CITATION: Grosvenor v. East Luther Grand Valley (Township), 2007 ONCA 55
DATE: 20070129
DOCKET: C45197

COURT OF APPEAL FOR ONTARIO

SHARPE, BLAIR and MacFARLAND JJ.A.

B E T W E E N :	)	
	)	
SUSAN GROSVENOR, PHIL BIGNELL and CARMEN BIGNELL, THOMAS WILLIAMS and PATRICIA WILLLIAMS, STEPHEN TUPLING and VEREENA TUPLING, MAX SCHEIWILLER and DORLY SCHEIWILLER, JOSEF HUBER and MARTHA HUBER and JOHN DUFFY	)	**Robert K. Brown, for the appellant**
	)	
Applicants (Respondents in appeal)	)	
	)	
- and -	)	
	)	
THE CORPORATION OF THE TOWNSHIP OF EAST LUTHER GRAND VALLEY	)	**Donald R. Good, for the respondents**
	)	
Respondent (Appellant)	)	
	)	**Heard: December 20, 2006**

On appeal from the judgment of Justice H.M. O'Connell of the Superior Court of Justice dated February 28, 2006.

R.A. BLAIR J.A.:

Overview

[1] This appeal raises an important issue: given the modern jurisprudence dictating that courts should afford generous deference to municipalities in the exercise of their statutory powers on behalf of electors, what role remains for the doctrine of good faith as grounds for quashing a by-law?

[2] In 1997, the Corporation of the Township of East Luther Grand Valley purchased a 10.5 kilometre stretch of abandoned railway right-of-way running from the village of Waldemar and by the village of Grand Valley to the western boundary of the Township. Originally acquired for purposes of reserving its future use as a highway and/or a utilities and services corridor, the abandoned line has since been used and developed as a multi-purpose walkway and riding trail. In these reasons I shall refer to it as "the Trailway".

[3] The Respondents are members of an Ad Hoc Group of Concerned Landowners (the "Concerned Landowners") whose rural properties altogether border about one-half the length of the Trailway. Their primary complaints are driven by a lack of any fencing dividing and protecting their lands from the Trailway and by the nuisances and other disruptions to their normal lives resulting from its usage.

[4] In late 2002, the Concerned Landowners decided to resort to the provisions of the *Line Fences Act*, R.S.O. 1990, c. L.17 in an effort to alleviate their problem. Section 20(1)(c) of that Act provides that a municipality acquiring lands formerly used as part of a railway line "is responsible for constructing, keeping up and repairing the fences that mark the lateral boundaries of [the land acquired]." In *Casier et al. v. The Corporation of the Municipality of Bayham and the Corporation of the Municipality of Tillsonburg* (11 October 2002), London 1221, (Div. Ct.), at para. 37, the Divisional Court held that "section 20(1)(c)clearly establishes the municipality is liable for the entire cost of fencing when fencing is sought by abutting land-owners."

[5] The Concerned Landowners, including the Respondents, submitted a demand for fencing to the Township, triggering a mechanism under the Act whereby persons known as "Fence Viewers" attend to inspect the lands in question and arbitrate the issues involving construction of the fence and the costs of doing so.

[6] The demand for fencing set in motion a chain of events that culminated in the Township enacting By-law No. 2003-07, which is the subject matter of these proceedings, on March 25, 2003. The By-law designates the Trailway as a "highway", thus bringing it within an exception to a municipality's obligation to fence under the *Line Fences Act* (section 25(1) stipulates that the Act does not apply to lands that constitute a public highway). The By-law was passed without notice to anyone and given first, second and third reading at one sitting at the end of a Council meeting, just six days

before the Fence Viewers – whose attendance was triggered by the demand for fencing referred to above – were scheduled to begin their deliberations.

[7] The Respondents moved to quash the By-law on the ground that it was enacted in bad faith and was therefore illegal. They succeeded before Justice O'Connell. The Township appeals from that determination.

[8] For the reasons that follow, I would dismiss the appeal.

Facts

[9] Following the acquisition of the Trailway by the Township, residents from the villages of Grand Valley and Waldemar formed the East Luther Grand Valley Trailway Committee[1] with a view to developing the abandoned railway line as a multi-purpose recreational trailway. The Committee generated a feasibility study for the project. Township Council was not involved in establishing the Trailway Committee; however, it supported the Committee's proposal to develop the property into a recreational trail and appears to have left the initiative with respect to the trail development process – including the public consultation component – to the Trailway Committee.

