1944
*Oct. 25, 26, 27, 30
1945
*Feb. 6

JAMES KUCHMA ..... APPELLANT;

AND

THE RURAL MUNICIPALITY OF TACHE ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipalities—Highways—By-law of Rural Municipality for closing of road—Validity—Application to quash—Municipal Act, R.S.M. 1940, c. 141—Period within which application to quash must be made (s. 389 (1))—Approval of Minister (Municipal Commissioner) (s. 473)—Jurisdiction of courts—Allegations that by-law not in the public interest nor passed in good faith—Onus of proof—"Excluded from ingress or egress" (s. 468)—Compensation (s. 468) not dealt with in by-law.

The appeal was from the judgment of the Court of Appeal for Manitoba (51 Man. R. 314) which (reversing the judgment of Donovan J., *ibid*) dismissed the present appellant's application for the quashing of a by-law of a Rural Municipality (the present respondent) for the closing of part of a government road allowance within the municipality.

This Court now affirmed the dismissal by the Court of Appeal of the application to quash the by-law.

Per the Chief Justice and Hudson, Taschereau and Estey JJ.:

(1) The period of one year within which, under s. 389 (1) of *The Municipal Act*, R.S.M. 1940, c. 141, such an application must be made is to be computed from the date of the passing of the by-law by the

*PRESENT:—Rinfret C.J. and Hudson, Taschereau, Rand and Estey JJ.

municipality, not from the date of approval of the by-law by the Minister under s. 473 (before which date it does not come into force).

(2) Though such a by-law has been approved by the Minister under s. 473 (and notwithstanding that, under s. 473, it "when so approved shall be valid, binding and conclusive, and its validity shall not thereafter be questioned in any court * * *"), the courts have jurisdiction to pass upon its validity. S. 473 does not authorize the municipality to go beyond its statutory powers, nor permit it to exercise its powers otherwise than in the public interest and in good faith.

(3) A by-law passed by a municipality, if not passed in good faith and in the public interest, is a nullity, and is not made otherwise by lapse of time, approval, registration or promulgation.

(4) The onus of proving that a by-law was not in the public interest or passed in good faith is upon the applicant moving to quash it.

(5) Courts have recognized that the municipal council, familiar with local conditions, is in the best position of all parties to determine what is or is not in the public interest and have refused to interfere with its decision unless good and sufficient reason be established.

(6) The mere fact that the closing of a highway benefits some and adversely affects others does not determine the question of public interest. All the circumstances must be surveyed. In the present case, regard should be had to the scheme of settlement that obtained in the municipality, the limited use of the highway in question, the fact that the municipality did not close all of the highway because of its desire to leave a way of ingress and egress to and from the applicant's land, and particularly the fact that the controversy had continued over a period of years during which the municipal council had had the question brought before it at the instance of both groups (those for and those against the closing) upon many occasions.

(7) The evidence did not establish that the members of the municipal council had acted, as alleged, "not in the public interest" or "in bad faith and through fraud and partiality."

(8) As the closing was only of the easterly mile and a half of the road, leaving open the half mile passing westward along the north of the applicant's property, thereby preserving his way of ingress and egress westward to a north-south highway, he could not successfully contend that, within the meaning of s. 468 of said Act, he "will be excluded from ingress or egress" so as to require provision for "some other convenient way of access".

(9) The compensation or provision therefor, mentioned in s. 468, need not be dealt with in the by-law itself. The omission to do so does not affect the rights of the applicant with respect to any claim that he may have for compensation.

(10) On the evidence it must be held that the Minister approved the by-law with full knowledge of the position taken by the municipality with respect to a certain other road which it had been suggested should be made passable as an alternative road to that closed.

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

(11) A finding by the trial Judge and facts in evidence disposed in the Minister's favour of any question of bad faith or misconduct on his part. There was no evidence to suggest any collusion whatever between the municipal council and the Minister.

(12) Sec. 7 (1) of *The Manitoba Expropriation Act* (R.S.M. 1940, c. 68) provides a method of closing highways (not required as such) of the Province's own initiative and without any consultation with the municipalities. It has no application in the present case.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) reversing (Robson J.A. dissenting) the judgment of Donovan J. (2) quashing on the ground of illegality a certain by-law of the Rural Municipality of Tache (the present respondent) for the closing of a part of a certain government road allowance within the municipality. The Court of Appeal set aside the judgment of Donovan J. and dismissed the application made by the present appellant for the quashing of the by-law.

