1964

*Mar. 17, 18
May 11

THE CORPORATION OF THE CITY OF OTTAWA (*Respondent*) ..... APPELLANT;

AND

THE ROYAL TRUST COMPANY, CITY CENTRE DEVELOPMENT (OTTAWA) LIMITED, KENSON CONSTRUCTION LIMITED, FREEDMAN REALTY COMPANY LIMITED, PINECREST INVESTMENTS (OTTAWA) LIMITED, RIDEAU TERRACE APARTMENT LTD. and SHIRDEN INVESTMENTS LIMITED (*Applicants*) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Taxation—City by-law imposing special charge upon owners of high-rise or other buildings—Validity of by-law—The City of Ottawa Act, 1960-61 (Ont.), c. 120, s. 4.

The City of Ottawa under s. 4 of *The City of Ottawa Act, 1960-61* enacted a by-law for the imposition of a special charge upon the owners of high-rise or other buildings to pay for part of the cost of providing additional sanitary and storm sewer and water capacity which would not otherwise have been required except for the heavy load such buildings impose or may impose on the city's sewer or water system or both. In the case of a residential building or the residential part of a combined residential and non-residential building, the charge, after crediting an exemption of two dwelling units, was $125 for each unit; in the case of a non-residential building or the non-residential part of a combined residential and non-residential building, the charge, after crediting an exemption of 1,500 square feet, was 17 cents for each square foot of floor space.

An application to quash the by-law having been dismissed in the first instance, the respondents appealed to the Court of Appeal where it was held that the by-law was invalid. The Court of Appeal concluded that s. 4 of *The City of Ottawa Act, 1960-61* authorized the enactment of a by-law only if an actual or estimated expenditure for a particular utility was dealt with and only if a charge for an actual or estimated expenditure capable of being revised by the Court of Revision was being dealt with. In addition, the Court of Appeal found that the by-law was bad for discrimination on four grounds, *viz.*, (1) the levy was imposed on owners of buildings which may be such as not to require any expenditure for additional utility capacity; (2) the levy was not upon the kind of buildings or classes thereof described in the enabling Act but was a levy made generally with respect to all new construction; (3) there was discrimination between buildings in the same class, and (4) the city classified buildings as residential and non-residential or combined residential and non-residential.

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

Held (Spence J., dissenting): The appeal should be allowed.

Per Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ.: The Court of Appeal was in error in holding that s. 4 of *The City of Ottawa Act, 1960-61* did no more than authorize what may be described as a local improvement by-law for an actual work in construction or in contemplation. The appeal provisions in subs. (4) did not justify a finding that the by-law must be a by-law contemplated by *The Local Improvement Act*. Also, there was no ground for the application of any principle of strict construction whether arising from a private Act or a taxing Act to support any holding that this by-law was bad. The scheme and purpose of the legislation were clear. The carrying out of the scheme and purpose by means of the by-law was no more than was authorized by the legislation.

With respect to the findings that the by-law was bad for discrimination on four grounds the following rulings were made: (1) The first finding seemed to imply that it is the duty of the city to assess in some way before enacting the by-law the actual gallonage of water consumed or likely to be consumed and the gallonage and time factors of the run-off for storm and sanitary sewers before it can act at all. The city, instead, classified the buildings to be taxed as residential and non-residential and mixed, and made elaborate provision for a levy on that basis. (2) The levy was not on new construction but on new construction of the classes mentioned, *i.e.*, over 1,500 square feet and two dwelling units, because these classes might require additional capacity. (3) Adding to an existing building in such a way as to bring it within the terms of the legislation and by-law for the purpose of the exemption and a levy on the new construction on that basis was not discrimination. (4) The classification of buildings as residential and non-residential or combined residential and non-residential was well within the broad terms of the enabling statute and there was nothing arbitrary, unjust or partial in drawing such a distinction.

Per Spence J., *dissenting*: The principle of strict construction of a public Act and a taxing Act applied to *The City of Ottawa Act, 1960-61*. Section 4 of the Act contemplated not the general levy on all new construction, which was in fact the essence of the by-law under attack, but rather a by-law passed for any particular area with a specific problem which may be surveyed in view of present new construction or contemplated new construction. The by-law in question, therefore, was *ultra vires* as going beyond the power granted by the enabling statute.

As to the allegations of discrimination made by the respondents some of which were accepted and some rejected in the Court of Appeal, there was discrimination only in the provision in the last sentence of s. 3(2) of the by-law which removes the two-dwelling unit or 1,500 square feet of non-residential space from the exemption in the case of enlarged buildings. The last words of s. 3(2) form no part of the main structure of the by-law but contain only a provision as to a minor detail of the scheme. Were it possible to hold the by-law valid apart from the final words of s. 3(2), those words should be severed. However, as the whole scheme of the by-law goes beyond the power granted by s. 4 of *The City of Ottawa Act, 1960-61*, it is invalid *in toto*.

[*The King v. Crabbs*, [1934] S.C.R. 523; *Cartwright v. City of Toronto* (1914), 50 S.C.R. 215; *Altrincham Union Assessment Committee v. Cheshire Lines Committee* (1885), 15 Q.B.D. 597; *Partington v. Attorney-General* (1869), L.R. 4 H.L. 100; *Kruse v. Johnson*, [1898]

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2 Q.B. 91; *Village of Long Branch v. Hogle*, [1948] S.C.R. 557, referred to.]

APPEAL from an order of the Court of Appeal for Ontario[1], which allowed an appeal from an order of Aylen J. dismissing a motion to quash a taxing by-law of the City of Ottawa. Appeal allowed, Spence J. dissenting.

J. T. Weir, Q.C., D. V. Hambling, Q.C., and *B. H. Kellock*, for the appellant.

J. J. Robinette, Q.C., and *G. E. Beament, Q.C.*, for the respondents.

The judgment of Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Hall was delivered by

JUDSON J.:—The City of Ottawa appeals from an order of the Court of Appeal for Ontario[1] which quashed its by-law 449-62. Aylen J., in the first instance, had affirmed this by-law. The statutory basis for the by-law is *The City of Ottawa Act*, 1960-61 (Ont.), c. 120, s. 4, by which the City of Ottawa, subject to the prior approval of the Ontario Municipal Board, was granted jurisdiction to enact by-laws concerning buildings constructed or enlarged after May 2, 1960. The legislation authorizes by-laws for the imposition of a special charge or charges upon the owners of high-rise or other buildings as defined by the by-law or any class or classes of such buildings that impose or may impose a heavy load on the city's sewer or water system or both.

