



## Municipal Powers to Address Climate Change

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### INTRODUCTION

Municipal action on climate change is crucial as impacts are felt locally and therefore, must be addressed locally. 80% of the Canadian population resides in municipalities.<sup>1</sup> Urban municipalities face unique threats, including hotter temperatures caused by the urban heat island effect and that resulted in the majority of deaths in the July 2018 heat wave in Quebec.<sup>2</sup>

A more progressive, deferential approach to municipal powers has emerged in the jurisprudence and in some provincial legislation, including the Municipal Act. This progressive approach provides municipalities with broad powers to enact by-laws to tackle environmental concerns, including climate change.

This document reviews several pieces of legislation and relevant jurisprudence to advise and inform municipalities of their broad jurisdiction to confront environmental issues.

### JURISPRUDENCE

#### 1. *Spraytech v Hudson*, [2001] 2 SCR 241 [*Spraytech*]

<sup>1</sup> The Constitutional Implications of the Hudson Decision: Lessons for Adapting to the Health Effects of Climate Change in Canada.

<sup>2</sup> Center-Sud-de-l'Île-de-Montréal Integrated University Health and Social Services Center, "Heat Wave: July 2018 – Montreal Preliminary Assessment", online: [https://santemontreal.qc.ca/fileadmin/fichiers/actualites/2018/07\\_juillet/BilanCanicule2018VF.pdf](https://santemontreal.qc.ca/fileadmin/fichiers/actualites/2018/07_juillet/BilanCanicule2018VF.pdf)

## A. Background

In *Spraytech*, the town of Hudson, Quebec adopted By-Law 270 [the “By-Law”] to restrict the use of cosmetic pesticides. Two pesticide companies, Spraytech and Chemlawn were charged with violating the By-Law. The companies contended that the By-Law was *ultra vires* and inoperative due to a conflict with provincial and federal legislation. The Supreme Court of Canada (SCC) upheld the by-law as *intra vires* and found that no conflict existed.

## B. Decision

The SCC at paragraph 19 noted that s. 410 of the Quebec *Cities and Towns Act* enables municipalities to “secure peace, order, good government, health and general welfare in the territory of the municipality” and is one example of a general welfare provision. These “omnibus” provisions are helpful for allowing municipalities to “respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation.”<sup>3</sup> The SCC confirmed that the Ontario Municipal Act contains provisions analogous to s. 410.<sup>4</sup> At paragraph 20, the Court held that these ‘general welfare powers’ authorize the enactment of by-laws “aimed at furthering goals such as public health and safety”. The By-Law passed by Hudson was validly enacted since its purpose fell within s. 410(1) of the Quebec *Cities and Towns Act*.

The SCC noted that the onus is on the party challenging a by-law’s validity to demonstrate that it is *ultra vires*.<sup>5</sup> Further, there is a presumption that by-laws passed by municipalities are valid.<sup>6</sup> At paragraph 23, the SCC noted that the courts should take care to avoid substituting their own views on what is in the best interest for citizens and affirmed a statement by Justice McLachlin in *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR. 231, at p. 244:

“Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. *Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold.*”

## C. Environmental Powers

The SCC at paragraph 3 echoed Justice La Forest in *Canada (Procureure générale) c Hydro-Québec*, [1997] 3 S.C.R. 213, at p. 296 when he stated “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”. *Spraytech* confirmed that, as the level of government closest to the affected citizens, it is legitimate for municipalities to enhance protection provided by other levels of government.<sup>7</sup>

In *Spraytech*, the pesticide by-law was found to be within the ambit of the general welfare power. Although the By-Law was not framed to adapt against the effects of climate change, it could be construed as such. Climate change alters precipitation patterns, and in times of heavy

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<sup>3</sup> *Spraytech* at para 19.

<sup>4</sup> *Spraytech* at para 19.

<sup>5</sup> *Spraytech* at para 21.

<sup>6</sup> *Spraytech* at para 10.

<sup>7</sup> *Spraytech* at para 3.

rain, precipitation will result in pesticide runoff into water bodies that can affect human and animal health.<sup>8</sup>

The decision in *Spraytech* was affirmed by many subsequent cases including by the Ontario Court of Appeal in *Croplife Canada v Toronto (City)*, [2005] OJ No 1896 [*Croplife*].

