MANITOBA

LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

REPORT

ON

"THE CITY OF WINNIPEG ACT"

S.M. 1971, Cap. 105

Report # 7

January 24, 1972

The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

The Commissioners are:

Francis C. Muldoon, Q.C., *chairman*

R. Dale Gibson

C. Myrna Bowman

Robert G. Smethurst, Q.C.

Val Werier

Sybil Shack

Kenneth R. Hanly

Professor John M. Sharp is Chief Research Officer to the Commission. The Secretary of the Commission is Miss Suzanne Pelletier.

The Commission offices are located at 331 Law Courts Building, Winnipeg, Manitoba R3C 0V8.

TABLE OF CONTENTS

MANITOBA

LAW REFORM COMMISSION
COMMISSION DE RÉFORME DU DROIT

INTRODUCTION

The subject of this Report is the administrative, entry and licensing powers conferred by "The City of Winnipeg Act" upon that municipal corporation, its agents, officers and employees. On July 26th, 1971, the Honourable the Attorney-General wrote, requesting this Commission to examine "the statutes that I have referred to as well as all other public statutes, with a view to deciding whether or not the provision for administrative powers as contained in the various statutes are reasonable, giving due consideration to the question of reasonable safeguards for the rights and civil liberties of individuals while ensuring the public interest by reasonable safeguards to ensure compliance with the law." (The statutes specifically referred to by the Hon. the Attorney-General were "The Consumer Protection Act" and "The Personal Investigation Act" of 1971; these and a number of others contained provisions creating certain investigative powers and administrative powers related thereto. In addition, reference was made to "The City of Winnipeg Act"* and the administrative and licensing powers created by that Act.)

We note that the Commission had, previously and independently of the Attorney-General's request, resolved to conduct a study of administrative procedure, and Prof. Bernard Nepon has been appointed Project Director to conduct this study. Had there been no urgency in our examination of those statutes specifically referred to by the Attorney-General, we would have asked Prof. Nepon, in his comprehensive study of administrative procedures, to give special attention to these references in his research for the Commission. Exigencies of time, however, deny us the benefit of a comprehensive and comparative study of the subject matter of this report side by side with the other topics to be dealt with by Prof. Nepon; instead, the element of urgency for obvious reasons present in the request of the Attorney-General, render imperative this present report. In submitting this report we emphasize that it is not the intention of the Commission that this Report be regarded either as a comprehensive survey of administrative procedures in municipal law or as a substitute for the ultimate Report to be made on the whole field of administrative procedures.

We considered "The City of Winnipeg Act" on a section-by-section programme in which each Commissioner considered parts of the Act and reported to the whole Commission over the span of several fortnightly meetings. Our basic premise in considering the various provisions of the Act has been: Is the specific power,

right or immunity actually necessary for the proper functioning of the City in the interest of all or most of its inhabitants; or is it arbitrary, sweeping or excessive merely to promote administrative convenience at the expense of the people? One so-called justification for the seeking of sweeping and arbitrary powers is, of course, that the seeker would never abuse them and indeed, might only rarely ever use them. However, when the Legislature doles out powers, rights and immunities in that manner, it intends them to be used; otherwise they would be expressed in and with words of limitation. Moreover, in the nature of human institutions, where convenient power is accorded it will be fully wielded and not restrained, because the wielder always rightly attributes the responsibility, not to himself, but to the Legislature which invented and conferred the power. It would be naive to assume that those on whom power is conferred will never be sour, arbitrary, punitive or churlish in inflicting their powers on the ignorant, the eccentric, the inarticulate, or the poor. We therefore approach the task with this conscious and freely confessed bias: We have to be positively convinced that the administrative powers of licensing and entry are apt in the public interest which includes safeguards for the rights and civil liberties of individuals. We make special reference to the research and reports of the Royal Commission of Inquiry Into Civil Rights,[1] of Ontario (the McRuer Commission), which reported these matters, among many others. In this report we have endeavoured to examine "The City of Winnipeg Act" referred to the Commission in comparison with the premises and principles set out above and hereafter.

*Printed version, as amended, obtained for distribution to Commissioners at meeting of September 8, 1971.

[1] **Royal Commission of Inquiry Into Civil Rights,** Report 1, Vol. 3, Part III, Section 2 "Licensing," p. 1094. (Referred to in this Report as the McRuer Report.)

LICENSING POWERS

Mr. Justice Rand of the Supreme Court of Canada, in **Roncarelli v. Duplessis**[2] stated that:

> The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulations would be free and legitimate, should be conducted with complete impartiality and integrity; and that the ground for refusing or cancelling a permit should unquestionably be such and such only as are incompatible (sic) with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the discretion of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

The tenor of this passage is echoed by the relevant part of the McRuer report 3 which stresses both the impartiality and integrity of any body which may be entrusted with licensing functions; the integrity referred to in this context is that which stems from compatibility with the purposes envisaged by the statute.

The McRuer report set out a number of recommendations which are regarded as being necessary to that integrity needed to preserve the purposes of the statute and at the same time to safeguard the civil rights of the individual. These may be summarized as follows:

a) That licensing requirements should not be unnecessarily imposed nor should unreasonable standards be required in their implementation.

b) That all powers which naturally relate to licensing, such as the power to revoke or suspend. should be stated expressly in the legislation conferring the power so that those affected by the exercise of the power may be under no doubt as to their right and potential liabilities. Such powers should not be left to implication. In other words, great care should be taken to express the intention of the legislation with clarity and that any uncertain language should be eschewed.

c) That if a large measure of discretion, is intended to be vested in a licensing tribunal, safeguards surrounding the exercise of this discretion should be established in that at least some guidelines may be referred to. The McRuer Commission takes the example of the Civil Aviation (Licensing) Act 1960 of the United Kingdom. That Act provides that the air transport licensing board "may at their discretion...either refuse the application or grant the applicant an air service license..." and that "in exercising their function under this section, the Board shall consider in particular..." and there follow a number of guidelines. In this way a completely discretionary, completely subjective application of licensing rules may be avoided.

d) That the power to limit the number of licences issued should only be conferred when accompanied by adequate safeguards for the rights of the individual. The Royal Commission recommends that "if the number of licences for taxicabs or restaurants or other facilities serving the public is to be limited in any community, the principle or the formula for fixing the number should

2(1959) **S.C.R.** 121, 140.

3McRuer Report, **op. cit.,** p. 1094.

be determined by legislation publicly debated and passed by the elected representatives of the people."

e) That subordinate legislative power in the licensing field conferring monopolistic privileges affecting the rights of the community as a whole should be exercised by an elected body or, if this is not possible, by a body directly accountable to an elected body, such as the Lieutenant-Governor-in-Council. The Royal Commission further comments that "apart from licenses issued for the purpose of collecting revenue and maintaining records, the only justification for a licensing scheme is the promotion of the public interest in good service, safety, health, and in some cases, the economic welfare of the licensees. Generally speaking, there can be no justification for a scheme of licensing which creates a franchise with a marketable value for the licensee. It may be that this is a necessary consequence in some cases, but the public interest demands that adequate safeguards be provided against public and private exploitation." It is therefore further recommended that where a limitation is put on the number of, for example, taxi-cab licences, the licensing tribunal should maintain a list of applicants for licences available for public inspection. When the holder of a licence no longer wishes to use it, he should return it to the tribunal and a new licence should be issued to the person qualified and entitled to it whose application has been on file with the licensing tribunal for the longest period of time.

f) That the proceedings of licensing tribunals should be conducted in substantially the same manner as those of judicial tribunals. The task of investigating complaints and making presentations to the tribunal should not be performed by members of the tribunal.

g) That power to issue licences may properly be delegated by a licensing tribunal to one or more qualified officials, but that the power to revoke a licence is quite a different matter from the issuing of one and that officials should not have the power to refuse, suspend or revoke a licence. (The only exception approved by the Royal Commission within Ontario is that under the Municipal Act[4] a chief constable of a municipality, where a board of commissioners of police is the licensing tribunal, may suspend a licence in certain circumstances for a time no longer than "the expiration of two weeks from the date of suspension or after the time of the next meeting of the board after the suspension, whichever occurs first.")

These are the recommendations of the McRuer Commission on licensing powers. That Commission then proceeds to make a number of recommendations in regard to safeguards on the exercise of licensing powers, and these include the following:

a) That no hearing should be required where a licence is issued in the first instance.

b) That if the issuing officer considers that there are grounds for rejection, the licensing tribunal should hold a hearing and give the applicant the opportunity to fully present his case.

c) That the applicant should be provided with sufficient information in order that he may meet the case against him and the hearing should comply with the provision of the Statutory Powers Procedure Act (Ontario). (N.B. there is no equivalent Statutory Powers Procedure Act in Manitoba.)

4R.S.O. 1960, c. 249, s. 247(7) (8).

d) That provision for notice of revocation or suspension proceedings should be in all licensing laws unless there are very exceptional circumstances when public health, safety or emergency are involved.

e) That the notice should set out briefly the grounds on which it is alleged the licence should be revoked or suspended and, where possible, a summary of the evidence that it is proposed to submit to the tribunal.

f) That evidence, if not supplied to the licensee with the notice, should be made available for his inspection prior to the hearing.

g) The onus should not be placed on the licensee to show cause why his licence should not be suspended or revoked.

h) That the Statutory Powers Procedure Act (Ontario) should apply to most licensing proceedings to correct procedural deficiencies in the licensing laws, particularly with respect to:

i) notice of hearing
ii) notice of case to be met
iii) right to counsel, and
iv) reasons for decision

(As noted above, there is no Act in Manitoba equivalent to the Ontario Statutory Powers Procedure Act; if the project being conducted under the supervision of Prof. Nepon leads to the enactment of a similar Act, it would seem to be advisable that the contents of such Act might be equally applied to licensing proceedings in Manitoba.)

i) That the minimum rules applicable to judicial tribunals should be applicable to the proceedings of all licensing tribunals except where a licence is granted on an initial application and where, for reasons of public safety, health or emergency, immediate action is required.

j) That additional rules governing judicial tribunals should apply to licensing tribunals where appropriate. The additional rules are:

i) decisions should be based on the records;
ii) no consultations after the hearing in the absence of affected parties;
iii) the deciding members of the tribunal should be present at the hearing;
iv) all evidence should be recorded.

k) That there should be statutory rights of appeal from licensing decisions and procedural provisions with regard thereto.

l) That where a licensing tribunal is required to base its decision on the record before it, an appeal should lie to the Manitoba Court of Appeal on all questions of *ultra vires* and on all questions of fact or law disclosed in the record.

m) That on the appeal the court should have power to make the order that the licensing tribunal should have made or to refer the matter back to the licensing tribunal for a re-hearing.

n) That where a tribunal is not required to base its decision solely on the record before it, an appeal should lie to an appropriate superior tribunal.

o) That on the appeal the appellate tribunal should have the same powers as the licensing tribunals and power to make such order as the licensing tribunal might make.

p) That in appropriate cases an appeal should lie by way of stated case to the Manitoba Court of Appeal on questions of law.

q) That there should be a right for appeal from suspension of licences.