Pursuant to the legislation, the City of Ottawa submitted a draft by-law to the Ontario Municipal Board. After hearing interested parties, the Board, on December 17, 1962, gave a decision which authorized the enactment of a by-law in the form submitted but with a variation in the quantum of the charges. By-law 449-62 was then enacted on December 21, 1962. Subsequently, on January 7, 1963, by-law 3-63 was enacted setting forth methods for payment of the charges. This by-law had not received the prior approval of the Ontario Municipal Board. It was quashed by Aylen J. as being discriminatory and there was no appeal from that judgment to the Ontario Court of Appeal. We are, therefore, concerned only with by-law 449-62.

[1] [1963] 2 O.R. 573, 40 D.L.R. (2d) 513.

It is necessary to set out the authorizing legislation and the by-law in full:

City of Ottawa Act
Statutes of Ontario, 9-10 Elizabeth II
c. 120, s. 4

4. (1) Subject to the approval of the Ontario Municipal Board first being obtained, the council of the Corporation may pass by-laws for imposing upon the owners of high-rise or other buildings, as defined by the by-law, for the erection or enlargement of which a building permit was or is issued subsequent to the 2nd day of May, 1960, or of any class or classes of such buildings, that impose or may impose a heavy load on the sewer system or water system, or both, by reason of which expenditures are or may be required to provide additional sanitary or storm sewer or water supply capacity, which, in the opinion of the council, would not otherwise be required, a special charge or charges over and above all other rates and charges to pay for all or part of the cost of providing the additional capacity.

(2) The proceeds of the charge or charges authorized by subsection 1 shall be used for the purpose therein referred to and not otherwise.

(3) Any charge or charges imposed under subsection 1 are a lien upon the land on which the building is erected and may be collected in the same manner and with the same remedies as provided by *The Assessment Act* for the collection of real property taxes.

(4) There shall be an appeal to the court of revision of the City of Ottawa from any charge or charges authorized by subsection 1 and the provisions with respect to appeals to the court of revision and section 51 of *The Local Improvement Act* apply *mutatis mutandis*.

(5) This section does not apply to single-family, double or duplex buildings.

BY-LAW 449-62

A by-law of The Corporation of the City of Ottawa for the imposition of a special capital charge respecting sewerage and water supply.

WHEREAS all residential buildings in the City of Ottawa not being a single family building, a double building or a duplex building, all non-residential buildings in the City of Ottawa having more than 1,500 square feet of gross floor area and all combined residential and non-residential buildings having more than two dwelling units or more than 1,500 square feet of gross floor area erected or enlarged pursuant to a building permit issued subsequent to the 2nd day of May, 1960 may impose a heavy load on the sewer system or water system of the Corporation or both by reason of which expenditures may be required to provide additional sanitary or storm sewer or water supply capacity which in the opinion of the Council would not otherwise be required;

AND WHEREAS it is expedient to impose a special charge upon the owners of the above mentioned buildings subject to the exceptions hereinafter set forth, to pay for part of the cost of providing the additional capacity;

AND WHEREAS the Council is by section 4 of The City of Ottawa Act, 1960-61, with the approval of the Ontario Municipal Board, authorized to enact as hereinafter set forth;

AND WHEREAS the Ontario Municipal Board has by its order dated the 17th day of December, 1962 approved of this by-law;

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Therefore the Council of The Corporation of the City of Ottawa enacts as follows:

1. In this by-law,

(a) "combined residential and non-residential building" means a building containing

(i) a dwelling unit or dwelling units and

(ii) space devoted to other purposes which space is not accessory to a dwelling unit or dwelling units only;

(b) "dwelling unit" means one room or two or more rooms connected together or having access one to another intended for use as a separate unit in the same building and constituting an independent housekeeping unit for residential occupancy;

(c) "gross floor area" means the total floor area obtained by adding together the area contained within the perimeter of the exterior of the building at each floor level;

(d) "non-residential building" means a building containing no dwelling units;

(e) "residential building" means a building containing only

(i) a dwelling unit or dwelling units or

(ii) a dwelling unit or dwelling units and space accessory to such use only.

2. It is the opinion of the Council that all residential buildings in the City of Ottawa not being a single family building, a double building or a duplex building, all non-residential buildings in the City of Ottawa having more than 1,500 square feet of gross floor area and all combined residential and non-residential buildings having more than two dwelling units or more than 1,500 square feet of gross floor area erected or enlarged pursuant to a building permit issued subsequent to the 2nd day of May, 1960 may impose a heavy load on the sewer system or water system of the Corporation or both by reason of which expenditures may be required to provide additional sanitary or storm sewer or water supply capacity which would not otherwise be required.

3. (1) Subject to subsections 2 and 3 and to section 5 the following charges are hereby imposed upon the owner of every building in the City of Ottawa for the erection or enlargement of which a building permit was or is issued subsequent to the 2nd day of May, 1960:

(a) in the case of a residential building or the residential part of a combined residential and non-residential building, a charge of $125.00 for each dwelling unit the creation of which is authorized by the permit,

(b) in the case of a non-residential building or the non-residential part of a combined residential and non-residential building, a charge of 17 cents for each square foot of gross floor area the creation of which is authorized by the permit.

(2) In calculating the charge under subsection (1) each residential building or residential part of a combined residential and non-residential building shall be credited with an exemption of two dwelling units and each non-residential building or non-residential part of a combined residential and non-residential building shall be credited with an exemption of 1,500 square feet and in applying such exemption dwelling units and floor area created pursuant to a building permit issued on or before the 2nd day of May, 1960 shall be counted.

(3) In calculating the charge under subsection (1) in respect of a combined residential and non-residential building, that part of each floor used for dwelling units only shall be excluded from the gross floor area of the building.

4. (1) All charges imposed under this by-law shall be calculated by the Building Inspector of the Corporation at the time of issuance of the building permit or, in the case of building permits issued prior to the date of enactment of this by-law, forthwith after such date and the Building Inspector shall certify the amount of the charge to the Treasurer of the Corporation.

(2) The Treasurer shall

(*a*) prepare a special roll showing
  (i) the name of the owner
  (ii) a description of the land on which the building is erected or enlarged and
  (iii) the amount of the charge imposed under section 3,

(*b*) send a notice to the owner at least fifteen days before the next sitting of the Court of Revision at which an appeal from the charge may be heard, setting out the information contained on the roll prepared under clause (*a*) and also the time and place of the said sitting of the Court of Revision.

(3) The charges imposed by this by-law are a lien upon the land on which the building is erected and shall be collected by the Treasurer in the same manner and with the same remedies as provided by The Assessment Act for the collection of real property taxes.

5. This by-law shall not apply to

(*a*) any building used for educational, religious or charitable purposes which is entitled to exemption from
  (i) all kinds of municipal taxation, or
  (ii) all kinds of municipal taxation other than school taxes or local improvement rates or both school taxes and local improvement rates,

(*b*) a building on a lot or block in respect of which lot or block a charge was imposed on or after the 21st day of June, 1961 as a condition of the approval of a plan of subdivision, pursuant to the resolution of the Council of the said date,

(*c*) any single family, double building or duplex building.

