Discrimination and Municipal By-Laws

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I. INTRODUCTION

Long before the *Charter* was enacted and long before Canada became an urban society, the Courts had developed a doctrine of "discrimination" to strike down municipal by-laws. That doctrine is still very much with us and is perhaps made more important as municipal regulation permeates all aspects of urban life, particularly the use of property, and as the *Charter* does not apply to protect property rights.

The Court's analysis of the doctrine of discrimination as it applies to municipal by-laws is in many cases inadequate. The analysis, with certain exceptions, generally does not examine the nature or purpose of distinctions or classifications which are made in municipal by-laws but rather relies on a doctrine known as the "express authority doctrine" to strike down municipal by-laws. In this way the Courts have replaced the views of municipal councils as to the merits or political wisdom of by-laws with their own judgments. They have done this with little principled reasoning, little rational analysis and little predictability while severely limiting the policy-making role of municipal governments.

This paper first describes the doctrine of discrimination and municipal by-laws in the absence of the *Charter*, then critically analyzes the use of the doctrine, and finally evaluates the doctrine in the context of s. 15(1) of the *Charter*. The following matters are examined:

1. The Court's approach to interpreting municipal by-laws;
2. The doctrine of discrimination as applied to municipal by-laws generally, i.e. non-zoning by-laws;
3. The shortcomings of the doctrine generally;
4. A doctrine of discrimination as applied to zoning by-laws;
5. The shortcomings of the doctrine with respect to zoning by-laws;
6. Interrelationship of the Doctrine with the *Charter*.

In examining these matters this paper concludes that a strain of judicial reasoning in some municipal discrimination cases emphasizes the need to analyze the purpose and effect of municipal legislation. That analysis, when coupled with recent case law under Section 15(1) of the *Charter* may aid in strengthening the doctrine of "discrimination" as it applies to municipalities outside of the *Charter*, so that the doctrine will be a sensible, predictable and rational one which will be useful in regulating the activities of municipal governments.

II. THE COURT'S APPROACH TO INTERPRETING MUNICIPAL BY-LAWS

It is clear that Canadian municipalities have no status of their own, no inherent jurisdiction, and even no right to exist except by virtue of provincial fiat. There was no municipal representation or involvement in the formulation of the *British North America Act*. Indeed, the only reference to municipalities in that *Act* is a provision placing municipalities under provincial jurisdiction.[1] Municipalities are therefore historically, legally and constitutionally inferior bodies under the jurisdiction of the province. If their Acts are beyond the scope of provincial jurisdiction they are clearly *ultra vires* the province.[2] The municipality is therefore "wholly a creature of the provincial legislature, and derives all of its powers from statute."[3]

As a result of this inferior legal position, the Courts have traditionally interpreted statutes respecting grants and powers to municipalities narrowly. This approach may be described as "Dillon's rule", or the "Express Authority" doctrine, which states that a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the express power in the statute, and those indispensible powers essential and not merely convenient to the effectuation of the purposes of the municipal corporation.[4]

The result of this approach has been that, in general, power can be exercised only if a statute explicitly confers that power upon the municipality. Even a specific grant of general power, moreover, has been rendered ineffective by the Courts. The *Municipal Act*, R.S.O. 1980 c. 302, s. 104 for example, contains a general grant of power to municipalities which states that "every council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act as may be deemed expedient and not contrary to law".[5] This provision has been interpreted as granting virtually no power at all.

In the leading case on this matter, *Morrison v. City of Kingston*,[6] the Court stated that very few subjects falling within the ambit of local government are left to the general provisions of this section. In addition, the Court stated that matters of "health" are generally dealt with by provincial legislation effecting health and that "morality" is generally dealt with in the *Criminal Code*, so that these areas are removed from the sphere of municipal legislation. The Court further held that the power to legislate for the "welfare" of the inhabitants is too vague and general to admit a definition; it may mean so much that it probably means very little. It cannot include powers that are otherwise specifically given, nor can it be taken to confer unlimited and unrestrained power.

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1. *Constitution Act*, 1867, 30-31 Victoria c. 3, s. 92 (8) (formerly the *British North America Act*, 1867).
2. *McKay* v. *R.* [1965] S.C.R. 798.
3. *Smith* v. *London* (1910), 20 O.L.R. 133 (Div. Ct.).
4. *Ottawa Electric Light Company* v. *Ottawa* (1906), 12 O.L.R. 290 (C.A.) at 299, where *Dillon Commentary on Municipal Corporations*, 4th ed. was quoted with approval by the Ontario Court of Appeal.
5. *Municipal Act*, R.S.O. 1980 c. 302, s.104.
6. *Morrison* v. *The City of Kingston*, [1938] O.L.R. 21 (C.A.).

Further examples are found in *Re Christie Taxi Limited and Doran*,[7] where the Ontario Court of Appeal held that the power to regulate taxi cabs did not include a power to regulate financial arrangements between owners and cab drivers, and *Re Pride Cleaners and Dyers*,[8] where the Court held that s. 199 of the *Vancouver Charter* which states:

> *The council, in addition to the power specifically allotted to it, shall have power to do all such things as are incidental or conducive to the exercise of the allotted powers.*

allowed the City to regulate noises but not to prohibit noises between certain hours.

Certainly, there have been exceptions to this general approach. In *E and J Murphy Limited v. City of Victoria*[9] the British Columbia Supreme Court upheld a by-law of the City of Victoria which, in order to preserve certain historical buildings, prevented the demolition of certain buildings, prohibited construction on certain lands and revoked demolition permits. The by-law was passed under the authority of the *Municipal Act* which provided that, notwithstanding any other provisions of that *Act*, when powers vested in the council are inadequate to deal with an emergency, the council by two-thirds vote may declare that an emergency exists and exercise all powers as are necessary to effectively deal with the emergency[10]. The Court held, *inter alia*, that this provision was wide enough to confer upon a municipal council the power, in an emergency, to adopt such measures as could be enacted by the provincial legislature. In *Re Weir and the Queen*[11], the Court, citing, but without overruling, distinguishing or reconciling *Morrison v. City of Kingston*,[12] held that there may well be situations in which the use of the general by-law making power under the *Municipal Act*[13] would be appropriate. The Court, however, struck down the municipality's by-law for other reasons. The discussion of s. 104 of the *Act* was not central to its decision and may not be useful in analyzing the law in this area.

