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Are General Welfare Provisions Carte Blanche for Municipalities?
A case study exploring authority to enact a pesticide bylaw in Stratford, Prince Edward Island

LAWS 2225 – Environmental Law placement

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FOREWORD

The following paper is submitted in partial fulfillment of the requirements of LAWS 2225 – the Environmental Law Placement at the Schulich School of Law. The course is designed to offer clinical experience to senior law students in the environmental field. The placement requires students to work with a local stakeholder, in this instance the East Coast Environmental Law Association (ECELAW). I was assigned for the winter 2014 semester to work under the direction of Lisa Mitchell, ECELAW lawyer, in advising a community group in Stratford, Prince Edward Island regarding a potential municipal pesticide ban. My project consists of three components: a research memo to Lisa Mitchell regarding Stratford's authority to restrict cosmetic pesticides; an opinion letter to the client regarding same; and an academic paper on the topic using Stratford as a case study. For the purposes of academic integrity, it was understood that I would draw heavily on my research memo in composing my academic paper.

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1. INTRODUCTION

Municipal bylaws restricting cosmetic pesticide use are now commonplace in Canada.[1] The landmark Supreme Court of Canada (SCC) case, *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*[2] ["*Spraytech*"], carved out new territory allowing municipalities to engage in this type of regulation. Numerous other cases have since upheld municipalities' authority to create bylaws on matters not expressly delegated in their enabling statutes.[3] The authority to do so is found in a municipality's "general welfare" provision, a broadly worded section specifically designed to allow municipalities to respond to unforeseen challenges.[4] Arguably, this increased use of general welfare provisions is representative of broader trends in administrative law.[5] In the past several decades, courts have become increasingly deferential to the democratically legitimate decisions of administrative bodies – particularly those of municipalities.[6]

Nevertheless, the scope of power granted in any given enabling statute is not unlimited.[7] Given the differences in wording from one general welfare provision to the next, it makes sense that a municipal council might doubt its ability to regulate in an area not specifically delegated – even in light of such decisions as *Spraytech*. Accordingly, this paper aims to explore the boundaries of municipal general welfare provisions via a case study of Stratford, Prince Edward Island. In particular, the following sections will set

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[1] Ontario Pesticide Reform, "Canadian Pesticide Bylaws," online: <http://www.pesticidereform.ca/canadianpesticidebylaws.htm> [Pesticide Reform].
[2] [*Spraytech*].
[3] *Croplife Canada v Toronto (City)*, (2005), 75 OR (3d) 357 (ONCA) [*Croplife*].
4500911 Manitoba Ltd. v Stuartburn (Rural Municipality), 2003 MBCA 122 [*Stuartburn*].
Darvonda Nurseries Ltd. v Greater Vancouver (Regional District), (2009) 51 MPLR (4th) 56 (BCSC) [*Darvonda*].
[4] *Spraytech*, *supra* note 2 at para 18.
[5] Colleen M. Flood and Lorne Sossin, *Administrative Law in Context* (Toronto: Edmond Montgomery Publications, 2013) at 29 [Flood].
[6] Stanley M. Makuch et al., *Canadian Municipal and Planning Law*, 2nd ed (Toronto: Thompson Canada, 2004) [MaKuch].
[7] *Spraytech*, *supra* note 2 at para 20.

out relevant background information, case law, commentary, and legislation and will apply these in determining whether Stratford has authority to pass a bylaw restricting cosmetic pesticide use. Altogether, I conclude Stratford probably does have this authority.

2. CASE STUDY – BACKGROUND

On June 27, 2013, Maureen Kerr of Stratford, PEI submitted a question to ECELAW regarding the possibility of restricting pesticide use in her community. In particular, Ms. Kerr was interested in whether the Town of Stratford had authority to enact a cosmetic pesticide ban under the *Charlottetown Area Municipalities Act*[8] ["CAMA"].

On July 11, 2013, a town hall meeting was held in Stratford. A video recording of that meeting shows David Dunphy, Mayor of Stratford, responding to questions about pesticide use from concerned citizens. The Mayor expressed interest in moving forward with a pesticide ban subject to an investigation into whether the Town had authority to enact the necessary bylaw.