GIVEN under the corporate seal of the City of Ottawa this 21st day of December, 1962.

The Court of Appeal concluded that s. 4 of *The City of Ottawa Act, 1960-61* authorized the enactment of a by-law only if an actual or estimated expenditure for a particular utility was dealt with and only if a charge for an actual or estimated expenditure capable of being revised by the Court of Revision was being dealt with. The basis for this conclusion was subs. (4) of s. 4, which provides for appeals to the Court of Revision and makes the provisions of s. 51 of *The Local Improvement Act* apply *mutatis mutandis*.

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The ratio of the judgment of the Court of Appeal on this point is set out in the following extract from the reasons of Aylesworth J.A.:

> Subsection (4) of section 4 of the Act provides for an appeal to the Court of Revision from any charge authorized by subsection (1) and makes applicable to such appeal, *mutatis mutandis*, the provisions with respect to appeals to the Court of Revision and section 51 of the Local Improvement Act. Section 51(3) of the Local Improvement Act provides that the Judge on an appeal to him has the like jurisdiction and powers as are conferred on the Court of Revision by section 47. Section 47(1) provides *inter alia* that the Court of Revision has jurisdiction "to review the proposed special assessment and to correct the same . . . in all cases as to the actual cost of the work." Upon a consideration of subsections (1) and (4) of the City of Ottawa Act under review and of the provisions of the Local Improvement Act imported into the special act and made applicable *mutatis mutandis* to the disposition of the appeals provided for by subsection (4), I am impelled to the conclusion that the special Act in contemplating the levy of the special charge or charges authorizes such charges only with respect to some actual work in construction or contemplation to provide for an additional capacity in the utilities; that the money expended or to be expended in connection therewith has been calculated or at least estimated and that such additional capacity in the opinion of the council "would not otherwise be required". It seems to me clear that to hold otherwise would be to render abortive or very nearly so, the protection afforded the taxpayer under subsection (4); unless the charge is made with respect to the actual work in construction or contemplation, the cost of which has been ascertained or at least estimated, the taxpayer in prosecuting an appeal with respect to the charge would be precluded from any effectual complaint to the Judge on the ground that the same was excessive or oppressive or on any ground involving a consideration of "the cost of the work."

I think that there was error in holding that the new legislation did no more than authorize what may be described as a local improvement by-law for an actual work in construction or in contemplation. The appeal provisions in subs. (4) do not justify a finding that the by-law must be a by-law contemplated by *The Local Improvement Act*.

The Local Improvement Act, R.S.O. 1960, c. 223, provides legislation by which public works of all kinds may be undertaken. There are two methods of financing under *The Local Improvement Act*, a special rate per foot frontage provided for by s. 20, or an area charge provided for in s. 67(1). *The Local Improvement Act*, of course, contemplates the existence of a specific scheme with all its incidental details of cost for which a charge is to be made. Section 4 of *The City of Ottawa Act* does not authorize this kind of by-law at all and without the importation of the appeal provisions in subs. (4) of s. 4, the Court of Appeal could never have

reached the conclusion that it did. Section 4 is dealing with a situation where new construction imposes or may impose a heavy load on public utilities. It provides for charges that are or may be required. By-law 449-62 recognizes that in areas of the city not recently sub-divided, a sewer and water system of sufficient capacity to allow the use or erection and use of non-residential buildings with 1,500 square feet of gross floor area or residential buildings with two dwelling units should be provided for out of ordinary revenue. Expenditures to provide for this capacity and its maintenance are recognized as normal while the erection of large buildings may require expenditures to provide additional capacity which would not otherwise be required. The purpose of the levy is clearly set forth in subs. (2) of the legislation: "The proceeds of the charge or charges authorized by subsection (1) should be used for the purpose therein referred to and not otherwise." They are not to be applied in reduction of general rates or to provide for normal expenditures but to provide increased capacity in the system needed for new construction after May 2, 1960, which would not otherwise be required.

The interpretation placed upon *The City of Ottawa Act* by the Court of Appeal would render it ineffectual. The statute authorizes the imposition of charges against owners of buildings erected or enlarged after May 2, 1960 and only against such people. *The Local Improvement Act* cannot and was not meant to operate under such legislation and it is error to import into the new legislation the provisions of *The Local Improvement Act* because of the provisions for appeal contained in subs. (4) of the legislation. Subsection (4) of s. 4 of *The City of Ottawa Act,* having created the right of appeal, refers to the provisions of *The Local Improvement Act* as a shorthand method of providing the necessary procedural regulations and in order to provide for appeals to the County Judge and the Court of Appeal. Those provisions are to be applied *mutatis mutandis* and the section does not provide that these provisions are to be applied verbatim to a new Local Improvement Act. The question whether or not by-law 449-62 is *intra vires* depends upon a consideration of *The City of Ottawa Act* alone and the by-law, and it is error to hold that this kind of reference to appeal provisions colours the whole scheme of the legislation and contemplates the specific scheme and the specific

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modes of financing provided for in *The Local Improvement Act*.

The Court of Appeal also says that this legislation must be strictly construed against the city because it is a private Act and a taxing Act. The principles have often been stated. Those who promote a private Act ought to see that the powers they wish to obtain are plainly expressed. Those who seek to tax must point to clear, unambiguous words which impose the tax. If these are not to be found or where the meaning of the statute is in doubt, there is no tax. I am using my own words but I do not wish to be taken in any way as departing from the usual formulae.

The cases cited in support of these principles are many. Up to 1934 there is a representative collection of them relating to taxing Acts in a judgment of this Court in *The King v. Crabbs*[1], which was concerned with sales tax under the *Special War Revenue Act*.

On the other hand, in *Cartwright v. City of Toronto*[2], in dealing with tax sales and validating legislation, Duff J. said:

> On the merits of the case I think all the contentions advanced on behalf of the appellant are disposed of by the decision of the Privy Council in *City of Toronto v. Russell* ([1908] A.C. 493). I see no reason to doubt that the passages of the judgment at page 501 form a part of the *ratio decidendi*. The effect of these passages, in my judgment, is to explode the notion which appears to have been founded on some decisions of this court, that statutes of this character are subject to some special canon of construction based, apparently, upon the presumption that all such statutes are *prima facie* monstrous. The effect of the judgment of the Judicial Committee is that particular provision in such statutes must be construed according to the usual rule, that is to say, with reasonable regard to the manifest object of them as disclosed by the enactment as a whole.

This principle was applied in *Palmolive Manufacturing Co. Ltd. v. The King*[3], also concerned with sales tax and the *Special War Revenue Act*, as was *Crabbs*, and in *Langdon v. Holtyrex Gold Mines Ltd.*[4], where the problem was the same as in *Cartwright v. Toronto* and *Toronto v. Russell*.