The material facts and questions in issue are stated in the reasons for judgment now reported.

Leave to appeal to this Court was granted by the Court of Appeal for Manitoba.

R. Quain K.C. for the appellant.

J. T. Beaubien K.C. for the respondent.

The judgment of the Chief Justice and Hudson, Taschereau and Estey JJ. was delivered by

ESTEY J.—This appeal involves the validity of a by-law closing one and a half miles of highway in the Rural Municipality of Tache in the Province of Manitoba.

The by-law in question is No. 752 as passed by the Rural Municipality of Tache on the 11th day of August, 1941. It closes a portion of a road allowance passing east and west, south of sections 1 and 2, Township 9, Range 5, East of the 1st Meridian. James Kuchma, a resident of the municipality, by a notice of motion dated February 1st, 1943, and returnable on March 1st, 1943, moved to quash the said by-law. The motion was heard by Mr. Justice Donovan, who granted the application and quashed the by-law.

(1) 51 Man. R. 314; [1944] 1 W.W.R. 321; [1944] 2 D.L.R. 41.
(2) 51 Man. R. 314, at 317-321; [1943] 3 W.W.R. 357.

The Appellate Court in Manitoba, Mr. Justice Robson dissenting, allowed an appeal for the reason, among others, that the application to quash was not made within the statutory period of one year, as required by sec. 389 of *The Municipal Act,* being ch. 141, R.S. of Manitoba, 1940. This section reads in part as follows:

389 (1) No such application shall be entertained unless it is made within one year from the passing of the by-law.

The appellant contends that this statutory period should be computed from the date the by-law was approved by the Minister under sec. 473, on the 3rd day of September, 1942, instead of from the date of the passing of the by-law by the Municipality of Tache on the 11th day of August, 1941. Sec. 473 reads in part as follows:

473. Every by-law

(*a*) for opening, establishing, widening, enlarging, altering, diverting, or closing a highway;

* * *

(*d*) for selling, conveying, leasing, or vesting any highway closed or altered by any municipal corporation,

shall, before it comes into force, be approved by the minister, and such a by-law when so approved shall be valid, binding and conclusive, and its validity shall not thereafter be questioned in any court or any proceedings unless the minister, upon due cause being shown, orders that the by-law be set aside or opened up for reconsideration.

("minister" at all times material to this case means the Municipal Commissioner.)

Upon this point there has been a difference of judicial opinion in the courts below. The learned judges who have held that the application is in time have relied upon *City of Winnipeg* v. *Brock* (1). There by-law No. 4264 provided for the closing of certain streets and was passed on Sept. 30th, 1907. It contained the following provision:

6. This by-law shall come into force and effect on the execution of the supplementary agreement dated the twenty-fourth day of August, A.D. 1907, by the Canadian Northern Railway Company and the City of Winnipeg and duly ratified by council.

Subsequently, on July 20th, 1908, the council passed by-law No. 5050, which contained the following provision:

2. By-law No. 4264 is hereby ratified and confirmed, and declared to be now in force.

(1) (1911) 45 Can. S.C.R. 271.

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

Estey J.

It was held that the statutory period should be computed from the passing of the last by-law, that is, No. 5050. Mr. Justice Anglin at p. 290 stated as follows:

> In my opinion the phrase "the passage of the by-law" in subsection *c* (1), of section 708, of the Winnipeg Charter (3 & 4 Edw. VII. ch. 64, sec. 15 (Man.)), means a final enactment of the by-law by the municipal council such that no further action by it in the nature of confirmation or ratification is requisite in order to make the by-law operative or effective. Where a by-law provides that it shall come into force only upon its being subsequently ratified or confirmed by the council "the passage of the by-law" is consummated only when such ratification or confirmation is had.

This decision, with deference to the learned judges who have held otherwise, in my opinion determines that the statutory period must be computed from the date of the passing of the by-law by which the municipality finally attains its objective, even if the by-law may not be brought into force until a later date. This is in accord with the decisions to the effect that statutory provisions requiring further acts such as registration or promulgation before a by-law becomes effective and binding do not extend the time within which the application to quash may be made. *Harding* v. *Corporation of Cardiff* (1); *Re Chinara and City of Oshawa* (2); *Wanderers Investment Co.* v. *City of Winnipeg; McPherson* v. *City of Winnipeg* (3).

