N° 26937

COUR SUPRÊME DU CANADA

(EN APPEL D'UN JUGEMENT DE LA COUR D'APPEL DU QUÉBEC)

ENTRE:

SERVICES DES ESPACES VERTS LTÉE/CHEMLAWN,
114957 CANADA LTÉE (SPRAYTECH, SOCIÉTÉ D'ARROSAGE),

DEMANDERESSES
(requérantes devant la cour supérieure)

ET:

VILLE DE HUDSON,

INTIMÉE
(intimée devant la cour supérieure)

ET:

LA FÉDÉRATION INTERDISCIPLINAIRE DE
L'HORTICULTURE ORNEMENTALE DU QUÉBEC,
L'UNION DES PRODUCTEURS AGRICOLES DU QUÉBEC,
LE PROCUREUR GÉNÉRAL DU QUÉBEC,

(mis en cause devant la cour supérieure)

AND:

TORONTO ENVIRONMENTAL ALLIANCE, SIERRA CLUB OF CANADA, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, 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

INTERVENERS

AND:

FEDERATION OF CANADIAN MUNICIPALITIES, NATURE-ACTION QUEBEC INC., AND WORLD WILDLIFE FUND CANADA

INTERVENERS

FACTUM OF THE INTERVENERS
TORONTO ENVIRONMENTAL ALLIANCE ET AL.

M. Theresa McClenaghan
M. Paul Muldoon
CANADIAN ENVIRONMENTAL LAW ASSOCIATION
517 College Street, Suite 401
Toronto, ON. M6G 4A2

Telephone: (416) 960-2284
Fax: (416) 960-9392

Solicitors for the Intervening Parties
Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, 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

M^{e} Gérard Dugré
BYERS CASGRAIN
1, place Ville-Marie, #3900
Montréal QC H3B 4M7

Telephone : (514) 878-8800
Fax: (514) 866-2241

Solicitors for the Appellants

M^{e} Stéphane Brière
BÉLANGER SAUVE
1, place Ville-Marie, #1700
Montréal QC H3B 2C1

Telephone: (514) 878-3081
Fax: (514) 878-3053

Solicitors for the Respondent City of Hudson

Henry S. Brown
GOWLINGS
160 Eglin St.
Ottawa, ON. K1P 1C3

Telephone: (613) 233-1781
Fax: (613) 563-9869

Agents in Ottawa

M^{e} Sylvie Roussel
NOËL BERTHIAUME
111, rue Champlain
Hull QC J8X 3R1

Telephone: (819) 771-7393
Fax: (819) 771-5397

Agents in Ottawa

M. Guy Regimbal
LETELLIER & ASSOCIES
15 Blvd. Gamelin, #500
Hull (QC) J8Y 1V4

Telephone: (819) 778-7293
Fax: (819) 778-1145

Agents in Ottawa

M. Patrice Claude
BERNARD ROY & ASS.
1 Notre-Dame East, #800
Montreal, QC, H2Y 1B6

Telephone: (514) 393-2336
Fax: (514) 873-7074

Solicitors for the Quebec Attorney-General

M. Stewart Elgie
M. Jerry DeMarco
SIERRA LEGAL DEFENCE FUND
106 Front St. E., Suite 300
Toronto, ON, M5A 1E1

Telephone: (416) 368-7533
Fax: (416) 363-2746

Solicitors for the Intervening Parties
World Wildlife Fund Canada, Federation of Canadian Municipalities and Nature-Action Quebec In.

M[e] Sylvie Roussel
NOËL BERTHIAUME
111, rue Champlain
Hull QC, J8X 3R1

Telephone: (819) 771-7393
Fax: (819) 771-5397

Agents in Ottawa

M. Martin Mason
GOWLINGS
160 Eglin St.
Ottawa, ON. K1P 1C3

Telephone: (613) 233-1781
Fax: (613) 563-9869

Agents in Ottawa

PART I: THE FACTS

1. These Interveners do not contest the facts as described in paragraphs 4 to 15 of the Appellants' Memorandum of Fact and Law, except for paragraphs 10 and 11. With respect to paragraph 10, see paragraph 47 of these Interveners' factum for a more complete description of what the by-law provides.

PART II: THE ISSUES

2. Did the City of Hudson have the authority under the *Cities and Towns Act* to pass by-law 270? What is the scope of the municipality's power to pass a by-law such as by-law 270?
3. Was the City of Hudson's authority to pass by-law 270 limited or constrained by the words "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" as contained in the said Act such that the by-law is invalid?

PART III: LEGAL SUBMISSIONS AND ARGUMENT

ISSUE 1. *Did the City of Hudson have the authority under the Cities and Towns Act to pass by-law 270? What is the scope of the municipality's power to pass a by-law such as by-law 270?*

SCOPE OF MUNICIPAL POWERS

4. Municipalities must exercise their powers as granted by a provincial statute. However, they are presumed to have done so. The elements of provincial legislation are presumed to be coherent and to work together as part of a functional whole and this rule of presumed coherence applies to subordinate legislation (such as municipal by-laws). The analysis as to whether a municipality has the power to pass a particular by-law must begin with the provincial statutory provisions under which the by-law was passed. The analysis includes a review as to whether the power is expressly granted by statute, as well as whether the power is necessarily or fairly implied by the expressed power on which the municipality relies.

   Venchiarutte v. Longhurst and Longhurst, (1992) 8 O.R. (3d) 422 (Ont. C.A.), at page 432. Sullivan, R. *Driedger on the Construction of Statutes.* (3rd edition) Butterworths. Toronto: 1994, pages 176, 185.

