THE *HUDSON* DECISION: AN "OVER-PRECAUTIONARY" APPROACH?

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Introduction

What degree of power do municipalities exercise in the regulation of environmental matters within their borders? Should they be permitted to pass environmental by-laws which overlap with or even supersede federal and provincial environmental laws? Are municipalities even equipped to legislate in such a complex area? These questions are interesting to consider in light of the decision by the Supreme Court of Canada in *114957 Canada Ltée. (Spraytech, Société d'arrosage)* v. *Hudson (Town)*.[1]

In short, the Supreme Court concluded that the Town of Hudson had the authority to pass a by-law controlling the use of pesticides, essentially banning their use for aesthetic purposes. Despite the fact that both the federal and provincial governments had already passed comprehensive legislation governing the licensing and use of pesticides and the Town of Hudson had no specific, express authority under the provincial municipal act to pass such a by-law, the Supreme Court upheld the validity of the by-law. It did so on the basis that the Town had a discretionary authority to regulate pesticides in this manner.

The majority of the Supreme Court proceeded to find additional support for the by-law based on the international law concept of the "precautionary principle." This principle states that where there is a threat of serious or irreversible damage to the environment, a lack of full scientific certainty should not be used as a bar to the pursuit of measures that would prevent harm to the environment. This is the portion of the decision that could have the greatest impact, particularly if the provinces do not control municipalities attempting to pass by-laws and regulations over environmental matters.

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[1] *114957 Canada Ltée. (Spraytech, Société d'arrosage)* v. *Hudson (Town)*, [2001] SCJ No. 42.

The decision in *Hudson* has arguably opened the door for municipalities to begin actively regulating other matters relating to the environment, even where such matters are beyond the scope of a municipal council's expertise. As we will discuss below, the Court's expansion of a municipality's discretion to pass by-laws, combined with its recognition of the "precautionary principle" as justification for municipalities to take preventative action, could lead to attempts by municipalities to attempt a broader regulation of environmental matters within their borders. This is cause for concern given that municipalities, though perhaps in touch with the environmental concerns of local residents, will likely lack the necessary experience and resources to deal with these matters. Relying on *Hudson*, a municipality may simply invoke the precautionary principle and argue that, even though there may not be scientific evidence that harm will be caused by a particular activity or substance, it is necessary to pass a by-law in order to prevent possible harm. As a result, legitimate efforts by the scientific community to determine whether substances or activities are harmful could be put aside in the name of the precautionary principle. In our view, this would represent a major step backward for the effective environmental regulation of Canadian industry and is inconsistent with developing trends in environmental law, including the concept of sustainable development.

An Overview of Municipal Power

As a federal state, the power to legislate in Canada is divided between two separate levels of government: the federal Parliament and the provincial legislatures.[2] The power to incorporate municipalities is exclusively provincial; under s.92(8) of the Constitution, the provinces are granted the authority to pass laws in respect of "municipal institutions in the province." To this end, most provincial legislatures have enacted statutes, usually entitled the "*Municipal Act,*" which provide for the framework, formation and operation of municipal governments. To incorporate a specific municipality, a province would also pass an individual statute, such as the *City of Toronto Act*. These individual statutes, combined with a province's general municipal act, are known collectively as a municipality's "enabling legislation."

Thus, municipalities are purely creations of provincial legislation. As such, they may only exercise those powers that are specifically delegated to them by the province. However, the provinces may only delegate those powers that they are themselves entitled to exercise under the Constitution. Thus, provincial legislation

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[2] *Constitution Act, 1867* (U.K.), 30 and 31 Vict., c. 3., reprinted in R.S.C. 1985, App. II, No. 5,. 91 and 92.

that purports to delegate powers that offend the federal-provincial division of powers, and the municipal by-laws passed pursuant to those purportedly delegated powers, are *ultra vires* and thus of no force or effect.

Furthermore, as municipalities are creatures of statute, they possess no inherent authority. They are only entitled to exercise those powers that have been expressly conferred upon them by the province. Consequently, they cannot exercise their authority in a way that conflicts with provincial legislation. Municipal initiatives that exceed the authority granted by their enabling legislation, or that conflict with other provincial legislation, will also be invalidated as being *ultra vires* the authority of the municipality.

