Loblaws Inc. v. Ancaster (Town) Chief Building Official
(Ont. Ct. (Gen. Div.))

Between
Loblaws Inc. and Fortino's Supermarket Ltd., Applicants (Respondents in Appeal), and
Mr. William G. Oliver, Chief Building Official for the Corporation of the Town of Ancaster and the Corporation of the Town of Ancaster, Respondents (Respondents in Appeal), and
Price Club Canada Inc. and Price Club Canada Real Estate Inc., Respondents (Appellants in Appeal)

[1992] O.J. No. 2621
Action No. 678/92

Ontario Court of Justice - General Division
Toronto, Ontario
Greer J.
Heard: November 18, 1992
Judgment: December 8, 1992

(9 pp.)

Richard R. Arblaster, for the Applicants (Respondents in Appeal), Loblaws Inc.
Nancy L. Smith, for the Respondent (Respondent in Appeal), Mr. William G. Oliver.
H. Radomski and Tom Friedland, for the Applicants (Respondents in Appeal).

GREER J. (orally):-- The applicants, the Price Club Canada Inc. and Price Club Canada Real Estate Inc., have brought on a Motion for an Order staying part of the Order of Madam Justice Feldman made October 28, 1992, in connection with an application brought on by Loblaws Inc. and Fortino's Supermarket Ltd. with respect to a Price Club outlet which was being planned for erection in the Town of Ancaster. On this application, the Town of Ancaster has taken no position.

The Motion asked for relief by way of an Order staying that part of Madam Justice Feldman's Order which declared any portion of the Price Club's intended use at its premises located in the Town of Ancaster, that is not bulk sale of quantities of goods, merchandise and materials, is contrary to their zoning by-law 87-57, as the prohibited portion is "any activity", as set out in the reasons of Madam Justice Feldman. The applicants are also asking, that that portion of Madam Justice Feldman's Order requiring the Price Club to modify its typical operation in order to comply with the zoning by-law as declared in her reasons, be stayed. They further ask for an Order to stay that part of her Order stating that if Price Club has not provided evidence satisfactory to the Town of Ancaster, that it will modify its operations as required by her Order, then the building permit which was issued by the Town on July 2, 1992, would be ended and all construction of the building will cease.

Counsel have informed me that Madam Justice Feldman was not made aware that there had been what I will call an "agreement" between the parties, on a without prejudice basis, that the construction of the building would continue perhaps to the prejudice of Price Club. In any event, the building has now been completed and, as I understand it, is actually ready to open for business. The Price Club is also, asking for an Order permitting it to use its proposed building without restricting its sales to "bulk" sale of quantities of goods, merchandise and materials as set out in the reasons for Judgment of Madam Justice Feldman.

Without going into the details of how the Price Club operates, suffice it to say that the details are quite clearly outlined in Madam Justice Feldman's reasons for Judgment. The issue before me is, of course, whether I ought to make an Order as is simply requested by the Price Club, or an Order for part of what is requested by the Price Club, or not order any stay at all. In making any Order of this type one must look at whether, in the appeal which Price Club is taking, of the Order of Madam Justice Feldman, there are any serious questions of principle at law raised in the grounds for appeal and whether the appeal is a bona fide appeal or, to put it colloquially, simply a stalling tactic.

I am satisfied on the evidence which was put before me, and on a reading of the Judgment and on examining the grounds for the appeal, that there are serious questions of principle and law raised in the appeal and that the appeal is a serious appeal and a bona fide appeal.

In the affidavit of Raymond Sarrazin, in these proceedings, sworn on November 5, 1992, there is attached as an exhibit to the affidavit a statutory declaration which is made by Joy Goodman, the Vice-President Legal of the Price Club Canada Inc. and Price Club Canada Real Estate Inc. This declaration states that subject to further and other orders of this Court, Price Club will in essence comply with the order, of Madam Justice Feldman as contained in her reasons. There is also attached to the affidavit, as exhibit "B", a letter from the Town of Ancaster dated November 4, 1992, under the signature of W.G. Oliver, the Chief Building official. It reads:

> We are in receipt of your Declaration outlining the modified operations for the Ancaster location as required by paragraph two of the orders of the Court, and insofar as the Town is concerned, the modified operations are appropriate and satisfactory and in our opinion, they comply with

the judgement of the Court.

As was noted earlier, the Town is taking no position in these proceedings. It is clear, however, that the Town will have to satisfy itself on an item by item basis as to what is

being sold, given the wording of the Judgment and given the statutory declaration. This will not be easy from an enforcement point of view, or in my view, from a very practical point of view.

Both parties on the Motion gave statistics, which differed in part, regarding the impact of the Price Club outlet types of sale and what percentages of them related to bulk items, individual items and those items broken down into general categories.

In reaching my decision I have not weighed one way or the other the percentage figures which were given to me, nor have I taken into account the numbers of items, as this in my view, will be more properly dealt with by the judges hearing the appeal. On the other hand, it is the evidence of Mr. Stamm, an expert relied on by Loblaws and Fortino's Supermarket, that the Price Club items which are sold in categories were classes of products which number 13. His outline was attached as Exhibit "B" to the Affidavit of Mr. Sarrazin who is the Vice-President Development of the Price Club of Canada. If one looks at the categories listed, only items 1 and 2 relate to items which are sold by Loblaws and

Fortino's. The other items include items not normally sold by Loblaws and Fortino's at all. For example, items not sold by Loblaws are large appliances, office electronics, "home entertainment", which I assume means televisions, VCRs, compact disc players and the like. Other items noted are automotive items, items of apparel, sporting goods, films, jewellery and personal accessories, office supplies, furniture, books, magazines, tapes and records.

In looking at whether a stay ought to be granted, one has to look at the impact of what will take place if such a stay or modified stay is granted. I am satisfied on the items listed in Mr. Stamm's categorization that the only impact which would be felt by Loblaws and Fortino's with respect to individual items being sold by the Price Club, as opposed to a number of like items being sold in bulk, are those items in categories 1 and 2, namely food and groceries, which includes candies and sundries, and item number 2 which includes cigarette and tobacco items. These are the only two categories which would have a financial impact on Loblaws and Fortinos if these items were allowed to be sold individually prior to the determination of the appeal.