[10] The Concerned Landowners made the issues about the use of the Trailway that disturbed them known to the Trailway Committee and to the Township Council. This occurred both before and after the delivery of the demand for fencing under the Act, referred to above. The concerns centred particularly around the fall-out from the use of the Trailway by motorized vehicles (snowmobiles and ATVs) but also included issues concerning noise, litter and other forms of pollution, damage to the adjoining landowners' properties as a result of people veering off the trail, and their potential liability in relation to people trespassing on their properties, as well as other problems.

[11] Generally, it was the Trailway Committee that reacted to these overtures. Following the demand for fencing, however, Council responded directly to the Concerned Landowners. On January 8, 2003, the Clerk-Treasurer notified them by letter that a special meeting would be held on January 21, 2003, for Council to meet with them.

[12] The January 21st meeting took place. The Minutes reveal that numerous issues were addressed. These included (a) the significant financial burden the liability to fence under the Act would impose on the Township, (b) the uses that would be permitted on the Trailway, (c) whether the adjoining landowners would have access across and along the Trailway, (d) concerns about the management plan, and (e) the potential liability of adjoining owners for any damages that might be caused to the fence, if erected, by their trees. The Reeve indicated that the Township had purchased the land with the intention of turning it into recreational use, and indicated that the Township was looking for a

[1] Now known as the Upper Grand Trailway Association.

solution to accommodate all persons involved (the adjoining landowners, the Trailway Committee and the Township).

[13] In addition, Council indicated its intention at the meeting to pass a by-law pursuant to section 5(2) of the *Line Fences Act*, which permits a municipality to forestall the work of Fence Viewers during the winter months from November to the end of March. The demand for fencing had been submitted to Council in late December, 2002, and as a result, attendances of the Fence Viewers under the Act were scheduled for January 30, 2003. Thus, when Council – true to its word – enacted By-law 2003-05 pursuant to section 5(2) on January 28th, the effect was to postpone those attendances until at least April 1, 2003.

[14] On January 28, 2003, a letter was sent to the Respondents and the Concerned Landowners by the Clerk-Treasurer advising that the date scheduled for the attendance of the Fence Viewers was "postponed due to inclement weather and ground conditions". By letter dated February 3, 2003, they were provided with a copy of By-law 2003-05 and told that "the next date for viewing the fence on your property will be scheduled after March 31, 2003" and that they "[would] be sent proper notification by registered mail."

[15] Six days before the arrival of March 31st, however, the Township passed the By-law that is attacked in this proceeding, By-law No. 2003-07. The By-law designated the Trailway as a public highway, thereby exempting the Township from the obligation to fence the Trailway under the *Line Fences Act* – and relieving it of the expense of doing so. Council passed the By-law at the end of its meeting on March 25, 2003 – giving it first and second reading, then immediately going into Committee of the Whole to discuss it, and directly thereafter "[rising and reporting] progress that the blanks now be filled in and the By-Law numbered 2003-07 be read a third time, signed by the Reeve and Clerk, sealed and inscribed in the By-Law Record Book."

[16] Although Council had been in regular contact with the Concerned Landowners regarding the fencing issues and problems arising from the use of the Trailway – particularly in the period following delivery of the demand for fencing – no notice was given to the Respondents or to any members of the Concerned Landowners or the general public of any intention to enact a by-law establishing the Trailway as a highway. As far as can be determined from the record, no studies had been done demonstrating the need to designate the Trailway as a highway for any particular purpose at that time, nor had any study been done with respect to the estimated cost to the Township of constructing the requested fencing.

[17] Throughout this period the Respondents, Mr. and Mrs. Williams, in particular, continued to communicate with the Township and to complain about intrusions onto their properties and illegal usage of the Trailway. They were advised by the Clerk-Treasurer that their letters had been circulated to Council.

[18] The Council itself dealt with the Trailway at its meeting on February 25, 2003. It authorized the following uses for it: hiking, cycling, equestrian, cross-country skiing, snowshoeing and snowmobiling (only upon suitable land management agreements being submitted by the Ontario Federation of Snowmobile Clubs and signed by the Deputy Reeve and Clerk[2]). There was no indication at this time, or at any other time in the period leading up to the enactment of the By-law, that Council intended to turn the Trailway into a highway.

