2006 CarswellOnt 8577
Ontario Superior Court of Justice

Grosvenor v. East Luther Grand Valley (Township)

2006 CarswellOnt 8577, [2006] O.J. No. 5562, 32 M.P.L.R. (4th) 20, 53 R.P.R. (4th) 176

Susan Grosvenor, Phil Bignell and Carmen Bignell, Thomas Williams and Patricia Williams, Stephen Tupling and Vereena Tupling, Max Scheiwiller and Dorly Scheiwiller, Josef Huber and Martha Huber and John Duffy and The Corporation of the Township of East Luther Grand Valley

H.M. O'Connell J.

Heard: July 28, 2005
Judgment: February 28, 2006 *
Docket: 675/03

Counsel: Donald R. Good for Applicants
Christopher C. Cooper for Respondent

***H.M. O'Connell J.*:**

This is an application for:

1. An order quashing By-law No. 2003-07 passed by the Respondent Corporation on March 25, 2003.

2. For costs on a full indemnity basis.

1 The application is brought pursuant to s. 273(1) of the *Municipal Act* 2001 which provides that:

> Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.

2 The Applicants allege that the By-law was enacted in bad faith in that the Township failed to consider the interests of the Applicants at large and that the By-law was passed primarily to eliminate the Township's liability for costs of erecting a fence, assuming that a decision by the line fence viewers appointed under the *Line Fences Act* was in favour of the Applicants; and that the Trailway does not fit the designation of a "highway" as set out in the *Municipal Act*, 2001, c.

25 as amended; and that the passing of the By-law was a conflict of interest in that the Township directly benefited at the expense of the Applicants.

3 The Respondents submit that the subject property was originally purchased for the purpose of establishing a highway and/or utilities/service corridor, or more specifically the reservation thereof for such future use.

4 The Respondent further submits that the current use of the subject property as a Trailway is not incompatible with its future proposed use as a highway and/or utilities/service corridor.

5 The land referred to as an abandoned railway right-of-way, which I will refer to as the "ARROW," was abandoned as a railway line by the Toronto Grey and Bruce County Railway Company in the mid 1980's. The report prepared for the Minister of Municipal Affairs and Housing indicates municipal governments acquired some of these right-of-ways as a resource for the community. Many have developed new uses as trails, some have become corridors for utilities, and others have been acquired simply for "the future."

6 In March of 1986, the Township received a proposal/offer from the CP Rail System (successor to the Toronto, Grey and Bruce County Railway Company), to sell the ARROW, a parcel commencing at the East Luther/West Luther Town Line and extending to the 10th Line of the Township of Amaranth, being some 10.5 kilometres in length. Discussions ensued prior to the purchase, resulting in Council undertaking an AGRA earth environmental assessment in April 1997, which was completed with recommendations and which revealed no toxic or other hazardous problems. Thereafter Council made an offer to purchase the ARROW and received a counter-offer from the CP Rail System, which was accepted, resulting in the transfer of the ARROW to the Township in December 1997. Shortly after the time of the transfer of the ARROW there was assigned to the Township, two utility agreements with Bell Telephone Company of Canada, they being Bell telephone line and cable (underground easements) and with the payments for such.

7 Council at that time had discussed the use of the ARROW as testified to by Mr. Hammond, that is that it was to be used for a service corridor. Mr. Hammond agreed that the property being owned by the Township meant that the Township didn't have to designate it as a road in order to have easement agreements for Bell Telephone or any other proposed agreements. He further stated that, "If we had thought of anybody complaining about it as it was, we probably would have, i.e. designated it as a road." And he agreed that it was his understanding that By-law 2003-07 was passed as a result of complaints for a fence or a request for a fence, no one ever having made such request at the time he was on Council. Mr. Hammond states in a question put to him:

> Q. Do you know of any reason or discussions why a similar By-law — if the purpose was to have a service corridor and a road allowance to accommodate that, why a By-law wouldn't have been passed back at the time of the acquisition?

A. Well, if we had thought of anybody complaining about it as it was, we probably would have.

Q. Who was complaining about it?

A. The residents are out there complaining about wanting a fence. If we had have known that was going to happen, we would have put a ...

Q. Road designation in at that time?

A. Right.

Q. So it's fair to say that your understanding is that By-law 2003-07 was passed as a result of complaints for a fence or a request for a fence?

A. That's right, I would say so. It makes sense to me that they would. All the time I was on Council nobody ever came in here wanting a fence around there ... where the railway owned it.

8 The Applicants own land that is bordered by the abandoned ARROW, being some 10.5 kilometres in length and located as stated above, being between the Village of Waldemar in the east and East/West Luther town line in the west.

9 Between December of 1997, the date of purchase and 2002, the ARROW was officially used as a walkway and riding trail between Waldemar and Grand Valley. The Respondent Township created an East Luther Grand Valley Trailway Committee to develop the ARROW into a multi-use recreational Trailway. In January 2002, the Trailway Committee presented a report to Council. The report was to study the feasibility of developing the ARROW into a recreational trailway. The Council gave their support in principle to the public consultation component of the trail development process.

