of *The Metropolitan Winnipeg Act*, 1960 (Man.), c. 40, it had to be attacked within a three months' limitation period, and that, no such attack having been made, the by-law must stand. The trial judge and the dissenting judges in the Court of Appeal held that the by-law was void and could be attacked in an action for a declaration of invalidity even after the three months' limitation period had elapsed.

Held (Judson J. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Cartwright and Spence JJ.: Subject to the reservation that it was not necessary to decide whether the attacked by-law was void, agreement

*PRESENT: Cartwright, Martland, Judson, Hall and Spence JJ.

was expressed with the reasons of Hall J. On the assumption that the by-law was merely voidable, the appellants' action was not barred by s. 206(5) of *The Metropolitan Winnipeg Act*. *Re Gordon and De Laval Co. Ltd.*, [1938] O.R. 462, referred to.

Per Martland and Hall JJ.: In enacting the amending zoning by-law the respondent was engaged in a quasi-judicial matter and was in law required to act fairly and impartially. It was obliged to act in good faith and fairly listen to both sides. *St. John v. Fraser*, [1935] S.C.R. 441; *Board of Education v. Rice*, [1911] A. C. 179; *Re Howard and City of Toronto* (1928), 61 O.L.R. 563, referred to.

In the particular circumstances of this case the by-law was void. It was not merely the failure to post the placards but the manifest ignoring of the fact that the home owners association would oppose the by-law. A body with power to decide was obliged not to act until it had afforded the other party affected a proper opportunity to be heard. *Ridge v. Baldwin*, [1932] 2 AII E.R. 66, referred to.

However, even if the by-law was voidable only, s. 206 of *The Metropolitan Winnipeg Act* would not bar the action for a declaratory judgment declaring the by-law invalid. The section appeared to provide a summary procedure to quash by-laws of the Metropolitan Council but it did not apply to an action such as this. There was nothing in the section depriving the appellants of their right to bring an action to have the by-law declared invalid. *Wanderers Investment Co. v. City of Winnipeg*, [1917] 2 W.W.R. 197, referred to.

Per Judson J., *dissenting*: However one might characterize the form of activity in which the Metropolitan Council was engaged when it passed the amending by-law, it was a function which involved private rights in addition to those of the applicant and the municipality could not act without notice to those affected. But they gave clear, reasonable and adequate notice and the failure to direct the posting of notices pursuant to their own internal regulations, which were subject to their own control, did not affect the validity of their by-law. This by-law was within the municipal function. The failure to post notices did not go to the question of jurisdiction nor was posting a condition precedent to the exercise of the statutory power. The 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.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], allowing an appeal from a judgment of Smith J. in which it was held that an amending zoning by-law of the Metropolitan Council of Greater Winnipeg was invalid. Appeal allowed, Judson J. dissenting.

D. J. Jessiman, Q.C., and *A. K. Twaddle*, for the plaintiffs, appellants.

D. C. Lennox and *J. D. McNairnay*, for the defendant, respondent.

[1] (1963), 48 W.W.R. 193, 45 D.L.R. (2d) 348.

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The judgment of Cartwright and Spence JJ. was delivered by

CARTWRIGHT J.:—In this appeal I agree with the conclusion of my brother Hall and subject to one reservation with his reasons.

I do not find it necessary to decide whether the by-law which is attacked was void and propose to deal with the appeal on the assumption that it was merely voidable. On that assumption, I agree with the reasons of my brother Hall for holding that, even if the by-law was voidable only, the appellants' action was not barred by s.206(5) of *The Metropolitan Winnipeg Act,* 1960 (Man.), c. 40.

I wish to add a reference to the decision of the Court of Appeal for Ontario in *Re Gordon and De Laval Co. Ltd.*[1] in which Middleton J. A., with whose reasons all the other members of the Court agreed, said at p. 468:

> The Municipal Act, R.S.O. 1937, ch. 266, 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 . . .

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.

I would dispose of the appeal as proposed by my brother Hall.

The judgment of Martland and Hall JJ. was delivered by

HALL J.:—This is an appeal from the judgment of the Court of Appeal for Manitoba[2] allowing the appeal of the respondent from the judgment of Smith J. of the Court of Queen's Bench in which he held that By-law No. 177 of the Metropolitan Corporation of Greater Winnipeg was invalid.