R. v. *Sharma,* [1993] 1 S.C.R. 650, per Iacobucci J. at page 668.
R. v. *Greenbaum*, [1993] 1 S.C.R. 674, per Iacobucci J. at pages 687, 688, including his citation of "Dillon's Rule" as set out in Makuch and Stanley, *Canadian Municipal and Planning Law*, at page 115.
See also *Toronto (City)* v. *Wassilyn,* (1999) 43 O.R. (3d) 97 (C.A.), at page 100.

5. The power granted to municipalities under their enabling statute, to make by-laws, is to be construed broadly. Arguments that a by-law is "unreasonable and oppressive" are limited, as described by Duff, J., in the following passage, when considering the validity of a municipal by-law that provided for store closing hours:

> "The by-law in question is also impugned as unreasonable and oppressive. To establish this contention in any sense germane to the question of the validity of the by-law it was necessary that the respondents should make it appear either that it was not passed in good faith in the exercise of the powers conferred by the statute or that it is so unreasonable, unfair or oppressive as to be upon any fair construction an abuse of those powers."

Short of this, (and the burden of proof is on the appellants), municipalities are to be permitted the discretion to exercise the powers granted to them. In fact, the appellants have conceded that there is no issue as to the bona fides or good faith of the by-law nor have they proven nor attempted to prove unreasonableness.

Montreal (City) v. Beauvais, (1909) 42 S.C.R. 211 at page 216, per Duff, J.
See Appellants' factum, paragraph 3.

6. Some of the considerations to be applied in interpreting municipal legislation were outlined by the Supreme Court of Canada in 1993 in the *Greenbaum* and *Sharma* cases. Both cases dealt with prosecutions by the City of Toronto against street vendors. One of the principles noted by Mr. Justice Iacobucci in writing the decision for the Court, from the 1907 *Hamilton Distillery* case, is that interpretation of provincial legislation enabling municipal by-laws should consider the subject matter and the intention obviously in view and should be given a benevolent construction. Further if the powers were not expressly conferred, they may be found to be conferred by a fair and reasonable implication.

R. v. *Sharma, ibid.*
R. v. *Greenbaum, ibid.,* at page 687.
Hamilton v. Hamilton Distillery Co., (1907) 38 S.C.R. 239, at page 249.

7. The purpose and the wording of the provincial enabling legislation must be reviewed to determine if there is the particular by-law making power. Iacobucci, J. relying on *Merritt v. City of Toronto,* noted that construction may be somewhat stricter where the power is one which restricts common law or civil rights. Further, in interpreting this type of legislation, municipal by-laws are to be read to fit within the parameters of the empowering provincial statute where the by-laws are susceptible to more than one interpretation.

   R. v. *Greenbaum, ibid.,* per Iacobucci J. at page 689.
   Merritt v. *City of Toronto,* (1895) 22 O.A.R. 205, at page 207.

ANALOGY TO OTHER MUNICIPAL POWERS IN OTHER PROVINCES.

8. Municipal powers analogous to section 410 of Quebec's *Cities and Towns Act* are found in the legislation of provinces and territories across Canada. Such statutory municipal powers would support a by-law such as By-Law 270. Some examples are discussed in this Part. There are other possible legislative bases for municipal by-laws dealing with pesticides but are also not discussed in this factum. The Interveners have limited their submissions in this factum to the municipal enabling provisions that are most analogous to section 410 of Quebec's *Cities and Towns Act*. The Interveners submit that the Court should consider the analogous provincial legislation from across the country, and the jurisprudence interpreting that legislation as an aid to interpretation in reaching its decision in the instant case.

   Loi sur les cites et villes, L.R.Q., c. C-19, article 410(1)
   Health Protection and Promotion Act, R.S.O. 1990, c.H.7.

9. Furthermore, interpretation by the Supreme Court of Canada as to whether the *Loi sur les cités et villes* allows the type of by-law enacted by the City of Hudson will have major implications for by-laws enacted by Canadian municipalities across the country for the control of pesticides in their locality as well as on other local concerns, especially health and environmental concerns. For example, section 102 of the Ontario *Municipal Act* and Article 410(1) of the Quebec *Loi sur les cites et villes* contain many statutory similarities.

   Municipal Act, R.S.O. 1990, c. M.45, s. 102
   Loi sur les cites et villes, L.R.Q., c. C-19, article 410(1)

10. The provincial municipal enabling statutes that are relevant to consider may be divided into the following categories, for the convenience of discussion: "general welfare" provisions, "nuisance prevention" provisions, and "others".

"General Welfare" Provisions

11. Quebec, Alberta, British Columbia, Manitoba, Nova Scotia, Nunavut, Ontario and Yukon are among the provinces and territories that have versions of municipal enabling legislation providing for a "general welfare" by-law making power. The provisions of many of these other provinces of Canada are substantially similar to the power which the Town of Hudson relies upon in the instant case. The Quebec provision found in section 410 of Quebec's *Cities and Towns Act*, states that council has power to make by-laws to secure the peace, order, good government, health, general welfare and improvement of the municipality. Two restrictions are specified in the section: provided such by-laws are not contrary to the laws of Canada, or of Quebec, and that they not be inconsistent with any special provision of this act of the charter. The restrictions will be discussed at paragraphs 31 and following in this factum.