From a review of the case law, it can be seen that in most circumstances, whether the provincial grant of authority is general or specific, the Courts will narrowly define municipal powers and where the municipal legislation possibly conflicts with provincial legislation and policies, the municipal legislation will be likely to be found invalid.[14]

This approach of interpretation of municipal by-laws reflects the Courts' suspicion and hostility towards the exercise of municipal government power. Traditionally, the Courts

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7. (1976), 10 O.R. (2d) 313.
8. (1965) 50 W.W.R. 645 (B.C.S.C.).
9. (1976-77), 1 M.P.L.R. 166 (B.C.S.C.).
10. R.S.B.C. 1979 c. 290.
11. (1980), 26 O.R. (2d) 326 (Div. Ct.).
12. *Supra* note 6.
13. R.S.O. 1980 c. 302, s. 104.
14. See, for example *A.G. Ont.* v. *City of Mississauga,* 1981, 15 M.P.L.R. 212 and *Re Regional Municipality of Ottawa-Carleton and Twp. of Marlborough*, (1974) 2 O.R. (2d) 297.

have viewed themselves as protectors of individual rights, and in the absence of the *Charter* or some overriding protection for individual rights, the "Express Authority" doctrine was a way of controlling potential abuses of municipal government authority, the way in which the *Charter* does today.

While this protection of individual rights may be applauded, and the results in individual cases accepted, one must be concerned with the general lack of analysis in interpreting municipal legislation. The Courts state conclusions as to the validity or invalidity of municipal by-laws without reviewing the objectives and purposes of the enabling legislation or the municipal by-law. They fail to consider the reason for the grant of legislative power, and the problem to which the legislation and by-law are addressed. The reason for general grants of power was not reviewed in *Weir, supra*[15] nor was the reason for the power to supply electricity in the *Ottawa Electric, supra*[16] case.

In their desire to protect individuals from the abuses of municipal power, the Courts have adopted an arbitrary, if not irrational, approach to interpreting municipal powers. Irrational, because the application of a narrow and literal interpretation of the enabling legislation without a review of the context and purpose of that legislation results in judicial inconsistency and unpredictability.

Without a rational discussion of the objectives and purposes of the enabling legislation, and the manner in which the municipal by-law attempts to attain these objectives and purposes, the Courts cannot adequately fulfill their role of protecting individual rights. For without this type of analysis, the application of the "Express Authority" doctrine may protect the rights of one individual while having deleterious effects on a larger body of the municipality's constituency.

A. The Doctrine of Discrimination as Applied to By-laws Generally

As part of or a subcategory of the doctrine of "Express Authority", the Courts also use the doctrine of discrimination to interpret municipal by-laws. In essence, absent the express power to classify or sub-classify within a by-law, the Courts generally find that the power conferred by the legislation does not include the power to classify or sub-classify, namely, to provide different rules or regulations for different categories, or have categories, for different types of individuals or groups. Where this occurs the Court will set aside the by-law for discrimination, on the theory that the legislature could not have intended to have established a sub-legislative mandate to make such rules.[17]

A municipal council interfering with common law rights must rely on very clear statutory authority. The basic principle which is well established is stated with clarity by

15. *Supra* note 11.

16. *Supra* note 4.

17. *R.* v. *Donald B. Allen Ltd.* (1976) 11 O.R. (2d) 271 (Div. Ct.).

Schroeder J.A. delivering the judgment of the Court of Appeal in *Re S.S. Kresge Co. and City of Windsor:*[18]

> *The right given to a municipality to regulate or trade or business does not give it the power to discriminate. The general principle governing the exercise of such a regulatory power is stated by Middleton, J.A. in* Forest v. Toronto *(1923), 54 O.L.R. 256 at p. 278:*
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> > *when the municipality is given the right to regulate, I think that all it can do is to pass general regulations affecting all who come within the ambit of the municipal legislation. It cannot itself discriminate, and give permission to one and refuse it to another; and,* a fortiori*, cannot give municipal officers the right, which it does not possess, to exercise a discretion and ascertain whether as a matter of policy permission should be granted in one case and refused in another.*
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> *The same principle is annunciated in* Regina v. Webster *(1988), 16 O.R. 187 and in* Re Kiley *(1887), 13 O.R. 451. It is an essential qualification of all such by-laws that they should be both reasonable and impartial, bearing on all alike.*

In *Re Bunce v. Town of Cobourg*[19] the Ontario Court of Appeal dealt with a by-law regulating the closing hours of shops. The by-law prescribed hours during which shops must be closed and further prescribed exceptions for certain classes of stores, including shops which specialized in "small manufactured articles of small value used in personal or household adornment, candy, soft drinks, ice cream, newspapers, periodicals, magazines and similar articles." The by-law was passed pursuant to authority given to municipalities to require the closing of "all or any class or classes of shops". The Court suggested that under the *Municipal Act*, class was to be determined by reference to the species of merchandise, not to the size of articles. The Court found that municipal council had no power to subdivide "the class" and make one subdivision of shops subject to the by-law and the others not. Shopkeepers in the municipality selling merchandise of the same type, kind or species must be treated alike. It was therefore discriminatory for the municipal council to permit shopkeepers who dealt only in small articles of that type to remain open for business without any restrictions as to hours, but require other shopkeepers who dealt in "small articles" of that type but also dealt with larger articles of that same type to close for specified hours.