The preceding recommendations are, substantially, those advocated by the McRuer Report.

Comments on Certain Licensing Provisions

The major licensing powers conferred by the City of Winnipeg Act are to be made in Part XVII (Sections 521 to 532) of the Act. The following sections are drawn to the attention of the reader:

> **Exceptions to limitations in subsection (1).**
>
> **523 (2)** None of the following shall be regarded as being within any of the classes of trades enumerated in clauses (a) to (f) of subsection (1) hereof
>
> (a) any trade or process liable, in the opinion of the council, to be dangerous, injurious or offensive;

523 (2) (a) re-iterates the City's power to regulate, control and license the carrying on of any trade or process as described. The City ought to have the power to protect the people from dangers, but the provision is too broadly drawn. Does this provision mean dangerous, injurious or offensive to health? to morals? to good taste? to artistic sensibility? to property or civil rights? As stated in item b) on page 7 of this Report: "Such powers should not be left to implication."

-523 (2) (a) should be clarified so as to limit, and to specify, the extent of the powers which the Legislature intends the City to have over, and on behalf of, its inhabitants in relation to the described trades or processes.

> **Exceptions to limitations in subsection (1)**
>
> **523 (2)** None of the following shall be regarded as being within any of the classes of trades enumerated in clauses (a) to (f) of subsection (1) hereof
>
> (p) the sale of goods by public outcry, including selling, exposing for sale or soliciting purchasers by means of audible solicitation addressed collectively to a group of three or more persons assembled for that purpose.

523 (2) (p) re-iterates the City's power to regulate, control and license the carrying on of the sale of goods by public outcry, as described. This provision seems to involve a misuse of language, in referring to sale of goods by "public outcry." According to the Shorter Oxford Dictionary the word "outcry" became obsolete in approximately 1600, and furthermore it meant, before it became obsolete, a sale by auction. It seems that this is not the intention of the legislation in this provision. The stated example of what "public outcry" is deemed to include appears to define the complete intention of the provision.

-523 (2) (p) should be re-drafted to avoid the obsolete expression "public outcry", unless sale by auction be actually intended, and to specify the conduct which is truly intended.

> **Power to license or regulate includes.**
>
> **524 (1)** Without limiting the meaning of the words "license" or "regulate" as used in this Act, the power to license or to regulate shall be deemed to include the power

(e) to require the applicant for a licence to furnish to the city in such form as may be prescribed such information with respect to himself and the trade for which the licence is sought as the city shall require;

524 (1) (e) contains no suggestion that the City's request should have to be reasonable or pertinent. As stated in item a) on page 7 of this Report, licensing requirements should not be unreasonable or unnecessary, to which we might add that legislation should not permit the City's Council or functionaries to be capricious with applicants. This provision should speak of "such *pertinent* information...as the City shall *reasonably* require." This power is stated in such absolute terms that a court might decline to interfere even with an unreasonable exercise of power. This observation applies to item (k) too.

-524 (1) (e) and (k) should oblige the applicant or licensee to provide only such pertinent information as the City may reasonably require or reasonably prescribe.

Power to license or regulate includes.

524 (1) Without limiting the meaning of the words "license" or "regulate" as used in this Act, the power to license or to regulate shall be deemed to include the power

(m) to revoke or suspend or provide for the revocation or suspension of licences on the ground that the licensee is carrying on his trade in an improper manner or on such other grounds as may be specified and to delegate to a committee of the council or officer of the city or the chief of police the duty of determining whether such grounds exist in any particular case;

524 (1) (m) is expressing the ground "that the licensee is carrying on his trade in an improper manner" is so subjective that it could generate abuses. This part of the Act (Part XVII) does not require the giving of notice by the City, committee, City officer or police chief. As stated in item d) on page 9 of this Report, the law should always specifically provide for reasonable notice of revocation or suspension proceedings unless there are very exceptional circumstances involving public health, safety or an emergency. The other observations relating to licence suspension or revocation expressed on pages 8 and 9 above are strongly recommended in this regard.

-524 (1) (m) should be re-drafted, or a supplementary provision should be enacted to require the City to exercise its licence suspension and revocation powers according to basic rules of natural justice as described on pages 8 to 10 of this Report.

Power to license or regulate includes.

524 (1) Without limiting the meaning of the words "license" or "regulate" as used in this Act, the power to license or to regulate shall be deemed to include the power

(n) after the licence issued to a person to carry on a trade has been cancelled, to prohibit the issue to such person during the current licence year of a new licence for the same trade or in respect of the same premises;

524 (1) (n) also gives the City a wide power to put out of business for the balance of a current licence year, a licensee whose licence has been cancelled. It is not clear whether cancellation includes both suspension and revocation. This provision is too ambiguous, and therefore, it seems to be too punitive. In according this power, the Legislature should formulate reasons, circumstances or limitations under which it can be exercised.

-524 (1) (n) should be re-drafted or a supplementary provision should be enacted, imposing on the City strict guidelines within which it may exercise the power to prohibit a person from obtaining a new licence during the current year after suspension or revocation of a licence to carry on the same trade on the same premises.

Power to license or regulate includes.

524 (1) Without limiting the meaning of the words "license" or "regulate" as used in this Act, the power to license or to regulate shall be deemed to include the power

(s) to prevent the issuing of licences to females, or minors under a specified age, or their employment by a licensee in the trade licensed or regulated;

524 (1) (s) is, in this non-paternalistic era of gender equality, in a word, discriminatory. Indeed, if it were not enacted by the Legislature, it could be struck down under *The Human Rights Act*. Why should the City have the power to prevent the issuing of licences to females, or to prevent their employment in a licensed trade? As to minors, Sec. 129 (3) of *The Child Welfare Act* deals with the subject, and there the Legislature is much more precise in stating reasonable guidelines.

-524(1) (s) should be repealed.

Power to license or regulate includes.

524 (1) Without limiting the meaning of the words "license" or "regulate" as used in this Act, the power to license or to regulate shall be deemed to include the power

(v) to provide that any billiard, pool or bagatelle table, bowling alley, or other amusement device, had or kept in a house of public entertainment or resort,whether used or not, shall be deemed to be kept for gain, and to provide that any such table, alley or device, or any rink, court or place used for amusement, had or kept for the use of its members by any club, whether incorporated or not, or by any corporation created by letters patent pursuant to The Companies Act, shall be deemed to be kept for gain; provided, however, that the council shall exempt from compliance with any by-law licensing or regulating the keeping of such tables, alleys, rinks, courts, places or devices, any club which the council is satisfied is not a proprietary club;

524 (1) (v) employs the expression "proprietary club" which is so succinct as to be unclear. The expression ought to be defined in Part XVII or elsewhere in the Act.

-524 (1) (v) ought to have reference to some other provision of the Act in which "proprietary club" is defined.

Power to license or regulate includes.

524 (1) Without limiting the meaning of the words "license" or "regulate" as used in this Act, the power to license or to regulate shall be deemed to include the power

(aa) to authorize the supervisor of building inspections, health officer, inspector of licences or other officer of the city, or any of their respective assistants, or a police officer, at all reasonable times to enter and inspect premises wherein any trade subject to licence is being carried on;

524 (1) (aa) impinges on both licensing and entry powers. In its favour, we note that it does restrict the *crowd* of people who may be authorized and enter and inspect to do so only at "all reasonable times." But, if "the premises wherein any trade subject to licence is being carried on" be a dwelling or part of a dwelling to which the public are not invited, then a warrant should be obtained and issued only upon pursuasive proof that entry and inspection are necessary without prior notice to the licensee.

-524 (1) (aa) should be amended to restrict the power to enter and inspect without warrant to premises to which the public is invited and in any event, which are not dwellings. Power of entry and inspection of dwelling premises, when necessary, ought to be exercised only after the application for, and issuance of a warrant by a judicial authority, if permission to enter and inspect be declined.

Licensing and inspecting vendors of milk.

447 (1) Subject to The Public Health Act, the city may pass by-laws

(a) for licensing, inspecting and regulating vendors of milk or cream;
(b) for inspecting cows and regulating their keeping;
(c) for inspecting and regulating the stables and enclosures wherein are kept the cows from which milk or cream is obtained for sale or use in the city, whether such stable or enclosures or such cows are situated or kept within the city or not;
(d) for inspecting and regulating the keeping and methods of carriage of such milk or cream;
(e) for providing for the inspection of cattle brought into the city for sale or otherwise;
(f) for providing that such cattle shall be taken to a designated place or places in the city for such inspection, and that immediate notice of the arrival of such cattle shall be given to the veterinary inspector;
(g) for providing that if such cattle be found to be diseased or unfit for human food they may be forthwith destroyed by the city; and
(h) for cancelling or revoking of any licence.

Regulation of production, sale, etc., of milk.

447 (3) The city shall have power

(a) to prescribe, for sanitary and other health reasons, the manner and conditions of the production, processing, purchasing, handling, delivery, keeping for sale, selling and distribution of milk, including the condition that cows which are positive reactors to a tuberculin test shall not be used in the production of milk, except under circumstances to be prescribed by by-law;

(b) to prescribe, for sanitary and other health reasons, the terms and conditions upon which milk may be received, handled, purchased, stored, delivered, supplied, processed, kept for sale or sold;

(c) to classify, for sanitary and other health reasons, milk producers and distributors or any other person engaged in the milk industry;

(d) to require persons who supply, distribute, process, keep for sale or sell milk, to furnish to the health officer of the city such information as he may from time to time require.

Scope of regulations made under this section.

447 (4) Any regulations made under the authority of this section shall be applicable both within and without the city and may be general in their application or may be limited to any person or classes of persons.

447 provides for the licensing and inspecting of milk vendors and so, is appropriately considered along with the above sections. This section is of wide application as may be seen from subsection (4) which accords the City jurisdiction beyond its own territory. Under subsection (1) (h) the City may pass by-laws for cancelling or revoking any licence. Cancellation or revocation being the ultimate, the expression undoubtedly includes the intermediate step of suspension. Suspension of licence ought to be specifically included because lack of specific inclusion would lead to needless proceedings. It is desirable that the Legislature itself prescribe by statute procedures to protect civil rights, rather than confer the naked power of cancellation to the City. This provision does not express any requirements for notice of hearing. It does not require the health officer to demand only *reasonable* and *pertinent* information and it should assert that requirement.

