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# COURT OF APPEAL FOR ONTARIO

**GOUDGE, FELDMAN and LANG JJ. A.**

| | | |
|---|---|---|
| **B E T W E E N :** | ) | |
| | ) | |
| **CROPLIFE CANADA** | ) | **J. Scott Maidment,** |
| | ) | **Jennifer Dent,** |
| | | **and Lisa Parliament for** |
| | ) | **the appellant** |
| **Appellant** | ) | |
| | ) | |
| **- and -** | ) | **Graham Rempe,** |
| | ) | **Susan L. Ungar, and Mark** |
| **CITY OF TORONTO** | ) | **Siboni for the respondent** |
| | ) | |
| **Respondent** | ) | **Justin Duncan and** |
| | ) | **Robert V. Wright for the** |
| | ) | **intervenors World Wildlife** |
| | ) | **Fund and Federation** |
| | ) | **of Canadian Municipalities** |
| | ) | |
| | ) | **Paul Muldoon and Marlene** |
| | ) | **Cashin for the intervenors** |
| | ) | **Toronto Environmental** |
| | ) | **Alliance, Canadian Association** |
| | ) | **for Physicians for the** |
| | ) | **Environment, Sierra Club of** |
| | ) | **Canada, Canadian** |
| | ) | **Environmental Law** |
| | ) | **Association, Environmental** |
| | ) | **Defence, and Ontario College of** |
| | ) | **Family Physicians.** |
| | ) | |
| | ) | **Heard: November 4, 2004** |
| | ) | |

**On appeal from the judgment of Justice William P. Somers of the Superior Court of Justice dated December 8, 2003.**

**FELDMAN J.A.:**

[1] The issue in this case is whether the City of Toronto had the authority under s. 130 of the new *Municipal Act, 2001,* S.O. 2001, c. 25 (the "*Municipal Act, 2001"* or the "new Act") to enact By- Law 456-2003, which limits the application of pesticides within the City.

[2] In its decision in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* [2001] 2 S.C.R. 241 ("*Spraytech*"), the Supreme Court of Canada held that the Town of Hudson in Quebec had the authority under a section of its *Cities and Towns Act*, R.S.Q., c. C-19, similar to s. 102 of the former *Municipal Act,* R.S.O. 1990, c. M.45 (the "old *Municipal Act*" or the "old Act") to enact a by-law regulating the use of pesticides in the town. Section 102 of the old *Municipal Act* was the predecessor of s. 130 of the *Municipal Act, 2001*.

[3] The appellant says the *Spraytech* decision does not apply to s. 130 of the *Municipal Act, 2001*. Bearing in mind that the *Municipal Act, 2001* was enacted after the *Spraytech* decision, s. 130 must be interpreted narrowly and restrictively because of, (a) its placement within the structure of the new Act, and (b) the addition of new language into the section that makes it distinguishable from s. 102 of the old *Municipal Act*.

[4] The motion judge rejected the appellant's arguments and upheld the by-law. For the reasons that follow, I agree with the conclusion of the motion judge and would dismiss the appeal.

**Background**

[5] The appellant, a trade association that includes pesticide producers, challenges the authority of the City of Toronto to enact By-Law No. 456-2003, which regulates the use of pesticides within the city. The city enacted the by-law under s. 130 of the *Municipal Act, 2001* on May 23, 2003. The by-law is set out in its entirety below:

> CITY OF TORONTO
>
> BY-LAW No. 456-2003
>
> To adopt a new City of Toronto Municipal Code Chapter 612, Pesticides, Use of.

WHEREAS environmental protection has emerged as a fundamental value in Canadian society and the common future of every Canadian community depends on a healthy environment; and

WHEREAS the Council of the City of Toronto wishes to respond to the concerns expressed by City residents about health risks associated with the use of pesticides within the City of Toronto; and

WHEREAS avoiding unnecessary exposure to pesticides conforms to the precautionary principle as it applies to the use of pesticides; and

WHEREAS minimizing the use of pesticides will promote the health of the inhabitants of the City of Toronto; and

WHEREAS pesticides used in lawn and garden care are known to enter streams and rivers, which discharge into Lake Ontario, the source of drinking water for the City of Toronto; and

WHEREAS under section 130 of the *Municipal Act, 2001*, by-laws may be passed by a municipality to provide for the protection of the health, safety and well-being of residents in the municipality; and

WHEREAS under section 425 of the *Municipal Act, 2001*, by-laws may be passed by a municipality for providing that any person who contravenes any by-law of the municipality, passed under the authority of the *Municipal Act, 2001*, is guilty of an offence;

The Council of the City of Toronto HEREBY ENACTS as follows:

1. The City of Toronto Municipal Code is amended by adding the following chapter:

Chapter 612

PESTICIDES, USE OF

§ 612-1. Definitions.

As used in this chapter, the following terms shall have the meanings indicated:

ENCLOSED – Closed in by a roof or ceiling and walls with an appropriate opening or openings for ingress or egress, which openings are equipped with doors which are kept closed except when actually in use for egress or ingress.

HEALTH HAZARD – A pest which has or is likely to have an adverse effect on the health of any person.

INFESTATION – The presence of pests in numbers or under conditions which involve an immediate or potential risk of substantial loss or damage.

PEST – An animal, a plant or other organism that is injurious, noxious or troublesome, whether directly or indirectly, and an injurious, noxious or troublesome condition or organic function of an animal, a plant or other organism.

PESTICIDE – Includes

A. A product, an organism or a substance that is a registered control product under the federal Pest Control Products Act which is used as a means for directly or indirectly controlling, destroying, attracting or repelling a pest or for mitigating or preventing its injurious, noxious or troublesome effects.