10 In May of 2002, a public meeting was held with the Trailway Committee to inform the adjoining landowners and the general public exactly what a multi-use recreational trailway was and how the municipality planned to develop and operate it.

11 On June 19, 2002 the Trailway public meeting occurred, attended by some of the co-Applicants, resulting in questions being put with respect to the idea. Answers were received as a result of the questions at the public meeting and a further public meeting notice was sent for a meeting to be held on October 17, 2002. On November 12, 2002 the Upper Grand Trailway Committee presented to Council, the Upper Grand Trailway Management Plan along with a copy of the questions and answers arising from the October 17th public meeting and attached to such was a document entitled, East Luther Grand Valley Trailway Feasibility Study.

At the same time, the Township of Amaranth Council was holding meetings and discussing the proposed Trailway project for their Township, making reference to the Grand Valley proposal.

12 There occurred at that time concerns by a number of the occupants and adjoining landowners over the proposals of the Trailway committee, particularly those involving the use of motorized vehicles along the ARROW which resulted in the formation of an Ad Hoc Group of the concerned landowners. The concerns related to the use of the Trailway: noise, pollution, litter and damage being done and liability for people trespassing on their properties, loss of vegetation, maintenance and costs, etc. These concerns were presented to Council on November 26, 2002 by Mr. Williams on behalf of the Ad Hoc Group. In a full and complete presentation relating to usage, goals, concerns for the trailway, maintenance, etc., including trailway management, the issue of fencing and the return of the land to the original owners. At the conclusion of his address to Council, Mr. Williams brought to the attention of Council under the heading "fencing." "The law stating unfortunately the municipality bought the land, they are left with responsibility of supplying that fence. We have requested the municipality provide us with fencing along the right-of-way. The response has been to table our request. We have consulted Mr. Good who successfully argued the Tillsonburg case."

13 Members of the Ad Hoc Group believed their concerns would be alleviated if the Township simply installed fencing. A formal request for fencing, under the *Line Fences Act* R.S.O. 1990 c.L. 17 had been submitted on November 8, 2002 by Mark Thorpe and Susan Grosvenor. As a result of Council taking no action on the demand for fencing, the group submitted a Form 1, under s.4 of the *Line Fence Act*, which was a request for fence viewers to view and arbitrate as to what portion of the fence each owner shall construct, etc. The group was advised that the matter would be discussed by Council in the new year. On January 8, 2003 they received a notice that a special meeting had been set for January 21, 2003 when Council would meet with members of the Ad Hoc Group.

14 At the meeting, the Reeve explained s.5 of the *Line Fences Act* which allowed for postponement of the arbitration to another day if, in the clerk's opinion, weather conditions or ground conditions make it impracticable for the arbitration to be held on the day originally named for the attendance of the fence viewers. Pursuant to s.5, a By-law was passed providing for no viewing between the 1st of November and the 31st of March the following year. Council had requested that the Ad Hoc Group withdraw their original Form 1 and submit a new one. The members refused to revoke Form 1.

15 This By-law referred to above was passed at the regular meeting of Council on January 28, 2003 and was to regulate the attendance of the fence viewers. At the meeting, Council accepted the amendment of the Upper Grand Trailway Management Plan and agreed to contribute $500 to the cost of the incorporation of the Upper Grand Trailway Committee.

16 In February, the Clerk-Treasurer forwarded to the Applicants a copy of By-law 2003-05, passed on January 28, 2003 and advised that the next date for fence viewing would be scheduled after March 31, 2003. The complaints of the adjoining landowners continued with respect to trespassing, motorized traffic, noise, etc.

At a meeting held on February 11, 2003 the trailway was discussed and at a meeting held on February 25, 2003 Council requested that all minutes be provided to members of the Ad Hoc Group dealing with issues of the trailway. Council authorized usage as follows: hiking, cycling, equestrian, cross-country skiing, snowshoeing and snowmobiles, subject to an agreement between the Ontario Federation of Snowmobile Clubs and Council.

17 On March 25, 2003 Council met, this being some six days before the fence viewers were to attend the property. It was a regular council meeting and at the meeting leave was given to introduce a By-law to designate the ARROW as a highway as set out in *The Municipal Act* and that it be given first and second reading. That being given first and second reading and after the Committee of the Whole meeting, By-law 2003-07 was read a third time, passed and signed by the Reeve and Clerk. The effect of the By-law was to make the Upper Grand Trailway a highway. Section 25 of the *Line Fences Act* reads as follows:

> Despite sections 23 and 24 this Act does not apply to any lands that constitute a public highway including lands abutting a public highway that are held as a reserve by the municipality ...

The By-law in question had never been discussed at any of the previous Council meetings, nor was there been any discussion of Council's intention to designate the Trailway as a highway and it was it never expressed in the consolidated plans by the Village of Grand Valley or the Township of East Luther as a highway.