Similarly, in the case of *R. v. Donald Allen*[20] the Court also took an *ultra vires* approach and held that the municipality did not have the authority to establish a sub-classification of car washes according to whether the car wash was within 500 feet of residential areas. The municipality, in short, could not discriminate among different types of car washes.

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18. [1957] O.W.N. 154 at 158 (C.A.).

19. [1963] 2 O.R. 343 (C.A.).

20. *Supra* note 16.

In essence, a by-law discriminates when it treats different members of the same class differently. Unless the provincial legislation expressly provides that the municipal by-law can subdivide specific classes and regulate accordingly, the judicial trend is to find such by-laws discriminatory and *ultra vires* the enacting legislation and therefore void. In such circumstances the municipal council has no power to subclassify or discriminate unless clear enabling legislation gives it that express power. In *Leavey v. Corporation of the City of London*,[21] the Court held that the by-law unlawfully discriminated between businesses of the same class, and in addition, discriminated between classes of persons without the municipality having the power to do so. The power to regulate does not allow or authorize discrimination.

In *R. v. Varga*[22] a by-law provided for the early closing of retail service stations but provided an exemption for full service stations. The majority of the Court of Appeal held that the municipality had gone beyond its powers, and had discriminated against certain sub-classes of service stations in the retail gasoline industry by limiting the members of the class who could apply for exemptions. The majority held that the by-law clearly discriminated against the small service stations by allowing their competitors who happen to be equipped to provide additional service, to sell gasoline at retail 24 hours a day.

The traditional rule that the power to make by-laws does not include that of enacting discriminatory provisions unless the enabling legislation provides contrary was recently affirmed by the Supreme Court of Canada in *Montreal v. Arcade Amusements Inc*.[23] In that case, the municipality had passed a by-law prohibiting amusement halls to admit on their premises people under the age of eighteen years.

Speaking for the Court, Justice Beetz held that by-laws which are discriminatory in the non-pejorative but most neutral sense of the word, are rendered invalid even though the distinction on which they are based is perfectly rational or reasonable, and conceived and imposed in good faith without favoritism or malice. Therefore, if by-laws are partial and equal in operation between different classes in the most neutral sense of the word and are based on perfectly rational or reasonable grounds, they will be declared invalid.

The Court embarked on the traditional analysis of determining whether the enacting legislation expressly or by necessary implication provided the municipality with authority to regulate classes of individuals. The Court recognized that authority to make distinction based on the age of children and adolescents would be useful to the City in exercising its general powers, and especially in exercising its power to adopt policing by-laws, but however useful or convenient such an authorization might be, the Court was not persuaded that it was absolutely necessary to the exercise of those powers and further that it would have to be found in the enabling legislation by necessary inference or implicit delegation.

The Court found that in the absence of express provisions to the contrary or implicit delegation by necessary inference, the sovereign legislature has reserved to itself the important power of limiting the rights and freedoms of individuals in accordance with such

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21. *Leavey* v. *Corporation of the City of London* (1979) 11 M.P.L.R. 19 (H.C.).

22. (1979) 12 M.P.L.R. 278 (Ont. C.A.).

23. [1985] 1 S.C.R. 368 at 404-405.

fine distinctions. The principle transcends the limits of administrative and municipal law. It is a principle of fundamental freedom.

B. The Shortcomings of the Doctrine as Applied to Municipal By-laws Generally

In some cases involving discrimination one can agree with the results reached, and can also understand why the Courts would develop such a doctrine. The Courts as protectors of individual rights do not want municipalities playing favourites amongst various property owners or individuals by regulating on an individual basis. So certainly the underlying rationale for the doctrine — mainly to prevent municipal abuse of its power — makes sense and has merit.

What the Courts have not done in these cases is provide a rational approach in determining what discrimination is, what the doctrine of discrimination is intended to prevent, and when it can be invoked. There is no attempt to formulate a clear rationale for the doctrine and although the doctrine depends in part on the strict interpretation of municipal power in order to protect common law rights, there is no strong attempt to relate this doctrine to the rationale or purpose of either the enacting legislation or the by-laws. Nor do the Courts deal with the discrimination on the basis of whether the by-law had a rational basis in regulating the way it did, or whether it was an irrational by-law with adverse effects on minorities or individuals without a rational basis. While the underlying policy would appear to be prevention of municipal regulation which is arbitrary, has no rational basis, or adversely affects minorities, the result is that the Courts interfere with the "political" decisions of municipal governments without clearly stating the basis for such interference.

Municipalities are restricted by the Court's assumption, without articulated reasons, that certain classifications or sub-classifications are unreasonable. No thought is given to the purpose of the regulation in evaluating whether there should be a finding of discrimination. Categories are struck down without an analysis of the reasons for the category and its rational relationship to the legislation. Moreover, there is no recognition that treating all persons the same when their circumstances are different can be as "unfair" as treating them differently when circumstances are the same.

In *Re Bunce v. Town of Cobourg*,[24] the Court struck down the exception for variety shops. The Court, however, did not consider whether the sub-class was a rational one given the legislation. There was no evidence that the municipality was trying to regulate for reasons totally unrelated to government functions. The Court stated the classification according to size is *ultra vires*, without giving its reasons, and merely relied on precedent in coming to this conclusion. The singling out of "variety stores" for different regulation than other kinds of stores has some rationale and may be justified. Variety stores by their nature generally sell small manufactured articles of small value, and provide a different type of service to the community than stores selling larger items. Certainly, a rational argument could be made that

24. *Supra* note 18.

the services of such "variety stores" should be available to the community at different hours than stores which deal in both small "variety store" articles and larger manufactured items.