    Loi sur les cites et villes, L.R.Q., c. C-19, article 410(1)
    Municipal Government Act, S.A. 1994, c. M-26.1, s.3 (c), s.7 (Alberta)
    Local Government Act, R.S.B.C. 1996, c. 323, s.221. (British Columbia)
    Municipal Act, L.M. 1996, c. 58 – Cap. M225, ss.232, 233. (Manitoba)
    Municipalities Act, c. M-22, s.190 (2), First schedule. (New Brunswick)
    Cities, Towns and Villages Act, R.S.N.W.T. 1988, c. C-8, as amended, s.54, 102 (Nunavut)
    Municipal Act, R.S.O. 1990, c.M.45, s.102. (Ontario)
    Municipal Act, R.S.Y. 1986 c. 119, s. 271. (Yukon)

12. The role of municipalities in enacting their by-laws is expressly described in Alberta's and Manitoba's statutes as giving each of them "broad authority", to "respect its right to govern the municipality in whatever way the council considers appropriate", within its jurisdiction, and to enhance its ability as a council to "respond to present and future issues in the municipality."

    Municipal Government Act, S.A. 1994, c. M-26.1, s.9.
    Municipal Act, L.M. 1996, c. 58 – Cap. M225, ss.232, 233. (Manitoba)

13. Since Nova Scotia's municipal legislation provides specific restrictions on the pesticide control by-law power, it is a distinct case from those municipalities elsewhere in Canada which pass by-laws under the general welfare clause where there is no more specific provision. However, it

does provide a comprehensive by-law making power and includes that power under the general welfare provision of Nova Scotia's legislation, demonstrating that this type of activity is properly a municipal concern and exercisable as a type of general welfare by-law power.

Municipal Government Act, S.N.S., 1998, c. 18, ss. 170, 171.

14. The authority of a municipality to pass a by-law under Ontario's general welfare provision was tested in the case of an anti-smoking by-law passed by the City of Toronto in 1977 (formerly section 242). It was challenged, among other reasons, on the basis that it was *ultra vires* because it dealt with a federal matter covered by the *Tobacco Restraint Act*, R.S.C., 1970, c.T-9. The Ontario Divisional Court held that this argument did not apply, since smoking is not itself a field of constitutional power, the federal legislation dealt with other aspects of tobacco, and furthermore, was not in conflict. (The by-law was overturned on other grounds.)

Re Weir et al. and The Queen, (1979) 26 O.R. (2d) 326 at page 338.

15. In the *Greenbaum* case, Iacobucci J. stated that he agreed with a 1937 statement of the Ontario Court of Appeal that there are many limits on this general power which is of a residual nature. Those limits were listed in the 1937 *Morrison* decision. One limit was stated to be that where the provincial legislature has itself undertaken to deal with a certain subject-matter in the interest of the inhabitants of the province, all legislation by the municipality must be subject to the provincial enactment. However, the requirement that the by-law power is subject to the enabling statute does not mean that the by-law power is displaced; *Multiple Access* is consistent with this requirement. As discussed in paragraph 31 and following, the impugned by-law in this case deals with a different subject-matter than does the provincial pesticides legislation.

R. v. *Greenbaum, supra.* per Iacobucci J. at page 693.
Morrison v. *Kingston,* [1937] 4 D.L.R. 740 at pages 743-744 - Appellant's Book of Authorities, Tab 9.

"Nuisance Prevention" Provisions

16. Most provinces provide their municipalities with the power to enact nuisance prevention provisions, including in relation to public nuisances. For example, Alberta, British Columbia, New Brunswick, Nunavut, Ontario and Yukon all provide such powers. Alberta municipalities

have the power to pass by-laws for the control of "nuisances, including unsightly property..." British Columbia municipalities also have the power to prevent, abate and prohibit nuisances to clear property of brush, trees, noxious weeds, and other matters. The New Brunswick Act prohibits persons from permitting property to become dilapidated or deteriorated so as to be in a dangerous, unsightly or unhealthful condition. Nunavut municipal councils may also pass by-laws for the control of public nuisances, such as a by-law to prohibit or regulate the emission of pollutants into the atmosphere or to establish or adopt standards for the maximum amount of pollution that may be emitted into the atmosphere. Ontario municipalities may pass by-laws for regulating manufactures and trades that in the opinion of the council may prove to be or may cause nuisances of any kind, and, without restricting the generality of the foregoing, for prohibiting or regulating the erection or continuance of gas works, tanneries or distilleries or other manufactories or trades that in the opinion of the council may prove to be or may cause nuisances. Yukon's statute provides for municipalities' by-law making powers in matters such as noises, pollution and other noxious activities, as well as to prevent, abate, and prohibit nuisances, to prohibit persons from causing or permitting water, rubbish or noxious, offensive or unwholesome matter or substances to collect or accumulate around their premises, to require owners to eliminate or reduce the fouling or contaminating of the atmosphere through the emission of smoke, dust, gas, sparks, ash, soot cinders, fumes or other effluvia, to prescribe measures and precautions to be taken for such purpose and to fix limits not to be exceeded in respect of such emissions, and to require owners to clear such property of brush, noxious weeds or other growths, among other things.

Municipal Government Act, S.A. 1994, c.M-26.1, s.7. (Alberta)
Local Government Act, R.S.B.C. 1996, c.323, s.725. (British Columbia)
Municipalities Act, c. M-22, s.190 (2). (New Brunswick)
Cities, Towns and Villages Act, R.S.N.W.T. 1988, c. C-8, as amended, s.120. (Nunavut)
Municipal Act, R.S.O. 1990, c.M.45, s.210.134.
Yukon Municipal Act, R.S.Y. 1986, as amended, c.119, s. 291 (b), (f), (h) and (j).

