

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

– and –

KANATA GREENSPACE PROTECTION COALITION

Intervener

**SUPPLEMENTAL BOOK OF AUTHORITIES OF THE APPLICANT,
CITY OF OTTAWA**

Dated: February 21, 2020

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

T: 613.237.5160
F: 613.230.8842

Kirsten Crain LSO# 44529U
E: kcrain@blg.com
T: 613.787.3741 direct

Emma Blanchard LSO# 53359S
E: eblanchard@blg.com
T: 613.369.4755 direct

Neil Abraham LSO# 71852L
E: nabraham@blg.com
T: 613.787.3587 direct

Lawyers for the Applicant, City of Ottawa

TO: **Lax O'Sullivan Lisus Gottlieb LLP**
Counsel
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Matthew P. Gottlieb LSO# 32268B
E: mgottlieb@lolg.ca
T: 416.644.5353

James Renihan LSO# 57553U
E: jrenihan@lolg.ca
T: 416.644.5344
F: 416.598.3730

John Carlo Mastrangelo LSO# 76002P
E: jmastrangelo@lolg.ca
T: 416.956.0101
F: 416.598.3730

Davies Howe LLP
The Tenth Floor
425 Adelaide Street West
Toronto, ON M5V 3C1

Mark R. Flowers LSO# 43921B
E: markf@davieshowe.com
T: 416.263.4513
F: 416.977.8931

Lawyers for the Respondent

AND TO: **Caza Saikaley S.R.L./LLP**
Lawyers | Avocats
350-220 Laurier Avenue West
Ottawa, ON K1P 5Z9

T: 613.565.2292
F: 613.565.2087

Alyssa Tomkins LSO# 54675D
E: atomkins@plaideurs.ca

Charles R. Daoust LSO#74259H
E: cdaoust@plaideurs.ca

Lawyers for the Intervener,
Kanata Greenspace Protection Coalition

INDEX

<i>Statutes</i>	
1	<i>Planning Act</i> , RSO 1980, c 379
2	<i>Municipal Act</i> , RSO 1980, c 302
3	<i>Municipal Act</i> , RSO 1990, c M45
4	<i>Public Parks Act</i> , RSO 1980, c 417
<i>Jurisprudence</i>	
5	<i>Heritage Capital Corp. v Equitable Trust Co.</i> , 2016 SCC 19
6	<i>Loyalist (Township) v The Fairfield-Gutzeit Society</i> , 2019 ONSC 2203
7	<i>Pelham (Town) v Fonthill Gardens Inc.</i> , 2019 ONSC 567
8	<i>Nanaimo (City) v Rascal Trucking Ltd.</i> , 2000 SCC 13
9	<i>114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)</i> , 2001 SCC 40
10	<i>Croplife Canada v Toronto (City)</i> , 75 OR (3d) 357

TAB 1

CHAPTER 379

Planning Act

1. In this Act,

Interpre-
tation

- (a) "council" means the council of a municipality or the board of trustees of an improvement district;
- (b) "designated municipality" means the municipality named by the Minister under subsection 2 (6) in the case of a joint planning area or the municipality in the case of a planning area consisting of one municipality or of one municipality and territory without municipal organization;
- (c) "joint planning area" means a planning area consisting of more than one municipality or part or parts thereof;
- (d) "local board" means any school board, public utility commission, transportation commission, public library board, board of park management, board of health, board of commissioners of police, planning board or any other board, commission, committee, body or local authority established or exercising any power or authority under any general or special Act with respect to any of the affairs or purposes of a municipality or of two or more municipalities or portions thereof;
- (e) "Minister" means the Minister of Housing;
- (f) "Municipal Board" means the Ontario Municipal Board;
- (g) "municipality" means a city, town, village, township or improvement district;
- (h) "official plan" means a program and policy, or any part thereof, covering a planning area or any part thereof, designed to secure the health, safety, convenience or welfare of the inhabitants of the area, and consisting of the texts and maps, describing such program and policy, approved by the Minister from time to time as provided in this Act;

Offence

(15) Every person who contravenes an order of the Minister made under clause (1) (a) is guilty of an offence and on conviction is liable to a fine of not more than \$1,000.

Effect of land use order

(16) An order of the Minister made under clause (1) (b) has the same effect as a by-law passed under section 29. 1976, c. 64, s. 4 (2).

Application for approval of subdivision plans

36.—(1) When land is to be subdivided for the purpose of being sold, conveyed or leased in lots by reference to a registered plan of subdivision, the owner of the land or someone authorized by him in writing shall forward at least eight, or as many as may be required, copies of a draft plan thereof drawn to scale, together with an application for approval, to the Minister. R.S.O. 1970, c. 349, s. 33 (1).

What draft plan to indicate

(2) The draft plan shall show the boundaries of the land to be subdivided, certified by an Ontario land surveyor, and shall indicate,

(a) the locations, widths and names of the proposed highways within the proposed subdivision and of existing highways on which the proposed subdivision abuts;

(b) on a small key plan, on a scale of not less than one centimetre to 100 metres, all of the land adjacent to the proposed subdivision that is owned by the applicant or in which the applicant has an interest, and the information specified under clause (c);

(c) every adjoining subdivision and the relationship thereto of the lands proposed to be subdivided, and the relationship of the boundaries of the land to be subdivided to the boundaries of the township lot or other original grant of which such land forms the whole or part;

(d) the purpose for which the lots are to be used;

(e) the nature of the existing uses of adjoining land;

(f) the approximate dimensions and layouts of the proposed lots;

(g) natural and artificial features such as buildings, railways, highways, watercourses, drainage ditches,

swamps and wooded areas within or adjacent to the land proposed to be subdivided, and anything within or adjacent to such land that constitutes a fire hazard to the proposed subdivision;

- (h) the availability and nature of domestic water supplies;
- (i) the nature and porosity of the soil;
- (j) such contours or elevations as may be required to determine the grade of the highways and the drainage of the land;
- (k) the municipal services available or to be available to the land proposed to be subdivided; and
- (l) the nature and extent of any restrictive covenants or easements affecting the land proposed to be subdivided. R.S.O. 1970, c. 349, s. 33 (2); 1978, c. 87, s. 21 (1).

(3) The Minister may then confer with officials of municipalities and ministries of the public service, commissions, authorities and any others who may be concerned and shall settle a draft plan that, in his opinion, will meet all requirements. R.S.O. 1970, c. 349, s. 33 (3); 1972, c. 1, s. 2.

(4) In considering a draft plan of subdivision, regard shall be had, among other matters, to the health, safety, convenience and welfare of the future inhabitants and to the following,

- (a) whether the plan conforms to the official plan and adjacent plans of subdivision, if any;
- (b) whether the proposed subdivision is premature or necessary in the public interest;
- (c) the suitability of the land for the purposes for which it is to be subdivided;
- (d) the number, width, location and proposed grades and elevations of highways, and the adequacy thereof, and the highways linking the highways in the proposed subdivision with the established highway system in the vicinity, and the adequacy thereof;

- (e) the dimensions and shape of the lots;
- (f) the restrictions or proposed restrictions, if any, on the land, buildings and structures proposed to be erected thereon and the restrictions, if any, on adjoining lands;
- (g) conservation of natural resources and flood control;
- (h) the adequacy of utilities and municipal services;
- (i) adequacy of school sites;
- (j) the area of land, if any, within the subdivision that, exclusive of highways, is to be conveyed or dedicated for public purposes. R.S.O. 1970, c. 349, s. 33 (4).

**Dedication
of land
for public
and highway
purposes**

(5) The Minister may impose such conditions to the approval of a plan of subdivision as in his opinion are advisable and, in particular but without restricting in any way whatsoever the generality of the foregoing, he may impose as a condition,

- (a) that land to an amount determined by the Minister but not exceeding 5 per cent of the land included in the plan shall be conveyed to the municipality for park purposes or, if the land is not in a municipality, shall be dedicated for park purposes;
- (b) that such highways shall be dedicated as the Minister considers necessary;
- (c) when the subdivision abuts on an existing highway that sufficient land, other than land occupied by buildings or structures, shall be dedicated to provide for the widening of the highway to such width as the Minister considers necessary; and
- (d) that the owner of the land enter into one or more agreements with the municipality, or, where the land is not in a municipality, with the Minister, dealing with such matters as the Minister may consider necessary, including the provision of municipal services. R.S.O. 1970, c. 349, s. 33 (5); 1972, c. 118, s. 5 (1); 1974, c. 53, s. 5 (1).

**Subdivision
agreements**

(6) Every municipality and the Minister may enter into agreements imposed as a condition to the approval of a

plan of subdivision and any such agreement may be registered against the land to which it applies and the municipality or the Minister, as the case may be, shall be entitled to enforce the provisions thereof against the owner and, subject to the provisions of the *Registry Act* and the *R.S.O. 1980, c. 445, 230*
Land Titles Act, any and all subsequent owners of the land. 1974, c. 53, s. 5 (2).

(7) Where the owner of the land or the municipality in which the land is situate is not satisfied as to the conditions imposed or to be imposed by the Minister, or any of them, he or it, at any time before the plan of subdivision is finally approved, may require the condition or conditions that are unsatisfactory to be referred to the Municipal Board by written notice to the secretary of the Board and to the Minister, and the Board shall then hear and determine the question as to the condition or conditions so referred to it, and the decision of the Board in respect of such condition or conditions has the same force and effect as if it were the decision of the Minister. R.S.O. 1970, c. 349, s. 33 (7). Reference of conditions

(8) The Minister may authorize, in lieu of the conveyance for park purposes required under subsection (5), the acceptance by the municipality of money to the value of such land required to be conveyed. R.S.O. 1970, c. 349, s. 33 (8); 1972, c. 118, s. 5 (2). Cash payment in lieu of conveyance

(9) Land conveyed to a municipality under subsection (5) Use and sale of land shall be used for park or other public recreational purposes but may be sold at any time. 1978, c. 93, s. 4 (1).

(10) The council of a municipality may include in its estimates an amount to be used for the acquisition of lands to be used for park purposes and may pay into the fund provided for in subsection (11) the sum so included in the estimates, and any person may pay any sum into the same fund. R.S.O. 1970, c. 349, s. 33 (10). Amounts for park purposes paid into special account

(11) All moneys received by the municipality under subsections (8) and (10) and all moneys received on the sale of land under subsection (9), less any amount expended by the municipality out of its general funds in respect of such land, shall be paid into a special account, and the moneys in such special account shall be expended only for the acquisition of lands to be used for park or other public recreational purposes, for the development or improvement of lands used or to be used for park or other public recreational purposes, including the erection or repair of buildings or other structures thereon or for the maintenance of lands, buildings or structures used for park or other public recre-

R.S.O. 1980,
c. 512

ational purposes, including the acquisition of machinery and equipment required for such maintenance, and the moneys in such special account may be invested in such securities as a trustee may invest in under the *Trustee Act*, and the earnings derived from the investment of such moneys shall be paid into such special account, and the auditor in his annual report shall report on the activities and position of the account. 1978, c. 93, s. 4 (2).

Approval of
draft plan
by Minister

(12) Upon settlement of the draft plan, the Minister may give his approval thereto, and may in his discretion withdraw his approval or change the conditions of approval at any time prior to his approval of a final plan for registration. R.S.O. 1970, c. 349, s. 33 (12).

Draft
approval to
lapse after
three years

(13) Where the Minister has not given his approval to a final plan for registration within three years after the date upon which approval to the draft plan was given, the approval of the draft plan shall, unless such approval has prior thereto been withdrawn under subsection (12), thereupon lapse, but the Minister may at any time during such three year period extend the duration of the approval and may from time to time thereafter, prior to the lapsing of the approval, further extend the duration of approval. 1971, c. 2, s. 3 (1).

When
draft plan
approved

R.S.O. 1980,
cc. 493, 445,
230

(14) When the draft plan is approved, the person desiring to subdivide may proceed to lay down the highways and lots upon the ground in accordance with the *Surveys Act* and the *Registry Act* or the *Surveys Act* and the *Land Titles Act*, as the case may be, and to prepare a plan accordingly certified by an Ontario land surveyor.

Approval
of plan by
Minister

(15) Upon presentation by the person desiring to subdivide, the Minister may, if satisfied that the plan is in conformity with the approved draft plan and that the conditions of approval have been or will be fulfilled, approve the plan of subdivision and thereupon the plan of subdivision may be tendered for registration.

Withdrawal
of approval
of plan for
registration

(16) When a final plan for registration is approved by the Minister under subsection (15) and is not registered within one month of the date of approval, the Minister may withdraw his approval and may require that a new application be submitted.

Duplicates to
be deposited
and sent to
Minister

(17) In addition to any requirement under the *Registry Act* or the *Land Titles Act*, the person tendering the plan of

subdivision for registration shall deposit with the land registrar a duplicate, or when required by the Minister two duplicates, of the plan in the form of linen tracings or transparent linen prints of a type approved by the Minister, and the land registrar shall endorse thereon a certificate showing the number of the plan and the date when the plan was registered and shall deliver such duplicate or duplicates to the Minister.

(18) Approval of a plan of subdivision by the Minister ^{Saving} does not operate to release any person from doing anything that he may be required to do by or under the authority of any other Act. R.S.O. 1970, c. 349, s. 33 (13-17).

37.—(1) Where an action or proceeding for the partition of land is brought under the *Partition Act*, notice shall be given to the Minister.

Proceedings
under
R.S.O. 1980,
c. 369,
Minister to
be notified

(2) The notice shall include a copy of the application for ^{Form and service of} the partition of land and shall state the day on which the ^{notice} matter is to be heard, and, subject to the rules of court, shall be served not less than ten days before the day of the hearing.

(3) The Minister is entitled as of right to be heard either ^{Right of} _{Minister to} in person or by counsel notwithstanding that the Crown is _{be heard} not a party to the action or proceeding.

(4) Where the Minister appears in person or by counsel, ^{Right of} _{Minister} to appeal the Minister shall be deemed to be a party to the action or proceeding for the purpose of an appeal and has the same rights with respect to an appeal as any other party to the action or proceeding. 1978, c. 93, s. 5.

38.—(1) Every person who subdivides and offers for sale, ^{Offence} _{re certain} agrees to sell or sells land by a description in accordance with _{land sales} an unregistered plan of subdivision is guilty of an offence and on conviction is liable to a fine of not more than \$500.

(2) In subsection (1), “unregistered plan of subdivision” <sup>Interpre-
tation</sup> does not include a reference plan of survey under section 149 of the *Land Titles Act* that complies with the regulations <sup>R.S.O. 1980,
cc. 230, 445</sup> under that Act or a plan deposited under Part II of the *Registry Act* in accordance with the regulations under that Act. R.S.O. 1970, c. 349, s. 34.

TAB 2



**REVISED STATUTES
OF
ONTARIO, 1980**

BEING A

REVISION AND CONSOLIDATION OF THE PUBLIC GENERAL
ACTS OF THE LEGISLATURE OF ONTARIO, PUBLISHED
UNDER THE AUTHORITY OF THE STATUTES
REVISION ACT, 1979

VOL. 5

TORONTO
PRINTED AND PUBLISHED BY THE QUEEN'S PRINTER

CHAPTER 302

Municipal Act

1. In this Act,

Interpre-
tation

1. "arbitration" means an arbitration under this Act;
2. "assessment commissioner", in relation to a municipality, means the assessment commissioner appointed under the *Assessment Act* for the assessment R.S.O. 1980, c. 31 region in which the municipality is situate;
3. "Assessment Review Court" means the Assessment Review Court under the *Assessment Review Court Act*; R.S.O. 1980, c. 32
4. "assessor" means the assessment commissioner and anyone acting under his authority;
5. "bridge" means a public bridge, and includes a bridge forming part of a highway or on, over or across which a highway passes;
6. "city", "town", "village", "township" and "county" respectively mean a city, town, village, township or county, the inhabitants of which are a body corporate within the meaning and for the purposes of this Act;
7. "debt" includes obligation for the payment of money;
8. "electors", when applied to a municipal election, means the persons entitled to vote at a municipal election; when applied to voting on a money by-law, means the persons entitled to vote on the by-law; and when applied to voting on any other by-law or on a resolution or question, unless otherwise provided by the Act, by-law or other authority under which the vote is taken, means municipal electors;
9. "highway" means a common and public highway, and includes a street and a bridge forming part of

When
occupant
deemed to
be owner

R.S.C. 1970,
c. V-4

4. A person in the actual occupation of land,

(a) under an agreement with the owner for the purchase of it; or

(b) sold by the Director in accordance with the *Veterans' Land Act* (Canada),

shall be deemed to be the owner, and the unpaid purchase money or balance, as the case may be, shall be deemed to be an encumbrance on the land. R.S.O. 1970, c. 284, s. 4.

Power to
acquire
includes
expropriation

5. Where power to acquire land is conferred upon a municipal corporation by this or any other Act, unless otherwise expressly provided, it includes the power to acquire by purchase or otherwise and to enter on and expropriate. R.S.O. 1970, c. 284, s. 5.

Special
Acts not
affected

6. Except where otherwise expressly provided, this Act does not affect the provisions of any special Act relating to a particular municipality. R.S.O. 1970, c. 284, s. 6.

Inhabitants
of municipali-
ties to
be bodies
corporate

7. The inhabitants of every county, city, town, village and township are a body corporate for the purposes of this Act. R.S.O. 1970, c. 284, s. 7.

Names of
municipal
corporations

8. The name of the body corporate is "*The Corporation of the County [United Counties, City, Town, Village, Township (as the case may be)] of..... (naming the municipality)*". R.S.O. 1970, c. 284, s. 8.

Council to
exercise
corporate
powers

9. The powers of a municipal corporation shall be exercised by its council. R.S.O. 1970, c. 284, s. 9.

PART 1

FORMATION, ERECTION, ALTERATION OF BOUNDARIES, AND DISSOLUTION OF MUNICIPALITIES, ETC.

INCORPORATIONS AND ERECTIONS

Interpre-
tation

10.—(1) In this section, "inhabitant" means a permanent resident or a temporary resident having a permanent dwelling within the locality. R.S.O. 1970, c. 284, s. 10 (1).

Improvement
districts

(2) The Municipal Board, upon the application of the Ministry or of not less than thirty inhabitants of a locality having a population of not less than fifty, may

PART VII

GENERAL PROVISIONS APPLICABLE TO ALL
MUNICIPALITIES

103.—(1) Except where otherwise provided, the jurisdiction of every council is confined to the municipality that it represents and its powers shall be exercised by by-law.

(2) A by-law passed by a council in the exercise of any of the powers conferred by and in accordance with this Act, and in good faith, shall not be open to question, or be quashed, set aside or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them. R.S.O. 1970, c. 284, s. 241.

104. 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, and for governing the proceedings of the council, the conduct of its members and the calling of meetings. R.S.O. 1970, c. 284, s. 242.

105. Where the council of any municipality passes a Municipal Code comprehensive general by-law dealing with all or any of such matters within its jurisdiction as the council considers desirable to include therein (which by-law may be known as "The [name of municipality] Municipal Code") and such by-law consolidates and includes therein the provisions of any by-law previously passed by the council,

- (a) the provisions in the comprehensive general by-law shall be deemed to have come into force on the day the original by-law came into force; and
- (b) any condition precedent or subsequent or the approval of any authority external to the council required by law before the original by-law came into force shall, where such condition was satisfied or approval obtained in respect of the original by-law, be deemed to have been satisfied or obtained in respect of the corresponding provision in the comprehensive general by-law in all respects as though the condition had been satisfied or the approval obtained in respect of that provision in the comprehensive general by-law. 1976, c. 69, s. 2.

106.—(1) Where the council of a municipality is required by law to hear interested parties or to afford them an Hearings by committee authorized

employ of the municipality or of a local board and includes a member of the police force of the municipality and any person or class of person designated as an employee by the Minister;

R.S.O. 1980,
c. 303

Local boards

- (ii) "local board" means a local board as defined in the *Municipal Affairs Act*.

Former
employees

- (b) A local board has the same powers to provide insurance for or to make payments to or on behalf of its employees as are conferred upon the council of a municipality under this paragraph in respect of its employees.
- (c) A by-law passed under this paragraph may provide that it applies to a person who was an employee at the time the cause of action or other proceeding arose but who prior to judgment or other settlement of the action or proceeding has ceased to be an employee.

Application

- (d) This paragraph does not apply to an act or omission that occurred prior to the 20th day of June, 1978. 1978, c. 32, s. 16 (2), *part*; 1980, c. 36, s. 2 (1).

Parks, Parking Lots, etc.

Acquiring
land for
parks, etc.

R.S.O. 1980,
c. 417

51. For acquiring land for and establishing and laying out public parks, squares, avenues, boulevards and drives in the municipality or in any adjoining local municipality and, in respect of lands acquired for any of such purposes that are not under the general management, regulation and control of a board of park management, for exercising all or any of the powers that are conferred on boards of park management by the *Public Parks Act*.

- (a) A corporation that expropriates land in another municipality under the powers conferred by this paragraph shall put the land in an efficient state to be used and open it to the general public for the purpose for which it was acquired within a reasonable time after such expropriation, and shall maintain and keep the land in an efficient state of repair and shall provide police protection therefor.
- (b) Where land is acquired under this paragraph, the cost of acquisition and maintenance thereof or any part thereof may be levied against a defined area in the municipality that in the opinion of the council derives special benefit therefrom.

- (c) Where land is acquired under this paragraph for park purposes and there is no board of park management, the council may appoint such number of persons qualified to hold office as a member of council as it considers appropriate to act on its behalf as a board of management for any undertaking under this paragraph. R.S.O. 1970, c. 284, s. 352, par. 68; 1980, c. 36, s. 2 (2).

52. For accepting and taking charge of land, within or outside the municipality, dedicated as a public park for the use of the inhabitants of the municipality. Accepting land dedicated

53. For entering into agreement with one or more municipalities for the purpose of, Joint acquisition and maintenance of public parks

- i. acquiring land for and establishing and laying out a public park within the municipality or within any other municipality, and
- ii. maintaining or operating a public park within the municipality or within any other municipality.

54. For establishing, laying out and maintaining bicycle paths and for regulating the use thereof and for acquiring land for such purposes and for entering into agreements with other municipalities, including a regional, district or metropolitan municipality, or with the Crown in right of Ontario or the Crown in right of Canada, or with any person or any other body for the use of land for such purposes. Bicycle paths

- (a) The power to acquire land under this paragraph does not include the power to enter on and expropriate land. 1978, c. 32, s. 16 (2), *part*.

55. For acquiring, establishing, laying out and improving land, buildings and structures where vehicles may be parked, and for erecting buildings or structures for or in connection with the parking of vehicles in, on or under any land vested for any purpose in a municipality, and for leasing such land, buildings or structures, and for regulating, supervising and governing the parking of vehicles therein or thereon. Municipal parking lots

- (a) A by-law under this paragraph may define vehicle Definition of vehicle for the purposes of the by-law.

- (b) Land acquired or established for the parking of vehicles under this paragraph and buildings and structures acquired or erected under this paragraph shall be deemed to be a highway for the Application of s. 316, par. 8

exist and its undertaking, documents, assets and liabilities shall be assumed by the municipality. R.S.O. 1970, c. 284, s. 352, par. 73; 1976, c. 69, s. 9 (2, 3).

Special Undertakings

Special undertakings

57. For acquiring, erecting, altering, maintaining, operating or managing or granting aid for the acquisition, erection, alteration, maintenance, operation or management of monuments, memorial windows, tablets, parks, recreational areas, playgrounds, athletic fields, zoological or other gardens, natural history collections, observatories or works of art, or other places of recreation and amusement, arenas, auditoriums, health or community recreation centres, stadia, museums, including public historical museums and similar buildings, within or outside the municipality that may or may not be in commemoration of the persons or any class thereof who served during any war in the armed forces of Her Majesty or Her Majesty's allies or in the auxiliary or ancillary services of such forces or in the merchant marine or any Corps of (Civilian) Canadian Fire Fighters for service in the United Kingdom.

- (a) The corporation may borrow money for any of the purposes of this paragraph by the issue of debentures and may levy therefor or for any of the purposes of this paragraph on the rateable property in the municipality or in defined areas thereof.
- (b) The council may authorize the erection of any such monument in any highway over which the corporation has jurisdiction.
- (c) Any such building may be established and equipped as a home or clubhouse for such persons or any class thereof or may be used for such purposes as the council considers proper.
- (d) The councils of two or more municipalities may enter into agreement for carrying out any of the purposes of this paragraph in any one of such municipalities.
- (e) The council may appoint such number of persons who are qualified to be elected as members of the council as it deems appropriate to act on its behalf as a board of management for any undertaking under this paragraph.

- (f) Where two or more municipalities have provided in an agreement under clause (d) for a board of management to act on their behalf, they may provide for the number of members that may be appointed to the board by each of the municipalities, but each member of the board shall be a person who is qualified to be elected as a member of the council of one of the municipalities.
- (g) The council may prescribe fees for admittance to or for the use of any undertaking under this paragraph.
- (h) A board of management appointed under this paragraph for an arena or community recreation centre shall have the power to let from year to year or for any time not exceeding ten years the right to sell refreshments within the arena or community recreation centre under such terms and conditions as the board may prescribe.
- (i) Members of a board of management appointed under this paragraph shall hold office at the pleasure of the council that appointed them and unless sooner removed shall hold office until the expiration of the term of the council that appointed them and until their successors are appointed and are eligible for reappointment.
- (j) Where a member of a board of management appointed under this paragraph has been removed from office before the expiration of his term, the council may appoint another eligible person for the unexpired portion of his term. R.S.O. 1970, c. 284, s. 352, par. 74; 1972, c. 1, s. 1; 1976, c. 69, s. 9 (5); 1978, c. 32, s. 16 (3); 1979, c. 63, s. 6 (2); 1979, c. 101, s. 5.

58. For entering into any agreement with Her Majesty respecting regional economic development and, subject to the approval of the Minister, any ancillary or subsidiary agreements with any person required as a result of entering into such an agreement with Her Majesty. 1974, c. 3, s. 2.

59. Without limiting the generality of section 193, and in addition to the powers set out therein, for acquiring by purchase or lease real property for the purpose of leasing such property to a legally qualified medical or dental practitioner on such terms and conditions as the council may determine, and such property may be so leased for residential, clinical or office purposes or a combination thereof.

Power to
acquire real
property for
purpose of
leasing to
doctor or
dentist

TAB 3

Nothing in this Act or in the *Assessment Act*
the collection of a rate for interest on county
in any county by-law providing for the issue

sealed.

ended by striking out "and taxable busi-

by striking out "or business assessment".

repealed.

ended by striking out "subsections (1) and

repealed and the following substituted:

ceased to be liable to be taxed at the rate at

aled and the following substituted:

y reason of repairs or renovations could not
iod of at least three months during the year.

ended by striking out "subsections (7), (12)
) and 12)".

pealed.

ended by striking out "or business, as the

ONTARIO MUNICIPAL ACT



R.S.O. 1990, c. M.45

1997 EDITION

An Unofficial Publisher's Consolidation

CANADA LAW BOOK INC.
240 Edward Street, Aurora, Ontario

MUNICIPAL ACT

R.S.O. 1990, c. M.45

Amended 1991, Vol. 2, c. 11, s. 5; in force January 1, 1991

Amended 1991, Vol. 2, c. 15, ss. 1 to 6; in force June 27, 1991

Amended 1991, Vol. 2, c. 54, s. 9; in force December 19, 1991

Amended 1992, c. 15, ss. 1 to 19; in force June 25, 1992, except ss. 18 and 19 in force January 1, 1992, and ss. 2(2)(b), 3(3), (4) and 8(1) proclaimed in force January 1, 1993

Amended 1992, c. 17, s. 5; deemed in force December 1, 1989

Amended 1992, c. 23, s. 40; proclaimed in force July 1, 1993

Amended 1992, c. 32, s. 22; proclaimed in force April 3, 1995

Amended 1993, c. 11, ss. 44 and 45; in force July 29, 1993

Amended 1993, c. 20, ss. 1 to 4; in force October 26, 1993

Amended 1993, c. 23, s. 68; in force November 15, 1993

Amended 1993, c. 26, ss. 46 to 48; proclaimed in force January 31, 1994

Amended 1993, c. 27, Sch.; deemed in force December 31, 1991

Amended 1994, c. 2, ss. 50 and 51; proclaimed in force July 14, 1994

Amended 1994, c. 7; in force June 23, 1994

Amended 1994, c. 10, s. 21(1) and (2); proclaimed

in force November 30, 1994

Amended 1994, c. 17, s. 49(1) to (3); in force December 1, 1995

Amended 1994, c. 23, ss. 51 to 60; ss. 51 to 55 and 59 proclaimed in force January 1, 1995; ss. 56, 57 and 60 proclaimed in force March 28, 1995; s. 58 to come into force on proclamation

Amended 1994, c. 25, s. 82; in force April 1, 1995

Amended 1994, c. 27, ss. 109, 123(1) to (12); ss. 109 and 123(1) to (10) in force January 1, 1995; s. 123(11) and (12) in force December 9, 1994

Amended 1994, c. 37, ss. 1 to 5; in force December 9, 1994

Amended 1996, c. 1, Sch. M, ss. 1 to 24; in force January 30, 1996

Amended 1996, c. 4, s. 54; proclaimed in force May 22, 1996

Amended 1996, c. 32, ss. 2 to 58; s. 58 deemed in force December 1, 1996; ss. 16 to 21, 24 to 42, 49(1) to (4), (6) to (9), 50 to 51 and 53 proclaimed in force March 6, 1997; remainder in force on Royal Assent December 19, 1996

1. (1) Definitions.—In this Act,

“arbitration” means an arbitration under this Act; (“arbitrage”)

“assessment commissioner”, in relation to a municipality, means the assessment commissioner appointed under the *Assessment Act* for the assessment region in which the municipality is situate; (“commissaire à l’évaluation”)

102. General power.—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. 1994, c. 23, s. 54.

102.1 (1) Delegation of administrative functions.—The council of a municipality may, by by-law, delegate to a committee of council or to an employee of the municipality any powers, duties or functions that are administrative in nature.

(2) **Conditions.**—The council may, in the by-law, impose conditions on the exercise or performance of the delegated powers, duties and functions.

(3) **Non-administrative matters.**—Subsection (1) does not authorize the delegation of powers, duties, or functions that are legislative or otherwise non-administrative in nature, such as the power to pass by-laws, adopt estimates, levy, cancel, reduce or refund taxes, or appoint persons to and remove them from offices created by statute.

(4) **Definition.**—In this section,

“municipality” includes a regional, metropolitan or district municipality and the County of Oxford. 1996, c. 32, s. 14.

103. (1) English and French by-laws and resolutions.—Every council may pass its by-laws and resolutions in English or in both English and French.

(2) **Official plans.**—Every council may adopt an official plan that is in English or that is in both English and French.

(3) **Proceedings of council.**—Every council and every committee of council may conduct its proceedings in English or French or in both English and French.

(4) **Minutes.**—Despite subsection (3), the minutes of the proceedings of council and all committees of council shall be kept in English or, where so authorized by a by-law of the council, in both English and French.

(5) **Conduct of affairs, etc., of municipality.**—Unless otherwise directed by a by-law of the council, the officers and employees of a municipality may conduct the business and affairs of the municipality in such language, including a language other than English or French, as may be reasonable in the circumstances.

(6) **Proviso.**—Nothing in this section,

- (a) affects an obligation imposed by or under any Act to make, keep, use, file, register or submit any form, book, document or other paper of any kind in the language or languages specified by or under the Act;
- (b) affects any requirement at law to give reasonable notice.

(7) **Translations.**—Where any form, book, document or other paper of any kind is submitted by a municipality to a ministry of the Government of Ontario in French, the municipality shall, at the request of the minister of the ministry to which the form, book, document or other paper was submitted, supply the minister with an English translation thereof. 1982, c. 50, s. 7.

104. (1) Municipal Code.—Where the council of any municipality passes a compe-

TAB 4



Ontario: Revised Statutes

1980

c 417 Public Parks Act

Ontario

© Queen's Printer for Ontario, 1980

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/rso>

Bibliographic Citation

Public Parks Act, RSO 1980, c 417

Repository Citation

Ontario (1980) "c 417 Public Parks Act," *Ontario: Revised Statutes*: Vol. 1980: Iss. 6, Article 57.

Available at: <http://digitalcommons.osgoode.yorku.ca/rso/vol1980/iss6/57>

CHAPTER 417

Public Parks Act

1.—(1) A park, or a system of parks, avenues, boulevards and drives, or any of them, may be established in any municipality, and the same, as well as existing parks and avenues, may be controlled and managed in the manner hereinafter provided.

(2) Subject to subsection (5), if a petition, praying for the adoption of this Act, is presented to the council of any county or city signed by not less than 500 electors, or to the council of any town or township signed by not less than 200 electors, or to the council of any village signed by not less than 75 electors, the council may pass a by-law giving effect to the petition, with the assent of the electors qualified to vote at municipal elections, given before the final passing of the by-law as provided by the *Municipal Act*.

R.S.O. 1980,
c. 302

(3) If the majority of the votes is in favour of the by-law, it shall be finally passed by the council at its next regular meeting held after the taking of the vote, or as soon thereafter as may be.

(4) If the vote is adverse, no by-law for the same purpose shall afterwards be submitted to the electors within the same year.

(5) It is not necessary for a county council to submit the by-law for the assent of the electors if the by-law, on the final reading thereof, is approved by three-fifths of the members of the council then present.

(6) A by-law passed under subsection (2) may be repealed with the assent of the electors qualified to vote at municipal elections.

(7) When a by-law passed under subsection (2) is repealed, every officer and employee of the board of park management becomes a municipal employee and continues as such until removed by the council, unless his engagement sooner terminates.

R.S.O. 1970, c. 384, s. 1.

2.—(1) The parks, avenues, boulevards and drives, and approaches thereto, and streets connecting the same, shall be open to public

be open to the public free of all charge, subject to the by-laws, rules and regulations of the board of park management, and subject also to sections 13 and 14.

Fees, for
use of
facilities

(2) The board of park management may pass by-laws prescribing fees for the use of any facilities provided in any park.

for entrance

(3) The board of park management, with the approval of the council of the municipality, may pass by-laws prescribing fees for entrance to any park. R.S.O. 1970, c. 384, s. 2.

Board of
park man-
agement

3.—(1) Where this Act is adopted, the general management, regulation and control of all existing parks and avenues, and of all properties both real and personal, applicable to the maintenance of parks belonging to the municipality, and of all parks, avenues, boulevards and drives which may thereafter be acquired and established under this Act, shall be vested in and exercised by a board to be called "The Board of Park Management".

Authority
of board
to what
streets
applicable

(2) The authority of the board does not extend to any streets open at the time of the adoption of this Act, with the exception of streets expressly specified in the by-law adopting this Act, or which at any time or from time to time afterwards, in pursuance of an agreement between the council and the board, the council by by-law declares to be subject to this Act.

Consent of
municipal
council and
agricultural
society

(3) Nothing in this Act authorizes the board to assume possession or control of any exhibition park in or belonging to the municipal corporation without the consent of both the council and of any district agricultural society or exhibition association having an interest therein.

Management
of special
under-
takings
R.S.O. 1980,
c. 302

(4) The council may by by-law appoint the board to manage, regulate and control any undertaking established under paragraph 57 of section 208 of the *Municipal Act* and thereupon the management, regulation and control thereof shall be vested in and exercised by the board, and the board has power to prescribe fees for admittance to or for the use of any such undertaking. R.S.O. 1970, c. 384, s. 3.

Constitution
of board

4. The board is a corporation, and shall be composed of the head of the municipality and of six other persons, who shall be residents or ratepayers of the municipality, but not members of the council, and shall be appointed by the council. R.S.O. 1970, c. 384, s. 4.

5.—(1) Notwithstanding sections 4 and 6, the council of the municipality may by by-law provide that the board shall be composed of such number of resident ratepayers, not fewer than three and not more than seven, as the by-law provides, but where the board is to be composed of five or more persons at least two shall be members of the council.

(2) The members of the board shall be appointed annually by the council.

(3) A majority of the members of the board constitutes a quorum.

(4) Subsections 6 (2), (4) to (12) and (14) apply with necessary modifications when the board is composed as provided in this section. R.S.O. 1970, c. 384, s. 5.

6.—(1) The appointed members of the board shall hold office for three years, except in the case of the members of the first board, two of whom shall hold office until the 1st day of February in the year following the first appointments, two for one year, and two for two years, from that day; such members retiring in rotation, two each year, the older of such retirements to be determined by lot among themselves at their first meeting; but every member of the board shall continue in office until his successor is appointed and is eligible for reappointment.

(2) In case of a vacancy by the death or resignation of a member, or from any cause other than the expiration of the time for which he was appointed, the member appointed in his place shall hold office for the remainder of his term and until his successor is appointed.

(3) Save as aforesaid, each of the appointed members shall hold office for three years from the 1st day of February in the year in which he is appointed.

(4) The first appointment of members of the board shall be made at the first regular meeting of the council held after the final passing of the by-law.

(5) Thereafter the appointments shall be made annually at the first meeting of the council held after its organization; and any vacancy arising from any cause other than the expiration of the time for which the member was appointed shall be filled at the first meeting of the council held after the occurrence of the vacancy.

Organization of board

(6) The first members of the board, within ten days after their appointment and on such day and hour as the head of the municipality shall appoint, notice of the appointment in writing, signed by him, having been duly sent to the address of each member at least one week before the day and hour named therein, shall meet at the office of the head for the purpose of organization, shall elect one of their number chairman and shall appoint a secretary who may be one of their own number.

When appointments not made at required time

(7) If for any reason appointments are not made at the prescribed time, they shall be made as soon as may be thereafter.

Tenure of office of chairman and secretary

(8) The chairman and secretary shall hold office at the pleasure of the board, or for such period as the board may prescribe.

Chairman and secretary *pro tem*

(9) When the chairman or secretary is absent or unable to act, the board may appoint a chairman or secretary *pro tempore*.

Monthly meeting

(10) The board shall meet at least once in every month.

Calling special meeting

(11) The chairman or any two members may summon a special meeting of the board by giving at least two days notice in writing to each member, specifying the purpose for which the meeting is called.

Vacating office by absence

(12) The office of a member who is absent from the meetings of the board for three consecutive months, without leave of absence from the board or without reasons satisfactory to the board, shall be declared vacant by the board, and notice thereof shall be given to the council at its next meeting.

Quorum

(13) No business shall be transacted at any special or general meeting unless at least four members are present.

Records

(14) All orders and proceedings of the board shall be entered in books to be kept for that purpose and shall be signed by the chairman for the time being, and, when so entered and purporting to be so signed, shall be deemed to be original orders and proceedings, and the books may be produced and read in any judicial proceeding as evidence of the orders and proceedings. R.S.O. 1970, c. 384, s. 6.

Payment of expenses of members

7. The members of the board shall serve without compensation, but each member is entitled to receive his actual disbursements for expenses in visiting or superintending the park or park

property where the visit or service is made or rendered by direction of the board. R.S.O. 1970, c. 384, s. 7 (1).

8. The board may employ all necessary clerks, agents and servants, and may prescribe their duties and compensation. R.S.O. 1970, c. 384, s. 8.

9. The board shall keep in its office all books, maps, plans, papers and documents used in and pertaining to the business of the board, and the same shall be open to the examination of the members of the council, and of any other person appointed for that purpose by the council. R.S.O. 1970, c. 384, s. 9.

10. The board shall keep accounts of its receipts, payments, credits and liabilities, and the accounts shall be audited by the auditor of the municipal corporation in like manner as other accounts of the municipal corporation, and shall thereafter be laid before the council by the board. R.S.O. 1970, c. 384, s. 10.

11.—(1) The board may pass by-laws for the use, regulation, protection and government of the parks, avenues, boulevards and drives, the approaches thereto, and streets connecting the same, not inconsistent with the provisions of this Act or of any law of Ontario.

(2) The powers conferred upon municipal councils by *The Railways Act*, so far as relates to any streets or approaches under the control of the board, shall not be exercised without the consent of the board, and no street railway or other railway shall enter upon or pass through the park.

Consent
of board
necessary
for exercise
of certain
powers
R.S.O. 1950,
c. 331

(3) The board has power to license cabs and other vehicles for use in a park, and to let from year to year, or for any time not exceeding ten years, the right to sell refreshments, other than spirituous, fermented or intoxicating liquors, within the park under such regulations as the board shall prescribe.

Licensing
of cabs and
vehicles and
sale of
refreshments

(4) The board has power in and by their by-laws to attach penalties for the infraction thereof, and such by-laws may be enforced and the penalties thereunder recovered in like manner as by-laws of municipal councils and the penalties thereunder may be enforced and recovered.

Penalties

**By-laws,
authentica-
tion of**

(5) The by-laws are sufficiently authenticated by being signed by the chairman of the board, and a copy of any by-law, written or printed, and certified to be a true copy by any member of the board, is receivable as evidence without proof of any such signature.

**Board
authorized
to perform
services**

(6) The board may perform such services for the municipality or any other local board as it ordinarily performs in the general maintenance and operation of parks under the authority of this Act and may receive compensation for such services.

**Owner and
driver of
vehicle
liable to
penalties**

(7) The driver of a vehicle, not being the owner, is liable to any penalty provided under a by-law passed under this section, and the owner of the vehicle is also liable to such a penalty unless, at the time the offence was committed, the vehicle was in the possession of a person other than the owner or his chauffeur without the owner's consent. R.S.O. 1970, c. 384, s. 11.

**Power of
municipality
to acquire
property
for park
purposes**

12. Real and personal property may be devised, bequeathed, granted, conveyed or given to the municipal corporation for the establishment or formation of a park, or for the purpose of the improvement or ornamentation of any park of the municipality, and of the avenues, boulevards and drives and approaches thereto, and of the streets connecting therewith, and for the establishment and maintenance on park property of museums, zoological or other gardens, natural history collections, observatories, monuments or works of art, upon such trusts and conditions as may be prescribed by the donor. R.S.O. 1970, c. 384, s. 12.

**Power of the
board to
acquire land**

13.—(1) The board may acquire by purchase, lease or otherwise the land, rights and privileges required for park purposes under this Act.

Grantee

(2) The conveyance of all land, rights and privileges so acquired by purchase or lease shall be taken to the municipal corporation.

**Power to
lease**

(3) The board has power to let any land not immediately required for park purposes.

**Power to
sell**

(4) If it has more land than is required for park purposes, the board may sell or otherwise dispose of the land not required in such manner and upon such terms as may be considered most advantageous.

(5) Where a park has been purchased or has been acquired by the board or by the corporation of the municipality, otherwise than by gift or devise, or by dedication to the public by the owner of the land, freely, or at a nominal price or rental, the board may set apart a sufficient part thereof for athletic purposes or for the purposes of sport, exhibitions or other lawful amusements or entertainments, and may lease it for such purposes, for such times and on such terms as the board may see fit, but the powers conferred by this subsection are not exercisable with respect to any park unless the board has applied for and received the approval of the council. R.S.O. 1970, c. 384, s. 13.

14.—(1) The council of the municipal corporation may by by-law provide that any land acquired by the corporation and not immediately required for any other purpose shall be under the management and control of the board, and the board may set apart the land or any part thereof for athletic purposes or for the purposes of sport, exhibitions or other lawful amusements or entertainments, and may lease it for such purposes, for such times and on such terms as the board may see fit.

(2) The council may repeal any by-law passed under subsection (1), and the municipal corporation may thereafter sell or otherwise dispose of the land or use it for any lawful purpose of the corporation. R.S.O. 1970, c. 384, s. 14.

15. The board, its engineers, surveyors, servants and workmen may enter upon the land of any person in the municipality, or, in the case of a city within sixteen kilometres, and in the case of a town within eight kilometres thereof, and may survey, set out and ascertain such parts thereof as are required for parks, avenues, boulevards and drives and approaches thereto, or for any other purposes of the board, including the supply of water for artificial lakes, fountains and other park purposes, and with the consent of all parties interested capable of consenting, may divert and expropriate any river, ponds of water, springs or streams of water therein that the engineer, surveyor or other person authorized by the board considers suitable for such purposes, and the board may contract with the owner or occupier of the land and with those having a right or interest in the water, for the purchase or renting thereof or of any part thereof, or of any privilege that may be required for the purposes of the board; but the board shall not interfere with the waterworks or water supply of any municipal corporation or of any waterworks company. R.S.O. 1970, c. 384, s. 15; 1978, c. 87, s. 45.

Arbitration

R.S.O. 1980,
cc. 148, 302

16. In case of any disagreement between the board and the owner or occupier of, or any other person interested in such land, or any person having an interest in such water, or in the natural flow thereof, or in any such privilege, respecting the amount of purchase money or yearly rental thereof, or otherwise, the matter in question, other than those to which the *Expropriations Act* applies, shall be determined by arbitration under the *Municipal Act* as hereinafter provided. R.S.O. 1970, c. 384, s. 16.

Application of
R.S.O. 1980,
c. 302

17. Sections 192, 193 and 195 of the *Municipal Act* shall be read as part of this Act, and apply to the board as if the board were named therein instead of the corporation or municipal council. R.S.O. 1970, c. 384, s. 17.

**Board to
make yearly
estimates**

18.—(1) The board shall, in the month of February in every year, prepare an estimate of the sums required during the ensuing financial year for,

- (a) the interest on money borrowed;
- (b) payment of interest and principal on debentures;
- (c) the expense of managing, regulating and controlling any undertaking established under paragraph 57 of section 208 of the *Municipal Act*;
- (d) the expense of maintaining, improving and managing the parks, boulevards, avenues and streets under its control; and
- (e) the interest and instalments of purchase money for the purchase of small squares or parks.

**When
estimate to
be reported**

(2) The board shall report its estimate to the council not later than the 15th day of February in each year.

**Estimates
for park
purposes**

(3) The council may include in its estimates the sums estimated to be required by the board of park management under subsection (1), or such greater or lesser sums as the council may determine.

**Power
to issue
debentures**

(4) Subject as hereinafter provided, the council may also, on the requisition of the board, raise by the issue of debentures the sums required for the purpose of purchasing the land and privileges that are reported by the board to be necessary for park purposes, and for making permanent improvements upon any land theretofore acquired by the board for park purposes.

(5) Except as otherwise expressly provided in this Act, Application of provisions of the *Municipal Act* as to money by-laws R.S.O. 1980, c. 302 and the debentures to be issued thereunder apply to by-laws passed by a municipal council under the authority of this Act and the debentures issued thereunder.

(6) All money realized or payable under this Act shall be received by the treasurer of the municipality in the same manner as other money, and shall be deposited by him to the credit of the park fund, and shall be paid out by him on the orders of the board. R.S.O. 1970, c. 384, s. 18.

19.—(1) No person shall,

Prohibitions
and
penalties:

- (a) wilfully or maliciously hinder, or interrupt, or cause or procure to be hindered or interrupted, the board or its engineers, surveyors, managers, contractors, servants, agents, workmen, or any of them in the exercise of any of the powers and authorities authorized and contained in this Act;
- (b) wilfully or maliciously let off or discharge any water so that it runs waste or useless from or out of any reservoir, pond, lake or other receptacle for water connected with any such park;
- (c) cause any dog or other animal to swim in, or throw or deposit any injurious, noisome or offensive matter into the water in any reservoir, lake, pond, or other receptacle for water connected with any such park, or upon the ice in case the water is frozen, or in any way foul the water, or commit any unlawful damage or injury to the works, pipes or water, or encourage the same to be done;
- (d) lay or cause to be laid any pipe or main to communicate with any pipe or main belonging to the waterworks connected with any such park or parks, or in any way obtain or use any water thereof without the consent of the board;
- (e) wilfully or maliciously injure, hurt, deface, tear or destroy any ornamental or shade tree or shrub or plant, or any statue, fountain, vase or fixture of ornament or utility in any street, park, avenue, drive or other public place under the control of the board, or wilfully, negligently or carelessly suffer or permit any horse or other animal driven by or for him, or any animal belonging to him or in his custody,

hindering,
etc., board
or its
officers

wasting
water

fouling
reservoir

diverting
water

destroying
ornamental
trees, etc.

possession or control, and lawfully on the street or other public place, to break down, destroy or injure any tree, shrub or plant therein;

injuring
animals, etc.

(f) wilfully or maliciously injure, hurt or otherwise molest or disturb any animal, bird or fish kept in any such park or in the lakes or ponds connected therewith.

Offence

(2) Every person who contravenes any provision of subsection (1) is guilty of an offence and on conviction is liable to a fine of not less than \$1 and not more than \$20; or may be imprisoned for a term of not more than thirty days; and is liable to an action at the suit of the board to make good any damage done by him. R.S.O. 1970, c. 384, s. 19.

TAB 5

Heritage Capital Corporation *Appellant*

v.

**The Equitable Trust Company
(now continued as Equitable Bank),
Lougheed Block Inc., Neil John Richardson,
Hugh Daryl Richardson,
Heritage Property Corporation,
604 1st Street S.W. Inc. and
Krayzel Corp.** *Respondents*

**INDEXED AS: HERITAGE CAPITAL CORP. *v.*
EQUITABLE TRUST CO.**

2016 SCC 19

File No.: 36301.

2016: January 22; 2016: May 6.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
ALBERTA**

Property — Real property — Sale — Right to incentive payments arising under Incentive Agreement registered by caveat on title to land — City adopting by-law designating building as municipal historical resource under Historical Resources Act — City entering into agreement with building owner providing for yearly payments over 15 years to compensate for decrease in economic value due to designation and for cost of rehabilitation work, and imposing restrictions on use of building — Agreement registered by caveat on title to land — Building sold in judicial sale — Whether incentive payments constitute positive covenant running with land either by virtue of Historical Resources Act or by virtue of agreement between City and building owner — Whether incentive payments sold as asset in judicial sale — Historical Resources Act, R.S.A. 2000, c. H-9, s. 29.

Heritage Capital Corporation *Appelante*

c.

**L'Équitable, Compagnie de fiducie (prorogée depuis sous le nom de Banque Équitable),
Lougheed Block Inc., Neil John Richardson,
Hugh Daryl Richardson,
Heritage Property Corporation,
604 1st Street S.W. Inc. et
Krayzel Corp.** *Intimés*

**RÉPERTORIÉ : HERITAGE CAPITAL CORP. *c.*
ÉQUITABLE, CIE DE FIDUCIE**

2016 CSC 19

N° du greffe : 36301.

2016 : 22 janvier; 2016 : 6 mai.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Biens — Biens réels — Vente — Droit à des paiements incitatifs découlant d'un contrat incitatif enregistré par voie de caveat sur le titre du bien-fonds — Adoption par la Ville d'un arrêté désignant un édifice ressource historique municipale en application de la Historical Resources Act — Conclusion par la Ville avec le propriétaire de l'édifice d'un contrat qui prévoit le versement sur une période de 15 ans de paiements annuels visant à indemniser le propriétaire pour la diminution de la valeur économique de l'édifice en raison de sa désignation et pour les frais des travaux de restauration, et qui impose certaines restrictions quant à l'utilisation de l'édifice — Contrat enregistré par voie de caveat sur le titre du bien-fonds — Édifice vendu lors d'une vente sous contrôle de justice — Les paiements incitatifs constituent-ils un engagement positif qui se rattache au bien-fonds soit par l'effet de la Historical Resources Act, soit en vertu du contrat entre la Ville et le propriétaire de l'édifice? — Les paiements incitatifs faisaient-ils partie des éléments d'actif vendus lors de la vente sous contrôle de justice? — Historical Resources Act, R.S.A. 2000, c. H-9, art. 29.

Personal property security — City entering into agreement with building owner providing for incentive payments to compensate for decrease in economic value due to historic resource designation and for cost of rehabilitation work — Building owner assigning right to incentive payments to two successive lenders as security for loans — Building sold in judicial sale — First lender assigning interest in payments to purchaser after closing of sale — Whether priority of interests in payments governed by Personal Property Security Act, R.S.A. 2000, c. P-7.

Lougheed Block Inc. (“Lougheed”) was the owner of the Lougheed Building, located in downtown Calgary, when it was designated a “Municipal Historical Resource” under the *Historical Resources Act* (“HRA”) in 2004. In order to compensate Lougheed for any decrease in economic value due to the designation and for expenses incurred in carrying out rehabilitation work to the building, the City of Calgary agreed to pay Lougheed \$3.4 million in 15 annual installments (“Incentive Payments”). The agreement (“Incentive Agreement”) between Lougheed and the City, which also imposed certain restrictions on the owner of the building in respect of its use, was registered by caveat on title to the land.

In November 2006, Lougheed borrowed money from Equitable Trust. The loan was secured by, among other things, the assignment of the Incentive Agreement. In May 2007, Lougheed obtained additional financing from Heritage Capital Corporation and also assigned to it, as security for the loan, its right to the Incentive Payments. In May 2009, Lougheed defaulted on Equitable Trust’s loan. The latter then commenced an action to enforce some of its security. As a consequence, the Lougheed Building was advertised for judicial sale. The parent company of 604 1st Street S.W. Inc. (“604”) presented an offer (“604 Offer”), which was accepted in July 2010.