18 Subsequently, Counsel for the Applicants requested reports, studies and the like which would have indicated that the Township had undertaken research on the need for a highway, including any traffic studies and any other information assembled by the Respondent Counsel with respect to development of the right-of-way as a road. This necessitated attendance by Counsel for the Applicants at the Township offices as Counsel for the Township so advised. Upon attendance, members were told there were no reports, studies and the like in the Respondent's possession.

19 On April 8th, 2003 the Clerk-Treasurer advised by notice, that the fence viewers would be attending on April 14th. Attached to the notice, was a copy of By-law 2003-07, which had established the Trailway as a highway. Fence viewers attended the properties and stated that after meeting to discuss their attendance and after receiving the By-law, and having had their attention drawn to section 25(1) of the *Line Fences Act*, that they had no jurisdiction to make an award. It

is noted that one of the viewers was aware of the provisions of the By-law. Since the Trailway was now a highway and designated as such, the obligation to fence no longer existed. The Clerk-Treasurer who states she was unaware of the effect of the By-law as it related to the fencing issue, had advised that the By-law had been sent as a courtesy to the Applicants.

20 On May 2, 2003 the members who had applied to have the fence viewers attend, appealed the decision of the fence viewers alleging that the fence viewers did have jurisdiction and that they had not been given an opportunity to respond at the time of the passing of the By-law as no notice of the meeting to discuss the intention of Council to pass the By-law was given, notwithstanding the numerous attendances with Council over the past months and the undertaking by a Councillor to keep the group advised.

21 On May the 5th 2003, a trail captain training meeting was held. Discussions took place with respect to the guide for Trailway workers and discussions took place with Mr. Hastings, chairman of the UGTA concerning the effects of the highway designation. According to the affidavit of Ms. Grosvenor, Mr. Hastings had indicated that he had only recently become aware of the designation and that questions relating to the By-law should be addressed to Council, it having been indicated to some members that the highway designation was applied because Council had wanted to install a sewer line on a portion of the ARROW from the fire station in Grand Valley East. It was also noted at the time that Mr. Hastings had attended the Township of Wellington North regular Council meeting on April 8, 2003, requesting support for the recreational Trailway development project and he advised them that the rail bed could be designated on the official plan as a road as this had been done in other municipalities to avoid the requirement of fencing the trail as it was not necessary to fence highways

22 On May 13, 2003 the Applicant and others addressed Council on the highway designation. The reeve stated at that meeting, that the change of designation to highway was required to protect the land as a utility corridor and that "maybe in forty years we may need another east/ west highway." At the same meeting, the issue of snowmobiles arose as to their use on the trail and whether Council had authorized such. Thereafter, the Upper Grand Valley Trail Association continued to meet and discuss ongoing business. On May 29, 2003 at a public meeting, the first draft plan was presented designating the ARROW as a highway. Subsequently, on June the 8th, the Clerk was directed to notify the current landowners to cease using the Upper Grand Trailway for moving of farm equipment except where previous permission had been given.

23 Council advised of the appeal date of July 9, 2003. The Applicant and others who had appealed the fence viewers' award had their appeal come before Referee Norman Kopperud who adjourned the matter *sini die* based on his assessment that to continue the hearing would cause multiplicity of proceedings based on the fact that the Ad Hoc Group had commenced this application in the Superior Court of Justice, that is to have By-law 2003-07 quashed. The application was dated July 4, 2003.

24 Subsequently, on October 14 th , Council passed a By-law allowing for the use of snowmobiles on the Trailway.

25 The Grand Valley Trailway Association continued to promote the ARROW as a Trailway despite the highway designation. At the same time, the adjoining landowners continued to experience the problems previously referred to because of the lack of fences. There's been no attempt by the Respondent municipality to properly care for and/or mark the Trailway as a highway. It is alleged that the Respondent continues to use the protection of a "highway designation" for Trailway purposes. This is obvious from the lack of signage and the like.

26 The residents of Grand Valley and Waldemar had formed the East Luther Grand Valley Trailway Committee (the ELGVT) and had presented a feasibility study to Council which in essence proposed to develop the subject property into a recreational trail. The ELGVT committee, now known as the Upper Grand Trailway Association (UGTA) asked Council to provide support in principle to proceed with the public consultation component of the trail development process and to appoint a member of Council to be the liaison with the ELGVT committee.

27 According to the Clerk-Treasurer, the Council was not involved in forming the ELGVT committee, but they gave it their blessing to proceed and asked that Council be informed as to what was going on. After the management plan had been developed it likewise received in principle, Council's approval. Council advised the UGTA that its use of the subject property as a Trailway would cease once the Township was ready to implement such future use according to the Township's Clerk-Treasurer.

28 Counsel for the Township submits that the current use of the subject property as a Trailway is not incompatible with its future proposed use as a highway and/or a utilities/corridor. It is clear that there were numerous discussions by Council and with Council with respect to the use of the ARROW but that there was never any expressed intention by Council not to allow the use of the ARROW as a Trailway. There was never any public intention expressed with respect to the use.