Counsel for the applicant Price Club has made reference to the case of Ayerst, McKenna & Harrison, Inc. v. Apotex Inc. (1983), 41 O.R. (2d) 366, which was a decision of the Court of Appeal in Ontario and which involved an appeal on a passing of action. While the facts of the case are not at all similar, I am struck by the statements of Mr. Justice Cory in speaking for the Court at pp. 370 and 371 in which he stated that the real issue between the two drug companies involved in the litigation was that they "were not motivated solely by public policy whereas the real issue was one of profit". The question of whether to stay or not stay the order in the case at bar appeared to me to be in very practical terms a question of profit one way or the other.

In examining the overall effect and the impact of a motion for a stay, we must look at not only whether the appeal is a bona fide appeal, but we must also look at the question of hardship or the prejudice to be suffered by the respective party. This was set out by Goodman J.A. in International Corona Resources Ltd. v. Lac Minerals Ltd. (1986), 21 C.P.C. (2d) 252, which was also a motion to stay pending an appeal. At p. 255 of that decision Mr. Justice Goodman stated the following:

> In considering a motion for such an order, it is my view that the presiding Judge should consider inter alia, the bona fides of the appeal, which in most cases involves a consideration of the substance of the grounds of appeal, and the hardship to or the prejudice to be suffered by the respective parties if a stay be granted or refused. In more general terms, it must be determined whether it is in the interests of justice that the stay be granted and the burden of proof rests upon the party seeking the stay.

This is also the test set out in s. 134(2) of the Courts of Justice Act.

In looking at the question of hardship to or the prejudice to be suffered by the respective parties, I am of the view that the hardship to the Applicants is much greater than that of the hardship which would be suffered by the Respondents in this appeal. If the Price Club cannot sell items which are "low key" in nature, but which are individual items and which have no financial impact on Loblaws and

Fortino's, the hardship to it, while it awaits the hearing of its appeal, would be very great indeed. Counsel, in his presentation, made a very strong argument regarding the overall economic impact which this would have. I am satisfied that justice does require a partial stay of the Order of Madam Justice Feldman. I therefore stay that portion of her Order which restricts the sales to "bulks, sale of quantities, of goods, merchandise and materials" and it relates to categories 3 to 13 inclusive on the list as set out in exhibit "B" to the Affidavit of Raymond Sarrazin dated November 5, 1992. I am informed by counsel that the Price

Club has undertaken that it will not sell those items listed in categories 1 and 2 in breach of Madam Justice Feldman's Order and I do not stay that part of her Order which relates to those items which will have a financial impact on Loblaws and Fortino's, namely, food and grocery items, including candies and sundries, and cigarettes and tobacco.

It will, of course, be up to the Town of Ancaster which issued the building permit, and which is taking no position in these proceedings, to ensure that the Price Club does not breach that part of Madam Justice Feldman's Order relating to those items in categories 1 and 2.

The statutory declaration of Joy Goodman shall have an addendum added to it to clarify the partial stay which I have granted.

I will endorse the Motion record:

> Partial stay granted In accordance with oral reasons delivered by me. Counsel may speak to me regarding the wording of the order.
>
> Costs of this Motion in the cause.

GREER J.

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Indexed as:
Loblaws Inc. v. Ancaster (Town) Chief Building Official

Between
Loblaws Inc. and Fortino's Supermarket Ltd., Applicants, and Mr. William G. Oliver, Chief Building Official for the Corporation of the Town of Ancaster, Price Club Canada Inc., and Price Club Canada Real Estate Inc., Respondents

[1992] O.J. No. 2290
Action No. 316/92

Ontario Court of Justice - General Division
Toronto, Ontario
Feldman J.
Heard: October 15, 16 and 19, 1992
Judgment: October 28, 1992
(29 pp.)

Application under Section 15 of the Building Code Act, R.S.O. 1990, c. B.13.

Richard R. Arblaster and D. Miller, for the Applicants.
Harry Radomski and T. Friedland, for Price Club Canada Inc. and Price Club Real Estate Inc.

Lee A. Pinelli, for the Corporation of the Town of Ancaster.

FELDMAN J.:-- The applicants seek an order of this court revoking a building permit issued by the Chief Building Official of the Town of Ancaster on June 2, 1992 to construct a building in which to operate a Price Club. By way of preliminary order made on September 10, 1992, the applicants were held to be persons with standing under s. 15(1) of the Building Code Act R.S.O. 1990 c. B.13. to appeal the decision of the Chief Building Official to issue the permit.

The issue before this court is whether the proposed Price Club operation is permitted by the Ancaster Zoning By-Law, and in particular, whether a Price Club operation qualifies as a "wholesale establishment" within the meaning of the by-law.

THE ZONING BY-LAW OF THE TOWN OF ANCASTER - BY-LAW NO. 87-57

Page 1 of the by-law sets out its function and effect as follows:

> Prohibiting the use of land for or except for such purposes as are set out in the By-law.
>
> Prohibiting the erection or use of buildings or structures for or except for such purposes as may be set out in the By-law.
>
> Regulating the type of construction and the height, bulk, location, size, floor area, spacing, character and use of buildings or structures, the minimum frontage and depth of the parcel of land and the proportion of its area that any building or structure may occupy.
>
> Requiring the provision and maintenance of loading and parking facilities for buildings or structures to be erected or used for a purpose named in the By-law.
>
> Prohibiting the making, establishment or operation
>
> of pits and quarries in defined areas.

Section 6.6 provides that in the by-law, "shall" is mandatory not directory, and "building" includes part of a building. Section 7.1 provides:

> No person shall within the town of Ancaster use any land or erect, alter or use any building or structure except in conformity with the provisions of this by-law.

Section 7.9 deals with multiple uses, and provides: "Where any land, building or structure is used for more than one purpose, all provisions of this by-law relating to each use shall be complied with..."

The by-law divides the municipality into zones, within each of which certain uses and types of buildings are permitted as set out. There are 6 listed commercial zones and 6 listed industrial zones.

Section 23 deals with the Prestige Industrial M2 Zone wherein the Price Club lands are located.

The section again provides:

> No person shall within any Prestige Industrial M2 Zone... use any land, or erect, alter or use any building or structure except for such purposes and in accordance with the following provisions:
>
> Permitted Uses
>
> Manufacturing uses
> Wholesale establishments
> Warehousing
> Transportation depots and truck terminals
> Other industrial uses
> Non-retail commercial uses
> Lumber and building materials yards
> Motor vehicle gasoline bars, including servicing of motor vehicles
> Restaurants
> Banks, Convenience Stores
> Public Uses and operations
> Communication Facilities
>
> Union Halls
> Recreation facilities
> Existing agricultural uses except poultry farms, mushroom farms, fur farms, piggeries and greenhouses
> Uses, buildings, and structures accessory to the foregoing

Section 3 is the Definition Section containing 137 definitions. The opening words of that section state:

> For the purpose of this by-law all words shall carry their customary meaning except those defined hereafter.