A perusal of sec. 473 leads to the same conclusion. It provides that before any by-law "comes into force" it shall be "approved by the minister," and then provides,

> when so approved, shall be valid, binding and conclusive, and its validity shall not thereafter be questioned in any court or any proceedings unless the minister, upon due cause being shown, orders that the by-law be set aside or opened up for reconsideration.

There can be no doubt that the intent of these provisions of sec. 473 is to restrict rather than to extend the period of one year as fixed by sec. 389. In fact, it might well be that in some cases the Municipal Commissioner might withhold his approval in order to give the parties an opportunity to contest the by-law in the courts within the one year period.

It is also contended that under the provisions of sec. 473, the Commissioner having granted his approval, the courts have no jurisdiction to pass upon the validity of this by-law. This and similar provisions are embodied

(1) (1882) 2 Ont. R. 329.
(2) (1928) 35 O.W.N. 30.
(3) (1917) 27 Man. R. 450.

in municipal Acts to restrict, if not to eliminate, the "supervisory and paternal jurisdiction" that has been exercised by the courts over municipal corporations, even when the enactment before the courts was admittedly within the competence of the municipal corporation, was enacted in good faith and in the public interest. Meredith and Wilkinson—Canadian Municipal Manual, 46.

These provisions of sec. 473 do not authorize the municipality to go beyond the powers granted by the legislature, nor do they permit the municipality to exercise its powers otherwise than in the public interest and in good faith. Any other view would enable the municipal corporation, with the approval of the Municipal Commissioner under sec. 473, to enlarge its powers beyond the express intention of the legislature and in effect to nullify many sections of the same statute. It has always been the function of the courts to pass upon questions of jurisdiction, good faith and public interest, and legislatures pass this and similar legislation in the expectation that the courts will continue to pass upon and determine such questions.

This construction does not nullify the plain language of sec. 473, but merely restricts the application of its curative provisions to those enactments of a municipal corporation which are made within the limits of its jurisdiction, in good faith and in the public interest.

These conclusions, however, do not dispose of the case. A by-law which has not been passed by a municipal corporation in good faith and in the public interest, when passed is a nullity, and cannot be changed or made otherwise by lapse of time, approval, registration or promulgation. *Canada Atlantic Railway Co.* v. *Corporation of the Township of Cambridge* (1).

The appellant here contends that the "by-law is not in the public interest" and further, that the council acted "in bad faith and through fraud and partiality". The authorities are clear that the onus of proving these allegations rests upon the applicant. They are equally clear that if the applicant succeeds in proving these allegations, the by-law is invalid.

(1) (1888) 15 Can. S.C.R. 219.

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

Estey J.

It therefore becomes necessary to examine these proceedings upon the merits. The road in question was a highway in the Dominion Government's Survey of Western Lands. Since the transfer of the natural resources to the Province, these lands are vested in the Province (ch. 148, R.S.M. 1940). The legislature of Manitoba has by secs. 2 (1) (*d*) and 450 of *The Municipal Act* (ch. 141, R.S.M. 1940) included this road as a highway and by sec. 456 of the same Act, vested in the municipal corporations jurisdiction over highways in the following language:

> 456. Every municipal corporation shall, subject to the provisions of "The Goods Roads Act, 1914" and "The Highway Traffic Act" and the exceptions hereinafter contained, have jurisdiction over the highways within the limits of the corporation.

Section 459 gives the possession of every highway within the limits of a municipal corporation to that corporation; and sec. 467 vests in municipal corporations the authority to close highways, and does not expressly contain any limits thereon material to these proceedings. This section in part reads as follows:

> 467. Every municipal corporation may pass by-laws
>
> (*a*) for opening, establishing, making, preserving, maintaining, improving, repairing, widening, enlarging, altering, diverting or closing highways within its jurisdiction, and for entering upon, breaking up, taking or using any land in any way necessary or convenient for the purposes, subject to the restrictions in this Act contained, and for preventing and removing any obstruction upon any such highways.

Beyond the memory of any person now living in the area people settled in and built their homes along the Seine River. Their farms, in contrast with those under the quadri-lateral plan of the prairies, are long and relatively narrow strips extending back from the Seine River varying distances, approximating one and a half miles. They constructed a highway along the river which has no relation to the federal government's surveyed roads. It is along this river road the public move east and west. The same scheme of settlement obtains west of the area in question and also in that immediately north of the river, but does not obtain eastward in the adjoining municipality.