Shortly before the sale’s closing date, Lougheed applied to a master of the Court of Queen’s Bench for a declaration that the Incentive Payments were not an interest in land and were not included in the assets being sold to 604 in the judicial sale. The master issued the requested declaration. On appeal by 604, a chambers judge of the same court upheld the master’s declaration, finding

Sûretés mobilières — Conclusion par la Ville avec le propriétaire d’un édifice d’un contrat qui prévoit le versement de paiements incitatifs visant à indemniser le propriétaire pour la diminution de la valeur économique de l’édifice en raison de sa désignation comme ressource historique et pour les frais des travaux de restauration — Cession par le propriétaire de l’édifice à deux prêteurs successifs du droit aux paiements incitatifs en guise de garantie des prêts — Édifice vendu lors d’une vente sous contrôle de justice — Cession par le premier prêteur d’un intérêt sur les paiements à l’acheteur après la clôture de la vente — L’ordre de priorité quant aux paiements est-il régi par la Personal Property Security Act, R.S.A. 2000, c. P-7?

Lougheed Block Inc. (« Lougheed ») était le propriétaire de l’édifice appelé « Lougheed Building » (l’« Édifice »), situé au centre-ville de Calgary, au moment où celui-ci a été désigné « ressource historique municipale » en vertu de la *Historical Resources Act* (« HRA ») en 2004. Afin d’indemniser Lougheed pour toute diminution de la valeur économique de l’Édifice en raison de sa désignation et pour des dépenses engagées afin de réaliser les travaux de restauration de l’Édifice, la Ville de Calgary (la « Ville ») a accepté de payer à Lougheed la somme de 3,4 M\$ répartie en 15 versements annuels (« Paiements incitatifs »). Le contrat (« Contrat incitatif ») intervenu entre Lougheed et la Ville, qui imposait également au propriétaire de l’Édifice certaines restrictions quant à l’utilisation de celui-ci, a été enregistré par voie de caveat sur le titre du bien-fonds.

En novembre 2006, Lougheed a emprunté des fonds à L’Équitable, Compagnie de fiducie (« Équitable »). Le prêt a été garanti notamment par la cession du Contrat incitatif. En mai 2007, Lougheed a obtenu du financement additionnel d’Heritage Capital Corporation et lui a cédé à elle aussi, en guise de garantie du prêt, son droit aux Paiements incitatifs. Lougheed a fait défaut de rembourser le prêt consenti par Équitable en mai 2009. Cette dernière a alors intenté une action visant l’exécution d’une partie de sa garantie. Par suite de cette action, l’Édifice a été mis en vente sous contrôle de justice. La société mère de 604 1st Street S.W. Inc. (« 604 ») a présenté une offre (l’« Offre de 604 ») qui a été acceptée en juillet 2010.

Peu avant la date de clôture de la vente, Lougheed a demandé à un protonotaire de la Cour du Banc de la Reine de rendre une décision déclarant que les Paiements incitatifs ne constituaient pas un intérêt foncier et ne faisaient pas partie des éléments d’actif vendus à 604 lors de la vente sous contrôle de justice. Le protonotaire a rendu la décision déclaratoire demandée. 604 a interjeté

that s. 29(3) of the *HRA* did not operate such that the Incentive Payments could run with the land as a positive covenant. On further appeal by 604, the majority of the Court of Appeal allowed the appeal, holding that the *HRA* creates *sui generis* covenants that displace the common law rule that positive covenants do not run with the land.

Held: The appeal should be allowed.

Correctness is the appropriate standard for reviewing the chambers judge's interpretation of the common law, as well as of the *HRA* given that statutory interpretation is a question of law. The palpable and overriding error standard applies to the chambers judge's interpretation of the Incentive Agreement and the 604 Offer, since contractual interpretation is a question of mixed fact and law.

Section 29 of the *HRA* does not completely displace the common law rule that positive covenants do not run with the land. Rather, s. 29 limits the positive covenants that may run with the land to those that are in favour of the person or organizations listed at s. 29(1), namely: the Minister; the council of the municipality in which the land is located; the Alberta Historical Resources Foundation; or an historical organization that is approved by the Minister. It does not permit positive covenants in favour of an entity not listed in s. 29(1) to run with the land. An application of the relevant principles of statutory interpretation leads to the conclusion that the exception to the common law rule provided for in s. 29 of the *HRA* should be limited by the precise language of the provision and the underlying purpose of the *HRA*. Had the legislature intended to completely displace the common law rules regarding positive covenants and create *sui generis* covenants and conditions that are enforceable by both the City and the landowner, it would have said so expressly. Section 29 is intended to permit governments and public interest bodies that have no interest in the land or building to enforce covenants and conditions that are in their favour. The chambers judge properly interpreted the *HRA*.

In the case at bar, the right to the Incentive Payments did not become an interest that runs with the land by virtue of the *HRA*. Although the City falls under the

appel et un juge en cabinet du même tribunal a confirmé la décision déclaratoire du protonotaire, estimant que le par. 29(3) de la *HRA* n'avait pas pour effet de permettre le rattachement des Paiements incitatifs au bien-fonds en tant qu'engagement positif. Au terme d'un appel formé subséquemment par 604, les juges majoritaires de la Cour d'appel ont accueilli l'appel, statuant que la *HRA* crée des engagements *sui generis* qui écartent la règle de common law selon laquelle des engagements positifs ne se rattachent pas au bien-fonds.

Arrêt : Le pourvoi est accueilli.

La décision correcte est la norme applicable pour examiner l'interprétation par le juge en cabinet de la common law, ainsi que de la *HRA* étant donné que l'interprétation d'une loi est une question de droit. C'est la norme de l'erreur manifeste et déterminante qui s'applique à l'interprétation par le juge en cabinet du Contrat incitatif et de l'Offre de 604, car l'interprétation contractuelle est une question mixte de fait et de droit.

L'article 29 de la *HRA* n'écarte pas complètement la règle de common law selon laquelle des engagements positifs ne se rattachent pas au bien-fonds. L'article 29 limite plutôt les engagements positifs susceptibles de rattachement au bien-fonds aux seuls engagements de cette nature énoncés en faveur de la personne ou des organisations mentionnées au par. 29(1), à savoir : le ministre, le conseil de la municipalité dans laquelle se trouve le bien-fonds, l'Alberta Historical Resources Foundation ou encore une organisation de conservation du patrimoine agréée par le ministre. Il n'autorise pas le rattachement au bien-fonds d'engagements positifs énoncés en faveur d'une entité qui n'est pas énumérée au par. 29(1). L'application des principes d'interprétation des lois pertinents mène à la conclusion que la portée de l'exception établie à l'art. 29 de la *HRA* à l'égard de la règle de common law doit être limitée par le langage exprès utilisé dans la disposition et par l'objet qui sous-tend la *HRA*. Si le législateur avait voulu écarter complètement les règles de common law relatives aux engagements positifs et créer des conditions et engagements *sui generis* dont l'exécution peut être demandée tant par la Ville que par le propriétaire foncier, il l'aurait dit en termes exprès. L'article 29 vise à permettre aux gouvernements ou entités à caractère public qui ne possèdent aucun intérêt dans le bien-fonds ou l'immeuble concerné de demander l'exécution des conditions et engagements énoncés en leur faveur. Le juge en cabinet a bien interprété la *HRA*.

Dans la présente affaire, le droit aux Paiements incitatifs n'est pas devenu un intérêt rattaché au bien-fonds par l'effet de la *HRA*. Bien que la Ville fasse partie des

organizations listed in s. 29(1), the covenant to pay the Incentive Payments is not in its favour. Therefore, the Incentive Payments do not run with the land under the *HRA*. Furthermore, the Incentive Agreement itself does not reveal an intention that the Incentive Payments would run with the land. Nothing in the Incentive Agreement indicates that the parties to the agreement intended the payments to go to a future owner; rather, a reasonable interpretation of the agreement is that all the Incentive Payments were intended to go to Lougheed. Therefore, even if the common law rule could be circumvented in the case at bar, 604's claim to the payments would still fail. There is no basis on which to disturb the chambers judge's findings with respect to the contractual interpretation of the Incentive Agreement.

The Incentive Payments were not sold in the judicial sale of the Lougheed Building to 604. The chambers judge's conclusion to that effect is well supported by the evidence, and he did not make a palpable and overriding error in his interpretation of the 604 Offer. There was no indication, express or otherwise, in any of the documents related to the sale that the court intended to sell, or 604 intended to buy, the Incentive Payments.

The Incentive Payments were assigned as security and the order of priorities is therefore governed by the *Personal Property Security Act* ("PPSA"). As set out in s. 3(1)(a), the *PPSA* applies to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral. The Incentive Payments are a chose in action, as the right to the payments is merely contractual and is not an interest that runs with the land or that is ancillary to the real property. Therefore, any interests in the payments are not exempt from the *PPSA*. If the parties disagree about the order of priorities under the *PPSA*, this issue alone should be remitted to a master to be decided.

Cases Cited

Referred to: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Austerberry v. Corporation of Oldham* (1885), 29 Ch. D. 750; *Rhone v. Stephens*, [1994] 2 A.C. 310; *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 58 O.R. (3d) 481; *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*,

organisations mentionnées au par. 29(1), l'engagement de verser les Paiements incitatifs n'a pas été souscrit en sa faveur. Par conséquent, les Paiements incitatifs ne se rattachent pas au bien-fonds au sens de la *HRA*. De plus, aucune intention de rattacher les Paiements incitatifs au bien-fonds ne ressort du Contrat incitatif lui-même. Le Contrat incitatif ne confirme d'aucune manière que les parties à ce contrat entendaient que les paiements puissent être versés à un futur propriétaire. Au contraire, une façon raisonnable d'interpréter le contrat consiste plutôt à considérer que tous les Paiements incitatifs étaient censés être versés à Lougheed. Par conséquent, même s'il était possible d'éviter l'application de la règle de common law en l'espèce, la demande de 604 visant les paiements devrait néanmoins être rejetée. Il n'y a aucune raison de modifier les conclusions du juge en cabinet relativement à l'interprétation du Contrat incitatif.

Les Paiements incitatifs n'ont pas été inclus dans la vente sous contrôle de justice de l'Édifice à 604. La conclusion du juge en cabinet à ce sujet est amplement étayée par la preuve et il n'a commis aucune erreur manifeste et déterminante dans son interprétation de l'Offre de 604. Aucun des documents relatifs à la vente n'indique, expressément ou autrement, que les Paiements incitatifs font partie de la vente, ou que 604 entendait les acheter.

Les Paiements incitatifs ont été cédés à titre de garantie et l'ordre de priorité est en conséquence régi par la *Personal Property Security Act* (« *PPSA* »). Comme l'indique l'al. 3(1)(a), la *PPSA* s'applique à toute opération qui crée essentiellement une sûreté, indépendamment de sa forme et de l'identité de la personne qui possède le titre relatif au bien grevé. Les Paiements incitatifs sont une chose non possessoire, car le droit aux paiements a simplement un caractère contractuel et n'est pas un intérêt rattaché au bien-fonds ou accessoire à l'immeuble. En conséquence, aucune cession relative à ces paiements n'échappe à l'application de la *PPSA*. Si les parties ne s'entendent pas sur l'ordre de priorité régi par la *PPSA*, cette seule question devrait être renvoyée à un protonotaire pour décision.

Jurisprudence

Arrêts mentionnés : *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633; *King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Compagnie des chemins de fer nationaux du Canada c. Canada (Procureur général)*, 2014 CSC 40, [2014] 2 R.C.S. 135; *Austerberry c. Corporation of Oldham* (1885), 29 Ch. D. 750; *Rhone c. Stephens*, [1994] 2 A.C. 310; *Amberwood Investments Ltd. c. Durham Condominium Corp. No. 123* (2002), 58 O.R. (3d) 481; *Westbank Holdings Ltd. c.*

2001 BCCA 268, 155 B.C.A.C. 1; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18, [2016] 1 S.C.R. 273.

Statutes and Regulations Cited

Historical Resources Act, R.S.A. 2000, c. H-9, ss. 1(e) “historic resource”, 2, 26, 28, 29.

Personal Property Security Act, R.S.A. 2000, c. P-7, ss. 3(1)(a), 4(f), (g).

Authors Cited

Côté, Pierre-André, in collaboration with Stéphane Beaulac and Mathieu Devinat. *The Interpretation of Legislation in Canada*, 4th ed. Toronto: Carswell, 2011.

Di Castri, Victor. *Registration of Title to Land*, vol. 1. Toronto: Carswell, 1987 (loose-leaf updated 2010, release 6).

Hall, Geoff R. *Canadian Contractual Interpretation Law*, 2nd ed. Markham, Ont.: LexisNexis, 2012.

Halsbury's Laws of England, vol. 36, 3rd ed. London: Butterworth & Co., 1961.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

APPEAL from a judgment of the Alberta Court of Appeal (O'Brien, Slatter and Wakeling JJ.A.), 2014 ABCA 427, 588 A.R. 258, 7 Alta. L.R. (6th) 285, 3 P.P.S.A.C. (4th) 69, 49 R.P.R. (5th) 19, 626 W.A.C. 258, [2015] 3 W.W.R. 139, [2014] A.J. No. 1397 (QL), 2014 CarswellAlta 2280 (WL Can.), setting aside a decision of Jeffrey J., 2013 ABQB 209, 550 A.R. 337, 77 Alta. L.R. (5th) 276, 1 P.P.S.A.C. (4th) 38, 31 R.P.R. (5th) 253, [2013] A.J. No. 362 (QL), 2013 CarswellAlta 457 (WL Can.), which affirmed a decision of Master Laycock, 2011 ABQB 269, 512 A.R. 200, 52 Alta. L.R. (5th) 414, [2011] A.J. No. 463 (QL), 2011 CarswellAlta 682 (WL Can.). Appeal allowed.

Jeffrey E. Sharpe and Paul G. Chiswell, for the appellant.

Westgate Shopping Centre Ltd., 2001 BCCA 268, 155 B.C.A.C. 1; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559; *Untel c. Ontario (Finances)*, 2014 CSC 36, [2014] 2 R.C.S. 3; *Parry Sound (district), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, 2003 CSC 42, [2003] 2 R.C.S. 157; *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831; *R. c. Proulx*, 2000 CSC 5, [2000] 1 R.C.S. 61; *Krayzel Corp. c. Équitable, Cie de fiducie*, 2016 CSC 18, [2016] 1 R.C.S. 273.

Lois et règlements cités

Historical Resources Act, R.S.A. 2000, c. H-9, art. 1(e) « historic resource », 2, 26, 28, 29.

Personal Property Security Act, R.S.A. 2000, c. P-7, art. 3(1)(a), 4(f), (g).

Doctrine et autres documents cités

Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et de Mathieu Devinat. *Interprétation des lois*, 4^e éd., Montréal, Thémis, 2009.

Di Castri, Victor. *Registration of Title to Land*, vol. 1, Toronto, Carswell, 1987 (loose-leaf updated 2010, release 6).

Hall, Geoff R. *Canadian Contractual Interpretation Law*, 2nd ed., Markham (Ont.), LexisNexis, 2012.

Halsbury's Laws of England, vol. 36, 3rd ed., London, Butterworth & Co., 1961.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed., Markham (Ont.), LexisNexis, 2014.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges O'Brien, Slatter et Wakeling), 2014 ABCA 427, 588 A.R. 258, 7 Alta. L.R. (6th) 285, 3 P.P.S.A.C. (4th) 69, 49 R.P.R. (5th) 19, 626 W.A.C. 258, [2015] 3 W.W.R. 139, [2014] A.J. No. 1397 (QL), 2014 CarswellAlta 2280 (WL Can.), qui a infirmé une décision du juge Jeffrey, 2013 ABQB 209, 550 A.R. 337, 77 Alta. L.R. (5th) 276, 1 P.P.S.A.C. (4th) 38, 31 R.P.R. (5th) 253, [2013] A.J. No. 362 (QL), 2013 CarswellAlta 457 (WL Can.), laquelle avait confirmé une décision du protonotaire Laycock, 2011 ABQB 269, 512 A.R. 200, 52 Alta. L.R. (5th) 414, [2011] A.J. No. 463 (QL), 2011 CarswellAlta 682 (WL Can.). Pourvoi accueilli.

Jeffrey E. Sharpe et Paul G. Chiswell, pour l'appelante.

No one appeared for the respondent The Equitable Trust Company.

Toby D. Schultz, for the respondents the Lougheed Block Inc., Neil John Richardson, Hugh Daryl Richardson and the Heritage Property Corporation.

Derrick S. Pagenkopf and *Peter Morrison*, for the respondent 604 1st Street S.W. Inc.

No one appeared for the respondent Krayzel Corp.

The judgment of the Court was delivered by

GASCON AND CÔTÉ JJ. —

I. Overview

[1] At the centre of this appeal is the Lougheed Building in downtown Calgary, which was designated a “Municipal Historic Resource” under the *Historical Resources Act*, R.S.A. 2000, c. H-9 (“HRA”). The owner at the time of the designation, Lougheed Block Inc. (“LBI”), agreed to rehabilitate the building and adhere to certain restrictions on its use in exchange for 15 yearly payments (“Incentive Payments”) from the City of Calgary (“City”) totalling \$3.4 million. The purpose of the Incentive Payments, owed under the “Lougheed Building Rehabilitation Incentive Agreement” (“Incentive Agreement”), was to compensate LBI for the restoration and for any decrease in economic value due to the historic resource designation. That agreement was registered by caveat on title to the land pursuant to the *HRA*.

[2] This appeal involves a dispute between one of LBI’s creditors, Heritage Capital Corporation (“Heritage”), and the present owner of the Lougheed Building, 604 1st Street S.W. Inc. (“604”), both of which claim a right to the Incentive Payments. At issue is whether the Incentive Payments constitute a positive covenant running with the land by virtue of

Personne n'a comparu pour l'intimée L'Équitable, Compagnie de fiducie.

Toby D. Schultz, pour les intimés Lougheed Block Inc., Neil John Richardson, Hugh Daryl Richardson et Heritage Property Corporation.

Derrick S. Pagenkopf et *Peter Morrison*, pour l'intimée 604 1st Street S.W. Inc.

Personne n'a comparu pour l'intimée Krayzel Corp.

Version française du jugement de la Cour rendu par

LES JUGES GASCON ET CÔTÉ —

I. Aperçu

[1] L’édifice appelé « Lougheed Building » (l’« Édifice »), situé au centre-ville de Calgary, est au cœur du présent pourvoi. Il a été désigné [TRA-DUCTION] « ressource historique municipale » en application de la *Historical Resources Act*, R.S.A. 2000, c. H-9 (« HRA »). Le propriétaire au moment de la désignation, Lougheed Block Inc. (« LBI »), a accepté de le restaurer et de respecter certaines restrictions quant à son utilisation moyennant 15 paiements annuels (« Paiements incitatifs ») totalisant 3,4 millions de dollars par la Ville de Calgary (« Ville »). Les Paiements incitatifs, dus aux termes du « Lougheed Building Rehabilitation Incentive Agreement » (« Contrat incitatif »), visaient à indemniser LBI pour les frais de restauration et pour toute diminution de la valeur économique de l’Édifice en raison de sa désignation comme ressource historique. Ce contrat a été enregistré par voie de caveat (mise en garde) sur le titre du bien-fonds conformément à la *HRA*.

[2] Le présent pourvoi porte sur un différend entre l’une des créancières de LBI, Heritage Capital Corporation (« Heritage »), et la propriétaire actuelle de l’Édifice, 604 1st Street S.W. Inc. (« 604 »), qui prétendent toutes deux avoir droit aux Paiements incitatifs. Il s’agit de décider si ces paiements constituent un engagement positif (engagement de faire) se

the *HRA*, whether they were sold in the judicial sale of the Lougheed Building, and what the present-day effect is of a number of agreements assigning an interest in the Incentive Payments.

[3] The master in chambers and the chambers judge both found that the Incentive Payments did not run with the land by operation of the *HRA* and that they had not been sold to 604 in the judicial sale. They declined to decide the issue of priority. The majority of the Court of Appeal disagreed, finding that the *HRA* creates *sui generis* covenants that displace the common law rule that positive covenants do not run with the land. They accordingly held that the Incentive Payments ran with the land. O'Brien J.A., dissenting, would have adopted the chambers judge's interpretation of the *HRA*.

[4] We would allow the appeal. Even though, at s. 29(3), the *HRA* provides that a condition or covenant relating to the preservation or restoration of any land or building that is registered on title under s. 29(2) runs with the land and can be enforced whether it is positive or negative, we conclude that the only covenants that run with the land under the *HRA* are those that are in favour of the person or organizations listed in s. 29(1). In the instant case, although the City falls under the listed organizations, the covenant to pay the Incentive Payments is not in its favour. Therefore, the Incentive Payments do not run with the land under the *HRA*. In any event, the Incentive Agreement between LBI and the City shows no intention for the Incentive Payments to run with the land.

[5] We further conclude that the Incentive Payments were not sold in the judicial sale of the Lougheed Building. There was no indication, express or otherwise, in any of the documents related to the sale that the court intended to sell, or 604 intended

rattachant au bien-fonds par application de la *HRA*, s'ils ont été inclus dans la vente sous contrôle de justice de l'Édifice et quel est l'effet actuel d'un certain nombre de contrats de cession d'un intérêt sur les Paiements incitatifs.

[3] Le protonotaire en chambre et le juge en cabinet ont tous deux conclu que les Paiements incitatifs ne se rattachaient pas au bien-fonds par l'effet de la *HRA* et qu'ils n'ont pas été vendus à 604 lors de la vente sous contrôle de justice. Le protonotaire et le juge ont refusé de statuer sur la question de la priorité. Les juges majoritaires de la Cour d'appel n'ont pas souscrit à ces conclusions, estimant que la *HRA* crée des engagements *sui generis* qui écartent la règle de common law selon laquelle des engagements positifs ne se rattachent pas au bien-fonds. Ils ont en conséquence jugé que les Paiements incitatifs se rattachaient au bien-fonds. Le juge O'Brien, dissident, aurait fait sienne l'interprétation qu'a adoptée le juge en cabinet de la *HRA*.

[4] Nous sommes d'avis d'accueillir le pourvoi. Même si le par. 29(3) de la *HRA* prévoit qu'une condition ou un engagement lié à la préservation ou à la restauration d'un bien-fonds ou d'un immeuble et enregistré sur le titre en application du par. 29(2) se rattache au bien-fonds et est susceptible d'exécution, que cette condition ou cet engagement soit de nature positive ou négative, nous concluons que les seuls engagements se rattachant au bien-fonds qui sont visés par la *HRA* sont ceux énoncés en faveur de la personne ou des organisations mentionnées au par. 29(1). En l'espèce, bien que la Ville fasse partie des organisations mentionnées, l'engagement de verser les Paiements incitatifs n'a pas été souscrit en sa faveur. Par conséquent, les Paiements incitatifs ne se rattachent pas au bien-fonds au sens de la *HRA*. Par ailleurs, le Contrat incitatif intervenu entre LBI et la Ville n'indique daucune façon que celles-ci avaient l'intention que les Paiements incitatifs se rattachent au bien-fonds.

[5] Nous concluons aussi que les Paiements incitatifs n'ont pas été inclus dans la vente sous contrôle de justice de l'Édifice. Aucun des documents relatifs à la vente n'indique, expressément ou autrement, que les Paiements incitatifs font partie de la vente,

to buy, the Incentive Payments. Granting the payments to 604 as the current owner would create an undeserved windfall and would have no commercial rationale. Lastly, we find that the Incentive Payments were assigned as security and that the order of priorities is therefore governed by the *Personal Property Security Act*, R.S.A. 2000, c. P-7 (“PPSA”). To the extent that the parties disagree about the effect of the *PPSA*, we would remit the matter to a master in chambers for determination on the priority issue alone.

II. Facts

[6] LBI acquired the Lougheed Building in 2003. It owned the building at the time it was designated a “Municipal Historic Resource” under s. 26 of the *HRA* in a bylaw passed by the City in 2004. Following the designation, LBI and the City entered into the Incentive Agreement in 2006. It provided that LBI would carry out rehabilitation work on the building and that, upon completion of the work, the City would begin paying LBI \$3.4 million in Incentive Payments, in 15 annual instalments. The purpose of the Incentive Payments was twofold: to satisfy, pursuant to s. 28 of the *HRA*, all of LBI’s rights to compensation from the City for the loss of economic value sustained as a result of the passage of the designating bylaw and to compensate LBI for expenses incurred in carrying out the rehabilitation work. This work was required to repair the building and restore it to its original appearance of 1912. LBI completed the rehabilitation work in 2007 and started receiving the Incentive Payments shortly thereafter.

[7] The Incentive Agreement also imposed certain restrictions on the owner of the Lougheed Building, namely:

8.4 The Building and Land shall be used for commercial purposes and no other purpose until all Yearly Installments have been paid pursuant to this Agreement.

ou que 604 entendait les acheter. Accorder ces Paiements à 604 en sa qualité de propriétaire actuelle lui procurerait un avantage auquel elle n’a pas droit et n’aurait aucune logique sur le plan commercial. Enfin, nous estimons que les Paiements incitatifs ont été cédés à titre de garantie et que l’ordre de priorité est en conséquence régi par la *Personal Property Security Act*, R.S.A. 2000, c. P-7 (« *PPSA* »). Dans la mesure où les parties ne s’entendent pas sur l’effet de la *PPSA*, nous sommes d’avis de renvoyer l’affaire à un protonotaire en chambre à la seule fin de trancher la question de la priorité.

II. Faits

[6] LBI a acquis l’Édifice en 2003. Elle en était la propriétaire au moment où il a été désigné « ressource historique municipale » en vertu de l’art. 26 de la *HRA* au moyen d’un arrêté adopté par la Ville en 2004. Après la désignation, LBI et la Ville ont conclu en 2006 le Contrat incitatif. Ce contrat prévoyait que LBI procéderait à des travaux de restauration de l’immeuble et qu’une fois les travaux achevés, la Ville commencerait à lui verser, au titre des Paiements incitatifs, la somme de 3,4 M\$ répartie en 15 versements annuels. Ces paiements visaient un double objectif : satisfaire, en conformité avec l’art. 28 de la *HRA*, l’ensemble des droits de LBI d’être indemnisée par la Ville pour toute perte de valeur économique résultant de l’arrêté municipal de désignation et pour des dépenses engagées afin de réaliser les travaux de restauration. Ces travaux étaient nécessaires pour réparer l’Édifice et le restaurer afin de lui redonner l’apparence qu’il avait à l’origine, en 1912. LBI a terminé les travaux de restauration en 2007 et a commencé à recevoir les Paiements incitatifs peu de temps après.

[7] Le Contrat incitatif imposait également à la propriétaire de l’Édifice certaines restrictions :

[TRADUCTION]

8.4 L’immeuble et le bien-fonds doivent être utilisés exclusivement à des fins commerciales jusqu’à ce que tous les versements annuels aient été effectués conformément au présent contrat.

8.5 The Owner shall use its best efforts to ensure that performance space is maintained within that portion of the Building that is currently referred to as the Grand Theatre.

[8] As was stipulated in clause 8.3, the Incentive Agreement was registered by caveat on title to the land. The entire agreement was attached to the caveat as a schedule.

[9] In November 2006, LBI borrowed money from The Equitable Trust Company, since continued as the Equitable Bank (“Equitable”). The loan was secured by a mortgage, a general security agreement, and assignments of a range of agreements, including the Incentive Agreement (collectively the “Equitable Assignment”). Equitable filed a financing statement at the Personal Property Registry at that time. In May 2007, LBI obtained additional financing from Heritage, and also assigned its right to the Incentive Payments to Heritage as security for the loan (the “Heritage Assignment”). In May 2009, LBI defaulted on the Equitable loan, and in June 2009, Equitable commenced an action to enforce some of its security. The Lougheed Building was advertised for judicial sale in March 2010. In June 2010, 604’s parent company presented an offer to buy the property (the “604 Offer”), which was accepted in July 2010 by means of an “Order Confirming Sale” issued by the Court of Queen’s Bench.

[10] Towards the end of August 2010, shortly before the sale’s closing date, LBI applied to a master in chambers for a declaration that the Incentive Payments were not an interest in land and were not included in the assets being sold to 604. After hearing the parties’ submissions, the master adjourned the application without deciding the issue, on the condition that the transaction would close as scheduled on September 1, 2010, without prejudice to the parties’ rights on the issue of entitlement to the Incentive Payments. After the closing, Equitable executed a specific assignment of its interest in the Incentive Agreement to 604 (the “604 Assignment”). The Heritage Assignment was only registered at the Personal Property Registry in October 2010. There is no evidence on the record in this

8.5 La propriétaire doit mettre tout en œuvre pour assurer la préservation de la salle de spectacle dans la partie de l’immeuble appelée présentement Grand Theatre.

[8] Comme le prévoyait la clause 8.3, le Contrat incitatif a été enregistré par voie de caveat sur le titre du bien-fonds. Le Contrat complet a été joint en annexe au caveat.

[9] En novembre 2006, LBI a emprunté des fonds à L’Équitable, Compagnie de fiducie, prorogée depuis sous le nom de Banque Équitable (« Équitable »). Le prêt a été garanti par une hypothèque, un contrat général de sûreté et la cession de divers contrats, y compris le Contrat incitatif (collectivement appelés la « Cession en faveur d’Équitable »). Équitable a alors déposé un état financier au bureau d’enregistrement des sûretés mobilières. En mai 2007, LBI a obtenu du financement additionnel d’Heritage et lui a cédé son droit aux Paiements incitatifs en guise de garantie du prêt (la « Cession en faveur d’Heritage »). LBI ayant fait défaut de rembourser le prêt consenti par Equitable en mai 2009, cette dernière a intenté une action visant l’exécution d’une partie de sa garantie en juin 2009. L’Édifice a été mis en vente sous contrôle de justice en mars 2010. En juin 2010, la société mère de 604 a présenté une offre d’achat (l’« Offre de 604 ») qui a été acceptée en juillet 2010 par le biais d’une [TRADUCTION] « Ordonnance de confirmation de la vente » rendue par la Cour du Banc de la Reine.

[10] Vers la fin d’août 2010, peu avant la date de clôture de la vente, LBI a demandé à un protonotaire en chambre de rendre une décision déclarant que les Paiements incitatifs ne constituaient pas un intérêt foncier et ne faisaient pas partie des éléments d’actif vendus à 604. Après avoir entendu les plaidoiries des parties, le protonotaire a ajourné la séance sans trancher la question litigieuse, à la condition que la vente soit conclue comme prévu le 1^{er} septembre 2010, sans préjudice aux droits des parties relativement aux Paiements incitatifs. Après la clôture de la vente, Équitable a signé en faveur de 604 un contrat de cession spécifique de son intérêt dans le Contrat incitatif (la « Cession en faveur de 604 »). La Cession en faveur d’Heritage a seulement été enregistrée au bureau d’enregistrement des sûretés mobilières

Court that the 604 Assignment was registered at the Personal Property Registry before the Heritage Assignment.

[11] It is undisputed that 604, as the owner of the Lougheed Building, is subject to the covenants in favour of the City set out in clauses 8.4 and 8.5 of the Incentive Agreement, which restrict the building's use. In 604's submission, as a result of the registration of the entire Incentive Agreement on title pursuant to s. 29 of the *HRA*, the Incentive Payments also constitute a positive covenant running with the land to which 604 is entitled as the new owner of the Lougheed Building. In the alternative, 604 submits that the Incentive Payments were among the assets sold in the judicial sale.

[12] Heritage is supported by LBI in its argument that the *HRA* does not allow the Incentive Payments to run with the land, that the right to the Incentive Payments is merely contractual and that the parties to the Incentive Agreement never intended these payments to run with the land. It also submits that the Incentive Payments were not sold as an asset in the judicial sale. Therefore, Heritage argues that as a creditor to LBI, it was assigned the Incentive Payments as security, and that it has priority with respect to these payments because its security was registered under the *PPSA* first.

III. Decisions Below

A. *Alberta Court of Queen's Bench, 2011 ABQB 269, 512 A.R. 200*

[13] Master Laycock granted the order sought by LBI, declaring that the Incentive Payments were not an interest in land. In his view, the scheme of the *HRA* required the City to compensate the owner of the property at the time the land or building was designated a historic resource. He concluded that the parties to the Incentive Agreement had intended

en octobre 2010. Il n'y a au dossier dont dispose notre Cour aucun élément de preuve indiquant que la Cession en faveur de 604 a été enregistrée au bureau d'enregistrement des sûretés mobilières avant la Cession en faveur d'Heritage.

[11] Personne ne conteste qu'à titre de propriétaire de l'Édifice, 604 est assujettie aux engagements stipulés en faveur de la Ville aux clauses 8.4 et 8.5 du Contrat incitatif restreignant l'utilisation qui peut être faite de l'immeuble. 604 prétend que, par suite de l'enregistrement du Contrat incitatif complet sur le titre conformément à l'art. 29 de la *HRA*, les Paiements incitatifs constituent eux aussi un engagement positif qui se rattache au bien-fonds et au bénéfice duquel a droit 604 en qualité de nouvelle propriétaire de l'Édifice. Subsidiairement, 604 soutient que les Paiements incitatifs faisaient partie des éléments d'actif visés par la vente sous contrôle de justice.

[12] Heritage prétend, avec l'appui de LBI, que la *HRA* ne permet pas le rattachement des Paiements incitatifs au bien-fonds, que le droit à ces paiements est simplement de nature contractuelle et que l'intention des parties au Contrat incitatif n'a jamais été que ces paiements soient rattachés au bien-fonds. Toujours selon Heritage, les Paiements incitatifs ne faisaient pas partie des éléments d'actif vendus lors de la vente sous contrôle de justice. En conséquence, elle fait valoir qu'en qualité de créancière de LBI, ces paiements lui ont été cédés à titre de garantie et qu'elle a priorité à leur égard étant donné que c'est sa sûreté qui a été enregistrée la première en vertu de la *PPSA*.

III. Décisions des juridictions inférieures

A. *Cour du Banc de la Reine de l'Alberta, 2011 ABQB 269, 512 A.R. 200*

[13] Le protonotaire Laycock a rendu l'ordonnance demandée par LBI et déclaré que les Paiements incitatifs ne constituaient pas un intérêt foncier. À son avis, suivant le régime établi par la *HRA*, la Ville était tenue d'indemniser la propriétaire des lieux au moment où le bien-fonds ou l'immeuble ont été désignés ressource historique. Il a conclu que

the Incentive Payments to be a purely contractual benefit that was to be bestowed on LBI. He further declared that the Incentive Payments had not been sold to 604 as an asset in the judicial sale. He found that neither Equitable's statement of claim nor the order for sale of the Lougheed Building nor the judicial sale listing indicated that the court intended to include the payments in the judicial sale.

[14] The master further noted that there was no mention of the Incentive Payments in the 604 Offer or in the court's acceptance of the offer. Equitable's statement of claim referred to its general security agreement, which included personal property "located at or used in connection with the property", but he was of the view that the Incentive Payments did not fall within that description of the property. With respect to the 604 Assignment, which had been executed after the sale of the Lougheed Building, the master held that because the Incentive Payments were only collateral for the debt and the debt had not been transferred, the transfer of the interest in the Incentive Payments was ineffective.

B. Alberta Court of Queen's Bench, 2013 ABQB 209, 550 A.R. 337

[15] The chambers judge, Jeffrey J., dismissed 604's appeal of the master's order, declaring that LBI had been entitled to receive the Incentive Payments as at August 30, 2010. He found that s. 29(3) of the *HRA* did not operate such that the Incentive Payments could run with the land as a positive covenant, given that only covenants in favour of the City can run with the land under that provision. Jeffrey J. agreed with the master's conclusion that the scheme of the *HRA* is to require the City to compensate the owner of property at the time of a designation under s. 26. In his view, the conclusion that the City's covenant to pay did not run with the land was consistent with the apparent intention of the parties to the Incentive Agreement. Regarding the judicial sale, he found that if the right to receive the Incentive Payments were an asset included in the sale, the 604 Offer would have expressly referred to it.

les parties au Contrat incitatif avaient l'intention que les Paiements incitatifs constituent un avantage purement contractuel réservé à LBI. Il a aussi déclaré que ces paiements ne faisaient pas partie des éléments d'actif vendus à 604 lors de la vente sous contrôle de justice. Il a conclu que ni la déclaration d'Équitable, ni l'ordonnance de vente de l'Édifice, ni l'avis de vente sous contrôle de justice n'indiquaient que le tribunal entendait que les paiements soient inclus dans cette vente.

[14] Le protonotaire a ajouté qu'il n'a aucunement été fait mention des Paiements incitatifs dans l'Offre de 604 ou dans l'acceptation de cette offre. Dans sa déclaration, Équitable se réfère à son contrat général de sûreté, qui incluait les biens meubles [TRADUCTION] « se trouvant sur la propriété ou utilisés à l'égard de celle-ci », mais de l'avis du protonotaire les Paiements incitatifs n'étaient pas inclus dans cette description de la propriété. En ce qui concerne la Cession en faveur de 604, qui a été conclue après la vente de l'Édifice, le protonotaire a jugé que, comme les Paiements incitatifs n'étaient qu'accessoires à la créance et que celle-ci n'avait pas été transférée, le transfert de l'intérêt sur les Paiements incitatifs était inopérant.

B. Cour du Banc de la Reine de l'Alberta, 2013 ABQB 209, 550 A.R. 337

[15] Le juge en cabinet, le juge Jeffrey, a rejeté l'appel formé par 604 contre l'ordonnance du protonotaire, déclarant que c'est LBI qui, au 30 août 2010, avait droit aux Paiements incitatifs. Selon lui, le par. 29(3) de la *HRA* n'avait pas pour effet de permettre le rattachement de ces paiements au bien-fonds en tant qu'engagement positif, puisque seuls les engagements énoncés en faveur de la Ville peuvent se rattacher au bien-fonds suivant cette disposition. Le juge Jeffrey a souscrit à la conclusion du protonotaire selon laquelle, conformément au régime instauré par la *HRA*, la Ville doit indemniser le propriétaire du bien au moment d'une désignation faite en vertu de l'art. 26. De l'avis du juge Jeffrey, la conclusion que l'engagement de payer pris par la Ville ne se rattache pas au bien-fonds concordait avec l'intention évidente des parties au Contrat incitatif. Quant à la vente sous contrôle de justice, il

He declined to decide the issue with respect to the *PPSA* priorities, finding that because the 604 Assignment had been executed after August 30, 2010, it was beyond the scope of the issues properly before him.

C. *Alberta Court of Appeal*, 2014 ABCA 427, 588 A.R. 258

(1) Majority (Slatter and Wakeling JJ.A.)

[16] The majority held that the proper standard for reviewing the chambers judge's interpretation of the *HRA*, the Incentive Agreement and the 604 Offer was correctness. They found that the *HRA* creates a *sui generis* historic resource covenant that runs fully with the land. In their view, s. 29 should be read as setting aside all common law restrictions that prohibit positive covenants from running with the land and should not be interpreted as allowing only positive covenants in favour of the City. The majority also found that the Incentive Agreement could not be severed such that the portions of it relating directly to the building could run with the land but the portions relating to the payments could not.

[17] The majority concluded that the omission of a specific reference to the Incentive Agreement in Equitable's statement of claim should not be taken to imply that it had decided to forego a portion of its security. They noted that the receivership order issued by the court on consent included the Incentive Agreement. In their view, 604 had clearly agreed to take on the burdens of the Incentive Agreement — it had taken title subject to the caveat protecting the historic resource covenants — and nothing in the Incentive Agreement suggested that the payments could or would be separated from the obligations under the agreement. Therefore, the majority found that the payments were clearly conditional on the

a conclu que, si le droit de recevoir les Paiements incitatifs avait été un élément d'actif visé par la vente sous contrôle de justice, l'Offre de 604 en aurait fait état expressément. Il a refusé de statuer sur la détermination de l'ordre de priorité en vertu de la *PPSA*, estimant que, comme la Cession en faveur de 604 avait été conclue après le 30 août 2010, elle débordait le cadre des questions dont il était régulièrement saisi.

C. *Cour d'appel de l'Alberta*, 2014 ABCA 427, 588 A.R. 258

(1) Majorité (les juges Slatter et Wakeling)

[16] Les juges majoritaires ont conclu que la norme de contrôle applicable à l'interprétation du juge en cabinet concernant la *HRA*, le Contrat incitatif et l'Offre de 604 était la norme de la décision correcte. Ils ont statué que la *HRA* crée en matière de ressource historique un engagement *sui generis* qui se rattache entièrement au bien-fonds. Selon eux, l'art. 29 doit être interprété comme ayant pour effet d'écartier toutes les restrictions de common law qui empêchent le rattachement au bien-fonds d'engagements positifs; il ne faut pas considérer que cet article autorise uniquement les engagements positifs énoncés en faveur de la Ville. Les juges majoritaires ont également conclu qu'il était impossible de scinder le Contrat incitatif de manière à ce que ses parties concernant directement l'immeuble puissent se rattacher au bien-fonds, mais non celles concernant les paiements.

[17] Les juges majoritaires ont statué que l'absence de mention du Contrat incitatif dans la déclaration d'Équitable n'implique pas que cette dernière avait décidé de renoncer à une partie de sa garantie. Ils ont souligné que ce contrat était inclus dans l'ordonnance de mise sous séquestre rendue sur consentement par la cour. À leur avis, 604 avait clairement accepté d'assumer les obligations du Contrat incitatif — elle avait acquis le titre qui était assujetti au caveat relatif aux engagements de protection de la ressource historique — et rien dans le Contrat incitatif ne tendait à indiquer que les paiements pouvaient être séparés des obligations imposées par le contrat ou qu'ils le seraient. Les juges majoritaires ont en

performance of the obligations in the agreement and, all things considered, it did not make sense to suggest that the burdens of the Incentive Agreement had passed with the sale, but not the benefits.

(2) Dissent (O'Brien J.A.)

[18] O'Brien J.A. held that the chambers judge's interpretation of the *HRA* and common law principles were matters of law for which the appropriate standard was correctness, whereas his application of the legal principles and interpretation of the agreements were matters of mixed fact and law for which the standard was palpable and overriding error, and therefore required deference. O'Brien J.A. was of the view that the objective of the *HRA* is to ensure that covenants made by a landowner in favour of the City, whether positive or negative, run with the land and are enforceable against all subsequent owners, but that the *HRA* does not permit positive covenants in favour of the landowner to run with the land. Further, in his view, the parties to the Incentive Agreement did not intend the Incentive Payments to run with the land.

[19] O'Brien J.A. held that the Incentive Agreement was not included in the 604 Offer. He noted that the 604 Offer did not state expressly that the payments under the Incentive Agreement were among the property and assets included in the sale, and there was no indication of an intention to this effect in the documents related to the sale. Regarding the order of priorities, O'Brien J.A. found that, having regard to the scope of the original application and to the evidentiary record, the Court of Appeal was not in a position to determine who was entitled to the Incentive Payments at that time.

IV. Issues

[20] This appeal raises four issues:

conséquence conclu que les paiements dépendaient clairement de l'exécution des obligations prévues par le contrat et, à tout bien considérer, il n'était pas logique de prétendre que les obligations du Contrat incitatif avaient été transférées lors de la vente, mais non ses avantages.

(2) Dissidence (le juge O'Brien)

[18] Le juge O'Brien a statué que l'interprétation par le juge en cabinet de la *HRA* et des principes de common law était une question de droit à laquelle il convenait d'appliquer la norme de la décision correcte, tandis que son application des principes juridiques et son interprétation des contrats constituaient des questions mixtes de fait et de droit auxquelles s'appliquait la norme de l'erreur manifeste et déterminante, ce qui, de ce fait, commandait déférence. Selon lui, la *HRA* a pour objectif de faire en sorte que les engagements pris par un propriétaire foncier en faveur de la Ville — qu'il s'agisse d'engagements de nature positive ou négative — se rattachent au bien-fonds et sont susceptibles d'exécution contre tous les propriétaires subséquents. Par contre, cette loi ne permet pas le rattachement au bien-fonds d'engagements positifs en faveur du propriétaire foncier. Le juge O'Brien a également estimé que les parties au Contrat incitatif n'avaient pas eu l'intention de rattacher les Paiements incitatifs au bien-fonds.

[19] Le juge O'Brien a conclu que le Contrat incitatif n'était pas inclus dans l'Offre de 604. Il a fait remarquer que celle-ci ne mentionnait pas expressément que les paiements prévus par ce contrat faisaient partie de la propriété et des éléments d'actif visés par la vente et qu'aucune indication d'une intention à cet effet ne ressortait des documents liés à la vente. Pour ce qui est de l'ordre de priorité, le juge O'Brien a statué que, vu l'objet de la demande initiale et la preuve au dossier, la Cour d'appel n'était pas en mesure de décider qui avait droit aux Paiements incitatifs.

IV. Questions en litige

[20] Le présent pourvoi soulève quatre questions :

- (1) What is the standard of review applicable to the chambers judge's interpretation of the Incentive Agreement and the 604 Offer?
- (2) Did the Incentive Payments run with the land? The resolution of this issue depends on the answers to two questions:
 - (a) Does s. 29 of the *HRA* displace the common law rule that positive covenants do not run with the land?
 - (b) Does the *Incentive Agreement* registered on title show that the parties to the agreement intended the Incentive Payments to run with the land?
- (3) Were the Incentive Payments sold as an asset in the judicial sale?
- (4) Is the priority of interests in the Incentive Payments governed by the *PPSA*?

V. Analysis

A. *What Is the Applicable Standard of Review?*

[21] As Rothstein J. stated in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, “[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix” (para. 50). In this context, deference to fact finders furthers the goals of limiting the number, length and cost of appeals, and of promoting the autonomy and integrity of trial proceedings. These principles weigh in favour of showing deference to first-instance decision makers on points of contractual interpretation, and treating contractual interpretation as a question of mixed fact and law (*Sattva*, at paras. 50-52).

[22] However, Rothstein J. held that where an extricable question of law can be identified, the standard of correctness applies. Extricable questions of

- (1) Quelle est la norme de contrôle applicable à l'interprétation adoptée par le juge en cabinet du Contrat incitatif et de l'Offre de 604?
- (2) Les Paiements incitatifs se rattachaient-ils au bien-fonds? La réponse à cette question dépend des réponses à deux autres questions :
 - a) L'article 29 de la *HRA* écarte-t-il la règle de common law suivant laquelle des engagements positifs ne se rattachent pas au bien-fonds?
 - b) Le Contrat incitatif enregistré sur le titre démontre-t-il que les parties à ce contrat entendaient que les Paiements incitatifs soient rattachés au bien-fonds?
- (3) Les Paiements incitatifs ont-ils été vendus en tant qu'éléments d'actif lors de la vente sous contrôle de justice?
- (4) Est-ce que l'ordre de priorité quant aux Paiements incitatifs est régi par la *PPSA*?

V. Analyse

A. *Quelle est la norme de contrôle applicable?*

[21] Comme l'affirme le juge Rothstein dans *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633, « [I]’interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s’agit d’en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel » (par. 50). Dans un tel contexte, faire montre de déférence envers les conclusions du juge des faits contribue à réduire le nombre, la durée et le coût des appels tout en favorisant l'autonomie du procès et son intégrité. Ces principes militent en faveur de la déférence à l'endroit des décideurs de première instance à l'égard de l'interprétation contractuelle et appuient la proposition selon laquelle l'interprétation en cette matière est une question mixte de fait et de droit (*Sattva*, par. 50-52).

[22] Cependant, le juge Rothstein conclut que, dans les cas où il est possible d'isoler une question de droit, la norme de la décision correcte s'applique.

law include “the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor” (*Satvva*, at para. 53, quoting *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 21).

[23] In 604’s submission, the chambers judge in the case at bar erred in interpreting the *HRA* and this tainted his interpretation of the Incentive Agreement and the 604 Offer, which means that the applicable standard of review for the latter interpretation is correctness. We disagree. While it is true that correctness is the appropriate standard for reviewing the chambers judge’s interpretation of the *HRA* given that statutory interpretation is a question of law (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 33), we do not find that this standard applies to his contractual interpretation of the Incentive Agreement and the 604 Offer. As the chambers judge’s interpretation of the *HRA* was correct, it did not taint the interpretation of the agreements.

[24] In our view, O’Brien J.A. was right to conclude that the correctness standard applies to the interpretation of the *HRA* and the common law, but that the palpable and overriding error standard applies to the chambers judge’s interpretation of the Incentive Agreement and the 604 Offer.

B. *Did the Incentive Payments Run With the Land?*

(1) Does Section 29 of the HRA Displace the Common Law Rule That Positive Covenants Do Not Run With the Land?

[25] The idea of a payment obligation running with land is by its nature unusual. In fact, it is undisputed that at common law, positive covenants cannot run with the land (*Austerberry v. Corporation of Oldham* (1885), 29 Ch. D. 750). This rule is founded

Parmi les questions de droit susceptibles d’être isolées, mentionnons le fait d’« appliquer le mauvais principe ou [de] négliger un élément essentiel d’un critère juridique ou un facteur pertinent » (*Satvva*, par. 53, citant *King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, par. 21).

[23] Selon 604, le juge en cabinet a commis une erreur dans son interprétation de la *HRA*. Cette erreur a vicié son interprétation du Contrat incitatif et de l’Offre de 604. Pour cette raison, la norme de contrôle applicable à cette dernière serait la décision correcte. Nous sommes en désaccord. Bien que la décision correcte soit effectivement la norme applicable pour examiner l’interprétation de la *HRA* par le juge en cabinet puisque l’interprétation d’une loi est une question de droit (*Compagnie des chemins de fer nationaux du Canada c. Canada (Procureur général)*, 2014 CSC 40, [2014] 2 R.C.S. 135, par. 33), nous estimons que cette norme ne s’applique pas à son interprétation du Contrat incitatif et de l’Offre de 604. Comme le juge en cabinet a correctement interprété la *HRA*, cette interprétation n’a pu vicier son interprétation des contrats.

[24] À notre avis, le juge O’Brien a eu raison de conclure que la norme de la décision correcte s’applique à l’interprétation de la *HRA* et de la common law, mais que c’est la norme de l’erreur manifeste et déterminante qui s’applique à l’interprétation par le juge en cabinet du Contrat incitatif et de l’Offre de 604.

B. *Les Paiements incitatifs se rattachaient-ils au bien-fonds?*

(1) L’article 29 de la HRA écarte-t-il la règle de common law selon laquelle les engagements positifs ne se rattachent pas au bien-fonds?

[25] L’idée qu’une obligation de payer puisse se rattacher au bien-fonds est, de par sa nature même, insolite. En fait, personne ne conteste qu’en common law un engagement positif ne peut se rattacher au bien-fonds (*Austerberry c. Corporation of*

on the principle that at common law, a person cannot be made liable upon a contract unless he or she was party to it (*Rhone v. Stephens*, [1994] 2 A.C. 310 (H.L.)). The rule against positive covenants running with the land applies even if an agreement contains an express intention to the contrary (*Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 58 O.R. (3d) 481 (C.A.)). As a result, the common law rule is that “[n]o personal or affirmative covenant, requiring the expenditure of money or the doing of some act, can, apart from statute, be made to run with the land” (V. Di Castri, *Registration of Title to Land* (loose-leaf), vol. 1, at p. 10-4 (emphasis added), quoted in *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268, 155 B.C.A.C. 1, at para. 16). The issue in the instant case is whether and to what extent s. 29 of the *HRA* displaces the common law rule by permitting positive covenants to run with the land.

[26] In our view, O’Brien J.A. and the chambers judge properly interpreted the *HRA*. We find that s. 29 of the *HRA* limits the positive covenants that may run with the land to those that are in favour of the City or of the other person or organizations listed in s. 29(1) and are enforceable by that entity. The *HRA* does not permit positive covenants in favour of an entity not listed in s. 29(1) to run with the land.

[27] Applying the widely accepted modern approach to statutory interpretation, we find that the words of s. 29 of the *HRA*, when read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament, lead to the following conclusion: only covenants in favour of a “person or organization” listed in s. 29(1), whether negative or positive, will run with the land (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 7; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at

Oldham (1885), 29 Ch. D. 750). Cette règle repose sur le principe selon lequel, en common law, nul ne peut être lié par un contrat à moins d’être partie à celui-ci (*Rhone c. Stephens*, [1994] 2 A.C. 310 (H.L.)). D’ailleurs, la règle qui interdit le rattachement des engagements positifs au bien-fonds s’applique même si un contrat exprime l’intention contraire (*Amberwood Investments Ltd. c. Durham Condominium Corp. No. 123* (2002), 58 O.R. (3d) 481 (C.A.)). Par conséquent, la règle de common law a été énoncée ainsi : [TRADUCTION] « Aucun engagement personnel ou positif requérant une dépense ou un acte ne peut être rattaché au bien-fonds, sauf si une loi le prévoit » (V. Di Castri, *Registration of Title to Land* (feuilles mobiles), vol. 1, p. 10-4 (nous soulignons), cité dans *Westbank Holdings Ltd. c. Westgate Shopping Centre Ltd.*, 2001 BCCA 268, 155 B.C.A.C. 1, par. 16). En l’espèce, il s’agit de décider si l’art. 29 de la *HRA* écarte la règle de common law en permettant que des engagements positifs se rattachent au bien-fonds, et dans quelle mesure elle l’écarte.

[26] À notre avis, le juge O’Brien et le juge en cabinet ont bien interprété la *HRA*. Nous estimons que l’art. 29 de la *HRA* limite les engagements positifs susceptibles de rattachement au bien-fonds aux seuls engagements de cette nature énoncés en faveur de la Ville ou de la personne ou des autres organisations mentionnées au par. 29(1) et dont cette entité peut demander l’exécution. La *HRA* n’autorise pas le rattachement au bien-fonds d’engagements positifs énoncés en faveur d’une entité qui n’est pas énumérée au par. 29(1).