## **2. Additional Case Law**

### **A. *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 SCR. 231 [*Shell*]**

Although dissenting in this case, Justice McLachlin's comments on a broad and deferential approach to municipal powers has been adopted by the SCC in *Spraytech*, the Ontario Court of Appeal in *Croplife*, the Ontario Court of Justice in *R v Drain*, and others. Her comments initiated a shift away from Dillon's Rule to a more purposive approach to the interpretation of municipal powers.<sup>9</sup> Justice McLachlin stated that "courts must be prepared to adopt the benevolent construction" and at paragraph 20 that if "municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values." Finally, she noted that a generous approach to municipal powers will increase efficiency of municipal bodies and avoid the costs and uncertainty associated with excessive litigation.<sup>10</sup>

### **B. *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 [*United*]**

The SCC affirmed the broad and purposive approach to the interpretation of municipal powers<sup>11</sup> which they stated was consistent with the Court's approach to statutory interpretation generally from *Bell ExpressVu Ltd Partnership v Rex*, [2002] 2 SCR 42.<sup>12</sup>

### **C. *Equity Waste Management of Canada v Halton Hills (Town)*, [1997] OJ N 3921**

The Ontario Court of Appeal held at paragraph 50 that interim control by-laws are "an important planning instrument for a municipality. They allow the municipality breathing space to rethink its land use policies by suspending development that may conflict with any new policy". The Ontario Court of Appeal confirmed that the municipality must meet only one condition before passing an interim control by-law, that it must have a "by-law or resolution directed that a review or study be undertaken in respect of land use planning policies in the municipality or in any defined area". The municipality is not statutorily required to give notice of an interim control by-law until after it has been passed.

### **D. *R v Drain*, 2006 ONCJ 186**

The Ontario Court of Justice at paragraph 29 noted that the ordinary meaning of 'well-being' (as included in section 10(2) of the Municipal Act) includes not only concern for the health of its citizens "but also the concern for the living conditions and prosperity of the people living in that municipality." In *R v Drain*, the Court held that the unregulated accumulation of refuse and debris on neighbouring yards could impact the well-being of the local community.<sup>13</sup>

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<sup>8</sup> The Constitutional Implications of the Hudson Decision: Lessons for Adapting to the Health Effects of Climate Change in Canada at para 7.

<sup>9</sup> *Croplife* at para 18.

<sup>10</sup> *Shell* at para 21.

<sup>11</sup> *United* at paragraph 6.

<sup>12</sup> *United* at paragraph 8.

<sup>13</sup> *R v Drain* at para 29.

### **3. Conflicts**

#### **A. Impossibility of Dual Compliance**

The SCC in *Spraytech* held that as a general principle, the existence of provincial legislation in a field “does not oust municipal prerogatives to regulate the subject matter”.<sup>14</sup> However, an operational conflict between a law enacted by a municipality and one enacted by the province will render the municipal by-law invalid. The SCC held in *Multiple Access v McCutcheon*, [1982] 2 S.C.R. 161 at p. 187 that an express contradiction exists if one enactment says yes and the other says no. This is an example of impossibility of dual compliance. The SCC in *Spraytech* noted that there must be a real conflict between the two pieces of legislation, a potential inconsistency is not sufficient to invalidate the by-law.<sup>15</sup>

#### **B. Same Subject Matter**

The Supreme Court has clearly stated that multiple jurisdictions can address different aspects of the same subject matter, or even the same subject matter with more stringency required by one level than the other. Therefore, the question of whether there is an operational conflict can sometimes become a case-by-case assessment of the particular requirements.

In *Peacock*, Norfolk County passed an interim control by-law [the “Bylaw”] that temporarily prohibited the use of land, buildings, and structures within the County for intensive livestock operations to protect municipal wells and avoid contamination. The Province of Ontario enacted the *Nutrient Management Act* [“the Act”] which “provides province-wide standards governing the distribution, storage, spreading, record keeping of nutrients and the construction of their associated facilities.”<sup>16</sup> Under the Act, provincial approval must be obtained to expand or build new intensive livestock operations. The Peacocks obtained this approval under the Act and corresponding Regulation 267/03 [“the Regulation”].