I do not think that these two lines of authority are saying exactly the same thing. The apparent diversity does suggest the need for emphasis on the problem before the legislature and the means adopted to solve it, and all the more so where the problem is new in municipal development.

[1] [1934] S.C.R. 523.
[2] (1914), 50 S.C.R. 215 at 219.
[3] [1933] S.C.R. 131 at 139.
[4] [1937] S.C.R. 334 at 340.

This legislation applies only to certain kinds of buildings for which a building permit is issued after May 2, 1960. The buildings may be of two classes: those that impose and those that may impose a heavy load on public utilities and which require or may require additional expenditures. This is not a situation apt to be dealt with by local improvement legislation. If it were, why would existing legislation not be adequate? The extensions are to be provided by those who make them necessary and not by the taxpayers at large as a bonus to a certain type of building operation.

The legislation itself exempts single family, double or duplex buildings. The by-law carries this out. Both are saying that the public utilities which the city has or which it would normally construct would be adequate for such buildings. Over and above this, whatever capacity is required or may be required is called for by a building in excess of these limits. The by-law provides for two classes of building to be subject to the special charges:

> (*a*) in the case of a residential building or the residential part of a combined residential and non-residential building, a charge of $125.00 for each dwelling unit the creation of which is authorized by the permit,
>
> (*b*) in the case of a non-residential building or the non-residential part of a combined residential and non-residential building, a charge of 17 cents for each square foot of gross floor area the creation of which is authorized by the permit.

Subsection (2) of s. 3 gives each of these classes of building a certain exemption which makes it clear that it is excess capacity that is being taxed. Broadly speaking, the classification is between residential and non-residential building. Residential building is taxed on a unit basis ($125 for each dwelling unit), non-residential building on floor space (17 cents per square foot). I agree with Aylen J. that the City Council had the right to draw this distinction between residential and non-residential building; that this distinction is valid and does not give rise to discrimination.

Subsection (3) of s. 3 is merely a mode of calculating the charge under subs. (1) in respect of combined residential and non-residential building. You deduct the floor space used for dwelling units only and the rest is non-residential floor area.

The by-law is, of necessity, a detailed document but it does not lack in clarity. I can see no ground for the applica-

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tion of any principle of strict construction whether arising from a private Act or a taxing Act to support any holding that this by-law is bad. To me the scheme and purpose of the legislation are clear. The carrying out of the scheme and purpose by means of the by-law is no more than is authorized by the legislation.

So far I have only dealt with the decision of the Court of Appeal in quashing the by-law because the levy was not imposed with respect to any planned expenditure for additional capacity with an ascertained or estimated cost. The Court of Appeal, however, went on to find that the by-law was bad for discrimination on four grounds.

The first of these grounds was that the levy is imposed on owners of buildings which may be such as not to require any expenditure for additional utility capacity. This is stated in the following extract from the reasons of the Court of Appeal:

> . . . Under this charging section therefore, a levy is made upon the owner of a building erected after the effective date which in fact may replace an existing building and be of such construction, extent and use as not only not to "impose a heavy load" upon the utilities but not to require any expenditures to provide any additional utility capacity whatsoever.

This conclusion is based upon a number of hypothetical cases put to the Court by counsel for the respondents. He quoted, for example, the possibility of the demolition of an old tenement building housing several families and its replacement by a warehouse building on one floor having only one or two employees. I doubt whether this kind of illustration is an aid to interpretation unless all the relevant facts are in evidence. There was no evidence called in this litigation. The evidence was entirely affidavit evidence which was merely put in to show that the respondents had an interest in attacking the by-law. Further, the probabilities do not stop with the hypothetical case. It ignores entirely the use of the word "may" in *The City of Ottawa Act*. There are all kinds of probabilities that this kind of building may be put to another use which may call for additional requirements.

This finding seems to imply that it is the duty of the city to assess in some way before enacting the by-law the actual gallonage of water consumed or likely to be consumed and the gallonage and time factors of the run-off for storm

and sanitary sewers before it can act at all. The city, instead, classified the buildings to be taxed as residential and non-residential and mixed, and made elaborate provision for a levy on that basis.

The second ground on which the Court of Appeal found discrimination is set out in the following extract:

> In pith and substance the levy is not upon the kind of buildings or classes thereof described in the enabling Act but is a levy made generally with respect to all new construction. Upon both these grounds, section 3 of the by-law is invalid.

The error here is that the levy is not on new construction but on new construction of the classes mentioned, *i.e.*, over 1,500 square feet and two dwelling units, because these classes may require additional capacity.

The third finding of the Court of Appeal was that there was discrimination between buildings in the same class. This is expressed in the following extract from the reasons dealing with s. 3(2) of the by-law:

> Again it is said that Section 3(2) of the by-law is discriminatory in that, although the special charge is levied upon owners of buildings erected or enlarged after the effective date, the owner of a building which is enlarged is discriminated against in comparison with the owner of a building which is newly erected in its entirety since the former is not granted an area or unit exemption in calculation of the tax which is received by the latter. I agree that the discrimination exists and if it exists it is a discrimination as between buildings in the same class, something not permitted by the enabling Act.

I take this to mean that when a building is extended, it is considered as a whole and the exemptions apply when the exemptions are determined. The exemptions may come out of the old construction and not necessarily out of the new construction. Take the case of an old residential building existing before the effective date. As it stands, it is not subject to this by-law. Any enlargement will have to be of such a character as to bring it within the legislation and the by-law but once this happens, there is no reason to restrict the operation of the exemption only to the enlargement. Enlargement brings a building within the scope of the by-law just as much as new erection.

There is a rational basis for the enactment of the by-law in its form as it stands. Adding to an existing building in such a way as to bring it within the terms of the legislation and by-law for the purpose of the exemption and a levy on the new construction on that basis is not discrimination.

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Section 3(2) of the by-law recognizes that if a lot is now vacant a new building thereon should not pay the special charge except in excess of occupation space for either two families or 1,500 square feet of commercial space. In enlargements of old buildings the by-law recognizes the same basic exemption but if the land is already consuming municipal services to the extent of 1,500 square feet of commercial space or two families, it recognizes that any additional construction will require expenditures on the sewer or water system.

Finally, discrimination is found in the fact that the city classified buildings as residential and non-residential or combined residential and non-residential. I agree with Aylen J. on this point that the distinction was a natural and sensible one and well within the broad terms of the enabling statute and that there was nothing arbitrary, unjust or partial in drawing such a distinction.

I would allow the appeal with costs both here and in the Court of Appeal and restore the order of Aylen J. which dismissed the motion to quash by-law 449-62.

