

BILL 111 2001
AN ACT TO REVISE THE MUNICIPAL ACT

A COMMENT BY CELA
REGARDING THE POTENTIAL IMPACT ON THE
DECISION OF THE SUPREME COURT OF CANADA
REGARDING MUNICIPAL PESTICIDE BY-LAWS

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INTRODUCTION

Bill 111, An Act to Revise the Municipal Act and to amend or repeal other Acts in relation to municipalities was introduced in the Ontario Legislative Assembly in October, 2001. The EBR comment period expires December 2nd, 2001.

The purpose of this comment is to review the Act and its potential impact upon the result of the Supreme Court of Canada decision in *Spraytech et al. v. Town of Hudson* (referred to hereafter as the *Hudson* case for Ontario municipalities. That decision was released by the Supreme Court of Canada on June 28, 2001.

The *Hudson* case concerned the validity of a municipal by-law passed by the Town of Hudson, Quebec controlling the use and application of pesticides within the municipality, including on private property. The by-law in question was passed under the authority of the Quebec statute, the *Cities and Towns Act*.

CELA represented eleven Interveners in the Supreme Court case, namely CELA, Toronto Environmental Alliance, Sierra club of Canada, Parents' Environmental Network, Healthy Lawns – Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond. This group of Interveners were given the right to file a factum in the case for the assistance of the Court.

The Court found that the authority to pass the by-law was found in Quebec's municipal legislation, the specific wording of which will be explained below.

Among other things, CELA's factum argued that the result of the Supreme Court's decision would affect municipal powers in other provinces, particularly since many of the provinces have municipal powers similar to the specific power under which the Town of Hudson acted. As will be discussed below in this comment, the Supreme Court agreed and in fact noted many of the provinces with similar powers which would empower municipalities to pass similar pesticide control by-laws.

Furthermore, the Court had to specifically consider the limits of the Town of Hudson's powers because of express limitations in the Quebec *Cities and Towns Act*; and in particular had to consider the question of whether the by-law was consistent with relevant

federal and provincial law. The Court found that the by-law was not inconsistent with federal and Quebec pesticides laws.

We wish to state that this comment is not a legal opinion for any particular proposed Ontario by-law. A specific legal opinion would have to be sought regarding the particular proposed wording of a by-law, in light of the relevant Ontario statutory provisions. Rather, these are general comments provided by CELA providing our general opinion as to the authority of Ontario municipalities to pass pesticide by-laws in general under the proposed *Municipal Act (Bill 111)*, based on the Supreme Court’s decision in *Hudson*.

Furthermore, this comment does not deal with other potential sources of municipal authority over pesticides by-laws such as municipal nuisance powers.

A. The wording of the power

Quebec Cities and Towns Act

In the *Hudson* case, the relevant authority provided by section 410(1) of the *Cities and Towns Act* provided that:

“410. The council may make by-laws:

- (1) To secure peace, order, good government, health and general welfare in the territory of the municipality, provided such by-laws are not contrary to the laws of Canada, or of Quebec, nor inconsistent with any special provision of this Act or of the charter;”

Ontario *Municipal Act* at present

The Interveners represented by CELA pointed the Supreme Court of Canada to Ontario’s analogous provisions in the Ontario *Municipal Act*. These included section 102:

“102. Every council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act as may be deemed expedient and are not contrary to law...”

Ontario *Municipal Act* proposed in Bill 111

The proposed Ontario *Municipal Act* provides for the powers of municipalities in a different framework than does the existing *Municipal Act*. Rather than an exhaustive list of specifically provided powers that form the entire set of powers of a municipality, the proposed *Act* provides that:

“8. A municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act.”

“9. (1) Sections 8 and 11 shall be interpreted broadly so as to confer broad authority on municipalities,

(a) to enable them to govern their affairs as they consider appropriate, and

(b) to enhance their ability to respond to municipal issues.”

(2) In the event of ambiguity in sections 8 and 11, those sections shall be interpreted broadly to include, rather than exclude, municipal powers that existed on December 31, 2002.”