On July 16, 2013, Michael Drake, a PEI lawyer, issued an opinion memo to James Aylward, the MLA for Stratford Kinlock. In short, that memo expressed reservations about whether Stratford has the power to enact a bylaw restricting pesticide use. Michael Drake noted that an argument could be made in favour of this authority, but that it could be costly and time consuming to uphold the bylaw should it be challenged by way of judicial review.

In the following weeks, Maureen Kerr continued correspondence with ECELAW. Ms. Kerr and Lisa Mitchell agreed that ECELAW would undertake further research on this matter.

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[8] RSPEI 1988, c C-4.1 [CAMA].

The issue, therefore, is whether the Town of Stratford has authority under the CAMA to pass a bylaw restricting pesticide use. Specifically, the question is about the breadth of Stratford's own general welfare provision under section 139 of the CAMA. That provision is as follows:

> 139. (1) The council may make bylaws that are considered expedient and are not contrary to this or any other Act or regulations for **the peace, order and good government of the town**, the provision of municipal services within the town, the exercise of any powers under section 96, town elections, and any other matter within the jurisdiction of the town.[9] (emphasis added)

3. CASE STUDY – ANALYSIS

Case law regarding scope of municipal authority

As noted, *Spraytech* is the defining case on municipal pesticide bylaws. There, the Town of Hudson passed a bylaw restricting cosmetic pesticides as a result of health concerns. This was done pursuant to section 410 of the Quebec *Cities and Towns Act*,[10] which stated that the council "may make by-laws to secure peace, order, good government, health and general welfare in the territory of the municipality."[11]

A group of landscaping companies challenged the bylaw as *ultra vires* the municipality. They argued first that the bylaw was incompatible with the provincial pesticide legislation. They argued second that the provincial and federal statutes represented a complete scheme with no room for municipal bylaws. The Appellants argued third that the bylaw impermissibly imposed an absolute ban. They also argued the bylaw was discriminatory in the municipal law sense.[12]

None of these arguments were effective. Instead, Justice L'Heureux-Dubé upheld Hudson's bylaw primarily on the basis that it fell "squarely" within the "health" component

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[9] *Ibid* at s 139(1).
[10] RSQ, c. C-19, s 410.
[11] *Ibid* at s 140.
[12] *Spraytech*, *supra* note 2 at paras 20-26.

of the power granted under the *Cities and Towns Act*.[13] It was not necessary to have scientific evidence that pesticides would actually be detrimental to the health of residents.

On the issue of compatibility with provincial legislation, the Court applied the "impossibility of dual compliance test" from *Multiple Access Ltd. v McCutcheon*.[14] The test states that unless compliance with a bylaw makes it impossible to comply with a provincial or federal legislative provision, the bylaw will be valid. On this point, Justice L'Heureux-Dubé at paragraph 37 cited the established principle that a bylaw is not void simply because it imposes stricter standards than legislation on the same topic.[15] A bylaw may be more restrictive, but not less so. In other words, there is no conflict unless one provision compels what the other forbids. Applying these principles to facts, the Court stated that the provincial scheme was permissive and non-exhaustive, leaving room for a bylaw. It was possible to comply with both regimes:

> 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.[16]

Further, the Court reasoned there was no conflict in purpose as both regimes were concerned with limiting exposure to potentially dangerous substances.[17]

Regarding the argument that the federal and provincial schemes comprised a complete regime with no room for municipal regulation, the SCC disagreed with the Appellants. On the contrary, the provincial Act, by stating that it would prevail over any

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[13] *Ibid* at para 27.
[14] [1982] 2 SCR 161 [*Multiple Access*].
[15] *Spraytech*, *supra* note 2 at para 37.
[16] *Ibid* at para 39.
[17] *Ibid* at para 35.

conflicting municipal bylaw, specifically envisioned that complementary bylaws might exist.[18]

Regarding the "absolute ban" alleged by the Appellants, the Court held the bylaw did no such thing. The bylaw made exceptions for many non-cosmetic uses of pesticides (primarily agriculture). Regarding the Appellants' discrimination argument, the Court held that, without drawing any distinctions, the bylaw could not achieve its permissible goal.[19]

More generally, Justice L'Heureux-Dubé made several important points about the review of municipal decisions. At paragraph 18 she noted that general welfare provisions are specifically intended to avoid problems of *ultra vires*.[20] A restrictive and formalistic reading therefore defeats the purpose. At paragraph 19, she held:

> …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.[21]

Justice L'Heureux-Dubé also cited Justice McLachlin in *Shell Canada Products Ltd. v Vancouver (City)*[22] for the idea that modern courts will respect the democratic legitimacy of elected municipal councils. Further, where powers are not expressly conferred, *Shell* stated that courts should take a "benevolent construction" approach and confer powers by "reasonable implication."[23]

Applying *Spraytech* to the present facts, the results look mostly favourable. With the exception of the explicit "health" wording, virtually all other aspects of the decision weigh in favour of Stratford's authority to enact a similar bylaw. The dual compliance test should work precisely the same way for Stratford as it did for Hudson. The overall factual similarities, the broader policy reasoning and the response to the Appellants' arguments

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[18] *Ibid* at para 26.
[19] *Ibid* at para 28.
[20] *Ibid* at para 18.
[21] *Ibid* at para 19.
[22] [1994] 1 SCR 231 [*Shell*].
[23] *Spraytech, supra* note 2 at para 23.

also work well for Stratford. The extent to which the "health" wording is a problem may be mitigated by principles of deference and by looking at the underlying purpose of all general welfare provisions.

Four years after *Spraytech*, the SCC's reasoning was applied in *Croplife Canada v Toronto (City)* ["*Croplife*"].[24] Similar to *Spraytech*, the municipality enacted a bylaw restricting cosmetic pesticides pursuant to its general welfare power under the Ontario *Municipal Act*, which stated at section 130 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."[25] The Appellant argued that *Spraytech* should not apply, making broadly repetitive arguments about paramountcy and a complete legislative scheme leaving no room for a bylaw.

The Ontario Court of Appeal was faithful to *Spraytech*. It cited *Shell* for the idea of deference toward municipalities, stating that elected officials should be able to exercise their statutory duty "freely and in accordance with the perceived wishes of the people they represent."[26] Justice McLachlin's approach in *Shell* was endorsed in numerous other decisions, including *Nanaimo (City) v Rascal Trucking Ltd*. and *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*.[27]

Pursuant to *Rothman's Benson & Hedges Inc. v Saskatchewan*,[28] the Court in *Croplife* was explicit about making distinct inquiries into conflict of operation and conflict of purpose. *Spraytech*, on the other hand, seems to only give passing recognition of this distinction.[29] The *Croplife* approach might offer more wiggle room for a bylaw opponent

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[24] *Croplife*, *supra* note 3.
[25] *Municipal Act*, SO 2001, c 25 at s 130.
[26] *Croplife*, *supra* note 3 at para 18.
[27] [2000] 1 SCR 342.
[2004] 1 SCR 485.
[28] 2005 SCC 13.
[29] *Spraytech*, *supra* at para 35.

to argue that a restrictive pesticide bylaw has a different core purpose than a permissive provincial licensing scheme.

Nevertheless, the Court in *Croplife* decided at paragraph 67 that the purpose of the bylaw did not frustrate the purpose of either the provincial or federal pesticide regulation schemes.[30] On the contrary, the Court held that the legislature did not intend to exhaustively regulate the field, but that both regimes specifically allowed for further regulation. A "tripartite" regime was therefore legitimate.

At paragraph 54, the Appellant argued for a particularly formal application of constitutional law.[31] Pushing back against this position, the Court cited *Spraytech* in adopting a more administrative law centred approach. This illustrates the blend of two areas of law in these decisions and the Courts' attempts to navigate the divide. Looking to the present facts, infusing constitutional principles with administrative values of deference and democratic legitimacy will be beneficial to Stratford's position.

The ultimate question in *Croplife* was whether the provisions in issue were so different from those in *Spraytech* as to render that case inapplicable.[32] By answering that question in the negative, the Ontario Court of Appeal arguably established a broad reading of *Spraytech*. The wording of the general welfare provision was different, the provincial scheme was different, but the overriding principles in *Spraytech* won out. That being said, the general welfare provision in *Croplife* did contain the reference to "health" which section 139 of the CAMA lacks.