The definition section of the by-law defines the following two terms:

> warehouse: means a building used for the bulk storage of goods, merchandise or materials and shall include wholesale establishments.
>
> wholesale establishment: means a building used for
>
> the bulk storage and sale of quantities of goods, merchandise and materials.

The by-law does not define the term "bulk". Nor does it contain a definition of the word "wholesale" nor of the word "retail", although there is a definition of the phrase "retail store" as follows:

> "Retail Store" means a building where goods, wares, merchandise, substances, articles or things are offered or kept for sale directly to the consumer.

Along with the references to retail and non-retail uses in the "permitted uses" section of article 23, prestige industrial zones, section 23.10 deals with "showroom or retail sales" as follows:

> A maximum of 10% of the floor area of an industrial building may be used for showroom or retail sale of products manufactured or assembled on the premises.

(That percentage has been raised to 25% in the particular

zone in which the subject lands are located.)

THE PRICE CLUB OPERATION

The building permit under appeal was issued for the construction of a warehouse in an M2 Prestige Industrial zone.

Although there were several affidavits, cross-examinations, and responding affidavits filed by both sides with respect to the true nature of the business carried on by the Price Club, I am satisfied that the relevant facts are not in dispute in any material way and can be briefly summarized.

The Price Club operates out of a very large warehouse-type structure containing few finishing amenities, and typically located in an industrial zone with major highway access. The business involves storage of large quantities of a limited selection of all types of goods including food, clothing, large and small appliances, electronics, automotive accessories and many other categories. In many cases, the goods are sold out of their

original packing boxes; in other words, they are not unloaded for shelf display. The goods are stored on metal floor to ceiling shelving and are sold directly from that storage. The

Price Club sells only to card carrying members, who include 1) owners of businesses, and other associates in the business as well as spouses of the business card holders; 2) privilege members who are individuals who work for the most part in the public sector as well as professionals.

The Price Club seeks to be a supplier of goods to small business either of inventory for resale, or of goods used or consumed in the business, but also sells goods for home use to its members. It is acknowledged by Price Club that a not insignificant portion of its sales are to end-users or consumers and are retail sales as out of a retail store. It is also acknowledged that this portion of the business is part of the overall marketing strategy and concept of the Price Club. In fact, in correspondence from the Town to the Price Club, the Director of Planning confirms that the Price Club will be operating a "warehouse retail establishment" and that it comes within the "wholesale establishment" designation in the by-law.

Price Club sells in "quantities" or in "bulk" in two ways: one is by selling by the pallet or in cases, or by selling a number of units which have been packaged together. For example, Price Club will sell 3 packages of macaroni and cheese dinner which have been shrink-wrapped together. This format is ostensibly useful for a variety or convenience store to purchase inventory, in which case the package will be unwrapped and the items resold separately; it is also convenient for a household purchaser. The second method of "quantity" selling is by selling extra large sizes of products, which can be used in businesses or at home. For example, a restaurant may purchase an oversize container of ketchup which it will serve to patrons in smaller refillable squeeze bottles. Of course a homemaker may also find such large sizes convenient and economical.

It is acknowledged by all sides that the Price Club stores goods in bulk in its buildings. It is also acknowledged by Price Club that it sells goods in bulk or in quantities, but it also sells individual, regular size items, and there is no breakdown in the evidence as to what portion of the business involves the sale of individual items. Some clear examples, however, are clothing, electronics and appliances. The evidence is that Price Club sells at the same price to all of its members.

A Price Club outlet also contains a photo center, an optical center, and a restaurant. The photo center is for small business as well as consumer use.

THE ISSUE

Simply put, the issue is whether the business operation just described qualifies as a "wholesale establishment" within the meaning of the by-law.

The applicant's position is that the definition of wholesale establishment is not to be read only literally, that is with only 2 qualifications, bulk storage and bulk sale. Rather, imported into it is the common meaning attributed to the term "wholesale" which it says is sales for resale only and not to end-users or consumers; that is not sales at retail. The applicant supports this argument with the references to retail uses allowed elsewhere throughout the by-law, and says that there would be no point confining retail uses to certain commercial zones with the restrictions and requirements in those zones for roads, parking etc. if one can easily avoid those requirements by setting up a retail outlet in an industrial zone. Or, why does the by-law specifically allow the limited 25% retail showroom as part of a manufacturing business in the industrial zone if one may operate a wholesale establishment which sells in unlimited quantities at retail in the same zone.

The position of the Price Club, supported by the Town, is that the definition is all-inclusive; because it is silent on who the sales may be made to, there is no restriction. They point to the introductory words of the definition section as a mandatory guide to the meaning to be given to words used in the by-law.

However, from an example within the definition of "wholesale establishment" itself, it became clear during argument that there may be some inconsistencies or anomalies within the by-law. This was demonstrated by the definition of the word "storage" which refers to outdoor storage, whereas a warehouse is a building for indoor storage. The respondents rely on the principle of statutory interpretation that if the definition given creates an absurdity, then it should be modified enough to avoid that absurdity. They argue however, that no such absurdity is created by the lack of reference to whom the sales may be made, and therefore nothing need be read in to clarify the meaning. There is no ambiguity and consequently no need to look outside the definition for clarification.

Price Club also disputes the meaning of "wholesale" as articulated by the applicants. Price Club led expert evidence that wholesale sales include not only sales for resale, but also sales to business for use in the business. The expert's evidence is that all sales are either retail, which means to the consumer, or wholesale, which encompasses all other sales.

The applicant's expert's opinion is that there are three types of sales, wholesale, which means for resale only, retail which means to the ultimate user (and this would include sales to businesses which use the goods in their business), and distribution transactions which are sales from

the producer to another producer who adds value to the product before it can be sold in its final form through the wholesale and retail stages.

Both experts supported their respective opinions with dictionary and textbook definitions.

Price Club says that although its business includes transactions for non-business use, its primary business is wholesale including sales to business for resale or for use in the business, and therefore even if the common meaning of "wholesale" is imported into the definition of "wholesale establishment", its operations still qualify.

THE CASE LAW

An examination of the case law discloses that the disagreement over the meaning of "wholesale" and of "retail" has been ongoing over many years in this Province as well as in others and also in the United States. From the point of view of this by-law, the disagreement has been particularly interesting because one of the meanings attributed is dependant on the quantity of goods in the sale, rather than on the use the buyer will make of the goods. This of course, is the qualification contained in the Ancaster by-law definition as it reads.