[27] Appliquant la méthode moderne d’interprétation des lois largement reconnue, nous sommes d’avis que, considérés dans leur contexte global, selon le sens ordinaire et grammatical qui s’harmonise avec l’économie de la loi, son objet et l’intention du législateur, les termes de l’art. 29 de la *HRA* mènent à la conclusion suivante : seuls les engagements énoncés en faveur d’une [TRADUCTION] « personne ou organisation » mentionnée au par. 29(1), qu’il s’agisse d’engagements de nature positive ou négative, se rattachent au bien-fonds (R. Sullivan, *Sullivan on the Construction of Statutes* (6^e éd.

paras. 26-30; *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3, at para. 18; *Canadian National Railway*, at para. 36). In the case at bar, therefore, the right to the Incentive Payments did not become an interest that runs with the land by virtue of the *HRA*.

[28] There is a presumption of statutory interpretation that the provisions of a statute are meant to work together “as parts of a functioning whole” (Sullivan, at p. 337) and form an internally consistent framework. In other words, “the whole gives meaning to its parts”, and “each legal provision should be considered in relation to other provisions, as parts of a whole” (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 326).

[29] In addition, where the legislature expressly creates a statutory exception to a common law principle, that exception should be narrowly construed, as the legislature is assumed not to have intended to change the common law unless it has done so clearly and unambiguously. In *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U.*, Local 324, 2003 CSC 42, [2003] 2 S.C.R. 157, at para. 39, Iacobucci J., writing for the majority, stated:

To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that “a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed”. In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077, Lamer J. (as he then was) wrote that “in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law”.

2014), p. 7; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 26-30; *Untel c. Ontario (Finances)*, 2014 CSC 36, [2014] 2 R.C.S. 3, par. 18; *Compagnie des chemins de fer nationaux*, par. 36). En conséquence, dans la présente affaire, le droit aux Paiements incitatifs n'est pas devenu un intérêt rattaché au bien-fonds par l'effet de la *HRA*.

[28] En matière d'interprétation législative, il faut présumer que les dispositions d'une loi forment un ensemble cohérent et fonctionnent en harmonie [TRADUCTION] « comme les diverses parties d'un tout » (Sullivan, p. 337). Autrement dit, « l'ensemble [contribue] au sens de chacun des éléments » et « chaque disposition légale doit être envisagée, relativement aux autres, comme la fraction d'un ensemble complet » (P.-A. Côté, avec la collaboration de S. Beaulac et de M. Devinat, *Interprétation des lois* (4^e éd. 2009), p. 352).

[29] De plus, lorsque le législateur crée explicitement dans une loi une exception à un principe de common law, cette exception doit être interprétée restrictivement, car le législateur est présumé ne pas avoir eu l'intention de modifier la common law à moins de l'avoir fait de façon claire et non ambiguë. Dans *Parry Sound (district), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale* 324, 2003 CSC 42, [2003] 2 R.C.S. 157, par. 39, s'exprimant au nom de la majorité, le juge Iacobucci a déclaré ce qui suit :

Tout d'abord, je pense qu'il est utile d'insister sur la présomption que le législateur n'a pas l'intention de modifier le droit existant ni de s'écarte des principes, politiques ou pratiques établis. Dans *Goodyear Tire & Rubber Co. of Canada c. T. Eaton Co.*, [1956] R.C.S. 610, p. 614, par exemple, le juge Fauteux (plus tard Juge en chef) écrit : [TRADUCTION] « le législateur n'est pas censé s'écarte du régime juridique général sans exprimer de façon incontestablement claire son intention de le faire, sinon la loi reste inchangée ». Dans *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, p. 1077, le juge Lamer (plus tard Juge en chef) écrit que « le législateur n'est pas censé, à défaut de disposition claire au contraire, avoir l'intention de modifier les règles de droit commun pré-existantes ».

[30] Professor Sullivan also takes the view that to displace a common law rule, the legislation must show a clear intention to do so. Quoting *Halsbury's Laws of England* (3rd ed. 1961), vol. 36, at p. 412, para. 625, she writes that, “[e]xcept in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law” (p. 538).

[31] Applying these principles of statutory interpretation, we conclude that the exception to the common law rule provided for in s. 29 of the *HRA* should be limited by the precise language of the provision and the underlying purpose of the *HRA*. Section 29 should not be interpreted more broadly than necessary. The express words of the enactment state that while positive covenants may run with the land, they are enforceable only by the entities listed in s. 29(1) in whose favour they are entered into. A purposive and contextual analysis of the *HRA*, and particularly of s. 29, shows that the legislation does not have a broader reach by necessary implication.

[32] Section 2 of the *HRA* provides that the Minister is responsible for “(a) the co-ordination of the orderly development, (b) the preservation, (c) the study and interpretation, and (d) the promotion of appreciation of Alberta’s historic resources”. A “historic resource” is defined as “any work of nature or of humans that is primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or esthetic interest including, but not limited to, a palaeontological, archaeological, prehistoric, historic or natural site, structure or object” (s. 1(e)).

[33] Section 26(2) of the *HRA* provides that a municipality may by bylaw designate any historic resource within the municipality as a “Municipal Historic Resource”. Section 28(1) then provides that

[30] La professeure Sullivan affirme elle aussi que, pour écarter une règle de common law, la loi doit exprimer clairement l’intention du législateur de ce faire. Citant *Halsbury's Laws of England* (3^e éd. 1961), vol. 36, p. 412, par. 625, elle écrit que, [TRADUCTION] « [s]auf dans la mesure où il est clair et non ambigu qu’elles ont été conçues à cette fin, les lois n’ont pas pour effet de modifier la common law ou quelque principe de droit établi » (p. 538).

[31] Appliquant ces principes d’interprétation des lois, nous concluons que la portée de l’exception établie à l’art. 29 de la *HRA* à l’égard de la règle de common law est limitée par le langage exprès utilisé dans la disposition et par l’objet qui soutient la *HRA*. L’article 29 ne doit pas recevoir une interprétation plus large que nécessaire. Suivant les termes exprès du texte de loi, bien que les engagements positifs puissent se rattacher au bien-fonds, ils sont susceptibles d’exécution uniquement par les entités mentionnées au par. 29(1) en faveur desquelles ils ont été pris. Il ressort d’une analyse téléologique et contextuelle de la *HRA* — et plus particulièrement de l’art. 29 — que cette loi n’a pas une portée plus large par voie d’implication nécessaire.

[32] Aux termes de l’art. 2 de la *HRA*, le Ministre est chargé de [TRADUCTION] « (a) coordonner la mise en valeur ordonnée des ressources historiques de l’Alberta, (b) de préserver ces ressources, (c) de les étudier et de les interpréter, (d) de promouvoir l’intérêt à leur égard ». Le terme « ressource historique » est défini ainsi : « une œuvre de la nature ou de l’être humain qui revêt une importance essentiellement paléontologique, archéologique, préhistorique, historique, culturelle, naturelle, scientifique ou esthétique, notamment un site, une construction ou un objet paléontologique, archéologique, préhistorique, historique ou naturel » (al. 1(e)).

[33] Le paragraphe 26(2) de la *HRA* édicte qu’une municipalité peut, au moyen d’un arrêté, désigner « ressource historique municipale » toute ressource historique située sur son territoire. Le

if a bylaw under s. 26 decreases the economic value of the building or land designated by the bylaw, the owner of the building or land is entitled to compensation for the decrease:

28(1) If a bylaw under section 26 or 27 decreases the economic value of a building, structure or land that is within the area designated by the bylaw, the council shall by bylaw provide the owner of that building, structure or land with compensation for the decrease in economic value.

Section 28 does not specify that the right to compensation is available to a future owner, nor does it refer to s. 29, which supports the chambers judge's interpretation to the effect that the intended recipient of the compensation under s. 28 is the owner at the time of the designation.

[34] Section 29, which is at the heart of this appeal, reads as follows:

29(1) A condition or covenant, relating to the preservation or restoration of any land or building, entered into by the owner of land and

- (a) the Minister,
- (b) the council of the municipality in which the land is located,
- (c) the Foundation, or
- (d) an historical organization that is approved by the Minister,

may be registered with the Registrar of Land Titles.

(2) When a condition or covenant under subsection (1) is presented for registration, the Registrar of Land Titles shall endorse a memorandum of the condition or covenant on any certificate of title relating to that land.

paragraphe 28(1) précise ensuite que, si un arrêté pris en vertu de l'art. 26 entraîne une diminution de la valeur économique de l'immeuble ou du bien-fonds qu'il désigne, le propriétaire de cet immeuble ou bien-fonds a le droit d'être indemnisé de cette diminution de valeur :

[TRADUCTION]

28(1) Si un arrêté pris en vertu de l'article 26 ou 27 entraîne une diminution de la valeur économique d'un immeuble, d'une construction ou d'un bien-fonds situé dans l'aire désignée par l'arrêté, le conseil doit, par voie d'arrêté, verser au propriétaire de ce bien une indemnité pour la diminution de la valeur économique de celui-ci.

L'article 28 ne précise pas que le droit à indemnisation est ouvert à un futur propriétaire, ni ne mentionne l'art. 29, facteurs qui étaient l'interprétation du juge en cabinet selon laquelle le bénéficiaire visé par l'indemnité prévue à l'art. 28 est celui qui est propriétaire au moment de la désignation.

[34] L'article 29, qui est au cœur du présent pourvoi, est rédigé ainsi :

[TRADUCTION]

29(1) Peut être enregistré auprès du registrateur des titres immobiliers une condition ou un engagement lié à la préservation ou à la restauration d'un bien-fonds ou d'un immeuble et dont ont convenu le propriétaire du bien-fonds et, selon le cas

- (a) le Ministre,
- (b) le conseil de la municipalité dans laquelle se trouve le bien-fonds,
- (c) la Fondation,
- (d) une organisation de conservation du patrimoine agréée par le Ministre.

(2) Lorsqu'une condition ou un engagement visé au paragraphe (1) est présenté pour enregistrement, le registrateur des titres immobiliers inscrit une mention de la condition ou de l'engagement sur tout certificat de titre lié à ce bien-fonds.

(3) A condition or covenant registered under subsection (2) runs with the land and the person or organization under subsection (1) that entered into the condition or covenant with the owner may enforce it whether it is positive or negative in nature and notwithstanding that the person or organization does not have an interest in any land that would be accommodated or benefited by the condition or covenant.

(4) A condition or covenant registered under subsection (2) may be assigned by the person or organization that entered into it with the owner to any other person or organization mentioned in subsection (1), and the assignee may enforce the condition or covenant as if it were the person or organization that entered into the condition or covenant with the owner.

(5) If the Minister considers it in the public interest to do so, the Minister may by order discharge or modify a condition or covenant registered under subsection (2), whether or not the Minister is a party to the condition or covenant.

[35] We agree with the chambers judge's interpretation of the above provision, which O'Brien J.A. accepted. Each subsection of s. 29 is like a piece of a puzzle, and when they are all read together, they form a coherent whole. Section 29(1) provides that a condition or covenant "relating to the preservation or restoration of any land or building" that is entered into by a landowner and the Minister or one of the organizations enumerated there may be registered. Section 29(3) provides that a condition or covenant registered under s. 29(2) runs with the land and can, whether it is negative or positive, be enforced by the "person or organization" listed in s. 29(1). Subsections (1) and (3) are necessary for the preservation or restoration of Municipal Historic Resources, because without them, the City would not be able to enforce such a covenant or condition at common law, as it would have no interest in the land or building to which the covenant or condition applied.

(3) Une condition ou un engagement enregistré en vertu du paragraphe (2) se rattache au bien-fonds et la personne ou l'organisation visée au paragraphe (1) qui en a convenu avec le propriétaire peut en demander l'exécution, que la condition ou l'engagement soit de nature positive ou négative et nonobstant le fait que cette personne ou organisation ne possède pas d'intérêt sur quelque bien-fonds qui serait desservi par la condition ou l'engagement, ou en bénéficierait.

(4) Une condition ou un engagement enregistré en vertu du paragraphe (2) peut être cédé par la personne ou l'organisation qui en a convenu avec le propriétaire à toute autre personne ou organisation mentionnée au paragraphe (1), et le cessionnaire peut en demander l'exécution au même titre que s'il en avait convenu avec le propriétaire.

(5) Si le Ministre estime qu'il est dans l'intérêt public de le faire, il peut, par voie d'arrêté, lever ou modifier une condition ou un engagement enregistré en vertu du paragraphe (2), qu'il soit ou non lui-même partie à la condition ou à l'engagement.

[35] Nous souscrivons à l'interprétation adoptée par le juge en cabinet de la disposition précitée et qui a été retenue par le juge O'Brien. Les différents paragraphes de l'art. 29 sont assimilables aux pièces d'un casse-tête et, lorsqu'on les considère globalement, ils forment un tout cohérent. Le paragraphe 29(1) précise qu'il est possible d'enregistrer une condition ou un engagement [TRADUCTION] « lié à la préservation ou à la restauration d'un bien-fonds ou d'un immeuble » et dont ont convenu un propriétaire foncier et le Ministre ou l'une des organisations énumérées à cette disposition. Suivant le par. 29(3), une condition ou un engagement enregistré en vertu du par. 29(2) se rattache au bien-fonds et, que cette condition ou cet engagement soit de nature négative ou positive, « la personne ou l'organisation » mentionnée au par. 29(1) peut en demander l'exécution. Les paragraphes (1) et (3) sont nécessaires aux fins de préservation ou de restauration des ressources historiques municipales, car, sans ces dispositions, la Ville ne serait pas en mesure de faire exécuter une telle condition ou un tel engagement en vertu de la common law, étant donné qu'elle ne possède aucun intérêt dans le bien-fonds ou dans l'immeuble auquel s'applique la condition ou l'engagement.

[36] It is noteworthy that s. 29(3) does not expressly grant a landowner the ability to enforce a condition or covenant against the City. According to 604, express language to this effect is unnecessary, because the landowner can already enforce covenants and conditions, given that he or she has an interest in the land or building. In our view, had the legislature intended to completely displace the common law rules regarding positive covenants and create *sui generis* covenants and conditions that are enforceable by both the City and the landowner, it would have said so expressly.

[37] An additional submission by 604 is that s. 29(2), which does not on its face prevent the owner from registering a covenant or condition on title, shows that the owner can register covenants, and therefore can also enforce them under the *HRA*, despite the fact that there is no express wording to this effect in s. 29(3). We are not convinced by this argument. In our view, s. 29(3) should be read as a whole, and the word “and” in that provision should be considered to be conjunctive rather than disjunctive. Section 29(3) provides that “[a] condition or covenant registered under subsection (2) runs with the land and the person or organization under subsection (1) that entered into the condition or covenant with the owner may enforce it whether it is positive or negative”. The covenant discussed in s. 29(3) is clearly the same covenant throughout the provision — this subsection sets out by whom the covenant registered under s. 29(2) can be enforced whether it is positive or negative, and that is by a person or organization listed in s. 29(1). Therefore, s. 29(3) does not lend itself to the interpretation that all covenants, whether positive or negative, in favour of the owner can be enforced by the owner and are covered by the exception provided for in that subsection.

[36] Il convient de noter que le par. 29(3) ne confère pas expressément à un propriétaire foncier la capacité de demander l'exécution d'une condition ou d'un engagement constituant une obligation pour la Ville. Selon 604, une disposition explicite à cet effet est inutile, étant donné que le propriétaire foncier est déjà en mesure de demander l'exécution de conditions et d'engagements en raison de l'intérêt qu'il possède dans le bien-fonds ou l'immeuble. À notre avis, si le législateur avait voulu écarter complètement les règles de common law relatives aux engagements positifs et créer des conditions et engagements *sui generis* dont l'exécution peut être demandée tant par la Ville que par le propriétaire foncier, il l'aurait dit en termes exprès.

[37] 604 soumet également que le fait que le texte même du par. 29(2) n'empêche pas le propriétaire d'enregistrer une condition ou un engagement sur le titre démontre que le propriétaire peut enregistrer des engagements et qu'il lui est donc possible d'en demander l'exécution en vertu de la *HRA*, malgré l'absence de disposition expresse à cet effet au par. 29(3). Cet argument ne nous convainc pas. À notre avis, il faut interpréter le par. 29(3) globalement et considérer que le mot « et » (« *and* » dans le texte original) a un caractère conjonctif plutôt que disjonctif. Aux termes de ce paragraphe, « [u]ne condition ou un engagement enregistré en vertu du paragraphe (2) se rattache au bien-fonds et la personne ou l'organisation visée au paragraphe (1) qui en a convenu avec le propriétaire peut en demander l'exécution, que cette condition ou cet engagement soit de nature positive ou négative ». L'engagement dont il est question au par. 29(3) est clairement le même partout dans cette disposition — ce paragraphe énonce qui peut demander l'exécution de l'engagement enregistré en vertu du par. 29(2), que cet engagement soit de nature positive ou négative, et il s'agit de la personne ou d'une organisation énumérée au par. 29(1). En conséquence, le par. 29(3) ne peut être interprété d'une manière qui permettrait d'affirmer que tout engagement — de nature positive ou négative — énoncé en faveur du propriétaire peut faire l'objet d'une demande d'exécution par celui-ci et est visé par l'exception prévue à ce paragraphe.

[38] The two subsections immediately following s. 29(3) further confirm our interpretation.

[39] Firstly, s. 29(4) provides that a condition or covenant registered under s. 29(2) can be assigned by the “person or organization” to any other “person or organization” mentioned in s. 29(1). Again, there is no mention in s. 29(4) of the landowner being able to assign any “condition or covenant”.

[40] In our view, this is further evidence that s. 29 is intended to permit governments and public interest bodies that have no interest in the land or building to enforce covenants and conditions that are in their favour. There is a presumption that the legislature “avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain” (Sullivan, at p. 211, citing *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838). Every provision of a statute should be interpreted as having a meaning and a function, and “courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant” (Sullivan, at p. 211; see also *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28). Section 29(4) ensures that the City can assign a condition or covenant registered under s. 29(2) to any other person or organization mentioned in s. 29(1), such that the assignee may enforce it as if it were the person or organization that entered into the condition or covenant with the owner.

[41] Secondly, s. 29(5) provides that the Minister may at any time discharge or modify a covenant or condition registered under s. 29(2) if it is in the public interest to do so. This provision only makes sense in our view if the covenant referred to in s. 29(3) is one in favour of a “person or organization” mentioned in s. 29(1). Indeed, it would be unjust if the Minister could unilaterally discharge a covenant to pay in favour of a landowner simply

[38] Les deux paragraphes qui suivent immédiatement le par. 29(3) viennent renforcer davantage notre interprétation.

[39] Premièrement, le par. 29(4) dispose qu’une condition ou un engagement enregistré en vertu du par. 29(2) peut être cédé par « la personne ou l’organisation » à toute autre « personne ou organisation » mentionnée au par. 29(1). Ici encore, le par. 29(4) n’indique aucunement que le propriétaire foncier peut céder quelque « condition ou engagement ».

[40] À notre avis, il s’agit d’une preuve supplémentaire que l’art. 29 vise à permettre aux gouvernements ou entités à caractère public qui ne possèdent aucun intérêt dans le bien-fonds ou l’immeuble concerné de demander l’exécution des conditions et engagements énoncés en leur faveur. Le législateur est présumé [TRADUCTION] « ne pas utiliser de mots superflus ou dénués de sens, ne pas se répéter inutilement ni s’exprimer en vain » (Sullivan, p. 211, citant *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, p. 838). Chaque disposition d’une loi doit être interprétée de manière à lui donner un sens et un rôle, et [TRADUCTION] « les tribunaux devraient éviter autant que possible d’adopter une interprétation qui dépouille une partie d’une loi de tout son sens ou qui la rend redondante » (Sullivan, p. 211; voir aussi *R. c. Proulx*, 2000 CSC 5, [2000] 1 R.C.S. 61, par. 28). Le paragraphe 29(4) fait en sorte que la Ville peut céder une condition ou un engagement enregistré en vertu du par. 29(2) à toute personne ou organisation mentionnée au par. 29(1), de telle sorte que le cessionnaire peut en demander l’exécution au même titre que si c’était lui qui en avait convenu avec le propriétaire.

[41] Deuxièmement, le par. 29(5) précise que le Ministre peut en tout temps écarter ou modifier un engagement ou une condition enregistré en vertu du par. 29(2) s’il est dans l’intérêt public de prendre une telle mesure. Nous sommes d’avis que cette disposition n’a de sens que si l’engagement mentionné au par. 29(3) est énoncé en faveur d’une « personne ou organisation » mentionnée au par. 29(1). En effet, il serait injuste que le Ministre

because he or she considered it in the public interest to do so.

[42] The common denominator between s. 29(3), s. 29(4) and s. 29(5) is that they all point to the conclusion that the covenants and conditions that may be enforced under s. 29(3) are those that the “person or organization” listed in s. 29(1) can in fact enforce: the covenants and conditions in its favour.

(2) Does the Incentive Agreement Registered on Title Show That the Parties to the Agreement Intended the Incentive Payments to Run With the Land?

[43] In addition to our conclusion arising out of our interpretation of the *HRA*, we find that the Incentive Agreement itself does not reveal an intention that the Incentive Payments would run with the land. Even if the common law rule could be circumvented in the case at bar, 604’s claim to the payments would still fail. We see no basis on which to disturb the chambers judge’s findings, which O’Brien J.A. accepted, with respect to the contractual interpretation of the Incentive Agreement.

[44] The provisions of the Incentive Agreement that are primarily at issue are clauses 5.3, 8.3 and 8.8. Clause 5.3 states:

If, at any time, the Owner, The Lougheed Block Inc., and any future owner, has not paid such taxes and levies when they become due, the City may, but is not obligated to, set off the amount owed by the Owner, the Lougheed Block Inc., or any future owner against any amounts owed, or that may be owing in the future, to the Owner by the City pursuant to this Agreement. [Emphasis added.]

[45] The chambers judge concluded that clause 5.3 could not be interpreted to mean that the parties to the Incentive Agreement intended the Incentive Payments to go to a future owner. The clause

puisse écarter unilatéralement un engagement de payer énoncé en faveur d’un propriétaire foncier, tout simplement parce que, selon le Ministre, il est dans l’intérêt public de le faire.

[42] Le dénominateur commun entre les par. 29(3), (4) et (5) est le fait qu’ils mènent tous à la conclusion que les conditions et engagements susceptibles d’exécution en vertu du par. 29(3) sont ceux dont l’exécution peut effectivement être demandée par les « personne ou organisations » énumérées au par. 29(1), soit les conditions et engagements énoncés en leur faveur.

(2) Le Contrat incitatif enregistré sur le titre démontre-t-il que les parties à ce contrat entendaient que les Paiements incitatifs se rattachent au bien-fonds?

[43] Outre notre conclusion découlant de notre interprétation de la *HRA*, nous estimons qu’aucune intention de rattacher les Paiements incitatifs au bien-fonds ne ressort du Contrat incitatif lui-même. Même s’il était possible d’éviter l’application de la règle de common law en l’espèce, la demande de 604 visant les paiements devrait néanmoins être rejetée. Nous ne voyons aucune raison de modifier les conclusions du juge en cabinet, qu’a retenues le juge O’Brien, relativement à l’interprétation du Contrat incitatif.

[44] Les principales clauses litigieuses du Contrat incitatif sont les clauses 5.3, 8.3 et 8.8. La clause 5.3 prévoit ce qui suit :

[TRADUCTION] Si, à un moment donné, le propriétaire, The Lougheed Block Inc., et tout futur propriétaire n’a pas payé des taxes et prélèvements de cette nature à l’échéance, la Ville peut — sans toutefois y être tenue — opérer compensation entre la somme due par le propriétaire, The Lougheed Block Inc., ou tout futur propriétaire, et les sommes dues au propriétaire par la Ville, ou qui pourraient lui être dues dans le futur, en application du présent contrat. [Nous soulignons.]

[45] Le juge en cabinet a conclu qu’on ne peut considérer que la clause 5.3 signifie que les parties au Contrat incitatif entendaient qu’un futur propriétaire puisse recevoir les Paiements incitatifs. La clause

does not refer to a future owner when describing the recipient of the payments from the City under the agreement. Its only references to future owners relate to the payment to the City of taxes and levies. We find no palpable and overriding error in this interpretation.

[46] The chambers judge also considered clause 8.3, which provides that, “[p]ursuant to and in accordance with Section 29 of the Act, this Agreement shall be registered by caveat on title to the Lands and the conditions and covenants herein shall run with the Lands and shall bind the Owner and subsequent owners and successors in title to the Owner.” He found that this was simply a restatement of what is provided for in s. 29 of the *HRA* (enforcement by the City of a positive or negative covenant in its own favour). Again, we find no palpable and overriding error in this interpretation. The reference to s. 29 does not show that the parties to the agreement intended the Incentive Payments to run with the land.

[47] Finally, clause 8.8 provides that “[e]verything herein contained shall inure to the benefit of and be binding upon the parties hereto, their administrators, successors, and assigns respectively.” According to the master’s interpretation, 604, which was merely a subsequent owner, cannot be considered an administrator, successor or assign of LBI. We agree. The term “successor” should be read to mean a corporate successor, considering that clause 8.3 refers to “successors in title” and “subsequent owners”, of which 604 clearly is one, while clause 8.8 refers to “successors”. “Contracting parties are presumed to intend the legal consequences of their words” (G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at p. 91). Meaning must be given to the choice to use one term in one clause and a different term in a different clause of the same agreement, and in this case, of the same section of an agreement (section 8 — *General provisions*). In our view, as the chambers judge found, the intention of the contracting parties was that LBI alone would, after

ne fait pas état d’un futur propriétaire lorsqu’elle décrit le bénéficiaire des paiements à être effectués par la Ville en vertu du contrat. Les seules mentions concernant de futurs propriétaires se rapportent au paiement à la Ville des taxes et prélèvements. Nous estimons que cette interprétation n’est entachée d’aucune erreur manifeste et déterminante.

[46] Le juge en cabinet a également examiné la clause 8.3, laquelle prévoit ce qui suit : [TRADUCTION] « En vertu de l’article 29 de la Loi et conformément à cette disposition, le présent contrat est enregistré par voie de caveat sur le titre des biens-fonds et les conditions et engagements prévus au présent contrat se rattachent au bien-fonds et lient le propriétaire — ainsi que les propriétaires subséquents et les successeurs en titre du propriétaire. » Selon le juge en cabinet, cette clause ne fait que répéter ce que prévoit déjà l’art. 29 de la *HRA* (le droit de la Ville de demander l’exécution d’engagements de nature positive ou négative énoncés en sa faveur). Encore une fois, nous estimons que cette interprétation ne comporte aucune erreur manifeste et déterminante. La mention de l’art. 29 n’établit pas que les parties au contrat entendaient que les Paiements incitatifs se rattachent au bien-fonds.

[47] Enfin, la clause 8.8 précise que [TRADUCTION] « [t]out ce qui est prévu au présent contrat bénéficie aux parties au présent contrat ainsi qu’à leurs administrateurs, successeurs et ayants droit respectifs et les lie. » Selon l’interprétation du protonotaire, 604 — qui était simplement un propriétaire subséquent — ne peut être considérée comme un administrateur, un successeur ou ayant droit de LBI. Nous sommes d’accord. Le mot « successeur » doit s’entendre au sens d’une personne morale qui lui succéderait (« *corporate successor* »), vu la présence des mots « successeurs en titre » (« *successors in title* ») et « propriétaires subséquents » (« *subsequent owners* ») à la clause 8.3, catégories auxquelles appartient de toute évidence 604, et l’utilisation du mot « successeurs » à la clause 8.8. [TRADUCTION] « Les parties à un contrat sont présumées vouloir les conséquences juridiques des mots qu’elles emploient » (G. R. Hall, *Canadian Contractual Interpretation Law* (2^e éd. 2012), p. 91). Il faut donner un sens à la décision

completing the rehabilitation work, be entitled to the Incentive Payments, which were to be paid over 15 years.

[48] In 604's submission, it would not make sense to sever the benefits available to the owner under the Incentive Agreement (which they identify as the Incentive Payments) from the burdens imposed on it (i.e. efforts to be expended with respect to the use of the Grand Theatre, and a restriction on the use of the building). In our view, there is nothing unusual about severing the Incentive Payments, a benefit under the Incentive Agreement, from the burdens relating to certain restrictions flowing from the designation of the building as a Municipal Historic Resource.

[49] As we explained above, nothing in clause 5.3 confirms that the parties to the Incentive Agreement intended the payments to go to a future owner. Rather, a reasonable interpretation of the agreement is that all the Incentive Payments were intended to go to LBI. Read in conjunction, the recitals of the Incentive Agreement, together with clauses 3 (*Rehabilitation Work*), 4 (*Payment of Rehabilitation Incentive*) and 5.4, lead to the conclusion that LBI was entitled to receive all of the Incentive Payments.

[50] We further adopt the chambers judge's reasoning to the effect that it is LBI that was the owner at the time of the designation and that completed all of the rehabilitative work 604 now benefits from as the new owner. It is LBI that suffered the loss of value and paid for the rehabilitation. Moreover, 604 could take the designation into consideration when it purchased the Lougheed Building. Consequently,

d'employer un terme donné dans une clause et un terme différent dans une autre clause figurant dans le même contrat, et encore plus, comme c'est le cas en l'espèce, dans une même section d'un contrat (section 8 — *Généralités*). À l'instar du juge en cabinet, nous sommes d'avis que l'intention des parties contractantes était que seule LBI, après avoir terminé les travaux de restauration, aurait droit aux Paiements incitatifs, lesquels devaient être versés sur une période de 15 ans.

[48] 604 fait valoir qu'il serait illogique de disso-
cier les avantages conférés par le Contrat incitatif au propriétaire (avantages qu'elle désigne comme étant les Paiements incitatifs) des obligations qui lui sont imposées par ce contrat (c'est-à-dire les efforts requis de sa part relativement au Grand Theatre, ainsi qu'une restriction concernant l'utilisation qui peut être faite de l'immeuble). Selon nous, il n'y a rien d'inhabituel à dissocier les Paiements incita-
tifs, un avantage conféré par le Contrat incitatif, des obligations liées à certaines restrictions découlant de la désignation de l'immeuble comme ressource historique municipale.

[49] Comme nous l'avons expliqué plus haut, la clause 5.3 ne confirme d'aucune manière que les parties au Contrat incitatif entendaient que les paie-
ments puissent être versés à un futur propriétaire. Au contraire, une façon raisonnable d'interpréter le Contrat incitatif consiste plutôt à considérer que tous les Paiements incitatifs étaient censés être ver-
sés à LBI. Une lecture d'ensemble des différents at-
tendus avec les clauses 3 (*Travaux de restauration*), 4 (*Paiement de l'incitatif à la restauration*) et 5.4 du Contrat incitatif mène à la conclusion que LBI avait le droit de recevoir tous les Paiements incita-
tifs.

[50] De plus, nous faisons notre le raisonnement du juge en cabinet selon lequel c'est LBI qui était propriétaire de l'Édifice au moment de sa désignation et qui a mené à bien tous les travaux de restauration dont profite maintenant 604 en tant que nouvelle propriétaire. C'est LBI qui a subi la perte de valeur et payé les travaux de restauration. Qui plus est, la désignation de l'Édifice était un facteur

to conclude now that the intention was for the Incentive Payments to go to a future owner would have no commercial rationale and would, in essence, provide 604 with an undeserved windfall.

C. Were the Incentive Payments Sold as an Asset in the Judicial Sale?

[51] Another submission by 604 is that it purchased the right to the Incentive Payments in the judicial sale. Once again, we disagree. The chambers judge's conclusion that the Incentive Payments were not sold in the judicial sale is well supported by the evidence.

[52] In the 604 Offer, the "Property" being purchased is defined using the legal description of the Lougheed Building (the real property) alone. The 604 Offer then lists other, ancillary, property that was to be included in the sale:

10. All fixtures, equipment and chattels located on the Property and which are owned by the Vendor shall be included in the Purchase Price. The Purchaser acknowledges that certain of said fixtures, equipment and chattels are the property of the tenants of the Property and are not included in the sale hereunder.

[53] The 604 Offer also states, at para. 6, that "[a]ll leases and contracts that are assignable shall be assigned to the Purchaser as of the Closing Date and the Purchaser shall assume all obligations thereunder." In 604's submission, the Incentive Agreement was an "assignable contract" within the meaning of para. 6 and was therefore sold to 604 in the judicial sale.

[54] The chambers judge accepted that the Incentive Agreement was an "assignable contract", but concluded that it had not been sold to 604, as

que 604 pouvait prendre en compte lorsqu'elle l'a acheté. Par conséquent, conclure maintenant que l'intention des parties était que les Paiements incitatifs seraient versés à un futur propriétaire n'aurait aucune logique d'un point de vue commercial et aurait essentiellement pour effet de procurer à 604 un avantage auquel elle n'a pas droit.

C. Les Paiements incitatifs ont-ils été vendus en tant qu'éléments d'actif lors de la vente sous contrôle de justice?

[51] Un autre argument que fait valoir 604 est qu'elle a acquis le droit aux Paiements incitatifs à l'occasion de la vente sous contrôle de justice. Une fois de plus, nous ne sommes pas d'accord. La preuve étaye amplement la conclusion du juge en cabinet selon laquelle les Paiements incitatifs n'ont pas été vendus lors de cette vente.

[52] Dans l'Offre de 604, la « propriété » visée par l'offre d'achat est définie uniquement au moyen de la description cadastrale de l'Édifice (l'immeuble). L'Offre de 604 énumère ensuite d'autres biens accessoires devant être inclus dans la vente :

[TRADUCTION]

10. Tous les accessoires fixes, équipements et biens meubles qui se trouvent sur la propriété et qui appartiennent au vendeur sont inclus dans le prix d'achat. L'acheteur reconnaît que certains de ces accessoires fixes, équipements et biens meubles appartiennent aux locataires de la propriété et ne sont pas inclus dans la vente visée aux présentes.

[53] L'Offre de 604 précise en outre, au par. 6, que [TRADUCTION] « [t]ous les baux et contrats cessibles sont cédés à l'acheteur à la date de clôture et ce dernier assume toutes les obligations en découlant. » 604 prétend que le Contrat incitatif constituait un « contrat cessible » visé au par. 6 et qu'il lui a en conséquence été cédé à l'occasion de la vente sous contrôle de justice.

[54] Le juge en cabinet a retenu la prétention selon laquelle le Contrat incitatif était un [TRADUCTION] « contrat cessible », mais il a conclu que ce contrat

para. 6 concerns only contracts that are “ancillary to the Property” (para. 62). He found that para. 6 does not expand the scope of the “Property” being acquired; rather, it merely addresses the process for the transaction. He observed that if 604 had intended to purchase the Incentive Payments, its offer would have expressly mentioned them either in the initial definition of the “Property” or in the list of ancillary property at para. 10.

[55] In our view, the chambers judge did not make a palpable and overriding error in his interpretation of the 604 Offer. He sensibly limited the scope of para. 6 to “assignable contracts” that were ancillary to the real property. As Heritage argues, there may have been other contracts to which LBI was a party — for example, car leases or club memberships — and 604 cannot be said to have purchased all such contracts just because they were “assignable contracts”. Given the substantial value of the Incentive Payments, if 604 had intended to purchase the Incentive Payments, its offer would likely have stated this expressly. Instead, there is no indication, express or otherwise, that 604 intended to purchase the Incentive Payments.

[56] Further, the circumstances of the 604 Offer support the chambers judge’s conclusion. As O’Brien J.A. observed, the statement of claim initiating the sale proceedings did not refer to the Incentive Agreement or to the Incentive Payments. In addition, neither the judicial sale listing nor the marketing brochure published pursuant to the order for sale indicated that the Incentive Payments were part of the property and assets included in the judicial sale.

D. *Is the Priority of Interests in the Incentive Payments Governed by the PPSA?*

[57] Having found that the Incentive Payments are not an interest that ran with the land and that they were not sold to 604 in the judicial sale, we must now determine whether the assignment of the Incentive Payments is governed by the *PPSA*. As

n’avait pas été cédé à 604, étant donné que le par. 6 ne vise que les contrats « accessoires à la propriété » (par. 62). Selon lui, le par. 6 n’élargit pas la définition de la « propriété » acquise; il ne porte que sur les modalités de l’opération. Le juge en cabinet a souligné que, si 604 avait eu l’intention d’acheter les Paiements incitatifs, son offre aurait fait expressément état de ceux-ci soit dans la définition initiale de la « propriété », soit dans la liste des biens accessoires, au par. 10.

[55] Selon nous, le juge en cabinet n’a commis aucune erreur manifeste et déterminante dans son interprétation de l’Offre de 604. Il a avec raison limité la portée du par. 6 aux « contrats cessibles » accessoires à l’immeuble. Comme le prétend Heritage, il est possible que LBI ait été partie à d’autres contrats — par exemple des contrats de location de voiture ou des contrats d’adhésion à un club — mais on ne saurait affirmer que 604 les a tous acquis du seul fait qu’ils constituaient des « contrats cessibles ». Étant donné la valeur considérable des Paiements incitatifs, si 604 avait eu l’intention de les acquérir, elle l’aurait vraisemblablement mentionné expressément dans son offre. Au contraire, il n’y a aucune indication, expresse ou autre, que 604 entendait acheter ces paiements.

[56] De plus, les circonstances de l’Offre de 604 appuient la conclusion du juge en cabinet. Comme l’a fait remarquer le juge O’Brien, la déclaration à l’origine de la procédure de vente ne faisait pas état du Contrat incitatif ou des Paiements incitatifs. En outre, ni la fiche descriptive de la propriété mise en vente sous contrôle de justice ni la brochure publicitaire publiée conformément à l’ordonnance de vente ne précisaien que les Paiements incitatifs faisaient partie de la propriété et des éléments d’actif inclus dans la vente sous contrôle de justice.

D. *L’ordre de priorité quant aux Paiements incitatifs est-il régi par la PPSA?*

[57] Comme nous avons conclu que les Paiements incitatifs ne constituent pas un intérêt qui se rattache au bien-fonds et qu’ils n’ont pas été vendus à 604 lors de la vente sous contrôle de justice, nous devons maintenant décider si les cessions des

we mentioned above, LBI successively assigned the Incentive Agreement to both Equitable and Heritage before it defaulted on the Equitable loan. The 604 Assignment was executed after the sale of the Lougheed Building. It appears that this assignment was registered at the Personal Property Registry, but not until after the Heritage Assignment had been registered in October 2010.

[58] Master Laycock held that the 604 Assignment was ineffective because no consideration had been paid for it. Jeffrey J. declined to decide this issue or to address the issues of assignments and redemptions. He was of the view that any question related to 604's claim to the Incentive Payments was beyond the scope of the issue before the court. The majority of the Court of Appeal, having determined that the Incentive Payments ran with the land, held that the *PPSA* did not apply. O'Brien J.A. was of the view that, "having regard both to the scope of the original application, and to the evidentiary record", the Court of Appeal was not in a position to determine which party was entitled to the Incentive Payments at that time (para. 93).

[59] In this Court, Heritage argues that the Heritage Assignment was registered before the 604 Assignment and that its interest in the Incentive Payments should therefore have priority under the *PPSA*. As for 604, it replies that the Equitable Assignment was already registered under the *PPSA* at the time of the 604 Assignment. Finally, Heritage maintains that, should this Court decline to decide the *PPSA* issue, it should at least determine whether the Incentive Payments are a chose in action so as to facilitate further proceedings between the parties.

[60] The *PPSA* applies to "every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral" (s. 3(1)(a)). We conclude that the Incentive Payments are a chose in action. The right to the Incentive Payments is merely contractual

Paiements incitatifs sont régis par la *PPSA*. Ainsi que nous l'avons mentionné précédemment, LBI a cédé le Contrat incitatif successivement à Équitable et à Heritage avant de faire défaut à l'égard du remboursement du prêt que lui avait consenti Équitable. La Cession en faveur de 604 a été conclue après la vente de l'Édifice. Cette cession semble avoir été enregistrée au bureau d'enregistrement des sûretés mobilières, mais seulement après l'enregistrement de la Cession en faveur d'Heritage en octobre 2010.

[58] Le protonotaire Laycock a jugé que la Cession en faveur de 604 était inopérante, parce qu'aucune contrepartie n'avait été payée à son égard. Le juge Jeffrey de la Cour du Banc de la Reine a refusé de trancher cette question ou d'examiner celles des cessions et des rachats. D'après lui, toute question liée à la demande de 604 visant les Paiements incitatifs dépassait le cadre de la question soumise à la cour. Ayant conclu que les Paiements incitatifs se rattachaient au bien-fonds, les juges majoritaires de la Cour d'appel ont décidé que la *PPSA* ne s'appliquait pas. Le juge O'Brien a quant à lui estimé que, [TRADUCTION] « eu égard à l'objet de la demande initiale et à la preuve au dossier », la Cour d'appel n'était pas en mesure de décider quelle partie avait droit aux Paiements incitatifs (par. 93).

[59] Devant notre Cour, Heritage prétend que la cession en sa faveur a été enregistrée avant la Cession en faveur de 604 et que l'intérêt qu'elle possède à l'égard des Paiements incitatifs devrait en conséquence avoir priorité suivant la *PPSA*. De son côté, 604 réplique que la Cession en faveur d'Équitable était déjà enregistrée en vertu de la *PPSA* au moment de la Cession en faveur de 604. Enfin, Heritage soutient que, si notre Cour refuse de statuer sur la question de la *PPSA*, elle devrait à tout le moins décider si les Paiements incitatifs constituent une chose non possessoire afin de faciliter le déroulement de procédures ultérieures entre les parties.

[60] La *PPSA* s'applique à [TRADUCTION] « toute opération qui crée essentiellement une sûreté, indépendamment de sa forme et de l'identité de la personne qui possède le titre relatif au bien grevé » (al. 3(1)(a)). Nous concluons que les Paiements incitatifs sont une chose non possessoire. Le droit

and is not an interest that runs with the land or that is ancillary to the real property. Therefore, it follows that, contrary to 604's suggestion, any interests in the payments are not exempt from the *PPSA* pursuant to s. 4(f) or (g) thereof. The *PPSA* governs the priority of interests in the Incentive Payments.

[61] Clause 7 of the Equitable Assignment states that the assignment was given by LBI to secure repayment of its mortgage to Equitable. Jeffrey J. held that the Equitable Assignment was only a security interest. O'Brien J.A. accepted Jeffrey J.'s conclusion, as he was also of the view that "the assignment was for purposes of securing the mortgage debt" and that it "constituted a security interest only" (para. 87).

[62] The right to the Incentive Payments, contrary to land lease payments, for example, arose only upon LBI's completion of the rehabilitation work, and their purpose was to satisfy all rights to compensation from the City that flowed from the historic resource designation and from the restoration. They were offered on a one-time basis to the owner of a newly designated building and were never meant to follow the property. This is confirmed by the fact that the parties agree that if the Incentive Payments had been made on a lump sum basis, 604 would not be entitled to recover part of that sum. We are therefore satisfied that the *PPSA* applies to the Incentive Payments.

[63] This being said, to the extent that the parties disagree about the effect of the assignments and the resulting priorities, we would remit this issue alone to a master in chambers to be decided in accordance with our findings above. However, we note that in light of our conclusion that the Equitable Assignment created a security interest only, the most Equitable could have transferred to 604 was its security interest. In this regard, this Court's reasons in the related appeal, *Krayzel Corp. v. Equitable Trust*

aux Paiements incitatifs a simplement un caractère contractuel et n'est pas un intérêt rattaché au bien-fonds ou accessoire à l'immeuble. Contrairement à ce que prétend 604, il s'ensuit qu'aucune cession relative à ces paiements n'échappe à l'application de la *PPSA* par l'effet de l'al. 4(f) ou (g) de cette loi. La *PPSA* régit l'ordre de priorité des Paiements incitatifs.

[61] La clause 7 de la Cession en faveur d'Équitable précise que la cession a été consentie par LBI pour garantir le remboursement de son hypothèque à Équitable. Le juge Jeffrey a statué que cette cession ne constituait qu'une sûreté. Le juge O'Brien a fait sienne cette conclusion du juge Jeffrey, étant lui aussi d'avis que [TRADUCTION] « la cession visait à garantir la créance hypothécaire » et qu'elle « avait uniquement créé une sûreté » (par. 87).

[62] Contrairement à ce qui aurait été le cas s'il s'était agi, par exemple, de paiements découlant d'un bail foncier, le droit aux Paiements incitatifs a pris naissance uniquement lorsque LBI a terminé les travaux de restauration. Ces paiements visaient la satisfaction de l'ensemble des droits à une indemnisation par la Ville pour la désignation de l'Édifice comme ressource historique et pour la restauration de celui-ci. Les paiements constituaient une offre globale à la seule intention du propriétaire d'un édifice récemment désigné et ils n'étaient aucunement censés suivre la propriété. Cette conclusion est confirmée par le fait que les parties s'accordent pour dire que, si les Paiements incitatifs avaient été versés sous forme de somme forfaitaire, 604 n'aurait eu droit à aucune partie de cette somme. Nous sommes donc convaincus que la *PPSA* s'applique aux Paiements incitatifs.

[63] Cela dit, dans la mesure où les parties ne s'entendent pas sur l'effet des cessions et sur l'ordre de priorité en découlant, nous sommes d'avis de renvoyer ce seul aspect à un protonotaire en chambre pour décision conformément aux conclusions que nous énonçons. Nous tenons toutefois à signaler que, vu notre conclusion selon laquelle la Cession en faveur d'Équitable a simplement créé une sûreté, la seule chose qu'Équitable aurait pu transférer à 604 était sa sûreté. À cet égard, les motifs exposés par

Co., 2016 SCC 18, [2016] 1 S.C.R. 273, which are being issued concurrently with the reasons in this appeal, will have to be considered in any further proceedings relating to the Incentive Payments.

VI. Conclusion

[64] We would allow the appeal and restore the order of the master in chambers, with costs throughout to Heritage and LBI as against 604. The Incentive Payments arising under the Incentive Agreement are not an interest in land by operation of the *HRA* and are not among the assets sold to 604. If the parties disagree about the order of priorities under the *PPSA* between the Heritage Assignment and the 604 Assignment, we would remit this issue alone to a master in chambers to be decided in accordance with the foregoing findings.

Appeal allowed with costs.

Solicitors for the appellant: Burnet, Duckworth & Palmer, Calgary.

Solicitors for the respondents the Lougheed Block Inc., Neil John Richardson, Hugh Daryl Richardson and the Heritage Property Corporation: Willow Park Law Office, Calgary.

Solicitors for the respondent 604 1st Street S.W. Inc.: Gowling WLG (Canada) Inc., Calgary.

notre Cour dans le pourvoi connexe *Krayzel Corp. c. Équitable, Cie de fiducie*, 2016 CSC 18, [2016] 1 R.C.S. 273, qui est décidé en même temps que le présent appel, devront être pris en compte dans toutes procédures ultérieures portant sur les Paiements incitatifs.

VI. Conclusion

[64] Nous sommes d'avis d'accueillir le pourvoi et de rétablir l'ordonnance du protonotaire en chambre, avec dépens payables par 604 en faveur d'Heritage et de LBI devant toutes les cours. Les Paiements incitatifs prévus par le Contrat incitatif ne constituent pas un intérêt foncier par l'effet de la *HRA* et ils ne font pas partie des éléments d'actif vendus à 604. Si les parties ne s'entendent pas sur la question de savoir si c'est la Cession en faveur d'Heritage ou la Cession en faveur de 604 qui a priorité en vertu de la *PPSA*, nous sommes d'avis de renvoyer cette seule question à un protonotaire en chambre pour qu'elle soit tranchée conformément aux conclusions que nous énonçons.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Burnet, Duckworth & Palmer, Calgary.

Procureurs des intimés Lougheed Block Inc., Neil John Richardson, Hugh Daryl Richardson et Heritage Property Corporation : Willow Park Law Office, Calgary.

Procureurs de l'intimée 604 1st Street S.W. Inc. : Gowling WLG (Canada) Inc., Calgary.

TAB 6

CITATION: Loyalist (Township) v. The Fairfield-Gutzeit Society, 2019 ONSC 2203
COURT FILE NO.: CV-15-293
DATE: 20190405

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CORPORATION OF LOYALIST TOWNSHIP)	<i>David M. Adams</i> , for the applicant (respondent by counter-application)
Applicant (respondent by counter-application))	
– and –)
THE FAIRFIELD-GUTZEIT SOCIETY)	<i>Roberto D. Aburto and Jacob A. Polowin</i> , for the respondent (applicant by counter-application)
Respondent (applicant by counter-application))	
)
)
) HEARD at Kingston: 21 December 2018

MEW J.

REASONS FOR DECISION

[1] The Village of Bath in Lennox & Addington County traces its origins back to its first European settlers, United Empire Loyalists, who settled there in 1784. It boasts a number of fine historic buildings, including the two properties which are the subject of this proceeding.

[2] Layer Cake Hall is a one-and-a-half-storey board and batten building, designed in the Carpenter's Gothic style and constructed in 1859.

[3] The Old Town Hall was completed in 1861 as a court house. It was designed in the Tuscan Portico style, patterned after Roman buildings that had civic or judicial functions. It is presently the home of the Bath Museum.

[4] On 11 December 1997, ownership of the properties was transferred from the Village of Bath, which at the time was a local authority, to The Fairfield-Gutzheit Society, for nominal consideration of two dollars each.

[5] These transactions were prompted by the then-pending amalgamation of the Village of Bath with two other local authorities to form Loyalist Township. Elected officials in Bath were concerned that they would have little influence in the new Township, and that it would not adequately protect Bath's historical buildings.

[6] The Fairfield-Gutzeit Society had been established earlier in 1997 as a not-for-profit corporation, and the properties were transferred to the Society to ensure their preservation and protection.

[7] The Township has leased Layer Cake Hall from the Society since amalgamation on 1 January 1998. The Township began leasing Old Town Hall from the Society on 1 May 2009.

[8] The last agreed-upon lease terms have now expired, although the Township remains in possession. Unable to find alternative tenants, the Society listed the properties for sale. The Township claims that by doing so the Society breached the terms of a covenant which, it says, gives it a right of first refusal to repurchase the properties for two dollars each, a right which it has purported to exercise.

[9] The Society challenges both the validity and (if valid), the effect of the covenant and, hence, the Township's exercise of its right of first refusal. It also alleges various breaches by the Township of its lease obligations and seeks orders that the Township vacate the premises.

[10] The properties have not been sold pending the outcome of this proceeding.

Issues

[11] The Township's application seeks to enforce what it characterises as its right of first refusal. By counter-application, the Society seeks declarations that the covenant containing the so-called right of first refusal is invalid and unenforceable, and that the leases between the Society and the Township are terminated, and an order that the Township vacate the properties within 90 days.

[12] I would summarise the issues presented as follows:

- a) Are the covenants (rights of first refusal) valid and enforceable?
- b) If the answer to (a) is "yes", were the rights triggered by the actions of the Society when it listed the properties for sale?
- c) If the answer to (b) is "no", did the Society nevertheless breach its good faith obligations of contractual performance?
- d) Is the Township in default, or has it otherwise breached its obligations under the leases of the property?
- e) What are the appropriate remedies arising from the determination of these issues?

The Covenants

[13] The agreements to transfer the properties from the Village of Bath to the Society contained what the Township describes as a right of first refusal in favour of the Township. The Society disputes this characterisation, maintaining that the provision is a restrictive covenant creating an interest in land which is null and void because

- a) it does not meet the statutory requirements of a covenant under s. 19(4) of the *Land Titles Act*, R.S.O. 1990, c.L.5 and, accordingly, was not properly registered on title, may not be enforced and should now be deleted; and
- b) it is an option to purchase which violates the rules against perpetuities.

[14] It is necessary to go back to 1997 in order to put the parties' dispute in a proper context.

[15] At that time, William Hineman was the Reeve of the Village. Under a plan of local government reorganisation that was due to come into effect on 1 January 1998, the Village would cease to exist as a local authority. Mr. Hineman's evidence is that the Council of the Village was concerned that the new local authority, Loyalist Township, would not protect its historic buildings, and would, perhaps "sell them off" or "dispose of them into the public sector".

[16] In 1997, there was already in existence a semi-independent committee in the Village known as the "Bath Bicentennial Committee". According to Mr. Hineman, this semi-independent committee was incorporated as the Fairfield-Gutzeit Society on 28 August 1997. It is a registered charity administered by volunteers who manage and maintain certain heritage properties, including the subject properties, in the former Village of Bath.

[17] Mr. Hineman was a founding director of the Fairfield-Gutzeit Society although he has testified that he did not take an active role in the Society until after he was no longer Reeve.

[18] On 27 October 1997, evidently in anticipation of an agreement between the Village and the Society, the Village passed a by-law to authorise agreements to convey the Layer Cake Hall and the Old Town Hall to the Society. The wording of the resolution included this narrative:

WHEREAS the Corporation of the Village of Bath desires to convey to two distinctively historic buildings to the Fairfield Gutzeit Society;

AND WHEREAS an agreement has been established whereby in the event that the Fairfield Gutzeit Society is dissolved, the Village will have first option to have these buildings re-conveyed to it and this agreement is attached to and forms Schedule "A".