447 (1) (h) ought to specify the suspending of licence in addition to cancelling and revoking. The City should be required, in such cases:

(i) to give reasonable written notice of revocation or suspension proceedings setting out the alleged complaints and a summary of the evidence to be called in support of the proceedings;

(ii) to submit to a hearing of its evidence and allegations with the burden of showing cause for revocation or suspension being borne by the party who alleges that one or other action ought to be imposed;

(iii) where protection of public health and safety seem reasonably so to require, to obtain only a temporary suspension and at the same time give notice of hearing, which hearing should be held within a reasonable time prescribed by statute.

447 (3) (d) should be amended to authorize the health officer to demand only **reasonable** *and* **pertinent** *information.*

Appeal from cancellation of licence.

524 (2) Every person whose licence is cancelled or who is refused a licence, as the result of a decision or recommendation of an officer of the city or of the chief of police, shall have the right to appeal within seven days to a county court judge, who shall have power to confirm the cancellation or reinstate or order the issue of the licence.

S.M. 1971, c. 105, s. 524.

524 (2) provides an appeal procedure which would be even better, if more specific guidelines, as suggested herein, were enacted for the guidance of the appeal court judge, as well as applicants, licensees and City licence administrators. Unless "cancelled" is defined to import both suspension and revocation, then there ought to be a right of appeal from a suspension of licence. Although it may seem to be administratively cumbersome, licences ordinarily ought not to be refused, revoked or suspended except after a hearing by some constituted tribunal, as stated in items b) to q) of pages 8 to 10 of this Report. Although provision of an appeal to a County Court judge is at variance with the premises expressed in items 1) and p) above cited, the legislative policy of this provision cannot be criticized so long as the court be vested with the recommended powers. (Some tribunals may resent the power of a sole judge to overrule a multi-member tribunal.) The time given for launching an appeal (7 days) is not generous and ought to be extended in the public interest.

-524 (2) should provide that the right of appeal should arise upon suspension of a licence in addition to cancellation of revocation.

There should be rights of appeal from procedural provisions where the appellant alleges that the procedures followed or invoked have prejudiced his presentation or development of his case. In such event and in addtion to the other salutary powers conferred on the appellate court, it should have power to refer the matter back to the licensing tribunal for a re-hearing.

Where the dispute of the aggrieved applicant or licensee with the disposition of his case involves only a question of law, an appeal should lie by way of a stated case directly to the Manitoba Court of Appeal.

Time for appeal ought to be extended longer than the presently provided seven days.

POWERS OF ENTRY, INSPECTION AND SEARCH

It is appropriate that the City of Winnipeg should have powers of entry, inspection and search, to be exercisable by authorized persons. This premise, then, ought to be examined from the viewpoints of the reasons and necessities for the exercise of such powers, and the differentiation of types of premises exigible to entry and the times at which entry is permitted. It should never be legally possible to exercise such powers capriciously. This is a matter of some gravity, as all human history amply shows. The personal rights of the individual may be affected by powers of entry, inspection and search.

The personal rights of the individual most likely to be affected by the exercise of investigatory powers include those such as property rights, any rights to privacy and the right to be left alone, and the right to keep one's information and ideas to one's self. As pointed out by the McRuer Report, however, these rights are not absolute. It is true that the creation of any investigatory power will automatically cause a diminution of the rights of the individual; sometimes this diminution is justified and it seems generally accepted that investigative powers are not evil per se. It is, rather, any **unjustifiable** encroachment upon the rights of the individual which must be guarded against. Among those recommendations made by the McRuer Report, are those that any arbitrary powers of investigation ought not be conferred in any statute, and that where powers of investigation are conferred, these should be subject to prerequisites which must be satisfied before an investigation can be validly commenced. Furthermore, any such conditions precedent should be expressed with precision and, wherever possible, they should be drawn in objective form.

The merits of demanding objective prerequisite conditions to the exercise of entry and search powers are clear. The basic validity of the need for an investigation would then have to be supported by facts capable of objective verification. Moreover the real substance of the prerequisite conditions would be open to judicial review. Contrariwise a prerequisite couched in subjective terms would be subject only to a very limited review, for example, to discover bias or bad faith.

Just as the desirability of objective prerequisites may be recommended in order to justify the exercise of a power of investigation at all, some precision should be employed in the definition of the basic purpose of a given investigation. As was remarked in the McRuer Report[5] **"there can be no dissent from the proposition that the express scope of an investigation should not be wider than is necessary to implement the policy of the Act conferring the power. The expression, 'for the purpose of carrying out this Act', is very comprehensive and in many cases too comprehensive. Care should be exercised not to use such broad language if more restrictive language would be sufficient."**

One of the matters which appears to have afforded some concern to the authors of the McRuer Report is that of powers of search and seizure. Their concern is not the first expression of such concern. A number of eminent legal writers have recognized the fact that the individual is today very much more vulnerable to invasions of his civil rights than at previous times. This was described by Sir Alfred Denning (as he then was) who pointed out that

> "Enforcement officers of the Ministry of Food may enter shop premises, inspect all the goods in it, require the shopkeeper to produce his books and so forth. Factory inspectors, sanitary inspectors, town planning officers may all enter all kinds of premises for their various purposes.

5McRuer, **op. cit.,** Vol. 1, p. 394

> Officials of the Ministry of Supply may enter your house to see if you are doing research into atomic energy. Officials of the Agricultural Executive Committee may come unto your land to see if you are farming it properly.
>
> The granting of these powers of entry is a complete departure from the principles hitherto enforced in England. The powers conferred on these officers are greater than those conferred on the police. It is not necessary for these officers, as it is for the police, to go to a magistrate and satisfy him that a search should be allowed. It is not necessary for them to show reasonable grounds for thinking that an offence has been committed. It is not necessary for them to hold a specific authority in respect of specified premises."[6]

The type of regulatory and administrative provisions commented on by Sir Alfred Denning are the subject of comment by the McRuer Report, which points out that this type of provision, which is very common in regulatory statutes, often confers the power to enter at any time without the necessity of obtaining permission (as in the case of obtaining search warrants) or without any other legal prerequisite such as the requirement of reasonable belief that the statute is not being complied with. The attitude of the McRuer Report towards this type of power is that "when legislation is drawn which is intended to give the power of entry to premises, the power should be stated in clear terms so that when it comes before the members of the legislature they will know what they are voting on."[7] Both Sir Alfred Denning and the McRuer Commission are even more vigilant when considering a possible power of entry and search of a private dwelling. Whereas they are both willing to allow a power of entry and search of business or other non-private dwelling premises subject to certain conditions, both are strong in their views that any power of entry and search of a private dwelling should be granted only subject to judicial authority. Also, the conditions authorizing seizure, as opposed to mere entry and inspection, are more strictly viewed by the McRuer Report:

> "The condition authorizing seizure should be more stringent than those empowering an investigator or inspector to enter property or inspect documents. We can see no valid reason for departing from the principles applicable to search warrants where seizure is anticipated. The power to seize property should be conditioned on there being reasonable grounds for believing that the property is something upon or in respect of which an offence against the statute in question has been or is suspected to have been committed or that it will afford evidence as to the commission of such an offence. The power arbitrarily to dispossess a person of his property ought not to be given."[8]

The recommendations of the McRuer Report relating to the whole topic of powers of search and seizure may be summarized as follows:

a) That legislation which is intended to give power to enter, search and seize property should so state in clear and unambiguous language.

b) That unless the purpose of the statute would be frustrated, judicial authority should be a condition precedent to the exercise of the power of entry and search.

6Denning, Alfred Thompson. **Freedom Under the Law** (1949), Stevens, London, p. 107

7McRuer, **op. cit.**, p. 411

8**Ibid.**, p. 419.

c) That judicial authority should always be a condition precedent to the right of entry and search of a private dwelling.

d) That where a stature is penal, as opposed to regulatory, strict rules with regard to search and seizure should be followed.

e) That where judicial authority to search and seize is required, guidelines should be laid down to direct the judicial authority; e.g. "reasonable grounds to believe...". Individuals should not be exposed to capricious and vexatious searches without recourse to the civil courts.

f) Where the power of search and seizure requires judicial authority, the applicant should be required to show:

   i) some facts to justify the exercise of the power;

   ii) The place to be searched; and

   iii) Some reason to believe that the relevant material may be found in the place to be searched.

g) That every statute authorizing a right of search should provide that the search be exercised during the day, unless otherwise ordered by judicial authority.

h) That the power to seize property should be conditioned on there being reasonable grounds for believing that it is something in respect of which an offence against the statute in question has been or is suspected to have been committed, or that it will afford evidence as to the commission of an offence.

i) That where it is necessary for documents to be examined away from their usual location, statutory provisions should be made that certified copies be admitted as *prima facie* evidence in any prosecution or matter arising under the relevant statute.

j) That no power should be given to any tribunal to investigate "where it deems it expedient" or to any person to seize property where "he deems it expedient."

It may be finally remarked that any powers to stop, detain, or search the person are regarded with considerable caution by the authors of the McRuer Report. It is there suggested, in particular, that discretionary powers to stop and detain should be abolished except in cases involving public safety or public health. It is further recommended that in all other cases they should be conditioned on reasonable grounds for belief that the statute in question is being violated. With particular reference to any power to search the person, the McRuer Report includes a strong recommendation that such power should not be conferred under provincial law. "The power is out of all proportion to the seriousness of provincial offences."[9]

Comments on Certain Entry, Inspection and Search Provisions

The following sections of the City of Winnipeg Act are noted:

> **Right of entry for survey and examination.**
>
> **145 (1)** The city has, subject to liability for damages occasioned by the exercise of its power, the right, with or without the consent of the owner to enter into and upon land and make such surveys, examinations, and other arrangements, as are necessary for locating and setting out the site of the works and the boundaries thereof.

145 (1) gives the City, with or without the owner's consent the right of entry onto land to make surveys. The purpose of the entry, and the City's liability for damages, are properly stated and provided. Survey work is usually never performed on impulse or in emergency circumstances. This provision could be

9**Ibid.**, p. 419.

improved by providing for reasonable notice and (although surveying is usually not conducted after nightfall) for the "surveys, examinations and other arrangements" to be carried out at reasonable times. Where possible, unnecessary disruption of the lives and commercial activities of owners and occupiers ought to be avoided.

- 145 (1) should provide for reasonable notice to be given to the owners and occupiers, and for surveys and other work to be carried out at reasonable times.

Overhanging shrubbery.

432 The city may enter on any land for the purpose of causing any tree, shrub or sapling growing or planted on land adjacent to a street to be trimmed or removed when deemed necessary for the convenient use of the street without being liable in damages or for compensation therefor.

S.M. 1971, c. 105, s. 432.

432 is inaccurately captioned "overhanging shrubbery": it could apply to "any tree, shrub or sapling growing or planted on" (but well within) "land adjacent to a street to be trimmed or removed" for better motorist visibility at an intersection. As framed, this provision could permit the City to inflict sudden and arbitrary action on the owner or occupant.