A useful starting point is the comment of Maclaren J.A. in Townsend v. Northern Crown Bk. (1913), 13 D.L.R. 300 at 302:

> It is common knowledge that in Canada, as in other new countries, the lines between wholesale and retail have been very loosely drawn and have not been at all rigid; the sales by reputed wholesalers have been far from being confined to those who bought to sell again; and even the practice of confining the word "wholesale" to its original idea of purchases or sales in bulk or in large quantities has not been at all generally adhered to. Many merchants are described as selling both wholesale and retail, and many so describe themselves and advertise as such.

It is interesting to note that Price Club is described throughout the materials as a new concept in merchandising, combining wholesale and retail sales with warehouse amenities in order to effect cost savings for all the members both from buying and selling in bulk and from cheaper operating costs.

But the concerns raised about whether Price Club qualifies as a pure wholesale operation, are reflected in 1913 usage and practice as well.

In the case of Imperial Oil Ltd. v. City of Ottawa, [1943] 3 D.L.R. 78 (O.C.A.) the issue was the business assessment of two Esso gas stations in Ottawa which sold 90% products manufactured elsewhere by Imperial, and 10% other products. The decision appealed from confirmed the assessment of the gas stations as a manufacturer at the 60% tax rate, rather than as a retail merchant at a lower rate. The judgment below seemed to rest on the distinction between one who resells someone else's products and one who resells products of its own manufacture. However, in discussing the issue and finding that the appellant was a retail merchant, the court had this to say on the definitions:

> As the expression is commonly used, selling by retail is selling in small quantities, as distinguished from selling by wholesale, or in gross. The word comes to us through the French, and signifies the sale of commodities in small quantities. There is nothing in its derivation to
>
> suggest that it means reselling, nor is that its proper meaning in modern use. (See Murray's Dictionary) (p. 80)

Re Buchman & Son Lumber Co. Ltd. and Regional Assessment Commissioner, Region No. 9 et al. (1982), 141 D.L.R. (3d) 95 (Ont. Div. Ct.) was also an assessment case. The taxpayer was a lumber merchant which sold a small proportion of its low-grade lumber to persons for resale, while 90% was sold to businesses to make crates in which to ship their goods. Most of the taxpayer's lumber was sold in bulk. The issue was whether it was to be assessed as a wholesale merchant. It was agreed that sale in quantity is one of the tests for a wholesaler; the issue was whether the sales also had to be to a retailer rather than to an end-user. Here the sales were to businesses for use in the business, but the court accepted that those business were end-users of the lumber by making it into crates.

At page 98, the court quotes various dictionary definitions of wholesale as follows:

> Some dictionary meanings of "wholesale" are as
>
> follows: the Shorter Oxford Dictionary, "in large quantities, in gross (opp. to 'by retail')"; Funk and Wagnalls' Standard College Dictionary, American version, "The sale of goods by the piece or in large bulk or quantity: opposed to 'retail'"; the Canadian version of Funk and Wagnalls is as follows, "The selling of goods in large bulk or quantity, especially for resale: distinguished from 'retail'"; The Canadian Living Webster Encyclopedic Dictionary of the English Language, "The sale of commodities in large quantities, and esp. for the

> purpose of resale, as to retailers or jobbers rather than to consumers directly: opposed to 'retail'", Stroud's Dictionary, vol. 3, p. 2237, "As a general rule, 'Wholesale' merchants deal only with persons who buy to sell again, whilst "Retail' merchants deal with consumers"; The Oxford English Dictionary, vol. XII, defines "wholesaler" as "one who sells goods wholesale (to retailers)".

The court distinguished the Imperial Oil decision on the basis that the sales in that case were being made to the end-user and were therefore retail on that basis regardless.

The court followed the decision of the New Brunswick Court of Appeal in Donovan v. Saint John, [1950] 4 D.L.R. 561, where a ship's chandler which sold goods and supplies to ships for use by the crew on the ship was a retailer and not a wholesaler even though the goods were sold in large quantities, on the basis that they were not for resale. The court quoted with approval the following from the decision of Richards C.J. at p. 565:

> It will be noted that in the above definitions of retail two distinguishing features appear, namely, sale in small quantities and sale to the consumer. Sale in small quantities may seem to appear more generally, but it must be remembered that dictionaries usually give alternative or varying definitions, and a conclusion cannot be made from a few selected definitions. Consideration must be given to actual business practice and judicial authority.

The Divisional Court concluded that "the proper test of what a wholesaler is and, to be one, the sale must not only be in large quantities, but it must be to a person other than the

end-user." (p. 99). Therefore the sales to businesses of lumber for crates did not qualify.

However, the dissenting opinion of Craig J. demonstrates that the term "wholesale" is one which has more than one common meaning or understanding in the community. Craig J. held that the "ordinary meaning " of "business of a wholesale merchant" "is descriptive of selling goods or merchandise in large quantities (usually, but not necessarily for resale)." (p. 102) He also refers to the several dictionary definitions, and the case law including the Imperial Oil case, as well as Heath v. City of Victoria (1892), 2 B.C.R. 276, where Begbie C.J.B.C. stated at p. 277:

> There is no doubt that a merchant who sells as above in large quantities to another trader, in order that the second may distribute piece-meal to actual consumers, is a wholesale merchant. The fallacy is in assuming that this, which is only an example of a class, exhausts the whole class. In fact, a wholesale dealer may know nothing, and certainly cares nothing, about the way in which his immediate customer deals with the goods.

I note that the latter comment applies with even more force to a municipality. It is not concerned with the use that Price Club shoppers will make of their purchases, and whether they are for business, for resale, or for home use. The municipality's concerns in the context of the zoning by-law are land-use related.

In analyzing the end-user qualification, Craig J. considered the very types of distinctions which were debated in argument in this matter. For example, a hotel may purchase food in bulk which it resells in its restaurant, and therefore its supplier would be a wholesaler. But its bulk purchases of towels, bedding or paper products which are used in the business and not resold as such would categorize those suppliers as retailers. Craig J. concluded that "no distinction can be made between any of the transactions mentioned in these examples; that is all of the suppliers come within the ordinary meaning of "wholesale merchant"" (p. 105). And at p. 104:

> In my opinion it is apparent from these definitions and authorities that the essential characteristic
>
> of a wholesaler is one who sells in large quantities. It is usual that he sells to a retailer for the purpose of resale, but that is not an essential characteristic. It is not a case where the language of the Act is ambiguous.