[19] The agreement subsequently entered into on 31 October 1997 provides for title of the properties to be transferred from the Village to the Society. The Society acknowledges in the agreement that the properties and title are being transferred to it subject to certain terms and conditions including that:

...the Society may transfer the Properties...to an organization having objects similar to the Society's on such terms as the Society is its sole discretion deems appropriate. In the event the Society wishes to dispose of its interest in either of the Properties, other than to an organization having similar objects, it shall give written notice of such intention to the Village, which notice shall include an offer to the Village to purchase the Property as a purchase price of Two Dollars (\$2.00)...the Village shall have a period of sixty (60) days following receipt of notice to either accept or reject the offer. If the Village fails to accept the offer in writing within a period of sixty (60) days, it shall be deemed to have refused the offer, and the Society shall be free to dispose of the Property to the third party on such terms and conditions as the Society, in its sole discretion may determine. In the event that the Village notifies the Society of its acceptance of such offer within the period of sixty (60) days, following receipt of notice from the Society, transfer of the Society's title to the Property or Properties shall be completed within a further period of sixty (60) days following acceptance of the offer by the Village.

[20] Following a public consultation, the Village declared the properties surplus on 24 November 1997 and passed a resolution which stated:

WHEREAS the Council of the Village of Bath is of the opinion that the historic properties known as the Old Town Hall and the Layer Cake Hall will be better served if kept within an organization dedicated to the preservation of the historical integrity of the Village of Bath;

WHEREAS the Fairfield Gutzeit Society has expressed its interest in obtaining and caring for both of these properties;

AND WHEREAS By-law 929/97 was approved at a Regular Meeting of the Council of the Corporation of the Village of Bath held October 27, 1997 to authorize the Reeve and Chief Administrative Officer to execute any and all documents for the conveyance of these properties from the Village of Bath to the Fairfield Gutzeit Society;

[21] The Village transferred the properties to the Society on 11 December 1997. "Schedule A" of the Transfer/Deed contain the following provisions:

In the event the Transferee wishes to dispose of its interest in the property other than to an organization having similar objects as the Transferee, the Transferee shall give written notice of such intention to the Transferor. This notice shall include an offer to sell the property to the Transferor at a purchase price of two (\$2.00) dollars, plus the assumption of any charge, mortgage or encumbrance then registered against title to the property that was given with the consent of the Transferor as set out above.

The Transferor shall have a period of 60 days following receipt of notice to either accept or reject the offer. If the Transferor fails to accept the offer in writing within the period of 60 days, it shall be deemed to have refused the offer and the Transferee shall be free to dispose of the property to a third party on such terms and conditions as the Transferee, in its sole discretion may determine. In the event the Transferor notifies the Transferee of its acceptance of such offer within the said period of 60 days, the transfer of the property to the Transferor shall be completed within a further period of 60 days following acceptance of the offer by the Transferor.

[22] Schedule A to the Transfer/Deed is described in the evidence of the Society as a restrictive covenant. It was signed by the chairman and secretary of the Society.

[23] When, on 27 March 2006, the properties were converted into the Land Titles system, the covenant was carried over and appears on the parcel register.

[24] The Township takes the position that the agreement between the Society and the Village to transfer the properties gives it valid and enforceable contractual rights of first refusal in the event that the Society wishes to dispose of one or both of the properties to anything other than an organisation having similar objects to its own.

[25] There is no dispute that, as the legal successor to the Village of Bath, the Township stands in the same position as the Village would have in terms of rights and obligations conferred by the agreement.

[26] The Society's position is that the covenant never met the applicable legal requirements for a restrictive covenant, and was, therefore, invalid and unenforceable from the outset. The Society argues that the covenant does not identify the benefiting lands, seeks to impose a positive covenant, and seeks to restrict transfer or assignment rights as opposed to use.

[27] A concise summary of the distinction between options to purchase and rights of first refusal is provided by Laskin J.A. in *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409, at para. 24:

... the jurisprudence establishes that options to purchase create immediate interests in land; rights of first refusal do not. Options to purchase are specifically enforceable; rights of first refusal are not. And options to purchase are subject to the rule against perpetuities; rights of first refusal are not. Finally ... options to purchase give the option holder control over the decision to effect a conveyance. Rights of first refusal give the land owner control over the decision to convey. But ... in some circumstances control over the exercise of the option is not determinative.

[28] In *Israel Estate*, the question posed by the Court of Appeal for determination was as follows:

A sells land to B. At the same time, A and B enter into an agreement that A can repurchase the land if a condition under B's control is met. Does the agreement give A an interest in land, or only a personal contractual right?

[29] The situation in the present case is somewhat similar. A (the Village of Bath, now Loyalist Township) sold the properties to B (the Fairfield-Gutzeit Society). In *Israel Estate*, the land in question contained a gravel pit, and the purchasers bought the land to obtain the gravel but, contemporaneously with the conveyance, signed an agreement giving A the "first option to purchase" the land for \$1.00 once the gravel had been removed from it. The agreement gave B the "discretion" and "authority" to state when all of the gravel had been removed.

[30] In the present case, the Society - B - has an unfettered ability to transfer the properties to a third party organisation having objects similar to the Society's on such terms as the Society deems appropriate. It is only in the event that the Society "wishes to dispose" of its interest in either of the properties other than to an organisation having similar objects, that the Society is obliged to notify Loyalist, such notice to include an offer to Loyalist to purchase the property.

[31] It can be seen that the event triggering Loyalist's ability to exercise what it describes as its right of first refusal is not within its control. Loyalist's right only becomes exercisable in the event that the Society wishes to dispose of its interest in the properties other than to an organisation having similar objects to the Society.

[32] As was the situation in *Israel Estate*, the right given to Loyalist amounts to a "first option to purchase" the land, but it is a right that "does not fit precisely into either the definition of an option to purchase or a definition of a right of first refusal established in the jurisprudence": *Israel Estate*, at para. 25. In such situations, it is appropriate to focus on what the parties intended by their agreement: *Israel Estate*, at para. 38.

[33] I would observe that the transfer of these hitherto two publicly owned properties by the Village of Bath to the Society was effected so that the properties would be preserved for the benefit of the community. It made sense, given the notional consideration received by the Village, that if the rationale for the transfer could no longer be assured, there would be an opportunity for the properties to revert to the Township (as successor to the Village). This was a provident condition of what might otherwise have been seen as an improvident transaction.

[34] In *Israel Estate*, the Court of Appeal determined that the purpose of the agreement, the context in which it was made, its terms, and the conduct of the parties under it, showed an intention to give the original owner ("A") an option to repurchase the land, which gave rise to an immediate, equitable interest in the land.

[35] A distinguishing feature between the present case and the circumstances in *Israel Estate*, is that, setting aside any issues relating to the rule against perpetuities, there was in that case an expectation that the option to repurchase would crystallise at some point. This would happen once the owner of the land ("B") had removed the gravel. By contrast, the Township's option to repurchase the properties would only arise in the event that the Society wished to dispose of its

[1] interest in the properties other than to an organisation having similar objects to the Society. It [2] might never have happened at all.

[36] Looking at the nature of the transaction, the intention of the parties and all of the circumstances, I conclude that the Township's option to repurchase the properties was not intended to, and did not, give rise to an immediate, equitable interest in the properties. The Township's interest in the properties would not have prevented the sale by the Society to a similar organisation with similar purposes. Neither the agreement nor the schedule to the Transfer/Deed purported to impose rights that would attach to the land and, hence, to a party purchasing the properties from the Society.

[37] It follows logically from this analysis that had the Society sold either of the properties to a similar organisation with similar purposes, it would not have had to notify the Township and the purchaser would have obtained title unencumbered by any restrictive covenant.

[38] It would also follow that had the Society sold the properties to a *bona fide* purchaser without notice that was not an organisation with similar objectives, the Township would not be able to assert any interest in the properties.

[39] In the event that I am wrong about the characterisation of what is essentially an option to purchase, I make two observations.

[40] First, although the rule against perpetuities would apply if there was an otherwise valid covenant, the Township purported to exercise its option within 21 years of the Transfer/Deed transaction.

[41] The second observation relates to the transfer of the properties into Land Titles. Sections 119(3) and (4) of the *Land Titles Act*, R.S.O. 1990, c.L.5, provide as follows:

Registration of covenants, on application

(3) Upon the application of the owner of land that is being registered or of the registered owner of land, the land registrar may register as annexed to the land a covenant that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other covenant running with or capable of being legally annexed to land.

Idem

(4) A covenant shall not be registered under subsection (3) unless,

- (a) the covenantor is the owner of the land to be burdened by the covenant;
- (b) the covenantee is a person other than the covenantor;

- (c) the covenantee owns land to be benefitted by the covenant and that land is mentioned in the covenant; and
- (d) the covenantor signs the application to assume the burden of the covenant.

[42] The Society argues that Schedule “A” to the Transfer/Deed of Land does not identify the land to be benefited (i.e. the dominant tenement) and, as such, the covenant should have been struck from title at the time of conversion into Land Titles.

[43] A not dissimilar scenario occurred in *Mississippi Mills (Town) v. 1278502 Ontario Inc.* (2006) 28 MPLR (4th) 102, 49 RPR (4th) 283 (Ont SCJ). There a municipality purported to exercise an option contained in a covenant to repurchase five parcels of land that had been sold to a developer. The covenant provided that the grantee would commence construction of one or more buildings on the properties within one year of the date of the closing of the purchase of the lands and to substantially complete the construction within one year of the date of issuance of a building permit. Failing which, the covenant provided that the grantor (the Municipality) had the right to repurchase the lands at the original purchase price. When the municipality purported to exercise this right, both the purchasers of the land and a mortgagee of three of the five properties objected. Pedlar J. held that covenants that had been registered did not comply with s. 119(4) of the *Land Titles Act*. In particular, the covenants did not describe the land to be benefited and the covenantee and the covenantor were the same entity.

[44] Notably, one of the submissions that was made to Pedlar J. was that the covenants must be enforceable either in contract or in equity, and as there was no privity of contract (the covenant being the product of a by-law rather than an agreement), the enforcement, or otherwise, of the covenants must be a matter of equity.

[45] In the present case, while I would agree that the covenant annexed to the Transfer/Deed of Land was not registerable under the Land Titles system, it nevertheless remains enforceable by the Township, given its privity of contract with the Society.

Was the Township’s Option Triggered?

[46] The Township’s right which I would describe as an option to purchase, turns on the following words:

In the event that the Transferee [the Society] wishes to dispose of its interest in the property other than to an organisation having similar objects as the Transferee, the Transferee shall give written notice of such intention to the Transferor [the Township]. This notice shall include an offer to sell the property to the Transferor at a purchase price of two (\$2.00) dollars.

[47] In May 2015, the Society listed the subject properties for sale to the general public on the multiple listing service (MLS) through Smith & Hineman, a firm of real estate agents (the

Hineman of Smith & Hineman is the same Mr. William Hineman who was the Reeve of the Village of Bath and a founding director of the Society).

[48] The listing for Layer Cake Hall stated that the Society was seeking \$279,000 for it and specified that this was a “first time offering to the public... Attached lot has possibility of severance”.

[49] The listing for Old Town Hall stated that the Society was seeking \$229,000 for the property, and provided that the building “is being offered to the public for the first time in over 150 years”.

[50] Neither listing made mention of the buyer having to be an organisation having similar objects as the Society.

[51] The Township argues that by listing the properties for sale, the Society was trying to do with the properties exactly what the Village of Bath had worried the new Township might do: “sell them off” or “dispose of them into the public sector”.

[52] The parties dispute whether the listing of the properties by the Society amounted to a “wish to dispose” which would trigger the Township’s option to repurchase.

[53] The Society’s position is that regardless of how the option contained in the agreement or covenant is characterised, the option was not, in fact, triggered. The Society never received an offer for sale. It argues that a mere listing for sale, absent some other step, such as the receipt of an offer or the transfer of the assets, would not trigger an option.

[54] The Township, by contrast, relies on this court’s decision in *St. Andrew Goldfields Ltd. v. Teddy Bear Valley Mines Ltd.*, 2014 ONSC 1843 to support its assertion that by listing the properties for sale to the public and not providing notice to the Township, the Society evinced a wish to sell the properties to the public.

[55] In the *St. Andrew Goldfields* case, contracts concerning the entitlement to mining royalties provided that if a party “wishes or seeks to transfer directly or indirectly” all or a portion of royalties to which it may have become entitled, the other participating parties would be entitled to a right of first refusal. An issue arose as to whether, when the party with the entitlement to royalties was dissolved, and its royalty interests were subsequently assigned to its largest shareholder, the rights of first refusal contained in the agreements were triggered. The court rejected an argument that the right of first refusal would only be triggered upon receipt of an offer from a third party to purchase the royalties that it was willing to accept, conditions which were never met since the dissolution did not result in an offer being made with respect to the royalties. McEwen J. stated, at para. 22:

... based on the wording of the Agreements, it was not when an offer to purchase was made, but rather when Teddy Bear sought to dispose of the royalties, that the obligation to provide SAS with a right of first refusal under both Agreements was

triggered. Interpreting the clauses otherwise would artificially avoid the parties' intentions, as derived from the Agreements' wording.

[56] The Township further notes that the *Concise Canadian Oxford Dictionary (2005)* defines the verb "wish" in part, as: "have a desire or aspiration (esp. something that cannot or is unlikely to occur)" or "have as an intention or hope".

[57] The Society, relying on the Court of Appeal's decisions in *Harris v. McNeely* (2000), 47 OR (3d) 161, 2000 CanLII 5649 (ON CA) and *Benzie v. Kunin*, 2012 ONCA 766 argues that a grantee's right of first refusal is only converted into an option to purchase when the grantor of the right receives an offer to purchase the grantor's interest which the grantor is prepared to accept.

[58] In *Harris v. McNeely*, the parties had entered into a right-of-way agreement which contained a mutual right of first refusal by each over the lands of the other in the event that "one wishes to sell their property and has received an offer which they are willing to accept" [emphasis added]. *Benzie* involved a right of first refusal that would be triggered if a party "shall desire to sell" the subject property. But the case did not consider when that right was triggered but, rather, whether the right of first refusal would bind non-parties and be registrable under the *Land Titles Act*.

[59] In *St. Andrew Goldfields Ltd. v. Teddy Bear Valley Mines Ltd.*, McEwen J. concluded that the construction that promoted the true intent of the parties in what he described as "the broadly worded Agreements" is that the party entitled to receive royalties could not divest itself of those royalties without giving the other party the right of first refusal.

[60] When one considers that the rationale for the original transfer of the properties from the Village of Bath to the Society was to protect its historic buildings and prevent them from being sold off or disposed of other than to an organisation with similar objectives to the Society's, the most reasonable interpretation of the agreement between the Village and the Society is that if the Society were to subsequently wish to dispose of the properties other than to an organisation having similar objects to its own, the Township would have a right to re-acquire the properties. The by-law passed by the Village on 27 October 1997 reinforces this:

In the event that the ... Society is dissolved, the Village will have first option to have these buildings re-conveyed to it...

[61] There is no basis to read into a straightforward agreement that evinces the intentions of the parties at the time the agreement was entered into what would amount to a condition precedent that the Township's rights would only be triggered in the event of receipt of an offer to purchase the properties that the Society is prepared to accept.

[62] The question, then, is whether listing the properties on MLS was sufficient to evince a wish or intent on the part of the Society to dispose of the properties.

[63] An affidavit sworn by Mr. Hineman sets out, from his and the Society's perspective, negotiations that were taking place between the Township and the Society concerning the renewal of the Township's leases on the properties and the Society's efforts to find new tenants who would lease the properties on more commercially viable terms. Mr. Hineman states that when the Society was unable to find a suitable tenant, it decided to list the properties for sale at the end of May 2015. His business partner, Gary Smith, listed the properties for sale and Mr. Hineman says that Mr. Smith was "actively seeking a purchaser or organisation having similar objects as the Society".

[64] Mr. Hineman continues, at paragraph 51 of his affidavit sworn on 29 April 2016:

Listing properties for sale is a method of testing the market for properties. At no time did the Society 'intend to dispose of its interests in the property other than to an organization having similar objects as the Society'.

[65] A minute of a 24 June 2015 Board meeting of the Society provides further context. It notes that the Society decided to "push" the lease issues with the Township "by offering the buildings for sale". Upon receipt by a letter from the Township's lawyers stating that the Society could not sell the buildings due to the "covenant" and threatening legal action, the Society instructed the real estate agent to remove the two properties from the "Active for Sale" market and to put them on the "Active for Lease" market.

[66] The difficulty with Mr. Hineman's evidence that it was never the intention of the Society to sell the properties, other than to a similar organisation, is that the listing states that the properties are "being offered to the public". The listing for Layer Cake Hall also notes the possibility of a severance. This is at odds with his evidence.

[67] If listing the properties for sale to the public was a ploy to get the Township to adopt a more reasonable (from the Society's perspective) attitude towards the lease renewal discussions, it failed to achieve that objective.

[68] Regardless of the reason for listing the properties for sale, I find that the listing of the properties for sale on MLS is evidence of the Society's wish, at that time, to dispose of its interest in the properties. The agreement of 31 October 1997 provided that in the event that the Society wished to dispose of its interest in the properties (other than to an organisation having similar objects), it was required to give notice of such intention to the Township. No such notice was given. As a result, I find that the Society breached its agreement with the Township.

[69] The Society agrees that if the Township's option to repurchase is enforceable and if it was triggered, the appropriate remedy is specific performance. However, it argues that in its eagerness to re-acquire the properties, the Township "jumped the gun". In that regard, the Society points to clause 5 of the 31 October 1997 agreement between the Society and the Village which provides:

In the event of a breach of any term or condition of this Agreement by either or both parties hereto, the parties hereto agree to negotiate for a reasonable period of

time in good faith to attempt to remedy the breach in a manner mutually satisfactory to the parties hereto before exercising their strict legal rights by action or otherwise.

[70] In seeking to force the transfer of the properties just three days after the Township became aware that the properties had been listed, the Society argues that the Township has failed to comply with clause 5 of the agreement.

[71] It may well be that the Township viewed the listing of the properties on the MLS “to the public” as an opportunity to exercise its option to repurchase. Such an opportunistic move, if that is what it was, was nevertheless a consequence of the Society’s breach of its obligation to provide the Township with notice of its wish to dispose of the properties to the public.

[72] After the Township notified the Society of its position that the Society was required to offer the properties to the Township for repurchase, there were exchanges of lawyers’ correspondence. But the Township started its application on 26 June 2015 without any meaningful negotiations having taken place.

[73] The Township’s argues, in relation to clause 5 of the agreement, that good faith negotiation was not required in view of the conduct of the Society, which amounted to repudiation, misrepresentation and/or bad faith conduct.

[74] I do not agree.

[75] Rather, in my view, the spirit, if not the letter, of clause 5 of the 31 October 1997 agreement was not adhered to by either party.

[76] However, clause 5 is in any event essentially aspirational. It is not cast in the language of a condition precedent to the right of either party to exercise their strict legal rights by action or otherwise.

[77] I find that the Township’s rights were triggered by the actions of the Society when it listed the properties for sale. It is entitled to seek a remedy from this court as a result of the Society’s failure to provide it with the required notice.

[78] Given my finding on the triggering of the option to purchase, it is not necessary for me to consider whether the Society otherwise breached its good faith obligations of contractual performance.

Is the Township in default or has it otherwise breached its obligations under the leases of the property?

[79] The Society points to what it alleges to be numerous breaches of the leases and acts of default.

[80] The leases on each of the properties expired on 31 August 2014.

[81] Prior to the expiry of the leases, the Township did not provide notice of its intention to renew the leases as required by the notice provisions contained in the leases.

[82] On 21 August 2014, however, the Township purported to notify the Society via email that the Council had passed a resolution to extend the current leases of the Layer Cake Hall and the Old Town Hall to 31 December 2014. Mr. Hineman describes this as a unilateral extension of the leases.

[83] The Township did not vacate at the end of 2014 and stayed on despite the expired leases. It was in this context that, in May 2015, with the Township “overholding” (as Mr. Hineman put it) and the Society unable to locate a new suitable tenant, that the properties were listed for sale on MLS.

[84] On 30 July 2016, in order to facilitate negotiations, the parties consented to an order of Tranmer J. which (according to Mr. Hineman) was intended to preserve the *status quo* for a short time. That order remains in place pending further order of this court.

[85] The Society asserts, and one of the Township’s representatives who was cross-examined (Robert Maddocks) appears to have conceded, that the Township has committed numerous breaches of the leases including:

- a) Failing to deliver a notice to extend its leases prior to 1 May 2014;
- b) Failing to perform maintenance of the properties as would a prudent owner;
- c) Failing to surrender the premises upon expiry of the term of the leases;
- d) Overloading the second floor of the Old Town Hall; and
- e) Leaving the Old Town Hall vacant and/or not open for business for more than 30 days in any twelve month period.

[86] In addition, the Society alleges that the Township has repeatedly paid rent late.

[87] The parties agree that in the event that I find that the Township is in breach of its lease obligations, with the result that it is ordered to vacate the properties, the Order of Tranmer J. dated 30 July 2015 should be vacated 90 days following my decision.

[88] Regardless of what breaches of the leases may have occurred in the past, the fact is that the leases expired in 2014 (either at the end of August or at the end of December). The Society commenced a counter-application seeking vacant possession of the properties, following which the consent order of Tranmer J. was entered into.

[89] The Township has overstayed. There can be no doubt about that. It was obliged to vacate the premises at the end of the lease and did not. Accordingly, the Township is in breach.

This may, however, be of limited consequence given my determination of the option to purchase issue.

Remedies

[90] The Township's option to purchase the properties for two dollars (\$2.00) each has, for the reasons given by me, been triggered.

[91] The Township is entitled to specific performance of the agreement of 31 October 1997. Specifically, the Township was, prior to the Society listing the properties for sale on MLS, entitled to receive a notice including an offer to the Township to purchase the properties at a purchase price of two dollars (\$2.00) each.

[92] The parties have agreed that in the event of such a determination by the court, if the Township is unable to immediately purchase the properties for two dollars (\$2.00) each, the Township must vacate the properties within 90 days following the release of this decision.

[93] The parties are not, of course, precluded from negotiating new lease terms in the event that the Township elects not to purchase the properties. But they agree that in any event, the order of Tranmer J. dated 30 July 2015 shall be vacated in 90 days following the release of this decision.

Final Comments

[94] I was greatly assisted by the five volume joint application record. I would encourage similar cooperation and collaboration between the parties to be deployed in an effort to agree on the appropriate disposition of costs.

[95] It was clear to me as I reviewed the material and listened to the arguments of counsel that both parties are concerned to preserve these historic buildings. While the Society will be no doubt disappointed at the outcome of this proceeding, I am confident that if the properties revert to the ownership of the local authority, the Society and other people in the community will be vigilant to ensure the preservation and continued benefit to the community of these buildings.

[96] If the parties are unable to agree on costs, I direct as follows. If either of the parties seek costs, they should serve a bill of costs on the opposite party, accompanied by a written submission of not more than four pages in length, within fourteen days of the release of these reasons; any party against which costs is sought may, within fourteen days of receiving the submission of the party seeking costs, serve a written submission in response, again not to exceed four pages in length; if a party is not seeking costs, it is invited to (at its option) submit the bill of costs it would have presented to the court if it was seeking costs.

[97] I would ask counsel for the Township to collect copies of all of the parties' submissions and arrange to have the package delivered to me at the Court House, 5 Court Street, Kingston, Ontario, K7L 2N4 as soon as the final exchange of materials has been completed. For the

avoidance of doubt, no material should be filed individually; rather, counsel for the Township should assemble a single package for delivery as described above.

[98] I can be spoken to if there are any issues regarding the implementation of this decision or the wording of the formal judgment.

Graeme Mew J.

Released: 05 April 2019

CITATION: Loyalist (Township) v. The Fairfield-Gutzeit Society, 2019 ONSC 2203
COURT FILE NO.: CV-15-293
DATE: 20190405

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CORPORATION OF LOYALIST TOWNSHIP

Applicant (respondent by
counter-application)

– and –

THE FAIRFIELD-GUTZEIT SOCIETY

Respondent (applicant by
counter-application)

REASONS FOR JUDGMENT

Mew J.

Released: 5 April 2019

TAB 7

CITATION: Pelham (Town) v. Fonthill Gardens Inc., 2019 ONSC 567
COURT FILE NO.: 12298/18 (Welland)
DATE: 20190125

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CORPORATION OF THE TOWN OF)
PELHAM)
) *Brent Harasym, for the Applicant*

) Applicant)

- and -)

FONTHILL GARDENS INC.)
) *Peter A. Mahoney, for the Respondent*

) Respondent)

) **HEARD:** January 8, 2019

R. A. LOCOCO J.

REASONS FOR JUDGMENT

I. Introduction

- [1] The Corporation of the Town of Pelham and Fonthill Gardens Inc. own adjoining blocks of land in Pelham. The Town and Fonthill Gardens each has the right to acquire land from the other in certain circumstances. Fonthill Gardens has registered a Notice of Option to Purchase on the title to part of the Town land.
- [2] The Town recently completed construction of the Pelham Community Centre on part of the Town land. The Town has agreed to sell to an outside party part of the Town land that was not required for the community centre. The proceeds would be used to pay down debt incurred to fund construction of the community centre. A condition of closing requires the removal of the Notice of Option to Purchase from the title to part of the Town land.
- [3] The Town brings an application seeking a declaration that Fonthill Gardens does not hold an option to purchase the entire block of Town land against which the Notice is registered. The Town is also seeking an order deleting registration of the Notice from the title to part of the Town land.

- [4] For the reasons that follow, I am granting the application to the extent indicated below.

A. *Background*

- [5] In 2005, the Town and Fonthill Gardens acquired adjoining blocks of land in the East Fonthill area of Pelham. Each block is in excess of 30 acres. The Town purchased the Town land for the purpose of developing a community centre. It was contemplated that Fonthill Gardens would develop and build a medical centre and a retirement residence.
- [6] On March 31, 2014, the Town and Fonthill Gardens entered into an agreement entitled Purchase Option and Cost Sharing Agreement. That agreement was amended by an amending agreement dated June 4, 2015 (referred to in these Reasons, collectively with the original agreement, as the “POCS Agreement”). The POCS Agreement has a five-year term, terminating on March 31, 2019 (s. 2.2.). Any rights and obligations for matters undertaken during that term continue until such time as the obligations have been satisfied (s. 2.3).
- [7] The recitals to the POCS Agreement indicate the following (among other things): (i) the parties intend to pursue the “coordinated servicing and development” of their respective lands; (ii) a portion of the Town land is surplus to the Town’s needs and therefore available for disposition; (iii) the Town has determined that an exchange of lands with Fonthill Gardens “to permit the development of a medical centre and a retirement centre and associated or complementary uses, and other uses may be permitted by the Town on a portion of the Town [Lands] will result in a net benefit to the Town”.
- [8] As also contemplated in the recitals, the substantive terms of the POCS Agreement provide that each of the parties has the right to acquire land from the other upon specified terms. Under s. 10, the parties “consent to registration of this Agreement or a notice of it against the title to Fonthill Gardens Lands and the Town Lands.”
- [9] Fonthill Gardens’ purchase rights relating to the Town land are set out in s. 5.1 of the POCS Agreement, entitled “Fonthill Gardens Option to Purchase”. Section 5.1 has two parts. The first part was included in the original agreement. The June 2015 amending agreement added the second part of s. 5.1.
- [10] Under the first part of s. 5.1, Fonthill Gardens has the option to purchase all or a portion of a specified parcel of Town land, identified as Parcel A. Fonthill Gardens may exercise that option to purchase within one year of obtaining site plan approval from the Town for the development of a medical centre or a retirement residence on Parcel A.
- [11] Under the second part of s. 5.1, the Town agrees to allow Fonthill Gardens to purchase an additional portion of the Town land on the same terms and conditions if (i) the additional Town land is “necessary for the construction of the Medical Centre and Retirement Residence”, (ii) the Town “does not require the Town Lands for its own purposes”, and (iii) the purchase of the additional Town land “does not interfere with the development of the Town Lands by the Town for its own purposes.” The additional

Town land that is subject to Fonthill Gardens' purchase right under the second part of s. 5.1 is referred to in these Reasons as the "Additional Town Land".

- [12] Among other things, the POCS Agreement also deals with sharing of development costs for roads, sewers and other services. Under s. 3.6, the Town agrees to retain an independent planning consultant to review all development applications with respect to the Town land and the Fonthill Gardens land. As well, s. 9 contemplates the use of arbitration to settle disputes between the parties that cannot be settled by negotiation or mediation.
- [13] It is common ground that at the time the POCS Agreement was entered into, there was no firm indication of (i) how much Town land would be required for the community centre, or (ii) how the Town would finance the building of the community centre. The Town Council approved the construction of the community centre on April 25, 2016. The financial analysis presented at that meeting set out the estimated cost of construction and outlined the steps in the financing and procurement process. The Town decided that construction of the community centre would be financed by a combination of debentures (having a 30-year term), development charges and proceeds from the sale of surplus Town land. The portion of the required funding attributed to the sale of the surplus Town land was \$12 million.
- [14] Construction of the community centre then proceeded on a portion of the Town land. Construction was substantially completed in July 2018.
- [15] On October 16, 2017, the Town Council adopted a bylaw declaring as surplus 19.75 acres of Town land not required for the community centre. The surplus Town land was then listed for sale.
- [16] On October 19, 2017, Fonthill Gardens registered a Notice of Option to Purchase on the title to Town land that included part of the Town land that the Town Council had declared surplus. The Town land against which the Notice is registered includes: (i) Parcel A, that is, the optioned Town land referred to in the first part of s. 5(1) of the POCS Agreement; and (ii) part of the Additional Town Land referred to the second part of s. 5(1).
- [17] By the fall of 2017, the Town and Fonthill Gardens were engaged in discussions relating to the proposed development of a medical centre, retirement centre and other commercial uses, as contemplated by the POCS Agreement. Fonthill Gardens did not submit an application for site approval for any proposed development at that time.
- [18] By agreement of purchase and sale dated May 1, 2018, the Town agreed to sell part of the surplus Town land to a third party. A condition of closing requires the removal of the Notice of Option to Purchase from the title to the Additional Town Land that the Town has agreed to sell. The legal description of the Additional Town Land that is currently subject to the closing condition is parts 6, 14 and 15 of Plan 59R-16208. The Town intends to use the proceeds of sale of the surplus Town land to repay interim indebtedness

to Infrastructure Ontario that would otherwise convert to debentures having a repayment term of 30 years.

- [19] In September 2018, in contemplation of a site plan application, Fonthill Gardens submitted a “conceptual site plan” to the Town for the development of a retirement residence and other commercial uses. The land required for that development (including access) would include parts of Parcel A and the Additional Town Land. The plan also provides for development of a medical centre on other land that the Town owns.
- [20] On October 19, 2018, Fonthill Gardens served an arbitration notice on the Town, as provided for in s. 9 of the POCS Agreement. A few days later, the Town brought this application. Fonthill Gardens then brought a motion to stay the application pending arbitration. For reasons set out in an endorsement dated November 15, 2018 (cited as 2018 ONSC 6821), Ramsay J. dismissed that motion.
- [21] Following discussions between the parties through their counsel, Fonthill Gardens has deleted the registration of the Notice of Option to Purchase from part but not all of the Additional Town Land that the Town has agreed to sell under the agreement of purchase and sale dated May 1, 2018.

B. Position of the parties and matters to be determined

- [22] The parties agree that Fonthill Gardens’ purchase right relating to Parcel A is an “option to purchase” that constitutes an interest in property. On that basis, it is common ground that Fonthill Gardens is entitled to register a Notice of Option to Purchase on the title to Parcel A pursuant to s. 71(1) of the *Land Titles Act*, R.S.O. 1990, c. L.5.
- [23] The dispute between the parties relates to whether Fonthill Gardens is entitled to register the Notice of Option to Purchase on the title to the Additional Town Land.
- [24] The Town says that Fonthill Gardens’ purchase right relating to the Additional Town Land is a personal right that does not constitute an interest in property. Therefore, Fonthill Gardens is not entitled to register a Notice of Option to Purchase on the title to the Additional Town Land.
- [25] Fonthill Gardens says that its Additional Town Land purchase right (like its Parcel A purchase right) is an option to purchase that constitutes an interest in property. Fonthill Gardens also says that even if its Additional Town Land purchase right does not constitute an option to purchase, Fonthill Gardens is still entitled to register its interest on the title to the property since, at very least, it is “interested in … unregistered … rights [or] interests … in registered land” within the meaning of s. 71(1) of the *Land Titles Act*.
- [26] Accordingly, the issues to be determined are as follows:
 - (a) **Nature of interest in Additional Town Land:** Is Fonthill Gardens’ interest in the Additional Town Land an option to purchase that property?

(b) **Registration entitlement:** Is notice of Fonthill Gardens' interest in the Additional Town Land capable of being registered on the title to the property?

(c) **Registration of Notice of Option to Purchase:** Should the Notice of Option to Purchase be deleted from the title to the Additional Town Land that the Town has agreed to sell to a third party?

- [27] I will address these issues in turn below.

II. Nature of interest in Additional Town Land

- [28] Is Fonthill Gardens' interest in the Additional Town Land an option to purchase that property?

A. Legal principles

- [29] In *Canadian Long Island Petroleum Ltd. v. Irving Industries (Irving Wire Products Division) Ltd.*, [1975] 2 S.C.R. 715, the Supreme Court addressed the nature of the interest conferred by an option to purchase land, as contrasted with the interest conferred by a right of first refusal. The court held that an option to purchase land constitutes an equitable interest in land, but a first refusal right does not. At pp. 731-32, the court indicated as follows:

An option [to purchase] gives to the optionee, at the time it is granted, a right, which he may exercise in the future, to compel the optionor to convey to him the optioned property.... In other words, the essence of an option to purchase is that, forthwith upon the granting of the option, the optionee upon the occurrence of certain events solely within his control can compel a conveyance of the property to him.

- [30] The court (at p. 732) goes on to contrast the interest conferred by a right of first refusal, stating as follows:

[The first refusal right] was not specifically enforceable at the time the agreement was executed. The [right holders] were not given any right to take away [the grantor's] interest without its consent. Their right under that clause was a contractual right, *i.e.*, the covenant of [the grantor] that if it was prepared to accept an offer to sell its interest, the [right holders] would then, and only then, have a 30-day option to purchase on the same terms. The contingency in this clause is resolved solely upon the decision of [the grantor] to sell.

- [31] As well, at p. 735, the court states that the section of the agreement providing the first refusal right "did not create property rights."

- [32] The Supreme Court's decision in *Canadian Long Island* was recently considered by the Ontario Court of Appeal *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409, 130 O.R. (3d) 641. As in *Canadian Long Island*, the Court of Appeal in *Israel Estate*

considered the nature of the rights conferred by an option to purchase land and a first refusal right.

- [33] In *Israel Estate*, the respondent conveyed land to purchasers that were interested extracting gravel from the property. The parties agreed that the respondent would have the “first option to purchase” the land for \$1 once the gravel was removed. The decision turned on whether the respondent had “an interest in land, or only a personal contractual right”: *Israel Estate*, at para. 1. The Court of Appeal held that the respondent’s interest constituted an option to repurchase the land, which gave rise to an immediate equitable interest in the land, rather than a right of first refusal: *Israel Estate*, at para. 43.
- [34] With respect to an option to purchase, the court indicates as follows (at para. 19), consistent with *Canadian Long Island*:

An option holder has an equitable interest in land, contingent on the holder’s election to exercise the option. Because an option to purchase creates an interest in land, it is specifically enforceable at the time the option is granted.

- [35] With respect to a first refusal right, the court states (at para. 23):

[T]he right of first refusal is a personal right. It does not create an immediate interest in land Thus, it is not immediately enforceable by an action for specific performance. If, however, an owner of land receives an offer to purchase that it is prepared to accept, then the right of first refusal is converted into an option to purchase. At that point, the holder of the right of first refusal has an interest in the land, which can be specifically enforced [Citations omitted.]

- [36] In *Israel Estate*, the Court of Appeal goes on to consider the extent to which the option holder’s control over the exercise of an option to purchase land affects the analysis as whether the option holder has an interest in the land. At para. 36, the court notes “apparent inconsistencies in the reasoning of the courts” on the control issue in *Canadian Long Island* and other Supreme Court decisions, which was previously the subject of comment in *Jain v. Nepean (City)* (1992), 9 O.R. (3d) 11 (C.A.), leave to appeal refused [1992] S.C.C.A. No. 473.
- [37] In *Israel Estate* (at para. 37), the court states that as in *Jain*, the respondent’s repurchase right “was not within the control of the holder of the right”. Consistent with *Jain*, the court concludes that control is “not decisive”, and goes on to state (at para. 38) that instead of focusing on control, it is appropriate to view the issue “as one of contract interpretation: to determine the true intent of the parties at the time the Agreement was made.” The court finds (at para. 43) that “the intent of the Agreement was to give [the respondent] an immediate, equitable interest in the land”, as shown by the “purpose of the Agreement and the context in which it is made, its terms and the later conduct of the parties”.

B. Analysis

[38] As previously noted, the parties agree that Fonthill Gardens has an option to purchase Parcel A that constitutes an interest in land. The above case law supports that conclusion.

[39] The first part of s. 5.1 of the POCS Agreement provides as follows:

Subject to the provisions of this section, the Town hereby grants to Fonthill Gardens the option to purchase all or a portion of the Town land, identified as Parcel A ... (the “Fonthill Gardens Option Lands”). This option to purchase may be exercised within one year of obtaining site plan approval for the development of the Medical Centre or the Retirement Residence on Parcel A. Should Fonthill Gardens fail to exercise the option to purchase within this one (1) year period, the option shall expire and be null and void.

[40] Similar to the facts in *Israel Estate*, Fonthill Gardens has the right to purchase all or part of Parcel A upon the occurrence of a future event, namely, “obtaining site plan approval for the development of the Medical Centre or the Retirement Residence on Parcel A.” The right to purchase is exercisable for one year following that approval. The initiation of the site approval application is within the control of Fonthill Gardens, but the approval itself is within the Town’s control. However, the Town’s control of the approval process is not absolute. In its review of the site plan application, the Town would be required by its statutory mandate to apply accepted planning principles, and to act in good faith in doing so. The POCS Agreement provides additional assurance, requiring that an independent planning consultant review development applications.

[41] In any case, as indicated in *Israel Estate*, the “control” factor is not decisive in the analysis. I am satisfied that the intention of the parties at the time of the POCS Agreement was that Fonthill Gardens have an option to purchase all or part of Parcel A that constituted an equitable interest in that property. That intention is evident from the terms of the POCS Agreement, including the fact (although not in itself determinative) that s. 5.1 uses the words “option to purchase” to describe Fonthill Gardens’ Parcel A purchase right. It is also relevant that the parties have a continuing consensus that Fonthill Gardens’ Parcel A purchase right is an option to purchase that constitutes an equitable interest in land.

[42] Fonthill Gardens argues that I should reach the same conclusion with respect to its purchase right relating to the Additional Town Land. The Town does not agree.

[43] As previously noted, under the second part of s. 5.1 of the POCS Agreement, the Town agrees to allow Fonthill Gardens to purchase the Additional Town Land on the same terms and conditions as Parcel A. Those terms and conditions include, in particular, the requirement for site plan approval for development. That purchase right is also subject to the following additional requirements: (i) the Additional Town Land is “necessary for the construction of the Medical Centre and Retirement Residence”; (ii) the Town “does not require the Town Lands for its own purposes”; and (iii) the purchase of the Additional Town Land “does not interfere with the development of the Town Lands by the Town for its own purposes.”

- [44] To support the position that its Additional Town Land purchase right is an option to purchase, Fonthill Gardens relies on the Supreme Court of Canada decision in *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187. In particular, Fonthill Gardens says that its Additional Town Land purchase right has the “three principal features of an option” referred to in *Mitsui*, at pp. 200-201, that is:
1. exclusivity and irrevocability of the offer to sell within the time period specified in the option;
 2. specification of how the contract of sale may be created by the option holder; and
 3. the obligation of the parties to enter into a contract of sale if the option is exercised.
- [45] According to Fonthill Gardens, the additional requirements that must be met to exercise the Additional Town Land purchase right (like the requirement for site plan approval) are properly characterized as “simply conditions precedent to the exercise of the option; they are not conditions precedent to the option *per se*”: *Mitsui*, at p. 203. The court also notes that “[t]he fact that [the purchase right] is subject to conditions precedent does not alter its nature”: *Mitsui*, at p. 205. Fonthill Gardens also relies on *Mitsui*, at pp. 204-205, to support its submission that the Town had a good faith obligation to take steps to bring about the events constituting a condition precedent to the extent they are within the Town’s control.
- [46] Fonthill Gardens also says that when considering the condition that the Town does not require the Additional Town Land for its own purpose, it is appropriate to consider and give effect to the intention of the parties at the time the POCS Agreement was entered into (see *Israel Estate*, at para. 38). At that time, there was no firm indication of (i) how much Town land would be required for the community centre, or (ii) how the Town would finance the building of the community centre. According to Fonthill Gardens, the POCS Agreement evidences the Town’s intention that part of the financing for the community centre would be from the sale of Town land to Fonthill Gardens upon the exercise of its purchase right under that agreement during the exercise period, including its Additional Town Land purchase right. Considered in this light, Fonthill Gardens says that it is not appropriate to interpret the Town’s “own purposes” to include selling part of the Additional Town Land during the exercise period to pay down debt incurred to develop and build the community centre. Fonthill Gardens also says that by taking that position, the Town is not acting in good faith. As further evidence of the Town’s lack of good faith, Fonthill Gardens notes that the Town has not to date retained an independent planning consultant to review development applications, as required by s. 3.6 of the POCS Agreement.
- [47] I do not agree with Fonthill Gardens’ position. For the reasons below, I have concluded that Fonthill Gardens’ purchase right relating to the Additional Town Land is a personal

right that does not constitute an option to purchase. Accordingly, that purchase right does not constitute an equitable interest in property.

- [48] In their submissions, both parties focused on the proviso to Fonthill Gardens' Additional Town Land purchase right that "the Town does not require the Town Lands for its own purposes". In my view, that term effectively takes the purchase right out of the realm of "irrevocability" (the first of the three principal features of an option referred to in *Mitsui*, at pp. 200-201) by providing the Town with the right to determine whether the option can be exercised by deciding that the Town required the land for its own purposes. The Town's right to do so is also inconsistent with the third of the three principal features referred to in *Mitsui*, that is, "the obligation of the parties to enter into a contract of sale if the option is exercised." If the Town decides it requires the land for its own purposes, it is not required to sell the land.
- [49] Fonthill Gardens is correct that the Town's right to determine that it requires the land for its own purposes is not completely unfettered because of its obligation to act in good faith in making that determination. I also recognize that (notwithstanding the contrary indication in *Canadian Long Island*) "control" relating to the exercise of the purchase right should not be the determining factor. However, I agree with the Town that this proviso makes the right more akin to a first refusal right than an option to purchase.
- [50] In the case of a first refusal right, the party granting the purchase right exercises control over whether the right holder is able to exercise its first refusal right. The first refusal right can be exercised only if the grantor "receives an offer to purchase that it is prepared to accept" (see *Israel Estate*, at para. 23). Similarly, Fonthill Gardens can exercise its purchase right relating to the Additional Town Land provided that the Town does not require the land for its own purposes. The Town exercises control over the exercise to that extent. I recognize that control is not the determining factor, as noted in *Israel Estate*. However, as is the case when considering a first refusal right, the grantor's degree of control with respect to the exercise of the purchase right is a relevant factor that may be taken into account in determining whether the parties intended that the purchase right constituted an immediate interest in land.
- [51] In any case, I consider the conclusion that Fonthill Gardens' Additional Town Land purchase right is not an option to purchase to be consistent with the intention of the parties at the time they entered into the POCS Agreement. Of particular note is the wording of the purchase right in the second part of s. 5.1, which was added to that section when the original agreement was amended in June 2015. Unlike the Parcel A purchase right in the first part of s. 5.1, the Additional Town Land purchase right is not described as an "option to purchase". The second part of s. 5.1 sets out the circumstances under which the Town agrees that it "shall allow Fonthill Gardens to purchase an additional portion of Town Lands". As already indicated, at least one of those provisos is inconsistent with a finding that the purchase right was intended to provide Fonthill Gardens with an immediate equitable interest in the Additional Town Land, that is, the proviso that the Town not require the land for its own purposes.

- [52] In addition, I do not find persuasive Fonthill Gardens' submission that other parts of the POCS Agreement support its position that the Town's "own purposes" should be read narrowly to exclude the sale of surplus land to pay down interim debt incurred to develop and build the community centre. In particular, I do not agree that the rest of the POCS Agreement should be read as suggesting that the sale of Additional Town Land to Fonthill Gardens pursuant to its purchase rights under the second part of s. 5.1 formed any necessary part of the Town's financing plan for the community centre. By its terms, the focus of the POCS Agreement is clearly the development of a medical centre, a retirement residence, and other associated and commercial uses, not the community centre.
- [53] Fonthill Gardens also argued that in determining the intention of the parties at the time the POCS Agreement was entered into, I should consider the factual matrix at that time to assist in the interpretation of that agreement. Respondent's counsel also suggests that if consideration of the factual matrix gave rise to a "triable issue", I should refuse the application and submit the matter for arbitration as contemplated by the POCS Agreement.
- [54] As indicated in *Israel Estate*, it is appropriate to consider the factual matrix when interpreting an agreement in order to determine the intention of the parties at the time the agreement was made. That principle is consistent with the decision of the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, a decision referred to in *Israel Estate*, at para. 44. In *Sattva*, the Supreme Court makes it clear that the objective of contractual interpretation is to ascertain the objective intentions of the parties having regard to the wording of the contract and the factual matrix in which it was constructed. The court must read the contract as a whole giving the words used their ordinary and grammatical meaning consistent with the surrounding circumstances known to the parties at the time of the contract's formation: *Sattva*, at para. 47. However, evidence of surrounding circumstances cannot be allowed to overwhelm the words used. Courts cannot use evidence of context to deviate from the text so as to effectively create a new agreement: *Sattva*, at para. 57. In that regard, the parol evidence rule remains good law. That rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary or contradict a contract that has been wholly reduced to writing: *Sattva*, at para. 59.
- [55] In reaching the conclusion that the Additional Town Land purchase right does not constitute an equitable interest in land, I considered the factual matrix as set out in the parties' application records, including the fact that at the time of formation of the POCS Agreement (both the original agreement and the amending agreement), there was no firm indication of how much Town land would be required for the community centre or how the Town would finance the building of the community centre. However, I saw nothing in the factual matrix that would lead me to conclude that I should interpret the purchase right in the second part of s. 5.1 of the POCS Agreement as constituting an immediate equitable interest in land.

- [56] In addition, I saw nothing in the evidence to support Fonthill Gardens' suggestion that the Town was not acting in good faith in its dealing with Fonthill Gardens, including the fact that an independent planning consultant has not been retained to review development applications. While the parties' application records indicate there were discussions between the Town and Fonthill Gardens from at least the fall of 2017, it was not until September 2018 that Fonthill Gardens submitted a "conceptual development plan" to the Town for the development of a retirement residence and other commercial uses, after the Town had already agreed to sell part of the Additional Town Land to a third party. In these circumstances, I find it difficult to conceive how Fonthill Gardens would be prejudiced by the absence of an independent planning consultant prior to that time.
- [57] I also considered Fonthill Gardens' suggestion that if consideration of the evidence gave rise to a "triable issue", I should refuse the application and submit the matter for arbitration. While no "triable issue" has arisen, adopting that course of action, in my view, would be inconsistent with Ramsay J.'s decision in which he refused to stay this application pending arbitration. The parties are of course free to pursue arbitration on other matters that may be in dispute, as contemplated by the POCS Agreement.
- [58] Accordingly, I find that Fonthill Gardens' purchase right relating to the Additional Town Land is not an option to purchase that constitutes an equitable interest in the Additional Town Land.

III. Registration entitlement

- [59] Is notice of Fonthill Gardens' interest in the Additional Town Land capable of being registered on the title to the property?
- [60] Fonthill Gardens argues that even if its Additional Town Land purchase right does not constitute an option to purchase, notice of its purchase right is capable of being registered on the title to the Additional Town Land. I agree with that submission.
- [61] Subsection 71(1) of the *Land Titles Act* provides as follows:

Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act or by the Director of Titles.

- [62] In *Benzie v. Hania*, 2012 ONCA 766, 112 O.R. (3d) 481, the Court of Appeal held that a first refusal right relating to a parcel of land was capable of being registered on the title to the land pursuant to s. 71(1) of the *Land Titles Act*. In reaching that conclusion, the court noted (at paras. 76-77) that s. 71(1) by its terms did not restrict registration to rights that constitute an equitable interest in land:

76 Now note the breadth of language used in s. 71(1) when describing that which can be registered pursuant to it. Section 71(1) does not limit registration to those entitled to an unregistered equity in land. It provides that any person

"entitled to" or "interested in", among other things, any unregistered equity in registered land can be protected by registration under s. 71(1).

77 As the legislature used the words "interested in" as well as "entitled to", the words "interested in" must have some meaning other than entitlement. On their plain and ordinary meaning, a person who is "interested in" a right, interest or equity has something less than one who is "entitled to" that right, interest or equity.

- [63] I agree with Fonthill Gardens that, on the same reasoning, notice of Fonthill Gardens' purchase right relating to the Additional Town Land is capable of being registered on title. At a point in time when the conditions to Fonthill Gardens' purchase right are met (the "point of crystallization", the term used in *Benzie*), Fonthill Gardens would have an equitable interest in the land: *Benzie*, at para. 75. Prior to the point of crystallization, Fonthill Gardens has a "legal interest that will swell into an equitable interest on crystallization. In the language of s. 71(1), the holder is a person '... interested in [an] unregistered ... [equity] in registered land ...'. Accordingly, [the purchase right] can be protected by registration under s. 71(1)": *Benzie*, at para. 78.
- [64] The Town argues that notice of Fonthill Gardens' purchase right relating to the Additional Town Land cannot be registered under s. 71(1), since it is not an interest in land. To support that position, the Town relies on *McLeod v. Walker*, 2015 ONSC 5984, 60 R.P.R. (5th) 231. In that case, respondent registered on title notice of a trust interest in the net proceeds of disposition that may arise on the sale of the property. The application judge ordered the removal of that notice from title, holding that the notice was not capable of being registered under s. 71(1) of the *Land Titles Act*. In doing so, the application judge considered but distinguished the Court of Appeal decision in *Benzie*, relying on the statutory prohibition against registration of notice of a trust interest in s. 62(2) of the *Land Titles Act*: *McLeod*, at paras. 19 and 24-38.
- [65] In my view, the *McLeod* decision is clearly distinguishable from the matter before me. Section 62(2) does not apply since Fonthill Gardens' purchase right relating to the Additional Town Land is not a trust interest. It is clear from the reasons in *McLeod* that absent s. 62(2) and consistent with the reasoning in *Benzie*, the respondent would have been entitled to register notice of her interest on title: *McLeod*, at para. 35.
- [66] Accordingly, I have concluded the notice of Fonthill Gardens' purchase right relating to the Additional Town Land is capable of being registered on the title to the Additional Town Land pursuant to s. 71(1) of the *Land Titles Act*.
- [67] The Town also argued that even if notice of Fonthill Gardens' purchase right relating to the Additional Town Land is capable of being registered, it is not entitled to register a Notice of Option to Purchase – it cannot give notice of an interest greater than it has. That issue is considered in the next section of these Reasons.

IV. Registration of Notice of Option to Purchase

- [68] Should the Notice of Option to Purchase be deleted from the title to the Additional Town Land that the Town has agreed to sell to a third party?
- [69] Pursuant to s. 160 of the *Land Titles Act*, a “person aggrieved by an entry” in the land title register “may apply to the court for an order that the register be rectified.” The court may make a rectification order “if satisfied of the justice of the case.”
- [70] The Town argues that an order should issue under s. 160, deleting the Notice of Option to Purchase from the title to the Additional Town Land that the Town has agreed to sell.
- [71] The Town says that Fonthill Gardens’ purchase right relating to the Additional Town Land does not constitute an option to purchase. I have already held that the Town is correct on that point. I have also held, however, that notice of Fonthill Gardens’ purchase right is capable of being registered on the title to the Additional Town Land.
- [72] On the assumption that notice of Fonthill Gardens’ purchase right is capable of being registered on title, the Town argues that Fonthill Gardens is not entitled to register a Notice of Option to Purchase that property. Fonthill Gardens’ purchase right is not an option to purchase. It cannot give notice of an interest it does not have.
- [73] The Town acknowledges that pursuant to s. 10 of the POCS Agreement, the Town consented to “registration of this Agreement or a notice of it against the title to ... the Town Lands.” However, according to the Town, that is not what Fonthill Gardens did, either at the time of the POCS Agreement or subsequently. What it registered in October 2017 was notice of an interest in the Additional Town Land that it does not have, that is, an option to purchase. In the Town’s submission, registration of the notice should not stand.
- [74] In its submissions, the focus of Fonthill Gardens’ response to the Town’s position was that Fonthill Gardens’ purchase right is, in fact, an option to purchase the Additional Town Land. While I do not consider it unreasonable for Fonthill Gardens to have taken that position, I have already rejected that submission and found that its interest is not an option to purchase. I have, however, accepted its position that notice of Fonthill Gardens’ purchase right is capable of registration against the Additional Town Land, given the broad scope of s. 71(1) of the *Land Titles Act*.
- [75] In the alternative, Fonthill Gardens argues that by ordering the deletion of the Notice from title to the Additional Town Land, I would be taking an unduly technical approach. As noted in *Benzie*, at para. 79, by its terms, the “clear purpose of s. 71(1) ... is to protect those with interests in unregistered ... interests ... in registered land from impairment by the registered owners.” Fonthill Gardens says that leaving the existing Notice on title serves that purpose. Fonthill Gardens also says that the forms of Notice that are acceptable to the Director of Titles under the *Land Titles Act* are limited: see *Benzie*, at para. 83. A “Notice of Option to Purchase” is a form that is acceptable to the Director. Respondent’s counsel was not aware of an alternative form that would be acceptable to the Director of Titles.