SPENCE J. (*dissenting*):—This is an appeal by the City of Ottawa from the order of the Court of Appeal for Ontario[1] dated July 2, 1963. In that judgment, the Court of Appeal for Ontario allowed an appeal by the respondents from the order of the late Mr. Justice Aylen dated March 19, 1963. In the latter judgment, Mr. Justice Aylen had dismissed an application by the respondents herein to quash by-law 449-62 of the City of Ottawa. *The City of Ottawa Act, 1960-61*, being chapter 120 of the Statutes of that year provided in s. 4:

> 4. (1) Subject to the approval of the Ontario Municipal Board first being obtained, the council of the Corporation may pass by-laws for imposing upon the owners of high-rise or other buildings, as defined by the by-law, for the erection or enlargement of which a building permit was or is issued subsequent to the 2nd day of May, 1960, or of any class or classes of such buildings, that impose or may impose a heavy load on the sewer system or water system, or both, by reason of which expenditures are or may be required to provide additional sanitary or storm sewer or water supply capacity, which, in the opinion of the council, would not otherwise be required, a special charge or charges over and above all other rates and charges to pay for all or part of the cost of providing the additional capacity.

[1] [1963] 2 O.R. 573, 40 D.L.R. (2d) 513.

(2) The proceeds of the charge or charges authorized by subsection 1 shall be used for the purpose therein referred to and not otherwise.

(3) Any charge or charges imposed under subsection 1 are a lien upon the land on which the building is erected and may be collected in the same manner and with the same remedies as provided by *The Assessment Act* for the collection of real property taxes.

(4) There shall be an appeal to the court of revision of the City of Ottawa from any charge or charges authorized by subsection 1 and the provisions with respect to appeals to the court of revision and section 51 of *The Local Improvement Act* apply *mutatis mutandis*.

(5) This section does not apply to single-family, double or duplex buildings.

A draft by-law of the Corporation of the City of Ottawa, numbered 449-62, was submitted to the Municipal Board in accordance with the provisions of the said s. 4 of *The City of Ottawa Act* and after a hearing on December 17, 1962, the Municipal Board gave reasons for authorizing the enactment of the by-law in the form submitted but with a variation in the quantum of the charges. Subsequently, on December 21, 1962, by-law 449-62 was enacted by the Corporation of the City of Ottawa. Before this Court, there were two main attacks levelled at the validity of the by-law. Firstly, that the whole scheme of the by-law was not in accordance with the provisions of the enabling statute as that enabling statute contemplated a building which had been or was about to be built and which would or might add a heavy load on the water or sewage system by reason of which expenditures were or may be required to provide the additional capacity, and that additional expenditure would, in the opinion of council, not otherwise be required, while it is submitted that what was enacted as by-law 449-62 was, in fact, with narrow exemptions, a general levy on all new construction irrespective of whether it will add a heavy load to the water or sewage facilities and irrespective of whether such heavy load will require expenditures not otherwise necessary. Secondly, that even if the scheme of the by-law were within the enabling legislation, it is bad as discriminatory in five different instances, and that the by-law being the embodiment of a scheme and that scheme having been approved by the Municipal Board, it is not possible to sever the alleged discriminatory portions of the by-law and to declare in favour of the validity of the truncated remainder.

To deal first with the allegation that the by-law is *ultra vires* in that it goes beyond the legislation permitted by the enabling statute, one must determine what general canons of

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construction are to be applied to the by-law and to the statute. Firstly, it is noted that c. 120 of the Statutes of Ontario, 1960-61, is in fact a private Act. It is so listed in the table of contents at p. viii of the index and the statute itself shows that it was enacted after a petition by the Corporation of the City of Ottawa. Lord Esher said in *Altrincham Union Assessment Committee v. Cheshire Lines Committee*[1], at p. 602:

> Now it is quite true that there is some difference between a private Act of Parliament and a public one, but the only difference which I am aware of is as to the strictness of the construction to be given to it, when there is any doubt as to the meaning. In the case of a public Act you construe it keeping in view the fact that it must be taken to have been passed for the public advantage, and you apply certain fixed canons to its construction. In the case of a private Act, which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in their favour, because the persons who obtain a private Act ought to take care, that it is so worded that that which they desire to obtain for themselves is plainly stated in it. But, when the construction is perfectly clear there is no difference between the modes of construing a private Act and a public Act . . .

It is true that in *North London Ry. Co. v. Metropolitan Board of Works*[2], Sir W. Page Wood V.C., said at p. 413:

> . . . and they point to the acts which regulate the taking of land by private companies to show that it is not in the course of the Legislature to give such powers without providing protection for the land owners. To this argument it is competent for the Defendants to reply, that the policy of Acts for the regulation of private companies is not necessarily applicable to an Act like this, the purpose of which is a great public benefit to the whole community.

That statement was made in reference to a statute which permitted the Metropolitan Board of Works to execute public works without first acquiring title to the land. I am of the opinion that it is not applicable to the situation in the present action. In *Quinton v. Corporation of Bristol*[3], at p. 532, Sir R. Malins, V.C., expressed a similar view as to a statute which permitted the City of Bristol to expropriate property in order to widen streets and held that it permitted the taking of a whole property and not the half or less which was actually required within the limits of the proposed street. So far as the present case is concerned, I am of the opinion that Lord Esher's statement sets a proper standard for the construction of the statute and indeed of the by-law passed by virtue of the statute.

[1] (1885), 15 Q.B.D. 597. [2] (1859), John. 405.
[3] (1874), L.R. 77 Eq. 524.

Again, the statute and the by-law is a taxing statute. The statute in fact only authorized the tax while the by-law purports to assess such tax but the principle of construction, it is suggested, applies to the enabling statute to determine whether or not it authorizes the tax as set out in the by-law. If there is any ambiguity then the interpretation must be the one more favourable to the taxpayer: *Partington v. Attorney-General*[1] at p. 122, per Lord Cairns:

> . . . because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there is admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

In *City of Ottawa v. Egan*[2], Idington J., at p. 308, quoted Lord Cairns in *Cox v. Rabbits*[3], at p. 478, to the same effect. And in *Montreal Light Heat and Power Consolidated v. City of Westmount*[4], Anglin C. J., at p. 519, adopted the citation I have made from the *Partington* case, as did Hughes J. in *The King v. Crabbs*[5], at p. 525. Counsel for the appellant cited *Langdon v. Holtyrex Gold Mines Ltd.*[6], *Palmolive Manufacturing Co. v. The King*[7], and *Northern Broadcasting Co. v. District of Mountjoy*[8]. I have considered these cases and they do not cut down the validity of the principle enunciated by Lord Cairns in the *Partington* case which, in my opinion, still applies to s. 4 of *The City of Ottawa Act, 1960-61.*

It is appropriate at this time to consider the problem which the statute and the by-law passed in virtue thereof attempt to deal with. The City of Ottawa was faced with a problem of urban core renewal. Land in an area no longer attractive to single-family residences was being developed for high-rise office and apartment buildings. In addition, the 50 to 60-year old water mains and sewers were wearing out. This is a problem common to every city in North America and particularly to the older cities in Ontario. If what Ottawa seeks to do by the by-law as distinguished

[1] (1869), L.R. 4 H.L. 100.
[2] [1923] S.C.R. 304.
[3] (1878), 3 App. Cas. 473.
[4] [1926] S.C.R. 515.
[5] [1934] S.C.R. 523.
[6] [1937] S.C.R. 334.
[7] [1933] S.C.R. 131.
[8] [1950] S.C.R. 502.