There was also a dissenting opinion in the Donovan decision referred to above. Hughes J. was satisfied that the taxpayer was not making retail sales to the ships because the sales were not in small quantities, and according to some dictionary definitions he refers to, sale to the ultimate consumer is not a necessary aspect of retail. He said that Donovan may not be a wholesaler either, but rather a jobber, or someone selling in some other capacity. This observation reflects the view of the applicant's expert that not all sales must be either wholesale or retail.

The final Ontario case cited by the applicants is Provincial Fruit Co. Ltd. v. H.J. Fine & Sons (1980), 30 O.R. (2d) 262 (O.H.C.). The issue in that case was whether a retail fruit market attached to the defendant's wholesale food business was an accessory use within the meaning of the relevant by-law. In the course of his reasons, Southey J.

discussed the meaning of wholesale and retail in the following way at p. 269:

> The function of a wholesaler is to buy large quantities of goods, pay for them to be transported to the area which he services, store them there in a warehouse, which in the case of some foods would probably be a cold storage facility, and then sell and deliver them to retailers in bulk, but in smaller quantities than those in which the wholesaler has purchased them.
> The retailer then deals with the consuming public by selling small quantities in stores located conveniently throughout the communities in which the consumers live.

Although the decision was reversed on appeal, this formulation of the concept of wholesale and retail in the context of the facts of that case was not questioned, and was implicitly accepted.

The applicants also cite two American cases for the proposition that the difference between a wholesaler and a retailer is that the person buying from a wholesaler does so in order to sell the article again, whereas the retailer sells to the ultimate user: Zehring v. Brown Materials Limited 48 F.Supp. 740 (California District Court); Haynie v. Hogue Lumber & Supply Co. of Gulfport, Inc. 96 F. Supp.214 (U.S. District Court, Mississippi).

Although the weight of authority in Ontario favours the definition of wholesale as large quantity or bulk sales to a reseller and not to an end-user whether consumer or business, each case is decided in the context of a particular statute, such as the Assessment Act, or of a particular set of circumstances. The ongoing nature of the debate in these various contexts confirms that there is not only one common or ordinary meaning of the word "wholesale".

In construing a by-law, one must look to the entire by-law "and construe one part with another or other parts, so as if possible to give effect to the whole." See In re Cameron and the Municipality of East Nissouri (1855), Ont. Q.B., Easter Term, 19 Vic. 190 at 192. In the M2 zone, retail uses are strictly delineated and limited, while retail stores are allowed in commercial zones but not in the prestige industrial zone. However, there is no provision anywhere in the by-law for a warehouse retail establishment which combines sales to consumers with sales for resale (or to businesses for use in the business, if the definition of wholesale extends that far). As the Supreme Court of Canada concluded in Bayshore Shopping Centre Ltd. v. Nepean Tp. (1972), 25 D.L.R. (3d) 443 at 450, where it was dealing with the words "shopping centre", the omission of those words from the permitted use sections of the by-law may indicate that in the view of the Municipality in enacting the by-law, the term was already covered by other permitted uses including in that case, "retail store", "service shop" and "department store".

In the Ancaster by-law, the proper conclusion may be that the term "warehouse retail establishment" is already covered by "wholesale establishment" in that the definition does not exclude retail sales directly to the consumer, but qualifies itself by the "bulk" requirement for storage and sale of goods.

In enacting a special provision allowing a limited retail showroom as part of a manufacturing industrial building, the municipality must have considered that such use might not be considered accessory within the meaning of the by-law, or it wished to limit that accessory use to the directed percentage. No such limit is set out for a wholesale establishment. The applicant says that this means therefore, that no retail sales are allowed from a wholesale establishment. The contrary conclusion is that retail sales are not prohibited in a wholesale establishment, therefore special permission is not necessary, or that the numbers of retail customers will be self-limiting by the requirements for bulk sale.

In my view, looking at the by-law as a whole, one is not compelled to the view that a wholesale establishment cannot permit sales directly to the consumer, or that if it does, it becomes a retail store. In the final analysis, the definition of "wholesale establishment" contained in the by-law itself must govern, as the definition section of the by-law directs that it must. That definition is silent on the issue of who may be the purchasers of the goods sold there. The definition has meaning as it stands, and as well accords with one of the ordinary meanings of wholesale, which is storage and sale in bulk. There is no absurdity which requires that any limiting words be read in: Dale Estate Limited v. The Town of Brampton [1953] O.R. 659 at 684.

In my view, the Court is also entitled to seek guidance from the words of the Town of Ancaster Official Plan which deals with the area which includes the subject land. The Plan provides the area is to be developed as an Industrial Park including the permitted use of "wholesale activities (including direct sales to the public) warehousing and storage and other similar industrial uses." It is argued that by leaving out the bracketed words in the by-law, the municipality has not carried forward the inclusion of direct sales to the public into the meaning of "wholesale establishment" as opposed to the "wholesale activities" contemplated in the Official Plan. However, in my view, where the by-law is silent on the issue of who may purchase at a wholesale establishment, and the official Plan indicates that the municipality does not consider the term wholesale to mean only sales to retailers, the court may take that information into account in deciding whether the intention of the by-law

is to import into the meaning of wholesale the very restriction it signified does not apply to that term.

It was urged upon me by the respondents that if there are alternative meanings that may apply, the court must construe the by-law strictly and in favour of the landowner. Several authorities were cited for the proposition that people may use their property as they deem fit except for acts of nuisance, entrapment, or in breach of a statute "and therefore by-laws restrictive of that right should be strictly construed." Bayshore Shopping Centre Ltd v. Nepean Tp. (1972), 25 D.L.R. (3d) 443 at 449. See also City of Thunder Bay v. Potts (1982), 142 D.L.R. (3d) 253 at 259/260 and cases cited therein. However, there is a contrary proposition, which is that because a by-law is enacted to set standards for the entire community, it is in the interest of the community that the by-law be given a liberal interpretation in order to ensure that those standards are achieved and applied fairly to all who choose to live and do business in that community: Re Bruce and City of Toronto (1971), 19 D.L.R. (3d) 386 at 391 (O.C.A.). I note that in the Bayshore case, the Supreme Court of Canada declined to interpret the by-law either strictly or liberally in the face of these two conflicting values (p. 449). I respectfully adopt the approach of the Supreme Court on this issue. In construing the by-law in favour of the literal interpretation and application of the definition of "wholesale establishment", I have not applied the rule of strict construction in favour of the landowner, Price Club.