The Delegation of Municipal Power

Generally speaking, a municipality's authority to pass by-laws is derived from two types of provisions in provincial enabling legislation. First, municipal acts include a large number of detailed provisions granting municipalities the authority to pass by-laws on specified subject matters, such as the creation of bicycle paths or the restriction of smoking in public places. Second, municipal acts also include a "general welfare provision," which grants municipalities an overriding power to enact by-laws for broad, discretionary purposes. For example, the general welfare provision of the *Ontario Municipal Act* provides as follows:

> 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.[3]

In the *Hudson* case, a similar general welfare provision was relied on to pass the by-law restricting pesticide use. Section 410(1) of Quebec's *Cities and Towns Act* states that "the council may make by-laws: to secure peace, order, good government, health and general welfare in the territory of the municipality."[4]

Given the specific nature of by-law provisions which inform a municipality of what it may pass, it is not surprising that municipalities have tried on several

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[3] *Municipal Act*, R.S.O. 1990, c. M.45, s.102.

[4] *Cities and Towns Act*, R.S.Q. c. C-19, s. 410(1).

occasions to expand their powers by passing by-laws under the umbrella of discretionary authority granted in a general welfare provision. Such attempts, however, have historically been met with limited success.

The Scope of General Welfare Provisions

General welfare provisions are, by their nature, broad and intentionally vague. Consequently, the courts have often been called upon to determine what a general welfare provision means, and how much power it actually confers on a municipal council. If a by-law which is not expressly authorized by a specific provision is found to be outside the scope of the general welfare power, the by-law will be deemed to be invalid.

In 1993, the Supreme Court of Canada considered the scope of the Ontario general welfare power in two concurrent judgements: *R.* v. *Sharma*[5] and *R.* v. *Greenbaum*.[6] In each case, a street vendor had been convicted of offering goods for sale on a street without a licence, contrary to a Toronto municipal by-law. The street vendors successfully appealed their convictions on the grounds that the relevant by-law was *ultra vires* the power of the municipality as it was not specifically authorized by the *Municipal Act*.

In reaching their decisions, the Court considered three specific by-law provisions that granted the City authority to regulate street vending which were ultimately found not to authorize the impugned by-law. The Court also considered the general welfare provision that granted power to regulate for the "health, safety, morality and welfare" of the City. The Court held that the general welfare power could not be a source of authority for a by-law that dealt with any subject matter already addressed by specific by-law provisions, and thus the by-law was deemed *ultra vires*.

Although the Supreme Court of Canada did not state that general welfare provisions could never be a source of municipal authority, their usefulness to municipalities was obviously restricted by these decisions. Where there are specific by-law provisions in a municipality's enabling legislation that relate to the same subject matter as an impugned by-law, the very existence of the specific provisions will prevent recourse to the general welfare provision as a source of authority. The specific by-law provisions are held to represent the full extent of a municipality's

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[5] [1993] 1 S.C.R. 650.

[6] [1993] 1 S.C.R. 674.

authority to legislate in that area.

Nevertheless, general welfare clauses have been accepted as a source of municipal jurisdiction in cases where no specific power is given in relation to the same subject matter in the enabling legislation and the by-law falls within the general welfare power.[7] This was the situation in the *Hudson* case.

The *Hudson* Case

In *Hudson*, the Supreme Court considered whether a municipality had the authority to pass a by-law effectively banning the use of pesticides for aesthetic purposes. In 1991, the Town had adopted By-law 270, which restricted the use of pesticides to specified locations and for enumerated activities. This by-law was passed by the Town's council in response to years of residents' concerns over pesticide use.

The appellants were landscaping and lawn-care companies operating in the municipality. In the course of their business, they regularly used pesticides approved under the federal *Pest Control Products Act*[8] and held the necessary licences under the provincial *Pesticides Act*.[9] The appellants were charged with violating By-law 270. A suspension of proceedings before the Municipal Court was granted to allow the appellants to bring a motion before the Superior Court to have the by-law declared inoperative and *ultra vires* the town's authority. The by-law was upheld as valid by both the Superior Court and, on appeal, by the Quebec Court of Appeal. The appellants consequently took the appeal to the Supreme Court of Canada.

Madame Justice L'Heureux-Dubé, writing for the majority and dismissing the appeal, considered two issues. Firstly, did the Town have the statutory authority to enact By-law 270? Secondly, even if the Town had the authority to enact it, was By-law 270 rendered inoperative because of a conflict with federal or provincial legislation?

