

## Municipal Regulation of Pesticide Use

114957 Canada Ltée (Spraytech, Société d'arrosage and Services des espaces verts Ltée/Chemlawn v. Town of Hudson<sup>1</sup>

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### Introduction

In 1991 the Town of Hudson, Quebec, located just outside Montreal, enacted a bylaw restricting the use of pesticides within the municipality. The bylaw responded to ongoing concerns raised by members of the community about the safety and adverse effects associated with pesticide use. The bylaw allowed limited use of pesticides, but essentially banned their aesthetic use for landscaping and lawn care. The municipality charged the appellants, two landscaping companies, with contravention of the bylaw for using pesticides for unpermitted uses in 1992. The appellants plead not guilty and asked the court to declare the bylaw to be inoperative and *ultra vires* the Town's authority. The Quebec Superior Court denied the motion for a declaratory judgement and the Quebec Court of Appeal affirmed this ruling. The appellants appealed to the Supreme Court of Canada. In June, the Supreme Court handed down its unanimous decision. It upheld the trial and appellate determination that the bylaw was valid. This important decision gives municipalities guidance on how they may legitimately use municipal powers to protect health and environment.

### The challenge and the Supreme Court's response

The Town of Hudson passed the bylaw under section 410 of Quebec's enabling municipal legislation, the *Cities and Towns Act*<sup>2</sup>. The appellants argued that the bylaw was invalid and *ultra vires*, on the grounds that it was not authorized under provincial legislation, it was prohibitory and discriminating and it conflicted with federal and provincial laws.

### Provincial authority to pass bylaw

A municipality is a delegated authority, created by the provincial legislature, and receives its law making powers from the province. Accordingly, if a local government body validly exercises a power, a grant of authority must be found somewhere in the provincial laws. The appellants argued that the province did not delegate power to regulate the use of pesticides to municipalities.

In the Hudson case, the Court broadly interpreted municipal powers under the *Cities and Towns Act*. LeBel J. explained that the "... Town of Hudson passed the pesticide restriction bylaw under section 410 of the *Cities and Towns Act*. The section enables municipal councils to make bylaws for the "peace, order, good government, health and general welfare in the territory of the municipality"". She noted that "More open-ended or "omnibus" provisions such as s.410 allow municipalities to respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation" [19]. However, such general grants of power normally supplement more specific grants. In the Hudson case, there was no specific grant of power, such

as a power relating to pesticide use within the municipality. The issue for the Court, therefore, was whether a general welfare provision such as s.410, absent a specific grant, could authorize bylaw 470 [52].

The Court found that omnibus provisions can authorize bylaws that fall outside of any specific grant of powers within certain limitations. In the Court's words:

It appears to be sound legislative and administrative policy, under such provisions, to grant local governments a residual authority to deal with the unforeseen or changing circumstances, and to address emerging or changing issues concerning the welfare of the local community living within their territory. Nevertheless, such a provision cannot be construed as an open and unlimited grant of provincial powers. It is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must relate to problems that engage the community as a local entity, not a member of the broader polity. It must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene [53].

The Court found the Hudson bylaw within the ambit of normal local government activities since it concerned the use and protection of the local environment within the community [54].

### **Precautionary principle**

In concluding its discussion on statutory authority the Court noted that reading section 410 to permit the Town to regulate pesticide use is consistent with and respects the precautionary principle, a dominant principle in international law and policy. This principle provides that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation"<sup>3</sup>[31]. It is significant that the Supreme Court's sees this principle as an aid to statutory interpretation.

### **Prohibitory and discriminating?**

The Court rejected the appellant's claim that the bylaw violated the principle of delegated legislation in that it was prohibitory and discriminated without authorization by enabling legislation. Although the bylaw made a general prohibition and then allowed some specific uses, the Court did not find that it was a purely prohibitory instrument. Regarding discrimination, the Court noted that there can be no regulation on a topic without some form of discrimination and concluded that an "... implied authority to discriminate was then unavoidably part of the delegated regulatory power" [55].

### **Conflict with federal or provincial laws?**

Federal regulation of pesticides is under the *Pest Control Products Act*<sup>4</sup>. This law deals with the registration of pesticides for use in Canada, and the manufacture of pesticides in Canada. Provincial regulation is under Quebec's *Pesticides Act*<sup>5</sup>. This law establishes a regulatory scheme for vendor and commercial applicator licenses and permits. In determining whether the bylaw conflicted with either the federal or provincial regime, the Court applied the *impossibility of dual compliance test*. This test was set out in the case of *Multiple Access Ltd. v. McCutcheon*<sup>6</sup>. That case explored the validity of

provincial and federal laws on the same matter. The court found that where two levels of legislation exist on the same topic, but it is possible to follow both laws, then there is no conflict requiring one of the laws to be struck down as invalid. A conflict only arises where following one law requires non-compliance with the other. In applying this test, the Supreme Court noted that the federal and provincial legislation fail to differentiate between 'cosmetic' and 'necessary' uses of chemical controls, and in this absence municipalities should be able to respond to local concerns. Further, the federal and provincial legislation did not take into account regional differences, community needs, and risk assessment regarding when and where pesticides may be applied. In the end, the Supreme Court found that since it was possible to mutually comply with the federal law, the provincial law and the bylaw, there was no conflict.

### **Application to Alberta**

The Supreme Court specifically cited sections 3(c) and 7 of the Alberta *Municipal Government Act* as being analogous to section 410 of Quebec's *Cities and Towns Act* [19]. Section 3(c) is an omnibus provision stating that a purpose of an Alberta municipality is to "develop and maintain safe and viable communities". Section 7 sets out general jurisdiction to pass bylaws, including respecting the "safety, health and welfare of people and the protection of people and property" among others. By specifically mentioning the Alberta legislation (along with other provinces municipal enabling legislation) the Supreme Court makes it clear that the Hudson case has application outside of Quebec. This should give Alberta municipalities the green light to enact bylaws that regulate many health, welfare, safety and environmental matters. Municipalities must be careful, however, that their proposed bylaws fit within the legislative purposes for municipalities, or within other bylaw making authority, are not prohibitory nor discriminatory and do not conflict with provincial or federal laws.

- <sup>1</sup> File No. 26937, 12-7-2001: 6-28-2002, Supreme Court of Canada. References in brackets are to paragraphs of decision.
- <sup>2</sup> *Cities and Towns Act*, R.S.Q., c. C-19.
- <sup>3</sup> From para. 7 of the Bergen Ministerial Declaration on Sustainable Development (1990).
- <sup>4</sup> *Pest Control Products Act*, R.S.C. 1985, c. P-9.
- <sup>5</sup> *Pesticides Act*, R.S.Q., c. P-9.3.
- <sup>6</sup> *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161.