In the *Allen*[25] case the Court struck down a sub-classification for car washes within 500 feet of residential areas. Clearly the classification was a rational one relating to the purpose of regulating the hours of such establishments. There is a rational distinction to be drawn between the regulation of car washes within 500 feet of residential areas and those beyond that 500 feet. Ones within 500 feet of residential areas can cause problems like noise and traffic which could interfere with the residential neighbourhood. Those further away may not. Moreover, there seems to be no reason why the same hours should be imposed on car washes far from residential areas. If the Court imposes a requirement that all car washes be treated alike, such a requirement may well result in a higher standard than necessary for those establishments removed from residential areas. Requiring a higher standard of regulation than necessary, where a rational basis for such higher standard does not exist, results in a type of reverse discrimination.

When faced with the allegation of discrimination in a municipal by-law, the Courts should not overlook the statutory basis for such a by-law, but the Courts should also determine whether there is a rational basis for the by-law as it relates to legitimate municipal concerns, for example, the regulation or prevention of nuisance, and then determine whether the by-law as enacted addresses that problem without treating its constituency differently on some discriminatory basis. For example, if a by-law required Catholics to close at one hour of the day and non-Catholics to close at a different time of day, one can clearly understand the Court striking it down. There would be no rational relationship between the class and the purpose of the regulation.

Where however the by-law has a rational connection to its enabling legislation and is not specifically aimed at some disadvantaged group, the Court should attempt to apply a rational basis test. For example, such analysis can be found in *City of Ottawa v. Royal Trust Company*,[26] where the City of Ottawa enacted a by-law for the imposition of a special charge upon the owners of a high-rise or other buildings to pay for part of the cost providing additional sanitary and storm sewer which would otherwise not have been required. Justice Judson speaking for the majority at page 537 stated:

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

and further on page 538:

> *Finally, discrimination is found in the fact that the City classified buildings as residential and non-residential or combined residential and non-residential. I agree with Aylen, J. on this point that the distinction was a natural and sensible*

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25. *Supra* note 19.

26. [1964] S.C.R. 526, 45 D.L.R. (2d) 220.

> *one and while within the broad terms of the enabling statute and that there was nothing arbitrary, unjust or partial in drawing such a distinction.*

By determining that the by-law had a rational relationship to its enacting legislation and by determining the problem the by-law was enacted to remedy, the Supreme Court of Canada provided useful analysis for future judicial reasoning and also assisted in obtaining valid municipal goals.

C. The Doctrine of Discrimination as Applied to Zoning By-laws

The doctrine of discrimination in the context of zoning by-laws has been viewed differently by the Courts. Generally, the Court's use of the doctrine of discrimination in limiting municipal zoning power has largely been an attempt to ensure the substantive fairness of municipal decisions, specifically, a concern for protection of minorities who would otherwise be prevented from using land. However, the issue of discrimination also arises in the context of zoning the land of individuals and whether such zoning is discriminatory because it relates only to one person or one lot.

In the early case of *City of Toronto v. Mandelbaum*,[27] the City passed a by-law which provided that no lumberyard, woodyard or planing mill shall be established in any place within the city "unless a permit therefore is first obtained from the committee on property, such permit to be approved by the City Council before being issued". The by-law was found to be *ultra vires* because of the provisions respecting the permit which, according to the Court, made the by-law not one of general regulation or application but one which was discriminatory in its application. When the municipality is given the power to regulate it can pass only general regulations and cannot discriminate and give permission to one and refuse it to another. This case is very much in keeping with the traditional rule of discrimination as discussed with respect to by-laws generally.

This traditional argument was considered in the seminal case of *Township of Scarborough v. Bondi*,[28] where a municipality zoned one piece of land owned by a property owner in order to prevent the owner from circumventing the general provisions of the zoning by-law respecting frontage. Mr. Justice Judson considered the classic definition of discrimination as provided in *Forst v. Toronto* (1923), 54 O.L.R. 256 p. 278-9:

> *when the municipality is given the right to regulate, I think all it can do is pass general regulations affecting all who come within the ambit of municipal legislation. It cannot itself discriminate, and give permission to one and refuse it to another.*

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27. [1932] O.R. 552.

28. [1959] S.C.R. 444 at 451, 18 D.L.R. (2d) 161.

Mr. Justice Judson went on to state that he doubted whether this definition of discrimination could ever afford a guide in dealing with a restrictive rezoning by-law.[29] Commenting further, he stated:

> *The mere delimitation of the boundaries of the area affected by such a by-law involves an element of discrimination. On one side of an arbitrary line an owner may be prevented from doing something with his property which another owner, on the other side of the line, with a property which corresponds in all respects except location, is free to do.*

Township of Scarborough[30] was followed in the case of *Re Township of North York Restricted By-law 1467*,[31] where the Court dealt with the issue of zoning individual lots. The Court stated:

> *Small areas may be zoned as well as large ones and facts as to their ownership or control should have no bearing when consideration is being given to the question of whether or not the area sought to be zoned complied with a general purpose and intent of the legislation.*[32]

It seems fair to conclude that the Courts in the *Bondi* and *North York* cases were willing to allow zoning on a case by case, lot by lot, basis, if it were done by the passing of a by-law. Spot zoning to the Canadian Courts is not an evil.

Furthermore, holding by-laws that freeze a development of a particular piece of property have also been held not to be discriminatory.[33] In *Soo Mill*[34] the appellant argued that the creation by the respondent municipality of a "holding zone" thereby freezing development of its property, amounted to discrimination against it. Chief Justice Laskin rejected this argument in the following terms at page 6:

> *Nor can the appellant complain of discrimination merely because the result of the freeze is to sterilize its land in respect of development. This has been done in the context of an overall official plan and general zoning by-law in furtherance thereof. There is no suggestion of bad faith on the part of the respondent in bringing the appellant's land within the holding category. That was a discretion which was reposed in the municipality under the zoning scheme.*

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29. *Ibid.* at 166.

30. *Supra* note 28.