These long farms of the settlers cut across the highway in question, and, speaking generally, they have been farming this surveyed highway since they went there; some have even fenced the portion immediately adjoining their farms. The one and a half miles in question have never been improved as a highway and were but very slightly if ever used as such.

The applicant purchased land south of the highway in question in 1924, has been residing there since 1926 and has been the leader, particularly since 1935, in an effort to have the road opened by the removal of the fences placed across the highway and discontinuance of farming operations thereon by the settlers.

Since 1935, the matter has often been before the council. In that year, a petition was presented to the council asking that the road be opened. In 1936, the council passed a resolution asking that the fences across this road allowance be moved. In 1937, a petition was presented to the council asking that the road be closed. In March of 1941, another petition was presented to Council, asking that the road be kept open. On June 9th, 1941, at the council meeting, both parties were represented (in fact had often attended and presented their views on previous occasions), when the council passed a resolution that the road should be closed on the condition that the adjoining owners purchase the road at $25 an acre before any action is taken. Finally, on August 11th, 1941, after having again heard all parties, and all the members of the council being in attendance, the by-law, the subject of these proceedings, was passed closing one and a half miles of the road.

This by-law closed the easterly mile and a half and leaves open the half mile passing westward along the north of the appellant's property, thereby preserving the way of ingress and egress that he has always had westward to the north-south highway. It is important to notice that one cannot travel further westward from this north-south road because from there on the road has been closed, the same type of settlement having developed there as obtains in the area in question. That area is similarly divided and the residents there use the river road. These facts, and indeed the evidence throughout

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

Estey J.

the proceedings, would indicate that the general public, apart from those whose lands abut upon this particular two miles, have little if any interest in its use. Of those whose lands abut upon this part of the highway, a majority favour closing the road as provided by the by-law.

The learned trial judge felt that the facts of this case brought it within the decision of *In re Knudsen and the Town of St. Boniface* (1). In that case, the by-law was quashed because it was not passed in the public interest. There, the by-law closed a street at the instance of a Mr. Marion, who, along with others, had subdivided an area into lots and blocks and registered the plan showing streets and lanes in the subdivision. On the basis of this plan, Marion sold certain lots. The learned trial judge states:

> I think the purpose of the council in closing and selling the street was, as indicated by the above, to aid Mr. Marion in retaking the land comprised in it or obtaining the proceeds of a sale of it.

It was also pointed out that while the municipal corporation gave as its reason for closing the street that it was of no public interest and was a cause of useless expense, it only three months later "passed another by-law to open a lane where this street ran and to buy the land for the purpose".

> This is sufficient of itself to show that there was something behind the action of the council in closing the street, and that the by-law now attacked was not passed in the public interest.

With deference to the learned trial judge, it appears to me that the facts in the present case are such as to distinguish it from the *Knudsen* case (1).

The by-law passed by the Rural Municipality of Tache in one sense continued what had existed in practice prior to the present controversy without objection. This controversy arose out of that scheme of settlement which had obtained there since beyond the memory of any living person. The parties affected had taken sides and at times a show of force had been made. Any compromise or adjustment suggested by the council had proved to be of no avail, and therefore the council quite properly concluded that in the public interest it should now deter-

(1) (1905) 15 Man. R. 317.

mine the question. In doing so, it has effected a compromise; it retained Mr. Kuchma's way of ingress and egress to the west and closed the one and a half mile to the east.

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

Jones v. *Township of Tuckersmith* (1); *In re Inglis & City of Toronto* (2); *Re Mills & City of Hamilton* (3); *Hurst* v. *Township of Mersea* (4).

Immediately associated with this question, is the allegation that the council acted "in bad faith and through fraud and partiality."

It is not contended that the council acted hastily or without giving all parties an opportunity to be heard. In fact all parties were heard upon many occasions; even upon the date of the passing of the by-law on August 11th, 1941, those opposing the closing of the road were heard. On September 6th, the Secretary-Treasurer of the municipality advised the applicant that further protests must be made to the Municipal Commissioner. Further, the correspondence between the council and the Municipal Commissioner indicates good faith when, as late as March 14th, 1942, the Secretary-Treasurer of the municipality wrote to the Deputy Municipal Commissioner in part as follows:

> There are two sides to this question, one favours the closing of the road, the other wants it to be left open. At nearly every council meeting one side or the other comes up and wants this and wants that.