On April 13, 1962, the Council of the Metropolitan Corporation of Greater Winnipeg passed By-law No. 177 rezoning from "R1" Single-Family District to "R4A" Multiple-Family District the following land:

> In the City of Winnipeg, in the Province of Manitoba, being in accordance with the Special Survey of the said City and being Lots Forty to Forty-five, both inclusive, which lots are shown on a plan of survey of part of Lot Forty-five of the Parish of Saint Boniface registered in the

[1] [1938] O.R. 462.

[2] (1964), 48 W.W.R. 193, 45 D.L.R. (2d) 348.

Winnipeg Land Titles Office as No. 308, excepting out of said Lots Forty-four and Forty-five all that portion coloured pink on Plan 5262 taken for a road diversion by the City of Winnipeg.

This land is situate at the northwest corner of the intersection of Academy Road and Wellington Crescent and comprises 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 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 Forty-three, Forty-four and Forty-five comprising approximately 1.8 acres were at all times relevant to this action owned by the late Dr. B. J. Ginsburg. Lots Forty, Forty-one and Forty-two 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.

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 No. 177 of the respondent declared invalid. The Crescentwood Home Owners Association is comprised of residents of the Crescentwood area in the City of Winnipeg which includes the tract covered by By-law No. 177. The overall objective of the Association has been to maintain the area in question as a single-family dwelling area. The Association had consistently opposed any attempts to have the area or any part of it rezoned or used for any purpose other than for single-family units.

In 1956 Dr. Ginsburg obtained two orders from the Zoning Board of the City of Winnipeg permitting him to erect on his property an 8-storey 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

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effect on April 1, 1961, when the Metropolitan Corporation of Great Winnipeg succeeded the City of Winnipeg in jurisdiction over zoning matters.

On November 22, 1961, Messrs. Johnston, Jessiman, Gardner & Johnston, as solicitors for the appellants, wrote the respondent as follows:

The Metropolitan Corporation of Greater Winnipeg,
100 Main Street,
Winnipeg, Manitoba.

Attention: Mr. John Pelletier

Dear Sirs:

Re: City of Winnipeg Zoning Board Orders

We act on behalf of the Crescentwood Home Owners Association.

As you know, the City of Winnipeg Zoning Board granted one year extensions to many of the orders made by it just prior to all zoning functions being taken over by Metro in April, 1961. We are interested in what our client's position is in respect to two such orders, namely, Z46/56 and Z113/57. The particulars of these two orders are as follows:

(1) Z46/56—on February 14th, 1956, the City of Winnipeg Zoning Board granted this order varying the Z. 1 restrictions applicable to the land commonly known as 3 Academy Road and 387 Wellington Crescent, being lot 43 and part of lots 44 and 45, D.G.S. 43/45 St. Boniface, plan 308, to permit the construction and maintenance of an eight storey apartment building containing sixty-four suites and twelve maids' rooms. The said order stipulated that it would automatically expire one year from February 14th, 1956, unless satisfactory operations to construct the said apartment building were completed or an extension of time granted by the Board.

(2) Z113/57—On April 23rd, 1957, the Board granted order No. Z113/57 varying the R. 1 restrictions applicable to a triangular portion of land at the north-west corner of Wellington Crescent and Academy Road to permit the said land to be used in conjunction with adjoining land, being the land described in the preceding paragraph, for the construction and maintenance of the said apartment building in accordance with plans filed with the Board. This order was likewise to expire within one year unless construction was commenced or an extension granted within that period.

The said orders have been extended by the Board from year to year. The last extension granted in respect to Z46/56 expired on February 14th, 1962, while that granted in respect to Z113/57 expires on April 23rd, 1962. On behalf of our client we opposed both applications which were granted by the Board on the dates as indicated and appealed both orders to the Municipal and Public Utility Board which were dismissed.

Our understanding is that the Board extended its orders upon an *ex parte* application being made to it for renewal. Orders Nos. Z46/56 and Z113/57 have been renewed four and three times respectively, without any notice of such application for renewal being given to our client.

Subsection 3 of section 82 of the Metropolitan Winnipeg Act appears to provide that the Metro Council has all the rights and powers possessed by the Winnipeg Zoning Board.