31. [1960] O.R. 374, 24 D.L.R. (2d) 12 (C.A.).

32. *Ibid.*, at 19.

33. *Soo Mill and Lumber Company* v. *Sault Ste. Marie,* [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1 (S.C.C.); *Re Sanbay Developments Limited* and *City of London*, [1975] 1 S.C.R. 485.

34. *Ibid.*

In these latter cases one begins to sense the genesis of a rational basis test. Although the test is not clearly articulated, the Court appears to be saying that the by-law had a rational basis in light of its enacting legislation, namely, development control and planning, and is therefore not discriminatory in light of the legislation. In effect the Courts, by using the doctrine of discrimination, review the merits of zoning decisions and examine the purposes for which municipalities exercise their zoning power. If the Court determines that the use of the zoning by-law is for planning purposes they are unlikely to find the by-law discriminatory. These cases are generally not problematic, but once this area of general municipal zoning power is left, rational analysis departs and arbitrary, case by case decision making arises. This most often occurs where the by-law impacts or potentially impacts on a discrete group in society.

This is illustrated in the cases of *R. v. Brown Camps Limited*,[35] *City of Barrie v. Brown Camps Residential and Day Schools*,[36] and *R. v. Bell*[37]. In these cases the Courts were considering municipal by-laws which dealt with single family zones. The primary issue in all the cases was whether the municipality could in fact regulate families although in the two *Brown Camps* cases, the issue revolved around whether a group home operated by Brown Camps was a family dwelling. Since in all the cases the by-laws restricted areas to single dwelling uses, if the attendants and "inmates" of a group home were not a family then the use would be prohibited in the *Brown Camps* cases.

In the first *Brown Camps*[38] case, Brown Camps Limited was charged with using premises as a commercial house for the treatment of children contrary to the municipal by-law which designated the premises for use as a single family detached dwelling. The by-law defined "family" as one or more persons living as a housekeeping unit provided that a house could be occupied only by a housekeeping unit. The defendant argued that the group of four children and the staff members caring for them constituted a housekeeping unit. The Court disagreed and held that this group was not a family as it was composed of staff and inmates, the latter of whom were passive in their placement and there at the whim of the defendant. There was no special relationship between them and they did not agree to live there. The Court saw a need for personal election to be a family and therefore a housekeeping unit.

An additional concern was the Court's view that the Brown Camps' use was a business use of providing services for the inmates. Under this view, occupancy was unimportant because Brown Camps' occupation was for business rather than family purposes. The case was one in which the interests of the minority lost out and, as shall be discussed shortly, on the basis of reasoning that was not very satisfactory.

In the second *Brown Camps*[39] case, a house was occupied in the same way and the municipality argued that the use was for the purposes of the business of carrying on a mental

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35. [1969] 2 O.R. 461 (C.A.).

36. (1974) 2 O.R. (2d) 337, 32 D.L.R. (3d) 671 (C.A.).

37. (1980), 9 M.P.L.R. 103, 98 D.L.R. (3d) 255 (S.C.C.).

38. *Supra* note 34.

39. *Supra* note 35.

health centre and not of a family dwelling unit. Under the by-law in this case the area was designated for one family detached dwelling units and dwelling unit was defined as separate living quarters for an individual or one family. Family was further defined as one or more persons inter-related by bonds of consanguinity, marriage or legal adoption, or not more than five unrelated persons.

The Court in this case stated that the "use" of the premises was the important concern and had to be examined in order to determine whether it was within the definitions of the by-law. The Court concluded that those "actually using" the premises were a family and, therefore, the fact that this was a commercial venture did not matter. The house was actually used or occupied for the purposes of the care and upbringing of children as if they were cared for by their own parents. It appears from this decision that those occupying the premises were important and not "the use" to which the premises were being put. Under this test, the defendant was not in breach of the by-law as not more than five persons were occupying the premises.

In *R. v. Bell*[40], the issue was the same. The by-law restricted the premises to single family use and the family was defined as two or more persons related by bonds, consanguinity, marriage or legal adoption, non-paying guests and servants, the owner and two other persons and not more than three foster children. The Supreme Court of Canada held that the by-law, in restricting occupancy to "family" was "not regulating the use of the building but who used it." The Supreme Court also quoted with approval from a lower Court decision that personal qualification of this type or other personal characteristics or qualities were not a proper basis for the control of density for any issue relevant to land use or land zoning. The Court was also concerned about the effect of the by-law including the sharing of rented accommodation by two adult persons unrelated by blood or marriage. College students were mentioned as one of the endless examples that led the Court to a conclusion that the regulation of families could not have been within the contemplation of the provincial legislature when it empowered municipalities to pass zoning by-laws.

The protection of minorities was also considered in the case of *H.G. Winton Limited v. Borough of North York*[41]. In that case, the applicants agreed to sell property to the Zoroastrian Society of Ontario. The land was zoned residential at the time of the agreement and the Building Commissioner confirmed in writing that the use of the property as a temple was permitted under the by-law. Within one week after the agreement was signed, the municipality re-zoned the property and the surrounding area to prohibit church uses. The zoning by-law was passed without any materials or studies from the Planning Board as was the usual practice. The Court found that the "Council was not concerned about or interested in zoning any property other than the applicant's." The Court further concluded that the by-law was discriminatory. However, the conclusion was not on the grounds of the zoning of one property but that the by-law was aimed solely and exclusively at the Society. The Court stated:

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40. *Supra* note 37.

41. (1979), 6 M.P.L.R. 1; 20 O.R. (2d) 737 (Div. Ct.).