29 The Respondent, as part of his submission, claims that the application is an expression of the Applicant's underlying frustration of not being able to acquire the subject property for their own use. It is clear from the cross-examination of Ms. Grosvenor, that Mr. Williams spoke of this issue on November 26, 2002. She states that the other abutting landowners and herself wished to purchase the land back if the price was right and that this offer was made to Council on two occasions to relieve them of the reliability and responsibility and to resolve the cost issue of fencing, such would have solved the problem. There was no acceptance of this offer by Council.

30 Subsequent to By-law 2003-07, meetings continued to take place and Council saw fit to undertake a number of studies with respect to municipal services and the initiatives for such which would utilize and/or be facilitated by the ARROW to better the needs of its residents which

Council states were in keeping with the options for development set forth in the feasibility study of the ELGVT committee, whose studies involved municipal services, pumping station, a water treatment plant, a sewer line and treatment plant and the relocation of the Grand Valley Sewage Treatment Plant.

The ELGVT committee (East Luther Grand Valley Trail Committee) feasibility study proposed to develop the ARROW as a recreational trail. Council had been asked to provide support in principle to proceed with a public consultation component. Under the option the study noted the following:

> Trail corridors are commonly used by utility companies to install buried utilizes [sic] such as water lines and communication cables. Trail corridors on former railway right-of-ways [sic] usually connect communities in a straight line reducing the cost of the cable or pipe and minimal traffic control problems during construction. Trail corridors are generally free from ongoing construction that may result in the disruption of service due to cable damage. Access to the trail corridor usually involves only an easement with one organization.

The studies undertaken by the council related to municipal services, pumping station, water treatment plant, the sewer line and treatment plant, and the relocation of the Grand Valley Treatment Sewage Plant. All such studies were undertaken subsequent to the passing of the by-law.

31 A report was prepared by the Dufferin County Member Municipalities Septage and Biosolids Management Options dated October 22, 2004 and that report concludes among other things, that "the relocation of the Grand Valley Sewage Treatment Plant provides an opportunity for rural and urban municipalities to work together to improve environmental stability throughout the County by managing septage and biosolids on a County wide basis." The report recommends that "[t]he Township of East Luther Grand Valley provides the best opportunity to accept septage year round on a County wide basis since it will be redesigned and possibly relocated in the near future. As a minimum the Grand Valley plant should be redesigned to accept septage from within the municipal boundaries of East Luther Grand Valley year round and on a county wide basis in the winter months."

32 In the material filed up to and including March 25, 2003, there is nothing to indicate Council's intention to pass By-law 2003-07 designating the ARROW as a highway in order to allow for future initiatives of the Township, be they for a pumping station, water treatment plant, sewer lines or enlargement of facilities to accommodate the needs of other municipalities in the county. There is nothing to indicate that access to and from the gravel pit abutting the ARROW and the new water treatment plant and sewer line within the Township, that they are hindered by the use of the ARROW designation as a Trailway subject to the rights of the Township as advised by the Township. The material supports Council undertaking numerous studies with respect to the

implementation of the much needed municipal services only after the By-law and requests of the committee for such reports.

33 The evidence supports a finding that the Township allowed for the development of a multi-use recreational Trailway. They were kept advised as to the management plan with respect to the contents of the feasibility study which received their support in principle. They were aware that the committee was created to oversee the development and maintenance of the Trailway. There is no doubt that Council intended that the ARROW was to be used as a Trailway. There was no opposition expressed by any of the public as to such use notwithstanding the public meetings and consultation process.

34 Council was aware as of November 8, 2002 of the Applicant's wishes, that the Trailway be fenced and that such would resolve the complaints of trespass and liability issues.

35 Council were obligated under s.20(1)(c) of the *Line Fences Act* which states as follows:

> Where land that was formerly used as part of a line of railway is conveyed in its entire width by the railway company ... to a corporation of a municipality which is not the owner of abutting land, the corporation is responsible for constructing, keeping up and repairing the fences that mark the lateral boundaries of such land, to construct the fence.

The obligation was considered by the Ontario Superior Court of Justice (Divisional Court) in the case of *Casier v. Bayham (Municipality)* (October 11, 2002), Doc. London 1221 (Ont. Div. Ct.). That case determined that section 20(1)(c) of the *Line Fences Act* clearly established that the municipality is liable for the entire cost of fencing when fencing is sought by abutting landowners. As stated by the Court, "In a word, the municipality is responsible." No other mandatory wording is necessary. The Court states the wording of the section is precise and unambiguous.

36 This obligation was recognized by Referee Mr. Norman A. Kopperud who was to hear the appeal brought under s.10(5) of the *Line Fences Act* from the decision of the fence viewers. The obligation, stated by Mr. Kopperud as follows:

> Section 20 of the Line Fences Act is a complete code and if in fact the By-law 2003-07 is not applicable or is quashed then based on the *Casier vs. Bayham/Tillsonburg* case the fence viewers have no jurisdiction and therefore the Referee has no jurisdiction because the Township is obliged to fence the former rail line.

37 Thus, prior to March 25, 2003, the date that By-law 2003-07 was passed, the Township was responsible for the entire cost of fencing sought by the abutting landowners to the Grand Valley Trailway. The fact of designating it as a highway through the By-law removed from Council that obligation, that is the *Line Fences Act* no longer applied.