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from what, in my opinion, it was empowered to do by the statute were a solution accepted by the legislature, then one would have expected it to have been the subject of a general amendment to *The Local Improvement Act* and other provincial statutes, whereby such a capital levy on new construction would have been permitted in all cases. Surely, therefore, the legislature acted on the City of Ottawa's petition only to permit the municipality to lay a special rate or rates when it would not otherwise be required.

The submission by counsel for the appellant that such a type of by-law would only apply on the first building erected thereunder cannot be supported. Were certain areas in the City of Ottawa surveyed by the proper authorities and it was determined that in the next "x" years the erection of high-rise buildings would require larger mains at a certain cost, larger sanitary sewers at a certain additional cost, and larger pumping stations and increased treatment plants at a further cost, and that of the total cost a certain per cent would be attributable not to replacement but to the additions caused by such new construction, this cost would then be distributed over new building in the area as it would occur during those years in an acceptable formula. The last words of subs. (1) of s. 4 of the statute, "to pay *for all or part* of the cost of providing the additional capacity" are the key (the italics are my own). Such a scheme would contemplate a calculation or estimation of the actual or potential increased load even if such calculations were an approximation only. On the other hand, the present by-law assesses a building built in 1962 despite the fact that it might be right over a large new trunk sewer and alongside a new water main, both constructed in 1958 and at that time prudently constructed of a size much larger than required, so that in fact the 1962 construction of the building entailed no additional load on either water or sewer facilities which would require additional expenditure. The additional expenditure had already been made and I can find no implication in the statute that the City of Ottawa is entitled to recoup itself for past expenditures in renewal or extension of services. It is true that in such a scheme there may be examples of such accidental discrimination as has been pointed out by counsel for the appellants in reference to the present by-law. In my opinion, such discrimination would have to be considered necessary and reasonable when the

statute contemplates and permits a rate assessed on a building which is merely proposed.

A consideration of s. 4 of *The City of Ottawa Act, 1960-61*, in my opinion, demonstrates that it has in view a by-law applicable to specific areas and schemes rather than a charge on all new construction subject to the slight exemptions.

Firstly, it should be noted that the opinion of council in the statute is confined to one element only, and that is whether the expenditures required for the additional capacity would or would not be otherwise required. Therefore, the other elements set out in the statute, (1) whether the buildings impose or may impose a heavy load, and (2) whether by reason of the heavy load additional capacity is required, are not by the statute left to the opinion of council and there must be some adjudication thereon. Such adjudication may be by the Municipal Board or by the Court of Revision, more probably by the former. This by-law has already been approved by the Municipal Board but it could not have considered those two elements, for the determination of the first element implies that the Board had to know the buildings which were or were to be built before it could determine if those buildings imposed or might impose a heavy load. By-law 449-62 in paragraph (2) purports to transfer the opinion to cover all of the elements and so, in my view, exceeds the statutory power granted.

Secondly, s. 4(2) of the statute provides that the proceeds shall be used for the purpose set out in subs. (1) and not otherwise. Yet by-law 449-62 makes no provision for segregation of the fund nor for its disbursement in accordance with the provisions of s. 4(1), that is to pay all or part of the cost of providing the additional capacity. In fact, apart from the declaration in para. (2), no mention is made of cost. One asks oneself how, under this by-law, can it be determined what amount is to be paid out of the proceeds of the fund for the new sewer on any particular street.

Thirdly, s. 4(4) of the statute provides:

> (4) There shall be an appeal to the court of revision of the City of Ottawa from any charge or charges authorized by subsection 1 and the provisions with respect to appeals to the court of revision and section 51 of the Local Improvement Act apply *mutatis mutandis*.

Counsel for the appellants argue that one must look at s. 4 and determine how it shall be interpreted and only then

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look at *The Local Improvement Act* to determine how the statute must be applied in so far as procedure is concerned. I cannot accept that method of construction; subs. (4) is part of the special Act and any light its provisions cast on the meaning of subs. (1) is available to aid in its interpretation and it should be so utilized. Counsel for the appellant submits that subs. (4) is only "a shorthand method of providing the necessary procedural regulations in order to provide for appeals to the County Judge and the Court of Appeal", but a consideration of subs. (4) demonstrates that it discharges a much more important task. It provides an appeal to the Court of Revision and then sets out the provisions with respect to appeals thereto and further appeals and includes s. 51 of *The Local Improvement Act*, with the direction that the provisions of the latter statute shall apply only *mutatis mutandis*. One of the provisions with respect to the Court of Revision is s. 47 of *The Local Improvement Act*, R.S.O. 1960, c. 223. That section is as follows:

> 47. (1) The court of revision has jurisdiction and power to review the proposed special assessment and to correct the same as to all or any of the following matters:
>
> (*a*) where the owners' portion of the cost is to be specially assessed against the land abutting directly on the work,
>
> (i) the names of the owners of the lots,
>
> (ii) the frontage or other measurements of the lots,
>
> (iii) the amount of the reduction to be made under section 28 in respect of any lot,
>
> (iv) the lots which, but for section 62, would be exempt from special assessment,
>
> (v) the lifetime of the work,
>
> (vi) the rate per foot with which any lot is to be specially assessed, and
>
> (vii) the exemption or amount of reduction to be made under section 30 in respect of any lot;
>
> (*b*) where part of the owners' portion of the cost is to be specially assessed on land not abutting directly on the work, in addition to the matters mentioned in clause a, as to the lots other than those abutting directly on the work which are or will be immediately benefited by it, and as to the special assessment which such lots should respectively bear;
>
> (*c*) in all cases as to the actual cost of the work.
>
> (2) The court of revision does not have jurisdiction or authority to review or to alter the proportions of the cost of the work that the lands to be specially assessed and the corporations are respectively to bear according to the provisions of the by-law for undertaking the work.