It would be much appreciated if you would send us a letter advising what policy the Metro Council is adopting towards applications to renew

the validity of zoning orders of the Winnipeg Zoning Board such as Z46/56 and Z113/57. We submit that under the circumstances relating to these two orders, no further extension should be granted by the Council. If this policy were followed it would mean that unless satisfactory operations to construct the said apartment building have been completed before the last extensions granted by the Board expire then a new application to vary the R. 1 restrictions applying to the said land will have to be made to the Board of Adjustment. Such a policy would ensure that our client would have an opportunity to make representations against such an application if it felt it was in its interest to do so.

In the alternative, if the Council decides to entertain applications to renew such orders then we ask that notice be given to our client so that it will have the opportunity to be heard at the hearing of such an application.

Yours truly,
JOHNSTON, JESSIMAN, GARDNER & JOHNSTON,
Per: "W. P. Riley"

WPR:dm

On or about December 22, 1961, Dr. Ginsburg applied to the Metropolitan Corporation of Greater Winnipeg to further extend these Zoning Board orders to April 30, 1963. The application was first heard by the Committee on Planning on January 4, 1962, at which time Mr. D. J. Jessiman, Q.C., representing the Association, opposed the granting of the proposed extension of time on the Zoning Board orders. The Planning Committee recommended that the orders be extended until April 30, 1963. The application with the recommendation of the Director of Planning was dealt with by the Metropolitan Council on January 11, 1962. Mr. Jessiman again 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.

Meanwhile, Dr. Ginsburg had requested the Metropolitan Corporation by letter dated December 27, 1961, to rezone 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 rezoned to an appropriate multiple-family dwelling category.

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

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March 1 and March 8, 1962, a notice appeared in the Winnipeg Free Press and the Winnipeg Tribune advising of the meeting to be held on March 12th.

At the Committee on Planning meeting on March 12th, no one appeared in opposition to the application for rezoning. The Committee recommended to Council that all six lots, *i.e.*, the Ginsburg and the Harris property, be rezoned to "R4A" classification, a multiple-family district. Council accepted the recommendation of the Planning Committee and subsequently By-law No. 177 was passed on April 13, 1962. In the meantime, Dr. Ginsburg had died.

On November 28, 1963, the appellants issued a statement of claim asking for a declaratory judgment to the effect that By-law No. 177 was invalid.

On December 18, 1963, the respondent issued a building permit to Welbridge 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 dimensions of the building being 166′ ×198′9″. 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.

The Crescentwood Home Owners had no notice or knowledge of Dr. Ginsburg's application to rezone from "R1" to "R4A".

The appellants contended (1) that the Association should have had notice of the application to rezone as aforesaid and, not having been notified or given an opportunity to oppose the application to rezone, By-law No. 177 was null and void; (2) that By-law No. 177 was not passed in good faith and in the public interest, but was, in fact, passed for Dr. Ginsburg's benefit only and was void.

The appellants rely on para. 10 of the Metropolitan Council's resolution which it adopted as the procedure to be followed in connection with applications to amend zoning by-laws and town planning schemes. Para. 10 of that resolution reads:

> 10. Public notice shall 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. The Director of Planning shall notify the municipality in which the land is situated of the proposed amendment and the time and place when the Committee on Planning will consider the amendment. The Director of Planning shall give to the applicant notices to be posted by

> the applicant on the premises which are the subject of the proposed amendment. Such notices must be erected by the applicant not less than 14 days before the date set for the hearing and shall be in such form as the Director of Planning may from time to time prescribe . . . .

Notice of Dr. Ginsburg's application to rezone was published in two newspapers having a general circulation in the metropolitan area, the Winnipeg Tribune and the Winnipeg Free Press in the issues of March 1 and March 8, 1962. The size of the advertisements was criticized, but it must be accepted that the advertisements were in the type and format usually used for legal notices of various kinds. The notice in question dealt with four applications, two in the City of Winnipeg, one in the Rural Municipality of Assiniboia and one in the Rural Municipality of St. Vital. Insofar as it dealt with the area in question in this appeal, the notice read:

> THE METROPOLITAN CORPORATION
> OF GREATER WINNIPEG
> ZONING NOTICE
>
> TAKE NOTICE that the Planning Committee of the Metropolitan Corporation of Greater Winnipeg will hold a public hearing at 2:00 p.m., Monday, March 12, 1962, in the Council Chambers, 100 Main Street, for the purpose of considering a re-zoning of the following areas and permitting certain specific uses on particular properties:
>
> 1. City of Winnipeg
>
> * * *
>
> (*b*) Northwest corner Wellington Crescent and Academy Road. From "R1" (One-family) District to "R4A" (Multiple-family) District property situated on the Northwest corner of Wellington Crescent and Academy Road more particularly described as Lots 40 to 45 inclusive, Plan 308, D.G.S. 45 Parish of St. Boniface except that portion of Lot 45 shown on Plan 5262 reserved for a road diversion by the City of Winnipeg. It is proposed to erect a multi-storey luxury apartment block on this property.

However, the second requirement of para. 10 above as to notices to be posted by the applicant on the premises was not compiled with. No notices were posted on the premises. No reason for this omission or explanation therefor was given and it appears that the Metropolitan Council proceeded to deal with the application on the basis that the requirements of said para. 10 had been complied with.

The respondent took the position that in enacting By-law No. 177 it was engaged in a legislative function and not in a quasi-judicial act and that it had the right to proceed without notice to interested parties despite its own procedure resolution before mentioned.

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I agree with Freedman J. A. when, on this aspect of the matter, he says:

> But 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 re-classification for zoning purposes. Rather this was a specific decision made upon a specific application concerned with a specific parcel of land. Metro had before it the application of Dr. Ginsburg, since deceased, for permission to erect a high-rise apartment building on the site in question. Under then existing zoning regulations such a building would not be lawful. To grant the application would require a variation in the zoning restrictions. Many residents of that area, as Metro well knew, were opposed to such a variation, claiming that it would adversely affect their own rights as property holders in the district. 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 I feel I must so treat it.
>
> Then counsel argues as well that the governing statute does not call for notice. Hence, he says, notice was not required. I am unable to accept this contention. 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. Some of the authorities dealing with this subject are referred to by Kirby J. in the recent case of *Camac Exploration Ltd. v. Oil and Gas Conservation Board of Alberta,* (1964), 47 W.W.R. 81.

The fact is that the Association did not see the notice which was published in the Winnipeg Tribune and the Winnipeg Free Press on March 1 and 8, 1962. An explanation as to why the Association did not see the advertisement published in the Winnipeg Tribune and the Winnipeg Free Press is that Mr. S. Greene who was secretary of the Association at the relevant time and who died prior to the trial was out of Winnipeg on holidays at that period in March 1962. Metro could not, of course, be expected to know this. However, it was stated in evidence by Mr. Johnston who was president of the Association at the time in question that if the placards contemplated by para. 10 of the procedure resolution had been erected on the premises for the 14-day period before the date set for the hearing he would certainly have seen them. He testified further

that if he or some other member of the Association had seen the placards the Association would have taken certain action to oppose the application on March 12th. It may be worth observing that on March 1, 1962, Metro notified Messrs. Keith & Westbury, solicitors for Dr. Ginsburg that the application to rezone the property would be considered by the Planning Committee of Metro at a public hearing to be held at 2:00 p.m., Monday, March 12, 1962, and the letter concluded with this paragraph: "You or an accredited representative should attend this meeting in accordance with section 80 of the Metropolitan Winnipeg Act." No similar or any notice was sent to the Association and as it was no one from the Association appeared to oppose the application when it came before Metro Council on March 12, 1962. It is manifest that had the Association received notice of the hearing or had it been aware that the application was to be dealt with on March 12, 1962, it would have had counsel present to object to the rezoning. The Association had on January 11, 1962, opposed extending the Zoning Board orders which Dr. Ginsburg had obtained in 1956 and which had been renewed from year to year until 1961. Although Metro knew of the Association's pronounced interest in any rezoning of the property in question, it did not communicate with it when Dr. Ginsburg applied on December 27, 1961 to rezone from "R1" to "R4A", nor did Metro, when all the interested parties were before it, make any reference to that new application when on January 4, 1962, and on January 11, 1962, council for the Association opposed further extending the 1956 orders permitting Dr. Ginsburg to erect a 64-suite apartment building. Moreover, Metro, on January 23, 1962, wrote Messrs. Johnston, Jessiman, Gardner & Johnston as follows:

Messrs. Johnston, Jessiman, Gardner & Johnston,
Barristers,
3rd Floor, Natural Gas Bldg.,
265 Notre Dame Avenue,
WINNIPEG 2, Manitoba.