17. Another provision in the Ontario statute that would be relevant to a pesticides by-law is section 102.140, which provides municipalities the power to pass by-laws for prohibiting and abating public nuisances. The definition as to what constitutes a public nuisance is to be taken from the courts' common law definitions. However, the *Re Weir* case, in dealing with this issue in the

context of a smoking by-law, noted that,

> "The concept of what may constitute a public nuisance is bound to vary with the times and the scope of man's knowledge. In the recent past, society has become aware of the pollution of the atmosphere and the effect of that pollution upon the health and well-being of mankind."

Municipal Act, R.S.O. 1990, c.M.45, s.210.140.
Auerback, S. *The Annotated Municipal Law*, 1993, Carswell at page 339
Re. Weir, supra at page 336.

18. In *Restaurant and Food Services Association of British Columbia v. Vancouver (City)*, the British Columbia Court of Appeal upheld the use of similar provisions under the Vancouver Charter to support a smoking bylaw because there was a clear connection between the bylaw and the City's public health objective.

Restaurant and Food Services Association of British Columbia v. *Vancouver (City),* [1998] B.C.J. No. 53 (Q.L.) at page 10.

19. At least one commentator noted that Ontario's section 210.134 can be utilized by municipal councils to pass a wide variety of by-laws dealing with environmental protection.

Auerback, S. *The Annotated Ontario Municipal Act 1993*, Carswell at page 336.

20. The 1981 Ontario Court of Appeal case, *A.G. Ontario v. Mississauga*, is distinguishable. In that case, by-laws that had been passed by a municipality to prevent a cement company from burning PCBs were quashed after certificates of approval under provincial legislation allowing the burning were granted. Since the absolute prohibition in the by-law clashed with the provincial legislation, the by-laws were inoperative as they were subordinate to the provincial legislation.

Attorney General for Ontario v. City of Mississauga, (1981) 15 M.P.L. R. 212 (C.A.O.) - Appellant's Book of Authorities, Tab 1.

21. The 1982 Ontario case of *Cox Construction v. Puslinch* is also distinguishable from the instant case because there was a limited power of prohibition elsewhere specified in the Act, dealing with the same subject matter, which was operation of a pit or quarry. These Interveners submit that where there is no other more specific provision in the provincial enabling legislation dealing with the subject matter of municipal control of pesticides on private property, the general powers

(general welfare or nuisance prevention) may be utilized by the municipality.

Cox Construction Ltd. v. *Puslinch,* (1982) 36 O.R. (2d) 618, at page 626.
Municipal Act, R.S.O. 1990, c. M.45, s.210.137.

IMPORTANCE OF LOCAL CONTROL OVER THE IMPUGNED BY-LAW MAKING POWERS

22. The trial judge below found that Hudson was addressing a need of the community and made a political decision which in its view concerned the health, general welfare and improvement of the municipality. This is the kind of by-law that section 410 envisages. The trial judge stated that the council recognized a current apprehension in the citizens in respect of health and the environment. Twenty years ago, he stated, there was very little concern over the effect of chemicals such as pesticides on the population. Today, he noted, 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.
23. Support for this type of control by municipal councils is found in the language of many of the provinces' municipal provisions reviewed above. Although not an exhaustive list of comparable kinds of control, many provinces empower their municipalities to deal with a wide range of activities that may have impacts on neighbours in the municipality. Many examples of municipal powers to control activities within municipalities are provided, some under the peace, order and good government or general health and welfare clauses of the relevant municipal legislation; others under nuisance prevention or more specifically listed categories of activities. In general, however, a by-law to control application of pesticides within the municipality is well within the range of the types of activities that municipalities have been empowered to deal with for over one hundred years in Canada, across the country.

24. Statutes must be interpreted in the contemporary context. It cannot be true that only the types of activities that were known when the statutes were originally drafted can be impacted by municipal by-laws passed today. As *Driedger* notes, statutes are “not meant to operate as historical documents.” They are written with the intention that will continue to apply into the indefinite future and to conditions and circumstances arising from time to time. Municipalities

must continue to be able to deal with activities that develop and eventually are perceived or appreciated to be problematic to others in the community. The basis for these concerns may be health based, because of nuisance impacts, because of environmental impacts, or for other reasons. Once there is a community of concern, it is legitimate for the municipal council to act. In applying pesticides to his or her property, a private owner is unable to limit the impacts and extent of that activity to the borders of his or her own property.

Sullivan, R. *Driedger on the Construction of Statutes*, (3rd Ed.), 1994, Butterworths, at pages 139, 140, 142.

25. The importance of municipalities' roles in local matters that have environmental implications was stressed in the 1993 *Goudreau* case. The consent of the municipality to open a road ensured that proper environmental standards would be adhered to and that the decision would be made after consideration was given to the greater public interest. The Court went on in that case to state that in a broad general sense a municipality is the trustee of the environment for the benefit of the residents in the area of the road allowance and, indeed, for the citizens of the community at large.

Goudreau et al. v. *Corporation of the Township of Chandos,* (1993) 14 O.R. (3d) 636, at page 640.

26. Similarly in the instant case, municipal control over pesticide application which affects residents in the vicinity of the activity in question is properly of municipal interest. Contrary to the assertions made in paragraph 42 of the Appellants' factum, and as discussed more fully in paragraphs 31 and following below, the provisions of the federal, provincial and municipal statutes and by-laws can all exist together and function as a whole. The exercise of municipal powers under the general welfare provisions of the enabling statute, such as section 410 of the *Cities and Towns Act* need not be dependant upon utilizing "technical expertise" to arrive at "wise scientific decisions" as the appellants assert. On the contrary, legislating and by-law making are political activities, carried out by the elected representatives, based upon community concerns and standards, balancing a number of competing interests. With respect to the allegation that the by-law may "cause the spread" of grass and plant diseases, the impugned by-law specifically allows for biological pesticide application in any case where insects constitute a

danger or an inconvenience to human beings, allows farmers to use pesticides for agricultural and horticultural uses, and to control or destroy plants which constitute a danger for human beings who are allergic thereto, among other cases. Contrary to the bald assertion that the by-law could cause such spread, the by-law is a balanced approach to dealing with a number of competing interests.