B. Despite Subsection A, a pesticide does not include:

(1) A product that uses pheromones to lure pests, sticky media to trap pests or ‘quick-kill’ traps for vertebrate species considered pests such as mice and rats.

(2) A product that is or contains any of the following active ingredients:

(a) A soap;

(b) A mineral oil, also called dormant or horticultural oil;

(c) Silicon dioxide, also called diatomaceous earth;

(d) Bt (Bacillus thuringiensis), nematodes and other biological control organisms;

(e) Borax, also called boric acid or boracic acid;

(f) Ferric phosphate;

(g) Acetic acid;

(h) Pyrethrum or pyrethrins;

(i) Fatty acids; or

(j) Sulphur.

§ 612-2. Restrictions.

A. No person shall apply or cause or permit the application of pesticides within the boundaries of the City.

B. The provision set out in Subsection A does not apply when pesticides are used:

(1) To disinfect swimming pools, whirlpools, spas or wading pools;

(2) To purify water intended for the use of humans or animals;

(3) Within an enclosed building;

(4) To control termites;

(5) To control or destroy a health hazard;

(6) To control or destroy pests which have caused infestation to property;

(7) To exterminate or repel rodents;

(8) As a wood preservative;

(9) As an insecticide bait which is enclosed by the manufacturer in a plastic or metal container that has been made in a way that prevents or minimizes access to the bait by humans and pets;

(10) For injection into trees, stumps or wooden poles;

(11) To comply with the *Weed Control Act* and the regulations made thereunder; or

(12) As an insect repellent for personal use.

§ 612-3. Offences.

Any person who contravenes any provision of this chapter is guilty of an offence and upon conviction, is liable to a fine or penalty provided for in the *Provincial Offences Act*.

2. This by-law comes into force on April 1, 2004.

**History of the *Municipal Act, 2001***

[6] The *Municipal Act, 2001* received royal assent on December 12, 2001 and came into force January 1, 2003. It was the first overhaul of the old Act and its predecessors in 150 years. The purpose of creating a new Act was to give municipalities “the tools they

need to tackle the challenges of governing in the 21st century" (Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 53 (18 October 2001) at 1350 (Hon. Chris Hodgson)), including more authority, accountability and flexibility so that municipal governments would be able to deliver services as they saw fit.

[7] One of the ways in which the new Act introduces more flexibility is by giving municipalities two kinds of powers. Part II of the new Act, for the first time, gives municipalities the power of a natural person (s. 8) and as well, ten broad "spheres of jurisdiction" (s. 11) within which municipal councils have wide discretion to enact by-laws. Part III of the new Act gives municipalities specifically defined by-law making powers, as under the old Act.

[8] Part II of the new Act is entitled "General Municipal Powers." That Part contains not only the two new general powers of a municipality in ss. 8 and 11, but also rules of interpretation. For example, s. 9(1) in Part II provides:

> 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.

[9] Section 9(1) applies to the s. 11 spheres of jurisdiction contained in Part II, but also to s. 8, which is in Part II but gives municipalities the capacity and powers of a natural person for all purposes under the new Act. Similarly s. 14, which sets out a "conflicts rule" for determining the validity of by-laws that regulate matters already dealt with by federal or provincial legislation, is a rule of general application that applies to any by-law enacted by a municipality, not just to those by-laws enacted under one of the spheres of jurisdiction in Part II. Section 14 provides:

> 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, licence or approval, made or issued under a provincial or federal Act or regulation.

[10] Part III of the new Act is entitled “Specific Municipal Powers.” These include detailed powers to enact by-laws in areas such as highways, transportation, and waste management, although these are also named as spheres of jurisdiction under s. 11. In order to clarify the relationship between the spheres of jurisdiction powers and the specific powers enumerated in Part III, s. 15(1) in Part II provides:

> 15. (1) If a municipality has power to pass a by-law under section 8 or 11 and also under a specific provision of this or any other Act, the power conferred by section 8 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision.

[11] Section 130, the provision at issue in this case, is one of the specific powers in Part III and 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.

[12] The predecessor to this section, then numbered s. 102, was referred to under the old *Municipal Act* as the general welfare provision and read:

> 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 and for governing the conduct of its members as may be deemed expedient and are not contrary to law.

[13] Section 130 was deliberately left as a specific power and not a sphere of jurisdiction when the new Act was created and passed. The language of the section was amended to remove the reference to morality and the conduct of municipal council members, and the term “welfare” was changed to “well-being.” In addition, the words “not contrary to law” were removed, as that condition is now provided in s. 14 of the Act.

Most importantly for the purposes of this case, the authority granted by s. 130 now excludes not just matters "specifically provided for by this Act" but also matters "specifically provided for by … any other Act."

[14] It is common ground that the *Municipal Act, 2001* contains no named specific power to make by-laws regarding the use of pesticides within a municipality, nor is there a sphere of jurisdiction that might encompass such a power. The appellant has two main arguments. First, it says that because s. 9(1) of the new Act directs a broad interpretation of the powers contained in the spheres of jurisdiction granted in Part II, the specific powers in Part III are to be interpreted narrowly. Consequently, the scope of the former general welfare power in s. 102 of the old Act has been pared down to what the appellant terms a "specific health power" with little or no scope, and certainly without scope to give the city the power to regulate pesticide use within the municipality.

[15] The appellant's second argument is that by the addition of the words "or any other Act" to the phrase "matters not specifically provided for by this Act," the effect of s. 130 is to prohibit any by-laws on matters the "pith and substance" of which are already the subject of legislation, whether federal or provincial. There is both federal and provincial legislation dealing with pesticides: in the case of the federal *Pest Control Products Act*, R.S.C. 1985, c. P-9 (the "*PCPA*"), with the importing, manufacturing, and labelling of pesticides; and in the case of the Ontario *Pesticides Act*, R.S.O. 1990, c. P.11, with the storage of pesticides and the licensing of commercial applicators and exterminators. The appellant characterizes both acts as legislation regulating the use of pesticides. Consequently, the appellant argues, a municipality cannot use s. 130 to enact any by-law that also regulates the use of pesticides.