- 432 should be amended or made subject to supplementary amendments to provide that the owner or occupant be given, in writing:

(i) the City's reasons for trimming or removing the shrubbery;

(ii) reasonable notice of the City's intended action; and

(iii) time to respond and, if justified, to prevent the City's intended action.

Some nominal, fixed award should be payable by the City if it did not comply with this procedure.

Removal of snow, etc.

433 The city may pass by-laws

(a) for compelling persons to remove all snow and ice from the roofs of the premises owned or occupied by them;

(b) for compelling owners or occupants to remove and clear away all snow, ice and dirt and other obstructions from the sidewalks and streets adjoining such premises;

(c) for compelling owners to provide for the cleaning of sidewalks and streets adjoining vacant property;

(d) for providing for removing and clearing away all snow and other obstructions from such sidewalks and streets at the expense of the owner or occupant in case of his default; and in case of non-payment, for charging such expenses as a special assessment against such premises, to be recovered in like manner as other municipal rates;

(e) to provide for the removing and clearing away of all snow, ice, dirt and other obstructions from the sidewalks and streets of the city, or in any prescribed area, and charge the expense of such removal as a special assessement against the real property in such area according to the frontage thereof, to be recovered in like manner as other municipal rates; and

(f) for providing that the city may assume a portion of the cost of the removal of snow from lanes.

S.M. 1971, c. 105, s. 433.

433 seems clear of intent, but badly imprecise of expression. For example, Article (a) permits the City to compel "persons to remove all snow and ice from the roofs of (their) premises..." but makes no reference to danger or likely harm. This section permits the City to pass by-laws for compelling people to do certain things as an ordinary, on-going matter of course. Surely such power is meant to be exercised only in cases of emergency or apprehended danger.

- 433 should be amended to specify that the compulsion may be invoked only in cases of emergency or probable danger to life, safety or property. Where the expenses charged are specifically in addition to those charged in the general rates, the circumstances in which such authorized charging of expenses could be invoked ought to be specified, such as (a) emergencies in which the City's own personnel and equipment cannot cope for a long time or (b) conditions which the owner, occupant or visitors and customers have particularly created.

Regulations for public welfare.

434 (1) The city may pass by-laws

(a) for taking a classified census of the residents of the city;

(b) for preventing or regulating noises which, in the opinion of the council, are unnecessary or may be prejudicial to the public health, either by reason of interfering to a greater or less degree with the rest or comfort of residents or otherwise;

(c) for prohibiting the pulling down or defacing of signs or other advertising devices and notices lawfully affixed;

(d) for preventing the injuring or destroying of trees or shrubs planted for shade or ornament, and the defacing of private or other property by printed or other notices;

(e) preventing, and compelling the abatement, of nuisances generally, and regulating untidy and unsightly premises;

(f) for the purpose of requiring an owner, lessee, tenant or agent of the owner to cut the grass on a boulevard which abuts or flanks a property occupied by him and providing that in the event of the failure of the owner, lessee, tenant or agent of the owner to cut the boulevard grass after reasonable notice to him to do so, the city may cut the grass and charge the cost of the work done against the property as taxes due and owing and collect it as such;

(g) providing for the removal or pruning of trees or shrubs, on private property or otherwise, that in any way interfere with or endanger the lines, poles, conduits, pipes, sewers or other works of a municipal or other public utility;

(h) for preventing cruelty to animals and preventing the destruction of birds;

(i) for preventing or regulating the firing of guns or other firearms, and the firing or setting off of fire balls, squibs, crackers or fireworks, and for prohibiting the sale within the city of fireworks to any person;

(j) for licensing and regulating the having or keeping of bicycles, but not including the having or keeping of new bicycles for sale.

Right to enter and inspect.

434 (2) Any person thereunto authorized by the council may enter any lands, buildings or premises to inspect for conditions that may constitute a nuisance or contravene or fail to comply with any by-law passed pursuant to subsection (1).

434 (2) accords power to authorized persons to enter and inspect "any lands, buildings or premises"..."for conditions that may constitute a nuisance, or contravene or fail to comply with any by-law passed pursuant to sub-section (1)." These powers are incredibly broad, and do not conform with items a) and following on pages 17 and 18 of this Report.

- 434 (2) should be amended or made subject to supplementary amendments to provide reasonable limitations of the powers, as follow:

a) the seeking of permission or the giving of reasonable notice should be required for all entry to dwellings, but cases under articles (b), (h) and (i) of subsection (1) would be excepted from the requirement of giving notice. No entry without warrant should be permitted when the owner or occupant declines to give permission or to comply with the notice;

b) where the premises are a dwelling and contravention of articles (b), (h) or (i) of subsection (1) is the case, the authorized persons should first seek permission to enter and, if refused, or if the owner or occupant will not respond, then apply for a warrant;

c) where the premises are exclusively business premises, normally open to the public, entry might be affected at any time during normal business hours;

d) where the premises are a dwelling or where inspection of business premises is to be at other than normal business hours, authorized persons, in resorting to an application for a warrant should be bound to show or describe reasonable and probable cause to believe that a breach of the section has occurred.

The words "constitute a nuisance or" should be deleted because they import a far too subjective and extraneous ground for entry.

Additional powers of city.

455 (1) The city shall have power

(e) to enter upon any premises for the purpose of

(i) blocking any sewer or sewer connection when in the opinion of the designated employee it is advisable that such action be taken to reduce or diminish damage or loss from or incidental to flood;

(ii) inspecting any sewer or sewer connection and pipe, apparatus, or other thing connected therewith;

(iii) for so long as the designated employee shall deem it advisable, maintaining any sewer-block, apparatus, or other thing placed to block a sewer or sewer connection or used in connection therewith; and

(iv) when in the opinion of the designated employee the blocking of the sewer or sewer connection is no longer required, removing the sewer-block, apparatus, or other thing placed to block a sewer or sewer connection.

455 (1) (e) also provides for entering and inspecting in a good cause, but with too much discretion to be exercised by a "designated employee." There is no doubt that a warrant could be speedily obtained in cases of genuine emergency, if the owner or occupant declined to permit entry. The observations about procedures relative to Section 434 (2) apply equally to this provision.

- 455 (1) (e) should be amended or made subject to supplementary amendments to provide for the seeking of permission to enter, or the giving of notice in writing, or the obtaining of a warrant where permission to enter is declined.

Officers of city may inspect.

477 A building inspector, health officer, market superintendent or inspector of licences of the city, or any of their respective assistants, or any police officer, may, at all reasonable times, enter and inspect any premises in which such official, assistant or police officer has reason to believe any by-law of the city is being violated.

S.M. 1971, c. 105, s. 477.

477 gives a veritable *host* of officials and constables (true—"at all reasonable times") power to come barging into *any* premises "in which such official...has reason to believe any by-law of the city is being violated." The utter unfettered perfection of this police power makes the mind boggle! This is an on-going, institutionalized Writ of Assistance to harass and ferret out whom? Dangerous criminals? No; violators of municipal by-laws! As stated, the powers to enter and inspect should be made to conform to items a) and following on pages 17 and 18 of this Report. This section as it stands is an invitation to scandalous abuse.

- 477 should be repealed.

Additional power of council.

493 The council may pass by-laws

(a) for condemning, preventing the occupation of, and closing up, any dwelling reported by the health officer to be in an unsanitary condition;

(b) for imposing a penalty on the owner for permitting the dwelling to be in such a condition and providing for his prosecution;

(c) providing for the imposition of a penalty from day to day, for every day the dwelling is permitted to remain in that condition;

(d) for authorizing the supervisor of building inspections or one of his assistants to enter upon and inspect premises whereon there is any dwelling in an apparent unhealthful or unsafe condition or likely to be a cause of fire.

S.M. 1971, c. 105, s. 493.

493 (d) also sanctifies by-laws which permit entry without a "by-your-leave." There is no requirement in this provision for seeking permission to enter, giving notice or obtaining a warrant. A person's home is his castle, even if it be less sanitary than the community deems healthful.

- 493 (d) should be amended or be made subject to supplementary amendments requiring the City to provide for entry and inspection only after the seeking of permission to enter, or the giving of written notice of intention to enter, or the obtaining of a warrant in conformity with items a) and following on pages 17 and 18 of this Report.

Right of entry.

494 The supervisor of building inspections or any other officer, employee, or agent of the city duly appointed and authorized for the purpose, may, at all reasonable times, enter upon any land, building or premises in the city for the purpose of

(a) inspecting or reading any meter or other appliance or equipment; or

(b) examining any dwelling or other building thereon or any thing appurtenant to any such dwelling or building to ascertain whether compliance is being made with any by-law or regulation enacted or made by the council, under this Part; or

(c) carrying into effect or enforcing any by-law or regulation made under this Part.

S.M. 1971, c. 105, s. 494

494 also (but directly) permits entry without a "by-your-leave." Here the grave cause for unbridled police powers of entry into *any* building or premises (true—"at all reasonable times") might well be engraved on tablets of stone: *inspecting or reading any meter or other appliance or equipment,* and again, *to ascertain whether compliance is being made with any by-law*...etc. This is an extravagant doling out of powers for petty matters—not unlike using a sledge hammer to drive a thumb tack.

As stated, the powers to enter and inspect should be made to conform to items a) and following on pages 17 and 18 of this Report. Provision for reading of indoor meters can be made a subject of contract, so the subscriber will either a) permit entry; b) perform the reading and transmit it to the utility; or c) authorize the utility to estimate the appropriate reading. An unrestricted power of entry for the reasons stated in this section is really too drastic.

- 494 should be amended or made subject to supplementary amendments to provide for the seeking of permission to enter, or the giving of written notice or the obtaining of a warrant for the stated purpose, if no contractual arrangement be available.

Power to license or regulate includes.

524 (1) Without limiting the meaning of the words "license" or "regulate" as used in this Act, the power to license or to regulate shall be deemed to include the power

(aa) to authorize the supervisor of building inspections, health officer, inspector of licences or other officer of the city, or any of their respective assistants, or a police officer, at all reasonable times to enter and inspect premises wherein any trade subject to licence is being carried on;

524 (1) (aa) has already been mentioned (page 13 of this Report). The City's authorizing entry and inspection "at all reasonable times" is a proper limitation. However, the purpose of the exercising of such power is not stated, although, presumably it is to ensure that the trade is carried on properly and that the premises are safe for the public. In most cases the premises will be commercial premises to which the public is invited but, there may well be instances where the premises are dwellings.

- 524 (1) (aa) should be amended or be made subject to supplementary amendments as recommended on page 13 of this Report.

Power to establish rates and to regulate operation of utilities.

545 The city may establish rates for any energy, power, commodity, water or service which it supplies and may

(c) enter upon any premises for the purpose of

affixing to any pipe, wire or apparatus connected with any such utility a meter or any other measuring or testing device;

taking readings from, repairing, inspecting or removing any meter or apparatus belonging to the city;

inspecting any wire, pipe, appliance or thing connected with or intended to be connected with any electrical, water works or other system operated by the city;

545 (c) is similar to Section 494, except that it does not even require entry to be at "all reasonable times." It should. As stated, the powers to enter and inspect should be made to conform to items a) and following on pages 17 and 18 of this Report.