The Court of Appeal found that the Impossibility of Dual Compliance Test did not apply to the case at bar, rather, the Act specified that if the municipal and provincial legislation “address the same subject-matter”, then the by-law is “inoperative while the regulation is in force”.<sup>17</sup> In *Peacock* at paragraph 41, the Court of Appeal held that the Regulation and By-law have similar underlying purposes and objects but attempt “to achieve this goal in different ways and each has its own unique focus and stated purpose”. The Regulation dealt primarily with the management of nutrients while the Bylaw prohibited certain land uses, both attempting to protect against water contamination of municipal wells. The Bylaw was therefore held to be inoperative.<sup>18</sup>

#### **C. Federal Paramountcy and Interjurisdictional Immunity**

Federal paramountcy will prevail in the face of an actual conflict between municipal bylaws and federal legislation and will render the municipal bylaw inoperative. It is also important to note that in certain circumstances under the doctrine of interjurisdictional immunity, the powers of one level of government are protected by intrusions, even incidental ones, by another level of government. For example, in *Quebec (Attorney General) v Canadian Owners and Pilots Association*, [2010] 2 SCR 536, the location of aerodromes was held to be in the exclusive jurisdiction of the Federal Government under its power over aeronautics.

#### **D. Inoperable Due to Explicit Language**

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<sup>14</sup> *Spraytech* at para 39.

<sup>15</sup> *Spraytech* at para 41.

<sup>16</sup> *Peacock* at para 8.

<sup>17</sup> *Peacock* at para 32.

<sup>18</sup> *Peacock* at para 61.

Lastly, it is possible that provincial statutes may explicitly render municipal bylaws inoperable in a specific area.

#### **4. Distinguishable Jurisprudence**

The following cases make evident that municipalities can legislate with respect to local health and public safety. Various environmental issues including flooding, extreme heat events, and emerging diseases will violate the health and safety of citizens across municipalities in Canada.

##### **A. *Eng v Toronto (City)*, 2012 ONSC 6818 [*Eng*]**

In *Eng*, the City of Toronto passed By-Law No. 12347-2011 that provided: “no person shall possess, sell or consume shark fin or shark fin food products within the city of Toronto”. In its preamble, the by-law stated that “the consumption of shark fins have an adverse impact on health, safety and well-being of persons and on the economic, social and environmental well-being of the City of Toronto”.

The Ontario Superior Court of Justice held that the consumption of shark-fin soup did not affect the health of the community as a local entity.<sup>19</sup> Therefore, the by-law was struck down as *ultra vires* because it was not enacted for a municipal purpose relating to health.<sup>20</sup> There are very clear local health impacts from climate change, especially in vulnerable communities, such that the finding in *Eng* should not be followed with respect to climate action.

##### **B. *Xentel DM Inc v Windsor (City)*, 2004 OJ No. 3656 [*Xentel*]**

In *Xentel*, the City of Windsor passed a by-law which prohibited entertainment involving exotic animals to protect public safety. The Court found an element of bad faith. The SCC in *Shell* at paragraph 13 agreed that judicial intervention may be justified where there is evidence of bad faith.<sup>21</sup> Before passing this by-law, Windsor City Council did not consult with police or fire departments regarding a potential risk to public safety, Council did not contact the Humane Society to obtain further information, nor did Council examine statistics involving the rate of injuries sustained by the public from circus animals.<sup>22</sup> The Court held that bad faith had been demonstrated, and the by-law’s pith and substance was in relation to animal welfare and not public safety.<sup>23</sup>

### **LEGISLATION**

This section will provide an overview of various pieces of provincial legislation that grant municipal jurisdiction relating to the environment.

#### **1. Municipal Act, 2001, SO 2001, c. 25**

Section 8(1) of the Municipal Act outlines a broad and deferential approach to municipal powers: “The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality’s ability to respond to municipal issues”

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<sup>19</sup> *Eng* at para 84

<sup>20</sup> *Eng* at para 85.

<sup>21</sup> *Xentel* at para 43.

<sup>22</sup> *Xentel* at para 43.

<sup>23</sup> *Xentel* at para 35.

**10 (1)** A single-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public.

**10(2)** A single-tier municipality may pass by-laws respecting the following matters:

...

5. Economic, social and environmental well-being of the municipality, including respecting climate change.

6. Health, safety and well-being of persons.

...

8. Protection of persons and property, including consumer protection.

9. Animals.

**11(1)** A lower-tier municipality and an upper-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public, subject to the rules set out in subsection (4).

**11(2)** A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting the following matters:

...

5. Economic, social and environmental well-being of the municipality, including respecting climate change.

6. Health, safety and well-being of persons.

..

8. Protection of persons and property, including consumer protection.

**11 (3)** A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting matters within the following spheres of jurisdiction:

...