[19] Following this sequence of events, on April 8, 2003, the parties received notice from the Clerk-Treasurer that the Fence Viewers would be attending on April 14th. Attached to the Notice was a copy of By-law 2003-07. The Fence Viewers did attend on that date, but determined that they had no jurisdiction to make an award since section 25(1) of the *Line Fences Act* excludes lands that constitute a public highway from the application of the Act. An appeal from that decision to a referee under the Act was adjourned *sine die* following the commencement of these proceedings in the Superior Court of Justice to quash the By-law.

The Application Judge's Reasons

[20] After a careful and detailed analysis of the facts, the applicable legislation and the law, the application judge made a critical finding: he found that in enacting By-law 2003-07 in the manner in which it was enacted, the Township had acted in bad faith. Recognizing that he must adopt the "generous deferential standard of review" towards the decision of a municipal council exercising its admitted authority,[3] and that he "must interpret the By-law benevolently and support it if possible", the application judge nonetheless concluded that the By-law must be quashed as it had been enacted in bad faith. The substance of his reasoning in this regard is found in paragraphs 70-73:

> 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.
>
> 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,

[2] Council authorized the Reeve and Clerk to sign an agreement between the Ontario Federation of Snowmobile Clubs and the Township by resolution passed at its meeting on October 14, 2003).

[3] There is no dispute between the parties that the Township has the authority under section 31(1) of the *Municipal Act*, 2001, to establish a highway by by-law, and that it has the statutory power to do so in relation to the Trailway.

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.

The comments of the former Councillor, 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.

The words of Robins J., Divisional Court, in *H.G. Winton v North York (Borough)* (1978) 20 O.R. (2d) 737, 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 [a] 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 ["abandoned railway right-of-way"]. 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. [Emphasis added.]

Positions of the Parties

Respondent Landowners

[21] The Respondents argued before the application judge that By-law 2003-07 must be quashed because it had been enacted in bad faith and was therefore illegal. They submitted there, and continue to submit in this Court, that the By-law was not passed for the legitimate purpose of using the lands as a highway, but rather was passed for the sole purpose of evading the Township's obligation to fence the Trailway under the *Land Fences Act*. Indeed, they point out that the lands have at all times since their acquisition by the Township been used as a trailway, and that they continue to be used in that fashion notwithstanding the "highway" designation (and, in fact, are presently used in a fashion that is not consistent with what is required of a highway under the *Highway Traffic Act*, R.S.O. 1990, c. H.8).[4]

[22] More particularly, although acknowledging that the Township has the power under the *Municipal Act, 2001*, S.O. 2001, c. 25, to designate a highway, the Respondents argue that the By-law was enacted without considering the interests of the Concerned Landowners at large and in a manner that did not demonstrate the "frankness and impartiality" that is required of a municipality in the exercise of its statutory powers: see

[4] The application judge found that the Township had no intention to comply with any of the rules governing highways under the *Highway Traffic Act* and, in fact, prohibited the use of certain vehicles on the Trailway that could not be prohibited if the designation had been made in good faith. The Township also permits the use of snowmobiles on the Trailway, a use that is prohibited on a highway.

Re H.G. Winton Ltd. and Borough of North York (1978), 20 O.R. (2d) 737 (Div. Ct.); *Pedwell v. Pelham (Town)*, [2003] O.J. No. 1774 (C.A.), leave to appeal refused, [2003] S.C.C.A. No. 355.

[23] In this respect, the Respondents rely upon the following "indicia of bad faith":

- The passage of the initial By-law 2003-05, which had the effect of postponing the attendance of the Fence Viewers, together with the Township's indication that the Concerned Landowners would be notified of the new date for that attendance, which would occur after March 31, 2003;
- The timing of the enactment of By-law 2003-07 (just six days before the Fence Viewers' attendance would again be in play);
- The lack of notice to the Concerned Landowners of Council's intention to pass a by-law designating the Trailway as a highway, in the face of ongoing communications between the Council, the Concerned Landowners and the Trailway Committee regarding usage of the Trailway and fencing;
- The lack of any apparent reason for the passage of By-law 2003-07 (apart from the desire to avoid the fencing obligation under the *Line Fences Act*) and the lack of any due diligence in relation to it; and,
- The lack of any intention to use the Trailway for any purposes other than a multi-purpose trailway, confirmed by the continued use of the Trailway for those purposes only.