- 545 (c) should be amended or made subject to supplementary amendments to provide for the seeking of permission to enter, or the giving of written notice or the obtaining of a warrant for the stated purpose, if no contractual arrangement be available.

Power of council to fix building standards.

641 In addition to all other powers delegated by this or any other Act, the council may pass by-laws applicable to the city or any area or areas within the city,

(k) for authorizing an inspector to enter upon and inspect any dwellings or post any orders made pursuant to sections 640 to 651 inclusive in such dwellings after notice to an adult occupant and at reasonable times.

S.M. 1971, c. 105, s. 641.

641 (k) again sanctifies by-laws which authorize a City inspector to enter dwellings, but after notice and at reasonable times. The same observations apply. As stated, the powers to enter and inspect should be made to conform to items a) and following on pages 17 and 18 of this Report. Some of the objections to the previous expressions of this power are already met in this provision but it could be improved, too, in compliance with the stated standards.

- 641 (k) should be amended or made subject to supplementary amendments which provide for: the seeking of permission to enter and inspect; or the giving of reasonable notice of intention to enter and inspect for the purpose of allowing the owner or occupant to object; or, if the foregoing fail, the obtaining of a warrant to authorize such entry and inspection.

City may do work in accordance with order.

646 (1) If the owner of a dwelling fails to repair or demolish the dwelling in accordance with an order, the city may repair or demolish all or any part of it and in so acting do any work on adjoining land, buildings or structures necessitated by such demolition or repair; for these purposes the officers, employees, and agents of the city may enter upon the dwelling of the owner and any adjoining land, building structures; and the city is not liable to compensate the owner of the dwelling or the owners of any adjoining lands, buildings or structures, by reason of anything necessarily done by it or on its behalf under this section.

646 (1) permits the City to enter any "land, building or structure" adjoining those upon which a dwelling is to be repaired or demolished. The owners and occupants of the adjoining land, building or structure are presumably not even consulted nor is the time for such entry required to be reasonable. This provision trenches on the limitation of the City's liability in terms which could permit highly oppressive results. This provision will be mentioned again under the heading of Liability.

- 646 (1) should provide for the giving of reasonable notice of the precise time at which repairs and demolition of dwelling are to be carried out; notice should always be given, as well, to the owners and occupants "of any adjoining lands, buildings or structures" whether or not the adjoining properties be dwellings.

The examples extracted in the foregoing part of this Report, in some instances, demonstrate legislative overlapping. The tendency, in drafting the Act, seems to be one of making very sure that the City has sufficient powers of entry and search. It has. They should always be tempered by regard to the rights of those whose dwellings or other premises are to be entered and inspected.

In general summation, it is recommended that a requirement of the exercise of those powers be firstly a request to enter and inspect. This will, we have no doubt, open most doors. Where there is no one present to respond to such request, it might, as a practical matter, be attempted by telephone if there be one. If there were no response or negative response and the need to enter were urgent, no doubt a warrant could be speedily obtained on reasonable and probable grounds. If there were no response or a negative response but no urgent need, then a written notice specifying the date, the time of the intended entry would be appropriate. If such notice were disregarded, a warrant would be sought.

It is further recommended, in general, that warrants ought not to be available except on reasonable and probable grounds and to cope with hazardous emergencies. Dwellings especially ought to be no less secure in regard to provincial and municipal laws than they are in regard to the criminal law. On the other hand, business premises to which the public is invited should be as accessible to City inspectors during business hours, as they are to the public.

Does the City need the power to swoop into premises on a sudden "raid"? It has no jurisdiction to enact criminal law or war measures provisions. The City needs no powers to deal with criminals, malefactors or revolutionaries so long as Parliament has enacted appropriate statutory provisions, and it has.

The warrant is the ultimate resort. It involves the need to set out reasonable grounds to persuade a judicial officer that it should be issued. In all events the need, if any, to enter and inspect premises should be demonstrably real and objectively ascertainable, and not illusory or capricious. The Act should not be an engine of possible oppression.

POWERS OF SEIZURE, CONFISCATION AND EXPROPRIATION

As earlier stated, powers of entry and search should always and ultimately be subject to judicial authority. So should powers of seizure, confiscation and expropriation of property. The City should have and exercise these powers only in furtherance of the public interest. Because such powers are generically rapacious, they should be thoughtfully formulated and carefully limited. These powers are also viewed with strictness by the McRuer Commission, as stated on pages 17 and 18 of this Report.

Comments on Particular Seizure, Confiscation and Expropriation Provisions

Particular statutory provisions relate to this subject in the following sections of the City of Winnipeg Act:

> **Power to acquire and dispose of land.**
>
> 144 The city may
>
> (a) acquire by lease, purchase, expropriation, gift or otherwise
>
> (i) any lands or interest therein, and
>
> (ii) any personal property that the city may deem necessary for its purposes; and

144 (a) accords the City power to acquire real and personal property by lease, purchase and *expropriation*. We question the need for the power to expropriate personal property. *The Expropriation Act* deals only with real property. The reason for this section may lie in section 413 (2) which permits the City to create its own monopoly on slaughterhouses. In combination with this section it could enable the City to expropriate all the machinery of the industry. Emergency powers, as expressed in section 410, to acquire commodities such as coal for power generation are not inappropriate, but we have reservations about a general power selectively to expropriate personal property and to establish a monopoly.

There are some instances, however, in which the City should be required to pay the land owner or tenant for personal property, apart from certain special compensations provided in *The Expropriation Act*. The example already cited is machinery which, because of its nature, or because of zoning regulations prohibiting its re-located use might not be marketable. In such a case forced removal and indefinitely lengthy storage would cause the owner of it undue hardship. Abandonment of such machinery in the street or elsewhere could not be seriously suggested.

This is an example of the kind of personal property for which the expropriating authority should be compelled to compensate in the price of its forcible acquisition of real property. Expropriation is effected in the public interest, but it would be unjust to force the person whose land is taken to suffer economic strangulation in addition to expropriation for the good of the public and its purse.

There would also have to be safeguards imposed to protect the City from being compelled to buy chattels of no intrinsic value, or chattels fraudulently brought onto the premises after the declaration of expropriation.

The choice as to whether the appropriate personal property should be included in the expropriation, or not, should be that of the person whose real property is expropriated; and the burden of proving that it is the kind of personal property for which provision is made, should lie on that person, too.

- 144 (a) should be amended to prohibit the City from acquiring personal property of its choice by expropriation. This section should be further amended to require the City to compensate the person expropriated, at his option, for personal property which is rendered unmarketable at a reasonable price in Manitoba and unusable within the City as a result of its removal from the expropriated land and premises, and to apply only to personal property which has been of valuable on-going use or merit in or upon the expropriated land and premises.

Goods and chattels liable.

232 (4) the restriction upon the distress and sale of goods and chattels the property of a person other than the person liable to pay the taxes does not apply

(b) where the goods and chattels are claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the person so liable, or by any other relative of his, in case that other relative lives on the premises of the person so liable as a member of his family, or by any person whose title is derived from any of them.

232 (4) (b) gives to the City the right to confiscate personal property which does not even belong to the person who is in arrears of taxes. While the purpose of this provision is to circumvent the tax debtor's giving away his goods to other family members, it is unjust that goods owned by relatives of the tax debtor should be liable to seizure.

- 232 (4) (b) should be deleted.

Disposal of surplus moneys from sale.

242 (9) If the goods and chattels seized be sold for more than the whole amount of the tax levied for and the costs attending the seizure and sale, the surplus, on demand, shall be returned to the person entitled thereto; and in case said surplus shall not be demanded, it shall remain in the hands of the treasurer, to be held for and paid over on demand to such person; provided that it be so demanded within three years, after which time it shall not be recoverable from the city.

S.M. 1971, c. 105, s. 242.

242 (9) provides for the City's right to dispose of surplus money received from tax sales. The time for demanding return is not generous, nor is the absence of a provision for accrued interest. Why should the claimant have to ask for his money?

- 242 (9) should be amended to provide:

–that the time for demanding return of the surplus money be extended to six years;

–that accrued interest on such moneys should be allowed in whole or in part to the claimant;

–that the City be required to volunteer the money to its rightful owner if that owner can, with due diligence, be found;

–that despite the requirement for public auction, the goods and chattels be sold at a reasonable price.

POWER TO COMPEL FURNISHING OF INFORMATION

There is no doubt that the City legitimately requires such powers. The circumstances and the manner in which these powers are exercised concern us. Once again statutory provisions should prevent the capricious exercise of such powers. The City should have power to compel the furnishing only of relevant information in regard to its purpose and need for it. Where the information is vast, complex or processed (as distinct from raw facts) there should be some provisions for compensation of the person, firm or corporation required to assemble and provide information. Reasonable time for furnishing information should be accorded.

Comments on Certain Compulsory Information Provisions

Some particular statutory provisions relate to this subject in the following sections of The City of Winnipeg Act:

> **Information for assessor.**
>
> **177 (1)** (a) Every assessable person or his agent and every person assessed on the last revised realty or business assessment rolls or his agent shall give (in writing over his signature, if required) to the assessor all information in his power with respect to rents paid or agreed to be paid, sale prices, terms and covenants in leases, construction costs (including costs of alterations or repairs), insurance premiums or other operating or maintenance costs, or any other information necessary to enable him to assess the value of any property or the annual rental value of any premises owned or occupied by such person or shown on such rolls as owned or occupied by him.
>
> (b) Every architect, contractor or builder having performed or supervised any work of construction, alteration or repairs on any land, or the agent of such person, shall give (in writing over his signature, if required) to the assessor all information in his power with respect to the cost of such work.

177 (1) is not dissimilar from the subsequent Section 485 (1) (c) which again gives power to extract information, in that the requirement for information could be never-ending, unless the information sought were actually specified as to form and content.

- 177 (1) should be amended to provide specifically only that information which the designated persons are compelled to give, and the prescribed form in which it may lawfully be given. Compensation for responding to extraordinary or complex demands ought to be provided.

> **Further information.**
>
> **177 (2)** Every assessable person or his agent shall also give to the assessor any further information as to himself or the land or premises owned or occupied by him which the assessor may require for the purpose of preparing the general assessment roll or the business assessment roll.

177 (2) seems even closer to Section 485 (1) (c). Why the City would or does need all this information ought to be precisely specified. No provision is made to require the City to pay for the presentation of this information, nor is the pertinence of the information required to be stated in terms of statutory provisions. The purpose of preparing the assessment rolls is not sufficient, if the information sought is not a constituent of such rolls. The possibility of badgering a person for information not strictly required ought not to come cheap.