**Evolution of the Interpretation of the Scope of Municipal By-Law Making Authority**

[16] Historically, the courts interpreted the powers of municipalities to enact by-laws restrictively. The rule they applied was known as "Dillon's Rule" (from the text, *Dillon on Municipal Corporations*, 4th ed.), which stated that "a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those powers essential to, and not merely convenient for, the effectuation of the purposes of the corporation": Stanley M. Makuch, Neil Craik & Signe B. Leisk, *Canadian Municipal and Planning Law*, 2d ed. (Toronto: Thomson-Carswell, 2004) at 82. In *Verdun (City) v. Sun Oil Co.*, [1952] 1 S.C.R. 222, Fauteux J. articulated the restrictive approach in this way at p. 228: "That the municipalities derive their legislative powers from the provincial Legislature and must, consequently, frame their by-laws strictly within the scope delegated to them by the Legislature, are undisputed principles."

[17] However, in the 1990s the Supreme Court of Canada began to move away from Dillon's Rule. The court favoured instead a "benevolent construction" or "broad and purposive" approach that allowed for a more generous interpretation of municipal powers, with a view toward showing deference to, and respect for, the decisions of locally elected officials.

[18] The move began with the dissenting reasons of McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, where she first identified a more liberal approach to the construction of enabling statutes that was already reflected in such cases as *Hamilton (City) v. Hamilton Distillery Co.* (1907), 38 S.C.R. 239; *Howard v. Toronto (City)* (1928), 61 O.L.R. 563 (C.A.); *Associated Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.); and *Kuchma v. Tache (Rural Municipality)*, [1945] S.C.R. 234. She then observed 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. 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*, [*infra*], 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.

McLachlin J. concluded at p. 248:

> It may be that, as jurisprudence accumulates, a threshold test for judicial intervention in municipal decisions will develop. For the purposes of the present case, however, I find it sufficient to suggest that judicial review of municipal decisions should be confined to clear cases. The elected members of council are discharging a statutory duty. The right to exercise that duty freely and in accordance with the perceived wishes of the people they represent is vital to local democracy. Consequently, courts should be reluctant to interfere with the decisions of municipal councils. Judicial intervention is warranted only where a municipality's

> exercise of its powers is clearly *ultra vires*, or where council has run afoul of one of the other accepted limits on municipal power.

[19] McLachlin J.'s broad and purposive approach to the interpretation of municipal statutes was subsequently adopted and approved by the Supreme Court in several cases, including *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485; and *Spraytech*, *supra*.

[20] At the same time, some provinces, starting with Alberta and now including Ontario, began to enact broader and more flexible enabling statutes for their municipalities. The *United Taxi* case, *supra*, arose under Alberta's new *Municipal Government Act*, S.A. 1994, c. M-26.1, which, like the Ontario *Municipal Act, 2001*, incorporates the concept of spheres of jurisdiction. The issue in that case was whether the City of Calgary had the authority under Alberta's new Act to freeze the number of taxi licenses it issued. Although he was dealing with the interpretation of broadly worded powers in the Act to pass bylaws to regulate transportation and licenses, Bastarache J.'s discussion of the new broad and purposive interpretive approach was not confined to the new form of statute. He stated at para. 6:

> The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo*, *supra*, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: *The Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M255; *Municipal Government Act*, S.N.S. 1998, c. 18; *Municipal Act*, R.S.Y. 2002, c. 154; *Municipal Act, 2001*, S.O. 2001, c. 25; *The Cities Act*, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern

> municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada,* at pp. 238 and 245.

[21] Finally, in *Spraytech*, *supra*, the issue was whether the Town of Hudson, Quebec, had the authority to enact a by-law limiting the non-essential use of pesticides in the town. Section 410(1) of the province of Quebec's *Cities and Towns Act*, *supra*, read:

> 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 Québec, nor inconsistent with any special provision of this Act or of the charter;

[22] Writing for the majority of the Supreme Court, L'Heureux-Dubé J. identified this section as a general welfare provision that supplements the specific grants of power in other sections, and stated the following about such provisions at para. 19:

> Section 410 *C.T.A.* is an example of such a general welfare provision and supplements the specific grants of power in s. 412. 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. There are analogous provisions in other provinces' and territories' municipal enabling legislation: see *Municipal Government Act*, S.A. 1994, c. M-26.1, ss. 3(*c*) and 7; *Local Government Act*, R.S.B.C. 1996, c. 323, s. 249; *Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225, ss. 232 and 233; *Municipalities Act*, R.S.N.B. 1973, c. M-22, s. 190(2), First Schedule; *Municipal Government Act*, S.N.S. 1998, c. 18, s. 172; *Cities, Towns and Villages Act*, R.S.N.W.T. 1988, c. C-8, ss. 54 and 102; *Municipal Act*, R.S.O. 1990, c. M.45, s. 102; *Municipal Act*, R.S.Y. 1986, c. 119, s. 271.

[23] In assessing whether the general welfare power in the Quebec *Cities and Towns Act* empowered the Town of Hudson to enact its pesticide by-law, L'Heureux-Dubé J. first examined whether there was a specific by-law making power that the town should

have used and concluded that there was not, an exercise mandated by the court's 1993 decision in *R. v. Greenbaum*, [1993] 1 S.C.R. 674.