Appellant Township

[24] The Township argues, on the other hand, that courts are obliged to give great deference to the actions of municipalities in the exercise of their statutory powers in the interests of their electors, and that Council acted on its admitted authority to pass a by-law designating lands as a highway and did so for valid budgetary reasons and in order to preserve the Trailway for the Township's future service and utility needs. The Township submits that the application judge erred factually in finding that Council acted in bad faith in the circumstances of this case and erred legally in failing to adopt the "generous, deferential standard of review toward the decisions of municipalities" and the "benevolent construction" of the exercise of their statutory powers required by modern jurisprudence: see *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 per McLachlin J. in dissent, adopted in *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.).

Analysis

[25] The application judge accepted the Respondents' position. I agree with that decision.

[26] While a municipal by-law is generally assumed to be valid, it may be set aside on grounds of illegality. Section 273(1) of the *Municipal Act, 2001* states:

> 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.

[27] "'Illegality' is a generic term covering any act not in accordance with the law": *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326 at 343. As I will explain, it encompasses by-laws that are passed in bad faith.

[28] There is no dispute that the onus of establishing bad faith rests on the person attacking the by-law.

[29] Here, the Township relies very heavily on recent jurisprudence from the Supreme Court of Canada and from this Court re-emphasizing the principle that courts should afford generous deference – undertake a "benevolent construction" – to the decisions of democratically elected municipal councils exercising their powers on behalf of their electors. This principle has its origins in the decision of the Supreme Court of Canada in *City of Hamilton v. Hamilton Distillery Co.* (1907), 38 S.C.R. 239 at 249, drawing upon the "benevolent construction" approach enunciated by Russell L.C.J. in *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.). The more liberal approach to statutory construction of municipal enabling legislation was adopted by this Court in *Re Howard and City of Toronto* (1928), 61 O.L.R. 563 at 575 (C.A.).

[30] McLachlin J. gave new life to this deferential standard of review, however, in her dissent in *Shell, supra*. There, relying upon earlier jurisprudence and upon trenchant academic criticism of the pro-interventionist approach then employed by courts, she concluded, at pp. 244-247:

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold….
>
> [McLachlin J. then set out four purposes served by the benevolent construction approach that are not accomplished by the interventionist approach[5], and continued:]

[5] In summary, the four purposes served by the deferential approach, as outlined by McLachlin J. are that:

> These considerations lead me to conclude that courts should adopt a generous, deferential standard of review toward the decisions of municipalities. To say that is not new. Lord Greene said it in *Wednesbury*[6], and his words have been oft-quoted in Canada…. [Footnote added].

[31] This deferential approach to the review of the enactment of municipal by-laws has subsequently been adopted by the Supreme Court of Canada in *Nanaimo (City) v. Rascal Trucking Ltd*., [2000] 1 S.C.R. 342 at paras. 35-36, and by this Court in *Equity Waste Management, supra*, and in *Pedwell, supra*.

[32] The appellant Township argues that the application judge in this case was too interventionist and that he ignored a number of justifications supporting the decision of Council to designate the Trailway as a highway. Principle amongst these factors was the budgetary concern regarding the cost of fencing. The appellant submits, however, that the By-law was also responsive to a number of prevailing and future servicing requirements of the Township. These include the existence of certain utility services already installed under the Trailway, the possibility of future utility installations and the possible extension of a sewer along the Trailway, as well as the potential use of the Trailway to provide access to a contemplated pumping station, a potential new wastewater treatment plant, and an existing gravel pit.

[33] The application judge concluded, however, that none of the foregoing considerations played a role in Council's decision to enact By-law 2003-07. At para. 32, he found that:

> 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

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a) it "adheres to the fundamental axiom that courts must accord proper respect to the democratic responsibilities of elected municipal officials and the rights of those who elect them";

b) it "will aid the efficient functioning of municipal bodies and avoid the costs and uncertainty attendant on excessive litigation";

c) it "is arguably more in keeping with the true nature of modern municipalities"; and,

d) it "is more in keeping with the flexible, more deferential approach [the Supreme Court of Canada] has adopted in recent cases to the judicial review of administrative agencies".

[6] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*., [1948] 1 K.B. 223 (C.A.).

> 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 designations 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.

[34] Instead, as indicated in the passages from his Reasons cited at para. 20 above, the application judge found that Council had passed the By-law for a collateral purpose – namely, "to avoid responsibility that [it] knew it had under the Line Fences Act and the law to fence and pay the cost" – and that in doing so it had "acted unreasonably and arbitrarily and without the degree of fairness, openness and impartiality required of a municipal government." He found that Council had acted in bad faith.