- [76] I am sympathetic to Fonthill Gardens' position that it should not be left without the protection afforded by s. 71(1) by reasons of a technicality. Nevertheless, I accept the Town's submission that neither s. 71(1) nor s. 10 of the POCS Agreement provides Fonthill Gardens with the authority to register on title an interest in the Additional Town Land that Fonthill Gardens does not have. Its purchase right is not an option to purchase. Accordingly, Fonthill Gardens is not entitled to register notice of an option to purchase on title to that property.
- [77] Accordingly, I am prepared to direct that the Notice of Option to Purchase be deleted from the title to that part of the Additional Town Land requested by the Town (being parts 6, 14 and 15 of Plan 59R-16208), and to direct the Land Registry Office at Niagara South to take the necessary steps to give effect to that direction. However, in all the circumstances, I am also ordering that these directions take effect 30 days after the date of these Reasons for Judgment. That period of time is intended to permit the parties to take any steps they deem advisable to preserve their respective positions.

V. Disposition

- [78] Accordingly, judgment will issue as follows:
1. A declaration will issue that Fonthill Gardens does not have an option to purchase parts 6, 14 and 15 of Plan 59R-16208.
 2. The Notice of Option to Purchase registered by Fonthill Gardens on October 19, 2017, shall be deleted from the title to parts 6, 14 and 15 of Plan 59R-16208. The Land Registry Office at Niagara South (LRO 59) is directed to take the necessary steps to give effect this direction. This paragraph shall take effect 30 days from the date of these Reasons for Judgment.
 3. Costs of this motion shall be determined based on written submissions.
- [79] If the parties cannot agree on costs, the Applicant may serve and file brief written submissions (not to exceed three pages) together with a costs outline within 21 days. The Respondent may respond by brief written submissions within 14 days. The Applicant may reply by brief written submissions within seven days. If no submissions are received within the specified timeframe, the parties will be deemed to have settled costs.

The Honourable Mr. Justice R. A. Lococo

CITATION: Pelham (Town) v. Fonthill Gardens Inc., 2019 ONSC 567
COURT FILE NO.: 12298/18 (Welland)
DATE: 20190125

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CORPORATION OF THE TOWN OF PELHAM

Applicant

– and –

FONTHILL GARDENS INC.

Respondent

REASONS FOR JUDGMENT

R.A. LOCOCO J.

Released: January 25, 2019

TAB 8

City of Nanaimo *Appellant*

v.

Rascal Trucking Ltd. *Respondent*

INDEXED AS: NANAIMO (CITY) v. RASCAL TRUCKING LTD.

Neutral citation: 2000 SCC 13.

File No.: 26786.

1999: November 3; 2000: March 2.

Present: L'Heureux-Dubé, Gonthier, McLachlin, Major, Bastarache, Binnie and Arbour JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Municipal law — Powers of municipalities — Municipal resolutions — Validity — Nuisances — Removal of dangerous erections — Meaning of phrase “or other matter or thing” — Whether municipality had jurisdiction under Municipal Act to pass resolutions declaring pile of soil a nuisance and ordering its removal — Standard of review applicable to municipality’s decisions — Municipal Act, R.S.B.C. 1979, c. 290, s. 936.

Municipal law — Decisions of municipalities — Standard of review applicable to municipality’s decisions.

The respondent company leased a parcel of land located within the appellant city. The city granted a permit to the company to deposit 15,000 cubic yards of soil on its site to conduct soil processing operations. Neighbouring residents complained about dust and noise emissions and a city inspector recommended that the soil be removed. The city council passed resolutions declaring the pile of soil a nuisance pursuant to s. 936 of the *Municipal Act* and ordered the company and its lessor to remove it. The company and its lessor failed to comply. The city brought a petition for a declaration that it was entitled to access the property and remove the pile of soil. The petition was granted. The company and its lessor unsuccessfully brought a second petition requesting that the resolutions be quashed. The Court of Appeal allowed the company’s appeal and quashed both resolutions and both court orders.

Held: The appeal should be allowed.

Ville de Nanaimo *Appelante*

c.

Rascal Trucking Ltd. *Intimée*

RÉPERTORIÉ: NANAIMO (VILLE) c. RASCAL TRUCKING LTD.

Référence neutre: 2000 CSC 13.

Nº du greffe: 26786.

1999: 3 novembre; 2000: 2 mars.

Présents: Les juges L'Heureux-Dubé, Gonthier, McLachlin, Major, Bastarache, Binnie et Arbour.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit municipal — Pouvoirs des municipalités — Résolutions municipales — Validité — Nuisances — Enlèvement de constructions dangereuses — Sens de l’expression «ou toute autre chose» — La Municipal Act confère-t-elle à la municipalité le pouvoir de voter des résolutions déclarant un tas de terre une nuisance et ordonnant son enlèvement? — Norme de contrôle applicable aux décisions de la municipalité — Municipal Act, R.S.B.C. 1979, ch. 290, art. 936.

Droit municipal — Décisions des municipalités — Norme de contrôle applicable aux décisions de la municipalité.

La société intimée a loué une parcelle située dans la ville appelante. La ville lui a délivré un permis l’autorisant à déposer sur son emplacement 15 000 verges cubes de terre en vue d'y effectuer des opérations de traitement des sols. Des voisins se sont plaints au sujet de la poussière et du bruit et un inspecteur municipal a recommandé que le tas de terre soit enlevé. Le conseil municipal a voté des résolutions déclarant que le tas de terre constituait une nuisance visée par l’art. 936 de la *Municipal Act*, et ordonné à la société et à son bailleur de l’enlever. La société et son bailleur n’ont pas obtenu. La ville a déposé une demande de jugement déclaratoire lui reconnaissant le droit d'accès au terrain et d'enlèvement du tas de terre. La Cour a fait droit à sa demande. La société et son bailleur ont été déboutés d'une seconde demande, en annulation des résolutions. La Cour d'appel a accueilli l'appel de la société et annulé les deux résolutions et les deux ordonnances judiciaires.

Arrêt: Le pourvoi est accueilli.

Section 936 of the *Municipal Act* empowered the city to issue resolutions declaring the company's pile of soil a nuisance and ordering its removal. The process of delineating municipal jurisdiction is an exercise in statutory construction. A statute must be construed purposively in its entire context and in light of the scheme of the Act as a whole with a view to ascertaining the legislature's true intent. The legislature, by including the phrase "or other matter or thing", did not intend to expand the scope of s. 936 to allow municipalities to declare almost anything to be a nuisance. Rather the phrase serves to extend the two classes of nuisance outlined in the section — that is, constructed or erected things, and watercourses. This interpretation follows from both a purposive interpretation and the application of the *ejusdem generis* limited class rule. A pile of soil falls within the phrase "building, structure or erection of any kind" since it does not materialize on its own, must at least be erected and clearly may be a "hazardous erection" either in the sense of reducing air quality through dust pollution, or by posing a serious risk to curious children.

The "pragmatic and functional" approach used to discern the standard of review applicable to an administrative tribunal can be harmoniously applied to a municipality's adjudicative functions as both bodies are delegates of provincial jurisdiction. The decision in question was clearly adjudicative as it involved an adversarial hearing, the application of substantive rules to individual cases and a significant impact on the rights of the parties. The "pragmatic and functional" approach is a contextual one that must be adapted to the body in question. A consideration of the relevant factors in this case militates against a deferential standard on the question of jurisdiction. Section 936 requires the municipal council to apply principles of statutory interpretation in order to answer the legal question of the scope of its authority. On such questions, municipalities do not possess any greater institutional competence or expertise than the courts. The test on jurisdiction and questions of law is correctness. Further, the nature of municipal government and the extent of municipal expertise do not warrant a heightened degree of deference on review. First, municipalities exercise a plenary set of legislative and executive powers yet do not have an independent constitutional status. They essentially represent delegated government. Second, municipalities are political bodies. Neither experience nor proficiency in municipal law and municipal planning is required to be elected a

L'article 936 de la *Municipal Act* habitait la ville à voter des résolutions déclarant que le tas de terre de la société était une nuisance et ordonnant son enlèvement. Pour statuer sur la question de la compétence des municipalités, les tribunaux recourent aux règles d'interprétation des lois. L'interprétation des lois doit être fondée sur l'objet en tenant compte de tout le contexte et de l'esprit de la loi dans son ensemble en vue de cerner l'intention véritable du législateur. En insérant l'expression «ou toute autre chose», le législateur n'avait pas l'intention d'élargir le champ d'application de l'art. 936 de manière à autoriser les municipalités à déclarer que quasiment n'importe quoi constitue une nuisance. L'expression élargit plutôt les deux catégories de nuisances décrites dans l'article, soit les constructions et les cours d'eau. Cette interprétation s'accorde tant avec une interprétation fondée sur l'objet qu'avec la règle *ejusdem generis*. Un tas de terre est visé par l'expression «tout bâtiment ou construction de quelque nature que ce soit» puisqu'il ne se fait pas tout seul, qu'il représente à tout le moins une construction et qu'il peut clairement être une «construction dangereuse» soit du fait qu'il diminue la qualité de l'air par la poussière en suspension, soit du fait qu'il constitue un grave danger pour les enfants curieux.

La démarche «pragmatique et fonctionnelle» utilisée pour déterminer quelle est la norme de contrôle applicable aux tribunaux administratifs peut s'appliquer de façon appropriée aux fonctions juridictionnelles d'une municipalité puisqu'il s'agit dans les deux cas de délégués du gouvernement provincial. Il est clair que la décision en question était de nature juridictionnelle puisqu'elle comportait une audience contradictoire ainsi que l'application de règles de fond à des cas particuliers et qu'elle avait des répercussions importantes sur les droits des parties. La démarche «pragmatique et fonctionnelle» est contextuelle et elle doit être adaptée à l'organisme en question. La prise en compte des facteurs pertinents en l'espèce milite contre l'application du principe de la retenue judiciaire quand il s'agit d'une question de compétence. Le conseil municipal doit, en application de l'art. 936, appliquer des principes d'interprétation des lois pour répondre à la question de droit touchant l'étendue de son pouvoir. Sur de telles questions, les municipalités ne sont pas dotées d'une compétence ou d'une expertise institutionnelles plus grandes que celles des tribunaux. Le critère à appliquer quand il s'agit de questions de compétence et de questions de droit est celui de la décision correcte. De plus, la nature du gouvernement municipal et l'étendue de l'expertise de la municipalité ne justifient pas un degré plus élevé de retenue de la part du tribunal d'examen. Premièrement, les municipalités

councillor. Finally, council decisions are more often by-products of the local political milieu than a considered attempt to follow legal or institutional precedent and are necessarily motivated by political considerations and not by an entirely impartial application of expertise. As a result, the courts may review those jurisdictional questions on a standard of correctness. Here, the city was correct in construing s. 936 as extending to it jurisdiction to issue resolutions declaring the company's pile of soil a nuisance and ordering its removal.

exercent un ensemble complet de pouvoirs législatifs et exécutifs, sans toutefois jouir d'un statut constitutionnel indépendant. Elles constituent essentiellement des gouvernements délégués. Deuxièmement, les municipalités sont des corps politiques. Nul n'est tenu de posséder une expérience ou une compétence en droit municipal et en planification municipale pour être élu conseiller. Enfin, les décisions des conseils sont plus souvent une manifestation du milieu politique local qu'une tentative réfléchie de suivre des précédents juridiques ou institutionnels et sont nécessairement le produit de facteurs politiques et non de l'application entièrement impartiale de l'expertise. Par conséquent, les tribunaux doivent examiner les questions en matière de compétence selon la norme de la décision correcte. En l'espèce, la ville a pris une décision correcte en interprétant l'art. 936 comme lui conférant la compétence pour adopter des résolutions déclarant que le tas de terre de la société était une nuisance et ordonnant son enlèvement.

The standard upon which the courts may review *intra vires* municipal decisions must be one of patent unreasonableness. Municipal councils are elected representatives of their community and accountable to their constituents. Municipalities also often balance complex and divergent interests in arriving at decisions in the public interest. These considerations warrant that *intra vires* decisions be reviewed upon a deferential standard. Here, the city's decision to declare the company's pile of soil a nuisance was not patently unreasonable.

La norme selon laquelle les tribunaux peuvent examiner les décisions prises par la municipalité dans les limites de sa compétence est celle du caractère manifestement déraisonnable. Les conseils municipaux sont composés de représentants élus de leur collectivité et sont responsables devant leurs commettants. Les municipalités doivent souvent soupeser des intérêts complexes et opposés pour arriver à des décisions conformes à l'intérêt public. Ces considérations justifient que l'on fasse preuve de retenue dans le cadre de l'examen des décisions prises par les municipalités dans les limites de leur compétence. En l'espèce, la décision de la ville de déclarer que le tas de terre de la société était une nuisance n'était pas manifestement déraisonnable.

Cases Cited

Considered: *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; **referred to:** *R. v. Sharma*, [1993] 1 S.C.R. 650; *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; 2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool), [1996] 3 S.C.R. 919; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; *Kruse v. Johnson*, [1898] 2 Q.B. 91.

Jurisprudence

Arrêt examiné: *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231; **arrêts mentionnés:** *R. c. Sharma*, [1993] 1 R.C.S. 650; *R. c. Greenbaum*, [1993] 1 R.C.S. 674; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961; 2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool), [1996] 3 R.C.S. 919; *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048; *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844; *Kruse c. Johnson*, [1898] 2 Q.B. 91.

Statutes and Regulations Cited

Constitution Act, 1867, s. 92(8), (16).
Interpretation Act, R.S.B.C. 1996, c. 238, s. 8.
Municipal Act, R.S.B.C. 1960, c. 255, s. 873.
Municipal Act, R.S.B.C. 1979, c. 290, ss. 932, 936.
Municipal Act, R.S.B.C. 1996, c. 323, ss. 725, 727.
Municipal Government Act, S.A. 1994, c. M-26.1, s. 539.
Statute Revision Act, R.S.B.C. 1996, c. 440, s. 8.

APPEAL from a judgment of the British Columbia Court of Appeal (1998), 49 B.C.L.R. (3d) 164, 109 B.C.A.C. 12, 177 W.A.C. 12, 161 D.L.R. (4th) 177, 47 M.P.L.R. (2d) 315, [1998] B.C.J. No. 1545 (QL), allowing the respondent's appeal from two orders permitting the appellant to remove top soil from respondent's property. Appeal allowed.

Guy E. McDannold, for the appellant.

Patrick G. Foy, Q.C., and *Angus M. Gunn*, for the respondent.

The judgment of the Court was delivered by

MAJOR J. — This appeal engages an interpretation of s. 936 of the *Municipal Act*, R.S.B.C. 1979, c. 290 (now R.S.B.C. 1996, c. 323, s. 727). As well, it raises the standard of judicial review applicable to municipal bodies, previously visited by this Court in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231.

I. Factual Background

The respondent, Rascal Trucking Ltd. ("Rascal"), leased a parcel of land located within the City of Nanaimo ("Nanaimo" or the "City") from Kismet Enterprises Inc. ("Kismet"). In April 1996, Rascal applied for and received a permit from the appellant Nanaimo to deposit approximately 15,000 cubic yards of soil on its site with the intent to conduct soil processing operations, an activity permitted by the applicable zoning classification.

Lois et règlements cités

Interpretation Act, R.S.B.C. 1996, ch. 238, art. 8.
Loi constitutionnelle de 1867, art. 92(8), (16).
Municipal Act, R.S.B.C. 1960, ch. 255, art. 873.
Municipal Act, R.S.B.C. 1979, ch. 290, art. 932, 936.
Municipal Act, R.S.B.C. 1996, ch. 323, art. 725, 727.
Municipal Government Act, S.A. 1994, ch. M-26.1, art. 539.
Statute Revision Act, R.S.B.C. 1996, ch. 440, art. 8.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1998), 49 B.C.L.R. (3d) 164, 109 B.C.A.C. 12, 177 W.A.C. 12, 161 D.L.R. (4th) 177, 47 M.P.L.R. (2d) 315, [1998] B.C.J. No. 1545 (QL), qui a accueilli l'appel interjeté par l'intimée contre deux ordonnances permettant à l'appelante d'enlever de la terre du bien-fonds de l'intimée. Pourvoi accueilli.

Guy E. McDannold, pour l'appelante.

Patrick G. Foy, c.r., et *Angus M. Gunn*, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE MAJOR — Le présent pourvoi concerne l'interprétation de l'art. 936 de la *Municipal Act*, R.S.B.C. 1979, ch. 290 (maintenant R.S.B.C. 1996, ch. 323, art. 727). Il porte aussi sur la norme de contrôle judiciaire applicable aux municipalités, question que notre Cour a étudiée dans *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231.

I. Le contexte factuel

L'intimée, Rascal Trucking Ltd. («Rascal»), a loué une parcelle située dans la ville de Nanaimo («Nanaimo» ou la «Ville») qui appartenait à Kismet Enterprises Inc. («Kismet»). En avril 1996, à la demande de Rascal, l'appelante, Nanaimo, lui a délivré un permis l'autorisant à déposer sur son emplacement environ 15 000 verges cubes de terre en vue d'y effectuer des opérations de traitement des sols en conformité avec le règlement de zonage applicable.

3 Shortly after Rascal started delivering soil to the site, neighbouring residents raised complaints about dust and noise emissions. A city inspector inspected the site and recommended that an order be issued compelling the owner to remove the pile of soil.

4 On July 3, 1996, Nanaimo held a public meeting where it heard from local residents and the respondent. It received a professional engineer's report analysing the noise emissions from the property, and an opinion from its legal counsel. The Nanaimo council deliberated and ultimately passed a resolution declaring the pile of soil a nuisance pursuant to s. 936 of the *Municipal Act*, and ordered Kismet to remove it within 30 days. It did not comply.

5 On August 19, 1996, Nanaimo passed a second resolution ordering the respondent to remove the topsoil within 15 days, in default of which it would be removed by the City at the respondent's or owner's cost. Neither the owner Kismet nor the respondent Rascal obeyed. On September 6, 1996, Rascal denied access for removal purposes to agents of the City.

6 These events precipitated two applications before the Supreme Court of British Columbia. Nanaimo brought the first, asking for a declaration that it was entitled to access the property and remove the offending pile of soil. Maczko J. granted the petition on the basis that Nanaimo had the jurisdiction both to declare the dirt pile a nuisance and order its removal.

7 Kismet and Rascal brought the second petition, requesting that the resolutions be quashed. Rowan J. dismissed the petition.

8 The British Columbia Court of Appeal allowed Rascal's appeal, set aside the orders and quashed the July 3rd and August 19th resolutions: (1998), 49 B.C.L.R. (3d) 164.

Peu de temps après que Rascal eut commencé à transporter de la terre sur les lieux, des voisins ont porté plainte au sujet de la poussière et du bruit qui en émanait. Un inspecteur municipal a recommandé après enquête sur place qu'une ordonnance soit prise, contraignant la propriétaire à enlever le tas de terre.

Le 3 juillet 1996, Nanaimo a tenu une séance publique pour entendre les résidents touchés et l'intimée. Elle a reçu un rapport d'un ingénieur analysant l'émission du bruit sur ce terrain ainsi qu'un avis de son conseiller juridique. Après délibération, le conseil de Nanaimo a voté une résolution déclarant que le tas de terre constituait une nuisance visée par l'art. 936 de la *Municipal Act*, et ordonné à Kismet de l'enlever dans un délai de 30 jours. Cette dernière n'a pas obtempéré.

Le 19 août 1996, Nanaimo a adopté une seconde résolution ordonnant à l'intimée d'enlever la terre dans un délai de 15 jours, faute de quoi la municipalité allait la faire enlever aux frais de l'intimée ou de la propriétaire. Ni la propriétaire, Kismet, ni l'intimée, Rascal, n'ont obtempéré. Le 6 septembre 1996, Rascal a refusé aux représentants de la Ville l'accès aux fins de l'enlèvement.

Ces faits ont donné lieu à deux demandes devant la Cour suprême de la Colombie-Britannique. Nanaimo a d'abord sollicité un jugement déclaratoire lui reconnaissant le droit d'accès au terrain et d'enlèvement du tas de terre. Le juge Maczko a fait droit à la demande pour le motif que Nanaimo avait la compétence tant pour déclarer que le tas de terre était une nuisance que pour ordonner son enlèvement.

Kismet et Rascal ont présenté la seconde demande, en annulation des résolutions. Le juge Rowan a rejeté cette demande.

La Cour d'appel de la Colombie-Britannique a accueilli l'appel de Rascal et annulé les ordonnances ainsi que les résolutions du 3 juillet et du 19 août: (1998), 49 B.C.L.R. (3d) 164.

II. Relevant Statutory Provisions*Municipal Act*, R.S.B.C. 1979, c. 290**Nuisances and disturbances****932.** The council may by bylaw

(b) prevent, abate and prohibit nuisances, and provide for the recovery of the cost of abatement of nuisances from the person causing the nuisance or other persons described in the bylaw;

(i) require the owners or occupiers of real property, or their agents, to eliminate or reduce the fouling or contaminating of the atmosphere through the emission of smoke, dust, gas, sparks, ash, soot, cinders, fumes or other effluvia; and prescribe measures and precautions to be taken for the purpose; and fix limits not to be exceeded for those emissions;

Removal of dangerous erections

936. (1) The council may declare a building, structure or erection of any kind, or a drain, ditch, watercourse, pond, surface water or other matter or thing, in or on private land or a highway, or in or about a building or structure, a nuisance, and may direct and order that it be removed, pulled down, filled up or otherwise dealt with by its owner, agent, lessee or occupier, as the council may determine and within the time after service of the order that may be named in it.

(3) The council may further order that, in case of default by the owner, agent, lessee or occupier to comply with the order within the period named in it, the municipality, by its employees and others, may enter and effect the removal, pulling down, filling up or other dealing at the expense of the person defaulting, and may further order that the charges for doing so, including all incidental expenses, if unpaid on December 31 in any

II. Les dispositions législatives pertinentes*Municipal Act*, R.S.B.C. 1979, ch. 290

[TRADUCTION]

Nuisances et troubles de jouissance**932.** Le conseil peut, par règlement,

b) prévenir, supprimer et interdire les nuisances, et pourvoir au recouvrement du coût de la suppression contre la personne qui a causé une nuisance ou contre toute autre personne visée par le règlement;

(i) contraindre les propriétaires ou occupants d'immeubles, ou leurs mandataires, à supprimer ou réduire la pollution atmosphérique résultant de l'émission de fumée, de poussière, de gaz, d'étincelles, de cendre, de suie, d'escarbilles, de vapeurs ou d'autres effluves; prescrire des mesures et précautions à prendre à cette fin, et fixer les limites supérieures de ces émissions;

Enlèvement de constructions dangereuses

936. (1) Le conseil peut déclarer que tout bâtiment ou construction de quelque nature que ce soit, tout égout, fossé, cours d'eau, étang, eaux de surface ou toute autre chose, situé sur un terrain privé ou sur la voie publique, ou dans un bâtiment ou une construction ou à proximité, constitue une nuisance et il peut ordonner, entre autres mesures, l'enlèvement, la démolition ou le remplissage par le propriétaire ou son mandataire, ou par le locataire ou l'occupant, selon les modalités que le conseil estime indiquées et dans le délai, à compter de la signification de l'ordonnance, qui y est indiqué.

(3) Le conseil peut en outre ordonner qu'au cas où le propriétaire ou son mandataire, le locataire ou l'occupant n'obtempérerait pas à l'ordonnance dans le délai imparti, la municipalité pourra, par l'entremise de ses employés ou d'autres personnes, avoir accès aux lieux et procéder à l'enlèvement, à la démolition ou au remplissage ou prendre toute autre mesure aux frais de la personne en défaut et il peut en outre ordonner que les frais engagés à cet égard, y compris tous frais accessoires, non acquittés le 31 décembre, soient ajoutés aux impôts

year, shall be added to and form part of the taxes payable on that land or real property as taxes in arrear.

perçus sur ce terrain ou immeuble, à titre d'arriéré d'impôts.

(5) This section applies to any building, structure or erection of any kind which the council believes is so dilapidated or unclean as to be offensive to the community.

Interpretation Act, R.S.B.C. 1996, c. 238

(5) Le présent article s'applique à tout bâtiment ou construction de quelque nature que ce soit que le conseil juge délabré ou insalubre au point d'offenser la collectivité.

Interpretation Act, R.S.B.C. 1996, ch. 238

[TRADUCTION]

Enactment remedial

8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Statute Revision Act, R.S.B.C. 1996, c. 440

Solution de droit

8 Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Statute Revision Act, R.S.B.C. 1996, ch. 440

[TRADUCTION]

Legal effect of revision

8 (1) A revision does not operate as new law but has effect and must be interpreted as a consolidation of the law contained in the Acts and provisions replaced by the revision.

(2) If a revised provision has the same effect as a provision replaced by the revision, the revised provision

- (a) operates retrospectively as well as prospectively, and
- (b) is deemed to have been enacted and to have come into force on the day on which the provision replaced by the revision came into force.

(3) If a revised provision does not have the same effect as a provision replaced by the revision,

- (a) the provision replaced by the revision governs all transactions, matters and things before the revision comes into force, and
- (b) the revised provision governs all transactions, matters and things after the revision comes into force.

Effet de la révision

8 (1) Le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte des règles de droit du texte antérieur.

(2) Si le nouveau texte a le même effet que le texte antérieur, le nouveau texte:

- a) a un effet rétroactif et dispose pour l'avenir;
- b) est réputé avoir été édicté et être entré en vigueur à l'entrée en vigueur du texte antérieur.

(3) Si le nouveau texte n'a pas le même effet que le texte antérieur,

- a) le texte antérieur régit tout ce qui est antérieur à l'entrée en vigueur du nouveau texte;
- b) le nouveau texte régit tout ce qui est postérieur à l'entrée en vigueur du nouveau texte.

III. Judicial History

A. British Columbia Supreme Court (Maczko J.)

The issue before Maczko J. was whether Nanaimo had the power under s. 936 of the *Municipal Act* to declare a pile of soil a nuisance and order its removal. He declared that Nanaimo had jurisdiction to do so, but did not extend his order to conclude on Nanaimo's right to do so in the case before him.

B. British Columbia Supreme Court (Rowan J.)

Rascal and Kismet filed a second petition requesting that the court quash Nanaimo's resolutions on the basis that the City exceeded its jurisdiction by declaring the pile of soil to be a nuisance. Rowan J. held that the pile of soil fell within the traditional meaning of a nuisance, specifically something harmful or offensive to the public for which there is a legal remedy. Therefore, he declined to intervene and quash the City's resolutions, finding it had acted within its jurisdiction.

C. British Columbia Court of Appeal (per Newbury J.A.)

The Court of Appeal held that Maczko J. erred in declaring Nanaimo had jurisdiction to declare the pile of soil a nuisance and to order its removal. As the ruling of Rowan J. was predicated on the ruling of Maczko J., that too was held to be in error. The court allowed the appeal and quashed the City's resolutions.

IV. Issues

This appeal raises two issues:

- (1) Did s. 936 of the *Municipal Act* empower the appellant to pass the resolutions declaring the pile of soil a nuisance and ordering its removal?

III. Les décisions des juridictions inférieures

A. La Cour suprême de la Colombie-Britannique (le juge Maczko)

Le juge Maczko devait trancher la question de savoir si l'art. 936 de la *Municipal Act* attribuait à Nanaimo le pouvoir de déclarer que le tas de terre était une nuisance et d'ordonner son enlèvement. Il a décidé que la loi conférait à Nanaimo la compétence voulue, mais n'a pas statué dans son ordonnance sur le droit de Nanaimo de l'exercer dans l'affaire dont il était saisi.

B. La Cour suprême de la Colombie-Britannique (le juge Rowan)

Rascal et Kismet ont ensuite déposé une demande sollicitant l'annulation des résolutions de Nanaimo pour le motif que la Ville a outrepassé sa compétence en déclarant que le tas de terre était une nuisance. Le juge Rowan a décidé que le tas de terre rentrait dans la définition reconnue de la nuisance, à savoir quelque chose de préjudiciable ou d'offensant pour le public pour lequel la loi prévoit une réparation. En conséquence, il s'est abstenu d'intervenir et d'annuler les résolutions de la Ville puisqu'elle avait agi, à son avis, dans les limites de sa compétence.

C. La Cour d'appel de la Colombie-Britannique (le juge Newbury)

La Cour d'appel a conclu que le juge Maczko avait commis une erreur en décidant que Nanaimo avait la compétence pour déclarer que le tas de terre était une nuisance et pour ordonner son enlèvement. La décision du juge Rowan reposant sur celle du juge Maczko, elle a aussi été jugée erronée. La cour a accueilli l'appel et annulé les résolutions de la Ville.

IV. Questions en litige

Le présent pourvoi soulève deux questions:

- (1) L'article 936 de la *Municipal Act* conférait-il à l'appelante le pouvoir de voter les résolutions déclarant que le tas de terre était une nuisance et ordonnant son enlèvement?

- (2) If so, upon what standard must the appellant's decision be reviewed?

V. Analysis

- (1) *Did s. 936 of the Municipal Act Empower the Appellant to Pass the Resolutions Declaring the Pile of Soil a Nuisance and Ordering Its Removal?*

¹⁴ Nanaimo relied upon s. 936 of the *Municipal Act* as its authority to declare Rascal's pile of soil a nuisance and to order its removal. The appellant submitted that a "broad and benevolent" rule of statutory construction be adopted in ascertaining its jurisdiction under s. 936 rather than the narrow view adopted by the Court of Appeal. Nanaimo argued that s. 936's reference to "or other matter or thing" cannot be limited to the genus of constructed things and watercourses preceding it. To the contrary, Nanaimo said this phrase is meant to stand alone and apart from the preceding items. Therefore, the power to declare "other matter or thing" a nuisance referred to the municipality's jurisdiction to abate nuisances and health hazards generally.

- (2) Dans l'affirmative, selon quelle norme la décision de l'appelante doit-elle être examinée?

V. Analyse

- (1) *L'article 936 de la Municipal Act conférait-il à l'appelante le pouvoir de voter les résolutions déclarant que le tas de terre était une nuisance et ordonnant son enlèvement?*

Nanaimo s'est appuyée sur l'art. 936 de la *Municipal Act* pour déclarer que le tas de terre de Rascal était une nuisance et pour ordonner son enlèvement. L'appelante a soutenu qu'il convenait de donner une interprétation [TRADUCTION] «large et bienveillante» à cette disposition attributive de compétence plutôt que de suivre la règle stricte préconisée par la Cour d'appel. Nanaimo a soutenu que le sens de l'expression «ou toute autre chose» qui figure à l'art. 936 ne saurait être limité au genre de choses énumérées précédemment, à savoir les constructions et cours d'eau. Au contraire, elle affirme qu'il faut prendre cette expression isolément et la considérer séparément des autres éléments de l'énumération. Par conséquent, le pouvoir de déclarer que «toute autre chose» constitue une nuisance s'entendait de la compétence de la municipalité pour supprimer les nuisances et les risques pour la santé en général.

¹⁵ In support of this conclusion Nanaimo pointed out that prior to the 1979 revision of the *Municipal Act*, the predecessor equivalent of s. 936 (*Municipal Act*, R.S.B.C. 1960, c. 255, s. 873) contained an additional comma prior to "or other matter or thing", which it was argued was included to set this phrase off as a stand alone grant of general power. Although this comma was removed in the 1979 revision, Nanaimo claims s. 8 of the *Statute Revision Act* required the Court to interpret s. 936 as if the comma remained, should the inclusion of a comma have the substantive effect of setting off this phrase as a general grant of jurisdiction over nuisances.

¹⁶ The respondent argued that this Court should not subscribe *a priori* to either a benevolent or strict approach, but rather seek to discern the "true

À l'appui de cette conclusion, Nanaimo a souligné qu'avant la révision de 1979 de la *Municipal Act*, l'expression «ou toute autre chose» employée dans l'article qui a précédé l'art. 936 (*Municipal Act*, R.S.B.C. 1960, ch. 255, art. 873) était précédée d'une virgule, qui aurait été insérée afin de faire ressortir que cette expression constituait une attribution distincte d'un pouvoir général. Quoique cette virgule ait été supprimée dans la version de 1979, Nanaimo affirme que, par l'application de l'art. 8 de la *Statute Revision Act*, l'art. 936 doit être interprété comme si la virgule s'y trouvait toujours, si l'inclusion d'une virgule a pour effet d'attribuer une compétence générale à l'égard des nuisances.

L'intimée a soutenu que notre Cour ne doit opter *a priori* ni pour une méthode d'interprétation bienveillante ni pour une règle stricte, mais chercher

intent" of s. 936. In the respondent's submission, such an analysis, aided by the *ejusdem generis* or limited class rule, forces the conclusion that s. 936 empowered Nanaimo to address only two classes of potential nuisance — constructed things and things associated with the handling, transit, or storage of water. To ascribe greater meaning to the phrase "or other matter or thing" it was said would run contrary to the intent of listing specific items before it, as well as deprive those words of meaning. In light of the specific items enumerated, the respondent company said it would be anomalous to conclude that reference to "or other matter or thing" permits a municipality to, in effect, declare anything to be a nuisance.

The first step is to consider the approach the courts should take when construing municipal legislation. As noted by Iacobucci J. in *R. v. Sharma*, [1993] 1 S.C.R. 650, at p. 668:

... as statutory bodies, municipalities "may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation".

The process of delineating municipal jurisdiction is an exercise in statutory construction. There is ample authority, on the interpretation of statutes generally and of municipal statutes specifically, to support a broad and purposive approach.

While *R. v. Greenbaum*, [1993] 1 S.C.R. 674, favoured restricting a municipality's jurisdiction to those powers expressly conferred upon it by the legislature, the Court noted that a purposive interpretation should be used in determining what the scope of those powers are. See Iacobucci J. (at pp. 687-88):

plutôt à cerner l'«intention véritable» de l'art. 936. Selon son argument, si l'on analyse la disposition de cette manière et si l'on applique la règle *ejusdem generis* ou règle des choses du même ordre, on est forcé de conclure que l'art. 936 ne conférait une autorité à Nanaimo qu'à l'égard de deux catégories de nuisances possibles: les constructions et tout ce qui concerne la manutention, l'acheminement ou l'emmagasinage de l'eau. Donner un sens plus large à l'expression «ou toute autre chose» irait, selon l'intimée, à l'encontre du but exprimé par l'énumération d'éléments qui la précède et en ferait une expression dénuée de sens. La société intimée ajoute qu'il serait anormal, compte tenu de l'énumération, de conclure que l'emploi de l'expression «ou toute autre chose» autorise une municipalité, en fait, à déclarer que n'importe quoi constitue une nuisance.

Il s'agit d'abord d'examiner la démarche que les tribunaux devraient adopter lorsqu'ils interprètent des textes législatifs se rapportant aux municipalités. Comme le fait observer le juge Iacobucci dans *R. c. Sharma*, [1993] 1 R.C.S. 650, à la p. 668:

... en tant qu'organismes créés par la loi, les municipalités [TRADUCTION] «peuvent exercer seulement les pouvoirs qui leur sont conférés expressément par la loi, les pouvoirs qui découlent nécessairement ou vraiment du pouvoir explicite conféré dans la loi, et les pouvoirs indispensables qui sont essentiels et non pas seulement commodes pour réaliser les fins de l'organisme».

Pour statuer sur la question de la compétence des municipalités, les tribunaux recourent aux règles d'interprétation des lois. Une abondante jurisprudence en matière d'interprétation des lois en général et des lois sur les municipalités en particulier favorise une interprétation large, fondée sur l'objet visé.

Dans l'arrêt *R. c. Greenbaum*, [1993] 1 R.C.S. 674, notre Cour a opté pour que la compétence des municipalités soit restreinte aux pouvoirs qui leur sont expressément conférés par une loi, mais elle a cependant fait remarquer qu'il fallait interpréter ces pouvoirs en tenant compte de l'objet visé. Voir les propos du juge Iacobucci (aux pp. 687 et 688):

As Davies J. wrote in his reasons in *City of Hamilton v. Hamilton Distillery Co.* (1907), 38 S.C.R. 239, at p. 249, with respect to construing provincial legislation enabling municipal by-laws:

In interpreting this legislation I would not desire to apply the technical or strict canons of construction sometimes applied to legislation authorizing taxation. I think the sections are, considering the subject matter and the intention obviously in view, entitled to a broad and reasonable if not, as Lord Chief Justice Russell said in *Kruse v. Johnson* [[1898]] 2 Q.B. 91], at p. 99, a “benevolent construction”, and if the language used fell short of expressly conferring the powers claimed, but did confer them by a fair and reasonable implication I would not hesitate to adopt the construction sanctioned by the implication.

Accordingly, a court should look to the purpose and wording of the provincial enabling legislation when deciding whether or not a municipality has been empowered to pass a certain by-law . . . [A] somewhat stricter rule of construction than that suggested above by Davies J. is in order where the municipality is attempting to use a power which restricts common law or civil rights.

20

This conclusion follows recent authorities dictating that statutes be construed purposively in their entire context and in light of the scheme of the Act as a whole with a view to ascertaining the legislature’s true intent. See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21-23, *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, at para. 25, and the B.C. *Interpretation Act*, s. 8.

21

It is my opinion that the legislature, by including the phrase “or other matter or thing”, did not intend to expand the scope of s. 936 to allow municipalities to declare almost anything to be a nuisance. I accept the respondent’s submission that to construe that phrase as creating a third class of potential nuisance would effectively negate the purpose of including rather specific preceding language.

Comme l’a affirmé le juge Davies dans *City of Hamilton c. Hamilton Distillery Co.* (1907), 38 R.C.S. 239, à la p. 249, à l’égard de l’interprétation d’une loi provinciale autorisant l’adoption de règlements municipaux:

[TRADUCTION] En interprétant la présente loi, je ne souhaiterais pas appliquer les principes techniques et stricts d’interprétation parfois appliqués aux mesures législatives qui autorisent la perception d’impôts. À mon avis, compte tenu de l’objet et de l’intention manifestement visés, les articles peuvent être interprétés d’une manière libérale et raisonnable, ou à tout le moins «bienveillante», comme le lord juge en chef Russell l’a écrit dans l’arrêt *Kruse c. Johnson* [[1898]] 2 Q.B. 91], à la p. 99. En outre, si le langage utilisé ne conférait pas expressément les pouvoirs revendiqués, mais le faisait par déduction juste et raisonnable, je n’hésiterais pas à adopter l’interprétation ainsi sanctionnée.

En conséquence, lorsqu’il doit déterminer si une municipalité a été habilitée à adopter un certain règlement, le tribunal devrait examiner l’objet et le texte de la mesure législative provinciale habilitante. [...] Il convient d’adopter une règle d’interprétation un peu plus stricte que celle proposée ci-dessus par le juge Davies lorsque la municipalité tente d’exercer un pouvoir qui restreint des droits civils ou de common law.

Cette conclusion suit des arrêts récents qui commandent que l’interprétation des lois soit fondée sur l’objet en tenant compte de tout le contexte et de l’esprit de la loi dans son ensemble en vue de cerner l’intention véritable du législateur. Voir *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, aux par. 21 à 23, *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961, au par. 25, et l’*Interpretation Act* de la Colombie-Britannique, art. 8.

Je suis d’avis qu’en insérant l’expression «ou toute autre chose», le législateur n’avait pas l’intention d’élargir le champ d’application de l’art. 936 de manière à autoriser les municipalités à déclarer que quasiment n’importe quoi constitue une nuisance. J’accepte l’argument de l’intimée qu’interpréter ces mots comme créant une troisième catégorie de nuisances possibles irait effectivement à l’encontre de l’objet visé, lequel s’exprime dans l’énumération d’éléments qui précède.

The phrase “or other matter or thing” extends the two classes of nuisances outlined before it, that is constructed or erected things, and watercourses. This interpretation follows from both a purposive interpretation and the application of the *eiusdem generis* limited class rule. It is not reasonable to believe that the legislature intended to subscribe such importance to the missing comma, namely that such minor punctuation should render null the specific items listed before.

It should also be noted that s. 932 of the *Municipal Act* (now s. 725) gave municipalities the authority to address nuisances, broadly defined, through duly passed by-laws. Under the Act, the procedure established to pass a by-law is more onerous and time consuming than that required to pass a resolution. Were reference to “or other matter or thing” interpreted to govern nuisances generally, s. 936 would necessarily encompass those nuisances addressed by s. 932. Section 932 would, in practice, be redundant. No reasonable and efficient municipality would address a nuisance through s. 932 in light of the less cumbersome procedure available under s. 936. The legislature could not have intended such redundancy.

The fact that s. 936 empowers municipalities to declare only two classes of thing to be a nuisance does not foreclose the possibility that a pile of soil may fall within one of those categories. It is clear that a pile of soil does not fall within any of the water-related items constituting the second class. However, does a pile of soil fall within the first class of constructed or erected things? Specifically, does it fall within the phrase “building, structure or erection of any kind”? I conclude that it does. A pile of soil does not materialize on its own. It must at least be erected presumably by piling or dumping. As well, a pile of soil clearly may be a “hazardous erection” within the wording of s. 936’s heading, either in the sense of reducing air quality

22

L’expression «ou toute autre chose» élargit les deux catégories de nuisances qui la précèdent, soit les constructions et les cours d’eau. Cette interprétation s’accorde tant avec une interprétation fondée sur l’objet qu’avec la règle *eiusdem generis*. Il n’est pas raisonnable de croire que le législateur ait voulu accorder une telle importance à la virgule manquante, c’est-à-dire qu’un signe de ponctuation aussi peu important rende nuls les éléments énumérés précédemment.

23

Il convient de signaler en outre que l’art. 932 de la *Municipal Act* (maintenant l’art. 725) conférait aux municipalités le pouvoir de prendre, par règlement, des mesures à l’égard des nuisances au sens large. Aux termes de la Loi, la procédure établie pour adopter un règlement est plus lourde et demande plus de temps que celle prévue pour adopter une résolution. Si l’utilisation de l’expression «ou toute autre chose» était interprétée comme régissant toutes les nuisances en général, l’art. 936 engloberait nécessairement les nuisances visées à l’art. 932, qui deviendrait alors, en pratique, redondant. Aucune municipalité raisonnable et efficace ne traiterait des questions de nuisance par le biais de l’art. 932 compte tenu de la procédure plus légère prévue à l’art. 936. Le législateur ne peut avoir prévu une telle redondance.

24

Le fait que l’art. 936 habilite les municipalités à déclarer que deux catégories de choses seulement sont des nuisances n’écarte pas la possibilité qu’un tas de terre entre dans l’une de ces catégories. De toute évidence, un tas de terre ne correspond à aucun des éléments ayant un rapport avec l’eau qui forment la seconde catégorie. Toutefois, un tas de terre entre-t-il dans la première catégorie, celle des constructions? Plus précisément, est-il visé par l’expression «tout bâtiment ou construction de quelque nature que ce soit»? Je suis d’avis qu’il l’est. Un tas de terre ne se fait pas tout seul. Il représente à tout le moins une construction, dans le sens qu’il a vraisemblablement été empilé ou déversé. De plus, un tas de terre peut clairement être une «construction dangereuse» au sens de l’intertitre qui précède l’art. 936, soit du fait qu’il diminue la qualité de l’air par la poussière en sus-

through dust pollution, or by posing a serious risk to curious children.

25 *Rizzo & Rizzo Shoes, supra*, at para. 27, noted “[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences”. In this sense, an absurdity would result if s. 936 did not extend to a pile of soil. It would mean a building, structure or pond could be declared a nuisance, but the soil excavated to create them could not.

26 It is my opinion that s. 936 empowered the appellant to issue resolutions declaring Rascal’s pile of soil a nuisance and ordering its removal. As a result of that conclusion the second question requires review.

(2) *Upon What Standard Must the Appellant’s Decision Be Reviewed?*

27 The standard of judicial review applicable to municipal policy making decisions was reviewed and set out in *Shell, supra*. See Sopinka J. (at p. 273):

As creatures of statute, however, municipalities must stay within the powers conferred on them by the provincial legislature. In *R. v. Greenbaum*, [1993] 1 S.C.R. 674, Iacobucci J., speaking for the Court, stated, at p. 687:

Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute.

It follows that the exercise of a municipality’s statutory powers . . . is reviewable to the extent of determining whether the actions are *intra vires*.

28 In this case we are considering the standard of review applicable to a municipality’s adjudicative function as opposed to its policy making. The decision in question was clearly adjudicative as it involved an adversarial hearing, the application of substantive rules to individual cases and a significant impact on the rights of the parties. (See 2747-

pension, soit du fait qu’il constitue un grave danger pour les enfants curieux.

Dans l’arrêt *Rizzo & Rizzo Shoes*, précité, au par. 27, il est indiqué que «[s]elon un principe bien établi en matière d’interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes». De ce point de vue, estimer que l’art. 936 ne vise pas un tas de terre conduirait à une absurdité. Cela signifierait qu’il peut être déclaré qu’un bâtiment, une construction ou un étang constitue une nuisance, mais non les déblais de l’excavation de ceux-ci.

À mon avis, l’art. 936 habilitait l’appelante à voter des résolutions déclarant que le tas de terre de Rascal était une nuisance et ordonnant son enlèvement. Étant donné cette conclusion, il y a lieu d’examiner la seconde question.

(2) *Selon quelle norme la décision de l’appelante doit-elle être examinée?*

La norme de contrôle judiciaire applicable aux décisions de principe des municipalités a été étudiée et énoncée dans *Shell*, précité. Voir les propos du juge Sopinka (à la p. 273):

En tant que créations de la loi, les municipalités doivent toutefois agir conformément aux pouvoirs que la législation provinciale leur a conférés. Dans l’arrêt *R. c. Greenbaum*, [1993] 1 R.C.S. 674, le juge Iacobucci affirme, au nom de la Cour, à la p. 687:

Les municipalités doivent leur existence aux lois provinciales. En conséquence, elles ne peuvent exercer que les pouvoirs qui leur sont expressément conférés par une loi provinciale.

Il s’ensuit que l’exercice des pouvoirs légaux d’une municipalité, quelle que soit leur classification, peut faire l’objet d’un contrôle dans la mesure où il s’agit de déterminer si elle a agi dans les limites de sa compétence.

En l’espèce, nous examinons la norme de contrôle applicable à la fonction juridictionnelle d’une municipalité par opposition à son rôle en matière de prise de décisions de principe. Il est clair que la décision en question était de nature juridictionnelle puisqu’elle comportait une audience contradictoire ainsi que l’application de règles de fond à des cas

3174 Québec Inc. v. Québec (Régie des permis d'alcool), [1996] 3 S.C.R. 919, at para. 24.) In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, and subsequent cases, this Court adopted what was described as a “pragmatic and functional” approach to discerning the standards of review applicable to administrative tribunals, be they delegates of federal or provincial jurisdiction. As municipalities are also delegates of provincial jurisdiction, there is harmony in applying the pragmatic and functional approach in ascertaining the standard of review applicable to municipalities exercising an adjudicative function.

As recently noted in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 29-38, several factors must be weighed in determining whether to afford an administrative tribunal curial deference. The approach is a contextual one that must be adapted to the body in question. It considers, where relevant, the existence of a privative clause, if any, the body’s expertise, the purpose of the body’s enabling legislation and whether the question at issue is one of law or fact. Here, s. 936 requires the municipal council to apply principles of statutory interpretation in order to answer the legal question of the scope of its authority. On such questions, municipalities do not possess any greater institutional competence or expertise than the courts so as to warrant a heightened degree of deference on review. The test on jurisdiction and questions of law is correctness.

A consideration of the nature of municipal government and the extent of municipal expertise further militates against a deferential standard on the question of jurisdiction. Furthermore, these factors reflect the institutional realities that make municipi-

particuliers et qu’elle avait des répercussions importantes sur les droits des parties. (Voir *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 R.C.S. 919, au par. 24.) Dans l’arrêt *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, et dans des arrêts subséquents, notre Cour a adopté une démarche «pragmatique et fonctionnelle» à l’égard de la détermination des normes de contrôle applicables aux tribunaux administratifs, qu’il s’agisse de délégués des gouvernements fédéral ou provinciaux. Comme les municipalités exercent aussi des pouvoirs délégués par le gouvernement provincial, il est approprié d’utiliser la démarche pragmatique et fonctionnelle pour déterminer quelle est la norme de contrôle applicable aux municipalités qui exercent une fonction juridictionnelle.

Il a récemment été noté dans l’arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, [1998] 1 R.C.S. 982, aux par. 29 à 38, que plusieurs facteurs doivent être pris en considération pour décider s’il y a lieu de faire montre de retenue à l’endroit d’un tribunal administratif. La démarche est contextuelle et doit être adaptée à l’organisme en question. Dans le cadre de cette démarche, l’examen porte sur l’existence d’une clause privative, le cas échéant, l’expertise de l’organisme, l’objet de la loi habilitante de l’organisme et la nature du problème, à savoir s’il s’agit d’une question de droit ou de fait. En l’espèce, le conseil municipal doit, en application de l’art. 936, appliquer des principes d’interprétation des lois pour répondre à la question de droit touchant l’étendue de son pouvoir. Sur de telles questions, les municipalités ne sont pas dotées d’une compétence ou d’une expertise institutionnelles plus grandes que celles des tribunaux, qui justifieraient un degré plus élevé de retenue de la part du tribunal d’examen. Le critère à appliquer quand il s’agit de questions de compétence et de questions de droit est celui de la décision correcte.

La prise en compte de la nature du gouvernement municipal et de l’étendue de l’expertise de la municipalité milite aussi contre l’application du principe de la retenue judiciaire quand il s’agit d’une question de compétence. De plus, ces fac-

palities creatures distinct and unique from administrative bodies.

31

First, in contrast to administrative tribunals, that usually adjudicate matters pertaining to a specialized and confined area, municipalities exercise a rather plenary set of legislative and executive powers, a role that closely mimics that of the provincial government from which they derive their existence. Yet, unlike provincial governments, municipalities do not have an independent constitutional status. (See *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 52, and the *Constitution Act, 1867*, ss. 92(8) and 92(16).) While administrative agencies are equally statutory delegates, they are not a substitute for provincial legislative and executive authority to the extent that municipalities are. Municipalities essentially represent delegated government.

32

Second, municipalities are political bodies. Whereas tribunal members should be and are, generally, appointed because they possess an expertise within the scope of the agency's authority, municipal councillors are elected to further a political platform. Neither experience nor proficiency in municipal law and municipal planning, while desirable, is required to be elected a councillor. Given the relatively broad range of issues that a municipality must address, it is unlikely that most councillors will develop such special expertise even over an extended time. Finally, as opposed to administrative tribunals, council decisions are more often by-products of the local political milieu than a considered attempt to follow legal or institutional precedent. To a large extent council decisions are necessarily motivated by political considerations and not by an entirely impartial application of expertise.

teurs témoignent des réalités institutionnelles qui distinguent nettement les municipalités des organismes administratifs.

Premièrement, au contraire des tribunaux administratifs, qui tranchent habituellement des questions relevant de domaines spécialisés et restreints, les municipalités exercent un ensemble assez complet de pouvoirs législatifs et exécutifs, jouant un rôle qui se rapproche énormément de celui du gouvernement provincial dont elles sont l'émanation. Néanmoins, contrairement au gouvernement provincial, les municipalités ne jouissent pas d'un statut constitutionnel indépendant. (Voir *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844, au par. 52, et la *Loi constitutionnelle de 1867*, par. 92(8) et 92(16).) Quoique les organismes administratifs soient également titulaires de pouvoirs délégués par des lois, ils ne se substituent pas à l'assemblée législative et au pouvoir exécutif des provinces au même titre que les municipalités qui, elles, constituent essentiellement des gouvernements délégués.

Deuxièmement, les municipalités sont des corps politiques. Alors que les membres des tribunaux administratifs doivent être nommés, et qu'ils le sont généralement, parce qu'ils possèdent une expertise pertinente par rapport aux attributions de l'organisme, les conseillers municipaux, pour leur part, sont élus en vue de la réalisation d'un programme politique. L'expérience et la compétence en droit municipal et en planification municipale sont des qualités souhaitables, mais nul n'est tenu de les posséder pour être élu conseiller. Vu la variété appréciable des questions qui ressortissent à l'autorité des municipalités, il est peu probable que la plupart des conseillers acquièrent de telles connaissances spécialisées même au bout d'un laps de temps assez long. Enfin, à l'inverse de celles des tribunaux administratifs, les décisions des conseils sont plus souvent une manifestation du milieu politique local qu'une tentative réfléchie de suivre des précédents juridiques ou institutionnels. Dans une large mesure, les décisions des conseils sont nécessairement le produit de facteurs politiques et non de l'application entièrement impartiale d'une expertise.

The fact that councillors are accountable at the ballot box, is a consideration in determining the standard of review for *intra vires* decisions but does not give municipal councillors any particular advantage in deciding jurisdictional questions in the adjudicative context. As a result, the courts may review those jurisdictional decisions on a standard of correctness.