[24] Having concluded that there was no specific power in the Quebec's *Cities and Towns Act* that would allow the Town to enact a pesticide control by-law, L'Heureux-Dubé J. had to determine whether the town could use the general welfare power to enact such a by-law. To interpret the general welfare power, she first turned to the *Nanaimo* case, *supra*, where the court had approved McLachlin J.'s view in *Shell Canada* advocating the benevolent construction approach to the implication of municipal powers that are not expressly conferred. L'Heureux-Dubé J. also referred to Sopinka J.'s majority judgment in *Shell Canada*, which enunciated the test that the municipal enactment had to have been "passed for a municipal purpose." L'Heureux-Dubé J. then quoted the following passage from *Greenbaum*, *supra* at 689:

> 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. However, courts must be vigilant in ensuring that municipalities do not impinge upon the civil or common law rights of citizens in passing *ultra vires* by-laws.

[25] Applying these principles from *Nanaimo*, *Shell Canada*, and *Greenbaum*, L'Heureux-Dubé J. examined the purpose of the Town of Hudson's pesticide by-law. She concluded that its purpose was to address the concerns of the town's inhabitants about the health risks arising from the non-essential use of pesticides and to minimize those risks. That purpose fell "squarely within the 'health' component" of the general welfare power.

[26] L'Heureux-Dubé J. also observed that to read the general welfare provision to permit the pesticide by-law accords with international law and policy and with the "precautionary principle." She referred to the definition in para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990) as follows:

> 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.

[27] Canada had advocated including this principle during the Bergen Conference, and has codified it in several pieces of federal legislation. L'Heureux-Dubé J. concluded that the town's concerns about pesticides fit within the precautionary principle's rubric of preventative action.

[28] Finally, having concluded that the Town of Hudson had the authority to enact its pesticide by-law, L'Heureux-Dubé J. had to decide whether the by-law was inoperative because of a conflict with federal or provincial legislation regulating pesticides, *i.e.*, the federal *PCPA* or the Quebec *Pesticides Act,* R.S.Q., c. P-9.3. L'Heureux-Dubé J. applied the "impossibility of dual compliance" test from *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, under which a provincial law is invalidated if compliance with it would result in the breach of a federal law. Looking first at the federal *PCPA*, L'Heureux-Dubé J. described it as regulating and authorizing the import, export, sale, manufacture, packaging, and labelling of pesticides, as well as their registration for use in Canada. L'Heureux-Dubé J. concluded that there was no operational conflict between the federal *PCPA* and the Town of Hudson's pesticide by-law, because it was not impossible to comply with both. She also found that the application of the by-law would not frustrate or displace the legislative purpose of Parliament.[1]

[29] Turning to the Quebec *Pesticides Act,* L'Heureux-Dubé J. found that it established a permit and licensing system for vendors and commercial applicators of pesticides. She noted that the provincial legislation complemented the focus of the federal *PCPA*, which is on the products themselves. She concluded, importantly, that "[a]long with By-law 270, these laws establish a tri-level regulatory regime" (para. 39). She found that there was neither a problem with dual compliance with Quebec's *Pesticides Act* and the Town of Hudson's pesticide by-law, nor any "plausible evidence that the legislature intended to preclude municipal regulation of pesticide use." In the result, the Supreme Court upheld the by-law.

**The Issues**

(1) Did the motion judge err in applying the broad and purposive approach to the interpretation of s. 130, when that section is not one of the spheres of jurisdiction in Part II of Ontario's *Municipal Act, 2001* but is a specific power under Part III?

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[1] This second prong of the conflicts test, focusing on purpose, was recently strengthened by the Supreme Court of Canada in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13. *Rothmans* made clear that in any paramountcy case, a court must ask two questions: (1) can a person simultaneously comply with the provincial and the federal legislation? and (2) does the provincial legislation frustrate the purpose of the federal legislation? As *Rothmans* was released while the decision of this court was under reserve, counsel were given the opportunity to make written submissions on its effect, if any, for the purpose of this appeal.

(2) What is the proper interpretation of the limitation that s. 130 can only be used to enact by-laws related to "matters not specifically provided for by this Act or any other Act"?

(3) Do the words "matters not specifically provided for by this Act or any other Act" require a comparison with legislation enacted by the other levels of government, either through an application of the "impossibility of dual compliance" test, or of a test focusing on the pith and substance of the potentially conflicting legislation?

(4) Does the precautionary principle apply to the interpretation of the by-law making power in s. 130?

## (1) The Proper Interpretive Approach

[30] In his discussion of the proper interpretation of s. 130, the motion judge applied the broad and purposive approach that I have discussed above. The appellant contends that the motion judge erred in so doing.

[31] The appellant submits that, through its structure and, more particularly, through the interpretive provision in s. 9(1), the *Municipal Act, 2001* adopts the broad and purposive approach for the interpretation of the spheres of jurisdiction in Part II, but not for the specific powers in Part III. By applying the generous approach to the interpretation of s. 130, which is found in Part III, the motion judge effectively elevated the general welfare power (which, as noted, the appellant refers to as the "specific health power") to a sphere of jurisdiction, contrary to the purport of the new Act.

[32] I do not agree with this submission, based on my reading of the language of the new Act and on the development of the new approach to the interpretation of municipal by-law making powers, which I have canvassed above.

[33] Although s. 9(1) is contained in Part II of the new Act and expressly requires a broad interpretation of the s. 11 spheres of jurisdiction, it imposes the same requirement for the interpretation of s. 8, the natural person power, which is found in Part II but applies to the entire Act.[2] Also, s. 9(1) contains no language that suggests that the broad approach is to be limited to the interpretation of the spheres of jurisdiction and is not to

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[2] Section 8 provides:

> s.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.

be applied when interpreting other parts or sections of the new Act. In light of the development of the jurisprudence in this area over the last twelve years and the clear adoption by the Supreme Court of a generous approach that accords deference to municipal governments, it would take clear legislative language to return to Dillon's Rule when interpreting those parts of the new Act not contained in Part II: see *United Taxi*, *supra* at para. 11.