There is an incident between an official of the municipal council and the son of the applicant which is stressed by the appellant's counsel. The conduct of this official upon that occasion cannot be commended, but when the question came before the council, his conduct was not approved. If any conclusion can be drawn from this incident, it would be that the council was desirous of pursuing a fair and reasonable course.

(1) (1915) 33 O.L.R. 634.
(2) (1905) 9 O.L.R. 562.
(3) (1907) 9 O.W.R. 731.
(4) [1931] O.R. 290.

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

Estey J.

Changes with respect to highways invariably assist some more than others, and often some are adversely affected. The mere fact that it benefits some and adversely affects others does not determine the question of public interest. All of the circumstances must be surveyed. In this case, regard should be had to the scheme of settlement that obtains in the Municipality of Tache, the limited use of the highway in question, the fact that the municipality did not close all of the two miles because of its desire to leave a way of ingress and egress to and from the applicant's land, and particularly that this controversy had continued over a period of years during which the council has had the question brought before it at the instance of both groups upon many occasions.

Similar issues were raised in *United Buildings Corporation, Ltd.* v. *City of Vancouver* (1). There, upon the petition of the Hudson's Bay Company, the Corporation of the City of Vancouver closed a portion of a public lane. Some of the people affected opposed it and others supported it. It was contended that the closing of the lane was not in the interest of the public but was solely in the interest of the Hudson's Bay Company. Accusations of bad faith were made against the council. The case eventually went before the Privy Council where the action of the Vancouver council was upheld. Lord Sumner, at p. 350, states:

> It is easy, especially for those who conceive themselves to be sufferers by it, to suspect and to suggest and even to argue with some plausibility that such a transaction cannot have been carried through without some improper or sinister motive on the part of those members of the corporation who voted for it, and in this case all who were voting; and, since opinions differed on this question in the Court below, their Lordships freely recognize that it might bear one aspect or the other, but judging it, as they must do, upon a judicial survey of the whole proved materials, with the experience of men of the world and the full persuasion that such a charge must be proved by those who make it, their Lordships are unable to differ from the opinion of those members of the Court below who held that the transaction was free from impropriety or bad faith.

Again at p. 353:

> But though the operation of a by-law benefits one or more persons more than others, it does not follow that by enacting it a corporation must be taken to "give any bonus" within the Municipal Act, 1906, sec. 194, nor can a by-law be said to be outside the powers

(1) [1915] A.C. 345.

conferred by sec. 125 of the Vancouver Act, 1900, merely because steps taken in the public interest are accompanied by benefit specifically accruing to private persons.

See also *Re Howard and City of Toronto* (1).

In my opinion, the evidence does not establish that the members of the Council of the Rural Municipality of Tache have acted either "not in the public interest" or "in bad faith and through fraud and partiality."

On behalf of the applicant, it was pressed that the common law rule is "once a highway, always a highway". However much that may be, we are dealing with statutory provisions that, subject to the limitations imposed by law, vest the power to close the highways in the municipal corporations. These statutory provisions supersede the common law and cannot be repealed or amended by the court.

It is further alleged that the by-law in question is invalid because sec. 468 is not complied with, in that the by-law does not contain a provision for compensation nor some other convenient way of access to the applicant's land:

> 468. No municipal corporation shall close up any original road allowance or highway, legally established, whereby any person will be excluded from ingress or egress to and from his lands or place of residence over such highway, unless in addition to compensation it also provides for the use of such person some other convenient way of access to his lands or residence.

The learned trial judge states as follows:

> It does not seem to me that the exclusion from ingress or egress provided against by that section has to be absolute before it applies.

With deference to the learned trial judge, it appears to me that the essential purpose of the section is to preserve to the occupant a way of ingress and egress, and if the closing of a highway by the municipality means that the occupant "will be excluded from ingress or egress", then and in that event only must "some other convenient way of access" be provided. If, as in this case, the closing of the road to the east left the road to the west open, and this latter provided ingress and egress, then the occupant cannot successfully contend that within the meaning of the section he "will be excluded from ingress or egress."

(1) (1928) 61 O.L.R. 563.

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

Estey J.

In *White* v. *The Rural Municipality of Louise* (1), upon an application to quash a by-law, the corresponding section of an earlier Manitoba statute was reviewed and Taylor C.J., at p. 237 states as follows:

> Reading that section as it stands, it seems to me the reasonable construction is, that it is only where a person would be, by the closing of the road, excluded from all ingress and egress to or from his land, that he can demand some other convenient road or way of access.