Hudson By-law 270, Articles 2, 3, 4 and 6.

27. As Madam Justice McLachlin stated in S*hell Canada* the general welfare provisions of municipal statutes are intended to provide a general power to municipalities to decide what is in the best interests of their citizens.

Shell Canada Products Ltd. v. *Vancouver (City)*, [1994] 1 S.C.R. 231, per McLachlin J. at 244

28. The Supreme Court of Canada recently had occasion in the *Nanaimo* case to consider the standard of review to be applied by an appellate court to the decisions of municipalities and in doing so, for *intra vires* decisions, the fact that a council is an elected body, consisting of representatives of their community and accountable to their constituents. That it is more familiar with the exigencies of its community and that municipalities often balance complex and divergent interests in arriving at decisions in the public interest were all key in Mr. Justice Majors' finding that the reviewing courts ought to be deferential to the decisions of municipalities and review such by-laws to a standard only of patent unreasonableness. Mr. Justice Major relied on the 1898 case, *Kruse v. Johnson*, and set out the following statement from that decision:

> "A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges."

Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342 at paragraph 36 - Appellants' Book of Authorities, tab 12.
Kruse v. *Johnson*, [1898] 2 Q.B. 91 (Div. Ct.), at page 100.

29. Mr. Justice Major also cited with approval the comment of Madam Justice McLachlin (as she then was) in her dissenting opinion in *Shell Canada Products Ltd. v. Vancouver (City),* where she said,

> "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 or those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum* and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives."
>
> *Shell Canada, supra* per McLachlin J. at page 244.
> *Nanaimo (City) v. Rascal Trucking Ltd., supra,* at paragraph 36 per Major J.

ISSUE 2: *Was the City of Hudson's authority to pass by-law 270 limited or constrained by the words "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" such that the by-law is invalid?*

30. Having determined that the by-law is within the scope of municipal power, the next issue to be determined is whether it is "not contrary to the laws of Canada or of Quebec." There is no issue among the parties that there is no "special provision" that applies.

The Test for Inconsistency is the *Multiple Access* Test

31. These Interveners submit that while all the parties have addressed the test for inconsistency at length in their facta, all fundamentally agree on the result, that is, that a by-law is ultra vires if it covers the same ground as federal or provincial legislation and it is impossible to comply with both. This is the test of "impossibility of dual compliance" set out by the Supreme Court in *Multiple Access Ltd.* v. *McCutcheon*.

> *Multiple Access Ltd.* v. *McCutcheon,* [1982] 2 S.C.R. 161 – Appellant's Book of Authorities, Tab 10.

32. These Interveners have read the factum of the Interveners, Federation of Canadian Municipalities et al. and adopt their analysis of the test. While the *Multiple Access* case addressed a conflict

between federal and provincial legislation, the test articulated applies equally to provincial and municipal legislation, save where specific statutory language guides the test for conflict elsewhere. There is no such statutory language in this case, and that the *Multiple Access* test therefore applies. This test is: will compliance with one regime make it impossible to comply with the other?

33. In the *British Columbia Lottery Corp.* v. *Vancouver* case, the British Columbia Court of Appeal found no conflict between a provincial regulation regulating the operation of casinos through the Lottery Corporation and a Vancouver by-law prohibiting casinos in the municipality. The court relied on *Multiple Access* stating:

> "It is no longer the key to this kind of problem to look at one comprehensive scheme and then to look at the other comprehensive scheme, and to decide which scheme entirely occupies the field to the exclusion of the other. Instead, the correct course is to look at the precise provisions and the way they operate in the precise case, and ask: Can they co-exist in this particular case in their operation?"
>
> A true and outright conflict can only be said to arise when one enactment compels what the other forbids.
>
> *British Columbia Lottery Corp.* v. *Vancouver,* (1999) 169 D.L.R. (4th) 141 (B.C.C.A.), at pages 147-148.

34. If the impugned provisions attempt to cover the same ground, as the superior legislation, and are inconsistent with one another such that it is impossible to comply with both, then the municipal by-law is *ultra vires*.

> *Re Mulder Investments Ltd. v. City of Winnipeg,* (1981) 119 D.L.R.(3d) 377 (Man. C.A.), at page 382 – Respondent's Book of Authorities, Tab 7.
> *Martin Feed Mills Ltd. v. Corporation of Township of Woolwich,* [1984] 26 M.P.L.R. 134 (Ont. S.C.) at page 138 - Respondent's Book of Authorities, Tab 10.

35. An example of such a conflict was found in *A.G. Ont.* v. *Mississauga*. In that case, the Ontario Court of Appeal found that a by-law prohibiting PCB facilities from operating was *ultra vires* because the same facility had been specifically approved by the provincial government under the provincial *Environmental Protection Act*. The Court stated:

"the provision in the statute covers the same ground as the by-law in a way to give rise to the interpretation that the statutory provision is intended 'completely, exhaustively, or exclusively [to express] what [shall be] the law governing the particular conduct … to which its intention is directed' then there is a case of conflict."