CONCLUSION

I have concluded that the phrase "wholesale establishment" in the by-law should be given its literal meaning, which is a building used for the bulk storage and sale of quantities of goods, merchandise and materials. Price Club obtained a building permit for a warehouse which includes a wholesale establishment, and it is common ground that Price Club's intention was to erect a building for the purpose of carrying on there the activities described earlier in this judgment. It is clear on the evidence that some of those activities, that is the bulk storage of goods, and the bulk sale of goods in the two ways I have described, are permitted by the by-law. It is also clear that some of those activities, including the sale of individual regular size items, for example, appliances, clothing and electronic equipment are not permitted uses.

Counsel for Price Club fairly conceded that the retail portion of its activities is not an accessory use as it forms part of the entire marketing scheme of the Price Club concept. It was not argued, nor do I believe it could be, that the sale of individual items, as opposed to sale in bulk or in quantity, is an accessory use to the wholesale establishment use. The evidence did not break down either gross or percentage figures for this portion of the business, but there was no suggestion that it is insubstantial or de minimus.

THE REMEDY

1. The Town took the position that it is premature to consider any remedy for anticipated use of the building that may not conform to the by-law as long as the building permit was issued for a building which as a structure is capable of being used lawfully in the zone. In this case, the permit was for a warehouse which is permitted by the by-law; the Town says the permit should be considered as properly issued, and the future use should be monitored by the Town to ensure compliance with the by-law, relying on the cases of O'Connor v. Jackson et al., [1943] O.W.N. 587; Re Coleman and McCallum, [1913] O.W.N. 1449; City of Toronto v. King (1923), 54 O.L.R. 100 (O.C.A.); Mackenzie v. City of Toronto, [1915] O.W.N. 820.

In my view the wording of the Building Code Act and of the by-law preclude the application of these cases. Section 6(1) of the Act provides:

> 6(1) The Chief Official shall issue a permit except where,
>
> (a) the proposed building or the proposed construction or demolition will not comply with this Act or the building code or will contravene any other applicable law.

Other applicable law includes a zoning by-law: Woodglen & Co. v. North York (1983), 23 M.P.L.R. 13 at 16; Axelrod v. Corporation of the City of Toronto (1981), 15 M.P.L.R. 143 at 149.

The zoning by-law prohibits the erection of a building for a purpose not permitted by the by-law, as well as prohibiting its use. In my view it is clear that a permit is not to be issued to erect a building for a purpose not permitted by the by-law. It was never Price Club's purpose or intention to use the building only for storage. The general purposes it intended were made known to the Town which determined that those purposes, as described herein, fell within the meaning of "wholesale establishment" as defined. It is now clear that part of the Price Club operation will comply and part will not. The erection of the building for the latter purposes will therefore contravene the by-law. It is inappropriate to ignore that contravention at the building permit stage.

A similar conclusion was reached by A.R. Campbell J. in John Walker v. Corporation of the City of Kingston (1991), 6 M.P.L.R. (2d) 316 at 320, where he held that to allow construction to proceed on additions to a duplex for an illegal occupation and then await prosecution for any future illegal use "would frustrate the intent and meaning of the by-law and cannot be sustained."

2. All parties took the position that the only remedy available under s. 15 of the Building Code Act R.S.O. 1990, c-B.13 is revocation or rescission of the permit, and that the court could also make a declaration as to the meaning of the by-law for the guidance of the parties. The applicant asks that the decision of the Chief Building Official to issue the permit be rescinded and that the permit be revoked, and that all construction cease while Price Club reapplies. The respondents say that if the court should find that the intended use of the premises contravenes the by-law in some way, then the court should not revoke the permit, but should make a declaration as to the permitted uses under the designation of "wholesale establishment" so that the Price Club will be able to govern itself accordingly.

Contrary to the submissions, I believe the court has the power to make other orders under the Building Code Act pursuant to s. 15(3) which provides:

> Where an application is made to a judge for a hearing under subsection (1), the judge shall appoint a time for and hold the hearing and may rescind or affirm the order or decision of the inspector or chief official or take such action as the judge considers the inspector or chief official ought to take in accordance with this Act and the regulations, and for such purposes the judge may
>
> substitute his or her opinion for that of the inspector or chief official. (Emphasis added).

Under s. 8(2), "Where an inspector finds that any provision of this Act...is being contravened, the inspector may give to the person whom he or she believes to be the contravenor an order in writing directing compliance with such provision, and may require the order to be carried out forthwith or within such time as he or she specifies." There is no section of the Act which says that a building must be erected in accordance with the building permit issued for it. However, subsection 6(5) provides that:

> No person shall construct or cause to be constructed a building in a municipality except in accordance with the plans, specifications, documents and any other information on the basis of which a permit was issued or any changes thereto authorized by the chief official.

And subsection 5(1) says:

> No person shall construct...or cause to be
>
> constructed...a building in a municipality unless a permit has been issued therefor by the chief official.

It is implicit in these two sections, and the Act as a whole, that once a permit is issued, the building must be constructed in accordance with the permit. Another way of looking at it is that if the building that is being constructed is not authorized by the permit, then that building is being constructed without a permit in contravention of subsection 5(1).

In this case the permit was issued for the erection of a building to be used as a warehouse, and the evidence is that this was in its included meaning of a wholesale establishment. The evidence has now disclosed that part of the business of the Price Club for which the building permit was sought and issued is sale of individual items, not in bulk, which is not permitted in a wholesale establishment. Therefore there is a breach of the Act, as the permit is for a permitted use, but the building being erected under it is not.

In such circumstances, an inspector is authorized to issue a compliance order under ss. 8(2), and a stop work order under ss. 8(5) which is precisely what happened in John Walker v. Corporation of the City of Kingston (1991), 6 M.P.L.R. (2d) 316, and which action was approved by the court in that case as a proper procedure in accordance with the Act. (p. 320). There the inspector required confirmation that the use of the building conformed with the by-law. It did not and ultimately the permit was revoked.

In my view, some action is required under the Act when a building permit has been issued by the municipality in error, based on a misunderstanding of the facts or a misinterpretation of the by-law, so that an appeal under s. 15(1) must be allowed. (In this case, it is not clear which of these circumstances caused the error.) However, the judge is authorized not only to rescind or revoke the permit, but also to take such action as the judge considers the inspector or chief official ought to take.