With respect to the first issue, the Supreme Court held that By-law 270 fell squarely within the "health" component of the general welfare provision, as the purpose of the by-law was to minimize the use of allegedly harmful pesticides.

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[7] See *Ward v. Edmonton (City)*, [1932] 3 W.W.R. 451 (Alta. S.C.).

[8] *Pest Control Products Act*, R.S.C. 1985, c. P-9.

[9] *Pesticides Act*, R.S.Q. c. P-9.3.

Since there was no specific provision in the enabling legislation governing pesticide use, and the by-law did not represent a complete ban of pesticides (which the Court would have found to be unlawful), By-law 270 was found to be a valid exercise of the municipality's general power to regulate for the good of the community.

In response to the second issue, the Court determined that the by-law was not rendered inoperative as there was no direct conflict between the by-law and any federal or provincial legislation. In order to be found inoperative, there must be an express contradiction between legislation such as where one law says "yes" and the other says "no." In this case, both the federal and provincial legislation were found to be permissive, rather than exhaustive, and the Court found no barrier to dual compliance. In addition, there was no evidence that the provincial legislature had intended to preclude the regulation of pesticides at the municipal level.

The *Hudson* case may give new life to municipalities' ability to legislate for the "general welfare" of the community, and undoubtedly expands municipal discretion to regulate environmental matters. However, the Supreme Court recognized that this discretionary authority is not without restrictions. Such provisions, the Court said, do not confer unlimited power on municipalities, nor can they provide a basis for enacting by-laws with ulterior objectives. Nevertheless, these concerns may materialize over the next several years as municipalities test the limits of their authority following the *Hudson* decision.

Can (and Should) Municipalities Regulate Environment Matters?

The decision in *Hudson* has arguably opened the door for municipalities to begin more active regulation of environmental matters within their borders. Through reliance on a general welfare power, a municipality may have authority to pass by-laws imposing stringent environmental requirements or standards, subject to direct conflict with existing provincial or federal legislation. We submit, though, that this was not the intention of provincial governments when discretionary authority was granted to municipalities under general welfare provisions.

General welfare provisions provide municipalities with the ability to pass necessary by-laws that have not been contemplated in advance by the provincial legislature. This "back up" jurisdiction is not, in our view, meant to be used as a primary source of power. The general welfare provisions are a reasonable delegation by the provincial governments, as it would be impossible to predict the incidental powers a municipality might require to govern effectively. However, it is untenable to suggest that environmental regulation was not contemplated by the provinces

when delegating authority to municipalities. It is more probable that municipalities were intentionally not granted wider, specific powers to regulate environmental matters. Provincial governments likely recognized that environmental issues should be dealt with on a provincial level, not by each municipality in a patchwork manner. General welfare provisions, like *all* municipal by-law powers, are intended to enable municipalities to address community specific issues, not those which are already regulated at the provincial or federal level.[10]

In *Hudson*, the Supreme Court proposed that "whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives." While we agree that it is a legitimate function of municipal councils to represent the interests of the community, this role must be confined to addressing *local* issues, specific to those residents for whom the council is responsible. We submit that granting municipalities the ability to impose specific environmental requirements or standards goes beyond the scope of local community representation.

Even if municipalities have the power to regulate environmental matters, should they? In our view, there are a number of reasons why municipalities should not attempt to regulate environmental matters, with the exception of the involvement they would have during the re-zoning or redevelopment of property.

If municipalities decide to regulate environmental matters involving businesses and their practices, we can see a number of difficulties that may arise. Municipalities that are unsophisticated or have insufficient resources to deal with environmental matters may simply decide to invoke the precautionary principle without regard to sound scientific evidence. This is particularly important given the fact that a by-law such as the one passed by the Town of Hudson can have a very significant impact on the operations of local businesses. For example, we can predict that the appellants in the *Hudson* case, despite compliance with all federal and provincial legislation will suffer significant hardship as a result of their inability to apply pesticides in the treatment of residential lawns and gardens.

One might question why that is a problem, given the concerns raised by residents about these practices. The Town of Hudson, like most municipalities, would not likely have had sufficient information, knowledge or resources to properly determine whether the appellants' activities actually posed a threat. Such matters are carefully

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[10] See *Shell Canada Products Ltd.* v. *Vancouver City*, [1991] 1 S.C.R. 231.

studied by experts and comprehensively regulated by both the federal and provincial governments. Unfortunately, the precautionary principle may allow municipalities to regulate without a similar regard for good science.