A.G. Ont. v. *Mississauga,* (1981) 15 M.P.L.R. 212 (C.A.O.), at page 232 – Appellant's Book of Authorities, Tab 1.

36. The facts in *Mississauga* are distinguishable from those in the present case. In *Mississauga*, the province had specifically turned its attention to the appropriateness of a PCB burning facility in that location and had issued an approval. The by-law forbade the facility in that location. Both provisions covered the same ground. An inconsistency was found and the by-law was found to be ultra vires.

For a similar case, see *City of Owen Sound (City)* v. *Township of Sydenham,* (1982) 134 D.L.R. (3d) 242 – Appellant's Book of Authorities, Tab 14.

37. In a 1989 British Columbia case, *Propane Gas*, which also closely parallels this one, the City of North Vancouver passed by-laws banning bulk storage and sale of propane in the City. The plaintiff charged that these were *ultra vires* because of the existence of provincial regulations regarding gas storage safety. As in *British Columbia Lottery Corp.,* the court found no conflict because the two provisions covered different ground. One aimed to ensure appropriate safety when propane is stored, the other to determine appropriate sites for propane.

Propane Gas Assn. of Canada Inc. v. *North Vancouver (City),* (1989) 42 M.P.L.R. 29 (B.C.S.C.) – Appellant's Book of Authorities, Tab 17.
British Columbia Lottery Corp. supra, at pages 147 – 148.

38. The Ontario courts have also distinguished and clarified the *Mississauga* case in subsequent cases. In *Martin Feed Mills Ltd.*, the Court noted:

"Unlike the facts in *Re A.G. Ont. and Mississauga*, *supra*, the subject-matter, policies and spheres of operation of the two pieces of legislation in the present case are different. The former defines zoning areas and regulates land use, the latter regulates assaults on the environment such as air contaminants and emissions. Each statute and the by-laws thereunder can operate effectively within their allotted spheres and accordingly to their particular objectives.…"

Martin Feed Mills Ltd. v. Corporation of Township of Woolwich, [1984] 26 M.P.L.R. 134 (Ont. S.C.) at page 138 - Respondent's Book of Authorities, Tab 10.

Application of *Multiple Access* Test of "impossibility of dual compliance"

39. It is respectfully submitted that when one applies the *Multiple Access* test to the current case by examining the goals and objectives and spheres of operation of By-Law 270 and the federal and provincial pesticides legislation, it is clear that the by-law and legislation are not in any way inconsistent.

Federal Legislation - *Pest Products Control Act*

40. The approach of the federal *Pest Control Products Act,* (referred to hereafter as the PCPA) is to control *which* pesticides are manufactured and/or available for use in Canada. The *Act* achieves this goal by establishing a registration process for a broad array of substances defined as pesticides in the statute.

    Pest Control Products Act, R.S.C. 1985, c. P-9.

41. The PCPA determines *which* pesticides may be used by providing the following:

    - Requirement of registration, conformity to standards, appropriate packaging/labeling, and advertising (s. 4)(s. 5)
    - Control over import (s. 5(1)) and export and interprovincial movement (s. 5(2)) of pesticides
    - Provision for regulations dealing with nomenclature, registration of products and manufacturers, inspection and operation of manufacturers, standards for products, safety standards, storage, display, and use of particular products (s. 6)
    - Prohibition of manufacture, storage, display, distribution, and use of pesticides in unsafe conditions (s. 4(1))

Provincial Pesticides Legislation

42. Generally, the approach of provincial pesticides legislation is to control commercial sale, use and application of pesticides in the province. Provincial pesticides legislation generally functions by creating a classification and licensing scheme to vendors and commercial applicators. These schemes allow the provinces to control who is licensed to sell or apply different kinds of pesticides, assure that they have proper training and that they apply the chemicals in the appropriate manner, when and where it is lawful to apply such substances.

    See for example *Pesticides Act*, R.S.O. 1990, c. P.11.

Quebec Legislation - *Pesticides Act*

43. Similarly the approach of the Quebec *Pesticides Act* is to regulate the commercial sale, use and application of pesticides in the province through a permitting and licensing system for vendors and applicators. The system ensures that those selling pesticides or pesticide application services receive training, hold insurance, keep records of their activities, and make appropriate guarantees.

    Loi sur les pesticides, L.R.Q., c. P.9.3 sections 34, 38, 50, 54, and 109.

44. Contrary to the assertion of the appellants, the licensing scheme which is at the heart of the *Pesticides Act* does not confer a "right" to use pesticides any more than a driving license confers a "right" to drive. The licensing scheme is a method of ensuring that where pesticide use is allowed, commercial vendors and applicators are trained, registered, and follow provincial guidelines pertinent to those commercial activities.

45. It is worth noting that the *Pesticides Act* implicitly anticipates that municipalities may pass local by-laws to regulate pesticide application in their territory. Section 102 of the Act states:

    > 102. The provisions of the Pesticide Management Code and of the other regulations of the Act prevail over any inconsistent provision of any by-law passed by a municipality or urban community.

    Loi sur les pesticides, L.R.Q., c. P.9.3, s. 102.

46. Thus while the *Pesticides Act* regulates classification of commercial applicators, and other requirements, municipalities may pass by-laws which regulate the location, timing and other aspects of that use in their territory. Such by-laws are only invalid where they are *inconsistent* with the *Pesticide Act* or its regulations. In other words, only if it was impossible to comply with both the impugned by-law the superior legislation would there be an argument of invalidity.