- 177 (2) should be amended so that, if the City's power to demand "any further information...which the assessor may require" is to be retained, the City should be required to compensate an assessable person for the cost, if any, and time expended in discovering and presenting such further information which the assessor may require. The section should be further amended to provide that the assessable person may effectively dispute the relevance of the information for the purposes stated in the section.

Assessor may inspect premises.

179 In order to obtain information for the purpose of making assessments and carrying out the other duties of the assessor, such officer or any assessor may enter upon any premises and inspect the same.

S.M. 1971, c. 105, s. 179.

179 combines powers of entry, inspection and obtaining information. There is but little restriction on the kind of information which can be requested, because as noted in previous and subsequent provisions, there are no sufficient limits to what information can be demanded "for the purpose of making assessments and carrying out the other duties of the assessor." The authorized ferreting out of information can be conducted on *any* premises, and apparently at *any* time. It accords these great powers directly and not through according the City the authority to make by-law provisions. The term "such officer" does not appear to have any previous reference, followed as it is by: "or any assessor" and so it is unclear which of a legion of public officers is meant.

- 179 should be repealed, and the kinds of powers accorded by it should be aptly described and specifically limited in a new provision which will achieve a balance between accommodating the assessment process and preserving the civil rights of the inhabitants.

Power to regulate.

485 (1) The power of council to regulate the erection, alteration, repair, demolition or removal of buildings under this Part shall be deemed to include inter alia the power

(a) to regulate the erection, alteration, repair, demolition or removal of buildings, erections, and structures;

(c) to require every owner, architect, engineer, contractor or builder, having contracted for or having performed or supervised any work of construction, alteration or repairs on any land, or the agent of such person, to give, in writing over his signature if so required, all the information in his power with respect to the cost of the work;

485 (1) has been mentioned by us in considering the provisions of Section 177. Under this section head we note subsection (1) (a) appears to be repetitive and, therefore, redundant. It is of no value.

- 485 (1) (a) should be deleted.

485 (1) (c) appears to be excessive in scope in requiring "all the information in his power with respect to the cost of the work". Surely, either experience or thoughtful consultation could produce a check list and form for presentation of information with respect to the costs of any work of construction, alteration or repair. If the provision is to be retained in this broad, sweeping expression, it could not only work a hardship on those who were required to produce the information, but it might well produce irrelevant and unnecessary information.

- 485 (1) (c) should be amended so that, if the City's power to require "all the information in his power with respect to the cost of the work" is to be retained, the City should be required to compensate the designated person for the cost, if any, and the time expended in discovering and presenting all such information in their power with respect to the cost of the work.

Power to license or regulate includes.

524 (1) Without limiting the meaning of the words "license" or "regulate" as used in this Act, the power to license or to regulate shall be deemed to include the power

(e) to require the applicant for a licence to furnish to the city in such form as may be prescribed such information with respect to himself and the trade for which the licence is sought as the city shall require;

524 (1) (e) appears to be too broad and too arbitrary in requiring the applicant for a licence to furnish "such information with respect to himself...as the city shall require."

- 524 (1) (e) should be amended or made subject to supplementary amendments in which the purpose of the power and the extent of the personal information should be more precisely specified.

CITY'S LIABILITY FOR DAMAGES

That the City, because it is the institution of the collectivity of the inhabitants, should be immune from responsibility for negligence or other wrongful acts is as unpalatable a proposition today as those propositions which in the past asserted, in turn, that the King, or the lordly land-owners, or the business-like mine-owners, or whoever, is above the law. Each of those old oppressors claimed to be the symbol of the nation, or the flower of civilization, or the paternalistic protector of ordinary folk.

Is the citizen of today better off because his garden is ruined by City crews under the umbrella of Section 432 of the Act, rather than by the mounted aristocracy of yesteryear and their hounds in quest of a fox? This analogy no doubt overstates the case, but serves to illustrate our premise.

Wrong-doing on the part of the City's officers and employees, whether by negligence or oppressive conduct, should import the same legal responsibility on the City as the law imposes upon any adult individual of sane understanding. We think that the City's liability for wrong-doing should not be hedged about by a thicket of unusual notice requirements which spring out of obscure statutory nooks and crannies to impede or thwart the wronged claimant.

Even if the Corporation of the City of Winnipeg be slow or obstinate in paying a money judgment pronounced against it, the public interest no doubt requires that City equipment and buildings should not be seized or sold to satisfy such judgment as provided in Section 113, but should the City also be immune from garnishment as provided? Why should this municipal corporation escape each and every consequence which may lawfully be imposed on ordinary persons, firms and corporations?

No matter what the precedents or practices which the Past has bequeathed us, we assert that these concepts should be re-examined and modified for the Present and the Future.

Comments on Certain Liability Provisions

By way of example, the following sections of the City of Winnipeg Act are noted:

> **Overhanging shrubbery.**
>
> **432** The city may enter on any land for the purpose of causing any tree, shrub or sapling growing or planted on land adjacent to a street to be trimmed or removed when deemed necessary for the convenient use of the street without being liable in damages or for compensation therefor.
>
> S.M. 1971, c. 105, s. 432.

432 may well give a wider immunity to the City than its drafter intended. We emphasized on page 19 of this Report that the owner or occupant should be given notice of the City's reasons for and intention to trim or remove any tree, shrub or sapling. If, after notice, the owner declined to cooperate or lost an adjudication to stop the City, then the City would be empowered to proceed. It should not then be liable for the loss of, or damage to, the tree, shrub or sapling, but it should be liable for any other damage to the affected property which it might cause. The use of the word "*therefor*" at the end of the section imports vagueness. We think that this section should not accord immunity for any and all compensible damage which the City might inflict while carrying out such trimming and removal. The section would be better expressed if, in addition to the notice and adjudication provisions which we recommend, it specifically narrowed the exemption from liability. We think that such amendment would more nearly express the draftsman's intention.

- 432 should be amended in accordance with our previous recommendations on page 19 of this Report, and should be further amended by deleting the word "therefor" *and by substituting for it the words* "for the trimming or removal of such tree, shrub or sapling."

Persons causing obstruction to indemnify city.

502 If a claim for damages be made against the city arising out of an obstruction, structure, encroachment or nuisance, placed, caused or permitted in a street by a person other than an employee of the city, or by the city at such other person's request, whether pursuant to a permit or agreement with the city or not, or any claim for damages otherwise arising as the result of an act or default on the part of a person other than such employee, the person placing, causing, performing or permitting such obstruction, structure, encroachment, nuisance, act or default, shall indemnify and save harmless the city from all costs, damages and expenses arising therefrom or in connection therewith and, whether or not a claim be made against the city in respect thereof, shall be directly responsible for such obstructions, structure, encroachment, nuisance, act or default to any person suffering damage therefrom including the city.

S.M. 1971, c. 105, s. 502.

502 provides, among other things, that a person who places any obstruction in a street, *"whether pursuant to a permit or agreement with the city or not"* must indemnify the City and be directly responsible for such obstruction to any person (including the City) suffering damage as a result. One can hardly criticize this provision as a matter of public policy, although it might tend to make the City a little less vigilant for public safety about obstructions or structures placed in streets, as for example the "Get-Together" summer street festivals. The civil rights aspect of this provision reside in (a) the public being unaware that they might not be able to look to the City for recovery of damages in cases of personal injuries caused as described in this section; and (b) the person or group sponsoring for example: a street festival, with or without a permit or agreement with the City, being unaware that they, personally, or their insurers, if any, are directly responsible "whether or not a claim be made against the City." This omnibus provision may well suffer from purporting to deal with obstructions such as structures placed with the agreement of the City and obstructions such as nuisances to which the City ought never to consent. It attempts to cope with the challenge of the concept that one person's festival may be another person's nuisance.

– 502 should be supplemented by an amendment requiring the provisions of the above section to be:

– declared to be ineffective to limit the right of any person to take legal action directly against and recover a judgment or award directly from the City (or alternatively all words after "therewith" *in the fourth last line should be deleted); and*

– furnished, in advance, to every applicant for a permit or agreement, to place, cause, perform or permit any obstruction, structure or encroachment and a further copy should be required to be appended to every such permit and agreement in writing.

Streets to be kept in repair.

519 (1) The city shall keep in repair every street, and on default in so doing the city shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default.

Limit of liability.

519 (2) Provided, however, that the liability of the city shall be limited to that portion of the street on which work has been performed or public improvements made by the city.

Limitation of actions.

519 (3) Provided further that notice of any claim or action for damages sustained by any person by reason of such default, whether the default was the result of misfeasance or nonfeasance, must be served within one month after the happening of the alleged accident giving rise to the claim or action and any such action shall be commenced within two years of the receipt of the notice.

Accidents caused by snow or ice on sidewalks.

519 (4) Notwithstanding anything hereinbefore contained, the city shall not be liable for accidents arising from persons falling owing to snow or ice upon the streets, unless in cases of gross negligence of the city, and no action shall be brought to enforce a claim for damages under this subsection unless notice in writing of the accident and the cause thereof has been served upon or mailed to the clerk, within seven days after the happening of the accident, and unless an action brought for damages in connection therewith be commenced within three months of the receipt of such notice.

When want or sufficiency of notice not a bar to action.

519 (5) In case of the death of the person injured, the want of the notice required under subsections (3) and (4) hereof shall not be a bar to the maintenance of the action, and in other cases the want or insufficiency of the notice required under either of said subsections shall not be a bar to an action if the court or judge before whom the action is brought considers that there is reasonable excuse for the want of such notice or for insufficiency, and that the defendant has not thereby been prejudiced in its defence but in case no notice or no sufficient notice is given under said subsections, no action shall be brought under this section unless commenced within three months from the happening of said accident.

Examination of claimant before suit begins.

519 (6) The city may, at any time after it has received notice of any such claim or action or become aware that an accident has taken place, unless some duly qualified medical practitioner certifies that such claimant is not in a fit condition to be examined, examine the claimant or person or persons who met with the accident before a special examiner of the Court of Queen's Bench, who shall administer the oath to the claimant, and himself or his clerk take down the evidence in writing or in shorthand of the claimant concerning the alleged negligence, and all the particulars of the accident complained of, and such evidence when taken down or transcribed, shall not need to be signed by the deponent, and no person shall bring or maintain an action against the city who has refused or

declined to give such evidence or answer any question or questions pertaining to the alleged negligence or as to the damage or injury complained of, unless the court or judge before whom the action is brought considers that there is reasonable excuse for such refusal; but such examination shall not be used as evidence or for any purpose at the trial of any issue arising out of any such accident.