(3) Without limiting the generality of subsections (1) and (2), a by-law under section 11 respecting a matter may,

(a) regulate or prohibit respecting the matter; and

(b) as part of the power to regulate or prohibit respecting the matter, require persons to do things respecting the matter, ...

“10. (1) Without limiting the generality of section 9 and except as otherwise provided, a by-law under this Act, except Parts VII to XIII, [the taxation powers] may be general or specific in its application and may differentiate in any way and on any basis a municipality considers appropriate.

(2) Despite subsection (1) and except as otherwise provided, a by-law under this Act may only deal differently with different person or businesses if the persons or businesses constitute different classes of persons or businesses defined in the by-law.

“11. (1) A single-tier municipality may pass by-laws respecting matters within the following spheres of jurisdiction...”

“14. A by-law is without effect to the extent of any conflict with,

(a) a provincial or federal Act or a regulation made under such an Act; or

(b) an instrument of a legislative nature, including an order, license or approval, made or issued under a provincial or federal Act or regulation.”

The statutory provisions must be interpreted in light of the purposes of the Act. In Bill 111, the purposes are stated to be:

“2. Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each

municipality is given powers and duties under this Act and many other Acts for purposes which include:

- “(a) providing the services and other things that the municipality considers are necessary or desirable for the municipality;
- (b) managing and preserving the public assets of the municipality;
- (c) **fostering the current and future economic, social and environmental well-being of the municipality; and** [emphasis added]
- (d) delivering and participating in provincial programs and initiatives.”

Section 130 of Bill 111 provides:

“130. A municipality may regulate matters not specifically provided for by this Act or any other Act for purposes related to the health, safety and well-being of the inhabitants of the municipality.”

Section 150 limits municipalities’ licensing powers to the following purposes: health and safety; nuisance control and consumer protection, and provides that licensing by-laws must include an explanation regarding why a municipality is licensing the activity and how that reason relates to the relevant purpose in the section.

Section 272 limits the ability of anyone to challenge a by-law by providing:

“272. A by-law passed in good faith under any Act shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the by-law.”

The ability of a court to rule a by-law invalid is limited to its legality by way of section 273:

“273. (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.”

(“Illegality” may include the issue of municipal jurisdiction or authority.)

Analysis

Section 130 of Bill 111 is the section analogous to section 410 of Quebec’s *Cities and Towns Act*, and analogous to section 102 of the current Ontario *Municipal Act*.

The general scheme of Bill 111, to provide for general natural person powers, is analogous to the approach taken by Alberta in its *Municipal Government Act*.

Both the current Ontario *Municipal Act* and the Alberta *Municipal Government Act* were among the list of provinces mentioned by the Supreme Court of Canada when it noted that other provinces had powers similar to the one it was considering in

Quebec. The Court described these types of powers as “general welfare” powers. These types of powers supplement the specific grants of power contained in most province’s municipal legislation. (paragraphs 18, 19 of the *Hudson* decision) In fact, the Court noted that such general welfare powers “allow municipalities to respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation.”

The Supreme Court noted the point made in a leading law text (Rogers), that “the legislature cannot possibly foresee all the powers that are necessary to the statutory equipment of its creatures...Undoubtedly the inclusion of ‘general welfare’ provisions was intended to circumvent, to some extent, the effect of the doctrine of *ultra vires* which puts the municipalities in the position of having to point to an express grant of authority to justify each corporate act” (paragraph 18 of the *Hudson* decision).

The Supreme Court specifically noted several specific provisions in various provinces’ statutes, including Alberta’s purpose clause, and its general jurisdiction clause.

Alberta’s purpose clause states:

- “3. The purposes of a municipality are
 - (a) to provide good government,
 - (b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and
 - (c) to develop and maintain safe and viable communities.”

Alberta’s general jurisdiction clause provides, in part:

- “7. A council may pass bylaws for municipal purposes respecting the following matters:
 - (a) the safety, health and welfare of people and the protection of people and property...”

The Supreme Court also noted Ontario’s section 102 (set out above), as well as the general welfare clauses of several other provinces.

For example, Nova Scotia’s *An Act Respecting Municipal Government* included in its section 172, the power to make by-laws respecting (a) the health, well being, safety and protection of persons; ...”