In this case, it was agreed between the parties and made part of an early order of the court in this proceeding that there would be no stay of the permit pending this appeal, so that the building is in some state of completion at this date and is apparently targeted to open for business on November 5, 1992. In those circumstances, and having regard for the fact that the Town was not misled by the Price

Club (although it is unclear how much information the Town had as to the extent of bulk sales at Price Club), and that the Town led the Price Club to believe that its operation fit within the applicable M2 zoning, Price Club should be given an opportunity to comply with the Act before the permit is rescinded.

ORDERS

1. It is declared that a portion of Price Club's intended use of the proposed building is contrary to Zoning By-Law 87-57 of the Town of Ancaster. The prohibited portion is any activity that is not bulk storage or sale of quantities of goods, merchandise and materials or any proper accessory use to those activities.

2. Price Club shall have until November 4, 1992 to comply with the building permit by providing evidence satisfactory to the Town that it will modify its operations

at the Ancaster location in order to comply with the zoning by-law, as declared in this judgment and the Town shall respond in writing.

3. If Price Club has not complied within the time limit set out in No. 2 above, then the building permit No. 2992/92 shall be rescinded and all construction of the building shall cease.

4. The respondent Chief Building Official shall provide the applicant with any documents contemplated or generated in connection with paragraph No. 2 of this order upon its request therefor.

5. The parties shall make arrangements to reattend to make submissions with respect to the costs of this application.

FELDMAN J.

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** Unedited **

Indexed as:
Loblaws Inc. v. Ancaster (Town) Chief Building Official

Between
Loblaws Inc. and Fortino's Supermarket Ltd., Applicants, and Mr. William G. Oliver, Chief Building Official for the Corporation of the Town of Ancaster, Price Club Canada Inc., and Price Club Canada Real Estate Inc., Respondents

[1992] O.J. No. 1879
DRS 94-00315

Action No. 316/92
Also reported at: 95 D.L.R. (4th) 695
Action No. 316/92 95 D.L.R. (4th) 695

Ontario Court of Justice - General Division
Toronto, Ontario
Feldman J.
Heard: September 8, 1992
Judgment: September 10, 1992

(10 pp.)

Practice -- Appeals -- Standing to appeal -- Appeal from issue of building permit on ground of economic impact on appellant's business -- Appellant alleging contravention of zoning bylaw -- Whether economic competition was sufficient to entitle person to appeal.

This was a ruling on a preliminary issue regarding the applicant's standing to appeal an order granting a building permit. The applicant submitted that the permit should be revoked on the ground that it contravened the applicable zoning bylaw and therefore did not comply with section 6 of the Building Code Act. The appellant argued that the Price Club would directly compete with two major grocery stores operated by the appellant and would have a significant impact on their sales volumes. The respondent argued that economic competition was not a sufficient basis for a person to be aggrieved and thus be entitled to appeal.

HELD: The applicants were persons who reasonably wished to appeal within the meaning of section 15 of the Act and therefore had standing to proceed with the application.

STATUTES, REGULATIONS AND RULES CITED:
Building Code Act, R.S.O. 1990, c. B.13, s. 15, 15(1).
Municipal Act, R.S.O. 1990, c. M.45, s. 328.
Statutes Revision Act, S.O. 1989, c. 81, ss. 3, 6, 6(1).

Richard R. Arblaster and D. Miller, for the Applicants.
Harry Radomski and T. Friedland, for Price Club Canada Inc. and Price Club Real Estate Inc.
Lee a. Pinelli, for the Corporation of the Town of Ancaster.

FELDMAN J.:-- This matter is an application by the applicants under s. 15 of the Building Code Act R.S.O. 1990, c. B.13 for a hearing and appeal of the order of the Chief Building Official of the Town of Ancaster granting a building permit to the respondents, known as Price Club.

The respondents have raised the preliminary issue that the applicants lack standing to appeal under s. 15, and all parties have requested that the court decide the issue as a preliminary matter before the parties take any further steps to complete the record and to set a new date to argue the main

application.

Section 15 of the Building Code Act currently provides:

> 15.(1) Any person who wishes to appeal an order given or decision made by an inspector or chief official under this Act or the regulations may, within twenty days after the order or decision is made, apply to the judge of the Ontario Court (General Division) for a hearing and appeal. R.S.O. 1980 c. 51, s. 15(1), revised. (Emphasis added)

The section formerly provided that "any person who considers himself aggrieved by an order given or decision made by an inspector or chief official under this Act" may appeal. (Emphasis added). The change was made in the 1990 statute revision pursuant to the Statutes Revision Act, 1989, S.O. 1989, c. 81 which authorizes certain Commissioners to omit obsolete statutes, to alter numbering, to make changes in language to achieve greater uniformity, and to make changes necessary to bring out more clearly what is considered to be the Legislature's intention, to reconcile apparently inconsistent provisions, or to correct clerical, grammatical or typographical errors. (s. 3).

The changes were incorporated into the revised statutes which were then passed into law by the Legislature, while the old Building Code Act was repealed. (s. 6).

The respondent argues that the commissioners do not have the authority to make any substantive changes in legislation, so that the change in wording cannot broaden any right of appeal where the change was made by the statute revision: Foster v. Johnsen (1983), 41 O.R. (2d) 498. However, as pointed out by Lerner J. in Fernandes v. Melo (1974), 6 O.R. (2d) 185 at 187, dealing with a similarly effected wording change to the Judicature Act, the operative word is the new word, since the old Act was repealed from the day when the revised statutes took effect.

Although the Commissioners clearly do not have authority to make any changes beyond those authorized by the Statutes Revision Act, the Legislature itself does have that authority, which it exercised by passing the new wording.

If the effect of the new wording is that literally "any person" may appeal a decision to issue a building permit, then there is no dispute that the applicants have standing to appeal.

The respondent argues that the change of wording effects no substantive change, and therefore must be interpreted to mean "any person who considers himself aggrieved", as that phraseology has been interpreted by the courts.

In my opinion, this is the better view, and is supported by the wording change. The phrase "who considers himself aggrieved" is not only old-fashioned in its form, but also, for example, in the fact that it is not gender neutral nor easily made so. Its purpose is to put a subjective element into the determination of who may appeal. The revised version does not give the right of appeal to any person" without qualification, but to "any person who wishes to appeal". Arguably this is merely a modern way to express the same subjective qualification of the right to appeal. The commissioners therefore acted within their mandate to change the language to more clearly bring out the meaning intended by the Legislature, using a more modern construction.