519 deals with liability for damages sustained by failure to repair, or maintain streets, or failure in a grossly negligent manner to clear away ice or snow. The definitions of what is meant here are a little involved. "Street" by Section 1 (ss) means any public highway...and so, on. "Public highway" is not defined, but "highway" is defined in Section 1(t) to mean: "any place or way...which the public is ordinarily entitled or permitted to use for the passage of vehicles or pedestrians..." With some hesitation it may be presumed that "street" includes "sidewalks" (not defined in this Act, but thoroughly defined in Section 2 (23) of "*The Highway Traffic Act*"), because "street" refers to "highway", which in turn refers to use by pedestrians." In the event that the presumption is correct, then subsections (1) and (2) of Section 519 refer to both streets *and sidewalks*. It is too bad that they appear to be contradictory. While (1) provides that the City is liable for damages caused by its **failure** to keep streets in repair, (2) limits the city's liability to that portion of the street on which **work has been performed or public improvements made** by the city! Is the City responsible for damages resulting from non-repair of streets and sidewalks, or not? We think that the apparent contradiction exists because we believe that subsection (2) is aimed at relieving the City from liability for streets which exist only on plans in the Land Titles office but cannot be seen to be streets or thoroughfares in actuality.

— *The precise application and interaction of subsections (1) and (2) should be clarified. The City should have no immunity which is not also available to any individual. The City should be liable for its omissions, neglects and defaults as others are.*

We think that the notices required by subsections (3) and (4) constitute somewhat of a snare to the unwary victims of injuries. Although subsection (5) excuses want or insufficiency of notice in the case of the death of the injured person and in cases where a judge considers that a reasonable excuse exists, these notice requirements operate basically to the detriment of the injured persons. They are too ambiguous. For example, normally ignorance of the law is not an excuse, but would or should ignorance of the limitation period provide a *reasonable* excuse under this provision even if it be not ordinarily a legal excuse? Again, use of the perplexing term "*gross* negligence" operates to the detriment of the injured persons. It has been the experience of years that in guest passenger claims under "*The Highway Traffic Act*" both the courts and counsel have been bedevilled by the concept of *very great* negligence. Such a term makes it exceedingly difficult for counsel to advise the injured person with even a firm opinion, much less professional precision, whether his claim will succeed because of the defendant's "gross negligence" or fail because of the defendant's merely common or garden-variety negligence. Adding the pejorative "gross" seems to be merely a palpable attempt to give advantage to the City; it certainly does not further the public interest in clarifying the law.

Paramount criticism with these subsections is, however, that they provide a special immunity for the City and are basically unfair. Although there is

a legal presumption about ignorance of the law, above stated, in fact it is unreasonable to expect that many, if any, potential claimants would be aware of the City's special immunity. It may well be that the special limitation periods and notice periods would have expired before a claimant would consult a solicitor.

– *519 ought to be amended so as to eliminate the special notice and limitation provision in relation to claims against the City; and to eliminate the word* "gross" *in relation to negligence.*

City not liable for breakage of pipes etc.

547 The city shall not be liable for damages caused by the breaking of any pipe, wire, meter or other apparatus or for the shutting off of electricity, gas, water or other service by reason of accident or the necessity of making repairs.

S.M. 1971, c. 105, s. 547.

547 relieves the City from legal liability for damage caused:

(a) where "any pipe, wire, meter or other apparatus" is broken by the City, or

(b) where "electricity, gas, water or other service" is shut off by the City because of accident or the need to make repairs.

It is possible that the first provision, like the second, was intended to apply only where the breakage was caused by accident or the need to make repairs; the language of the section is unclear.

We can see no valid reason for the first of these provisions. Its only effect can be to grant the City a legal immunity which other individuals and corporations would not have in similar circumstances.

As to the second provision, it is reasonable that the City should, in ordinary circumstances, be exempted from liability for shutting off service in order to effect necessary repairs. It is also reasonable to expect that where possible the City should give some reasonable notice of the disruption of service.

– *547 should be amended to provide, in effect, that if the City negligently breaks a pipe, wire, meter or other apparatus, it should be as responsible to compensate those who are damaged by its wrongdoing as anyone else would be; and that if, in relation to shutting off service, the repairs were necessitated by the City's own negligence, or if the City failed, where possible, to give reasonable notice of the disruption of service, legal liability should exist.*

Temporary shut-offs.

558 (1) The city is not liable for damages caused by the shut-off or reduction of the amount of water supplied to any person in cases of emergency or breakdown or when it is necessary in maintaining or extending the system.

558 (1) makes similar provisions to Section 547, but in relation exclusively to water supply. Accident, breakdown or other emergency may be properly considered as exemptions from liability (although they, in turn, may have been caused by the City's negligence).

– *558 (1) should be amended to provide that the City ought to give notice to consumers where possible and to be liable for any ensuing damage when it could have given notice to consumers but failed to do so.*

Liability for damages caused by quality of water.

558 (3) The city is not liable for damages caused by the quality or content of water supplied unless the water does not meet the accepted standards of purity established by provincial health regulations.

S.M. 1971, c. 105, s. 558.

558 (3) appears to be a reasonable exemption, providing the accepted standards of water purity established by provincial health regulations be a precise term and providing such standards be reasonable, themselves.

City may do work in accordance with order.

646 (1) If the owner of a dwelling fails to repair or demolish the dwelling in accordance with an order, the city may repair or demolish all or any part of it and in so acting do any work on adjoining land, buildings or structures necessitated by such demolition or repair; for these purposes the officers, employees, and agents of the city may enter upon the dwelling of the owner and any adjoining land, building or structures; and the city is not liable to compensate the owner of the dwelling or the owners of any adjoining lands, buildings or structures, by reason of anything necessarily done by it or on its behalf under this section.

646 (1) provides a great and unreasonable exemption from liability. Although in repairing or demolishing any dwelling the City's power in so acting is limited to doing *any work* on adjoining property necessitated by such demolition or repair, the City is not liable to compensate the owner of the dwelling *or the owners of any adjoining* property, for anything necessarily done under this section. Why not? The swath the City can cut here without incurring liability is far too wide. We think the City should have to compensate the unresponsive dwelling owner for acts of negligence and especially the City should be required to compensate the innocent owners of adjoining property for its negligent acts under this Section. The extent of this exemption from liability is appalling.

– *646 (1) should be amended to delete all exemption from liability for any negligent conduct and for all acts except the specific repair or demolition described in the order, if properly and carefully performed; the City should be as responsible as any of its citizens for all of its acts, including those* "necessarily done by it or on its behalf under this section."

IMPORTANT MISCELLANEOUS COMMENTS

The various other provisions of The City of Winnipeg Act attract comment, within our terms of reference, by which we intend to suggest improvements to this statute. We note the following sections of the Act.

City may regulate, control and license traders, with certain exceptions.

523 (1) The city shall have power to regulate, control and license the carrying on of any trade, excepting

(c) the public press;

523 (1) (c) in referring merely to "the public press" may be narrower than intended. Public press in Canada includes radio and television as well as newspapers and any other publications.

- 523 (1) (c) should be supplemented to provide, without limiting the generality of the expression "the public press" that such expression includes radio and television as well as newspapers and any other publications.

Additional powers of council.

454 (2) For the purposes of carrying out its duties under this Part, the city has all the powers conferred upon the Metropolitan Corporation under Part VIII of The Metropolitan Winnipeg Act immediately before repeal of that Act and for the purpose of conferring those powers and rights upon the city that Act shall, to that extent and notwithstanding the repeal thereof, be deemed to be in force.

454 (2) incorporates a multitude of provisions and powers by reference to *"The Metropolitan Winnipeg Act"*. Part VIII of that Act makes provisions for the metropolitan sewage disposal system. It accords wide powers, including for example, under Section 146A in Part VIII a right of entry "notwithstanding anything contained in this Act or in *"The Expropriation Act"*...(to) enter upon, take, and use, any land required...at any time, either before or after the commencement of expropriation proceedings..."

Contributing to the complexity of the statutory maze, one discovers that the now defunct Metropolitan Corporation (for which, read: the new City) had "all the powers and rights conferred, but except as herein stated, not the duties or responsibilities charged, upon Greater Winnipeg Sanitary District under *"The Greater Winnipeg Sanitary District Act"* immediately before the repeal of **that** Act..." (emphasis added). This provision is found in Section 146 (2) of Part VIII.

Further in said Part VIII, by Section 155, it is provided that the (now defunct) council of a (now defunct) area municipality may appeal to The Municipal Board where it considers itself aggrieved by the refusal of the (now defunct) corporation (for which, read: the new City) to do five enumerated things.

Further, in said Part VIII reference is made to provisions, now repealed, of other sections of *"The Metropolitan Winnipeg Act"*—for example: Section 156 (2) in Part VIII imports considerations expressed in Section 35, which is found in Part II of that Act.

Section 159 in Part VIII provides that "any person authorized for the purpose by the metropolitan council shall have free access from time to time (true—upon reasonable notice)...to all lands, buildings and premises..." This is the kind of power of entry upon which comment is made at pages 16 to 18 of this Report. This provision (Section 159 in Part VIII) goes some distance towards preserving the civil right to privacy of the occupants of dwelling premises by requiring "reasonable notice given and request made."

However, where the request is refused, unless there be a demonstrable emergency, judicial authority should always be a condition precedent to the right of entry and search of a private dwelling. Conformity to items a) and following on pages 17 and 18 of this Report is recommended and reiterated.

Division II of Part VIII confers on the City the power to license pollution, subject only to the lawful directions and instructions of the Minister of Health and Public Welfare (sic) in respect to any matter to which this Division applies. Is Section 169 (2) not contrary in spirit to *"The Clean Environment Act"*? It would be proper and preferable to make polluting by the City subject to an independent, resolute provincial authority, in the public health interest.

– *Generally in relation to Section 454 (2) of the new Act, the interests of clarity and precision would be much better served by enacting all the necessary provisions directly as part of the subject Winnipeg Act, and avoiding the convolutions of incorporating provisions by reference to repealed statutes of another era.*

Additional powers of the city.

550 (2) For the purpose of supplying water pursuant to section 549, the city has all the powers and rights conferred upon the Metropolitan Corporation under Part VII of The Metropolitan Winnipeg Act immediately before the repeal of that Act and for the purpose of conferring those powers and rights upon the city that Act shall, to that extent and notwithstanding the repeal thereof, be deemed to be in force.

S.M. 1971, c. 105, s. 550.

550 (2) incorporates by reference "all the powers and rights conferred upon the Metropolitan Corporation under Part VII of *"The Metropolitan Winnipeg Act"* immediately before the repeal of that Act..." Part VII of that Act makes provisions for the metropolitan waterworks system. It accords wide powers.

Contributing again to the further complexity of the statutory maze, one notes that the now defunct Metropolitan Corporation (for which, read: the new City) had "all the powers and rights conferred, but, except as herein stated, not the duties and responsibilities charged, upon Greater Winnipeg Water District under *"The Greater Winnipeg Water District Act"* immediately before the repeal of **that** Act..." (emphasis added). This provision is found in Section 118 (2) in Part VII.