[35] This brings me back to the central issue on this appeal.

[36] The Township indisputably had the statutory authority to enact a by-law designating the Trailway as a highway: *Municipal Act, 2001*, s. 31(1). Consequently, this is not a case of a municipality attempting to do indirectly what it does not have the power to do directly. Rather, it is a case of the municipality exercising a statutory power to enact a by-law for a purpose other than that envisaged by the statutory power. Does the doctrine of bad faith apply in such circumstances, given the strong modern jurisprudential preference for generous deference towards the exercise of such powers by elected municipal officials?

[37] In my view, the obligation to act in good faith continues to be an essential characteristic of the valid exercise of by-law enacting authority by municipal councils. It is one component of the modern deferential approach. McLachlin J. implicitly acknowledged as much in *Shell*, *supra*, at p. 243, by relying upon the decision of Lord Greene in *Wednesbury*, *supra* – Lord Greene said that judicial intervention "would be justified where there was evidence of bad faith or absurdity" – and explicitly by stating, at 247-248:

> 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.

> …
>
> … Judicial intervention is warranted only where a municipality's exercise of its powers is clearly *ultra vires*, or where council has run afoul of one of the other accepted limits on municipal power. [Underlining added.]

[38] I take it from *Wednesbury* and from the foregoing passage in *Shell* that municipal conduct "coloured by bad faith" constitutes conduct "[running] afoul of one of the other accepted limits on municipal power."

[39] The "bad faith" prohibition is not confined to cases where a municipal council enacts a by-law in an attempt to accomplish indirectly what it is not authorized by its statutory powers to achieve directly. There are, of course, cases of that nature where bad faith has been found and a by-law quashed for illegality: see, for example, *Barrick Gold v. Ontario (Minister of Municipal Affairs and Housing)*, [1999] O.J. No. 5015 (S.C.J.); affirmed, but on different grounds, (2000), 51 O.R. (3d) 194 (C.A.); Ian Rogers, *The Law of Canadian Municipal Corporations*, 2d ed. looseleaf (Scarborough: Carswell, 1971) at 1021. However, both *Equity Waste Management* and *Pedwell* were cases involving statutorily authorized municipal conduct – zoning in *Equity Waste Management*, and setting minimum lot sizes in *Pedwell* – and there is no reason in principle, in my view, to confine the good faith requirement to such cases.

[40] Although Laskin J.A. found that the record did not support a finding of bad faith in the circumstances, and notwithstanding his adoption of the deferential approach to the review of municipal action, his decision in *Equity Waste Management* was premised on an analysis of whether such bad faith could be found. So too was *Pedwell*, where Rosenberg J.A. concluded that the trial judge's finding of bad faith was supportable on the record and held that the finding could not be overturned in spite of the Court's acceptance of the generous deference principle.

[41] I conclude, therefore, that good faith remains a central foundation for the validity of a municipal by-law enacted in conformity with the municipality's power. My conclusion in this regard is strengthened by the existence of section 272 of the *Municipal Act, 2001*, which states:

> A 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.

[42] This provision reinforces the notion that municipal by-laws properly enacted are not to be lightly quashed; they are not open to review even if they are unreasonable. It is a pre-condition to that immunization from review, however, that the by-law be "passed in

good faith". This, in turn, reinforces the essential character of a valid and legal by-law: it must be enacted in good faith. Such a requirement makes sense. Unlike Canada or the provinces, municipalities do not derive their existence and their powers from the constitution. Instead, they are creatures of statute exercising powers delegated to them by the provinces: see *Nanaimo*, *supra*, at para 31. Institutions and individuals exercising statutory powers are obliged to do so in good faith: *Reference Re: Regulations in Relation to Chemicals*, [1943] S.C.R. 1 at 13; *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140.

[43] What, then, constitutes "bad faith"? Many authorities on this question draw upon the decision of Robins J. in *Winton, supra.* That, too, was a case involving the enactment of a by-law that was within the statutory authority of the municipality (a spot zoning by-law). The Borough of North York rezoned a piece of property in a hasty fashion and with no notice to the property owner in order to prevent its purchase for use as a Zorastrian temple. The existing zoning had permitted use of the property as a church but there was strong community opposition to the proposed use. No planning purpose was put forward to justify the zoning change or the selection of a single spot in the borough as the subject of the amending by-law. The Divisional Court found, at 745, that the by-law was "simply spot zoning calculated to defeat existing land use rights" and concluded that it had been passed in bad faith and did not constitute a valid exercise of the legislative power of North York.