38 Under the *Municipal Act* 2001, section 272 and 273, provide as follows:

> 272. Any By-law passed in good faith under any Act shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the By-law.
>
> 273. Upon the application of any person, the Superior Court of Justice may quash a By-law of a municipality in whole or in part of illegality.

39 The Applicants state that the By-law should be quashed due to illegality. Illegality is a term not defined by the *Act*, but is generally interpreted to encompass By-laws that are passed in bad faith. Reference to bad faith and the meaning of it, is found in *H.G. Winton Ltd. v. North York (Borough)* (1978), 20 O.R. (2d) 737 (Ont. Div. Ct.), a decision of the Divisional Court where Robins J.J. stated:

> To say that Council acted in what is characterized in law as "bad faith" is not to imply or suggest any wrongdoing or personal advantage on the part of any of its members. But it is to say, in the factual situation of this case that Council acted unreasonably and arbitrarily and without the degree of fairness, openness, and impartiality required of a municipal government.

40 Bad faith was likewise dealt with in the case of *Pedwell v. Pelham (Town)*, [1998] O.J. No. 3461 (Ont. Gen. Div.): Fleury J. in deciding whether the municipality acted in bad faith in enacting the By-law, states at paragraph 32:

> How does one determine whether a body politic acted in bad faith? It surely does not call for a minute examination of all of the actions of the members of the body to see if one acted in malice. It calls rather for an examination of the general attitude of the body politic to the task being approached. Two of the most important indicia of good faith identified by the Supreme Court of Canada were "frankness and impartiality." (*City of Ottawa vs Boyd Builders 1968 S.C.R. 408 at 415)*

And he further states at paragraph 37, the following:

> Although Council did not technically offend any requirements contained in the legislation with respect to the giving of notice, it is clearly an indication of Council's lack of openness and candour with the plaintiffs.

41 The Applicants allege the indicia of bad faith in this application are as follows:

> (i) passage of By-law 2003-05,
>
> (ii) timing, in relation to the date of March 31, 2003 when the viewers were to attend,

(iii) no reason for passage of By-law 2003-07,

(iv) lack of notice that Council intended to pass By-law 2003-07,

(v) due diligence,

(vi) budgetary reasons, and

(vii) Council attempting to restrict the right to use the Trailway as a "highway," a highway not designated as unopened or otherwise.

42 Council was entitled to pass By-law 2003-05 by reason of weather conditions during the winter months, as the By-law relates to fence viewers attending each year between November and March, that By-law was passed only after the request for the fence viewers and was to delay fence viewer activity and the right of the Applicants who demanded that Council act within the meaning of the decision of the Divisional Court in *Casier*, *supra*.

43 By-law 2003-07 was passed seven days before the expiry of By-law 2003-05 and the attendance of the fence viewers on April 14, 2003. The effect of the By-law was to deny the fence viewers a right to make a decision. Section 25 (1) of the *Line Fences Act* applied.

44 It is to be noted that Council in sending the notice to the parties under the *Line Fences Act*, indicated that the fence viewers would attend on April 14th and sent to the parties at that time, a copy of By-law 2003-07. The question I ask is why? Council knew the effect of the By-law in relation to section 25 (1) of the *Line Fences Act*. It was apparently a rather devious way to portray actions of a supposedly impartial body by the notice and the attendance, if the By-law absolved Council of the obligation to fence. The Clerk-Treasurer, according to the answers given during examination, didn't know the effect of the By-law. The same Clerk-Treasurer was aware of the s.5 By-law passed to defer the fence viewing by her reading of the *Act*. Someone, either a Councilor or other advisor had obviously brought to the attention of Council, the effect of the passing of By-law 2003-07.

45 The suggested uses of the ARROW by Council for municipal services/utilities corridor and/or highway after the By-law was passed, were in conflict with the statements made by the Reeve in January 2003 at a meeting, saying the land was purchased with the intention of creating a recreational use. In April 2003, Mr. Hastings in attending a Township of North Wellington meeting, he being the Chair of the Trailway Committee, stated that the By-law was passed to avoid fencing and further, that a rail bed could be designated on the Official Plan as a road as was done in other municipalities to avoid fencing. I can only conclude that Mr. Hastings must have been tuned into the thinking of Council on March 25, 2003 or thereafter, or that of Mr. Hammond who was on Council at the time of the acquisition of the abandoned railway.

46 The Reeve on May 23, 2003, at a meeting when the By-law was discussed, said, "the change of designation to a highway was required to protect the land as a utility corridor and maybe in 40 years they may need another east/west highway."

47 The ARROW was used as a utility corridor when purchased as it was subject to utility agreements with Bell Canada.

48 It is admitted by the Clerk-Treasurer, that no notice was given to the public that the By-law would be passed at the meeting on March 25, 2003, it being a regular Council meeting date and be made effective on that date. It was passed without public input by anyone notwithstanding that numerous meetings of the committee and the updating of Council by the committee who had received notice of many of those meetings of Council.