[34] Furthermore, it would be a retrograde step to apply the former, restrictive approach to interpret the balance of the *Municipal Act, 2001* outside Part II, when the goal of modernizing the Act, as stated by the Minister of Municipal Affairs at the time, was to give municipalities in Ontario the "the tools they need to tackle the challenges of governing in the 21st century."

[35] As I discussed above, in the *United Taxi* case, Bastarache J. did not limit the application of the new approach to the interpretation of powers granted in spheres of jurisdiction. It is also useful to refer to the concurring reasons of Lebel J. in the *Spraytech* case. He viewed the question in that case to be an administrative law issue applied to the field of municipal governance. In his view, the restrictive interpretation urged by the appellants in that case would have made the general welfare section "an empty shell." The following is his analysis at paras. 53 and 54:

> The case at bar raises a different issue: absent a specific grant of power, does a general welfare provision like s. 410(1) authorize By-law 270? A provision like s. 410(1) must be given some meaning. It reflects the reality that the legislature and its drafters cannot foresee every particular situation. 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. In *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1

> S.C.R. 231, the Court emphasized the local ambit of such power. It does not allow local governments and communities to exercise powers in questions that lie outside the traditional area of municipal interests, even if municipal powers should be interpreted broadly and generously (see F. Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Governments* (1996), at pp. 17-24).
>
> In the present case, the subject matter of the by-law lies within the ambit of normal local government activities. It concerns the use and protection of the local environment within the community. The regulation targets problems of use of land and property, and addresses neighbourhood concerns that have always been within the realm of local government activity. Thus, the by-law was properly authorized by s. 410(1). [Original emphasis.]

[36] Relying on *Toronto v. Goldlist Properties* (2003), 67 O.R. (3d) 441 at 461 (C.A.), the appellant points to aspects of the legislative history to support its narrow reading of s. 130, including the fact that there was consideration given to including "health, safety and well-being of people and protection of property", as well as "the natural environment" as spheres of jurisdiction in Part II, but ultimately that was not done.[3] There is also some equivocal discussion in Hansard from when the legislation was before the Standing Committee on General Government about whether the *Spraytech* decision would apply under the new Act. However, in his 2001/02 Report to the Legislature, Ontario's Environmental Commissioner gave the opinion that s. 130 could be viewed as authorizing municipalities to enact pesticide by-laws to protect the health, safety, and well-being of their inhabitants. In my view, the legislative history in this case is of little assistance to this court. The fact that s. 130 remains a specific power in Part III of the new Act does not exempt it from the modern interpretive rules discussed above.

[37] I conclude that absent an express direction to the contrary in the *Municipal Act, 2001*, which is not there, the jurisprudence from the Supreme Court is clear that municipal powers, including general welfare powers, are to be interpreted broadly and generously within their context and statutory limits, to achieve the legitimate interests of

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[3] I have set out the wording of these two spheres of jurisdiction in accordance with the appellant's submissions, to which the respondents did not object. The fact that these spheres were once considered is confirmed by a 1998 government consultation document: Ministry of Municipal Affairs and Housing, *A Proposed New Municipal Act: Draft Legislation, Including Explanatory Notes* (Consultation Document) (Queen's Printer for Ontario, 1998) at iii-iv.

the municipality and its inhabitants. The trial judge did not err by adopting this approach to the general welfare power in s. 130.

### (2) Interpreting the phrase "matters not specifically provided for in this Act or any other Act"

[38] In *Spraytech, supra*, a pesticide by-law with very similar aims and objectives was found to be within the ambit of the general welfare power in s. 410(1) of the *Cities and Towns Act*, which was the province of Quebec's counterpart to s. 102 of the old Ontario *Municipal Act*. The question, then, is: Does the wording of s. 130 of the new Act, properly interpreted, make the result in *Spraytech* inapplicable to the case at bar? To answer that question, I must consider the differences between s. 130 and its predecessor provision.

[39] Section 102 of the old *Municipal Act* provided:

> 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*. [Emphasis added.]

[40] The appellant acknowledges that, as it was worded in s. 102, the phrase "in matters not specifically provided for by this Act" articulated a "rule against circumvention". That is, the phrase articulated a rule prohibiting a municipality from making by-laws using the s. 102 general welfare power to circumvent restrictions on its ability to enact by-laws regarding a particular subject-matter, contained in specific powers in other parts of the old Act. To formulate a simple example, if a specific provision elsewhere in the old *Municipal Act* provided that a municipality could pass by-laws related to pool safety, but not height limits for diving boards, a municipality could not then pass a by-law purporting to limit the height of diving boards under s. 102.

[41] Another example of this rule can be found in the Supreme Court decision in *Greenbaum*. In that case, the court held that Metropolitan Toronto could not use its general welfare power in s. 102 of the old *Municipal Act* to enact a by-law prohibiting the sale of goods on Metro sidewalks except to licensed owners or occupiers of abutting property. The court's reasoning was that there were other specific sections of the old Act that authorized by-laws for the purposes of controlling sidewalk obstructions, street vending, and public nuisances. If those specific powers did not give Metro the authority

to enact the impugned by-law, then the municipality could not find that authority in the general welfare section.

[42] The appellant submits that the rule against circumvention is now codified in Part II of the *Municipal Act, 2001* in s. 15(1), which by its terms, relates only to ss. 8 and 11. Section 15(1) provides:

> 15. (1) If a municipality has power to pass a by-law under section 8 or 11 and also under a specific provision of this or any other Act, the power conferred by section 8 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision.