[44] In a frequently cited statement regarding "bad faith", Robins J. said, at 744:

> 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: *Re Hamilton Powder Co. and Township of Gloucester* (1909), 13 O.W.R. 661. 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. [Underlining added].

[45] In *Equity Waste Management, supra*, at 340, Laskin J.A. concluded that "[b]ad faith by a municipality connotes a lack of candour, frankness and impartiality", and that it "includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest". He cited the foregoing passage from *Winton* with approval.

[46] The application judge adopted the *Winton* approach to bad faith as well, holding that the Township Council had "acted unreasonably and arbitrarily and without the degree of fairness, openness and impartiality required of a municipal government". There was ample evidence in the record to support that finding.

[47] In *Pedwell*, *supra*, the municipality made the same argument the appellant raises here, namely, that the trial judge had been too interventionist and had failed to adopt the modern deferential approach to review of the validity of municipal by-laws. Rosenberg J.A. rejected this argument, concluding at paras. 72 and 73:

> Some parts of the trial judge's reasons suggest a more interventionist approach than is permitted under authorities….
>
> However, when the trial judge's reasons are considered in their entirety I am not persuaded that he erred. He was alive to the role the court has in reviewing the validity of by-laws and that it could only intervene if there was a finding of bad faith. The trial judge, moreover, accepted that the Town officials believed that they were acting in the public interest. As he said, "their own subjective assessment of the righteous character of their conduct does not resolve the problems of whether they acted in good faith in so doing". The findings by the trial judge did not rest on second-guessing planning decisions by the Town. He was concerned about the process adopted and the evidence that convinced him that the Town's purpose was to target a development that its officials knew to be legal. There was evidence to support his findings in that respect. As in this court's decision in Re Hall and City of Toronto et al. (1979), 23 O.R. (2d) 86 at 92 it was open to the trial judge to find that there was "a singular absence of frankness and impartiality, which are the usual indicia of good faith" and a "deplorable lack of frankness and a calculated disregard of the appellant's right to make the best use of his property in accordance with the existing by-laws". Again, while I would not necessarily have reached the same conclusion, I cannot say that the trial judge's conclusion is unreasonable. He had the benefit of a lengthy trial in which the entire course of conduct was canvassed with many witnesses for the plaintiffs and the defendants. He made findings of fact that I have found are supported by the evidence and he drew inferences that are not unreasonable. In my view, this court is not entitled to interfere with his conclusion.

[48] There is much in the foregoing comment that can be applied to the case before us. The application judge was well aware of his role in reviewing the validity of the By-law and of the requirement to give generous deference and a benevolent interpretation to the By-law and to support it if possible. He thus gave effect to the modern approach to

reviewing by-laws. The Council members' belief that their conduct was in the public interest and their hindsight attempts to find an underlying justification for By-law 2003-07, however, do not resolve the issue of whether they acted in good faith in enacting the By-law. The application judge recognized that his role was not to second-guess what Council had done; rather, his findings led him to the conclusion that the Township had acted for a collateral purpose and that the process followed had not been characterized by the frankness, openness, impartiality and regard for the rights of the Concerned Landowners that was required of the municipality in the circumstances. His findings, and the inferences he drew from them, were all supportable on the record. In my opinion, there is no basis upon which this Court can or should interfere with them.

[49] Mr. Good does not submit on behalf of the respondents that the Township is forever barred from passing a by-law designating the Trailway as a highway. Indeed, he concedes the Township has the authority to do so. He argues, however, that the validity and legality of this particular By-law, having been enacted in bad faith by the Township, cannot be sustained. In addition, he contends that the issue of whether the Township can enact a by-law designating the Trailway as a highway for purposes of avoiding the obligation to fence imposed upon it by the provisions of the *Line Fences Act* and the decision of *Casier*, *supra*, vis-à-vis these respondents, has been resolved by the decision of the application judge. I agree with these submissions.

Disposition

[50] For the foregoing reasons, then, the appeal must be dismissed. Having been enacted in bad faith, By-law 2003-07 cannot stand as a valid exercise of the Township's statutory authority.

[51] The respondents on appeal are entitled to their costs of the appeal, fixed in the amount of $8,500 inclusive of disbursements and GST.

"R.A. Blair J.A."
"I agree Robert J. Sharpe J.A."
"I agree J.L. MacFarland J.A."

RELEASED: January 29, 2007