> *There must be proper planning grounds or standards to warrant discriminatory distinctions between property owners in the same position, classification or zoning category. Here, no planning purpose has been shown to explain let alone justify, this election of a single spot in the borough as a subject of this amendatory zoning by-law. There is no rhyme nor reason, in a planning sense, for it.*[42]

The Court was in fact protecting the Society from zoning that was not rationally related to the purposes of the legislation. This was zoning which had the sole purpose of keeping out a religious group which the majority of the community did not want in its midst. Here, in the Court's eyes, was true discrimination regardless of the area zoned, even though the municipality had zoned the use and not the user.

In conclusion, where the by-law involves spot-zoning or holding-zoning, the Courts appear to accept the rational basis test and will examine the planning rationale and the purpose of the legislation in relation to the by-law, and unless there is no planning rationale, the Court will uphold the zoning by-law. Where the zoning by-law is clearly aimed at a specific minority group and is not enacted for a legitimate planning purpose, the Courts will clearly find it to be discriminatory and strike it down.

Where these areas are left, if the zoning by-law potentially impacts on discrete societal groups such as families, group homes or college students, the Courts refuse to inquire if the by-law has a rational planning purpose, and instead focus on the effects of the zoning by-law on certain groups of individuals, and then implicitly, if it finds the policy involved objectionable, substitutes its own policy for that envisioned by the municipal council. The Court does so without any objective analysis of the policy it finds distasteful, and without examining the impact of its own substituted policy for that of the municipal council.

Without a rational analysis of why the Court found discrimination, neither the Courts, the municipality nor individuals have a clear indication of what will constitute discrimination as applied to zoning by-laws, or how the Courts will view by-laws that potentially impact on discrete groups of individuals in society. Once again, as with the doctrine of discrimination in relation to general by-laws, neither the Courts, individuals or municipalities have a clear indication of what constitutes discrimination or how the Courts will likely view by-laws that effect individuals.

D. Shortcomings of the Doctrine of Discrimination with Respect to Zoning By-laws

Within the context of spot-zoning and holding zone by-laws, it would appear that the Courts first examine the enabling legislation and its purpose, then determine whether the zoning by-law, as enacted, addresses legitimate concerns of the enabling legislation or rather

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42. *Ibid*. at 12.

singles out any particular group or minority for unfavourable treatment. Where the zoning by-law potentially impacts on minority groups, the Courts refuse to take this approach.

In the first *Brown Camps* case,[43] the Court considered the voluntary nature of the family. This issue bore no relationship at all to planning concerns. In that case, the Court's concern was that the use was a commercial or business use and yet no consideration was given to the fact that the renting of a house to a family could also be a commercial use.

The two *Brown Camps* cases were decided differently on the basis of the difference between "occupancy" and "actual use" on the one hand and "use" on the other. In the first case, use was important in that the Court's main concern was that Brown Camps was making a commercial use of the premises although the Court considered occupancy in that case and found the premises not to be occupied by a "family". In the second, the actual use or occupancy by a family was the determining factor. In the first case, the Court characterized the use as a business, while in the second, it was characterized as providing a family life. Both seem correct and the decisions seemed to vary according to the values the Courts wished to uphold. In the first case, the view that the "externalities" of Brown Camps business should not be borne by the community seemed important; in the second, the need to protect the mentally ill from being legislated out of communities seemed paramount.

These cases present two conflicting views, with no analysis that would be useful in deciding future cases. Different cases should have different results because of factual or legal differences, not because of the Court's choice of words to categorize the activity.

The Supreme Court of Canada followed the same approach in the *Bell* decision. It quoted with approval the view that the by-law was land zoning by people and concluded that this was inappropriate without saying why. The emphasis on the adverse effects of the by-law on particular groups hinted at the Court's concern for minority groups being adversely affected. The decision, however, did not consider that any drawing of a line in law may cause problems on the immediate other side of the line. Had the municipalities simply limited the density to four persons or less per household, then such a standard would have prevented "natural families" of five persons from living in the area. Surely this would have been as oppressive or gratuitous an interference with individual rights as zoning with respect to "family".

In the *Bell* case, the Supreme Court of Canada concluded in part that because zoning can relate only to the use as opposed to the users of property, two unrelated adults should not be prevented from living together. The Court's subjective judgement on the merits of the by-laws, should not be unlimited and should take place within the confines of the purpose of the legislation and by-law. The Court should have considered whether, for servicing reasons, municipal councils might encourage family uses in certain parts of their municipality. The purpose may be to encourage the use of existing schools, parks and nurseries, or it may be in order to prevent the need and expense of building such services in other areas. The Courts also should consider if it is appropriate to zone with respect to such matters in order to keep a population mix and thus, perhaps, a safer community.

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43. *Supra* note 34.

Most importantly, in all the cases, the Courts failed to examine the purpose of the family zone. In zoning areas for single family housing the municipality is using the term "single family" as a proxy for an indefinite but generally small number of people who, living in a group, can be properly serviced in the community without placing an inordinate burden on the community by overcrowding the schools, congesting the streets, overtaxing the water and sewage services and causing excess noise. Seen in this way, the Court in the first *Brown Camps* case could have upheld the use of the premises for Brown Camps because if that was how family should be interpreted then the Brown Camps group fitted within the definition. In the second *Brown Camps* case[44] the problem was largely resolved by the definition of family which included a group interrelated by bonds of consanguinity (a proxy for a "small group of people") or five unrelated persons.

In the case of *R. v. Bell*[45] the Court of Appeal in Ontario really came closer to the approach advocated here in upholding the efficacy of the by-law to prohibit the use in question. The Court of Appeal stated that the "limitation of the use to families as defined may be based on such things as school, traffic, sewer or water requirements, or a host of other needs, problems and concerns within the responsibility of the municipality."[46] The Court continued that it would have been legally "difficult" for the municipality if it had sought to limit the size of families as commonly understood, but it was not unreasonable, in the legal sense, for the municipality to limit the number of people who may occupy a dwelling unit in areas that it had determined would be residential. The by-law was not "aimed" at unmarried couples, elderly widows or any other particular group, or indeed anyone's moral conduct, the Court concluded.