The Supreme Court noted that these general welfare powers are not open ended – they must be “genuinely aimed at furthering goals such as public health and safety.” (paragraph 20) As noted below, the Court found that the Town’s pesticides by-law was aimed at such goals.

Another consideration for Ontario by-laws is the phrase “not specifically provided in this Act” found in the current section 102. The proposed section 130 will include this phrase and add the words “or any other Act” to the section. This was the basis for the Supreme Court to distinguish the *Greenbaum* decision, an earlier case involving Ontario’s Municipal Act, since the Quebec legislation did not contain such a phrase.

Inclusion of such a phrase is not necessary – many other provinces, including Quebec, have general welfare clauses that do not contain this phrase. The issue of preventing inconsistency between a municipal by-law and a provincial or federal law is dealt with below. However, most provinces, including Ontario, include an express provision to this effect in a separate section or as part of the general welfare clause. Bill 111 includes such a prohibition on conflict with a federal or provincial law in section 14. The argument that might arise in section 130 is whether municipal by-laws to control pesticide spraying within the municipality are dealing with a “matter specifically provided in another Act.” CELA’s opinion is that it would not. There are provincial and federal Acts dealing with some aspects of pesticides, but not with the topic of municipal pesticide by-laws controlling the place and type of application within the municipality. For example, the federal pesticides legislation deals with obtaining registration and thus approval for the pesticide to be used at all in Canada, as further described below. The Ontario provincial Pesticides Act primarily controls commercial applications, licensing of commercial applicators and such matters.

B. The wording of the statutory restrictions on the power

As noted above, most of the provincial municipal powers contain an express limit on municipal by-law powers in that they may not be inconsistent with other provincial or federal legislation. The way that the Court expressed this requirement was by way of an “express contradiction test” – in other words, there is only an invalid conflict if there is

“an actual conflict in operation as where one enactment says ‘yes’ and the other says ‘no’; ‘the same citizens are being told to do inconsistent things’; compliance with one is defiance of the other.’ (para. 34 *Hudson*; quoting *Multiple Access Ltd. v. McCutcheon* [1982] 2 S.C.R. 161 at 187)

The Supreme Court reviewed the federal legislation and found that it relates to the regulation and authorization of the import, export, sale, manufacture, registration, packaging and labeling of pesticides. It regulates which pesticides can be registered for manufacture. The legislation is permissive. There was no operational conflict with Hudson’s by-law – the court stated, “No one is placed in an impossible situation by the legal imperative of complying with both regulatory regimes. Analogies to motor vehicles or cigarettes that have been approved federally, but the use of which can nevertheless be restricted municipally, well illustrate this conclusion. There is, moreover, no concern in this case that application of By-law 270 displaces or frustrates ‘the legislative purpose of Parliament’”. (*Hudson* paragraph 35)

The Supreme Court also stated that the *Multiple Access* test (namely, “impossibility of dual compliance”) is an appropriate test for consideration of whether there is a conflict between provincial laws and a municipal by-law, unless the relevant statute specifies its own test. The Court cautioned that various decisions, including Ontario decisions that were issued prior to the *Multiple Access* decision must be read with caution.

The Supreme Court stated that,

“As a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter.”
(*Hudson*, para. 39)

The Court found that there was no barrier to dual compliance with the Town’s by-law and the Quebec *Pesticides Act*; “nor any plausible evidence that the legislature intended to preclude municipal regulation of pesticide use.” The Quebec *Pesticides Act*, according to the Court,

“establishes a permit and licensing system for vendors and commercial applicators of pesticides and thus complements the federal legislation’s focus on the products themselves. Along with By-law 270, these laws establish a tri-level regulatory regime.” (*Hudson*, para. 40)

The same comment can be made with respect to Ontario’s *Pesticides Act*.

Furthermore, the Supreme Court stated that it agreed with the Quebec Court of Appeal, that “A potential inconsistency is not sufficient to invalidate a by-law; there must be a real conflict.” (*Hudson*, para. 41)

Of course, an express statutory provision by the provincial legislature stating what municipalities may or may not do in respect of pesticide by-laws would prevail. Such examples are found in Quebec (not yet in force at the time of the Hudson by-law) and Nova Scotia. However, no such express statutory provision is contained in the proposed Bill 111 for Ontario; nor in any other current Ontario legislation.