Further, in said Part VII, Section 134 accords the same kind of right of appeal to the (now defunct) council of a (now defunct) area municipality as is accorded by Section 155 in Part VIII which has been mentioned. Section 137 in Part VII provides for the same sort of "free access from time to time" by "any authorized person" as does Section 159 in Part VIII. Again it must be emphasized, that, unless there be a demonstrable emergency, judicial authority should always be a condition precedent to the right of entry and search of a private dwelling. Conformity to items a) and following on pages 17 and 18 of this Report is recommended and reiterated.

Interested persons should not have to seek the law through the convolutions of provisions incorporated by reference to otherwise previously repealed statutes of a previous era.

– *Generally in relation to Section 550 (2) of this new Act, the interests of clarity and precision would be much better served by having all the necessary provisions specifically drafted and enacted as part of the text of this Act.*

City may remove building restriction caveats.

283 (2) In the event of a certificate of title issuing, or which has already been issued, in the name of the city in respect of lands sold for taxes subject to any building restrictions under agreements filed by way of caveat, or howsoever otherwise arising, imposed, created, filed or registered, shown on said certificate, the city may by by-law passed by a two-thirds majority of the council present remove any such building restrictions and the filing of the by-law in the land titles office shall be authority for the removal of every such restriction and for the removal or cancellation of every caveat, memorial, document, instrument or covenant by which such restriction was created, reserved, evidenced, filed or registered in so far as it affects said lands; provided that no such by-law shall be passed until notice thereof shall have been mailed to each of the owners of the property covered by the caveat at least thirty days before the passing of the by-law.

S.M. 1971, c. 105, s. 283.

283 (2) gives the City the right, subject to rather impressive safeguards, to lift building restrictions by caveat or howsoever on land sold for taxes, title to which is or has been acquired by the City. Notice must be mailed to owners of only the property covered by the caveat, although the matter would normally be of interest to other owners or residents of the general area, perhaps even of the whole ward.

– *283 (2) should be amended or supplemented with provisions to require: extension of notification by mail; posting of the affected property; and publication by newspaper of the intended action by the Council.*

Limitation of petition against in certain cases.

373 (5) The owner of any land to which there is a private approach or crossing leading from the street on which it fronts shall not have the right to petition against any proposed opening of a lane or improvement in an existing lane, at the rear of his land, and for the purpose of this section the signature of such owner on any such petition shall be disregarded.

S.M. 1971, c. 105, s. 373.

373 (5) renders a land owner with a private approach a non-person, when it comes to petitioning against any opening or improving of a lane at the rear of his land and in such circumstances his signature is to be simply disregarded. He may, in common with his neighbours have to pay but he cannot legally petition against the project. Surely, if the author of this section feared an overwhelming or significant number of landowners with private approaches petitioning against such projects, clearer words could have been used to say that an overwhelming or significant number of petitioners must not be permitted to thwart the project planners. This provision is repugnant to democratic concepts.

- *373 (5) ought to be repealed.*

Where land fronts on park or drive.

387 Where work is done as a local improvement in a park, square, scenic drive or boulevard, land abutting thereon shall only be assessed for the cost of the work to the extent that it is specially benefited thereby, and where there is taxable land on only one side of such drive or boulevard, the city at large shall assume at least one-half of the cost of the work and the work may be done and the cost assessed as aforesaid in spite of any adverse petition by the owners of the property affected.

S.M. 1971, c. 105, s. 387.

Note: For Methods of Assessing Cost—See sec. 353 et. seq.

387 also sweeps away the opinions of owners of affected property by specifically empowering municipal officialdom to ignore their adverse petition. This provision is little better than section 373 (5), because it effectively suppresses the cherished right of the people to petition those who govern them.

– *387 should be deleted, or at least the words* "in spite of any adverse petition by the owners of the property affected" *should be deleted.*

CONCLUSIONS

This Report does not constitute an exhaustive analysis of "The City of Winnipeg Act." Such an analysis would, no doubt, involve consideration of the political and financial structures of the new City and many other aspects of its creation and existence, some of which might well be beyond our terms of reference. For example, the practical effectiveness of the procedures of application for the enactment of a zoning by-law or for variation of the operation of a zoning by-law as provided in Part XX of the Act may well merit study and reform. For further example, the dispension under which the Winnipeg police department, the board of police commissioners and the magistrates' court operate, has generated considerable comment over the years and we note that it is carried into the new Act but little altered, if at all, in substance. It is our hope and intention to study the interactivity of the police, the magistrates' court, and the citizen in the near future. We have not performed such studies in this analysis.

We therefore abide by the specific reference made to us by the Honourable the Attorney-General in relation to the administrative, entry, and licensing powers of the new City. We are, at once, conscious that the analysis which we did perform may well be incomplete in detail, but we trust that the principles which we have espoused are broad and cogent enough to enable the draftsmen to deal with other deficiencies in detail.

In regard to licensing powers, reference should be made to the text of this Report. Our recommendations would ensure openness of proceeding with adequate appeal provisions. Administrative convenience or covert disposition of matters of relating to civil rights must, in our view, yield to necessary safeguards to the rights and civil liberties of individuals and can be made to do so without subverting the collective interest of the citizens of the new, large and potentially impersonal City. The age-old conundrum is usually resolved, if not efficiently then at least humanely, in the concept that the public interest ultimately resides in the preservation of individual rights and liberty. Those passages of this Report which deal with Licensing Powers (pages 7 to 10) and our Comments on Certain Licensing Provisions (pages 10 to 15) enunciate and illustrate our appreciation of this concept.

In relation to the City's powers of entry, inspection, search and compulsion, we have enunciated certain principles (pages 16 to 18) and illustrated them by our comments (pages 18 to 25). One further recommendation should now be appropriately stated. It has to do with abuse of such powers or the negligent misuse of them. There ought, in our view, to be a consequence to be faced by the power wielder for such abuse or misuse.

Where the need for entry, inspection, search, seizure, or compulsion whether on warrant or not, cannot be reasonably demonstrated—especially in relation to private dwellings, or the compelling of processed, elaborate information—the official conduct is oppressive. In such circumstances the oppressed should have a right of action and discovery against the oppressor. Where oppressive conduct is shown (as in a case of failure to demonstrate the need for the official acts or conduct) damages should be presumed. ("*The Privacy Act*" adopts this concept.) If the amount of such presumed damages cannot be proved, as may well be the case in most instances, then damages should be awarded against the City, and its errant employee or official, in an amount not less than $100 exclusive of costs. Because we regard it plainly in the public interest to demonstrate clearly that the officials and municipal corporation which employs them must pay for proved transgressions, we recommend that this new remedy should be additional to, and not in substitution for, any other existing remedies at law. We reason

that if particular authorized officials of the City continue, by their official conduct, to attract liability for damages against the City, they will sooner or later be instructed to ameliorate their conduct or face dismissal. If such were not the result, the electors might well wonder why.

This right of action could be expressed in the new Act itself or in amendments to *"The Privacy Act"*. At this time, and because it was not drawn with the powers of the new City in mind, *"The Privacy Act"* both 'gives' and 'takes' in an ambiguous manner in relation to oppressive conduct by municipal officials. Thus, in "giving" it provides:

> 8 (1) Notwithstanding any other Act of the Legislature, whether special or general, this Act applies where there is any violation of the privacy of any person.
>
> 8 (2) Where there is a conflict between a provision of this Act and a provision of any other Act of the Legislature, whether general, or special, the provision of this Act prevails.

Alas, in "taking" it prescribes:

> 5 In an action for violation of privacy of a person it is a defence for the defendant to show
>
> (d) that the defendant acted under authority conferred upon him by a law in force in the province or by a court or any process of a court; or
>
> (e) where the act, conduct or publication constituting the violation was
>
> (i) that of a peace officer acting in the course of his duties; or
>
> (ii) that of a public officer engaged in an investigation in the course of his duty under a law in force in the province;
>
> that it was neither disproportionate to the gravity of the matter subject to investigation nor committed in the course of a trespass; and was within the scope of his duties or within the scope of the investigation, as the case may be, and was reasonably necessary in the public interest; ...

General protection would be afforded to the public against oppressive official acts of invasion of privacy if *"The Privacy Act"* were amended in conformity with these recommendations. Specific uniform amendments to "The City of Winnipeg Act", the other city charters, and *"The Municipal Act"* would afford protection against oppressive conduct by municipal officials, in regard to those wide powers they can exercise beyond the scope of *"The Privacy Act"*.

It may be said that these recommendations in regard to oppressive conduct are too radical, especially since we cannot determine the extent of the abuse, if any, of the powers conferred. To this the appropriate response, we suggest, is that no conscientious municipal officials deliberately set out to behave oppressively toward residents of the municipality which they serve.

Although the jurisdiction of the Ombudsman of Nova Scotia extends to municipal corporations, such jurisdiction has not been conferred on the Manitoba Ombudsman. The City, despite its council of elected representatives, is a subordinate government in that it is a creature of the Legislature. The Legislature saw fit to create the office of Ombudsman in relation to provincial government and agencies, but no such provision has yet been made in relation to this subordinate municipal government, which can exercise tremendous powers by delegation from

the Legislature. The former City of Winnipeg operated an "ombudsman committee" for two years as a means of effecting an outlet and remedy for complaints. It was disbanded but not, we think, for want of material. Even though it is generally known that he has no jurisdiction, the Ombudsman still receives some complaints about municipal administration.

– *The jurisdiction of the Manitoba Ombudsman ought to be extended to the new City of Winnipeg, at least, if not to all other municipal institutions and municipalities in the province. The Ombudsman's jurisdiction in regard to municipal administration and agencies ought, when so extended, to be no less than it is in regard to provincial government administration and agencies.*

It is with these considerations in mind, that we note that we cannot determine the real extent of abuse of municipal powers. We should, therefore, be clearly understood to say that we think there are indeed such abuses, even though we cannot determine the extent. We should also be clearly understood **not** to be impugning the good faith, competence and helpfulness of legions of conscientious municipal officials and other employees, by elaborating the potential for abuse of the powers accorded. We should hesitate to believe that the citizens' remedies which we recommend would in any way impair the City's functioning in the public interest, because that would imply that the City cannot function normally without resorting to oppressive conduct.

We acknowledge the valuable assistance of our Chief Research Officer, Professor John M. Sharp, in the preparation of this Report.

This is a Report submitted pursuant to Section 5(3) of "The Law Reform Commission Act."

Dated this 24th day of January, 1972.

FRANCIS C. MULDOON, Chairman

R. DALE GIBSON, Commissioner

C. MYRNA BOWMAN, Commissioner

ROBERT G. SMETHURST, Commissioner

VAL WERIER, Commissioner

SYBIL SHACK, Commissioner

KEN HANLY, Commissioner