49 So the question is why? Was it solely to circumvent the substantial costs associated with fencing? The Applicants were interested parties who received no notice of Council's intentions to pass the By-law. It is a fact that there was no obligation to give notice. Passing of the By-law without input from anyone, including those interested parties, relates to the issue whether there was frankness and impartiality. In *Ottawa (City) v. Boyd Builders Ltd.*, [1965] S.C.R. 408 (S.C.C.), a decision of Spence J., it is noted as follows:

> The relevant cases may be summarized by stating the most important indicia of good faith in these matters are frankness and impartiality.
>
> It passed that By-law without any opportunity having been given to the appellant, which was so vitally interested, to make any representations concerning it. Everything was done to defeat the appellant's *prima facie* right was done behind its back for the obvious purpose of avoiding embarrassment that the appellant's protestations on its own behalf might cause. It is difficult to think of any stronger evidence of bad faith.

50 Again in the *Pedwell* case, Fleury J. states, and I summarize, as Council did not offend any requirements with respect to giving notice as was the case here, it is clearly, in my opinion, an indication of Council's lack of openness and candour with the Applicants.

51 What due diligence did Council undertake prior to enacting By-law 2003-07? It had conducted an environmental assessment of the property in 1997, prior to purchase but no assessments were conducted relating to its use as a highway. Yet the Trailway committee had management reports and feasibility studies undertaken for use as a Trailway. It is clear that Council had undertaken no studies nor prepared or received any report with respect to highway designation. Potential uses of the trialway are referred to by the Clerk-Treasurer but are unsupported by any report which supports the designation of the highway, save that the feasibility study makes reference to its use as a utility corridor, as noted. Simply put, there was no due diligence.

52 The designation of the ARROW as a highway was of more concern to the abutting landowners than that of a Trailway where use is controlled and complaints would be satisfied by fencing. With a highway designation, the complaints would always exist.

53 There is no doubt that the costs connected with fencing would be a financial burden on the municipality as the Reeve stated at the meeting of January 21, 2003. This cost is one that confronts each municipality who has purchased ARROW's and they are met through county and municipal levies or by other agreements. It is interesting to note that subsequent to the March 25th date when By-law 2003-07 was passed, Council has by its conduct, let the Trailway committee treat the ARROW as a Trailway.

54 It is not disputed that the Respondent has the power to establish highways, the power being given to it by virtue of section 31 of the *Municipal Act* which states:

> 31 (1) A municipality may by By-law establish a highway.

55 It is the submission of the Applicants that the By-law was passed to avoid the responsibility placed upon the Council for the municipality to fence and to pay the costs. As stated by Rogers in the *Law of Municipal Corporations*:

> A By-law which is ostensibly within the authority of a Council to enact may be set aside or declared invalid if its real purpose and attempt is to accomplish by indirect means an object which is beyond its authority.... Hence, the court must always 'in examining a By-law, see that it is passed for the purpose allowed by a statute and that such purpose is not resorted to as a pretext to cover an evasion of a clear statutory duty'.

56 In this case, if that were the intention of Council to designate the Trailway as a highway, there is no evidence to indicate any intention by the Council to comply with any of the rules governing highways as provided for in *The Highway Traffic Act*. Council has allowed as uses: hiking, cycling, equestrian, cross-country skiing, and snowshoeing, uses which do not fall within the meaning of section 1 of *The Highway Traffic Act* which defines "highway" as:

> Highway includes a common and public highway... or any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof.
>
> Vehicle is defined to include a motor vehicle ... but does not include a motorized snow vehicle ....

57 Council has in fact, prohibited the use of certain vehicles on the highway, uses which cannot be prohibited if the designation was made in good faith. Likewise, with respect to the use of snowmobiles under the *Motorized Snow Vehicles Act*, snowmobiles may be driven along and

across highways by virtue of section 9, but are not allowed on highways. Yet Council passed a By-law on October 14, 2003, allowing snowmobiles on the "highway."

58 There can be no dispute that the municipal Council may by By-law establish highways, meaning the actual opening up of and laying them out for the future (see *Reeve v. Fort William (City)*, [1954 CarswellOnt 439 (Ont. H.C.)]). Likewise, as stated in *Bruce v. Toronto (City)*, [1971 CarswellOnt 792 (Ont. C.A.)]:

> It is my belief that Ontario Courts now accept that the obligation imposed on the municipal Council to plan for the growth and development of the community demands recognition of the necessity for means to compel the observance of rights of the community to determine and enforce the direction in which the community should be shaped, and that in this regard the rights of the community are paramount to the rights of the owner.

59 There is no dispute to the fact that the By-law passed, is valid but the onus is on the Applicants to prove otherwise.

60 As stated in *R. v. Morello*, [1936 CarswellOnt 210 (Ont. H.C.)], a decision of the High Court of Justice O.W.N. 1936 p.475:

> The Courts are not disposed to interfere with the legislative functions of municipal Councils except in cases where there has been a clear excess or abuse of statutory authority or a disregard of some statutory condition upon which the right to exercise such authority is based.