Furthermore, it is arguably more effective to regulate environmental matters on a national or even international scope, as opposed to regulation on a local basis. Of course, contamination of the air, soil and water does not respect municipal or provincial borders. To ensure there is sufficient certainty and fairness, environmental requirements and standards should be imposed at the provincial and in some cases, national level.

A municipality might argue that it should be entitled to impose an even stricter standard at the municipal level because of the particular and unique concerns of its local residents. This could cause businesses to establish or relocate themselves outside that municipality. In our view, to avoid a "race" to the bottom where companies would seek out municipalities with weaker laws, it makes better sense to have environmental requirements and standards established at the provincial level. That is where the most resources are available, and can be applied in a fair and meaningful way to protect the environment and the citizens of the province.

It would be difficult, if not impossible, for industry to operate provincially or nationally where there is a patchwork of environmental legislation adopted by various municipalities. Rather than having a multitude of municipalities determining whether a substance or undertaking is harmful to the environment and requires regulation, one agency can do the job much more effectively at the provincial level. Indeed, the ability of a provincial government to regulate intra-provincial environmental matters was recognized in the Constitution. Provinces are granted the ability to regulate matters involving property rights, as well as matters of local concern, which would encompass environmental matters impacting health and property rights within the province.

The economic impact of the *Hudson* decision does not stop at the Quebec pesticide industry. It is entirely possible that other types of businesses will be targeted. Non-governmental organizations have already begun to speculate on the possible future applications of the reasoning in *Hudson*. For example, the Sierra Club of Canada has posted on its website sample pesticide by-laws for every Canadian province. In addition, the Sierra Club's website provides an example of how broadly the decision might be interpreted:

> This decision goes farther than simply upholding Hudson's by-laws, however. It points out that the relevant pieces of legislation in other provinces have wording that is comparable, with the implication that correctly-worded bylaws enjoy the same interpretation. In addition, while upholding the right of municipalities to protect the health of their residents against environmental threats, *there is no explicit mention of pesticides, which opens up the potential for bylaws prohibiting or restricting other activities or substances (MOX plutonium shipments, gmo's, dioxin?) in communities.*[11] [emphasis added]

Our concerns are more than hypothetical. Since the original by-law was passed by Hudson in 1991, 36 municipalities in Quebec have passed similar by-laws. Other provinces have also followed suit. Halifax has passed a by-law banning the aesthetic use of pesticides and several Ontario municipalities have approved differing levels of pesticide bans.

These are but a few of the concerns raised by the *Hudson* decision. These potential impacts will be further compounded if municipalities are entitled to rely on the precautionary principle as the Court did in *Hudson*.

The Impact of the Precautionary Principle

The precautionary principle (sometimes referred to as the precautionary approach) is a concept which has evolved primarily through international law. It first gained prominence through its inclusion in the *Rio Declaration on the Environment and Development*.[12] Principle 15 of the *Rio Declaration* stated:

> ... in order to protect the environment, the Precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Prior to the *Hudson* decision, the precautionary principle had only been mentioned sporadically by Canadian courts and had never directly formed part of the

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[11] The Sierra Club of Canada, online: <www.sierraclub.ca/national/pest/pesticide-bylaws/>.

[12] *United Nations Conference on Environment and Development (Rio Declaration)*, 14 June 1992, U.N. Doc. A/Conf. 151/51 Rev. 1, 31 I.L.M. 876.

basis for a judgement.[13] It had generally been considered in the context of international treaties and national environmental policies. In *Hudson*, however, the Supreme Court not only recognized the precautionary principle as a valid interpretative tool, but applied it to justify legislative action at the municipal level.

The precautionary principle is not yet an established legal concept, and is quite controversial in its scope and application. For instance, there is debate whether the precautionary principle might automatically create a positive legal duty to act in the face of a serious environmental threat. At the international level, there is disagreement over the level of harm required to trigger the precautionary principle, the best way to translate the threshold into an operationally meaningful standard,[14] and the scope of activities that should be covered by the principle.[15] By importing the precautionary principle into municipal law, the Supreme Court has granted municipalities a legislative tool that neither provincial, federal nor even international governments have entirely mastered.