The approach of the Court of Appeal seems much more desirable. There was an attempt to ascertain a rational relationship between the by-law and the purpose of the section granting power under the *Act*. In this way the Court was reverting to a rationale basis test as conducted by Mr. Justice Judson in the *City of Ottawa*,[47] where he determined there was a rational basis for the enactment of a by-law respecting levies on new buildings for sewers. He concluded that the categories established by the by-law of residential, non-residential, and combined residential and non-residential buildings were "natural and sensible" given the statute. That kind of examination should have been undertaken in the *Bell* case.[48] Had it been done, the Supreme Court of Canada might well have concluded that, in attempting to regulate to prevent nuisance and to ensure adequate services, zoning by reference to family was sensible and reasonable.

The Courts in these cases, as mentioned earlier, are apparently concerned about discrimination against various groups in society who might be adversely effected by zoning by-laws. In trying to prevent this from happening the Supreme Court of Canada has potentially inhibited municipalities from zoning with respect to the users of property. The

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44. *Supra* note 35.

45. *Supra* note 36.

46. (1977) 2 M.P.L.R. 39 at 47, 15 O.R. (2d) 425 (C.A.).

47. *Supra* note 25.

48. *Supra* note 36.

result is that a substantial limitation may have been placed on municipal zoning powers without any guarantees that such discrimination will not occur. Clearly, municipalities can discourage or encourage family uses by zoning with respect to unit size both in terms of floor space and number of rooms per unit. The establishment of minimum lot sizes, frontages, and unit sizes can severely discriminate against the poor without zoning directly against the users of property. The Courts need to be much clearer about the purposes for which zoning can be used and what constitutes discrimination in zoning. The regulation of land uses for the building of low income housing, for example, could easily be struck down on the user, as opposed to the use principle, although, as indicated above, a distinction is inappropriate. A similar fate would befall by-law zoning land for senior citizen housing and municipal legislation designed to make those homes more acceptable to the community as ocurred in *Re City of Toronto By-Law 413-78*,[49] where a zoning by-law permitting a senior citizens residence was struck down as being "people zoning".

In the absence of taking an approach that looks at the purpose of the legislation and the relationship of zoning to that purpose, the Courts merely interfere with the policy decisions of municipal governments on the basis of their own views. There are of course important areas where Courts should interfere to prevent real discrimination: in cases where zoning does not relate to planning or where, although it does relate to planning, it so substantially interferes or potentially interferes with the interests of minorities that it should be struck down. Where this is the case, the Court should clearly state this to be so and indicate to all the reason for the interference. In order to provide guidance to municipal decision makers, the Court should face directly the issue of how broad the zoning power is to be. Where that interference comes in the form of technical distinctions such as one between user and use found in the *Bell* case, the lack of meaningful analysis enables the Courts to interfere arbitrarily without limits on their own decision making.

The best approach in all cases would be to consider the purpose of the enabling legislation, and to interpret the by-law and the scope of the zoning power in the context of that purpose. The zoning power is intended to prevent nuisance and physical interference with the land and ensure that uses are physically compatible. For example, in order to accomplish this, in the case of *Planning Act,*[50] the Ontario Legislature granted authority in the *Planning Act* to regulate through zoning such matters as uses, densities, servicing and frontages on highways. At a minimum, the Court should look at the zoning power in that context and relate its interpretation to those kinds of zoning and planning considerations.

An example of this type of analysis is found in *Village of Euclid v. Ambler Realty Company*[51], the seminal case on zoning power in the United States. The United States Supreme Court, after examining the nature and purpose of the legislation, upheld the constitutionality of a by-law dividing the municipality into various uses and density districts, against an attack which argued that the by-law deprived the respondents of property, without due process of law and deprived them of equal protection under the law. The Court concluded, in part, that the by-law was passed for the public welfare — that is to prevent

49. (1980), 9 M.P.L.R. 117, 10 O.M.B.R. 38 (O.M.B.).

50. S.O. 1983 c. 1, s. 34.

51. 272 U.S. 365 (1926) (U.S.S.C.).

nuisances. The Court saw that the provisions were for the purpose of safety, as well, and that regulations regarding light and space could prevent fire. The test appeared to be whether the regulation bears a rational relationship to the health and safety of the community. Did the by-laws assist the extinguishing of fires, make streets safer for children, facilitate the repairing of streets, reduce noise or prevent accidents? These seemed to be the physical matters which concerned the Court and related to matters of the physical use of the land.

III. LESSONS FOR INTERPRETING THE *CHARTER*

Section 15 (1) of the *Charter* is Canada's constitutionally entrenched guarantee to be free from discrimination. To make this guarantee as effective and encompassing as possible, it is important to use whatever sources possible, including the judicial approach to discrimination and municipal by-laws, to assist in that goal.

While the analysis used in municipal by-laws may be helpful in interpreting Section 15 (1) of the *Charter*, perhaps the best lesson that can be learned from the discussion of discrimination and municipal by-laws, is what to avoid. In fact, it should be stated that the judicial reasoning used in determining whether legislation offends Section 15 (1) of the *Charter* should be incorporated into the judicial analysis involving discriminatory by-laws. This is especially important, for it appears that certain common law rights, for example, the right to use and enjoy our property, may not be protected under the *Charter*, and if the Courts are to maintain their historic role in protecting individual rights, whether property or otherwise, it is more important now to have reasoned judicial analysis in striking down discriminatory by-laws. One source of analysis that may be useful in determining if a by-law is discriminatory is the reasoning used by the Courts in determining if legislation offends Section 15 (1) of the *Charter*.

Section 15 (1) of the *Charter* provides:

> *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

While it is unlikely that Section 15 (1) of the *Charter* will have a great impact on by-laws that relate to the use or enjoyment of property, the analysis used in determining if legislation offends Section 15 (1) of the *Charter* may be useful in developing a reasoned rational basis test for determining if by-laws discriminate or merely classify on the basis of rational distinctions.