2. Transportation systems, other than highways.

3. Waste management.

4. Public utilities.

5. Culture, parks, recreation and heritage.

6. Drainage and flood control, except storm sewers.

...

9. Animals.

## **Agreement, conservation authority**

**95 (1)** The upper-tier municipalities of Durham, Halton, Peel and York may enter into an agreement with a conservation authority to manage and control land vested in the conservation authority.

## **Green roofs or alternative roof surfaces Environmental standards; construction of buildings**

**97.1 (1)** Without limiting sections 9, 10 and 11, those sections authorize a local municipality to pass a by-law respecting the protection or conservation of the environment that requires buildings to be constructed in accordance with provisions of the building code under the *Building Code Act, 1992* that are prescribed under that Act, subject to such conditions and limits as may be prescribed under that Act.

**97.1 (3)** Without limiting sections 9, 10 and 11, the power described in subsection (1) includes the power to require the construction of green roofs or of alternative roof surfaces that achieve similar levels of performance to green roofs.

## **Tree by-laws**

**135 (1)** Subject to subsection (4) and without limiting sections 9, 10 and 11, a local municipality may prohibit or regulate the destruction or injuring of trees.

## **Woodlands**

**135 (2)** Without limiting sections 9, 10 and 11, an upper-tier municipality may prohibit or regulate the destruction or injuring of trees in woodlands designated in the by-law.

## **Energy planning**

**147 (1)** Without limiting sections 9, 10 and 11, a municipality may provide for or participate in long-term energy planning in the municipality

(2) Long-term energy planning referred to in subsection (1) may include consideration of energy conservation, climate change, and green energy.

**226.1** As chief executive officer of a municipality, the head of council shall,

...

- (d) participate in and foster activities that enhance the economic, social and environmental well-being of the municipality and its residents.

## **2. Health Protection and Promotion Act, R.S.O. 1990, c. H.7**

### **Duty to inspect**

**10 (1)** Every medical officer of health shall inspect or cause the inspection of the health unit served by him or her for the purpose of preventing, eliminating and decreasing the effects of health hazards in the health unit.

### **Complaint re health hazard related to occupational or environmental health**

**11 (1)** Where a complaint is made to a board of health or a medical officer of health that a health hazard related to occupational or environmental health exists in the health unit served by the

board of health or the medical officer of health, the medical officer of health shall notify the ministry of the Government of Ontario that has primary responsibility in the matter and, in consultation with the ministry, the medical officer of health shall investigate the complaint to determine whether the health hazard exists or does not exist.

#### **Duty of M.O.H. re occupational and environmental health**

**12** (1) Every medical officer of health shall keep himself or herself informed in respect of matters related to occupational and environmental health.

#### **Order by M.O.H. or public health inspector re health hazard**

**13** (1) A medical officer of health or a public health inspector, in the circumstances mentioned in subsection (2), by a written order may require a person to take or to refrain from taking any action that is specified in the order in respect of a health hazard.

#### **Orders to deal with communicable disease outbreaks**

**29.2** (1) Subject to subsection (2), a medical officer of health may make an order requiring a public hospital or an institution to take any actions specified in the order for the purposes of monitoring, investigating and responding to an outbreak of communicable disease at the hospital or institution.

### **3. Planning Act, R.S.O. 1990, c. P.13**

#### **Purposes**

- 1.1. The purposes of this Act are,
- (a) to promote sustainable economic development in a healthy natural environment within the policy and by the means provided under this Act;
  - (b) to provide for a land use planning system led by provincial policy;
  - (c) to integrate matters of provincial interest in provincial and municipal planning decisions;
  - (d) to provide for planning processes that are fair by making them open, accessible, timely and efficient;
  - (e) to encourage co-operation and co-ordination among various interests;
  - (f) to recognize the decision-making authority and accountability of municipal councils in planning.

#### **Provincial interest**

2 The Minister, the council of a municipality, a local board, a planning board and the Tribunal, in carrying out their responsibilities under this Act, shall have regard to, among other matters, matters of provincial interest such as,

- (a) the protection of ecological systems, including natural areas, features and functions;
- (b) the protection of the agricultural resources of the Province;
- ...
- (e) the supply, efficient use and conservation of energy and water;
- ..
- (g) the minimization of waste;
- (h) the orderly development of safe and healthy communities;
- ...
- (o) the protection of public health and safety;
- (p) the appropriate location of growth and development;
- (q) the promotion of development that is designed to be sustainable, to support public transit and to be oriented to pedestrians;
- (r) the promotion of built form that,



- (i) is well-designed,
- (ii) encourages a sense of place, and
- (iii) provides for public spaces that are of high quality, safe, accessible, attractive and vibrant;
- (s) the mitigation of greenhouse gas emissions and adaptation to a changing climate.