It will be seen that in both clauses (*a*) and (*c*) of the said section the Court of Revision is permitted to make

adjustments having in view a specific work and after ascertaining the exact nature and cost of the work. Counsel for the appellant argues that this type of provision is obviously inapplicable to the present case and insists the provisions of *The Local Improvement Act* are to apply only *mutatis mutandis* and that therefore this section cannot be used to restrictively interpret s. 4(1) of *The City of Ottawa Act*. But surely *mutatis mutandis* means "with necessary changes in matters of detail" and the proper interpretation is not to ignore the provisions of s. 47 of *The Local Improvement Act* such as found in clause (*c*) of subs. (1) "in all cases as to the actual cost of the work" but to interpret the *mutatis mutandis* direction of s. 4(4) as providing that the Court of Revision may consider the *estimated* cost of all the work required in addition to that which would otherwise be required. In my view, to confine s. 4(4) to limit the provisions as to appeal to the Court of Revision and further appeals therefrom to merely the formal and mechanical matters such as the name of the owners or the size of the lots would be to improperly limit the application of the subsection. I have, therefore, concluded that s. 4 of *The City of Ottawa Act, 1960-61*, contemplates not the general levy on all new construction, which is in fact the essence of the by-law under attack, but rather a by-law passed for any particular area with a specific problem which may be surveyed in view of present new construction or contemplated new construction, and that therefore by-law 449-62 is *ultra vires* as going beyond the power granted by the enabling statute.

Counsel for the respondents also submits that by-law 449-62 is invalid in that it is in many instances discriminatory. Firstly, counsel for the respondents had made no attempt to attack by-law 449-62 on the basis that it is unreasonable as distinguished from discriminatory despite the fact that s. 242(2) of *The Municipal Act*, R.S.O. 1960, c. 249, which provides that a by-law passed by the council in the exercise of any of its powers conferred by that Act could not be found to be unreasonable applies by its very terms only to by-laws passed by virtue of *The Municipal Act* while this by-law was passed by virtue of the powers conferred by *The City of Ottawa Act*.

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Lord Russell C. J., when purporting to define "unreasonableness" in a by-law in *Kruse v. Johnson*[1], at p. 99, defined, in my view, "discrimination" when he said:

> But unreasonable in what sense? If for instance they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires".

Again, in *City of Montreal v. Beauvais*[2], Duff J., as he then was, at p. 216 described such a by-law as "so unreasonable, unfair or oppressive as to be on any fair construction an abuse of the power". The invalidity of discriminatory by-laws has frequently been declared in this Court and in the Province of Ontario: *City of Hamilton v. Hamilton Distillery Co.*[3]; *Carleton Woollen Co. v. Town of Woodstock*[4]; *Forst v. City of Toronto*[5], and *Re S. S. Kresge Co. Ltd. v. City of Windsor et al.*[6]

It is, however, well settled law that a court, when considering the validity of subordinate legislation such as a by-law and finding two possible interpretations, one of which would result in the invalidity of the by-law as discriminatory and one of which would result in its being found valid, should choose the latter: *Kruse v. Johnson, supra; City of Toronto et al. v. Outdoor Neon Displays Ltd.*[7], per Cartwright J. at p. 313. Applying those statements of the relevant principles I proceed to consider the allegations of discrimination made by the respondents some of which were accepted and some rejected in the Court of Appeal.

(1) *In fixing rates differently based for residential and non-residential buildings, and in fixing one rate for all sizes of residential buildings:*

Section 4(1) of the statute authorized the council to pass by-laws for imposing on the owners of high-rise or other buildings, or of any class or classes of such buildings, a special charge or charges. The statute therefore gives the council power to set up classes of buildings and to apply appropriate rates to such classes. The council set up, so far

[1] [1898] 2 Q.B. 91.
[2] (1909), 42 S.C.R. 211.
[3] (1907), 38 S.C.R. 239.
[4] (1907), 38 S.C.R. 411.
[5] (1923), 54 O.L.R. 256.
[6] [1957] O.W.N. 154, 7 D.L.R. (2d) 708.
[7] [1960] S.C.R. 307.

as this allegation of discrimination is concerned, three classes, residential, non-residential and combined residential and non-residential, and defined them in s. 1 of the by-law. The council also set different rates for the classes of residential and non-residential accommodation. It may well be that the result is that the owner of a residential building pays exactly the same rate per square foot as the owner of a non-residential building only when each dwelling unit contains exactly 735.3 square feet but it would appear, nevertheless, that council honestly exercised their judgment in determining that the amount of $150 (varied by the Municipal Board to $125) represented a fair approximation of some undetermined, or at any rate unstated, part of the cost of the required additional capacity of sewers and water supply, and that the council similarly exercised its judgment as to the non-residential rate. To quote again Lord Russell C. J. in *Kruse v. Johnson, supra,* at p. 100:

> Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.

I realize, of course, that the oft-quoted statement was said in relation to a by-law prohibiting playing music or singing in the streets. However, as was said by counsel for the appellant during the argument in this Court, any by-law is bound to be "mildly discriminatory". The test of discrimination, if any, is whether it were reasonably necessary. Again, to apply the test of Duff J. in *Montreal v. Beauvais, supra:*

> The by-law in fixing the two general rates was not, in my opinion, so unreasonable, unfair or oppressive as to be on any fair construction an abuse of the powers of council.

(2) *The alleged discrimination against the enlargement of buildings contained in the final words of subs. (2) of s. 3 of the by-law "and in applying such exemption dwelling units and floor area created pursuant to a building permit issued on or before the 2nd day of May, 1960, shall be counted":*

It would appear that if one owner builds a new building containing twelve units then he is required to pay, allowing the exemption of two-dwelling units, ten times $125 or $1,250, while another owner who builds a new wing to an

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existing building containing twelve units exactly similar would be required to pay twelve times $125 or $1,450. Counsel for the appellant submits that this provision is rational and in fact that its omission would be discriminatory, for the owner of a newly-built building had not before utilized the municipal services beyond the basic extent of two-dwelling units or thirteen hundred feet commercial space, and so would be entitled to that exemption while the owner of the enlarged building had already the use of the services to at least the extent of that basic exemption. This argument presupposes that in the case of the new building as distinguished from the enlarged one it was built on land utilized prior to its construction to an extent less than the basic exemption and that no additional lands are used in the enlargement, that is, that the enlargement consists of adding additional storeys, a most unusual situation. In my opinion, the reasonable and necessary discrimination would be more properly attained if the provision had been omitted from the by-law. The provision as it stands would appear to be so unreasonable, unfair and oppressive as to be an abuse of the power although, in my opinion, it is not an important one.

(3) *The alleged discrimination in s. 3(3) of the by-law by the requirement that in combined residential and non-residential buildings that part of each floor "used for dwelling purposes only" shall be excluded from the gross floor area of the building:*

It is true that if this provision were interpreted so that corridors, elevator shafts, laundries, garage space, etc., were to be held to be space not "used for dwelling units" then the owner of a combined building would pay a much larger sum than the owner of a residential building of comparable size. Counsel for the appellant, however, does not seek to have the provision so interpreted. It must be noted that the words in the subsection are "used for dwelling units only" and not such words as "contained within the walls of dwelling units", and one may well say a corridor, for instance, is "used for dwelling units". In view of the authorities I have cited above, it would appear that this is a case where the Court should so interpret the provisions of the by-law as to remove any invalidity resulting from discrimination, and I do so.