The determination of whether a particular piece of legislation offends the *Charter* involves a two step analysis. The first step of the analysis involves determining the purpose of the constitutional guarantee which is to be ascertained by analyzing the interests it was

meant to protect.[52] Having determined the purpose of the constitutional guarantee, the court then considers whether the purpose and effect of the challenged legislation offends that guarantee. If the party challenging the legislation satisfies the onus of proving that the legislation does offend the guaranteed right or freedom in question, the Court then turns to the second step of the analysis which involves a consideration of Section 1 of the *Charter*.

Under Section 1 of the *Charter* the government must justify the legislation that has been found to contravene a guaranteed right on freedom. The analysis under Section 1 of the *Charter* in turn involves a two-step analysis.

Firstly, the government must prove on the balance of probabilities that the objective of the legislation is sufficiently important to warrant overriding a constitutionally protected right or freedom. If the government proves that the objective is sufficiently important, then in the second step of the analysis, a form of proportionality test is considered. This involves a three-step analysis:

1. The measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective;

2. The means even if rationally connected to the objective should impair as little as possible the right or freedom in question; and

3. There must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom and the objective which has been identified as of "sufficient importance."[53]

This approach was used in the case of *Andrews v. Law Society of British Columbia*,[54] where Mr. Justice MacIntyre, whose analysis in this respect was concurred with by the majority of the Supreme Court of Canada, firstly, defined discrimination:

> *I would say then that discrimination may be described as a distinction, whether intentional or not based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.*

Justice MacIntyre, speaking with respect to the words "without discrimination" as found in Section 15, stated:

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52. *R.* v. *Big M Drug Mart Ltd.* (1985) 1 S.C.R.295 at 344.

53. *R.* v. *Oaks* [1986] 1 S.C.R. 103 at 138-139.

54. [1989] 2 W.W.R. 289 at 312 (S.C.C.), MacIntyre J.

> *these words require more than a mere finding of distinction between the treatment of groups or individuals. Those words are a form of qualifier built into section 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage."*[55]

And further Justice MacIntyre then determined the role and purpose of s.15(1) of the *Charter*:[56]

> *In assessing whether a complainant's rights have been infringed under section 15 (1) it is not enough to focus only on the alleged ground of discrimination to decide whether or not it is a enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to section 15 (1) which goes beyond a mere recognition of a legal distinction. Complainant under section 15 (1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in a protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.*

Justice MacIntyre then turned to the question of whether the purpose and effect of the legislation in question contravened Section 15 (1) of the *Charter* and found that it did.[57] Having found that the legislation in question was discriminatory, the next issue to be resolved was whether the legislation was justifiable under Section 1 of the *Charter*. The majority found it was not.

The analysis used by the Courts in determining whether legislation offends Section 15 (1) of the *Charter* may be useful in determining whether or not municipal by-laws are discriminatory.

The first step of the inquiry would involve a judicial determination of what discrimination is, what evils the doctrine of discrimination was designed to protect against, for example, unequal treatment with respect to the property or business interests of an individual on the basis of religion, and then finally whether the purpose or effect of the by-law in question classifies in a way that offends the interests that the doctrine of discrimination is designed to protect. In essence, this would require the Courts to examine the objectives of the enabling legislation, the by-law, whether the means adopted by the by-law were rationally connected to both of these objectives, and whether the classification involved was "proportional" considering the importance of the objectives.

Rather than focusing on the literal interpretation of the enabling legislation, for in most situations the enabling legislation could be interpreted to provide authority for the municipal action, and determining whether such sub-classification or discrimination is

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55. *Ibid*. at 313.

56. *Ibid*. at 314.

57. *Ibid*. at 314-15.

specifically authorized, the Court should inquire if there are classifications or distinctions drawn, and if so, then determine if there is a rational and reasonable basis for this classification. If so, then the by-law is not discriminatory, and the doctrine of discrimination does not apply to strike the by-law down unless the by-law fails the "proportionality" test. Such an analysis necessarily involves an inquiry into the policy of both the enabling legislation and the by-law, and although it is conceded that the judicial mandate when reviewing by-laws is narrower than the mandate for reviewing the constitutionality of legislation, explicitly doing what has been implicitly done can only result in clear and well-reasoned directions on how to utilize the doctrine of discrimination and municipal by-laws. Such an approach can only lead to better and fairer municipal law-making, the result being that all constituents, and not just particular individuals of the municipality, are treated in a fairer manner by municipal governments.

IV. CONCLUSION

Our society, governments and legislators are becoming increasingly concerned with all forms of discrimination, as evidenced by the enactment of provincial human rights legislation, the federal government's Bill of Rights and recently the *Canadian Charter of Rights and Freedoms*. Within this context, our governments, lawyers and the judiciary are seeking to define what discrimination is, and how to combat it. To effectively do this, the hardest task facing anyone involved in the issue of discrimination is to determine and analyze what discrimination is. Any attempt at classifying discriminatory legislation, whether it be federal, provincial or municipal, will depend on how discrimination is determined.

Absent a clear analysis of discrimination which includes how and when it is to be found, judicial decisions striking down legislation as discriminatory can only unduly hamper our legislative bodies. Case by case decisions which merely strike down legislation as discriminatory, without any consistency of legal reasoning, do not in any way assist societal goals in eliminating discrimination. This was one of the fears constantly expressed with respect to Section 15(1) of the *Charter* and is still of major concern today. In developing an analysis to interpret the *Charter* generally, and Section 15(1) specifically, our courts have been careful to avoid irrational and inconsistent approaches to the various rights and guarantees found in the *Charter*. This approach is to be applauded and, moreover, emulated when discrimination and municipal by-laws are considered.