[43] The appellant argues that the words in s. 130 that provided for the rule against circumvention in the old s. 102, must now have a different meaning, since the only rule against circumvention in the new Act is in s. 15(1).

[44] The appellant also submits that the addition of the words "or any other Act" to the words "matters not specifically provided for by this Act" indicates a change in meaning. The appellant says that the phrase that was the rule against circumvention of more restrictive by-law making powers elsewhere in the Act, now means that where the subject matter of the by-law is already the subject of federal or provincial legislation, the municipality is precluded from legislating in respect of that subject matter. I will discuss this argument when dealing with issue (3), below.

[45] The City's position is that the phrase "matters not specifically provided for by this Act or any other Act" in s. 130 is an extended version of the rule against circumvention from the old Act. The motion judge agreed with this interpretation and so do I. I do so for three reasons.

[46] The first is that the legislature has repeated the same phrase from the former s. 102, merely adding the four additional words "or any other Act". Citing *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths Canada Ltd., 2002) at 395, Bastarache J. in *United Taxi*, *supra* at para. 11, stated: "It is well established that the legislature is presumed not to alter the law by implication … Rather, where it intends to depart from prevailing law, the legislature will do so expressly." The use in s. 130 of language identical to s. 102, with the addition of the words "or any other

Act," is not enough to signal a change in meaning. Rather, it simply indicates an extension of the same rule against circumvention that existed in the old *Municipal Act* to by-law making powers granted to municipalities in acts other than the *Municipal Act, 2001*.

[47] Consistent with this interpretation, the respondent points out that with the passage of the new Act, the legislature transferred some by-law making powers out of the old *Municipal Act* into other provincial acts such as the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4, s. 7.1, and the *Fluoridation Act*, R.S.O. 1990, c. F.22, s. 2.1. See *Municipal Act, 2001*, *supra* at s. 475, 476. Some of these powers may well relate to matters of health and safety.

[48] Second, I reject the appellant's argument that s. 15(1) is the only "rule against circumvention" in the new Act, and that therefore the court must adopt a radically different interpretation of the limiting words in s. 130. The purpose of s. 15(1) is to ensure that, where the spheres of jurisdiction in s. 11 or the natural person powers in s. 8 overlap with any specific power in Part III, the procedural or other restrictions in the specific power will be respected. There is no indication that this section in any way replaces the limitation that has always been part of the general welfare power. If the appellant's argument were correct, it would mean that there no longer is any language in s. 130 that specifically addresses how the general welfare power is to be interpreted in relation to other powers in the Act. Again, that would represent a significant and unworkable shift in the meaning of s. 130, when compared to the interpretation given to s. 102 of the old *Municipal Act* by Iacobucci J. in *Greenbaum*, *supra*.

[49] Third, the clearest and most logical interpretation of the phrase "matters not specifically provided for in this Act or any other Act" is its historical meaning, which is the rule against circumvention. It is to be noted that this rule goes back at least as far as the 1937 case of *Morrison v. Kingston* (1937), 69 C.C.C. 251 (Ont. C.A.), which was cited by Iacobucci J. in *Greenbaum*, *supra*. In *Morrison*, Middleton J.A. interpreted essentially the same language as follows (at p. 255):

> A third limitation is I think to be found in the express enactments of the *Municipal Act*. Very few subjects falling within the ambit of local government are left to the general provisions of s. 259 [the general welfare power at that time]. Almost every conceivable subject proper to be dealt with by a municipal council is specifically enumerated in the detailed provisions in the Act, and in some instances there are distinct limitations imposed on the powers of the municipal council.

> These express powers are, I think, taken out of any power included in the general grant of power by s. 259.

[50] In other words, previously, when there was no other specifically related by-law making power elsewhere within the old *Municipal Act*, then a matter could be made the subject of a by-law under s. 102 or its predecessors. Under s. 130 of the *Municipal Act, 2001*, a matter can be regulated by by-law so long as there is no other specifically related by-law making power elsewhere in the new Act or in any other act.

**(3) Is the by-law in conflict with federal or provincial legislation?**

[51] The other significant change in s. 130 is the removal of the requirement in s. 102 of the old Act that the by-laws not be "contrary to law," under which a by-law would not be effective in the event of a conflict with a federal or provincial law. This requirement is now set out in s. 14 of the new Act, which I repeat here for ease of reference:

> 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, licence or approval, made or issued under a provincial or federal Act or regulation.

[52] The appellant acknowledges that s. 14 applies to by-laws made under Part III, including under s. 130, as well as Part II of the new Act, and that s. 14 represents a codification of the "impossibility of dual compliance" conflicts test articulated and applied by L'Heureux-Dubé J. in *Spraytech*, *supra*. The appellant also concedes that the City of Toronto's pesticide by-law meets that test. It is not impossible to comply with the city's pesticide by-law and at the same time to comply with the requirements of the federal *PCPA* or the Ontario *Pesticides Act*.

[53] The appellant says, however, that the conflicts test from *Spraytech*, *supra*, is not relevant for the purposes of s. 130. In other words, the fact that dual (in fact, triple) compliance is possible is not determinative in this case. Again, the appellant points to the words "matters not specifically provided for by this Act or any other Act" in s. 130. The appellant says that because the "impossibility of dual compliance" conflicts rule is

articulated in s. 14, the words in s. 130 cannot be a reference to the same conflicts rule, but must have another meaning. Moreover, as discussed under issue (2) above, because of the addition of the words “or any other Act”, the phrase is no longer a reference to the rule against circumvention.