Given the interpretation of s. 936 set out in part 1 of these reasons, it is my opinion that Nanaimo was correct in construing s. 936 as extending to its jurisdiction to issue resolutions declaring Rascal's pile of soil a nuisance and ordering its removal.

In light of the conclusion that Nanaimo acted within its jurisdiction in passing the resolutions at issue, it is necessary to consider the standard upon which the courts may review those *intra vires* municipal decisions. Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing *intra vires* decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the *intra vires* decision of municipalities be reviewed upon a deferential standard.

Kruse v. Johnson, [1898] 2 Q.B. 91 (Div. Ct.), has long been an authority in Canadian courts for scrutinizing the reasonableness of municipal by-laws. There, Lord Russell of Killowen offered

Le fait que les conseillers municipaux sont responsables devant leurs commettants au moment des élections est un élément à prendre en considération pour déterminer la norme de contrôle des décisions prises dans les limites de leur compétence, mais ce fait ne leur donne pas d'avantage particulier lorsqu'ils tranchent des questions de compétence dans le contexte juridictionnel. Par conséquent, les tribunaux doivent examiner les décisions en matière de compétence selon la norme de la décision correcte.

Vu l'interprétation de l'art. 936 énoncée dans la première partie des présents motifs, j'estime que Nanaimo a pris une décision correcte en interpréter l'art. 936 comme lui conférant la compétence pour adopter des résolutions déclarant que le tas de terre de Rascal était une nuisance et ordonnant son enlèvement.

Compte tenu de la conclusion que Nanaimo a agi dans les limites de sa compétence en adoptant les résolutions en question, il est nécessaire d'examiner la norme selon laquelle les tribunaux peuvent examiner les décisions prises par la municipalité dans les limites de leur compétence. Les conseillers municipaux sont élus par les commettants qu'ils représentent et, de ce fait, ils sont plus au courant des exigences de leur collectivité que ne le sont les tribunaux. Le fait que les conseils municipaux sont composés de représentants élus de leur collectivité et, partant, qu'ils sont responsables devant leurs commettants est un élément pertinent de l'examen des décisions prises dans les limites de leur compétence. La réalité qui veut que les municipalités doivent souvent soupeser des intérêts complexes et opposés pour arriver à des décisions conformes à l'intérêt public est tout aussi importante. Bref, les considérations qui précèdent justifient que l'on fasse preuve de retenue dans le cadre de l'examen des décisions prises par les municipalités dans les limites de leur compétence.

L'arrêt *Kruse c. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.), a longtemps fait autorité au Canada quant au caractère raisonnable des règlements municipaux. Lord Russell of Killowen y invite les

33

34

35

the courts some cautionary language on findings of unreasonableness (at p. 100):

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

Or as more recently expressed in *Shell*, *supra*, per McLachlin J., 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*, 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.

tribunaux à user de circonspection lorsqu'il s'agit de statuer sur le caractère déraisonnable d'une telle mesure (à la p. 100):

[TRADUCTION] Un règlement n'est pas déraisonnable simplement parce que certains juges peuvent estimer qu'il va au-delà de ce qui est prudent ou nécessaire ou commode, ou parce qu'il n'est pas assorti d'une réserve ou d'une exception qui devrait y figurer de l'avis de certains juges. Il n'est sans doute pas exagéré de dire que, lorsqu'une question touche directement et principalement les habitants du comté, qui ont le droit de choisir ceux qu'ils jugent les plus aptes à les représenter au sein du corps municipal, on peut faire confiance à ces représentants pour ce qui est de comprendre mieux que les juges ce qui leur convient.

Ou bien, comme le juge McLachlin l'a exprimé plus récemment dans *Shell*, précité, à la p. 244:

Il ressort d'un commentaire récent que l'on commence à s'accorder pour dire que les tribunaux doivent respecter la responsabilité qu'ont les conseils municipaux élus de servir leurs électeurs et de prendre garde de substituer à l'opinion de ces conseils leur propre avis quant à ce qui est dans le meilleur intérêt des citoyens. A moins qu'il ne soit clairement démontré qu'une municipalité a excédé ses pouvoirs en prenant une décision donnée, les tribunaux ne devraient pas conclure qu'il en est ainsi. Dans les cas où il n'y a pas d'attribution expresse de pouvoirs, mais où ceux-ci peuvent être implicites, les tribunaux doivent se montrer prêts à adopter l'interprétation «bienveillante» évoquée par notre Cour dans l'arrêt *Greenbaum* et à conférer les pouvoirs par déduction raisonnable. Quelles que soient les règles d'interprétation appliquées, elles ne doivent pas servir à usurper le rôle légitime de représentants de la collectivité que jouent les conseils municipaux.

37

I find these comments equally persuasive in the scrutiny of municipal resolutions. The conclusion is apparent. The standard upon which courts may entertain a review of *intra vires* municipal actions should be one of patent unreasonableness.

J'estime que ces commentaires sont également persuasifs lorsqu'il s'agit d'examiner des résolutions municipales. La conclusion est évidente. La norme suivant laquelle les tribunaux peuvent examiner les actions d'une municipalité accomplies dans les limites de sa compétence est celle du caractère manifestement déraisonnable.

38

An example of legislative intent in the review of municipal by-laws or resolutions is found in the Province of Alberta where the province seeks to shield its municipalities from a challenge on

On trouve dans la province d'Alberta un exemple d'intention législative en matière d'examen des règlements ou résolutions des municipalités. En effet, cette province cherche à protéger

unreasonableness alone. See the *Municipal Government Act*, S.A. 1994, c. M-26.1, that states:

539 No bylaw or resolution may be challenged on the ground that it is unreasonable.

We are left to consider whether Nanaimo was patently unreasonable in declaring this specific pile of soil a nuisance. The pile of soil had serious and continuing effects upon the neighbouring community. It was an annoyance and a source of pollution. Nanaimo's decision to declare Rascal's pile of soil a nuisance was not patently unreasonable. I would allow the appeal with costs throughout, set aside the order of the British Columbia Court of Appeal and reinstate the orders of Maczko J. and Rowan J. below, as well as Nanaimo's resolutions dated July 3, 1996 and August 19, 1996.

Appeal allowed with costs.

Solicitors for the appellant: Staples McDannold Stewart, Vancouver.

Solicitors for the respondent: Ladner Downs, Vancouver.

ses municipalités contre une contestation fondée uniquement sur la question du caractère déraisonnable. Voir la *Municipal Government Act*, S.A. 1994, ch. M-26.1, dont l'art. 539 dispose:

[TRADUCTION]

539 Nul ne peut contester un règlement ou une résolution pour le motif qu'il est déraisonnable.

Il reste à décider si Nanaimo a pris une décision manifestement déraisonnable en déclarant que le tas de terre en question était une nuisance. Le tas de terre a eu des effets graves et constants sur la collectivité voisine. Il constituait un désagrément et une source de pollution. La décision de Nanaimo de déclarer que le tas de terre de Rascal était une nuisance n'était pas manifestement déraisonnable. Je suis d'avis d'accueillir le pourvoi avec dépens dans toutes les cours, d'annuler l'ordonnance de la Cour d'appel de la Colombie-Britannique et de rétablir les ordonnances des juges Maczko et Rowan en première instance, ainsi que les résolutions de Nanaimo datées du 3 juillet 1996 et du 19 août 1996.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante: Staples McDannold Stewart, Vancouver.

Procureurs de l'intimée: Ladner Downs, Vancouver.

TAB 9

114957 Canada Ltée (Spraytech, Société d'arrosage) and Services des espaces verts Ltée/Chemlawn Appellants

v.

Town of Hudson Respondent

and

Federation of Canadian Municipalities, Nature-Action Québec Inc. and World Wildlife Fund Canada, Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, Parents' Environmental Network, Healthy Lawns – Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond, and Fédération interdisciplinaire de l'horticulture ornementale du Québec Intervenors

INDEXED AS: 114957 CANADA LTÉE (SPRAYTECH, SOCIÉTÉ D'ARROSAGE) *v.* HUDSON (TOWN)

Neutral citation: 2001 SCC 40.

File No.: 26937.

2000: December 7; 2001: June 28.

Present: L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Municipal law — By-laws — Regulation and restriction of pesticide use — Town adopting by-law restricting use of pesticides within its perimeter to specified locations and enumerated activities — Whether Town had statutory authority to enact by-law — Whether by-law rendered inoperative because of conflict with federal or

114957 Canada Ltée (Spraytech, Société d'arrosage) et Services des espaces verts Ltée/Chemlawn Appelantes

c.

Ville de Hudson Intimée

et

Fédération canadienne des municipalités, Nature-Action Québec Inc. et Fonds mondial pour la nature (Canada), Toronto Environmental Alliance, Sierra Club du Canada, Association canadienne du droit de l'environnement, Parents' Environmental Network, Healthy Lawns – Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee et Dr Merryl Hammond et la Fédération interdisciplinaire de l'horticulture ornementale du Québec Intervenants

RÉPERTORIÉ : 114957 CANADA LTÉE (SPRAYTECH, SOCIÉTÉ D'ARROSAGE) *c.* HUDSON (VILLE)

Référence neutre : 2001 CSC 40.

Nº du greffe : 26937.

2000 : 7 décembre; 2001 : 28 juin.

Présents : Les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit municipal — Règlements — Réglementation et restriction de l'utilisation des pesticides — Adoption par la Ville d'un règlement limitant l'utilisation des pesticides sur son territoire à des endroits précis et à des activités énumérées — La Ville avait-elle le pouvoir légal d'adopter le règlement? — Le règlement a-t-il été rendu inopérant du fait de son incompatibilité avec la législation fédérale ou provinciale? — Règlement 270

provincial legislation — Town of Hudson By-law 270 — Cities and Towns Act, R.S.Q., c. C-19, s. 410(1).

The appellants are landscaping and lawn care companies operating mostly in the greater Montreal area, with both commercial and residential clients. They make regular use of pesticides approved by the federal *Pest Control Products Act* in the course of their business activities and hold the requisite licences under Quebec's *Pesticides Act*. In 1991 the respondent Town, located west of Montreal, adopted By-law 270, which restricted the use of pesticides within its perimeter to specified locations and for enumerated activities. The definition of pesticides in By-law 270 replicates that in the *Pesticides Act*. Under s. 410(1) of the Quebec *Cities and Towns Act* ("C.T.A."), the council may make by-laws to "secure peace, order, good government, health and general welfare in the territory of the municipality", while under s. 412(32) *C.T.A.* it may make by-laws to "regulate or prohibit the . . . use of . . . combustible, explosive, corrosive, toxic, radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within 1 km therefrom". In 1992 the appellants were charged with having used pesticides in violation of By-law 270. They brought a motion for declaratory judgment asking the Superior Court to declare By-law 270 to be inoperative and *ultra vires* the Town's authority. The Superior Court denied the motion, and the Court of Appeal affirmed that decision.

Held: The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier, Bastarache and Arbour JJ.: As statutory bodies, municipalities may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation. Included in this authority are "general welfare" powers, conferred by provisions in provincial enabling legislation, on which municipalities can draw. Section 410 *C.T.A.* is an example of such a general welfare provision and supplements the specific grants of power in s. 412. While enabling provisions that allow municipalities to regulate for the "general welfare" within their territory authorize the enactment of by-laws genuinely aimed at furthering goals such as public health and safety, courts faced with

de la ville de Hudson — Loi sur les cités et villes, L.R.Q., ch. C-19, art. 410(1).

Les appelantes sont des entreprises d'aménagement paysager et d'entretien des pelouses qui exercent leurs activités surtout dans la région métropolitaine de Montréal et qui ont aussi bien des clients commerciaux que des clients résidentiels. Elles utilisent régulièrement, dans le cadre de leurs activités commerciales, des pesticides conformes à la *Loi sur les produits antiparasitaires* du gouvernement fédéral et détiennent les permis requis par la *Loi sur les pesticides* du Québec. En 1991, la Ville intimée, située à l'ouest de Montréal, a adopté le règlement 270, qui limite l'utilisation des pesticides sur son territoire à des endroits précis et aux activités énumérées. La définition de pesticides contenue dans le règlement 270 est la réplique exacte de celle adoptée dans la *Loi sur les pesticides*. En vertu du par. 410(1) de la *Loi sur les cités et villes* du Québec (« *L.C.V.* »), le conseil peut faire des règlements « [p]our assurer la paix, l'ordre, le bon gouvernement, la salubrité et le bien-être général sur le territoire de la municipalité », tandis qu'en vertu du par. 412(32) *L.C.V.*, il peut faire des règlements « [p]our réglementer ou défendre [. . .] l'usage de [. . .] matières combustibles, explosives, corrosives, toxiques, radioactives ou autrement dangereuses pour la santé ou la sécurité publiques, sur le territoire de la municipalité ou dans un rayon de 1 km à l'extérieur de ce territoire ». En 1992, les appelantes ont été accusées d'avoir utilisé des pesticides contrairement au règlement 270. Elles ont introduit une requête en jugement déclaratoire demandant à la Cour supérieure de déclarer inopérant le règlement 270 et *ultra vires* le pouvoir de la Ville. La Cour supérieure a rejeté la requête, et la Cour d'appel a confirmé cette décision.

Arrêt : Le pourvoi est rejeté.

Les juges L'Heureux-Dubé, Gonthier, Bastarache et Arbour : En tant qu'organismes créés par la loi, les municipalités peuvent exercer seulement les pouvoirs qui leur sont conférés expressément par la loi, les pouvoirs qui découlent nécessairement ou vraiment du pouvoir explicite conféré dans la loi, et les pouvoirs indispensables qui sont essentiels et non pas seulement commodes pour réaliser les fins de l'organisme. Y sont inclus les pouvoirs en matière de « bien-être général » conférés par la loi provinciale habilitante, sur laquelle les municipalités peuvent se fonder. L'article 410 *L.C.V.* constitue un exemple d'une telle disposition générale de bien-être et il ajoute aux pouvoirs spécifiques conférés par l'art. 412. Bien que les dispositions habilitantes permettant aux municipalités de réglementer pour le « bien-être général » sur leur territoire autorisent l'adoption de

an impugned by-law enacted under an “omnibus” provision such as s. 410 C.T.A. must be vigilant in scrutinizing the true purpose of the by-law.

By-law 270 does not fall within the ambit of s. 412(32) C.T.A. There is no equation of pesticides and “toxic . . . materials” either in the terms of the by-law or in any evidence presented during this litigation. Since there is no specific provision in the provincial enabling legislation referring to pesticides, the by-law must fall within the purview of s. 410(1) C.T.A. By-law 270 read as a whole does not impose a total prohibition, but rather permits the use of pesticides in certain situations where that use is not purely an aesthetic pursuit. Based on the distinction between essential and non-essential uses of pesticides, it is reasonable to conclude that the Town by-law’s purpose is to minimize the use of allegedly harmful pesticides in order to promote the health of its inhabitants. This purpose falls squarely within the “health” component of s. 410(1) C.T.A. The distinctions impugned by the appellants as restricting their businesses are necessary incidents to the power delegated by the province under s. 410(1) C.T.A. Moreover, reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. The interpretation of By-law 270 set out here respects international law’s “precautionary principle”. In the context of the precautionary principle’s tenets, the Town’s concerns about pesticides fit well under their rubric of preventive action.

By-law 270 was not rendered inoperative because of a conflict with federal or provincial legislation. As a product of provincial enabling legislation, By-law 270 is subject to the “impossibility of dual compliance” test for conflict between federal and provincial legislation set out in *Multiple Access*. The federal *Pest Control Products Act* regulates which pesticides can be registered for manufacture and/or use in Canada. This legislation is permissive, rather than exhaustive, and there is no operational conflict with By-law 270. The *Multiple Access* test also applies to the inquiry into whether there is a conflict between the by-law and provincial legislation. In this case, there is no barrier to dual compliance with By-law 270 and the Quebec *Pesticides Act*, nor any plausible evidence that the legislature intended to preclude municipal regulation of pesticide use. The *Pesticides Act* establishes a permit and licensing system for

règlements visant véritablement à faciliter la réalisation d’objectifs telles la santé et la sécurité publiques, les tribunaux saisis d’un règlement contesté adopté en vertu d’une disposition « omnibus » comme l’art. 410 L.C.V. doivent être vigilants lorsqu’ils cherchent à déterminer le but véritable du règlement.

Le règlement 270 ne tombe pas sous l’égide du par. 412(32) L.C.V. Le texte du règlement et la preuve présentée au cours du présent litige n’assimilent pas les pesticides aux « matières [...] toxiques ». Étant donné qu’aucune disposition particulière de la loi provinciale habilitante ne mentionne les pesticides, le règlement doit tomber dans le champ d’application du par. 410(1) L.C.V. Interprété dans son ensemble, le règlement 270 n’impose pas une interdiction totale, mais permet plutôt l’usage de pesticides dans certains cas où cet usage n’a pas un but purement esthétique. Selon la distinction entre l’usage essentiel et l’usage non essentiel des pesticides, il est raisonnable de conclure que le règlement de la Ville a pour objet de minimiser l’utilisation de pesticides qui seraient nocifs afin de protéger la santé de ses habitants. Cet objet relève directement de l’aspect « santé » du par. 410(1) L.C.V. Les distinctions contestées par les appétentes au motif qu’elles restreignent leurs activités commerciales sont des conséquences nécessaires à l’application du pouvoir délégué par la province en vertu du par. 410(1) L.C.V. De plus, interpréter le par. 410(1) comme permettant à la Ville de réglementer l’utilisation des pesticides correspond aux principes de droit et de politique internationaux. L’interprétation du règlement 270 exposée ici respecte le « principe de précaution » du droit international. Dans le contexte des postulats du principe de précaution, les craintes de la Ville au sujet des pesticides s’inscrivent confortablement sous la rubrique de l’action préventive.

Le règlement 270 n’a pas été rendu inopérant du fait de son incompatibilité avec la législation fédérale ou provinciale. Découlant d’une loi provinciale habilitante, le règlement 270 est sujet au critère de « l’impossibilité de se conformer aux deux textes » en cas de conflit entre la législation fédérale et la législation provinciale, critère qui a été énoncé dans l’arrêt *Multiple Access*. La *Loi sur les produits antiparasitaires* du gouvernement fédéral dicte quels pesticides peuvent être agréés à des fins de fabrication et/ou d’utilisation au Canada. Cette loi est permissive, et non pas exhaustive, de sorte qu’il n’y a aucun conflit d’application avec le règlement 270. Le critère de l’arrêt *Multiple Access* s’applique également à l’examen de la question de savoir s’il y a conflit entre le règlement municipal et la législation provinciale. Dans la présente affaire, rien n’empêche que l’on se conforme à la fois au règlement 270 et à la *Loi sur les*

vendors and commercial applicators of pesticides and thus complements the federal legislation's focus on the products themselves. Along with By-law 270, these laws establish a tri-level regulatory regime.

Per Iacobucci, Major and LeBel JJ.: The basic test to determine whether there is an operational conflict remains the impossibility of dual compliance. From this perspective, the alleged conflict with federal legislation simply does not exist. Nor does a conflict exist with the Quebec *Pesticides Act*, for the reasons given by the majority.

The issues in this case remain strictly first whether the *C.T.A.* authorizes municipalities to regulate the use of pesticides within their territorial limits, and second whether the particular regulation conforms with the general principles applicable to delegated legislation. The Town concedes that the only provision under which its by-law can be upheld is the general clause of s. 410(1) *C.T.A.* While it appears to be sound legislative and administrative policy, under general welfare provisions, to grant local governments a residual authority to address emerging or changing issues concerning the welfare of the local community living within their territory, it is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern 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 this case, the by-law targets problems of use of land and property, and addresses neighborhood concerns that have always been within the realm of local government activity. The by-law was thus properly authorized by s. 410(1).

Two basic and longstanding principles of delegated legislation state that a by-law may not be prohibitory and may not discriminate unless the enabling legislation so authorizes. While on its face, By-law 270 involves a general prohibition and then authorizes some specific uses, when it is read as a whole its overall effect is to prohibit purely aesthetic use of pesticides while allowing other uses, mainly for business or agricultural

pesticides du Québec, et il n'y a aucun élément de preuve plausible indiquant que la législature avait l'intention d'empêcher la réglementation par les municipalités de l'utilisation des pesticides. La *Loi sur les pesticides* établit un régime de permis pour les vendeurs et les applicateurs commerciaux de pesticides et elle est donc complémentaire à la législation fédérale, qui porte sur les produits eux-mêmes. Conjointement avec le règlement 270, ces lois établissent un régime de réglementation à trois niveaux.

Les juges Iacobucci, Major et LeBel : Le critère fondamental permettant de déterminer s'il existe conflit d'application demeure l'impossibilité de se conformer aux deux textes. Dans cette optique, le présumé conflit avec la législation fédérale n'existe tout simplement pas. Il n'y a pas non plus conflit avec la *Loi sur les pesticides* du Québec pour les raisons données par la majorité.

En l'espèce, les questions se résument à savoir si, premièrement, la *L.C.V.* autorise les municipalités à réglementer l'utilisation des pesticides sur leur territoire et, deuxièmement, si le règlement en cause respecte les principes généraux applicables à la législation déléguée. La Ville admet que la seule disposition qui permette de confirmer la légalité de son règlement est la clause générale du par. 410(1) *L.C.V.* Bien qu'il paraisse logique, sur les plans législatif et administratif, de recourir à des dispositions générales de bien-être pour conférer aux administrations publiques locales le pouvoir résiduaire de traiter des questions nouvelles ou évolutives relativement au bien-être de la collectivité locale vivant sur leur territoire, il ne suffit pas qu'une question particulière soit devenue une préoccupation urgente selon la collectivité locale. Cette préoccupation doit être étroitement liée aux intérêts immédiats de la collectivité se trouvant dans les limites territoriales définies par la législature pour ce qui concerne toute question pour laquelle l'intervention des administrations publiques locales peut se révéler utile. En l'espèce, le règlement vise les problèmes liés à l'utilisation des terres et des biens et il porte sur des préoccupations de quartier qui ont toujours relevé du domaine d'activité des administrations publiques locales. Le règlement était donc autorisé en bonne et due forme par le par. 410(1).

Selon deux principes fondamentaux établis depuis longtemps en matière de législation déléguée, un règlement ne peut pas être prohibitif et discriminatoire à moins que la loi habilitante ne l'autorise. Bien que le règlement 270 établisse de prime abord une prohibition générale pour ensuite permettre certaines utilisations particulières, lu dans son ensemble, il a comme effet d'interdire l'utilisation des pesticides pour des raisons

purposes. Moreover, although the by-law discriminates, there can be no regulation on such a topic without some form of discrimination in the sense that the by-law must determine where, when and how a particular product may be used. An implied authority to discriminate was thus unavoidably part of the delegated regulatory power.

purement esthétiques tout en permettant d'autres utilisations, surtout pour des activités commerciales et agricoles. De plus, bien que le règlement soit discriminatoire, il ne peut y avoir aucune réglementation sur un tel sujet sans une certaine forme de discrimination, en ce sens que le règlement doit établir où, quand et comment un produit particulier peut être utilisé. Le pouvoir de réglementation délégué comportait donc inévitablement le pouvoir implicite de faire de la discrimination.

Cases Cited

By L'Heureux-Dubé J.

Distinguished: *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; **applied:** *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; **referred to:** *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *R. v. Sharma*, [1993] 1 S.C.R. 650; *Re Weir and The Queen* (1979), 26 O.R. (2d) 326; *Kuchma v. Rural Municipality of Tache*, [1945] S.C.R. 234; *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13; *Scarborough v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *A.P. Pollution Control Board v. Nayudu*, 1999 S.O.L. Case No. 53; *Vellore Citizens Welfare Forum v. Union of India*, [1996] Supp. 5 S.C.R. 241; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Attorney General for Ontario v. City of Mississauga* (1981), 15 M.P.L.R. 212; *Township of Uxbridge v. Timber Bros. Sand & Gravel Ltd.* (1975), 7 O.R. (2d) 484; *British Columbia Lottery Corp. v. Vancouver (City)* (1999), 169 D.L.R. (4th) 141; *Law Society of Upper Canada v. Barrie (City)* (2000), 46 O.R. (3d) 620; *Huot v. St-Jérôme (Ville de)*, J.E. 93-1052; *St-Michel-Archange (Municipalité de) v. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875.

By LeBel J.

Applied: *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; **referred to:** *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409, 2000 SCC 45;

Jurisprudence

Citée par le juge L'Heureux-Dubé

Distinction d'avec les arrêts : *R. c. Greenbaum*, [1993] 1 R.C.S. 674; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231; **arrêt appliqué :** *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; **arrêts mentionnés :** *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3; *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213; *R. c. Sharma*, [1993] 1 R.C.S. 650; *Re Weir and The Queen* (1979), 26 O.R. (2d) 326; *Kuchma c. Rural Municipality of Tache*, [1945] R.C.S. 234; *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368; *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13; *Scarborough c. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255; *Allard Contractors Ltd. c. Coquitlam (District)*, [1993] 4 R.C.S. 371; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *A.P. Pollution Control Board c. Nayudu*, 1999 S.O.L. Case No. 53; *Vellore Citizens Welfare Forum c. Union of India*, [1996] Supp. 5 S.C.R. 241; *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961; *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121; *Attorney General for Ontario c. City of Mississauga* (1981), 15 M.P.L.R. 212; *Township of Uxbridge c. Timber Bros. Sand & Gravel Ltd.* (1975), 7 O.R. (2d) 484; *British Columbia Lottery Corp. c. Vancouver (City)* (1999), 169 D.L.R. (4th) 141; *Law Society of Upper Canada c. Barrie (City)* (2000), 46 O.R. (3d) 620; *Huot c. St-Jérôme (Ville de)*, J.E. 93-1052; *St-Michel-Archange (Municipalité de) c. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875.

Citée par le juge LeBel

Arrêt appliqué : *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; **arrêts mentionnés :** *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961; *Public School Boards' Assn. of Alberta c. Alberta (Procureur général)*, [2000]

Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General), [2001] 1 S.C.R. 470, 2001 SCC 15; *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *R. v. Sharma*, [1993] 1 S.C.R. 650; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13; *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231.

Statutes and Regulations Cited

Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33, s. 2(1)(a).
Cities and Towns Act, R.S.Q., c. C-19, ss. 410 [am. 1982, c. 64, s. 5; am. 1996, c. 2, s. 150], 412(32) [am. 1984, c. 47, s. 213; am. 1986, c. 31, s. 5; am. 1996, c. 2, s. 151], 463.1 [ad. 1998, c. 31, s. 15].
Cities, Towns and Villages Act, R.S.N.W.T. 1988, c. C-8, ss. 54, 102.
Code of Civil Procedure, R.S.Q., c. C-25, art. 453.
Endangered Species Act, S.N.S. 1998, c. 11, ss. 2(1)(h), 11(1).
Local Government Act, R.S.B.C. 1996, c. 323, s. 249.
Municipal Act, R.S.O. 1990, c. M.45, s. 102.
Municipal Act, R.S.Y. 1986, c. 119, s. 271.
Municipal Act, S.M. 1996, c. 58, C.C.S.M. c. M225, ss. 232, 233.
Municipal Government Act, S.A. 1994, c. M-26.1, ss. 3(c), 7.
Municipal Government Act, S.N.S. 1998, c. 18, s. 172.
Municipalities Act, R.S.N.B. 1973, c. M-22, s. 190(2), First Schedule.
Oceans Act, S.C. 1996, c. 31, Preamble (para. 6).
Pest Control Products Act, R.S.C. 1985, c. P-9, ss. 4(1), (3), 6(1)(j) [am. 1993, c. 44, s. 200].
Pest Control Products Regulations, C.R.C. 1978, c. 1253, s. 45.
Pesticides Act, R.S.Q., c. P-9.3, ss. 102 [am. 1987, c. 29, s. 102; am. 1990, c. 85, s. 122; repl. 1993, c. 77, s. 9], 105 [am. 1987, c. 29, s. 105], 105.1 [ad. 1993, c. 77, s. 11], 106 [am. 1987, c. 29, s. 106], 107 [am. 1987, c. 29, s. 107].
Town of Hudson By-law 248.
Town of Hudson By-law 270 [am. 1995, by-law 327; am. 1996, by-law 341], arts. 1, 2, 3, 4, 5, 6, 10.

2 R.C.S. 409, 2000 CSC 45; *Ontario English Catholic Teachers' Assn. c. Ontario (Procureur général)*, [2001] 1 R.C.S. 470, 2001 CSC 15; *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368; *R. c. Sharma*, [1993] 1 R.C.S. 650; *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13; *R. c. Greenbaum*, [1993] 1 R.C.S. 674; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231.

Lois et règlements cités

Code de procédure civile, L.R.Q., ch. C-25, art. 453.
Endangered Species Act, S.N.S. 1998, ch. 11, art. 2(1)(h), 11(1).
Local Government Act, R.S.B.C. 1996, ch. 323, art. 249.
Loi canadienne sur la protection de l'environnement (1999), L.C. 1999, ch. 33, art. 2(1)a).
Loi municipale, L.R.Y. 1986, ch. 119, art. 271.
Loi sur les cités et villes, L.R.Q., ch. C-19, art. 410 [mod. 1982, ch. 64, art. 5; mod. 1996, ch. 2, art. 150], 412(32) [mod. 1984, ch. 47, art. 213; mod. 1986, c. 31, art. 5; mod. 1996, c. 2, art. 151], 463.1 [aj. 1998, ch. 31, art. 15].
Loi sur les cités, villes et villages, L.R.T.N.-O. 1988, ch. C-8, art. 54, 102.
Loi sur les municipalités, L.M. 1996, ch. 58, C.P.L.M. ch. M225, art. 232, 233.
Loi sur les municipalités, L.R.N.-B. 1973, ch. M-22, art. 190(2), annexe I.
Loi sur les municipalités, L.R.O. 1990, ch. M-45, art. 102.
Loi sur les océans, L.C. 1996, ch. 31, préambule (par. 6).
Loi sur les pesticides, L.R.Q., ch. P-9.3, art. 102 [mod. 1987, ch. 29, art. 102; mod. 1990, ch. 85, art. 122; rempl. 1993, ch. 77, art. 9], 105 [mod. 1987, ch. 29, art. 105], 105.1 [aj. 1993, ch. 77, art. 11], 106 [mod. 1987, ch. 29, art. 106], 107 [mod. 1987, ch. 29, art. 107].
Loi sur les produits antiparasitaires, L.R.C. 1985, ch. P-9, art. 4(1), (3), 6(1)(j) [mod. 1993, ch. 44, art. 200].
Municipal Government Act, S.A. 1994, ch. M-26.1, art. 3(c), 7.
Municipal Government Act, S.N.S. 1998, ch. 18, art. 172.
Règlement 248 de la ville de Hudson.
Règlement 270 de la ville de Hudson [mod. 1995, règlement 327; mod. 1996, règlement 341], art. 1, 2, 3, 4, 5, 6, 10.
Règlement sur les produits antiparasitaires, C.R.C. 1978, ch. 1253, art. 45.

Authors Cited

- Cameron, James, and Juli Abouchar. "The Status of the Precautionary Principle in International Law", in David Freestone and Ellen Hey, eds., *The Precautionary Principle and International Law*. The Hague: Kluwer Law International, 1996.
- Canada. *CEPA Issue Elaboration Paper No. 18 — CEPA and the Precautionary Principle/Approach*. Paper prepared by Dr. David VanderZwaag, Director of Marine and Environmental Law Program (MELP), Dalhousie Law School. Ottawa: Environment Canada, 1995.
- Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.
- Driedger on the Construction of Statutes*, 3rd ed. by Ruth Sullivan. Toronto: Butterworths, 1994.
- Duplessis, Yvon, et Jean Hétu. *Les pouvoirs des municipalités en matière de protection de l'environnement*, 2^e éd. Cowansville: Yvon Blais, 1994.
- Dussault, René, and Louis Borgeat. *Administrative Law: A Treatise*, vol. 1, 2nd ed. Toronto: Carswell, 1985.
- Freestone, David, and Ellen Hey, eds. *The Precautionary Principle and International Law*. The Hague: Kluwer Law International, 1996.
- Garant, Patrice. *Droit administratif*, vol. 1, 4^e éd. Cowansville: Yvon Blais, 1996.
- Hétu, Jean, Yvon Duplessis, et Dennis Pakenham. *Droit Municipal : Principes généraux et contentieux*. Montréal: Hébert Denault, 1998.
- Hoehn, Felix. *Municipalities and Canadian Law: Defining the Authority of Local Governments*. Saskatoon: Purich Publishing, 1996.
- Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, loose-leaf ed. Scarborough, Ont.: Carswell, 1997 (updated 2000, release 1).
- McIntyre, Owen, and Thomas Mosedale. "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 *J. Env. L.* 221.
- Rogers, Ian MacFee. *The Law of Canadian Municipal Corporations*, Cum. Supp. to vol. 1, 2nd ed. Toronto: Carswell, 1971 (loose-leaf updated 2001, release 1).
- Swaigen, John. "The Hudson Case: Municipal Powers to Regulate Pesticides Confirmed by Quebec Courts" (2000), 34 C.E.L.R. (N.S.) 162.
- United Nations. General Assembly. Preparatory Committee for the United Nations Conference on Environment and Development. Report of the Economic Commission for Europe on the Bergen Conference, Annex I, *Bergen Ministerial Declaration on Sustainable Developments*, A/CONF.151/PC/10, August 6, 1990, para. 7.

Doctrine citée

- Cameron, James, and Juli Abouchar. « The Status of the Precautionary Principle in International Law », in David Freestone and Ellen Hey, eds., *The Precautionary Principle and International Law*. The Hague: Kluwer Law International, 1996.
- Canada. *Document d'élaboration des enjeux 18 — La LCPE et le principe ou l'approche précaution*. Document publié par David VanderZwaag, directeur, Marine and Environmental Law Program (MELP), Dalhousie Law School. Ottawa: Environment Canada, 1995.
- Côté, Pierre-André. *Interprétation des lois*, 3^e éd. Montréal : Éditions Thémis, 1999.
- Driedger on the Construction of Statutes*, 3rd ed. by Ruth Sullivan. Toronto : Butterworths, 1994.
- Duplessis, Yvon, et Jean Hétu. *Les pouvoirs des municipalités en matière de protection de l'environnement*, 2^e éd. Cowansville : Yvon Blais, 1994.
- Dussault, René, et Louis Borgeat. *Traité de droit administratif*, t. I, 2^e éd. Québec : Presses de l'Université Laval, 1984.
- Freestone, David, and Ellen Hey, eds. *The Precautionary Principle and International Law*. The Hague : Kluwer Law International, 1996.
- Garant, Patrice. *Droit administratif*, vol. 1, 4^e éd. Cowansville : Yvon Blais, 1996.
- Hétu, Jean, Yvon Duplessis, et Dennis Pakenham. *Droit Municipal : Principes généraux et contentieux*. Montréal : Hébert Denault, 1998.
- Hoehn, Felix. *Municipalities and Canadian Law: Defining the Authority of Local Governments*. Saskatoon : Purich Publishing, 1996.
- Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, loose-leaf ed. Scarborough, Ont. : Carswell, 1997 (updated 2000, release 1).
- McIntyre, Owen, and Thomas Mosedale. « The Precautionary Principle as a Norm of Customary International Law » (1997), 9 *J. Env. L.* 221.
- Nations Unies. Assemblée générale. Préparatifs de la Conférence des Nations Unies sur l'environnement et le développement. Rapport de la Commission économique pour l'Europe sur la Conférence de Bergen, annexe I, *Déclaration ministérielle de Bergen sur le développement durable*, A/CONF.151/PC/10, 6 août 1990, par. 7.
- Rogers, Ian MacFee. *The Law of Canadian Municipal Corporations*, Cum. Supp. to vol. 1, 2nd ed. Toronto : Carswell, 1971 (loose-leaf updated 2001, release 1).
- Swaigen, John. « The Hudson Case: Municipal Powers to Regulate Pesticides Confirmed by Quebec Courts » (2000), 34 C.E.L.R. (N.S.) 162.

APPEAL from a judgment of the Quebec Court of Appeal, [1998] Q.J. No. 2546 (QL), J.E. 98-1855, affirming a decision of the Superior Court (1993), 19 M.P.L.R. (2d) 224, dismissing the appellants' motion for declaratory judgment. Appeal dismissed.

Gérard Dugré and *Denis Manzo*, for the appellants.

Stéphane Brière and *Pierre Lepage*, for the respondent.

Stewart A. G. Elgie and *Jerry V. DeMarco*, for the interveners Federation of Canadian Municipalities, Nature-Action Québec Inc. and World Wildlife Fund Canada.

Written submissions only by *Theresa A. McClenaghan* and *Paul Muldoon*, for the interveners Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, Parents' Environmental Network, Healthy Lawns – Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond.

Jean Piette, for the intervenor Fédération interdisciplinaire de l'horticulture ornementale du Québec.

The judgment of *L'Heureux-Dubé*, Gonthier, Bastarache and Arbour JJ. was delivered by

¹ L'HEUREUX-DUBÉ J. — The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. In the words of the Superior Court judge: "Twenty years ago, there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in, and what quality of life we wish to expose our children [to]" ((1993), 19 M.P.L.R. (2d) 224, at p. 230). This Court has recognized that

POURVOI contre un arrêt de la Cour d'appel du Québec, [1998] A.Q. no 2546 (QL), J.E. 98-1855, qui a confirmé un jugement de la Cour supérieure (1993), 19 M.P.L.R. (2d) 224, qui avait rejeté la requête en jugement déclaratoire des appétentes. Pourvoi rejeté.

Gérard Dugré et *Denis Manzo*, pour les appétentes.

Stéphane Brière et *Pierre Lepage*, pour l'intimité.

Stewart A. G. Elgie et *Jerry V. DeMarco*, pour les intervenants la Fédération canadienne des municipalités, Nature-Action Québec Inc. et le Fonds mondial pour la nature (Canada).

Argumentation écrite seulement par *Theresa A. McClenaghan* et *Paul Muldoon*, pour les intervenants Toronto Environmental Alliance, Sierra Club du Canada, l'Association canadienne du droit de l'environnement, Parents' Environmental Network, Healthy Lawns — Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee et Dr Merryl Hammond.

Jean Piette, pour l'intervenante la Fédération interdisciplinaire de l'horticulture ornementale du Québec.

Version française du jugement des juges L'Heureux-Dubé, Gonthier, Bastarache et Arbour rendu par

LE JUGE L'HEUREUX-DUBÉ — Le contexte de ce pourvoi nous invite à constater que notre avenir à tous, celui de chaque collectivité canadienne, dépend d'un environnement sain. Comme l'a affirmé le juge de la Cour supérieure : [TRADUCTION] « Il y a vingt ans, on se préoccupait peu de l'effet des produits chimiques, tels les pesticides, sur la population. Aujourd'hui, nous sommes plus sensibles au genre d'environnement dans lequel nous désirons vivre et à la qualité de vie que nous voulons procurer à nos enfants » ((1993), 19

“[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment . . . environmental protection [has] emerged as a fundamental value in Canadian society”: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 55. See also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 16-17.

Regardless of whether pesticides are in fact an environmental threat, the Court is asked to decide the legal question of whether the Town of Hudson, Quebec, acted within its authority in enacting a by-law regulating and restricting pesticide use.

The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. La Forest J. wrote for the majority in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 127, that “the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels” (emphasis added). His reasons in that case also quoted with approval a passage from *Our Common Future*, the report produced in 1987 by the United Nations’ World Commission on the Environment and Development. The so-called “Brundtland Commission” recommended that “local governments [should be] empowered to exceed, but not to lower, national norms” (p. 220).

There are now at least 37 Quebec municipalities with by-laws restricting pesticides: J. Swaigen, “The Hudson Case: Municipal Powers to Regulate

M.P.L.R. (2d) 224, p. 230). Notre Cour a reconnu que « [n]ous savons tous que, individuellement et collectivement, nous sommes responsables de la préservation de l’environnement naturel [...] la protection de l’environnement est [...] devenue une valeur fondamentale au sein de la société canadienne » : *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031, par. 55. Voir également *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, p. 16-17.

Peu importe que les pesticides constituent ou non en fait une menace pour l’environnement, la Cour est appelée à trancher la question de droit consistant à savoir si la ville de Hudson (Québec) a agi dans le cadre de ses pouvoirs en adoptant un règlement régissant et restreignant l’utilisation de pesticides.

Cette instance surgit à une époque où les questions de gestion des affaires publiques sont souvent examinées selon le principe de la subsidiarité. Ce principe veut que le niveau de gouvernement le mieux placé pour adopter et mettre en œuvre des législations soit celui qui est le plus apte à le faire, non seulement sur le plan de l’efficacité mais également parce qu’il est le plus proche des citoyens touchés et, par conséquent, le plus sensible à leurs besoins, aux particularités locales et à la diversité de la population. S’exprimant au nom de la majorité dans *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213, par. 127, le juge La Forest écrit que « la protection de l’environnement est un défi majeur de notre époque. C’est un problème international qui exige une action des gouvernements de tous les niveaux » (je souligne). Dans ses motifs, il cite avec approbation un extrait de *Notre avenir à tous*, rapport publié en 1988 par la Commission mondiale sur l’environnement et le développement (« Commission Brundtland »), créée par les Nations Unies. Cette commission a recommandé que « les autorités locales [soient] habilitées à renforcer, mais non pas à libéraliser, les normes nationales » (p. 262).

Il existe aujourd’hui au Québec au moins 37 municipalités où l’utilisation des pesticides est restreinte par règlement : J. Swaigen, « The Hudson

Pesticides Confirmed by Quebec Courts" (2000), 34 C.E.L.R. (N.S.) 162, at p. 174. Nevertheless, each level of government must be respectful of the division of powers that is the hallmark of our federal system; there is a fine line between laws that legitimately complement each other and those that invade another government's protected legislative sphere. Ours is a legal inquiry informed by the environmental policy context, not the reverse.

I. Facts

5 The appellants are landscaping and lawn care companies operating mostly in the region of greater Montreal, with both commercial and residential clients. They make regular use of pesticides approved by the federal *Pest Control Products Act*, R.S.C. 1985, c. P-9, in the course of their business activities and hold the requisite licences under Quebec's *Pesticides Act*, R.S.Q., c. P-9.3.

6 The respondent, the Town of Hudson ("the Town"), is a municipal corporation governed by the *Cities and Towns Act*, R.S.Q., c. C-19 ("C.T.A."). It is located about 40 kilometres west of Montreal and has a population of approximately 5,400 people, some of whom are clients of the appellants. In 1991, the Town adopted By-law 270, restricting the use of pesticides within its perimeter to specified locations and for enumerated activities. The by-law responded to residents' concerns, repeatedly expressed since 1985. The residents submitted numerous letters and comments to the Town's Council. The definition of pesticides in By-law 270 replicates that of the *Pesticides Act*.

7 In November 1992, the appellants were served with a summons by the Town to appear before the Municipal Court and respond to charges of having used pesticides in violation of By-law 270. The appellants pled not guilty and obtained a suspen-

Case: Municipal Powers to Regulate Pesticides Confirmed by Quebec Courts » (2000), 34 C.E.L.R. (N.S.) 162, p. 174. Chaque niveau de gouvernement doit, toutefois, respecter le partage des compétences, qui est la caractéristique de notre système fédéral; il existe une distinction subtile entre les lois qui se complètent légitimement les unes les autres et celles qui empiètent sur le domaine de compétence législative protégé de l'autre ordre de gouvernement. Notre examen en est donc un d'ordre juridique dans le contexte des politiques environnementales et non l'inverse.

I. Les faits

Les appelantes sont des entreprises d'aménagement paysager et d'entretien des pelouses qui exercent leurs activités surtout dans la région métropolitaine de Montréal et qui ont aussi bien des clients commerciaux que des clients résidentiels. Elles utilisent régulièrement, dans le cadre de leurs activités commerciales, des pesticides conformes à la *Loi sur les produits antiparasitaires* du gouvernement fédéral, L.R.C. 1985, ch. P-9, et détiennent les permis requis par la *Loi sur les pesticides* du Québec, L.R.Q., ch. P-9.3.

L'intimée, la ville de Hudson (la « Ville »), est une municipalité régie par la *Loi sur les cités et villes*, L.R.Q., ch. C-19 (« L.C.V. »). Elle est située à environ 40 kilomètres à l'ouest de Montréal et compte approximativement 5 400 habitants, dont certains sont des clients des appelantes. En 1991, la Ville adopte le règlement 270, qui limite l'utilisation des pesticides sur son territoire à des endroits précis et aux activités énumérées. Ce règlement fait suite aux craintes exprimées à maintes reprises depuis 1985 par les résidants, qui ont présenté de nombreuses lettres et observations au conseil municipal. La définition de pesticides contenue dans le règlement 270 est la réplique exacte de celle adoptée dans la *Loi sur les pesticides*.

En novembre 1992, les appelantes ont reçu signification, de la part de la Ville, de sommations leur enjoignant de comparaître devant la Cour municipale pour répondre à des accusations d'avoir utilisé des pesticides contrairement au

sion of proceedings in order to bring a motion for declaratory judgment before the Superior Court (under art. 453 of Quebec's *Code of Civil Procedure*, R.S.Q., c. C-25). They asked that the court declare By-law 270 (as well as By-law 248, which is not part of this appeal) to be inoperative and *ultra vires* the Town's authority.

The Superior Court denied the motion for declaratory judgment, finding that the by-laws fell within the scope of the Town's powers under the *C.T.A.* This ruling was affirmed by a unanimous Quebec Court of Appeal.

II. Relevant Statutory Provisions

Town of Hudson By-law 270

1. The following words and expressions, whenever the same occur in this By-Law, shall have the following meaning:
 - a) "PESTICIDES": means any substance, matter or micro-organism intended to control, destroy, reduce, attract or repel, directly or indirectly, an organism which is noxious, harmful or annoying for a human being, fauna, vegetation, crops or other goods or intended to regulate the growth of vegetation, excluding medicine or vaccine;
 - b) "FARMER": means a farm producer within the meaning of the Farm Producers Act (R.S.Q., chap., P-28);
2. The spreading and use of a pesticide is prohibited throughout the territory of the Town.
3. Notwithstanding article 2, it is permitted to use a pesticide in the following cases:
 - a) in a public or private swimming-pool;
 - b) to purify water intended for the use of human beings or animals;
 - c) inside of a building;
 - d) to control or destroy animals which constitute a danger for human beings;
 - e) to control or destroy plants which constitute a danger for human beings who are allergic thereto.

règlement 270. Les appelantes ont plaidé non coupable et ont obtenu la suspension des procédures afin d'introduire une requête en jugement déclaratoire devant la Cour supérieure (en vertu de l'art. 453 du *Code de procédure civile* du Québec, L.R.Q., ch. C-25). Elles ont demandé à la cour de déclarer inopérant le règlement 270 (et le règlement 248, qui ne fait pas l'objet du pourvoi) et *ultra vires* le pouvoir de la Ville.

La Cour supérieure a rejeté la requête en jugement déclaratoire, concluant que les règlements relevaient des pouvoirs conférés à la Ville par la *L.C.V.* Cette décision a été confirmée à l'unanimité par la Cour d'appel du Québec.

II. Les dispositions législatives pertinentes

Règlement 270 de la ville de Hudson

1. Dans ce règlement, les mots et expressions suivants ont le sens et l'application que leur attribue le présent article :
 - a) « PESTICIDE » : toute substance, matière ou micro-organisme destiné à contrôler, détruire, amoindrir, attirer ou repousser, directement ou indirectement, un organisme nuisible, nocif ou gênant pour l'être humain, la faune, la végétation, les récoltes ou les autres biens, ou destiné à servir de régulateur de croissance de la végétation, à l'exclusion d'un médicament ou d'un vaccin.
 - b) « FERMIER » : un producteur agricole au sens de la Loi sur les producteurs agricoles (L.R.Q., chap. P-28);
2. L'épandage et l'utilisation de tout pesticide est interdit partout sur le territoire de la Ville.
3. Nonobstant l'article 2, l'utilisation d'un pesticide est permis dans les cas suivants :
 - a) dans une piscine publique ou privée;
 - b) pour purifier l'eau destinée à la consommation des humains ou des animaux;
 - c) à l'intérieur d'un bâtiment;
 - d) pour contrôler ou enrayer la présence d'animaux qui constituent un danger pour les humains;
 - e) pour contrôler ou enrayer les plantes qui constituent un danger pour les humains qui y sont allergiques.

4. Notwithstanding article 2, a farmer using a pesticide on an immoveable which is exploited for purposes of agriculture or horticulture, in a hot house or in the open, is requested to
- register, by written declaration, with the Town, in the month of march of each year, the products which he stores and which he will be using during that year.
 - also provide, in the written declaration at article 4 a), the schedule of application of said products and the area(s) of his property where the products will be applied.
5. Notwithstanding article 2, it is permitted to use a pesticide on a golf course, for a period not exceeding five (5) years from the date this by-law comes into force:
6. Notwithstanding article 2, it is permitted to use a biological pesticide to control or destroy insects which constitute a danger or an inconvenience for human beings.
10. For the purpose of article 8 of the Agricultural Abuses Act (R.S.Q. chap. A-2) an inspector designated by the Town may use a pesticide, notwithstanding article 2 of the By-Law, if there is no other efficient way of destroying noxious plants determined as such by the Provincial Government and the presence of which is harmful to a real and continuous agricultural exploitation.

Cities and Towns Act, R.S.Q., c. C-19

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;

In no case may the council make by-laws on the matters contemplated in the Agricultural Products, Marine Products and Food Act (chapter P-29) or in the Dairy Products and Dairy Products Substitutes Act (chapter P-30). This paragraph applies notwithstanding any provision of a special Act granting powers on those matters

4. Nonobstant l'article 2, un fermier utilisant un pesticide sur une propriété qui est exploitée à des fins agricoles ou horticoles, dans une serre ou à l'extérieur, doit :
- enregistrer, par déclaration écrite à la Ville, au cours du mois de mars de chaque année, les produits qu'il entrepose et dont il entrevoit faire usage durant l'année;
 - de plus fournir, dans la déclaration écrite à l'article 4a), la cédule d'épandage desdits produits et les secteurs de sa propriété où les produits seront appliqués.
5. Nonobstant l'article 2, il est permis d'utiliser un pesticide sur un terrain de golf, pour une période n'excédant pas cinq (5) ans, à partir de la date d'entrée en vigueur de ce règlement :
6. Nonobstant l'article 2, il est permis d'utiliser un pesticide biologique pour contrôler ou enrayer les insectes qui constituent un danger ou qui incommodent les humains;
10. Selon l'article 8 [de] la Loi sur les abus agricoles (L.R.Q. chap. A-2), un inspecteur désigné par la Ville peut utiliser un pesticide en dépit de l'article 2 du règlement, s'il n'existe aucune autre façon efficace d'enrayer les plantes nocives déterminées comme telles par le gouvernement provincial et la présence desquelles est nuisible à une exploitation agricole véritable et continue.

Loi sur les cités et villes, L.R.Q., ch. C-19

410. Le conseil peut faire des règlements :

1º Pour assurer la paix, l'ordre, le bon gouvernement, la salubrité et le bien-être général sur le territoire de la municipalité, pourvu que ces règlements ne soient pas contraires aux lois du Canada ou du Québec, ni incompatibles avec quelque disposition spéciale de la présente loi ou de la charte;

Le conseil ne peut faire des règlements sur des matières visées par la Loi sur les produits agricoles, les produits marins et les aliments (chapitre P-29) et par la Loi sur les produits laitiers et leurs succédanés (chapitre P-30). Le présent alinéa s'applique malgré une disposition d'une loi spéciale accordant des pouvoirs sur ces

to any municipality other than Ville de Trois-Rivières and Ville de Sherbrooke.

412. The council may make by-laws:

(32) To regulate or prohibit the storage and use of gun-powder, dry pitch, resin, coal oil, benzine, naphtha, gasoline, turpentine, gun-cotton, nitro-glycerine, and other combustible, explosive, corrosive, toxic or radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within 1 km therefrom;

By-laws passed under the first paragraph in respect of corrosive, toxic or radioactive materials require the approval of the Minister of the Environment;

463.1 Subject to the Pesticides Act (chapter P-9.3) and the Environment Quality Act (chapter Q-2), the municipality may, with the consent of the owner of an immovable, carry out pesticide application works on the immovable.

Pesticides Act, R.S.Q., c. P-9.3

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

102. [As revised in 1993; not yet in force] The Pesticide Management Code and any other regulation enacted pursuant to this Act shall render inoperative any regulatory provision concerning the same matter enacted by a municipality or an urban community, except where the provision

- concerns landscaping or extermination activities, such as fumigation, as defined by government regulation, and

- prevents or further mitigates harmful effects on the health of humans or of other living species or damage to the environment or to property.

matières à une municipalité autre que la Ville de Trois-Rivières et la Ville de Sherbrooke.

412. Le conseil peut faire des règlements :

32^o Pour réglementer ou défendre l'emmagasinage et l'usage de poudre, poix sèche, résine, pétrole, benzine, naphte, gazoline, térébenthine, fulmicoton, nitroglycérine, ainsi que d'autres matières combustibles, explosives, corrosives, toxiques, radioactives ou autrement dangereuses pour la santé ou la sécurité publiques, sur le territoire de la municipalité ou dans un rayon de 1 km à l'extérieur de ce territoire;

Un règlement adopté en vertu du premier alinéa à l'égard de matières corrosives, toxiques ou radioactives requiert l'approbation du ministre de l'Environnement;

463.1 Sous réserve de la Loi sur les pesticides (chapitre P-9.3) et de la Loi sur la qualité de l'environnement (chapitre Q-2), la municipalité peut, avec le consentement du propriétaire d'un immeuble, procéder à des travaux d'épandage de pesticides sur l'immeuble.