Att: Mr. D. J. Jessiman.

Dear Sirs:

Please be advised that at its meeting held on January 11th, 1962, the Metropolitan Council granted an extension of Winnipeg Zoning Board Orders Z46/56 and Z113/57 in favour of Dr. B. J. Ginsburg, insofar as they affect No. 3 Academy Road and No. 587 Wellington Crescent, and more

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particularly described as Lot 43 and part of Lots 44 and 45, D.G.S. 43/45, St. Boniface, Plan 308 to April 30th, 1963, the said orders allowing the applicant to construct a 64 suite apartment block in the above noted site.

Yours truly,

"D. C. Lennox"
D. C. Lennox,
Secretary.

RGP/nm

This letter refers to the orders permitting a 64-suite apartment building without in any way referring to the new application to rezone and to erect a 12-storey 166-suite apartment building which was then actually under consideration. Metro was aware at this time that Dr. Ginsburg did not intend proceeding with the 8-storey 64-suite project.

What are the legal consequences of the manner in which Dr. Ginsburg's application to rezone was dealt with by the respondent? The matter being, as I have stated, a quasi-judicial one, Metro was in law required to act fairly and impartially: See *St. John v. Fraser*[1], at p. 452. In the language of Lord Loreburn in *Board of Education v. Rice*[2], at p. 182: ". . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything."

The obligation of a municipal body in carrying out its responsibilities is aptly and correctly stated by Masten J. A. in *Re Howard and City of Toronto*[3], at p. 576:

> In dealing with a proposed by-law which involves a conflict of interests between private individuals who are affected, the council, while exercising a discretion vested in it by statute, acts in a quasi-judicial capacity . . . and its preliminary investigations and all subsequent proceedings ought to be conducted in a judicial manner, with fairness to all parties concerned.

And, at p. 579:

> The council is empowered in cases like this to adjudicate between conflicting interests.
>
> In performing that duty councils are bound, like courts of justice, to see that every person interested is afforded full opportunity of presenting his views and contentions. The powers conferred on the council carry with them an obligation to see that every one affected gets British fair play, not only from the council itself when passing the by-law, but from its officers and committees in the preliminary steps leading up to the final result.

[1] [1935] S.C.R. 441.
[2] [1911] A.C. 179.
[3] (1928), 61 O.L.R. 563.

Guy J.A., (Schultz J.A. concurring) after referring to these quotations, went on to say:

> The evidence disclosed so much correspondence and discussion over such a lengthy period of time, that it is not open to the Metro Council to rely on the argument that this was a legislative by-law for the good of the community, in the public interest, in good faith, and initiated by Metro Council itself in an attempt to "better the lot of" the inhabitants of the Metropolitan area as a whole. In the light of all of the evidence, it is clear that the passage of this by-law was simply the end result of a plan conceived and carried forward by Dr. Ginsburg and his solicitors.
>
> This in turn indicates that the by-law was passed in the interest of one person directly and would only indirectly benefit the Metropolitan area as a whole. This, of course, goes to the matter of public interest.
>
> The fact that written notice, of a hearing of February 1, 1962 and March 12, 1962, was sent to Dr. Ginsburg's solicitors *and not to the Home Owners,* despite the fact that the opposing interests of the Home Owners were known to Metro, not only places Metro in an untenable position from the standpoint of equitable justice, but emphasizes the argument that the passage of this by-law was indeed to benefit one person and had little if any regard for the public interest as a whole.

The point to be decided is whether the failure to post the placards on the premises and proceeding to hold hearings on Dr. Ginsburg's application to rezone in the 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, vitiated By-law No. 177 and rendered it a nullity.

I am of opinion that the by-law was void in the particular circumstances of this case. It was not merely the failure to post the placards but the manifest ignoring of the fact known to it that the Association would oppose the by-law and that the Association had been advised by the letter of January 23, 1962 (Ex.1) that the orders of 1956 had been extended to April 30, 1963 for the 8-storey 64-suite apartment block, leaving the Association with no reason to believe or expect that the concurrent application to rezone was at that very time being processed without its knowledge.