[54] The appellant’s position is that the effect of the language of s. 130 is that a municipality only has the power to enact a by-law for health, safety, or well-being where the subject-matter of the by-law in pith and substance is not specifically provided for in any other act. The appellant says that the federal *PCPA* and the Ontario *Pesticides Act* together form a comprehensive regime for the regulation of pesticides, with a view to the protection of health and the environment. Therefore, the subject matter is provided for in other legislation, causing the by-law to be *ultra vires.* Stated another way, the appellant says that the proper approach is to determine the pith and substance of the by-law, then to see if there is any other legislation dealing with the same pith and substance. If there is, the by-law is invalid. A central implication of the appellant’s position is that, contrary to the approach endorsed by L’Heureux-Dubé J. in *Spraytech*, s. 130 of the *Municipal Act, 2001* precludes municipalities in Ontario from participating in a tri-level regime to regulate the use of pesticides, where each level of government plays a role in the regulatory scheme.

[55] Both in its factum and in oral argument, the appellant developed a detailed examination of the federal *PCPA* and of the Ontario *Pesticides Act*. The appellant sought to show that, although they deal in the case of the *PCPA* with such issues as registering and labelling pesticide products, and in the case of the *Pesticides Act* with the licensing of pesticide contractors, the true “matter” of those acts is the protection of human health through restrictions on the use of registered pesticides. Since this is also the “matter” of the by-law, the appellant argues that the pesticide by-law is *ultra vires* the City of Toronto. In my view, the position of the appellant is without merit and must be rejected.

[56] As I stated in the discussion of issue (2), above, as a matter of statutory interpretation there is no basis to read the phrase “matters not specifically provided for by this Act or any other Act” other than in accordance with Iacobucci J.’s interpretation from *Greenbaum*, *supra*. The phrase is a mere restatement, and modest extension, of the traditional rule against circumvention. This reading gives the provision a pragmatic and workable meaning; it is consistent with the accepted interpretation of those words in previous incarnations of the *Municipal Act*; and there is nothing in the language used to indicate that the legislature intended that a new and different meaning be given to the phrase. Had the legislature wanted such a drastic change, it would have used very clear language to communicate that intention: *United Taxi*, *supra* at para. 11.

[57] Once it is accepted that the words “matters not specifically provided for by this Act or any other Act” is merely a rule against circumvention referring to other specific municipal by-law making powers, the appellant’s argument collapses.

[58] Regardless, the appellant’s proposed interpretation is one that would have to be clearly intended and expressed by the legislature because its effect would be to turn the “impossibility of dual compliance” conflicts rule from *Multiple Access*, *supra*, and *Spraytech*, *supra*, on its head. It would reintroduce the approach to paramountcy, long since rejected in Canada, that legislation by one level of government occupies the field and precludes complementary legislation by other levels: see Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. looseleaf (Scarborough, Ont.: Thomson-Carswell, 1997) at 16-7 to 16-13. Moreover, the validity of tri-level regulation, which the appellant’s position repudiates, has been unambiguously endorsed by the Supreme Court of Canada in *Spraytech*, *supra* at para. 39, as the accepted model in our federal system.

[59] The most recent discussion by the Supreme Court of the conflicts rule and the doctrine of paramountcy is in Major J.’s decision in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13. The issue in that case was whether s. 30 of the federal *Tobacco Act*, S.C. 1997, c. 13, rendered s. 6 of the Saskatchewan *Tobacco Control Act*, S.S. 2001, c. T-14.1 inoperative, based on the doctrine of paramountcy. Section 30 of the federal act permits the retail display of tobacco products or accessories as an exception to a prohibition of the promotion of tobacco products contained in s. 19 of the same Act. Section 6 of the Saskatchewan Act bans all advertising and promotion of tobacco products in any place where persons under 18 are allowed.

[60] In *Rothmans*, Major J., writing for the court, set out at para. 15 a two-part test to determine whether a provincial provision is so inconsistent with a federal provision that the paramountcy doctrine renders it inoperative: (1) can a person simultaneously comply with both provisions? (the impossibility of dual compliance test); and (2) does the provincial provision frustrate Parliament’s purpose in enacting the federal provision? Major J. concluded that a person could comply with both s. 6 of the Saskatchewan *Tobacco Control Act* and s. 30 of the federal *Tobacco Act*. The federal Act did not grant a positive right to advertise tobacco products. Although the federal government’s constitutional jurisdiction to legislate in the area came from its criminal law power, the purpose of the Act was to promote public health and to protect young persons by restricting access to tobacco. Major J. observed that a provision enacted in the prohibitory context would not ordinarily create a freestanding right. Indeed, such a right would be inconsistent with the stated purpose of the Act.

[61] Major J. at para. 21 specifically rejected the suggestion that Parliament intended to occupy the field with respect to the regulation of the retail display of tobacco products:

"In my view, to impute to Parliament such an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O'Grady* [*O'Grady v. Sparling*, [1960] S.C.R. 804], at p 820." He also found that the more stringent provincial prohibition on the retail display of tobacco products enhanced rather than frustrated the legislative purpose of the federal Act.

[62] The *Rothmans* case is the latest in the series of cases from the Supreme Court that explains how different levels of government may legislate in related or overlapping fields. The only restrictions on this co-operative view of federalism are that the legislative provisions may not expressly conflict, and the legislation of the lower levels of government may not frustrate the legislative purpose of the more senior level of government.

[63] Applying these principles to the issues in this case, the conflicts test explicitly provided in s. 14 of the *Municipal Act, 2001* must be interpreted in accordance with the two-pronged test prescribed in *Rothmans*: (1) Is it impossible to comply simultaneously with the pesticide by-law and with the federal *PCPA* or the Ontario *Pesticides Act*?; (2) Does the by-law frustrate the purpose of Parliament or the Ontario legislature in enacting those laws? If the answer to both questions is "no," then the by-law is effective.