C. The wording of the by-law

The Supreme Court wet out the By-Law (Hudson By-law 270) in translation, in part, as follows:

1. The following words and expressions, whenever the same occur in this By-Law, shall have the following meaning:
 - a) “PESTICIDES”: means any substance, matter or micro-organism intended to control, destroy, reduce, attract or repel, directly or indirectly, an organism which is noxious, harmful or annoying for a

- human being, fauna, vegetation, crops or other goods or intended to regulate the growth of vegetation, excluding medicine or vaccine;
- b) "FARMER": means a farm producer within the meaning of the Farm Producers Act (R.S.Q., chap., P-28);
2. The spreading and use of a pesticide is prohibited throughout the territory of the Town.
 3. Notwithstanding article 2, it is permitted to use a pesticide in the following cases:
 - a) in a public or private swimming pool;
 - b) to purify water intended for the use of human beings or animals;
 - c) inside of a building;
 - d) to control or destroy animals which constitute a danger for human beings;
 - e) to control or destroy plants which constitute a danger for human beings who are allergic thereto.
 4. Notwithstanding article 2, a farmer using a pesticide on an immovable which is exploited for purposes of agriculture or horticulture, in a hot house or in the open, is requested to
 - a) register, by written declaration, with the Town, in the month of March of each year, the products which he stores and which he will be using during that year.
 - b) also provide, in the written declaration at article 4 a), the schedule of application of said products and the area(s) of his property where the products will be applied.
 5. Notwithstanding article 2, it is permitted to use a pesticide on a golf course, for a period not exceeding five (5) years from the date this by-law comes into force:
 6. Notwithstanding article 2, it is permitted to use a biological pesticide to control or destroy insects which constitute a danger or an inconvenience for human beings.
-
10. for the purpose of article 8 of the Agricultural Abuses Act (R.S.Q. – chap. A-2), an inspector designated by the town may use a pesticide, notwithstanding article 2 of the by-Law, if there is no other efficient way of destroying noxious plants determined as such by the Provincial government and the presence of which is harmful to a real and continuous agricultural exploitation."

The by-law passed by the Town of Hudson was found by the Supreme Court NOT to be a by-law that prohibited the spreading and use of a pesticide throughout the [entire] territory of the town. Rather, the Court stated, the by-law's sections 3 to 6 "state locations and situations for pesticide use." The Court quoted with approval a recent case commentary by John Swaigen, which noted "by-laws like Hudson's typically target non-essential uses of pesticides. That is, it is not a total prohibition, but rather permits the use

of pesticides in certain situations where the use of pesticides is not purely an aesthetic pursuit (e.g. for the production of crops)”. (paragraph 24 of the *Hudson* decision).

The court further found that the by-law was to be read to reflect the implicit purpose of promoting the health of the Town’s residents. This purpose was supported by the distinction contained in the by-law between essential and non-essential uses of pesticides. The court stated that the by-law’s purpose “is to minimize the use of allegedly harmful pesticides in order to promote the health of its inhabitants.” This purpose, the Court stated falls “squarely within the ‘health’ component of section 410(1).” (paragraph 27 of *Hudson*)

Oddly enough, a law textbook on statutory interpretation contains the following example on by-law purposes, which the Supreme Court took the trouble to quote at length:

“Suppose, for example, that a municipality passed a by-law prohibiting the use of chemical pesticides on residential lawns. With no additional information, one might well conclude that the purpose of the by-law was to protect persons from health hazards contained in the chemical spray. This inference would be based on empirical beliefs about the harms chemical pesticides can cause and the risks of exposure created by their use on residential lawns. It would also be based on assumptions about the relative value of grass, insects and persons in society and the desirability of possible consequences of the by-law, such as putting people out of work, restricting the free use of property, interfering with the conduct of businesses and the like. These assumptions make it implausible to suppose that the municipal council was trying to promote the spread of plant-destroying insects or to put chemical workers out of work, but plausible to suppose that it was trying to suppress a health hazard.” (Driedger; paragraph 27 *Hudson*).