61 The standard of review is found in the judgment of *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.), wherein Laskin J.A. states,

> I adopt the more deferential approach to the review of municipal powers advocated by this Court in *Howard v Toronto (City)*, and by McLachlin J. in her dissenting reasons in *Shell Canada Products Ltd. v. Vancouver City*, [1994] 1 S.C.R. 231:
>
> > The weight of current commentary tends to be critical of the narrow, pro-interventionist approach to the review of municipal powers, supporting instead a more generous, deferential approach: Stanley M. Makuch, Canadian Municipal and Planning Law (Toronto: Carswell, 1983), at pp. 5-6; McDonald, op. cit.; Arrowsmith, op. cit., at p. 219. Such criticism is not unfounded. Rather than confining themselves to rectification of clear excesses of excesses of authority, courts under the guise of vague doctrinal terms such as 'irrelevant considerations,' 'improper purpose,' 'reasonableness,' or 'bad faith,' have not infrequently arrogated to themselves a wide and sweeping power to substitute their views for those of the elected representatives of municipalities. To the same effect, they have "read in" principles of statutory construction such as the one which states that a by-law cannot affect "common-law rights" unless the statute confers authority to do so

in 'plain language or by necessary implication:' *City of Prince George v. Payne* (1977), at p. 4. The result is that, to quote McDonald (at p.79), "despite the court's protestations to the contrary, they do, in fact, interfere with the wisdom which municipal councils exercise."

The learned justice continues:

> These considerations lead me to conclude that courts should adopt a generous, deferential standard of review toward the decisions of municipalities. To say this is not new. Lord Greene said it in Wednesbury, and his words have been oft-quoted in Canada. Nevertheless, many courts have continued to take a narrow, interventionist approach to municipal decisions. This has prompted some writers to argue for a "threshold" test for judicial interference. McDonald, for example, suggests (at p.108), that the courts should 'defer to the municipality to determine what the public interest requires in the implementation of the powers conferred on it,' provided that the 'municipal action can be rationally supported and is not in violation of any judicial interest in the matter." Expressing this notion another way, it could be argued, by analogy to judicial review of administrative tribunals, that unless a municipality's interpretation of its power is "patently unreasonable" in the sense of being coloured by bad faith or some other abuse, the interpretation should be upheld.

62 In the case of *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 (S.C.C.) and thereafter reference again is made to the standard upon which the courts may review those *intra vires* municipal decisions and to the dissenting reasons of McLachlin J. as being persuasive and the scrutiny of municipal resolutions:

> The standard upon which the courts may review *intra vires* municipal decisions must be one of patent unreasonableness. Municipal councils are elected representatives of their community and accountable to their constituents. Municipalities also often balance complex and divergent interests in arriving at decisions in the public interest. These considerations warrant that *intra vires* decisions be reviewed upon deferential standard. Here, the city's decision to declare the company's pile of soil a nuisance was not patently unreasonable.

63 Professor Rogers states:

> The Courts have shown an increasing disposition to avoid interference with the legislative functions of municipal Councils except in cases where there has been a clear excess or abuse of statutory authority or a disregard of some statutory condition upon which the right to exercise such authority is based. They have abdicated their claims to what has been termed a supervisory and paternal jurisdiction, the exercise of which resulted in the Legislature placing restrictions on the powers of the Courts to invalidate municipal action on ultra legal grounds. The modern attitude of the Courts has been even more pronounced where the By-law is

designed to authorize the undertaking of a municipal work for the general benefit of the community or some part of it. The judicial approach is therefore that municipal By-laws are to be benevolently interpreted and supported if possible.

64 The Supreme Court of Canada, Major J. stated in *Nanaimo (City) v. Rascal Trucking Ltd.*:

> Barring clear demonstration that the municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum v. Greenbaum*. A generous approach to municipal powers will aid the efficient functioning of municipal bodies and avoid the cost and uncertainty attendant on excessive litigation. Excessive judicial interference in municipal decision-making can have the unintended and unfortunate result of large amounts of public funds being expended by municipal Councils in the attempt to defend the validity of their exercise of their powers.

Or as summarized in the head note:

> The standard upon which the Courts may review *intra vires* municipal decisions must be one of patent unreasonableness.

65 Counsel for the Respondent submits that the Respondent did not exceed or abuse its authority. Counsel passed the By-law for the general benefit of the community given the prevailing and future municipal servicing requirements of the Township of East Luther Grand Valley. And thus, it acted reasonably when and in the manner in which it did.

66 The Court must assume that the By-law was passed in good faith, and as stated the Applicants have the burden to establish the contrary, that is to prove that they acted in bad faith, a generic term under which are grouped all such forms of illegality arising out of corrupt or personal interests or motives as distinguished from illegality in substance or form. "The general rule is that municipal Councils are not to exercise their powers for what are called sinister or collateral purposes. Municipal action must be exercised *bona fide* and not be founded upon fraud, oppression or improper motives," *The Law of Canadian Municipal Corporations*, Ian MacFee Rogers.