Hudson By-law No. 270 Concerning Pesticides

47. By-Law 270 determines where and in what circumstances pesticides may be used within the municipality. It does not prevent agricultural producers from applying agricultural or horticultural pesticides, subject to notification requirements (article 4). Otherwise, the by-law prohibits the use of pesticides except:

    - in swimming pools (art.3 (a));

- inside buildings (art.3 (c));
- in locations where there are plants or animals which pose a danger to humans (art.3 (d,e));
- subject to compliance with its provisions, on golf courses (art.5).

The prohibition also does not apply to pesticides used for water purification (art.3 (b)) or as a wood preservative (art.3 (f)). In addition, the by-law provides, that 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" (article 6).

48. In those locations where pesticides may be used, they must of course, be applied by those who are properly licensed or certified and in accordance with the rules of application under the prescribed *Pesticides Act*. The by-law does not attempt to alter this regime in any way.

The Hudson By-Law is not inconsistent with the federal or provincial Legislation

49. Applying the *Multiple Access* test to the federal and provincial legislation, and to the Hudson by-law makes clear that there is no inconsistency. A party applying pesticides in Hudson can and must comply with all three regimes. The federal PCPA regulates which pesticides can be used in Canada. The provincial *Pesticides Act* regulates commercial vendors and applicators in Quebec. By-Law No. 270 determines where and sometimes when in the municipality of Hudson, that application may take place. The provisions have been developed according to the needs and concerns of the local community.

50. The British Columbia Lottery Corporation challenged the power of the City of Vancouver to prohibit casinos by way of a zoning by-law. Williamson J. stated then,

> "...this is not a case of the City attempting "to enter the field of the sale of lottery tickets" or, for that matter, operate slot machines. Rather, the City is using its zoning powers to regulate *where* slot machines may or may not be placed."
>
> *British Columbia Lottery Corp.* v. *Vancouver (City),* [1997] 14 M.P.L.R. (2d) 1 (B.C.S.C.), at page 6, (affirmed 1999) - Appellant's Book of Authorities, Tab 2.

51. This analysis can be applied to the present case. The province of Quebec has passed a law regulating the licensing and conduct of commercial vendors and users of pesticides. The municipality has passed a by-law restricting where and when that conduct may take place.

Furthermore, the impugned by-law has balanced considerations, allows for perceived necessary uses, is not an absolute ban, and allows for control of infestations, thereby protecting reasonable concerns as understood and described by the council in its by-law.

52. Not only do the provisions cover different ground, but it is entirely possible to comply with both regimes. In those locations in the municipality of Hudson where pesticides may be applied, the applicator must be appropriately licensed and comply with all requirements of the *Pesticides Act.* According to the *Multiple Access* test, there is no incompatibility.

53. Ultimately, all three levels of government have by their legislation recognized the danger of pesticides to human health and the environment while perceiving the need to use them in certain circumstances. Each takes action within its sphere of authority, but also in the sphere in which it is practical for that level of government. The federal government provides for the registration of all pesticides and establishes national standards for labeling and advertising. The provincial government creates a licensing scheme within its boundaries to ensure vendors and applicators act appropriately. Finally, local municipalities recognize local concerns about pesticide use and may restrict the location, timing and circumstances of such use to match local concern.

54. The concern about a piecemeal approach is not valid as the province establishes minimum standards for pesticide application and licenses vendors and commercial applicators. A municipality may provide for stricter standards for application or determine that pesticides may only be applied in some locations or circumstances, but it does so to match local concerns regarding health, general welfare and improvement of the municipality.

55. It is respectfully submitted that By-Law 270 is *intra vires* since it is not inconsistent with either federal or provincial law.

COMMUNITY STANDARDS VERSUS PRIVATE PROPERTY RIGHTS

56. Contrary to the assertion of the Appellants in paragraph 81 of their factum, the instant case must be distinguished from those cases which are jealous to protect individuals' private property rights.

These rights and the rationale for their protection were well described in *MacDonald v. Halifax.* In that case, (which dealt with provincial legislation that required the installation of an elevator for certain types of buildings), MacDonald J. stated,

> "In essence I am asked to review this legislation in the face of competing, but nonetheless legitimate rights. On the one hand we have the rights of individual property owners to enjoy their land as they see fit. On the other hand we have the rights of the citizenry generally, that prescribe certain community standards including as in this case minimal housing requirements. In deference to these competing rights conflicting principles of statutory interpretation have emerged. Again on the one hand I am directed to narrowly interpret legislation that is designed to restrict an individual's vested rights. On the other hand I am to liberally interpret laws designed to enhance the community's common good. Thus when balancing these competing rights I must at the same time balance competing principles of statutory interpretation."
>
> *MacDonald v. Halifax (Regional Municipality)*, [1997] N.S.J. No. 376 (Q.L.), (N.S.S.C). per MacDonald J. at paragraphs 9 – 11.

57. Owners and occupiers of properties in the vicinity of pesticide application should be entitled to be free of pesticides in their neighbourhood. In many cases, especially where there are health concerns or illnesses, pesticide drift may amount to a breach of the security of the use and occupation of their own property. On the other hand, application of pesticides is not a traditional common law property right such as "privacy" or "security". While these latter values are highly protected by the courts, MacDonald J. reviewed the protection of competing "community based property rights." Land use zoning is such an example, and the Interveners submit, Hudson's by-law is another such example. MacDonald J. quoted the following passage from *Driedger:*

> "In the past, common law courts assumed that the free use and disposition of property, and contractual freedom generally, benefited not only the owner of the property but also society as a whole. While free markets and free trade remain respectable common values, courts today are less likely to believe that what is good for property owners is good for society as a whole. In current interpretative practice, the value of protecting the freedom of property owners easily gives way to competing values and goals."
>
> *MacDonald v. Halifax (Regional Municipality)*, [1997] N.S.J. No. 376 (Q.L.), (N.S.S.C. per MacDonald J. at paragraph 14.