In my view, the meaning is even clearer when it is read and interpreted in accordance with the interpretation given to the old language by judicial interpretation. In the decision of the Divisional Court in Friends of Toronto Parkland v. Corporation of the City of Toronto et al. (1991), 6 O.R. (3d) 196, the court held that the test for standing to appeal, although subjective, was not completely open-ended, and the correct approach was that the section should be read as though it stated: "any person who reasonably considers himself aggrieved" (emphasis added). This qualification would allow a court to exclude a person whose reason for feeling aggrieved was unfounded or fanciful.

The same word can conveniently be read into the revised wording of s. 15: "any person who reasonably wishes to appeal", and with the same effect.

The Divisional Court points out in the Friends of Toronto case, that "the legislature clearly intended that some threshold test be applied, and it would be inappropriate to leave the whole matter either to the subjective whim of the appellant or solely to the discretion of the court." (p. 205). I respectfully agree with this view of the wording of section 15 in its old form, and I am satisfied that the intent of the new wording was to achieve the same balance but in more modern, and hopefully therefore, clearer language.

The position of the applicant is that the building permit that was issued should be revoked, on the ground that the proposed building will contravene the applicable zoning by-law and therefore the building permit does not conform to other applicable law as required by s. 6 of the Act. The applicant says that the Price Club outlet to be constructed there is not a "wholesale establishment", which is allowed by the by-law, but rather its operation is primarily retail which the applicant asserts is not permitted by the zoning.

The reason the applicant wishes to appeal and considers

that it has standing to appeal, is because The Price Club will directly compete with the two major retail grocery stores in the Ancaster and Hamilton area which the applicant now operates, and will have significant negative effect on their sales volumes.

It is common ground that the applicant's stores and property will not be physically affected by the Price Club outlet. Rather, it is conceded by the applicant that it is only its economic interest and the commercial value of its property which are in potential jeopardy.

The respondent says that the evidence of the applicant supporting its position is not probative as to the alleged negative economic impact of the Price Club, without for example, comparative figures showing the effect of other Price Club outlets on other grocery stores in close proximity. I agree that such evidence might have been more cogent. On the other hand, it is not possible to prove what will happen in the future, and any attempt at proof will necessarily also address a main issue on the application, which is the characterization of the business of the Price Club and the nature of its market. That issue is not to be determined at this preliminary stage. The test remains a subjective one, and the evidence is sufficient for the applicant to claim its right to appeal, if an economic interest is one which falls within the ambit of the section.

The respondent's submission is that economic competition is not a sufficient basis for a person to be aggrieved. I will take the liberty of expressing the proposition in the current language of the section: "economic competition is not a sufficient basis for a person to reasonably wish to appeal". Nothing that the Price Club may do on its lands as a result of the building permit will impede the use that the applicants may make of their own lands. For example, in the case of Giglio Enterprises Ltd. v. Link, [1989] O.J. No. 1652 the applicant was an owner of abutting lands, who feared that his property would be used by customers of the respondent for parking as a result of a building permit issued to the respondent which did not provide for sufficient parking spaces on its own property. The applicant's use of his own land could be adversely affected.

The respondent says that the real complaint here is that the Price Club use of its land may have an adverse economic impact on the applicant by creating more competition, and this is not the type of basis upon which an appellant can legitimately feel himself aggrieved within the intent of the section.

No Ontario authority was brought to the attention of the court which stands for the proposition asserted by the respondent. The case of Re Halifax Atlantic Investments Ltd. and City of Halifax (1978), 90 D.L.R. (3d) 633, a decision of the Nova Scotia Court of Appeal holds that a different phrase, "a person aggrieved", that is, with no subjective element, requires that to have a right to appeal, a person must have a legal grievance, i.e. the person must have been wrongfully deprived of something by the decision, and therefore increased economic competition was not enough.

However, in the leading Ontario case, Friends of Toronto, the Divisional Court specifically holds that "persons may be aggrieved within the meaning of that term in s. 15 though they have suffered no legal harm."

The other authority upon which the respondent relies is the Federal Court decision in Pfizer Canada Inc. v. Minister of National Health & Welfare (1986), 12 C.P.R. (3d) 438. The issue was the interpretation of s. 28(2) of the Federal Court Act which allowed "any party ...directly affected by the decision" of the Minister to apply to set it aside. The court held that a competitor of the drug affected by the decision did not have standing because if its property rights in its product were affected, it was because of competition but not because of the Minister's decision. Again, in my view, the wording of the statute is so different, that no analogy may be drawn.

The best source of analysis for the scope of standing under the section is the Friends case itself. In that case, the court allows for the broadest of nexus between the interests of the applicant and the decision to issue the building permit. In that case, the appellant public interest group had no proprietary or pecuniary interest in the decision, but rather felt that the development in question was not in the public interest for various reasons. The court would not have denied them standing on that basis, but because they had already tried to stop the development through several other routes within the planning process, with no success, the court was of the view that the applicant was now trying to use an appeal regarding the alleged non-compliance of the parking component of the permit as another route to accomplish their original purpose and questioned the bona fides of their subjective feelings of being aggrieved by the decision to issue the permit.

In my view, the reference by the court to a pecuniary interest (p. 205) suggests that if a person did have such an interest or reasonably believed that they did, then that interest would be sufficient to give standing under s. 15. Furthermore, I can see no reason in principle why a potentially adverse economic impact of an allegedly improperly issued building permit, such as that asserted by the appellant, is any less legitimate or worthy of concern than the interest of a neighbour that its property may be

physically affected by an allegedly improperly issued permit.

I am therefore satisfied that the applicants are persons who reasonably wish to appeal within the meaning of section 15, as interpreted by the Divisional Court in the Friends of Toronto case, and therefore they have standing to proceed with this application.

The respondent, the Chief Building Commissioner for Ancaster has made a second submission, that the application should be quashed at this stage on the ground that on its face, the permit, issued for a warehouse, complies with the zoning by-law which allows warehouses. Therefore the commissioner was obliged to issue the permit which is regular and discloses no basis for challenge. It is the future use which the Price Club may make of the premises, about which the applicants are concerned, then their remedy is not under the

Building Code Act, but rather under s. 328 of the Municipal Act which allows a ratepayer to restrain the contravention of a by-law. The respondent commissioner says that at the moment there is no contravention so that this application is premature, and ill conceived as the complaint is not with the permit but with the intended future use of the premises.

Although this argument is an attractive one at first blush, upon reflection, in my view it begs the question of the meaning of s. 6(1) of the Building Code Act and in particular the requirement that the building may not contravene any other law. I therefore decline to decide this issue on the preliminary motion but leave it to counsel, if so advised, to raise the issue again and point to appropriate evidence to support it, as part of the main application.

FELDMAN J.