(4) *Re alleged discrimination by exemption of subdivision charge areas:*

Section 5 of by-law 449-62 exempts certain properties from the operation of the by-law. Subsection (*c*) thereof exempts single-family and double or duplex buildings, and therefore simply repeats the exemption in s. 4(5) of the statute. Section (*a*) provides exemption for charitable educational institutions, and is again a repetition of other provincial legislation. Subsection (*b*), however, exempts:

> (*b*) a building on a lot or block in respect of which lot or block a charge was imposed on or after the 21st day of June, 1961, as a condition of the approval of a plan of subdivision, pursuant to the resolution of the Council of the said date

By a resolution of Council passed on June 21, 1961, a series of charges on subdivisions recommended for approval after January 16, 1961, were set. The charges include $1,200 per acre plus $100 per unit to an amount of not less than $1,500 for multiple dwellings and $1,200 per acre for non-residential buildings. Under this schedule, a 10-apartment building built on an acre of ground subdivided after January 1, 1961, would pay a subdivison charge of $1,200 plus ten times $100 or $2,200. A 10-unit apartment building under by-law 449-62 apart from the exemption set out as not within the exemption of subdivision charge areas, would pay eight times $125 or $1,000, and a building on one acre of land under the by-law would have to have at least sixty dwelling units before the special rates set out in by-law 449-62 would exceed the subdivision charges. However commercial or non-residential buildings, to use the terminology of the subdivision resolution and the by-law, respectively, do exhibit what might well be regarded as discrimination. An acre of land for commercial purposes is subject to a charge under the subdivison resolution of $1,200 whether it were occupied by a parking lot or a multi-storey office building, while the same one acre of land under the by-law, if completely covered by a one-floor non-residential building containing say 40,000 square feet after allowing for walls, would pay a charge under by-law 449-62 of $6,800 and each floor would add a like amount to the charge. Aylesworth J. A., in the Court of Appeal, considered this allegation of discrimination and pointed out that under the statute the council were empowered to set up classes and affix rates. In my view, that power does permit council

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to reasonably differentiate between various buildings and so long as it does so reasonably the different rates assigned to the different classes cannot be found to be discrimination. What s. 5(*d*) has done in effect is to divide each class into two sub-classes, dependent on whether the land on which the building was erected was or was not subject to the subdivision charge. It may well be that the result is favourable to the owner who has erected on land subject to the subdivision charge a large non-residential building, if any such example exists, unless that owner in the subdivision agreement also was required to instal services such as sewers and water mains at a very considerable cost.

I have come to the conclusion that the differentiation, having regard to the existence of the subdivision charges, is a reasonable one and the fact that there may occur examples of inequality is merely an example of the approximate equality which must result in order to avoid discrimination.

It will be seen, therefore, that I have found discrimination only in the provision in the last sentence of s. 3(2) of the by-law which removes the two-dwelling unit or 1,500 square feet of non-residential space from the exemption in the case of enlarged buildings. The problem therefore arises whether such a provision may be severed from the by-law. By the provision of s. 4(1) of the statute, the by-law must be approved by the Municipal Board and it has been so approved. That approval, of course, does not in any way validate a by-law which is *ultra vires* or discriminatory: *Re Casa Loma*[1]; *R. ex rel. St. Jean v. Knott*[2], per Rose C.J.H.C. at pp. 434 and 435.

It has been said that where a by-law must be approved by the Municipal Board then it is approved as a whole and the Court could not declare in favour of the validity of a by-law so approved unless it was ready to find it valid *in toto*: *City of Chatham v. Sisters of St. Joseph et al.*[3], per Robertson C.J.O. at p. 554; *Re Wilmot et al. and City of Kingston*[4]. Both of these decisions were in reference to s. 406 subs. (4) of *The Municipal Act* which then read:

> No part of any by-law passed under this section and approved by the Municipal Board shall be repealed or amended without approval of the Municipal Board.

[1] 61 O.L.R. 187, [1927] 4 D.L.R. 645 (App. Div.).
[2] [1944] O.W.N. 432.
[3] [1940] O.W.N. 548 (C.A.).
[4] [1946] O.R. 437, 3 D.L.R. 790.

Robertson C.J.O. observed that the council cannot amend it without the Board's approval, yet in effect that is what the Court would do if it should hold part of the by-law to be invalid and other parts of it to be valid and in force.

Section 4 of *The City of Ottawa Act, 1960-61*, the enabling legislation here, simply provides:

> Subject to the approval of the Municipal Board first being obtained, the council of the Corporation may pass by-laws . . .

and no counterpart of the subsection of *The Municipal Act*, then in effect, quoted above appears in the statute, nor so far as I have been able to ascertain, in any other statutory provision applicable to this case. Moreover, as Kerwin J., as he then was, pointed out in *Village of Long Branch v. Hogle*[1], at pp. 559-60, the statement by Robertson C.J.O. in *Chatham v. Sisters of St. Joseph* was *obiter* with which he did not agree and its approval by Laidlaw J.A. in *Wilmot v. City of Kingston, supra*, at p. 448, was also *obiter*, and that Robertson C.J.O. continued:

> These by-laws for imposing building restrictions usually set up a scheme which is designed and adopted as a whole and, quite apart from the question of the approval of the Municipal Board, it is from the very nature of the by-law a delicate operation for the court to sever one part of such a by-law from the rest with any assurance that what is left of it sets forth any scheme that the council had put in operation.

Kerwin J. adopted those remarks and found that the invalid part of the by-law in *Long Branch v. Hogle* was merely an additional penalty and so severable and with that view Rand J. concurred. Kellock J. found that the penalty section did not require approval by the Municipal Board and so that body's approval of the by-law did not prevent the penalty section being severed therefrom. Applying this principle, in my view, the Court should hold that even if the statute contained such a provision as to the approval of the Board as that quoted from *The Municipal Act* which it does not, it may in proper circumstances sever the invalid provision in the by-law. In the present case, the last words of s. 3(2) of by-law 449-62 form no part of the main structure of the by-law but contain only a provision as to a minor detail of the scheme. Were it possible to hold by-law 449-62 valid apart from the final words of s. 3(2) thereof, I would have no hesitation in severing them.

[1] [1948] S.C.R. 557.

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However, in view of my opinion that the whole scheme of the said by-law goes beyond the power granted by s. 4 of *The City of Ottawa Act, 1960-61*, I am of the opinion that it is invalid *in toto*.

I would dismiss the appeal with costs.

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

Solicitor for the appellant: D. V. Hambling, Ottawa.

Solicitors for the respondents: Beament, Fyfe, Ault, Hutton & Wilson, Ottawa.