67 Counsel for the Respondent submits that Council in passing the By-law did not engage in this serious type of conduct bordering on corrupt or sinister or collateral purposes or improper motives that are required in order to found bad faith, and he further submits that the Applicants have not satisfied the onus cast upon them to prove the alleged serious conduct.

68 There is no evidence to suggest a conflict of interest as those words imply nor procedural irregularity, as the By-law was passed in the normal manner as testified by the Clerk-Treasurer without Council recording discussions as it relates to the By-law. The Council could have given notice. It didn't. Council had previously undertaken to give the committee notice with respect to

matter relating to the trail. It had given notice on previous occasions in dealing with the committee at its meetings. The Applicants acknowledge in their submissions that there was no obligation on Council to disclose their intention to pass the By-law or give notice of it.

69 Why was the By-law passed? Counsel for the Respondents submits that it was passed for the purpose of reserving the subject property for future use as a highway and/or a utility/services corridor given the anticipated future growth of the Township of East Luther Grand Valley and the need for the structuring of municipal servicing in respect thereof as suggested by the report of Triton Engineering Services Limited, dated October 22, 2004, some fifteen months after the filing of the application (July 4, 2003). Council further submits that the proceedings were open and conducted in a fair manner, upon proper determination in the public interest and in its capacity as the duly elected representatives and thus, the By-law emanating from the proceedings was passed for the reasons stated and not in bad faith.

70 The question is why was the By-law passed as stated? The Applicants contend that there was no reason for Council to pass the By-law, that it was passed in bad faith and the fact that Council failed to consider the interest of the Applicants at large and primarily to eliminate its own liability for the costs of the fencing, that it was illegal, because it was passed to eliminate the possibility of a proper decision by the line fence viewers and/or a proper application of the law under that *Act*.

71 I am satisfied on the facts as ably outlined by Counsel in their respective factums and the authorities referred to, that the Applicants have satisfied the onus cast upon them. That is, that the By-law was passed in bad faith. The motive for passing the By-law was clearly established by the evidence, that it was to avoid responsibility that Council knew it had under the *Line Fences Act* and the law to fence and pay the cost. The motive was established by reason of the following:

1) Timing,

2) The comments of the Reeve and of Council,

3) That there was no due diligence undertaken,

4) The budgetary considerations, and

5) The bringing in of By-law 2003-05, to delay the attendance of the fence viewers to April 1, 2003.

72 The comments of the former Councilor, Mr. Hammond, ring true, if you need to fence it then designate it as a highway. And as stated by Mr. Hastings to the adjoining Council, those remarks are the basis of the action of this Council unsupported by any evidence to support the necessity of By-law 2003-07. Council knew what it was doing on March 25, 2003 at its meeting, when it passed the By-law, settling the demand for fencing and using the designation as a defence to the demand.

73 The words of Robins J., Divisional Court, in *H.G. Winton v. North York (Borough)* (1978), 20 O.R. (2d) 737 (Ont. Div. Ct.), are important. The factual situation of this case proves that Council acted unreasonably and arbitrarily and without the degree of fairness, openness and impartiality required of a municipal government. *Winton* is referred to in the appellant's argument where it is stated two of the most important indicia of good faith identified by the Supreme Court of Canada were frankness and impartiality. It cannot be said on this application that Council acted frankly and impartially in introducing and passing the By-law, that they did not have sinister or collateral purpose; that they did not have an improper motive; that they exercised their powers in good faith. I say that a generous deferential standard of review must be adopted by a court toward the decisions of municipal governments. And I must interpret the By-law benevolently and support it if possible. The good faith of Council is not evident. It allows for the decision I make that it was not necessary to pass the By-law for the purpose of reserving the property for future use as a highway and/or a utility service corridor given the anticipated future growth of the Township of East Luther Grand Valley and the need for construction and municipal servicing in respect thereof, as the Township owned the ARROW. The Township could meet all of its requirements present and future, without the necessity of the By-law. The failure of the Township to treat the ARROW as a highway after the passing of the By-law by allowing for a continuing use as a Trailway and supporting the committee's activities, supports my conclusion that the By-law must be quashed and an order is to issue accordingly as the evidence as a whole establishes clearly and convincingly that the By-law was enacted in bad faith and the result is as I have indicated, that the By-law must be quashed and an order is to issue accordingly.

74 The issue of costs may be addressed by Counsel in writing and I ask that they attach to their submissions, a copy of their Bill of Costs so that I may assess same or Counsel if they so elect, can arrange an appointment with the Trial Co-ordinator in Orangeville for a date to attend to make oral submissions. If Counsel elects to do so in writing, they are to forward their submissions to me at:

Justices' Chambers

Superior Court of Justice,

611 Ninth Avenue East

Owen Sound. N4K 6Z4

Application granted.

Footnotes

∗ Affirmed at *Grosvenor v. East Luther Grand Valley (Township)* (2007), 53 R.P.R. (4th) 1, 32 M.P.L.R. (4th) 1, 2007 CarswellOnt 337 (Ont. C.A.).