The obligation on a body with the power to decide not to act until it has afforded the other party affected a proper opportunity to be heard is aptly stated by Lord Reid in *Ridge v. Baldwin*[1], at p. 81 as follows:

> Then there was considerable argument whether in the result the watch committee's decision is void or merely voidable. Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void and that was expressly decided in *Wood v. Wood,* (1874) L.R. 9 Exch. 190. I see no reason to doubt these

[1] [1963] 2 All E.R. 66.

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authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case.

Having arrived at the conclusion that the by-law was void, there remains for determination the question whether the appellant's action was barred by the provisions of s. 206 of *The Metropolitan Winnipeg Act,* 1960 (Man.), c. 40, which reads as follows:

> 206. (4) Any resident of the metropolitan area may apply to a judge of the Court of Queen's Bench in chambers to quash a by-law of the metropolitan council in the manner in which, and for the reasons for which, a by-law of a municipal council may be quashed under sections 390 to 391 and 393 to 395 of The Municipal Act and those sections and subsection (2) of section 290 of that Act apply, *mutatis mutandis,* to an application made under this subsection and in particular, substituting the expression "metropolitan corporation" for "municipal corporation" and "secretary" for "clerk". [am. 1962, c. 97, s. 29(a)]
>
> (5) No application under subsection (4) shall be entertained unless it is made within three months from the passing of the by-law. [enacted 1962, c. 97, s. 29(b)]

This section cannot be invoked as a bar to the action. The law in this regard is stated by Rogers in The Law of Canadian Municipal Corporations, vol. 2, p. 893, as follows:

> . . . if a by-law is within the power of the council and remains unimpeached within the time limited, it is validated by the effluxion of time.
>
> It must be stressed, however, that the curative effect of a failure to quash a by-law is limited to by-laws which are merely voidable and not void. The courts have made a distinction between these two classes of illegal by-laws. A voidable by-law is one that is defective for non-observance or want of compliance with a statutory formality or an irregularity in the proceedings relating to its passing and is therefore liable to be quashed whereas a void by-law is one that is beyond the competence to enact either because of complete lack of power to legislate upon the subject matter or because of a non-compliance with a prerequisite to its passing.

Even if the by-law was voidable only as argued by the respondent, I do not think that s. 206 of *The Metropolitan Winnipeg Act, supra,* would bar the action for a declaratory judgment declaring the by-law invalid. The section in question appears to provide a summary procedure to quash by-laws of the Metropolitan Council but it does not apply to an action such as this. There is nothing in the section depriving the appellants of their right to bring an action to have the by-law declared invalid: *Wanderers Investment Co. v. The City of Winnipeg*[1], at p. 205.

[1] [1917] 2 W.W.R. 197.

In view of my finding that the by-law was void for want of notice and for failure to give the appellants an opportunity to oppose the application to rezone, I do not find it necessary to deal with the second ground that By-law No. 177 was not passed in good faith and in the public interest.

I would accordingly allow the appeal and restore the judgment of Rhodes Smith J. with costs throughout.

JUDSON J. (*dissenting*):—In spite of the wide range of the argument on this appeal, the issue is very narrow. The trial judge quashed an amending zoning by-law for want of notice. This judgment was reversed on appeal, Guy and Schultz JJ. A., dissenting. 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 amendments to zoning by-laws. Without setting out the section in full, it provides for advertising in at least two newspapers and by the posting of notices by the applicant for the amendment on the premises which are the subject-matter of the proposed amendment. The criticism of the newspaper advertising by counsel for the appellant is, in my opinion, without foundation. It was clear and prominent 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.

The majority in the Court of Appeal held that even if the notice was defective for lack of the posting, the most that could have been made of this omission was to find that the by-law was voidable only and not void, that it had to be attacked within a three months' limitation period, and that, no such attack having been made, the by-law must stand. The trial judge and the dissenting judges in the Court of Appeal held that the by-law was void and could be attacked in an action for a declaration of invalidity even after the three months' limitation period had elapsed.

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Both the trial judge and the majority in the Court of Appeal found that the by-law was passed in good faith and in the public interest.

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 which involved 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 their 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.

I would dismiss the appeal with costs.

Appeal allowed with costs, JUDSON J. *dissenting.*

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