## **Official plan**

### **Contents of official plan**

- 16 (1) An official plan shall contain,
- (a) goals, objectives and policies established primarily to manage and direct physical change and the effects on the social, economic, built and natural environment of the municipality or part of it, or an area that is without municipal organization;

### **Climate change policies**

(14) An official plan shall contain policies that identify goals, objectives and actions to mitigate greenhouse gas emissions and to provide for adaptation to a changing climate, including through increasing resiliency.

### **Zoning by-laws**

34 (1) Zoning by-laws may be passed by the councils of local municipalities:

#### **Natural features and areas**

- 3.2 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures within any defined area or areas,
- i. that is a significant wildlife habitat, wetland, woodland, ravine, valley or area of natural and scientific interest,
  - ii. that is a significant corridor or shoreline of a lake, river or stream, or
  - iii. that is a significant natural corridor, feature or area.

#### **Community improvement project area**

28(1) “community improvement” means the planning or replanning, design or redesign, resubdivision, clearance, development or redevelopment, construction, reconstruction and rehabilitation, improvement of energy efficiency, or any of them, of a community improvement project area, and the provision of such residential, commercial, industrial, public, recreational, institutional, religious, charitable or other uses, buildings, structures, works, improvements or facilities, or spaces therefor, as may be appropriate or necessary

#### **Designation of community improvement project area**

(2) Where there is an official plan in effect in a local municipality or in a prescribed upper-tier municipality that contains provisions relating to community improvement in the municipality, the council may, by by-law, designate the whole or any part of an area covered by such an official plan as a community improvement project area.

#### **Acquisition and clearance of land**

- (3) When a by-law has been passed under subsection (2), the municipality may,
- (a) acquire land within the community improvement project area;
  - (b) hold land acquired before or after the passing of the by-law within the community improvement project area; and
  - (c) clear, grade or otherwise prepare the land for community improvement.

### **Interim control by-law**

**\*See above: *Equity Waste Management of Canada v Halton Hills (Town)*\***

38 (1) Where the council of a local municipality has, by by-law or resolution, directed that a review or study be undertaken in respect of land use planning policies in the municipality or in

any defined area or areas thereof, the council of the municipality may pass a by-law (hereinafter referred to as an interim control by-law) to be in effect for a period of time specified in the by-law, which period shall not exceed one year from the date of the passing thereof, prohibiting the use of land, buildings or structures within the municipality or within the defined area or areas thereof for, or except for, such purposes as are set out in the by-law.

### **Examples of Municipal By-Laws Protecting Environmental Health**

#### **1. By-law Respecting the Conservation of Trees in Woodlands, By-Law Number 08-026**

Pursuant to section 135 of the Municipal Act, the Regional Municipality of Waterloo passed this by-law to prohibit or regulate the destruction and injury of trees in a woodland to sustain a healthy and natural environment.

#### **2. Adequate Temperature By-Law, By-Law Number 110-18**

Pursuant to paragraphs 5, 6 and 8 of subsection 11(2), Mississauga passed its Adequate Temperature By-Law. This by-law requires that landlords maintain adequate and suitable cooling (i.e., temperatures under 26°C) in all dwelling units with air-conditioning to protect the health, well-being, and safety of their tenants.

#### **3. A By-Law to Regulate the Use of Pesticides on Lawns Within The City Of Kingston, By-Law Number 2008-28**

Pursuant to 10(2), paragraph 5 and 6 of the Municipal Act, The City of Kingston passed this by-law prohibiting the application of a pesticide on any Lawn (as defined); driveway or lane; walkway, sidewalk, or path; or on any patio. This has since been superseded by amendments to the Ontario Pesticides Act.

#### **4. Toronto Green Roof Bylaw**

Pursuant to 97.1 (3) of the Municipal Act, the City of Toronto passed its Green Roof Bylaw which requires the construction of green roofs on: new commercial, institutional and residential development with a minimum gross floor area of 2,000 m<sup>2</sup>, new additions to commercial, institutional and residential development where the new gross floor area added is greater than 2,000 m<sup>2</sup> and industrial buildings greater than 2,000 m<sup>2</sup> gross floor area.