[64] Using Major J.'s analysis, had either Parliament or the Ontario legislature intended to occupy the field of pesticide regulation with the federal *PCPA* or the provincial *Pesticides Act*, they would have used very clear language to say so. Furthermore, had the Ontario legislature intended to prevent municipalities in Ontario from having the authority to enact by-laws limiting the use of pesticides following the Supreme Court's decision in *Spraytech*, it could have done so explicitly either in the *Municipal Act, 2001*, which was enacted after the *Spraytech* decision, or by including a provision prohibiting municipalities from enacting pesticide by-laws in the provincial *Pesticides Act*.[4]

[65] The appellant concedes it that it is possible to comply with the City of Toronto's pesticide by-law, the federal *PCPA*, and the Ontario *Pesticides Act* at the same time. However, in subsequent submissions, the appellant took the position that the pesticide by-law contravenes the second part of the test from *Rothmans*, suggesting that it frustrates the purpose of the federal pesticide regime, which the appellant says is to make pesticides available for use by the public.

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4 As it did, for example, in s. 20 of the *Milk Act*, R.S.O. 1990, c. M.12, which states: "Despite this or any other Act, no council of a local municipality shall by by-law require that fluid milk products sold in the municipality be produced or processed in the municipality or in any other designated area."

[66] The appellant also refers to the new federal *Pest Control Products Act*, 2002, c. 28, which has been passed but is not yet in force. The preamble to that Act states that, "[P]est control products of acceptable risk and value can contribute significantly to the attainment of the goals of sustainable pest management." The appellant says that the by-law deprives residents of Toronto of the benefits of the pesticides that are regulated by the *PCPA* but are restricted or prohibited by the by-law.

[67] In my view, this argument has been addressed and determined by the Supreme Court in *Spraytech, supra*. There the court held that the Town of Hudson's pesticide by-law would not frustrate the purpose of the old federal *PCPA*, which, like the new federal Act, is permissive only. Its purpose is to make certain pesticides available by regulating their manufacture and labelling, but it does not require that everyone be able to use every regulated product in an unrestricted way.

**(4) The Role of the Precautionary Principle**

[68] In *Spraytech, supra*, after concluding that s. 410(1), the general welfare provision of the province of Quebec's *Cities and Towns Act*, gave the Town of Hudson statutory authority to enact its pesticide by-law, L'Heureux-Dubé J. noted that reading the section in that way was consistent with the precautionary principle (see para 26 above). Since *Spraytech*, the precautionary principle has been referred to in two appellate decisions, but in neither case was it determinative: *R. v. Kingston (City)* (2004), 70 O.R. (3d) 577 at para. 86 (C.A.); *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District)* (2003), 15 B.C.L.R. (4th) 229 at para. 80 (B.C.C.A.).

[69] In this case, the third paragraph of the preamble to the City of Toronto's pesticide by-law invokes the precautionary principle. However, in his decision, the motion judge did not discuss the principle, although he did address the appellant's submission about alleged deficiencies with the city's scientific evidence supporting the by-law. He concluded that the court was not in a position to judge the sufficiency of the city's research. However, he found that Dr. Sheela Basrur, then the city's medical officer of health, had made substantial inquiries and reviewed numerous reports and publications to assess whether the by-law would protect the health of Toronto's citizens.

[70] The appellant submits that it is not appropriate for the city to seek to support its pesticide by-law based on the precautionary principle for two reasons: (1) It says the city conducted no meaningful assessment of the by-law's impact, which assessment is necessary to rely on the precautionary principle. (2) The precautionary principle cannot be used to confer power where there is none.

[71] I agree that if there was no credible research basis for enacting the by-law, and if the municipality did not otherwise have the power to enact the by-law, the precautionary principle could not be used as authority for upholding the effectiveness of the by-law. However, that is not the case here. As the motion judge did not rely on the precautionary principle to support his conclusions, there is no need for this court to address the issue further on this appeal.

**Summary**

[72] The motion judge found that the by-law is aimed primarily at the matters of health, safety, and well-being of the City of Toronto's inhabitants. Its municipal purpose therefore falls squarely within the authority granted by s. 130 of the *Municipal Act, 2001*.

[73] No by-law can be enacted under s. 130 to regulate matters of health, safety, or well-being of the inhabitants of the city if the purpose of the by-law is to regulate a "matter that is specifically provided for by this Act or any other Act." These limiting words require the court to examine the *Municipal Act, 2001* and other provincial acts to determine if they give municipalities any specific powers to regulate the use of pesticides. If so, no such by-law can be enacted using s. 130. There is no dispute that there is no specific municipal power to regulate pesticide use contained in the *Municipal Act, 2001* or in any other Ontario statute. Therefore, the limiting words of s. 130 do not preclude enactment of the pesticide by-law.

[74] Finally, the by-law will not be effective if it expressly contradicts any other law, whether federal or provincial, or if it frustrates the purpose of those laws. The appellant concedes that it is not impossible to comply with the pesticide by-law at the same time as the federal *PCPA* or the Ontario *Pesticides Act*. Moreover, as I have found, the pesticide by-law does not frustrate the purpose of those acts. Therefore, the by-law is not rendered inoperative by the conflicts test in s. 14 of the *Municipal Act, 2001*, applied in accordance with the Supreme Court's decisions in *Spraytech* and *Rothmans*, *supra*.

**Conclusion**

[75] As I have concluded that the City had the authority to pass the by-law under s. 130 of the *Municipal Act, 2001*, I would dismiss the appeal with costs payable by the appellant to the respondent in the amount of $50,000. No costs to the intervenors, as agreed.

**Signed:** **"K. Feldman J.A."**

"I agree S.T. Goudge J.A."
"I agree S.E. Lang J.A."

**RELEASED: “SG” May 13, 2005**