Loi sur les pesticides, L.R.Q., ch. P-9.3

102. Toute disposition du Code de gestion des pesticides et des autres règlements édictés en vertu de la présente loi prévaut sur toute disposition inconciliable d'un règlement édicté par une municipalité ou une communauté urbaine.

102. [Selon la modification de 1993; non en vigueur] Le Code de gestion des pesticides et tout autre règlement édictés en application de la présente loi rendent inopérante toute disposition réglementaire portant sur une même matière qui est édictée par une municipalité ou une communauté urbaine, sauf dans le cas où cette disposition réglementaire satisfait aux conditions suivantes :

- elle porte sur les activités d'entretien paysager ou d'extermination, notamment la fumigation, déterminées par règlement du gouvernement;

- elle prévient ou atténue davantage les atteintes à la santé des êtres humains ou des autres espèces vivantes, ainsi que les dommages à l'environnement ou aux biens.

105. [Not yet in force] The Government shall enact by regulation a Pesticide Management Code which may prescribe rules, restrictions or prohibitions respecting activities related to the distribution, storage, transportation, sale or use of any pesticide, pesticide container or any equipment used for any of those activities.

105.1. [Not yet in force] The Pesticide Management Code may require a person who stores pesticides of a determined category or in a determined quantity to subscribe civil liability insurance, the kind, extent, duration, amount and other applicable conditions of which are determined in the said Code, and to furnish proof thereof to the Minister.

106. [Not yet in force] The Pesticide Management Code may cause any rule elaborated by another government or by a body to be mandatory.

In addition, the code may cause any instructions of the manufacturer of a pesticide or of equipment used for any activity referred to in the code to be mandatory.

107. [Not yet in force] The Government may prescribe that the contravention of the provisions of this code which it determines constitutes an offence.

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

4. (1) No person shall manufacture, store, display, distribute or use any control product under unsafe conditions.

(3) A control product that is not manufactured, stored, displayed, distributed or used as prescribed or that is manufactured, stored, displayed, distributed or used contrary to the regulations shall be deemed to be manufactured, stored, displayed, distributed or used contrary to subsection (1).

6. (1) The Governor in Council may make regulations

(j) respecting the manufacture, storage, distribution, display and use of any control product;

105. [Non en vigueur] Le gouvernement édicte, par règlement, un Code de gestion des pesticides. Ce code peut édicter des règles, restrictions ou prohibitions portant sur les activités relatives à la distribution, à la vente, à l'entreposage, au transport ou à l'utilisation de tout pesticide, de tout contenant d'un pesticide ou de tout équipement servant à l'une de ces activités.

105.1. [Non en vigueur] Le Code de gestion des pesticides peut exiger d'une personne qui entrepose des pesticides d'une catégorie ou en quantité déterminée qu'elle contracte une assurance de responsabilité civile, dont il détermine la nature, l'étendue, la durée, le montant ainsi que les autres conditions applicables, et en fournissoit l'attestation au ministre.

106. [Non en vigueur] Le Code de gestion des pesticides peut rendre obligatoire une règle élaborée par un autre gouvernement ou par un organisme.

Il peut, en outre, rendre obligatoires les instructions du fabricant d'un pesticide ou d'un équipement servant à l'une des activités visées par le code.

107. [Non en vigueur] Le gouvernement peut, dans ce code, déterminer les dispositions dont la contravention constitue une infraction.

Loi sur les produits antiparasitaires, L.R.C. 1985, ch. P-9

4. (1) Il est interdit de fabriquer, stocker, présenter, distribuer ou utiliser un produit antiparasitaire dans des conditions dangereuses.

(3) La fabrication, le stockage, la présentation, la distribution ou l'utilisation d'un produit antiparasitaire, réalisés de façon contraire ou non conforme aux règlements, sont réputés contrevenir au paragraphe (1).

6. (1) Le gouverneur en conseil peut, par règlement :

j) régir la fabrication, le stockage, la présentation, la distribution et l'utilisation de produits antiparasitaires;

Pest Control Products Regulations, C.R.C. 1978, c. 1253

45. (1) No person shall use a control product in a manner that is inconsistent with the directions or limitations respecting its use shown on the label.

(2) No person shall use a control product imported for the importer's own use in a manner that is inconsistent with the conditions set forth on the importer's declaration respecting the control product.

(3) No person shall use a control product that is exempt from registration under paragraph 5(a) for any purpose other than the manufacture of a registered control product.

III. Judgments

A. *Superior Court* (1993), 19 M.P.L.R. (2d) 224

Kennedy J. held that by-laws are presumed valid and legal. He found that By-laws 248 and 270 were adopted under s. 410 *C.T.A.* and, thus, did not require ministerial approval to enter into effect. Both by-laws deal with pesticides and not toxic substances and since "pesticides" are not included in s. 412(32), ministerial approval is not required. According to Kennedy J., the Town, faced with a situation involving health and the environment, acted in the public interest by enacting the by-laws in question. Consequently, the Town could rely on s. 410(1) *C.T.A.* as the legislative provision that enabled it to adopt these by-laws.

Kennedy J. then considered the provisions of the *Pesticides Act* to determine whether the by-laws conflicted with provincial legislation. He found it clear that the *Pesticides Act* was enacted with the intention to allow municipalities to adopt by-laws of this nature. In this regard, Kennedy J. cited ss. 102 and 105 to 107 of the *Pesticides Act*, which envision the creation of a Pesticide Management Code allowing the provincial government to restrict or prohibit pesticides. Section 102 of that Act states that the provisions of the Code are to take precedence over inconsistent by-laws. Yet, given that the Code had yet to come into force, nothing prohibited municipalities from regulating

Règlement sur les produits antiparasitaires, C.R.C. 1978, ch. 1253

45. (1) Il est interdit d'utiliser un produit antiparasitaire d'une manière qui ne correspond pas au mode d'emploi, ni aux limitations figurant sur le label.

(2) Il est interdit d'utiliser un produit antiparasitaire importé par un utilisateur pour son propre usage d'une manière qui ne correspond pas aux conditions énoncées sur la déclaration de l'importateur visant ledit produit.

(3) Il est interdit d'utiliser un produit antiparasitaire exempté de l'enregistrement en vertu de l'alinéa 5a) pour une autre fin que la fabrication d'un produit antiparasitaire enregistré.

III. Les jugements

A. *Cour supérieure* (1993), 19 M.P.L.R. (2d) 224

Le juge Kennedy conclut que les règlements sont présumés valides et légaux. À son avis, les règlements 248 et 270 ont été adoptés en vertu de l'art. 410 *L.C.V.*, de sorte que leur entrée en vigueur ne nécessite pas l'approbation du ministre. Ils portent tous deux sur les pesticides et non pas sur les substances toxiques; vu que les « pesticides » ne sont pas visés par le par. 412(32), l'approbation du ministre n'est pas requise. Selon le juge Kennedy, la Ville, face à une situation où la santé et l'environnement sont en jeu, a agi dans l'intérêt public en adoptant les règlements en question. Elle pouvait donc se fonder sur le par. 410(1) *L.C.V.* en tant que disposition législative l'habilitant à adopter ces règlements.

Le juge Kennedy examine ensuite les dispositions de la *Loi sur les pesticides* pour déterminer si les règlements vont à l'encontre de cette loi provinciale. À son avis, l'adoption de la *Loi sur les pesticides* vise clairement à permettre aux municipalités d'adopter des règlements de cette nature. À cet égard, le juge Kennedy cite les art. 102 et 105 à 107 de la *Loi sur les pesticides*, qui prévoient la création d'un Code de gestion des pesticides permettant au gouvernement provincial de restreindre ou d'interdire l'utilisation des pesticides. Selon l'article 102 de cette loi, les dispositions du Code prévalent sur tout règlement inconciliable. Toutefois, étant donné que le Code n'était pas encore en

10

11

pesticide use in the interim. Kennedy J. thus concluded that there was no conflict between the by-laws and provincial or federal legislation.

B. *Court of Appeal*, [1998] Q.J. No. 2546 (QL)

12 Before the Court of Appeal, the Town conceded that By-law 248 was inoperative. Thus, only By-law 270 was at issue. The appellants challenged Kennedy J.'s ruling on two grounds. First, they argued that By-law 270 was inoperative given that it was incompatible with the *Pesticides Act*. Second, the appellants contended that since the regulation of toxic substances was covered by s. 412(32) *C.T.A.*, Kennedy J. erred in finding that the by-law was enacted under s. 410(1) *C.T.A.* While the latter provision allows a municipality to enact by-laws considered necessary for public health and welfare, s. 412(32) *C.T.A.* is concerned with "toxic" materials, and states that by-laws addressing this subject matter require approval from the Minister of the Environment. Given that the Town did not obtain such approval when it enacted By-law 270, the appellants argued that the by-law was invalid.

13 The Court of Appeal, *per Delisle J.A.*, accepted the Town's position that By-law 270 was enacted under s. 410(1) *C.T.A.* In reaching this conclusion, the court noted that By-law 270 repeated the definition of "pesticide" that is found in the *Pesticides Act*. This definition makes no reference to terms used in s. 412(32) or to toxicity. Moreover, the *C.T.A.* itself does not discuss whether pesticides are "toxic . . . materials", nor does it require ministerial approval for regulations relating to pesticides. No evidence was submitted concerning the toxic character of pesticides. The Court of Appeal also held that By-law 270 furthered the objectives set out in s. 410(1) *C.T.A.* It reiterated the statements of Kennedy J. that by-laws are presumed to be valid and legal and that there is a presumption that legislators act in good faith and in the public interest. It found that s. 410(1) is a very general

vigueur, rien n'empêchait les municipalités de réglementer entre-temps l'utilisation des pesticides. Le juge Kennedy conclut donc qu'il n'y a aucun conflit entre les règlements et la législation provinciale ou fédérale.

B. *Cour d'appel*, [1998] A.Q. no 2546 (QL)

Devant la Cour d'appel, la Ville admet que le règlement 248 est inopérant. En conséquence, seul le règlement 270 est ici en cause. Les appelantes contestent la décision du juge Kennedy pour deux motifs. Premièrement, elles font valoir que le règlement 270 est inopérant du fait de son incompatibilité avec la *Loi sur les pesticides*. Deuxièmement, elles soutiennent que, la réglementation des substances toxiques étant visée par le par. 412(32) *L.C.V.*, le juge Kennedy a commis une erreur en concluant que le règlement avait été adopté en vertu du par. 410(1) *L.C.V.* Même si cette dernière disposition autorise une municipalité à adopter les règlements jugés nécessaires pour la santé et le bien-être publics, le par. 412(32) *L.C.V.*, qui porte sur les matières « toxiques », prévoit que les règlements en cette matière doivent être approuvés par le ministre de l'Environnement. Les appelantes soutiennent que, la Ville n'ayant pas obtenu l'approbation requise lorsque le règlement 270 fut adopté, celui-ci est en conséquence invalide.

Le juge Delisle, au nom de la Cour d'appel, accepte la position de la Ville selon laquelle le règlement 270 a été adopté en vertu du par. 410(1) *L.C.V.* En tirant cette conclusion, la cour souligne que le règlement 270 reprend la définition de « pesticide » dans la *Loi sur les pesticides*. Cette définition ne réfère aucunement aux termes utilisés au par. 412(32) ni à la toxicité. De plus, la *L.C.V.* elle-même ne précise pas si les pesticides sont des « matières [...] toxiques » et elle n'exige pas non plus l'approbation du ministre pour les règlements visant les pesticides. Aucun élément de preuve n'a été présenté au sujet de la toxicité des pesticides. La Cour d'appel conclut aussi que le règlement 270 facilite la réalisation des objectifs énoncés au par. 410(1) *L.C.V.* La cour réitère les déclarations du juge Kennedy voulant que les règlements sont présumés valides et légaux et qu'il existe une pré-

enabling clause and must receive a liberal interpretation.

The court agreed with Kennedy J.'s finding that the by-law was enacted by the Town in the public interest and in response to health concerns expressed by residents. The court noted that these concerns were recorded in the Town Council's meeting minutes and manifested themselves in letters to Council, as well as a petition with more than 300 signatures. Moreover, the Court of Appeal recognized that s. 410 *C.T.A.* describes when a municipality may not act under its general governance powers. By-laws on subjects contemplated in the *Pesticides Act* were not included in this list of unauthorized areas of regulation. The appellants argued that s. 410(1) does not permit the Town to ban pesticides. The Court of Appeal held that an absolute ban would be forbidden, but that the by-law does not impose an absolute ban.

The Court of Appeal then examined whether By-law 270 was in conflict with the *Pesticides Act* and thus inoperative. It found that s. 102 of the *Pesticides Act* — which states that the Pesticide Management Code and all regulations of the *Pesticides Act* take precedence over any incompatible municipal by-law — contemplated municipal regulation of pesticide use. The court also commented that the revised version of s. 102, as well as ss. 105 to 107 regarding the Pesticide Management Code, had yet to be enacted. As a result, it held that, as opposed to a real conflict, a potential future incompatibility between the by-law and the Code did not suffice to render the by-law inoperative.

Finally, the Court of Appeal noted that, although not yet in force, the revised version of s. 102 of the *Pesticides Act* allows municipalities to adopt by-laws concerning pesticides, so long as these are not incompatible with the Pesticide Management Code. At the same time, even if such incompatibil-

somption que le législateur agit de bonne foi et dans l'intérêt public. Elle juge que le par. 410(1) est une clause habilitante très générale qui doit recevoir une interprétation libérale.

La Cour d'appel partage l'avis du juge Kennedy, selon lequel la Ville a adopté le règlement dans l'intérêt public en réponse aux craintes liées à la santé exprimées par les résidants. Elle souligne que ces craintes ont été consignées dans les procès-verbaux du conseil municipal et qu'elles se sont manifestées par des lettres au conseil de même que par une pétition portant plus de 300 signatures. De plus, la cour reconnaît que l'art. 410 *L.C.V.* précise les cas où une municipalité ne peut pas agir en vertu de son pouvoir général de gestion des affaires publiques. Les règlements portant sur des matières visées par la *Loi sur les pesticides* ne figurent pas parmi les domaines de réglementation interdits. Les appelantes soutiennent que le par. 410(1) n'autorise pas la Ville à interdire les pesticides. La Cour d'appel conclut qu'une interdiction absolue serait interdite, mais que le règlement en question n'impose pas une telle interdiction.

La Cour d'appel examine ensuite la question de savoir si le règlement 270 entre en conflit avec la *Loi sur les pesticides* et s'il est en conséquence inopérant. Selon la cour, l'art. 102 de la *Loi sur les pesticides* — qui prévoit que le Code de gestion des pesticides et les règlements d'application de la *Loi sur les pesticides* prévalent sur tout règlement municipal incompatible — vise la réglementation par les municipalités de l'utilisation des pesticides. La cour fait aussi remarquer que la version modifiée de l'art. 102, de même que les art. 105 à 107 relatifs au Code de gestion des pesticides, n'étaient pas encore en vigueur. Elle conclut donc que, contrairement à un conflit réel, une éventuelle incompatibilité entre le règlement et le Code ne suffit pas pour rendre le règlement inopérant.

Enfin, la Cour d'appel souligne que, même si la nouvelle version de l'art. 102 de la *Loi sur les pesticides* n'était pas encore en vigueur, elle permettait aux municipalités d'adopter des règlements sur les pesticides dans la mesure où ils ne sont pas incompatibles avec le Code de gestion des pesti-

ity arises, the by-laws can continue to be operative if they relate to landscaping activities, or if they aim to prevent or reduce injury or damage to people, animals, the environment or property. As such, this new regime would enable municipalities to enact by-laws that are more restrictive than the provisions set out in the provincial Pesticide Management Code. Based on these reasons, the Court of Appeal dismissed the appeal, holding that By-law 270 was validly enacted and operative.

IV. Issues

17

There are two issues raised by this appeal:

- (1) Did the Town have the statutory authority to enact By-law 270?
- (2) Even if the Town had authority to enact it, was By-law 270 rendered inoperative because of a conflict with federal or provincial legislation?

V. Analysis

A. Did the Town Have the Statutory Authority to Enact By-law 270?

18

In *R. v. Sharma*, [1993] 1 S.C.R. 650, at p. 668, this Court recognized “the principle that, as statutory bodies, municipalities ‘may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation’ (*Makuch, Canadian Municipal and Planning Law* (1983), at p. 115)”. Included in this authority are “general welfare” powers, conferred by provisions in provincial enabling legislation, on which municipalities can draw. As I. M. Rogers points out, “the legislature cannot possibly foresee all the powers that are necessary to the statutory equipment of its creatures. . . . Undoubtedly the inclusion of ‘general welfare’ provisions was intended to circumvent, to some extent, the effect of the doctrine of *ultra vires* which puts the municipalities in the position of having to point to an express

cides. Par ailleurs, même en cas d’incompatibilité, les règlements continuent de s’appliquer s’ils ont trait à l’aménagement paysager ou s’ils visent à prévenir ou à réduire les blessures causées aux personnes ou aux animaux ou les dommages causés à l’environnement ou à la propriété. Ainsi, ce nouveau régime permettrait aux municipalités d’adopter des règlements plus restrictifs que le Code de gestion des pesticides de la province. Pour ces motifs, la Cour d’appel rejette le pourvoi, concluant que le règlement 270 a été valablement adopté et qu’il s’applique.

IV. Les questions en litige

Le pourvoi soulève deux questions :

- 1) La Ville avait-elle le pouvoir légal d’adopter le règlement 270?
- 2) Dans l’hypothèse où la Ville avait le pouvoir de l’adopter, le règlement 270 a-t-il été rendu inopérant du fait de son incompatibilité avec la législation fédérale ou provinciale?

V. Analyse

A. La Ville avait-elle le pouvoir légal d’adopter le règlement 270?

Dans l’arrêt *R. c. Sharma*, [1993] 1 R.C.S. 650, p. 668, notre Cour reconnaît que le « principe selon lequel, en tant qu’organismes créés par la loi, les municipalités [TRADUCTION] “peuvent exercer seulement les pouvoirs qui leur sont conférés expressément par la loi, les pouvoirs qui découlent nécessairement ou vraiment du pouvoir explicite conféré dans la loi, et les pouvoirs indispensables qui sont essentiels et non pas seulement commodes pour réaliser les fins de l’organisme” (*Makuch, Canadian Municipal and Planning Law* (1983), à la p. 115) ». Y sont inclus les pouvoirs en matière de « bien-être général » conférés par la loi provinciale habilitante, sur laquelle les municipalités peuvent se fonder. Comme le souligne I. M. Rogers, [TRADUCTION] « la législature ne peut pas prévoir tous les pouvoirs de réglementation nécessaires à ses créatures [...] Sans doute, l’inclusion de dispositions en matière de “bien-être général” visait à contourner dans une certaine mesure l’effet de la

grant of authority to justify each corporate act" (*The Law of Canadian Municipal Corporations* (2nd ed. (loose-leaf)), Cum. Supp. to vol. 1, at p. 367).

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.

While enabling provisions that allow municipalities to regulate for the "general welfare" within their territory authorize the enactment of by-laws genuinely aimed at furthering goals such as public health and safety, it is important to keep in mind that such open-ended provisions do not confer an unlimited power. Rather, courts faced with an impugned by-law enacted under an "omnibus" provision such as s. 410 *C.T.A.* must be vigilant in scrutinizing the true purpose of the by-law. In this way, a municipality will not be permitted to invoke the implicit power granted under a "general welfare" provision as a basis for enacting by-laws that are in fact related to ulterior objectives, whether mischievous or not. As a Justice of the Ontario Divisional Court, Cory J. commented instructively on this subject in *Re Weir and The*

théorie de l'excès de pouvoir qui oblige les municipalités à invoquer une attribution expresse de pouvoir pour justifier chaque acte qu'elles accomplissent » (*The Law of Canadian Municipal Corporations* (2^e éd. (feuilles mobiles)), suppl. cum. du vol. 1, p. 367).

L'article 410 *L.C.V.* constitue un exemple d'une telle disposition générale de bien-être et il ajoute aux pouvoirs spécifiques conférés par l'art. 412. Les dispositions moins limitatives ou « omnibus », tel l'art. 410, permettent aux municipalités de relever rapidement les nouveaux défis auxquels font face les collectivités locales sans qu'il soit nécessaire de modifier la loi provinciale habilitante. Les lois habilitantes des autres provinces et des territoires qui autorisent l'adoption de règlements municipaux contiennent des dispositions analogues: voir *Municipal Government Act*, S.A. 1994, ch. M-26.1, al. 3c) et art. 7; *Local Government Act*, R.S.B.C. 1996, ch. 323, art. 249; *Loi sur les municipalités*, L.M. 1996, ch. 58, C.P.L.M., ch. M225, art. 232-233; *Loi sur les municipalités*, L.R.N.-B. 1973, ch. M-22, par. 190(2), annexe I; *Municipal Government Act*, S.N.S. 1998, ch. 18, art. 172; *Loi sur les cités, villes et villages*, L.R.T.N.-O. 1988, ch. C-8, art. 54 et 102; *Loi sur les municipalités*, L.R.O. 1990, ch. M.45, art. 102; *Loi municipale*, L.R.Y. 1986, ch. 119, art. 271.

Bien que les dispositions habilitantes permettant aux municipalités de réglementer pour le « bien-être général » sur leur territoire autorisent l'adoption de règlements visant véritablement à faciliter la réalisation d'objectifs telles la santé et la sécurité publiques, il importe de garder à l'esprit le fait que ces dispositions non limitatives ne confèrent pas un pouvoir illimité. Les tribunaux saisis d'un règlement contesté adopté en vertu d'une disposition « omnibus » comme l'art. 410 *L.C.V.* doivent plutôt être vigilants lorsqu'ils cherchent à déterminer le but véritable du règlement. Ainsi, une municipalité ne pourra pas invoquer le pouvoir implicite conféré par une disposition de « bien-être général » pour adopter des règlements qui sont en fait liés à des objectifs inavoués, que ceux-ci soient ou non malicieux. Lorsqu'il était juge à la Cour division-

Queen (1979), 26 O.R. (2d) 326 (Div. Ct.), at p. 334. Although he found that the City of Toronto's power to regulate matters pertaining to health, safety and general welfare (conferred by the *Municipal Act*, R.S.O. 1970, c. 284, s. 242) empowered it to pass a by-law regulating smoking in public retail shops, Cory J. also made the following remark about the enabling provision: "There is no doubt that a by-law passed pursuant to the provisions of s. 242 must be approached with caution. If such were not the case, the municipality could be deemed to be empowered to legislate in a most sweeping manner."

naire de l'Ontario, le juge Cory a fait des commentaires instructifs sur ce sujet dans l'affaire *Re Weir and The Queen* (1979), 26 O.R. (2d) 326 (C. div.), p. 334. Même s'il a conclu que le pouvoir de réglementation de la ville de Toronto en matière de santé, de sécurité et de bien-être général (conféré par la *Municipal Act*, R.S.O. 1970, ch. 284, art. 242) lui permettait d'adopter un règlement sur l'usage du tabac dans les commerces de détail, le juge Cory a aussi fait la remarque suivante au sujet de la disposition habilitante : [TRADUCTION] « Il ne fait aucun doute qu'un règlement adopté en vertu de l'art. 242 doit être examiné avec prudence. Sinon, la municipalité pourrait être réputée avoir un pouvoir de réglementation extrêmement étendu. »

21

Within this framework, I turn now to the specifics of the appeal. As a preliminary matter, I agree with the courts below that By-law 270 was not enacted under s. 412(32) *C.T.A.* This provision authorizes councils to "make by-laws: To regulate or prohibit the storage and use of gun-powder, dry pitch, resin, coal oil, benzine, naphtha, gasoline, turpentine, gun-cotton, nitro-glycerine, and other combustible, explosive, corrosive, toxic or radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within 1 km therefrom" (emphasis added). In replicating the definition of "pesticides" found in the provincial *Pesticides Act*, By-law 270 avoids falling under the ambit of s. 412(32). There is no equation of pesticides and "toxic . . . materials" either in the terms of the by-law or in any evidence presented during this litigation. The provincial government did not consider By-law 270 to fall under s. 412(32): see letter of July 5, 1991 from the Deputy Minister of the Environment. As Y. Duplessis and J. Hétu state in *Les pouvoirs des municipalités en matière de protection de l'environnement* (2nd ed. 1994), at p. 110,

C'est sur cette toile de fond que j'aborde maintenant les questions spécifiques soulevées par ce pourvoi. Tout d'abord, je suis d'accord avec les cours d'instance inférieure que le règlement 270 n'a pas été adopté en vertu du par. 412(32) *L.C.V.* Cette disposition autorise les conseils à « faire des règlements: Pour réglementer ou défendre l'emmagasinage et l'usage de poudre, poix sèche, résine, pétrole, benzine, naphte, gazoline, térébenthine, fulmicoton, nitroglycérine, ainsi que d'autres matières combustibles, explosives, corrosives, toxiques, radioactives ou autrement dangereuses pour la santé ou la sécurité publiques, sur le territoire de la municipalité ou dans un rayon de 1 km à l'extérieur de ce territoire » (je souligne). Reprenant la définition de « pesticide » dans la *Loi sur les pesticides* de la province, le règlement 270 évite de tomber sous l'égide du par. 412(32). Le texte du règlement et la preuve présentée au cours du présent litige n'assimilent pas les pesticides aux « matières [...] toxiques ». Selon le gouvernement provincial, le règlement 270 ne relève pas du par. 412(32) : voir la lettre du 5 juillet 1991 du sous-ministre de l'Environnement. Comme le disent Y. Duplessis et J. Hétu dans *Les pouvoirs des municipalités en matière de protection de l'environnement* (2^e éd. 1994), p. 110 :

[TRANSLATION] . . . these subsections concerning "corrosive, toxic or radioactive materials" in no way limit the other more general powers granted to municipalities that

... ces paragraphes relatifs aux « matières corrosives, toxiques, radioactives » ne viennent aucunement limiter les autres pouvoirs plus généraux confiés aux munici-

could justify municipal intervention in relation to pesticides.

As a result, since there is no specific provision in the provincial enabling legislation referring to pesticides, the by-law must fall within the purview of s. 410(1) *C.T.A.* The party challenging a by-law's validity bears the burden of proving that it is *ultra vires*: see *Kuchma v. Rural Municipality of Tache*, [1945] S.C.R. 234, at p. 239, and *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368, at p. 395.

The conclusion that By-law 270 does not fall within the purview of s. 412(32) *C.T.A.* distinguishes this appeal from *R. v. Greenbaum*, [1993] 1 S.C.R. 674. In that case, various express provisions of the provincial enabling legislation at issue covered the regulation of Toronto sidewalks. The appellant was therefore trying to expand the ambit of these specific authorizations by recourse to the "omnibus" provision in Ontario's *Municipal Act*. Moreover, that provision, s. 102, stated that "[e]very 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). The Court thus held in *Greenbaum*, at p. 693, that "[t]hese express powers are . . . taken out of any power included in the general grant of power". Since the *C.T.A.* contains no such specific provisions concerning pesticides (nor a clause limiting its purview to matters not specifically provided for in the Act) the "general welfare" provision of the *C.T.A.*, s. 410(1), is not limited in this fashion.

Section 410(1) *C.T.A.* provides that councils 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

paux [sic] et pouvant justifier une intervention municipale dans le domaine des pesticides.

Par conséquent, étant donné qu'aucune disposition particulière de la loi provinciale habilitante ne mentionne les pesticides, le règlement doit tomber dans le champ d'application du par. 410(1) *L.C.V.* Il incombe à la partie qui conteste la validité d'un règlement de prouver qu'il est *ultra vires*: voir *Kuchma c. Rural Municipality of Tache*, [1945] R.C.S. 234, p. 239, et *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368, p. 395.

La conclusion selon laquelle le règlement 270 n'est pas visé par le par. 412(32) *L.C.V.* établit une distinction entre le présent pourvoi et l'affaire *R. c. Greenbaum*, [1993] 1 R.C.S. 674. Dans cette affaire, différentes dispositions expresses de la loi provinciale habilitante en cause portaient sur la réglementation des trottoirs de Toronto. L'appelante tentait donc d'élargir la portée de ces autorisations spécifiques au moyen de la disposition « omnibus » de la *Loi sur les municipalités* de l'Ontario. De plus, cette disposition, soit l'art. 102, prévoit que « [l]e conseil peut adopter les règlements municipaux, ainsi que les règlements qui ne sont pas contraires à la loi, qui sont réputés pertinents, et qui portent sur la santé, la sécurité, la moralité et le bien-être des habitants de la municipalité, au sujet de questions qui ne sont pas expressément prévues par la présente loi . . . » (je souligne). Notre Cour a en conséquence conclu dans *Greenbaum*, p. 693, que [TRADUCTION] « [c]es pouvoirs explicites sont . . . soustraits de ceux qui sont compris dans le pouvoir général ». Étant donné que la *L.C.V.* ne contient aucune disposition particulière de ce genre au sujet des pesticides (et aucune disposition qui en limite la portée aux matières non expressément prévues par la loi), la disposition en matière de « bien-être général » de la *L.C.V.*, soit le par. 410(1), n'est pas ainsi limitée.

Le paragraphe 410(1) *L.C.V.* prévoit que les conseils peuvent faire des règlements :

1^o Pour assurer la paix, l'ordre, le bon gouvernement, la salubrité et le bien-être général sur le territoire de la municipalité, pourvu que ces règlements ne soient pas

Canada, or of Québec, nor inconsistent with any special provision of this Act or of the charter.

In *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 36, this Court quoted with approval the following statement by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 244:

Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the “benevolent construction” which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives. [Emphasis added.]

contraires aux lois du Canada ou du Québec, ni incompatibles avec quelque disposition spéciale de la présente loi ou de la charte.

Dans *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13, par. 36, notre Cour cite avec approbation l'énoncé suivant du juge McLachlin (maintenant Juge en chef) dans *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, p. 244 :

Il ressort d'un commentaire récent que l'on commence à s'accorder pour dire que les tribunaux doivent respecter la responsabilité qu'ont les conseils municipaux élus de servir leurs électeurs et de prendre garde de substituer à l'opinion de ces conseils leur propre avis quant à ce qui est dans le meilleur intérêt des citoyens. À moins qu'il ne soit clairement démontré qu'une municipalité a excédé ses pouvoirs en prenant une décision donnée, les tribunaux ne devraient pas conclure qu'il en est ainsi. Dans les cas où il n'y a pas d'attribution expresse de pouvoirs, mais où ceux-ci peuvent être implicites, les tribunaux doivent se montrer prêts à adopter l'interprétation «bienveillante» évoquée par notre Cour dans l'arrêt *Greenbaum* et à conférer les pouvoirs par déduction raisonnable. Quelles que soient les règles d'interprétation appliquées, elles ne doivent pas servir à usurper le rôle légitime de représentants de la collectivité que jouent les conseils municipaux. [Je souligne.]

24

The appellants argue that By-law 270 imposes an impermissible absolute ban on pesticide use. They focus on s. 2 of the by-law, which states that: “The spreading and use of a pesticide is prohibited throughout the territory of the Town.” In my view, the by-law read as a whole does not impose such a prohibition. By-law 270's ss. 3 to 6 state locations and situations for pesticide use. As one commentary notes, “by-laws like Hudson's typically target non-essential uses of pesticides. That is, it is not a total prohibition, but rather permits the use of pesticides in certain situations where the use of pesticides is not purely an aesthetic pursuit (e.g. for the production of crops)”: Swaigen, *supra*, at p. 178.

Les appelantes prétendent que le règlement 270 impose une interdiction absolue non permise relativement à l'utilisation de pesticides. Elles mettent l'accent sur l'art. 2 du règlement : « L'épandage et l'utilisation de tout pesticide est interdit partout sur le territoire de la Ville. » Selon moi, le règlement, interprété dans son ensemble, n'impose pas une telle interdiction. Les articles 3 à 6 du règlement 270 indiquent les lieux et les cas où l'utilisation de pesticides est permise. Comme le souligne Swaigen, *loc. cit.*, p. 178 : [TRADUCTION] « les règlements comme celui de Hudson visent généralement les usages non essentiels de pesticides. C'est-à-dire qu'ils ne prévoient pas une interdiction totale, mais permettent plutôt l'usage de pesticides dans certains cas où cet usage n'a pas un but purement esthétique (p. ex. pour la production de récoltes) ».

The appellants further submit that the province's adoption in 1997 of s. 463.1 *C.T.A.*, which states that a municipality may get permission to introduce pesticides onto private property, indicates, by virtue of the principle of *expressio unius est exclusio alterius* (express mention of one is the exclusion of the other), that the province did not intend to allow municipal regulation of pesticides. I find this argument to be without merit, since, even if this subsequent enactment were considered to instantiate prior legislative intent, there is absolutely no implication in s. 463.1 *C.T.A.*, a permissive provision, that it is meant to exhaust municipalities' freedom of action concerning pesticides.

In *Shell, supra*, at pp. 276-77, Sopinka J. for the majority quoted the following with approval from Rogers, *supra*, § 64.1:

In approaching a problem of construing a municipal enactment a court should endeavour firstly to interpret it so that the powers sought to be exercised are in consonance with the purposes of the corporation. The provision at hand should be construed with reference to the object of the municipality: to render services to a group of persons in a locality with a view to advancing their health, welfare, safety and good government.

In that case, Sopinka J. enunciated the test of whether the municipal enactment was "passed for a municipal purpose". Provisions such as s. 410(1) *C.T.A.*, while benefiting from the generosity of interpretation discussed in *Nanaimo, supra*, must have a reasonable connection to the municipality's permissible objectives. As stated in *Greenbaum, supra*, at p. 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".

Les appelantes soutiennent, en outre, que l'adoption par la province en 1997 de l'art. 463.1 *L.C.V.*, selon lequel une municipalité peut obtenir la permission d'épandre des pesticides sur une propriété privée, indique, d'après le principe *expressio unius est exclusio alterius* (la mention explicite de l'un signifie l'exclusion de l'autre), que la province n'avait pas l'intention de permettre la réglementation des pesticides par les municipalités. J'estime cet argument mal fondé, car, même si l'on considère que l'adoption ultérieure de cette disposition confirme l'intention antérieure du législateur, absolument rien dans l'art. 463.1 *L.C.V.*, une disposition permissive, ne vise à retirer aux municipalités leur liberté d'action en ce qui a trait aux pesticides.

Dans l'arrêt *Shell*, précité, p. 276-277, le juge Sopinka, au nom de la majorité, cite avec approbation l'extrait suivant tiré de l'ouvrage de Rogers, *op. cit.*, § 64.1 :

[TRADUCTION] Devant un problème d'interprétation d'une résolution ou d'un règlement adopté par une municipalité, les tribunaux doivent s'efforcer en premier lieu de donner une interprétation qui harmonise les pouvoirs que l'on cherche à exercer avec les objectifs de la municipalité. La disposition en cause devrait s'interpréter en fonction de l'objectif de la municipalité : fournir des services à un groupe de personnes, dans une localité, en vue d'en améliorer la santé, le bien-être, la sécurité et le bon gouvernement;

Dans cet arrêt, le juge Sopinka énonce le critère applicable afin de déterminer si le règlement municipal a été « adopt[é] à des fins municipales ». Même si elles bénéficient de l'interprétation large mentionnée dans *Nanaimo*, précité, les dispositions tel le par. 410(1) *L.C.V.* doivent être raisonnablement liées aux objectifs municipaux permis. Comme le mentionne l'arrêt *Greenbaum*, précité, p. 689 : « lorsqu'ils sont susceptibles de recevoir plus d'une interprétation, les règlements municipaux doivent être interprétés de manière à respecter les paramètres de la loi provinciale habilitante. Toutefois, les tribunaux doivent veiller à ce que les municipalités n'empêchent pas sur les droits civils ou de common law des citoyens en adoptant des règlements *ultra vires* ».

27

Whereas in *Shell*, the enactments' purpose was found to be "to affect matters beyond the boundaries of the City without any identifiable benefit to its inhabitants" (p. 280), that is not the case here. The Town's By-law 270 responded to concerns of its residents about alleged health risks caused by non-essential uses of pesticides within Town limits. Unlike *Shell*, in which the Court felt bound by the municipal enactments' "detailed recital of . . . purposes" (p. 277), the by-law at issue requires what Sopinka J. called the reading in of an implicit purpose. Based on the distinction between essential and non-essential uses of pesticides, it is reasonable to conclude that the Town by-law's purpose is to minimize the use of allegedly harmful pesticides in order to promote the health of its inhabitants. This purpose falls squarely within the "health" component of s. 410(1). As R. Sullivan appositely explains in a hypothetical example illustrating the purposive approach to statutory interpretation:

Suppose, for example, that a municipality passed a by-law prohibiting the use of chemical pesticides on residential lawns. With no additional information, one might well conclude that the purpose of this by-law was to protect persons from health hazards contained in the chemical spray. This inference would be based on empirical beliefs about the harms chemical pesticides can cause and the risks of exposure created by their use on residential lawns. It would also be based on assumptions about the relative value of grass, insects and persons in society and the desirability of possible consequences of the by-law, such as putting people out of work, restricting the free use of property, interfering with the conduct of businesses and the like. These assumptions make it implausible to suppose that the municipal council was trying to promote the spread of plant-destroying insects or to put chemical workers out of work, but plausible to suppose that it was trying to suppress a health hazard.

Alors que, dans l'arrêt *Shell*, les règlements adoptés ont été jugés avoir « pour objet d'exercer une influence à l'extérieur des limites de la ville et ne comport[ai]nt aucun bénéfice précis pour ses citoyens » (p. 280), tel n'est pas le cas ici. Le règlement 270 de la Ville répondait aux craintes de ses résidants au sujet des risques que pourrait présenter pour la santé l'usage non essentiel de pesticides dans les limites de la Ville. Contrairement à la situation dans *Shell*, où notre Cour s'est sentie liée par « l'énumération détaillée des objets » (p. 277) des règlements municipaux, le règlement en cause exige ce que le juge Sopinka a recommandé de faire, soit de lui prêter un objectif implicite. Selon la distinction entre l'usage essentiel et l'usage non essentiel des pesticides, il est raisonnable de conclure que le règlement de la Ville a pour objet de minimiser l'utilisation de pesticides qui seraient nocifs afin de protéger la santé de ses habitants. Cet objet relève directement de l'aspect « santé » du par. 410(1). Comme R. Sullivan l'explique pertinemment dans un exemple hypothétique illustrant l'interprétation téléologique des lois :

[TRADUCTION] Supposons, par exemple, qu'une municipalité adopte un règlement interdisant l'utilisation de pesticides chimiques sur les pelouses résidentielles. Sans autre renseignement, on pourrait bien conclure que le règlement avait pour objet la protection contre les risques pour la santé que présente la vaporisation de produits chimiques. Cette conclusion serait fondée sur des croyances empiriques au sujet des problèmes que les pesticides chimiques peuvent causer et des risques d'exposition créés par leur utilisation sur des pelouses résidentielles. Elle serait également fondée sur des présomptions au sujet de la valeur relative de l'herbe, des insectes et des personnes dans la société ainsi qu'au sujet du caractère souhaitable des conséquences possibles du règlement, comme le fait de causer des pertes d'emploi, de restreindre la liberté d'utilisation de la propriété, de s'ingérer dans l'exploitation des entreprises et les autres conséquences semblables. Ces présomptions font en sorte qu'il n'est pas plausible de supposer que le conseil municipal tentait de favoriser la propagation des insectes qui détruisent les plantes ou de causer la mise à pied de travailleurs du domaine des produits chimiques, mais qu'il est plausible de supposer qu'il tentait d'éliminer un risque pour la santé.

(*Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 53)

Kennedy J. correctly found (at pp. 230-31) that the Town Council, “faced with a situation involving health and the environment”, “was addressing a need of their community.” In this manner, the municipality is attempting to fulfill its role as what the Ontario Court of Appeal has called a “trustee of the environment” (*Scarborough v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255, at p. 257).

The appellants claim that By-law 270 is discriminatory and therefore *ultra vires* because of what they identify as impermissible distinctions that affect their commercial activities. There is no specific authority in the *C.T.A.* for these distinctions. Writing for the Court in *Sharma, supra*, at p. 668, Iacobucci J. stated the principle that:

... in *Montréal (City of) v. Arcade Amusements Inc., supra*, this Court recognized that discrimination in the municipal law sense was no more permissible between than within classes (at pp. 405-6). Further, the general reasonableness or rationality of the distinction is not at issue: discrimination can only occur where the enabling legislation specifically so provides or where the discrimination is a necessary incident to exercising the power delegated by the province (*Montréal (City of) v. Arcade Amusements Inc., supra*, at pp. 404-6). [Emphasis added.]

See also *Shell, supra*, at p. 282; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, at p. 413.

Without drawing distinctions, By-law 270 could not achieve its permissible goal of aiming to improve the health of the Town’s inhabitants by banning non-essential pesticide use. If all pesticide uses and users were treated alike, the protection of health and welfare would be sub-optimal. For example, withdrawing the special status given to farmers under the by-law’s s. 4 would work at cross-purposes with its salubrious intent. Section 4 thus justifiably furthers the objective of By-law 270. Having held that the Town can regulate the use of pesticides, I conclude that the distinctions

(*Driedger on the Construction of Statutes* (3^e éd. 1994), p. 53)

Le juge Kennedy a conclu à bon droit (aux p. 230-231) que, [TRADUCTION] « devant une situation où la santé et l’environnement sont en jeu », le conseil municipal « voyait à un besoin de sa collectivité ». Ainsi, la municipalité tente d’exercer son rôle, qualifié par la Cour d’appel de l’Ontario de [TRADUCTION] « fiduciaire de l’environnement » (*Scarborough c. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255, p. 257).

Les appelantes font valoir que le règlement 270 est discriminatoire et en conséquence est *ultra vires* en raison de ce qu’elles identifient comme des distinctions non permises affectant leurs activités commerciales. La *L.C.V.* n’autorise pas explicitement de telles distinctions. S’exprimant au nom de la Cour dans *Sharma*, précité, p. 668, le juge Iacobucci énonce le principe suivant :

... dans l’arrêt *Montréal (Ville de) c. Arcade Amusements Inc.*, précité, notre Cour a reconnu que la discrimination au sens du droit municipal n’était pas plus permise entre des catégories qu’au sein de catégories (aux pp. 405 et 406). En outre, le caractère raisonnable ou rationnel général de la distinction n’est pas en cause: il ne saurait y avoir de discrimination que si la loi habilitante le prévoit précisément ou si la discrimination est nécessairement accessoire à l’exercice du pouvoir délégué par la province (*Montréal (Ville de) c. Arcade Amusements Inc.*, précité, aux pp. 404 à 406). [Je souligne.]

Voir également *Shell*, précité, p. 282; *Allard Contractors Ltd. c. Coquitlam (District)*, [1993] 4 R.C.S. 371, p. 413.

Sans faire ces distinctions, le règlement 270 ne pourrait pas atteindre l’objectif y autorisé, soit d’améliorer la santé des habitants de la Ville en interdisant l’usage non essentiel de pesticides. Si l’on traitait de façon similaire tous les usages et utilisateurs de pesticides, la protection de la santé et du bien-être ne serait pas optimale. Par exemple, le retrait du statut spécial que l’art. 4 du règlement confère aux fermiers irait à l’encontre de l’objectif de salubrité de ce règlement. L’article 4 facilite ainsi, et il est justifié de le faire, la réalisation de l’objectif visé par le règlement 270. Ayant conclu

impugned by the appellants for restricting their businesses are necessary incidents to the power delegated by the province under s. 410(1) *C.T.A.* They are “so absolutely necessary to the exercise of those powers that [authorization has] to be found in the enabling provisions, by necessary inference or implicit delegation”; *Arcade Amusements, supra*, at p. 414, quoted in *Greenbaum, supra*, at p. 695.

30

To conclude this section on statutory authority, I note that reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. My reasons for the Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 70, observed that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review”. As stated in *Driedger on the Construction of Statutes, supra*, at p. 330:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

31

The interpretation of By-law 270 contained in these reasons respects international law’s “precautionary principle”, which is defined as follows at para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):

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

que la Ville peut réglementer l’utilisation des pesticides, je juge que les distinctions contestées par les appelantes au motif qu’elles restreignent leurs activités commerciales sont des conséquences nécessaires à l’application du pouvoir délégué par la province en vertu du par. 410(1) *L.C.V.* Elles sont « indispensable[s] à l’exercice de ces pouvoirs de telle sorte que [l’autorisation] doive [être] trouv[ée] dans ces dispositions habilitantes, par inférence nécessaire ou délégation implicite »; *Arcade Amusements*, précité, p. 414, cité dans *Greenbaum*, précité, p. 695.

En conclusion quant à cette partie relative au pouvoir conféré par la loi, je souligne qu’interpréter le par. 410(1) comme permettant à la Ville de réglementer l’utilisation des pesticides correspond aux principes de droit et de politique internationaux. Au nom de la Cour dans *Baker c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, [1999] 2 R.C.S. 817, par. 70, je note dans mon opinion que « [I]es valeurs exprimées dans le droit international des droits de la personne peuvent [...] être prises en compte dans l’approche contextuelle de l’interprétation des lois et en matière de contrôle judiciaire ». Comme il est mentionné dans *Driedger on the Construction of Statutes, op. cit.*, p. 330 :

[TRADUCTION] [L]a législature est présumée respecter les valeurs et les principes contenus dans le droit international, coutumier et conventionnel. Ces principes font partie du cadre juridique au sein duquel une loi est adoptée et interprétée. Par conséquent, dans la mesure du possible, il est préférable d’adopter des interprétations qui correspondent à ces valeurs et à ces principes. [Je souligne.]

L’interprétation que je fais ici du règlement 270 respecte le « principe de précaution » du droit international, qui est défini ainsi au par. 7 de la *Déclaration ministérielle de Bergen sur le développement durable* (1990) :

Un développement durable implique des politiques fondées sur le principe de précaution. Les mesures adoptées doivent anticiper, prévenir et combattre les causes de la détérioration de l’environnement. Lorsque des dommages graves ou irréversibles risquent d’être infligés, l’absence d’une totale certitude scientifique ne

postponing measures to prevent environmental degradation.

Canada “advocated inclusion of the precautionary principle” during the Bergen Conference negotiations (D. VanderZwaag, CEPA Issue Elaboration Paper No. 18, *CEPA and the Precautionary Principle/Approach* (1995), at p. 8). The principle is codified in several items of domestic legislation: see for example the *Oceans Act*, S.C. 1996, c. 31, Preamble (para. 6); *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 2(1)(a); *Endangered Species Act*, S.N.S. 1998, c. 11, ss. 2(1)(h) and 11(1).

Scholars have documented the precautionary principle’s inclusion “in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment” (D. Freestone and E. Hey, “Origins and Development of the Precautionary Principle”, in D. Freestone and E. Hey, eds., *The Precautionary Principle and International Law* (1996), at p. 41. As a result, there may be “currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law” (J. Cameron and J. Abouchar, “The Status of the Precautionary Principle in International Law”, in *ibid.*, at p. 52). See also O. McIntyre and T. Mosedale, “The Precautionary Principle as a Norm of Customary International Law” (1997), 9 *J. Env. L.* 221, at p. 241 (“the precautionary principle has indeed crystallised into a norm of customary international law”). The Supreme Court of India considers the precautionary principle to be “part of the Customary International Law” (*A.P. Pollution Control Board v. Nayudu*, 1999 S.O.L. Case No. 53, at para. 27). See also *Vellore Citizens Welfare Forum v. Union of India*, [1996] Supp. 5 S.C.R. 241. In the context of the precautionary principle’s tenets, the Town’s concerns about pesticides fit well under their rubric of preventive action.

devrait pas servir de prétexte pour ajourner l’adoption de mesures destinées à prévenir la détérioration de l’environnement.

Le Canada « a préconisé l’inclusion du principe de précaution » au cours des négociations de la Conférence de Bergen (D. VanderZwaag, Examen de la LCPE : Document d’élaboration des enjeux 18, *La LCPE et le principe ou l’approche précaution* (1995), p. 11). Ce principe est intégré dans plusieurs dispositions de législation interne : voir par exemple la *Loi sur les océans*, L.C. 1996, ch. 31, Préambule (par. 6); la *Loi canadienne sur la protection de l’environnement* (1999), L.C. 1999, ch. 33, al. 2(1)a); la *Endangered Species Act*, S.N.S. 1998, ch. 11, al. 2(1)(h) et par. 11(1).

Des auteurs ont démontré que le principe de précaution est repris [TRADUCTION] « dans pratiquement tous les traités et documents de politique récents en matière de protection et de préservation de l’environnement » (D. Freestone et E. Hey, « Origins and Development of the Precautionary Principle », dans D. Freestone et E. Hey, dir., *The Precautionary Principle and International Law* (1996), p. 41. Par conséquent, il y a peut-être [TRADUCTION] « actuellement suffisamment de pratiques de la part des États pour qu’il soit permis de prétendre de façon convaincante que le principe de précaution est un principe de droit international coutumier » (J. Cameron et J. Abouchar, « The Status of the Precautionary Principle in International Law », *ibid.*, p. 52). Voir également O. McIntyre et T. Mosedale, « The Precautionary Principle as a Norm of Customary International Law » (1997), 9 *J. Env. L.* 221, p. 241 [TRADUCTION] (« le principe de précaution s’est vraiment cristallisé en une norme de droit international coutumier »). La Cour suprême de l’Inde considère le principe de précaution comme faisant [TRADUCTION] « partie du droit international coutumier » (*A.P. Pollution Control Board c. Nayudu*, 1999 S.O.L. Case No. 53, par. 27). Voir également *Vellore Citizens Welfare Forum c. Union of India*, [1996] Suppl. 5 S.C.R. 241. Dans le contexte des postulats du principe de précaution, les craintes de la Ville au sujet des pesticides s’inscrivent conformément sous la rubrique de l’action préventive.

B. Even if the Town Had Authority to Enact it, Was By-law 270 Rendered Inoperative Because of a Conflict with Federal or Provincial Legislation?

33

This Court stated in *Hydro-Québec, supra*, at para. 112, that *Oldman River, supra*, “made it clear that the environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*. As it was put there, ‘the *Constitution Act, 1867* has not assigned the matter of “environment” *sui generis* to either the provinces or Parliament’ (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64).” As there is *bijurisdictional responsibility* for pesticide regulation, the appellants allege conflicts between By-law 270 and both federal and provincial legislation. These contentions will be examined in turn.

B. Dans l'hypothèse où la Ville avait le pouvoir de l'adopter, le règlement 270 a-t-il été rendu inopérant du fait de son incompatibilité avec la législation fédérale ou provinciale?

Notre Cour a dit dans *Hydro-Québec*, précité, par. 112, que l’arrêt *Oldman River*, précité, « a précisé [...] que l’environnement n’est pas, comme tel, un domaine de compétence législative en vertu de la *Loi constitutionnelle de 1867*. Comme il y est affirmé, “la *Loi constitutionnelle de 1867* n’a pas conféré le domaine de ‘l’environnement’ comme tel aux provinces ou au Parlement” (p. 63). Il s’agit plutôt d’un sujet diffus qui touche plusieurs domaines différents de responsabilité constitutionnelle, dont certains sont fédéraux et d’autres provinciaux (pp. 63 et 64). » Étant donné qu’il existe une responsabilité *bijuridictionnelle* en matière de réglementation de pesticides, les appelantes allèguent que le règlement 270 entre en conflit tant avec la législation fédérale qu’avec la législation provinciale. Je discuterai de ces pré-tentions à tour de rôle.

1. Federal Legislation

34

The appellants argue that ss. 4(1), 4(3) and 6(1)(j) of the *Pest Control Products Act* (“PCPA”), and s. 45 of the *Pest Control Products Regulations* allowed them to make use of the particular pesticide products they employed in their business practices. They allege a conflict between these legislative provisions and By-law 270. In *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 187, Dickson J. (as he then was) for the majority of the Court reviewed the “express contradiction test” of conflict between federal and provincial legislation. At p. 191, he explained that “there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says ‘yes’ and the other says ‘no’; ‘the same citizens are being told to do inconsistent things’; compliance with one is defiance of the other”. See also *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, at paras. 17 and 40; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121,

1. La législation fédérale

Les appelantes prétendent que les par. 4(1) et 4(3) ainsi que l’al. 6(1)(j) de la *Loi sur les produits antiparasitaires* (la « LPAP ») et l’art. 45 du *Règlement sur les produits antiparasitaires* leur permettaient d’utiliser les pesticides particuliers qu’elles employaient dans le cadre de leurs activités commerciales. Elles allèguent qu’il existe un conflit entre ces dispositions et le règlement 270. Dans *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 187, le juge Dickson (plus tard Juge en chef), au nom de la majorité de la Cour, examine le « critère du conflit explicite » entre la législation fédérale et la législation provinciale. À la page 191, il explique qu’« il ne semble y avoir aucune raison valable de parler de prépondérance et d’exclusion sauf lorsqu’il y a un conflit véritable, comme lorsqu’une loi dit “oui” et que l’autre dit “non”; “on demande aux mêmes citoyens d’accomplir des actes incompatibles”; l’observance de l’une entraîne l’inobservance de l’autre ». Voir également *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961, par. 17 et 40; *Banque de Montréal c. Hall*, [1990] 1 R.C.S.

at p. 151. By-law 270, as a product of provincial enabling legislation, is subject to this test.