The federal government is currently seeking comments on a discussion paper, entitled "*A Canadian Perspective on the Precautionary Approach/Principle,*" which was released in September 2001. This discussion paper proposes a system of guiding principles to apply the precautionary principle in a consistent manner across Canada. The paper outlines six general principles of application:

1. the precautionary approach is a legitimate and distinctive decision making tool within risk management;

2. it is legitimate for decisions to be guided by society's chosen level of protection against risk;

3. *sound scientific information and evaluation must be the basis for applying this precautionary approach*, particularly with regard to
   (i) the decision to act or not to act, and

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[13] See *Canadian Environmental Law Association* v. *Canada (Minister of the Environment) (T.D.)*, [1999] 3 F.C. No. 564; *River Road Action Team* v. *New Brunswick (Minister of the Environment)*, [1997] N.B.J. No. 126, online: QL (WWR); *611428 Ontario Ltd.* v. *Metropolitan Toronto and Regional Conversation Authority*, [1996] O.J. No. 1392, online: QL (WWR).

[14] J. Moffet, "Legislative Options for Implementing the Precautionary Principle" (1997) 7 J.E.L.P. 157 at 160.

[15] D. VanderZwaag, "The Precautionary Principle in Environmental Law and Policy: Exclusive Rhetoric and First Embraces" (1998) 8 J.E.L.P. 355 at 360.

(ii) the measures taken once the decision is made;

4. the scientific evidence required should be established relative to the chosen level of protection. Further, the responsibility for producing the information base or burden of proof may be assigned. It is recognized that the scientific information base and responsibility for producing it may shift as the knowledge evolves;

5. mechanisms should exist for re-evaluating the basis for the decision and for providing the transparent process for further consultation;

6. a greater degree of transparency, clearer accountability and increased public involvement are appropriate.

The discussion paper also suggests ongoing requirements for governments that pass preventative legislation which rely on the principle. Such requirements would include the continued monitoring of new scientific evidence to determine whether a regulation is still justified.

We submit that the implementation of the precautionary principle in a manner consistent with the proposed federal principles is beyond the ability and resources of individual municipalities. A thorough understanding of the existing scientific evidence, or the reasons for a lack of evidence, is a prerequisite for the proper application of the precautionary principle. Furthermore, it is necessary for the body applying the principle to have the resources needed to continually monitor new scientific information to and determine whether the preventative regulation is still relevant. A municipality that purports to take preventative action consistent with the precautionary principle will likely do so only at a superficial level.

This does not imply that municipal governments are incapable of effectively governing their local communities. However, we submit that an effective implementation of the precautionary principle would require an experienced and informed regulatory agency to administer a comprehensive environmental framework that incorporates established environmental policies. This form of administration is beyond the scope of a municipal council's expertise and is far more appropriate for an experienced environmental agency, such as the Provincial Ministries of the Environment.

Conclusion

Surprisingly, provincial governments do not appear to be making attempts to reign in the municipal discretion to pass by-laws. In fact, the exact opposite has occurred in at least two jurisdictions. In Alberta and Ontario, the provincial governments have granted or are in the process of granting municipalities "natural person" powers. Such powers enable municipalities to take action even where they are not expressly authorized to do so by their enabling legislation. Municipal corporations that possess natural person powers may exercise any right, privilege or power enjoyed by a natural person, except where prohibited or limited by statute. The ability of a municipality to pass a by-law governing environmental matters appears very broad indeed when such natural person powers are combined with the decision in *Hudson.*

The extent to which municipalities will step into the environmental regulatory arena remains to be seen. The impact of the Supreme Court's decision in *Hudson* and the acceptance of the precautionary principle as a legitimate legislative tool, may only be determined when the next municipality attempts to pass environmental legislation pursuant to its general welfare provision. The courts will then have to determine whether *Hudson* should be restricted to its facts, or whether it is only the beginning of an expanded municipal role in environmental regulation. In our view, the Supreme Court's acceptance of the precautionary principle for use by municipalities has the potential to open a Pandora's box that will only be closed when provincial governments restrict the powers available to municipalities. Unfortunately, this restriction may cause the pendulum to swing too far in the opposite direction. The result would be a situation where municipalities would lose the incidental powers necessary to deal with local matters for the benefit of their constituents.