58. Among the cases reviewed by MacDonald, J. was *Bayshore* in the context of modern zoning by-laws which

> "have been enacted to protect the whole community and should be construed liberally having

in certain the public interest..."

Bayshore Shopping Centre Ltd. v. Township of Nepean et al., (1972) 25 D.L.R. (3d) 443 (S.C.C) per Spence J., at page 449.

CONCLUSION

59. Use and application of pesticides is a heavily controlled, prescribed, and regulated activity, best construed as occurring with a series of permissions: firstly, the permission granted to the manufacturer to make and market the pesticide (the federal registration scheme); secondly, the permission granted to a vendor to distribute or sell the pesticide, or to a service company to apply the pesticide (the provincial scheme); and finally, where a municipality has enacted by-law controls, the permission granted pursuant to that by-law to apply pesticides within the municipality in accordance with the provisions thereof . Simply because it has been possible for home owners to purchase pesticides and apply them or to buy the services of pesticide applicators for the last thirty years or so does not make pesticide application a common law private property right with the level of concern and judicial protection that the values of privacy and security would attract. Even in the time frame during which pesticide products have been available, these products have been controlled and regulated. But in this time frame, it has also become apparent that there are local concerns, validly held, and which it is most appropriate that the municipality control. There are significant differences at the local level, which would lead to valid differences in municipally elected councils making different decisions as to how to control pesticide application in the municipality.

60. The considerations applicable to pesticide application where their use is primarily for cosmetic and aesthetic purposes differ from situations where their use is for agricultural purposes. The cosmetic use of pesticides, in home lawns and gardens, cannot be considered anything but a local concern, in all but the most unusual of circumstances. It is well accepted that municipalities can impose by-laws for control of appearances of local buildings and lots, in matters ranging from upkeep of exteriors, appearance and size of signs, parking of vehicles, control of vegetation, tree removal and many other matters. Similarly, municipal control of use and application of pesticides must be considered valid, especially where a plain reading of the enabling statute would provide

for this power. This is especially true where the function of the pesticides is primarily for appearance and cosmetics, and where there are competing concerns from residents in the municipality because of health concerns, short term and long term, and where there are legitimate concerns as to environmental impacts from urban pesticide use.

61. Various municipalities would find different concerns that predominate in their municipality. For example, concerns as to pesticide run-off to groundwater or to surface water might differ with the differences in location of these features. Concerns as to impacts on young children might vary with the demographics of the municipality, and with the location of parks, schools, daycares and recreational facilities. Concerns might differ at different seasons or times of day, and with the pattern of pesticide usage in the community. Municipalities have traditionally been empowered to deal with considerations that reflect these differences, from the ability to zone land use, to the ability to pass by-laws for the control of nuisance uses in a community. The underlying concerns have ranged from health concerns (safety of drinking water, for example), to that of the peace and enjoyment of their lands by neighbours (by-laws dealing with noise nuisances and air emission nuisances, for example).

    Environmental Protection Act, R.S.O. 1990, c. E.19, s. 1(1), 6(1)

    Municipal Act, R.S.O. 1990, C.M.25, s. 210.138; 210.140

62. In many cases, the municipal power to act and enact by-laws is not in any way related to matters such as federal or provincial statutory or regulatory standards or guidelines. For example, noise by-laws have nothing whatsoever to do with Ontario Ministry of Environment noise guidelines; both of them deal with different concerns in different ways. Municipal noise by-laws can and do control much activity that would not breach Ministry of Environment noise guidelines. The municipal provisions allowing for by-laws that deal with the nuisances from air emissions from trades and manufactures are not in any way related to Ministry of Environment air standards. The former may be primarily concerned with nuisance impacts; the latter with short or long term "proven" health or environmental impacts, and even then, usually only concerned with the most serious of these impacts.

    Ibid.

63. Municipal by-laws dealing with pesticides are simply one of the most recent of a line of municipal by-laws that regulate activities by property owners and occupiers, where their activity has an impact upon others in the municipality. This is, in fact, the very purpose of providing municipal general health and welfare powers in the municipal legislation. It is not expected, nor practically useful, to attempt a federal or provincial scheme that would deal with all such concerns and conflicts. Short of a nation-wide ban on cosmetic or urban use of pesticides, local impacts from their use will occur in differing ways in differing locations and the concerns that must be addressed therefrom will also differ. Since it is ecologically impossible to confine pesticides to their place of application, their use by any owner of private or public property is a legitimate community concern.

64. Enactment of a by-law to control the application of pesticides in a municipality, where by way of control over the types of application permitted, the locations in the municipality permitted, or whether by way of time of year, time of day, weather conditions and other controls is valid as a matter of Canadian municipal law. Such a by-law is not incompatible with federal legislation, nor with provincial legislation. Until a province decides to enact more specific legislation as to by-laws for municipal control of pesticides within the locality, and unless a province specifically prescribed the manner in which they may thus act, municipalities may act under the "general welfare", "public health" or "nuisance" provisions of the relevant municipal legislation.

PART IV: ORDER REQUESTED

65. These Interveners respectfully request that the Court dismiss the Appeal.

ALL OF WHICH IS RESPECFULLY SUBMITTED

This day of September, 20000.

_____

Theresa A. McClenaghan

Paul Muldoon

Counsel for the Interveners, Toronto Environmental Alliance, et al.

PART V: TABLE OF AUTHORITIES