Federal legislation relating to pesticides extends to the regulation and authorization of their import, export, sale, manufacture, registration, packaging and labelling. The *PCPA* regulates which pesticides can be registered for manufacture and/or use in Canada. This legislation is permissive, rather than exhaustive, and there is no operational conflict with By-law 270. No one is placed in an impossible situation by the legal imperative of complying with both regulatory regimes. Analogies to motor vehicles or cigarettes that have been approved federally, but the use of which can nevertheless be restricted municipally, well illustrate this conclusion. There is, moreover, no concern in this case that application of By-law 270 displaces or frustrates “the legislative purpose of Parliament”. See *Multiple Access, supra*, at p. 190; *Bank of Montreal, supra*, at pp. 151 and 154.

121, p. 151. Découlant d'une loi provinciale habilitante, le règlement 270 est sujet à ce critère.

La législation fédérale relative aux pesticides s'étend à la réglementation et à l'autorisation de leur importation, de leur exportation, de leur vente, de leur fabrication, de leur agrément, de leur emballage et de leur étiquetage. La *LPAP* dicte quels pesticides peuvent être agréés à des fins de fabrication et/ou d'utilisation au Canada. Cette loi est permissive, et non pas exhaustive, de sorte qu'il n'y a aucun conflit opérationnel avec le règlement 270. Nul n'est placé dans la situation impossible d'avoir l'obligation légale de se conformer aux deux régimes de réglementation. L'analogie avec les véhicules automobiles et les cigarettes qui ont été approuvés au niveau fédéral mais dont l'usage peut toutefois être restreint au niveau municipal illustre bien cette conclusion. Il n'y a, en outre, aucune crainte en l'espèce que l'application du règlement 270 écarte ou déjoue « l'intention du Parlement ». Voir *Multiple Access*, précité, p. 190; *Banque de Montréal*, précité, p. 151 et 154.

2. Provincial Legislation

Multiple Access also applies to the inquiry into whether there is a conflict between the by-law and provincial legislation, except for cases (unlike this one) in which the relevant provincial legislation specifies a different test. The *Multiple Access* test, namely “impossibility of dual compliance”, see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 16-13, was foreshadowed for provincial-municipal conflicts in *dicta* contained in this Court's decision in *Arcade Amusements, supra*, at p. 404. There, Beetz J. wrote that “otherwise valid provincial statutes which are directly contrary to federal statutes are rendered inoperative by that conflict. Only the same type of conflict with provincial statutes can make by-laws inoperative: I. M. Rogers, *The Law of Canadian Municipal Corporations*, vol. 1, 2nd ed., 1971, No. 63.16” (emphasis added).

2. La législation provinciale

L'arrêt *Multiple Access* s'applique également à l'examen de la question de savoir s'il y a conflit entre le règlement municipal et la législation provinciale, sauf dans les cas (différents de la présente affaire) où la loi provinciale pertinente spécifie un critère autre. La remarque incidente faite dans la décision rendue par notre Cour dans *Arcade Amusements*, précité, p. 404, présageait le critère de l'arrêt *Multiple Access*, à savoir [TRADUCTION] « l'impossibilité de se conformer aux deux textes », voir P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 1, p. 16-13. Dans cette décision, le juge Beetz écrit que « des lois provinciales, valides par ailleurs, mais qui se heurtent directement à des lois fédérales, sont rendues inopérantes par suite de ce conflit. Seule la même sorte de conflit avec des lois provinciales peut rendre des règlements inopérants: I. M. Rogers, *The Law of Canadian Municipal Corporations*, vol. 1, 2^e éd., 1971, n° 63.16 » (je souligne).

37

One of the competing tests to *Multiple Access* suggested in this litigation is based on *Attorney General for Ontario v. City of Mississauga* (1981), 15 M.P.L.R. 212 (Ont. C.A.). In that case, decided before *Multiple Access*, Morden J.A. saw “no objection to borrowing, in this field, relevant principles of accommodation which have been developed in cases involving alleged federal-provincial areas of conflict. In both fields great care is, and should be, taken before it is held that an otherwise properly enacted law is inoperative” (p. 232). He added, at p. 233, the important point that “a by-law is not void or ineffective merely because it ‘enhances’ the statutory scheme of regulation by imposing higher standards of control than those in the related statute. This is not conflict or incompatibility per se” (quoting *Township of Uxbridge v. Timber Bros. Sand & Gravel Ltd.* (1975), 7 O.R. (2d) 484 (C.A.)). See also P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 353 (“In some cases, the courts have held that the provincial statute does not imply full repeal of the municipal power. The municipality retains its authority as long as there is no conflict with provincial legislation. It may be more demanding than the province, but not less so”).

L’un des critères opposés à celui de l’arrêt *Multiple Acess* qui ont été proposés dans le présent litige est fondé sur l’arrêt *Attorney General for Ontario c. City of Mississauga* (1981), 15 M.P.L.R. 212 (C.A. Ont.). Dans cette décision rendue avant l’arrêt *Multiple Access*, le juge Morden de la Cour d’appel de l’Ontario ne voit [TRADUCTION] « aucun problème à introduire dans ce domaine les principes d’accommodement pertinents qui ont été élaborés dans les affaires portant sur des présumés domaines de conflit entre les textes fédéraux et les textes provinciaux. Dans les deux domaines, on fait, et il faut faire, bien attention avant de déclarer inopérante une disposition qui a été autrement valablement adoptée » (p. 232). Il ajoute, à la p. 233, un point important, qui est qu’ [TRADUCTION] « un règlement n’est pas nul ou sans effet simplement parce qu’il “rehausse” le régime législatif de réglementation en imposant des normes de contrôle plus sévères que celles prévues dans la loi connexe. Cela n’est pas un conflit ou une incompatibilité en soi » (citation de *Township of Uxbridge c. Timber Bros. Sand & Gravel Ltd.* (1975), 7 O.R. (2d) 484 (C.A.)). Voir également P.-A. Côté, *Interprétation des lois* (3^e éd. 1999), p. 446-447 (« Dans certaines affaires, on a jugé que l’adoption de la loi provinciale ne devait pas s’interpréter comme une abrogation complète du pouvoir municipal : celui-ci pouvait continuer à s’exercer à la condition toutefois de ne pas contredire la réglementation provinciale, c’est-à-dire que la municipalité pouvait être plus exigeante, mais non moins exigeante que la province »).

38

Some courts have already made use of the *Multiple Access* test to examine alleged provincial-municipal conflicts. For example, in *British Columbia Lottery Corp. v. Vancouver (City)* (1999), 169 D.L.R. (4th) 141, at pp. 147-48, the British Columbia Court of Appeal stated that cases pre-dating *Multiple Access*, including the Ontario Court of Appeal decision in *Mississauga, supra*, “must be read in the light of [that] decision”.

Certains tribunaux ont déjà recouru au critère de l’arrêt *Multiple Access* pour examiner les présumés conflits entre des textes provinciaux et des textes municipaux. Par exemple, dans *British Columbia Lottery Corp. c. Vancouver (City)* (1999), 169 D.L.R. (4th) 141, p. 147-148, la Cour d’appel de la Colombie-Britannique déclare que les décisions rendues avant l’arrêt *Multiple Access*, notamment la décision de la Cour d’appel de l’Ontario dans *Mississauga*, précité, [TRADUCTION] « doivent être interprétées selon [cette] décision ».

It is no longer the key to this kind of problem to look at one comprehensive scheme, and then to look at the other comprehensive scheme, and to decide which

[TRADUCTION] On ne résout plus ce genre de problème en examinant un régime complet, en examinant l’autre régime complet et en décidant quel régime

scheme entirely occupies the field to the exclusion of the other. Instead, the correct course is to look at the precise provisions and the way they operate in the precise case, and ask: Can they coexist in this particular case in their operation? If so, they should be allowed to co-exist, and each should do its own parallel regulation of one aspect of the same activity, or two different aspects of the same activity. [Emphasis added.]

The court summarized the applicable standard as follows: "A true and outright conflict can only be said to arise when one enactment compels what the other forbids." See also *Law Society of Upper Canada v. Barrie (City)* (2000), 46 O.R. (3d) 620 (S.C.J.), at pp. 629-30: "Compliance with the provincial Act does not necessitate defiance of the municipal By-law; dual compliance is certainly possible"; *Huot v. St-Jérôme (Ville de)*, J.E. 93-1052 (Sup. Ct.), at p. 19: [TRANSLATION] "A finding that a municipal by-law is inconsistent with a provincial statute (or a provincial statute with a federal statute) requires, first, that they both deal with similar subject matters and, second, that obeying one necessarily means disobeying the other."

As a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter. As stated by the Quebec Court of Appeal in an informative environmental decision, *St-Michel-Archange (Municipalité de) v. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875 (C.A.), at pp. 888-91:

[TRANSLATION] According to proponents of the unitary theory, although the provincial legislature has not said so clearly, it has nonetheless established a provincial scheme for managing waste disposal sites. It has therefore reserved exclusive jurisdiction in this matter for itself, and taken the right to pass by-laws concerning local waste management away from municipalities. The *Environment Quality Act* therefore operated to remove those powers from municipal authorities.

According to proponents of the pluralist theory, the provincial legislature very definitely did not intend to abolish the municipality's power to regulate; rather, it

occupe tout le domaine à l'exclusion de l'autre. Il faut plutôt examiner les dispositions précises et la manière dont elles s'appliquent dans le cas particulier et se demander si elles peuvent s'appliquer de façon harmonieuse dans ce cas précis? Dans l'affirmative, il faut permettre leur coexistence et elles doivent chacune réglementer en parallèle une facette, ou deux facettes différentes, de la même activité. [Je souligne.]

La cour a résumé ainsi la norme applicable : [TRADUCTION] « On peut dire qu'il y a un conflit réel et direct seulement lorsqu'un texte impose ce que l'autre interdit. » Voir également *Law Society of Upper Canada c. Barrie (City)* (2000), 46 O.R. (3d) 620 (C.S.J.), p. 629-630 : [TRADUCTION] « La conformité à la loi provinciale ne requiert pas l'inobservation du règlement municipal; il est certainement possible de se conformer aux deux textes); *Huot c. St-Jérôme (Ville de)*, J.E. 93-1052 (C.S.), p. 19 : « En effet, pour qu'un règlement municipal soit incompatible avec une loi provinciale (ou une loi provinciale avec une loi fédérale), il faut d'abord que les deux touchent des sujets similaires et, ensuite, qu'un citoyen, pour obéir à l'une doive enfreindre l'autre. »

De façon générale, la simple existence d'une loi provinciale (ou fédérale) dans un domaine donné n'écarte pas le pouvoir des municipalités de réglementer cette matière. Comme le dit la Cour d'appel du Québec dans un arrêt instructif en matière d'environnement, *St-Michel-Archange (Municipalité de) c. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875 (C.A.), p. 888-891 :

Pour les tenants de la thèse unitaire, le législateur provincial, sans le dire d'une façon claire, a néanmoins instauré un système provincial de gestion des sites de réception des déchets. Il s'est donc réservé l'exclusivité des compétences en la matière et a enlevé aux municipalités le droit de faire des règlements sur la gestion locale des déchets. La *Loi sur la qualité de l'environnement* aurait donc eu pour effet de retirer ces pouvoirs aux autorités municipales.

Pour les tenants de la thèse pluraliste, le législateur provincial n'a pas, bien au contraire, entendu abolir le pouvoir municipal de réglementation, mais simplement

intended merely to better circumscribe that power, to ensure complementarity with the municipal management scheme. . . .

The pluralist theory accordingly concedes that the intention is to give priority to provincial statutory and regulatory provisions. However, it does not believe that it can be deduced from this that any complementary municipal provision in relation to planning and development that affects the quality of the environment is automatically invalid.

A thorough analysis of the provisions cited *supra* and a review of the environmental policy as a whole as it was apparently intended by the legislature leads to the conclusion that it is indeed the pluralist theory, or at least a pluralist theory, that the legislature seems to have taken as the basis for the statutory scheme.

In this case, there is no barrier to dual compliance with By-law 270 and the *Pesticides Act*, nor any plausible evidence that the legislature intended to preclude municipal regulation of pesticide use. The *Pesticides Act* establishes a permit and licensing system for vendors and commercial applicators of pesticides and thus complements the federal legislation's focus on the products themselves. Along with By-law 270, these laws establish a tri-level regulatory regime.

40

According to s. 102 of the *Pesticides Act*, as it was at the time By-law 270 was passed: "The provisions of the Pesticide Management Code and of the other regulations of this Act prevail over any inconsistent provision of any by-law passed by a municipality or an urban community." Evidently, the *Pesticides Act* envisions the existence of complementary municipal by-laws. As Duplessis and Hétu, *supra*, at p. 109, put it, [TRANSLATION] "the Quebec legislature gave the municipalities the right to regulate pesticides, provided that the by-law was not incompatible with the regulations and the Management Code enacted under the *Pesticides Act*". Since no Pesticide Management Code has been enacted by the province under s. 105, the

l'encadrer davantage dans une perspective de complémentarité de gestion avec les autorités municipales. . . .

La thèse pluraliste admet donc qu'il y a intention de donner priorité aux dispositions législatives et réglementaires provinciales. Elle ne croit cependant pas que l'on puisse en déduire qu'automatiquement toute disposition municipale complémentaire en matière d'urbanisme et d'aménagement et qui touche la qualité de l'environnement soit nulle.

Une analyse approfondie des textes précités et l'examen de l'ensemble de la politique environnementale que semble avoir voulu le législateur mènent à la conclusion que c'est bien la thèse pluraliste, ou du moins une certaine thèse pluraliste, que celui-ci semble avoir pris comme base de l'ensemble législatif.

Dans la présente affaire, rien n'empêche que l'on se conforme à la fois au règlement 270 et à la *Loi sur les pesticides*, et il n'y a aucun élément de preuve plausible indiquant que la législature avait l'intention d'empêcher la réglementation par les municipalités de l'utilisation des pesticides. La *Loi sur les pesticides* établit un régime de permis pour les vendeurs et les applicateurs commerciaux de pesticides et elle est donc complémentaire à la législation fédérale, qui porte sur les produits eux-mêmes. Conjointement avec le règlement 270, ces lois établissent un régime de réglementation à trois niveaux.

En vertu de l'art. 102 de la *Loi sur les pesticides*, tel qu'il existait au moment de l'adoption du règlement 270 : « Toute disposition du Code de gestion des pesticides et des autres règlements édictés en vertu de la présente loi prévaut sur toute disposition inconciliable d'un règlement édicté par une municipalité ou une communauté urbaine. » Il est clair que la *Loi sur les pesticides* envisage l'existence de règlements municipaux complémentaires. Comme le disent Duplessis et Hétu, *op. cit.*, p. 109, « le législateur provincial reconnaît aux municipalités le droit de réglementer les pesticides en autant que cette réglementation n'était pas inconciliable avec les règlements et le Code de gestion adoptés en vertu de la *Loi sur les pesti-*

lower courts in this case correctly found that the by-law and the *Pesticides Act* could co-exist. In the words of the Court of Appeal, at p. 16: [TRANSLATION] “The *Pesticides Act* thus itself contemplated the existence of municipal regulation of pesticides, since it took the trouble to impose restrictions.”

I also agree with the Court of Appeal at p. 16, that: [TRANSLATION] “A potential inconsistency is not sufficient to invalidate a by-law; there must be a real conflict”. In this regard, the Court of Appeal quoted, at p. 17, *St-Michel-Archange, supra*, at p. 891, to the effect that: [TRANSLATION] “However, to the extent that and for as long as the provincial regulation is not in force, the municipal by-law continues to regulate the activity, provided, of course, that it complies with all the rules established by the law and the courts concerning its validity.”

I note in conclusion that the 1993 revision to the *Pesticide Act* added a new s. 102 stating:

The Pesticide Management Code and any other regulation enacted pursuant to this Act shall render inoperative any regulatory provision concerning the same matter enacted by a municipality or an urban community, except where the provision

- concerns landscaping or extermination activities, such as fumigation, as defined by government regulation, and

- prevents or further mitigates harmful effects on the health of humans or of other living species or damage to the environment or to property.

This revised language indicates more explicitly that the *Pesticides Act* is meant to co-exist with stricter municipal by-laws of the type at issue in this case. Indeed, the new s. 102, by including the word “health”, echoes the enabling legislation that underpins By-law-270, namely s. 410(1) *C.T.A.* Once a Pesticide Management Code is enacted,

cides ». Étant donné qu’aucun Code de gestion des pesticides n’a été adopté par la province aux termes de l’art. 105, les tribunaux antérieurs en l’espèce ont eu raison de conclure que le règlement et la *Loi sur les pesticides* pouvaient coexister. Pour reprendre les termes de la Cour d’appel, à la p. 16 : « La *Loi sur les pesticides* envisageait donc elle-même l’existence d’une réglementation municipale sur les pesticides, puisqu’elle prenait la peine d’imposer des contraintes. »

Je suis également d’accord avec la Cour d’appel à la p. 16 pour dire qu’« [u]ne éventuelle incompatibilité ne suffit pas pour invalider un règlement; il faut une réelle opposition ». À cet égard, la Cour d’appel a cité, à la p. 17, l’arrêt *St-Michel-Archange*, précité, p. 891, selon lequel « [t]ant et aussi longtemps toutefois que le règlement provincial n’est pas en vigueur, le règlement municipal continue à régir l’activité à condition, naturellement, qu’il respecte toutes les normes fixées par la loi et par la jurisprudence relativement à sa validité ». ⁴¹

Je souligne, en terminant, que la version modifiée de 1993 de la *Loi sur les pesticides* comporte un nouvel art. 102, ainsi libellé :

Le Code de gestion des pesticides et tout autre règlement édictés en application de la présente loi rendent inopérante toute disposition réglementaire portant sur une même matière qui est édictée par une municipalité ou une communauté urbaine, sauf dans le cas où cette disposition réglementaire satisfait aux conditions suivantes :

- elle porte sur les activités d’entretien paysager ou d’extermination, notamment la fumigation, déterminées par règlement du gouvernement;

- elle prévient ou atténue davantage les atteintes à la santé des êtres humains ou des autres espèces vivantes, ainsi que les dommages à l’environnement ou aux biens.

Ce nouveau libellé indique de façon encore plus explicite que la *Loi sur les pesticides* vise à coexister avec des règlements municipaux plus sévères du genre de celui qui est en cause en l’espèce. En fait, l’inclusion du mot « santé » dans le nouvel art. 102 reflète la disposition habilitant le règlement 270, soit le par. 410(1) *L.C.V.* Dès l’adoption

municipalities will be able to draw on s. 102 in order to continue their independent regulation of pesticides. As Duplessis and Hétu, *supra*, explain at p. 111: [TRANSLATION] “the Quebec legislature has again recognized that municipalities have a role to play in pesticide control while at the same time indicating that it intends to make the municipal power subordinate to its own regulatory activity”.

VI. Disposition

43 I have found that By-law 270 was validly enacted under s. 410(1) *C.T.A.* Moreover, the by-law does not render dual compliance with its dictates and either federal or provincial legislation impossible. For these reasons, I would dismiss the appeal with costs.

The reasons of Iacobucci, Major and LeBel JJ. were delivered by

LEBEL J. —

Introduction

44 I agree with Justice L’Heureux-Dubé that the impugned by-law on pesticide use adopted by the respondent, the Town of Hudson, is valid. It does not conflict with relevant federal and provincial legislation on the use and control of pesticides and is a valid exercise of municipal regulatory power under s. 410(1) of the *Cities and Towns Act*, R.S.Q., c. C-19 (“*C.T.A.*”).

45 I view this case as an administrative and local government law issue. Although I agree with L’Heureux-Dubé J. on the disposition of the appeal, I wish to add some comments on some of the problems raised by the appellants. First, I will discuss the alleged operational conflict with the regulatory and legislative systems put in place by other levels of government. I will then turn to the difficulties created by the use of broad provisions like s. 410 and the application of the general prin-

du Code de gestion des pesticides, les municipalités pourront se fonder sur l’art. 102 pour continuer de réglementer les pesticides de façon indépendante. Comme Duplessis et Hétu, *op. cit.*, l’expliquent à la p. 111 : « le législateur québécois reconnaît une fois de plus que les municipalités ont un rôle à jouer en matière de contrôle des pesticides tout en voulant subordonner le pouvoir municipal à son activité réglementaire ».

VI. Dispositif

J’ai conclu que le règlement 270 a été valablement adopté en vertu du par. 410(1) *L.C.V.* De plus, le règlement ne rend pas impossible la conformité à ses prescriptions ainsi qu’à la législation fédérale et à la législation provinciale. Pour ces motifs, je rejette le pourvoi avec dépens.

Version française des motifs des juges Iacobucci, Major et LeBel rendus par

LE JUGE LEBEL —

Introduction

Je conviens avec le juge L’Heureux-Dubé que le règlement sur l’utilisation des pesticides contesté qui a été adopté par l’intimée la ville de Hudson est valide. Il n’entre pas en conflit avec la législation fédérale et la législation provinciale pertinentes sur l’utilisation et le contrôle des pesticides, et il constitue un exercice valide du pouvoir de réglementation que confère aux municipalités le par. 410(1) de la *Loi sur les cités et villes*, L.R.Q., ch. C-19 (« *L.C.V.* »).

Je considère la présente affaire comme une question de droit administratif et de droit municipal. Je suis d’accord avec le juge L’Heureux-Dubé quant à l’issue du pourvoi, mais je désire ajouter quelques observations au sujet de certains problèmes soulevés par les appelantes. J’aborde en premier lieu le présumé conflit d’application avec les régimes réglementaire et législatif mis en place par les autres ordres de gouvernement. Je traite ensuite des difficultés que créent l’application de

ciples of administrative law governing delegated legislation.

The Operational Conflict

As its first line of attack against By-law 270 of the Town of Hudson, the appellants raise the issue of an operational conflict with the federal *Pest Control Products Act*, R.S.C. 1985, c. P-9, and the *Pest Control Products Regulations*, C.R.C. 1978, c. 1253. The appellants also assert that the by-law conflicts with the Quebec *Pesticides Act*, R.S.Q., c. P-9.3. As L'Heureux-Dubé J. points out, the applicable test to determine whether an operational conflict arises is set out in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at pp. 187 and 189. There must be an actual conflict, in the sense that compliance with one set of rules would require a breach of the other. This principle was recently reexamined and restated by Binnie J. in *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, at paras. 39-42. The basic test remains the impossibility of dual compliance. From this perspective, the alleged conflict with federal legislation simply does not exist. The federal Act and its regulations merely authorize the importation, manufacturing, sale and distribution of the products in Canada. They do not purport to state where, when and how pesticides could or should be used. They do not grant a blanket authority to pesticides' manufacturers or distributors to spread them on every spot of greenery within Canada. This matter is left to other legislative and regulatory schemes. Nor does a conflict exist with the provincial *Pesticides Act*, and I agree with L'Heureux-Dubé J.'s analysis on this particular point. The operational conflict argument thus fails.

The Administrative Law Issues

The most serious problems raised by the appeal involve pure administrative law issues. The appellants' arguments raise some basic issues of admin-

dispositions larges comme l'art. 410 et celle des principes généraux de droit administratif régissant la législation déléguée.

Le conflit d'application

Comme premier moyen de contestation du règlement 270 de la ville de Hudson, les appétentes soulèvent la question du conflit d'application avec la *Loi sur les produits antiparasitaires*, L.R.C. 1985, ch. P-9, et le *Règlement sur les produits antiparasitaires*, C.R.C. 1978, ch. 1253, adoptés au niveau fédéral. Les appétentes affirment également que le règlement va à l'encontre de la *Loi sur les pesticides* du Québec, L.R.Q., ch. P-9.3. Comme le souligne le juge L'Heureux-Dubé, le critère servant à déterminer s'il existe un conflit d'application est établi dans *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 187 et 189. Il faut qu'il y ait un conflit véritable, en ce sens que l'observation d'un ensemble de règles entraîne l'inobservation de l'autre. Le juge Binnie a récemment réexaminé et réaffirmé ce principe dans *M. & D. Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961, par. 39-42. Le critère fondamental demeure l'impossibilité de se conformer aux deux textes. Dans cette optique, le présumé conflit avec la législation fédérale n'existe tout simplement pas. La loi fédérale et son règlement d'application ne font qu'autoriser l'importation, la fabrication, la vente et la distribution des produits au Canada. Ils ne visent pas à prescrire où, quand et comment les pesticides peuvent ou doivent être utilisés. Ils ne confèrent pas aux fabricants et aux distributeurs de pesticides l'autorisation générale de les appliquer partout où il y a un bout de verdure au Canada. Cette question relève d'autres régimes législatifs et réglementaires. Il n'y a pas non plus conflit avec la *Loi sur les pesticides* de la province, et je souscris à l'analyse du juge L'Heureux-Dubé sur ce point particulier. L'argument reposant sur le conflit d'application n'est donc pas fondé.

Les questions de droit administratif

Les problèmes les plus graves mentionnés dans le pourvoi portent sur des questions de droit administratif pur. Dans leurs arguments, les appétentes

istrative law as applied in the field of municipal governance.

48

The appellants assert that no provision of the *C.T.A.* authorizes By-law 270. If such legislative authority exists, the by-law is nevertheless void because of its discriminatory and prohibitory nature. A solution is to be found in the principles governing the interpretation and application of the laws governing cities and towns like the respondent in the Province of Quebec. Interesting as they may be, references to international sources have little relevance. They confirm the general importance placed in modern society and shared by most citizens of this country on the environment and the need to protect it. Nevertheless, no matter how laudable the purpose of the by-law may be, and although it may express the will of the members of the community to protect their local environment, the means to do it must be found somewhere in the law. The issues in this case remain strictly, first, whether the *C.T.A.* authorizes municipalities to regulate the use of pesticides within their territorial limits and, second, whether the particular regulation conforms with the general principles applicable to delegated legislation.

49

A tradition of strong local government has become an important part of the Canadian democratic experience. This level of government usually appears more attuned to the immediate needs and concerns of the citizens. Nevertheless, in the Canadian legal order, as stated on a number of occasions, municipalities remain creatures of provincial legislatures (see *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409, 2000 SCC 45, at paras. 33-34; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470, 2001 SCC 15, at paras. 29 and 58-59). Municipalities exercise such powers as are granted to them by legislatures. This principle is illustrated by numerous decisions of our Court (see, for example, *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *R. v. Sharma*, [1993] 1 S.C.R. 650). They are not endowed with residuary general powers, which would allow them to exercise dor-

soulèvent des questions de droit administratif fondamentales appliquées au domaine de la gestion des affaires municipales.

Les appelantes affirment qu'aucune disposition de la *L.C.V.* n'autorise le règlement 270. Même si une telle autorisation législative existe, le règlement est nul en raison de son caractère discriminatoire et prohibitif. Une solution se trouve dans les principes régissant l'interprétation et l'application des lois visant les cités et les villes comme l'intimité au Québec. Si intéressants soient-ils, les renvois aux sources internationales ne sont guère pertinents. Ils confirment l'importance que la société moderne accorde généralement à l'environnement et à la nécessité de le protéger, position que partagent la plupart des citoyens de ce pays. Cependant, aussi louable que soit l'objet du règlement et même si celui-ci exprime la volonté des membres de la collectivité de protéger son environnement local, les moyens pour ce faire doivent être tirés de la loi. En l'espèce, les questions se résument à savoir, premièrement, si la *L.C.V.* autorise les municipalités à réglementer l'utilisation des pesticides sur leur territoire et, deuxièmement, si le règlement en cause respecte les principes généraux applicables à la législation déléguée.

La tradition d'établir des administrations publiques locales fortes est devenue une partie importante de l'expérience démocratique canadienne. Cet ordre d'administration publique paraît généralement mieux adapté aux besoins et préoccupations immédiats des citoyens. Toutefois, dans l'ordre juridique canadien, comme on l'a dit à plusieurs reprises, les municipalités demeurent des créatures du législateur provincial (voir *Public School Boards' Assn. of Alberta c. Alberta (Procureur général)*, [2000] 2 R.C.S. 409, 2000 CSC 45, par. 33-34; *Ontario English Catholic Teachers' Assn. c. Ontario (Procureur général)*, [2001] 1 R.C.S. 470, 2001 CSC 15, par. 29 et 58-59). Les municipalités exercent les pouvoirs que leur confèrent les législatures. Nombre de décisions de notre Cour illustrent ce principe (voir, par exemple, *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368; *R. c. Sharma*, [1993] 1 R.C.S. 650). Elles ne possèdent aucun pouvoir résiduaire

mant provincial powers (see I. M. Rogers, *The Law of Canadian Municipal Corporations* (2nd ed. (loose-leaf)), Cum. Supp. to vol. 1, at pp. 358 and 364; J. Hétu, Y. Duplessis and D. Pakenham, *Droit Municipal: Principes généraux et contentieux* (1998), at p. 651). If a local government body exercises a power, a grant of authority must be found somewhere in the provincial laws. Although such a grant of power must be construed reasonably and generously (*Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13), it cannot receive such an interpretation unless it already exists. Interpretation may not supplement the absence of power.

The appellants argue that no power to regulate the use of pesticides was delegated to municipalities in Quebec, either under a specific grant of power or under the more general provisions of s. 410(1) *C.T.A.* The respondent concedes that the only provision under which its by-law can be upheld is the general clause of s. 410(1). It no longer asserts that it could be supported under s. 412(32) concerning toxic materials.

As the appellants interpret a general clause like s. 410 *C.T.A.*, it would amount to an empty shell. Any exercise of municipal regulatory authority would require a specific and express grant of power. The history of the *C.T.A.* confirms that the Quebec legislature has generally favoured a drafting technique of delegating regulatory or administrative powers to municipalities through a myriad of specific provisions, which are amended frequently. The reader is then faced with layers of complex and sometimes inconsistent legislation.

In the case of a specific grant of power, its limits must be found in the provision itself. Non-included powers may not be supplemented through the use of the general residuary clauses often found in municipal laws (*R. v. Greenbaum*, [1993] 1 S.C.R. 674).

général qui leur permettrait d'exercer des pouvoirs provinciaux non attribués (voir I. M. Rogers, *The Law of Canadian Municipal Corporations* (2^e éd. (feuilles mobiles)), suppl. cum. du vol. 1, p. 358 et 364; J. Hétu, Y. Duplessis et D. Pakenham, *Droit Municipal: Principes généraux et contentieux* (1998), p. 651). Une administration publique locale ne peut exercer un pouvoir que s'il est conféré par une loi provinciale. Certes, ce pouvoir doit être interprété de façon raisonnable et libérale (*Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13), mais il ne peut recevoir cette interprétation que s'il existe. L'interprétation ne peut pas suppléer à l'absence de pouvoir.

Les apppellantes prétendent qu'aucun pouvoir de réglementation de l'utilisation des pesticides n'a été délégué aux municipalités du Québec, que ce soit par un pouvoir particulier ou en vertu des dispositions plus générales du par. 410(1) *L.C.V.* L'intimée admet que la seule disposition qui permette de confirmer la légalité de son règlement est la clause générale du par. 410(1). Elle n'affirme plus que son règlement pourrait s'appuyer sur le par. 412(32), qui porte sur les matières toxiques.

Si l'on acceptait l'interprétation par les apppellantes d'une clause générale comme l'art. 410 *L.C.V.*, cette disposition équivaudrait à une coquille vide. L'exercice de tout pouvoir de réglementation municipal nécessiterait un pouvoir particulier et explicite. L'historique de la *L.C.V.* confirme que la législature du Québec privilégie généralement la technique de rédaction consistant à déléguer des pouvoirs de réglementation ou administratifs aux municipalités par d'innombrables dispositions particulières qui sont modifiées fréquemment. Le lecteur se retrouve donc avec une série de dispositions législatives complexes et parfois incohérentes.

Dans le cas d'un pouvoir particulier, la disposition elle-même doit en préciser les limites. L'application des clauses générales relatives aux pouvoirs non attribués que comportent souvent les lois municipales ne peut pas suppléer aux pouvoirs non visés (*R. c. Greenbaum*, [1993] 1 R.C.S. 674).

53

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).

54

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 prop-

La question qui se pose en l'espèce est différente : en l'absence d'un pouvoir particulier, une disposition de bien-être général comme le par. 410(1) autorise-t-elle le règlement 270? Il faut donner un sens à une disposition comme le par. 410(1). Celui-ci correspond à la réalité que la législature et ses rédacteurs ne peuvent pas prévoir tous les cas particuliers. Il paraît donc logique, sur les plans législatif et administratif, de recourir à de telles dispositions pour conférer aux administrations publiques locales le pouvoir résiduaire d'intervenir en cas d'imprévu et de changements ainsi que de traiter des questions nouvelles ou évolutives relativement au bien-être de la collectivité locale vivant sur leur territoire. On ne peut toutefois pas interpréter une telle disposition comme conférant de façon absolue des pouvoirs provinciaux. Il ne suffit pas qu'une question particulière soit devenue une préoccupation urgente selon la collectivité locale. Cette préoccupation doit avoir trait à des problèmes touchant la collectivité comme entité locale et non pas comme membre de la société au sens large. Elle doit être étroitement liée aux intérêts immédiats de la collectivité se trouvant dans les limites territoriales définies par la législature pour ce qui concerne toute question pour laquelle l'intervention des administrations publiques locales peut se révéler utile. Dans *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, notre Cour a souligné la portée locale d'un tel pouvoir. Elle ne permet pas aux administrations publiques locales et aux collectivités locales d'exercer des pouvoirs pour des questions ne relevant pas du domaine traditionnel des intérêts municipaux, même si les pouvoirs municipaux doivent être interprétés de façon large et libérale (voir F. Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Governments* (1996), p. 17-24).

En l'espèce, l'objet du règlement relève des activités normales des administrations publiques locales. Il s'agit de l'utilisation et de la protection de l'environnement local de la collectivité. La réglementation vise les problèmes liés à l'utilisation des terres et des biens, et elle porte sur des préoccupations de quartier qui ont toujours relevé du domaine d'activité des administrations

erly authorized by s. 410(1). I must then turn briefly to the second part of the administrative law argument raised by the appellants, that the particular exercise of the existing municipal power breached principles of delegated legislation against prohibitory and discriminatory regulations.

Two basic and longstanding principles of delegated legislation state that a by-law may not be prohibitory and may not discriminate unless the enabling legislation so authorizes. (See P. Garant, *Droit administratif* (4th ed. 1996), vol. 1, at pp. 407 *et seq.*; R. Dussault and L. Borgeat, *Administrative Law: A Treatise* (2nd ed. 1985), vol. 1, at pp. 435 *et seq.*; Hétu, Duplessis and Pakenham, *supra*, at pp. 677-82 and 691-96.) The drafting technique used in the present case creates an apparent problem. On its face, the by-law involves a general prohibition and then authorizes some specific uses. This obstacle may be overcome through global interpretation of the by-law. When it is read as a whole, its overall effect is to prohibit purely aesthetic use of pesticides while allowing other uses, mainly for business or agricultural purposes. It does not appear as a purely prohibitory legal instrument. As such, it conforms with this first basic principle of municipal law. There remains the problem of the discriminatory aspect of the by-law. Although the by-law discriminates, I agree with L'Heureux-Dubé J. that this kind of regulation implies a necessary component of discrimination. There can be no regulation on such a topic without some form of discrimination in the sense that the by-law must determine where, when and how a particular product may be used. The regulation needed to identify the various distinctions between different situations. Otherwise, no regulation would have been possible. An implied authority to discriminate was then unavoidably part of the delegated regulatory power.

publiques locales. Par conséquent, le règlement était autorisé en bonne et due forme par le par. 410(1). Je dois donc aborder brièvement la deuxième partie de l'argument de droit administratif soulevé par les appelantes, selon lequel l'exercice particulier du pouvoir municipal existant a contrevenu aux principes de législation déléguée interdisant la prise de règlements prohibitifs et discriminatoires.

Selon deux principes fondamentaux établis depuis longtemps en matière de législation déléguée, un règlement ne peut pas être prohibitif et discriminatoire à moins que la loi habilitante ne l'autorise. (Voir P. Garant, *Droit administratif* (4^e éd. 1996), vol. 1, p. 407 et suiv.; R. Dussault et L. Borgeat, *Traité de droit administratif* (2^e éd. 1984), t. I, p. 557 et suiv.; Hétu, Duplessis et Pakenham, *op. cit.*, p. 677-682 et 691-696.) La technique de rédaction employée en l'espèce crée un problème apparent. Le règlement établit de prime abord une prohibition générale pour ensuite permettre certaines utilisations particulières. L'interprétation globale du règlement permet de contourner cet obstacle. Lu dans son ensemble, le règlement a comme effet d'interdire l'utilisation des pesticides pour des raisons purement esthétiques tout en permettant d'autres utilisations, surtout pour des activités commerciales et agricoles. Il ne paraît pas constituer un texte juridique purement prohibitif. À ce titre, il respecte ce premier principe fondamental du droit municipal. Il reste le problème de l'aspect discriminatoire du règlement. Bien que le règlement soit discriminatoire, je conviens avec le juge L'Heureux-Dubé que ce genre de réglementation comporte nécessairement une composante de discrimination. Il ne peut y avoir aucune réglementation sur un tel sujet sans une certaine forme de discrimination, en ce sens que le règlement doit établir où, quand et comment un produit particulier peut être utilisé. La réglementation devait établir les diverses distinctions entre les différentes situations. Autrement, aucune réglementation n'aurait été possible. Le pouvoir de réglementation délégué comportait donc inévitablement le pouvoir implicite de faire de la discrimination.

56

For these reasons, the appeal is dismissed, with costs to the respondent the Town of Hudson.

Appeal dismissed with costs.

Solicitors for the appellants: Fraser Milner Casgrain, Montréal.

Solicitors for the respondent: Bélanger Sauvé, Montréal.

Solicitors for the interveners Federation of Canadian Municipalities, Nature-Action Québec Inc. and World Wildlife Fund Canada: Sierra Legal Defence Fund, Toronto.

Solicitors for the interveners Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, Parents' Environmental Network, Healthy Lawns — Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond: Canadian Environmental Law Association, Toronto.

Solicitors for the intervenor Fédération interdisciplinaire de l'horticulture ornementale du Québec: Ogilvy Renault, Québec.

Pour ces motifs, le pourvoi est rejeté avec dépens en faveur de l'intimée la ville de Hudson.

Pourvoi rejeté avec dépens.

Procureurs des appelantes : Fraser Milner Casgrain, Montréal.

Procureurs de l'intimée : Bélanger Sauvé, Montréal.

Procureurs des intervenants la Fédération canadienne des municipalités, Nature-Action Québec Inc. et le Fonds mondial pour la nature (Canada) : Sierra Legal Defence Fund, Toronto.

Procureurs des intervenants Toronto Environmental Alliance, Sierra Club du Canada, l'Association canadienne du droit de l'environnement, Parents' Environmental Network, Healthy Lawns — Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee et Dr Merryl Hammond : Association canadienne du droit de l'environnement, Toronto.

Procureurs de l'intervenante la Fédération interdisciplinaire de l'horticulture ornementale du Québec : Ogilvy Renault, Québec.

TAB 10

Croplife Canada v. City of Toronto*

[Indexed as: Croplife Canada v. Toronto (City)]

75 O.R. (3d) 357
[2005] O.J. No. 1896
Docket: C41220

Court of Appeal for Ontario,
Goudge, Feldman and Lang JJ.A.
May 13, 2005

* Application for leave to appeal to the Supreme Court of Canada was dismissed with costs November 17, 2005 (Bastarache, LeBel and Deschamps).

Municipal law -- By-laws -- Validity -- Section 130 of Municipal Act to be given broad and purposive interpretation -- City having authority under general welfare power in s. 130 of Municipal Act to enact by-law limiting application of pesticides within City -- By-law not invalid because of existence of federal and provincial legislation dealing with same subject matter -- Municipal Act, 2001, S.O. 2001, c. 25, s. 130.

The respondent enacted a by-law which regulated the use of pesticides within the city under s. 130 of the Municipal Act, 2001. Section 130, which is in Part III of the Act, entitled "Specific Municipal Powers", provides that "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." The appellant, a trade association that included pesticide producers, challenged the authority of the respondent to enact the by-law. The motion judge upheld the by-law. The appellant appealed.

Held, the appeal should be dismissed.

The Act gives municipalities two kinds of powers. Part II of the Act 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 Act gives municipalities specifically defined by-law making powers. Section 9(1) of the Act provides that "Sections 8 and 11 are to 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 [page358] enhance their ability to respond to municipal issues". The motion judge did not err in applying the broad and purposive approach to the interpretation of s. 130, despite the fact that that section is not one of the spheres of jurisdiction in Part II of the Act, but is a specific power under Part III. Historically, the courts interpreted the powers of municipalities to enact by-laws restrictively, applying Dillon's Rule, 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". However, in the 1990s, the Supreme Court of Canada began to move away from Dillon's Rule, favouring instead a broad and purposive approach that allowed for a more generous interpretation of municipal powers, with a view towards showing deference to, and respect for, the decisions of locally elected officials. Although s. 9(1) of the Act is contained in Part II 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. 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 be applied when interpreting other parts or sections of the Act. In light of the development of the jurisprudence in this area over the last 12 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. 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 tools they need to tackle the challenges of governing in the 21st century".

The phrase "matters not specifically provided for in this Act or any other Act" in s. 130 merely restates, and modestly extends, the "rule against circumvention", that is, the rule prohibiting a municipality from making by-laws using the general welfare power to circumvent restrictions on its ability to enact by-laws regarding a particular subject matter found elsewhere in the Act. Under s. 130, a matter can be regulated by by-law so long as there is no other specifically related by-law making power elsewhere in the Act or in any other act. 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 Act. There is no specific municipal power to regulate pesticide use contained in the Act or in any other Ontario statute. Therefore, the limiting words of s. 130 do not preclude enactment of the pesticide by-law.

The by-law is not in conflict with federal or provincial legislation. The requirement of the general welfare provision in s. 102 of the former Act that by-laws not be "contrary to law" has been removed from s. 130 and is now set out in s. 14 of the Act, which provides that "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". Section 14 applies to by-laws made under Part III, including s. 130. The appellant argued that because the "impossibility of dual compliance" conflicts rule is articulated in s. 14, the words "matters not specifically provided for by this Act or any other Act" in s. 130 cannot be

a reference to the same conflicts rule, but must have another [page359] meaning, and 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 argued that the Pest Control Products Act, R.S.C. 1985, c. P-9 ("PCPA") and the Pesticides Act, R.S.O. 1990, c. P.11 together formed a comprehensive regime for the regulation of pesticides. Therefore, the subject matter is provided for in other legislation, causing the by-law to be ultra vires. That argument could not be accepted. As stated above, there is no basis to read the phrase "matters not specifically provided for by this Act or any other Act" as anything more than a restatement and extension of the rule against circumvention referring to other specific municipal by-law making powers. Moreover, the appellant's approach 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. The validity of tri-level regulation has been unambiguously endorsed by the Supreme Court of Canada as the accepted model in our federal system. It was not impossible to comply with the pesticide by-law at the same time as the federal PCPA or the Ontario Pesticides Act, and the by-law did not frustrate the purpose of those Acts. Therefore, the by-law was not rendered inoperative by the conflicts test in s. 14 of the Act.

114957 Canada Lte (Spraytech, Socit d'arossage) v. Hudson (Town), [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42, 200 D.L.R. (4th) 419, 171 N.R. 201, 19 M.P.L.R. (3d) 1, 2001 SCC 40; Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, [2005] S.C.J. No. 1, 257 Sask. R. 171, 250 D.L.R. (4th) 411, 331 N.R. 116, 342 W.A.C. 171, 2005 SCC 13, apld

United Taxi Drivers Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485, [2004] S.C.J. No. 19, 346 A.R. 4, 236 D.L.R. (4th) 385, 318 N.R. 170, 320 W.A.C. 4, [2004] 7 W.W.R. 603, 46 M.P.L.R. (3d) 1, 2004 SCC 19, 50 M.V.R. (4th) 1, 26 Alta. L.R. (4th) 1, 18 R.P.R. (4th) 1, consd

Other cases referred to

Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp., [1948] 1 KB 223, [1947] 2 All E.R. 680, [1948] L.J.R. 190, 1947 W.L. 10584, 45 L.G.R. 635, 63 T.L.R. 623 (C.A.); Hamilton (City) v. Hamilton Distillery Co. (1907), 38 S.C.R. 239; Howard v. Toronto (City) (1928), 61 O.L.R. 563, [1928] 1 D.L.R. 952 (C.A.); Kuchma v. Tache (Rural Municipality), [1945] S.C.R. 234, [1945] 2 D.L.R. 13; Morrison v. Kingston (City), [1938] O.R. 21, 69 C.C.C. 251 (C.A.); Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138; Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342, [2000] S.C.J. No. 14, 76 B.C.L.R. (3d) 201, 183 D.L.R. (4th) 1, 251 N.R. 42, [2000] 6 W.W.R. 403, 9 M.P.L.R. (3d) 1; O'Grady v. Sparling, [1960] S.C.R. 804, 25 D.L.R. (2d) 145, 33 W.W.R. 360, 128 C.C.C. 1, 33 C.R. 293; R. v. Greenbaum, [1993] 1 S.C.R. 674, [1993] S.C.J. No. 24, 100 D.L.R. (4th) 183, 149 N.R. 114, 79 C.C.C. (3d) 158, 19 C.R. (4th) 347, 14 M.P.L.R. (2d) 1 (sub nom. R. v. Sharma); R. v. Kingston (City) (2004), 70 O.R. (3d) 577, [2004] O.J. No. 1940, 187 O.A.C. 143, 240 D.L.R. (4th) 734, 185 C.C.C. (3d) 446, 7 C.E.L.R.(3d) 198 (C.A.); Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231, [1994] S.C.J. No. 15, 88 B.C.L.R. (2d) 145, 110 D.L.R. (4th) 1, 163 N.R. 81, [1994] 3 W.W.R. 609, 20 M.P.L.R. (2d) 1; Toronto (City) v. Goldlist Properties Inc. (2003), 67 O.R. (3d) 441, [2003] O.J. No. 3931, 232 D.L.R. (4th) 298, 44 M.P.L.R. (3d) 1 (C.A.); Verdun (City) v. Sun Oil Co., [1952] 1 S.C.R. 222, [1952] 1 D.L.R. 529; Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District), [2003] B.C.J. No. 1581, 2003 BCCA 403, 15 B.C.L.R. (4th) 229 (C.A.) [page360]

Statutes referred to

Cities and Towns Act, R.S.Q., c. C-19, s. 410 [as am.]

Fire Protection and Prevention Act, 1997, S.O. 1997, c. 4, s. 7.1 [as am.]

Fluoridation Act, R.S.O. 1990, c. F.22, s. 2.1 [as am.]

Milk Act, R.S.O. 1990, c. M.12, s. 20 [as am.]

Municipal Act, R.S.O. 1990, c. M.45, s. 102 [as am.]

Municipal Act, 2001, S.O. 2001, c. 25, ss. 8, 9, 11, 14, 15,
130

Municipal Government Act, S.A. 1994, c. M-26.1

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

Pest Control Products Act, S.C. 2002, c. 28 [not in force]

Pesticides Act, R.S.O. 1990, c. P.11

Pesticides Act, R.S.Q., c. P-9.3

Tobacco Act, S.C. 1997, c. 13, ss. 19, 30

Tobacco Control Act, S.S. 2001, c. T-14.1, s. 6

Authorities referred to

Bergen Ministerial Declaration on Sustainable Development in
the ECE Region, UN Doc. A.CONF151/PC/10, (1990) 1 Y.B. Int'l
Env. L., 429, 4312

Dillon on Municipal Corporations, 4th ed.

Hogg, P.W., Constitutional Law of Canada, 4th ed., looseleaf
(Scarborough, Ont.: Thomson-Carswell, 1997)

Makuch, S.M., N. Craik and S.B. Leisk, Canadian Municipal and
Planning Law, 2nd ed. (Toronto: Thomson-Carswell, 2004)

Ministry of Municipal Affairs and Housing, A Proposed New
Municipal Act: Draft Legislation, Including Explanatory Notes
(Consultation Document) (Ontario: Queen's Printer, 1998)

Ontario, Legislative Assembly, Official Report of Debates

Sullivan, R., Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ont.: Butterworths Canada Ltd., 2002)

APPEAL from the judgment of Somers J. of the Superior Court of Justice, reported at (2003), 68 O.R. (3d) 520, [2003] O.J. No. 4828 (S.C.J.), upholding the validity of a by-law.

J. Scott Maidment, Jennifer Dent and Lisa Parliament, for appellant.

Graham Rempe, Susan L. Ungar and Mark Siboni, for respondent.

Justin Duncan and Robert V. Wright, for intervenors World Wildlife Fund and Federation of Canadian Municipalities.

Paul Muldoon and Marlene Cashin, for 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.

The judgment of the court was delivered by

[1] FELDMAN J.A.--- The issue in this case is whether the City of Toronto had the authority under s. 130 of the new [page361] Municipal Act, 2001, S.O. 2001, c. 25 (the "Municipal Act, 2001" or the "new Act") to enact By-Law No. 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, [2001] S.C.J. No. 42 ("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
[page362]

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 'aequick-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; [page363]

- (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. [page364]

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. [page365]

[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 [page366] 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 and Signe B. Leisk, Canadian Municipal and Planning Law, 2nd ed. (Toronto: Thomson-Carswell, 2004) at p. 82. In *Verdun (City) v. Sun Oil Co.*, [1952] 1 S.C.R. 222, [1952] 1 D.L.R. 529, Fauteux J. articulated the restrictive approach in this way at p. 228 S.C.R.: "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. [page367]

[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, [1994] S.C.J. No. 15, 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, [1928] 1 D.L.R. 952 (C.A.); *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223, [1947] 2 All E.R. 680 (C.A.); and *Kuchma v. Tache (Rural Municipality)*, [1945] S.C.R. 234, [1945] 2 D.L.R. 13. She then observed at p. 244 S.C.R.:

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 S.C.R.:

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, [2000] S.C.J. No. 14; United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485, [2004] S.C.J. No. 19; 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. [page368] 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 licences it issued. Although he was dealing with the interpretation of broadly worded powers in the Act to pass by-laws to regulate transportation and licences, 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 Quebec, nor inconsistent with any special provision of this Act or of the Charter;

[22] Writing for the majority of the Supreme Court, L'Heureux-Dub 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), [page369] 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-Dub 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, [1993] S.C.J. No. 24.

[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-Dub 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-Dub 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-Dub J. then quoted the following passage from Greenbaum, *supra*, at p. 689 S.C.R.:

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-Dub 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-Dub 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 [page370] 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-Dub 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-Dub 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-Dub J. applied the "impossibility of dual compliance" test from *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 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-Dub 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-Dub 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 [See Note 1 at the end of the document].

[29] Turning to the Quebec Pesticides Act, L'Heureux-Dub 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 [page371] 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?
- (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 [page372] 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 [See Note 2 at the end of the document]. 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 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 12 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 [page373] *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 (City) v. Goldlist Properties* (2003), 67 O.R. (3d) 441, [2003] O.J. No. 3931 (C.A.), at p. 461 O.R., 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 [See Note 3 at the end of the document]. 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 the municipality and its inhabitants. [page374] 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. [page375]

[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 p. 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.

[page376] See Municipal Act, 2001, *supra*, at ss. 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*

(City), [1938] O.R. 21, 69 C.C.C. 251 (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. 26 O.R., p. 255 C.C.C.):

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 sec. 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 sec. 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.

(4) 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 [page377] 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-Dub 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 [page378] the appellant's position is that, contrary to the approach endorsed by L'Heureux-Dub 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 pp. 16-7 to 16-13. Moreover, the [page379] 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*, *supra*. 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 v. Sparling*, [1960] S.C.R. 804, 25 D.L.R. (2d) 145], at p. 820 S.C.R." 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. [page380]

[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 [See Note 4 at the end of the document].

[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.

[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." [page381] 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-Dub 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, [2004] O.J. No. 1940 (C.A.), at para. 86; *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District)*, [2003] B.C.J. No. 1581, 15 B.C.L.R. (4th) 229 (C.A.), at para. 80.

[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; [and] (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 [page382] 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.

Appeal dismissed. [page383]

Notes

Note 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] 1 S.C.R. 188, [2005] S.C.J. No. 1, 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.

Note 2: Section 8 provides:

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.

Note 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.

Note 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."

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

– and –

KANATA GREENSPACE PROTECTION

COALITION

Intervener

Court File No. 19-81809

**ONTARIO
SUPERIOR COURT OF JUSTICE**
Proceeding commenced at Ottawa

**SUPPLEMENTAL BOOK OF AUTHORITIES
OF THE APPLICANT**

BORDEN LADNER GERVAIS LLP

World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

T: 613.237.5160
F: 613.230.8842

Kirsten Crain LSO# 44529U
E: kcrain@blg.com
T: 613.787.3741 direct

Emma Blanchard LSO# 53359S
E: eblanchar@blg.com
T: 613.369.4755 direct

Neil Abraham LSO# 71852L
E: nabraham@blg.com
T: 613.787.3587 direct

Lawyers for the Applicant, City of Ottawa