A similar view is expressed in *Re The Credit Foncier Franco-Canadien and The Village of Swansea* (2), where Robertson, C.J.O., states at p. 56:

> It is only when the "effect of the by-law will be to deprive any person of the means of ingress and egress" that the subsection applies. It seems that it is plain when the statute speaks of the means of ingress and egress what is contemplated is a property having only one means of ingress and egress, and of that one means the land-owner will be deprived by the by-law

Exception is taken that no compensation was paid nor provision made therefor in the by-law. The question is dealt with in the cases already cited, and it appears to be well established that compensation need not be dealt with in the by-law itself. The omission to do so does not affect the rights of the applicant with respect to any claim that he may have for compensation.

The applicant further alleges that the by-law was approved by the Municipal Commissioner in bad faith and through collusion with the said council. The learned trial judge upon this point states:

> Although counsel for the applicant in speaking of the failure of the Commissioner to give them that opportunity was critical of the later attitude of the Commissioner, I think it was probably only by an oversight that they were not given a chance to make further presentation to him of their case.

The learned judge then proceeds to hold:

> In my opinion it is clear from the evidence, and especially from Ex. 30, that the Commissioner gave final approval only on the understanding that the council had committed itself to making the alternative road passable in accord with the condition which he had attached from the first.

This refers to a road south of section 35. This point is covered by correspondence, the relevant portions of which are as follows:

On June 9th, 1942, the Secretary-Treasurer of the municipality wrote to the Municipal Commissioner in part as follows:

(1) (1891) 7 Man. R. 231. (2) [1940] O.W.N. 53.

At its meeting held yesterday, June 8th, the Council passed the following motion:

Winther-Legal: "That this Council refuse to open (that is cut the brush and grade the road) the mile of road between Sections 26 and 35-8-5 because of the cost of such opening and of the building of a bridge over the Desorcv Coulee."

Carried unanimously.

On July 18th, the Secretary to the Minister wrote to the Secretary-Treasurer of the municipality in part as follows:

I believe that at the time the Reeve visited at the office, the Minister agreed to approve of the by-law providing the Municipality opened an alternative road and had another vote of the Council on the by-law. Failing this he did not see how he would be justified in closing the present road.

On July 23rd, 1942, the Secretary of the municipality replied to the Secretary to the Municipal Commissioner in part as follows:

My letter of June 9th, which you must have, gives you the reaction of the Council.

On August 11th, the Secretary of the Municipality wrote to the Municipal Commissioner in part as follows:

As for the road south of 35-8-5 it is clear that there may be a request at any time to make it passable. Being a section road it is legally opened and on request of some ratepayers the Council will have to make it passable. This was pointed out to Councillor Reimer at yesterday's meeting. Naturally if there is no request for this on the part of the ratepayers, the Council will not proceed on its own.

A perusal of this correspondence, with deference, leads me to the conclusion that the Commissioner approved of this by-law on September 3rd, 1942, with full knowledge of the position of the municipality with respect to the road south of section 35.

The finding of the learned trial judge, the fact that the Commissioner accorded to the parties an opportunity to be heard, inspected the premises and obviously endeavoured to assist in the solution of this controversy, disposes in his favour of any question of bad faith or misconduct on his part. There is no evidence that suggests any collusion whatever between the council and the Municipal Commissioner.

It has been suggested that the approval of the Lieutenant-Governor in Council under sec. 7 (1) of *The Manitoba Expropriation Act,* R.S.M. 1940, ch. 68, in addition

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

Estey J.

to the proceedings taken herein was necessary in order to make the by-law valid. This section provides as follows:

7. (1) Where any highway is not required as such, the Lieutenant-Governor-in-Council may, on the report and recommendation of the minister, by order-in-council, close and stop up such highway or any portion thereof.

(2) A certified copy of the order-in-council shall be registered in the registry office or land titles office for the registration district or land titles district in which the highway is situated.

With great respect to the learned judge who holds that view, a perusal of this section, in my opinion, indicates that the province is there providing a method of closing highways (not required as such) of its own initiative and without any consultation with the municipalities. One can quite understand the reason for this and therefore it has no application to proceedings such as are considered in this case.

In my opinion, this appeal should be dismissed with costs.

RAND J.—I concur in the result.

Appeal dismissed with costs.

Solicitors for the appellant: *Stubbs, Stubbs & Stubbs.*

Solicitor for the respondent: *J. T. Beaubien.*