The Supreme Court noted, in discussing the argument that the Hudson by-law made distinctions, noted that

“Without drawing distinctions, By-law 270 could not achieve its permissible goal of aiming to improve the health of the Town’s inhabitants by banning non-essential pesticide use. If all pesticide uses and users were treated alike, the protection of health and welfare would be sub-optimal. For example, withdrawing the special status given to farmers under the by-law’s section 4 would work at cross-purposes with its salubrious intent. Section 4 thus justifiably furthers the objective of By-law 270.” (paragraph 29 *Hudson*)

The Court’s discussion concerning the purpose of the Hudson by-law as framed, along with the approach taken by that by-law deserve serious consideration for the wording of the by-law by any community considering a municipal pesticides by-law, for the reasons expressed by the Court.

D. Conclusion

The Supreme Court found further support for its conclusion that Hudson's by-law was valid based on the consistency of such a reading with principles of international law and policy. The court noted a principle of statutory interpretation being to reflect the principles and values of international law, both customary and conventional. The court stated that its interpretation of Hudson's by-law "respects international law's 'precautionary principle', citing the *Bergen Ministerial Declaration on Sustainable Development* (1990):

"In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

The Court noted that Canada advocated inclusion of the precautionary principle during the Bergen Conference negotiations, and furthermore, the principle is found in several pieces of domestic legislation. (Paragraph 31, *Hudson*) The court further noted academic argument that the principle is now a principle of customary international law. The Supreme Court concluded this review of the precautionary principle with the note that "in the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action." (paragraph 32 *Hudson*)

In its introductory discussion, the Supreme Court began with the statement,

"The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. In the words of the Superior Court judge: "Twenty years ago there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in and what quality of life we wish to expose our children [to]." This Court has recognized that "[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment ... environmental protection [has] emerged as a fundamental value in Canadian society..." (*Hudson* para. 1)

Furthermore, the court noted that

"The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity...[quoting an earlier decision of the court] 'the protection of the environment is a major challenge of our time. It is an international problem, one

that requires action by governments at all levels’ [emphasis added by Supreme Court]. His reasons in that case also quoted with approval a passage from *Our Common Future*.... ‘local governments [should be] empowered to exceed, but not to lower, national norms.’” (*Hudson*, para. 3)

The court later agreed with the lower court judge that the Town of Hudson “faced with a situation involving health and the environment”, “was addressing a need of their community” and in so doing, was attempting to fulfill its role “as what the Ontario Court of Appeal has called the ‘trustee of the environment’”. (*Hudson*, para. 27)

The court also noted authority that municipal by-laws are presumed valid.

The proposed Bill 111 supports these interpretative statements in that:

- Section 272 states that a by-law passed in good faith by a municipality may not be quashed by a court by reason of unreasonableness
- Section 2, the purposes section, expressly states that one of the purposes for which Municipalities are created is the “fostering the current and future economic, social and environmental well-being of the municipality”
- Section 130 provides municipalities with a general welfare power, including for health, safety and well-being of inhabitants of the municipality, analogous to the power in the present Ontario section 102
- Section 9 provides that Sections 8 and 11 (the natural persons section and the spheres of jurisdiction section) shall be interpreted broadly so as to confer broad authority on municipalities, to enable them to govern their affairs as they consider appropriate, and to enhance their ability to respond to municipal issues and that in the event of ambiguity in sections 8 and 11, those sections shall be interpreted broadly to include, rather than exclude, municipal powers that existed on December 31, 2002, and
- Bill 111 contains no provision expressly prohibiting municipalities from passing pesticides by-laws, and nor does any other Ontario legislation.

Based on the foregoing, CELA is of the opinion that in general, Ontario municipalities will continue to be able to pass municipal by-laws dealing with pesticides under the proposed Bill 111 in accordance with the reasons of the Supreme Court of Canada in the *Spraytech et al. v. Town of Hudson* case. However, as noted at the outset, this is NOT a legal opinion relevant to any specific municipality or any specific proposed by-law. A specific opinion in light of the proposed wording would have to be obtained for a particular by-law.