While not specifically concerned with pesticides, there are several cases that offer some additional clarity to Stratford's situation. In *4500911 Manitoba Ltd. v Stuartburn (Rural Municipality)*,[33] the municipality passed a bylaw restricting the location

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[30] *Croplife*, *supra* note 3 at para 67.
[31] *Ibid* at para 54.
[32] *Ibid* at para 38.
[33] *Stuartburn*, *supra* note 3.

of intensive livestock operations pursuant to the general welfare provision in its enabling statute. In upholding the bylaw, the Manitoba Court of Appeal stated at paragraph 25 that a municipality is entitled to legislate for the general welfare of the community so long as it is not contrary to provincial legislation.[34] The general welfare provision in question did contain reference to "health" and the Court recognized this. Still, the judge appeared to be more concerned with the fact that the thrust of the bylaw fell within the "general welfare" of the community.[35] As Stratford is concerned, this case lends further support to the idea that general welfare provisions should be interpreted broadly and with deference.

The impossibility of dual compliance test as formulated in *Spraytech* was explicitly followed in *Mississauga (City) v Erin Mills Corp*.[36] and as recently as this year in *Wakelam v Johnson & Johnson*.[37] In *Mississauga* the Court quoted a lower decision at paragraph 42 that stated "great care" should be taken before finding a bylaw inoperative by virtue of conflict with provincial or federal legislation.[38] Similarly, the Court in *Wakelam* cited *Spraytech* in emphasizing that the mere possibility of conflict between two pieces of legislation was not enough to ground a conflict under the dual compliance test.[39] Neither of these cases dealt with general welfare provisions.

Two cases that dealt specifically with the idea that municipalities can set stricter standards than a surrounding provincial regime are *Darvonda Nurseries Ltd. v Greater Vancouver (Regional District)*[40] and *Saint John (City) v Merzetti*.[41] In *Darvonda*, the Court was concerned with whether Vancouver could enact stricter air quality standards

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[34] *Ibid* at para 25.
[35] *Ibid* at paras 22-30.
[36] (2003) 169 OAC 266 (Ont Sup Ct) [*Mississauga*].
[37] 2014 BCCA 36 [*Wakelam*].
[38] *Mississauga*, *supra* note 34 at para 42.
[39] *Wakelam*, *supra* note 35 at para 18.
[40] *Darvonda*, *supra* note 3.
[41] (2005) 6 MPLR (4th) 210 (NBCA).

for particulate matter from wood burning boilers than the province. In *Saint John* the Court was concerned with whether the city could pass building setback requirements greater than those provided by provincial legislation. In both cases, the courts affirmed the established principle that municipal regulation can exceed provincial regulation so long as it does not conflict.[42]

One recent case dealing with general welfare provisions that has attracted some attention is *Petrolia Inc. v Gaspé (Town of)*.[43] There, the municipality enacted a bylaw restricting the proximity of shale gas drilling/fracking operations to groundwater sources. Petrolia, a gas company, had been specifically authorized by the province to conduct drilling in that area. The Superior Court of Quebec struck down the bylaw as *ultra vires* the municipality. This is a surprising result in light of *Spraytech* and the other abovementioned cases. Fortunately, there are a few critical distinguishing points between *Petrolia* and the situation in Stratford.

First, *Petrolia* took place in a unique statutory context. The Quebec *Environmental Quality Act* at section 124 states that a municipal bylaw is inoperative if it relates to the same object as any regulation adopted under that Act.[44] To clarify, it does not matter if there is a direct conflict, the bylaw will be inoperative simply by virtue of covering the same subject matter as the provincial regulation. This effectively displaces the impossibility of dual compliance test where two provisions share the same core purpose.

In this instance, there was such a provision under the *Regulation respecting the application of the Environmental Quality Act*.[45] Therefore, to the extent that the Court

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[42] *Ibid* at para 36.
[43] 2014 QCCS 360 [*Petrolia*].
[44] CQLR c Q-2 at s 124.
[45] CQLR c Q-2, r 3.

accepted the Town's bylaw was concerned with water quality, it was inoperative by virtue of section 124 of the *Environmental Quality Act*.

Second, the Court's approach to the pith and substance of the bylaw is questionable and seems inconsistent with the *Spraytech* line of cases. At paragraph 53, the Superior Court concluded that the bylaw's true object was to regulate drilling – not to ensure the general welfare of its citizens via water protection.[46] The Court said that the bylaw's effects (i.e. preventing drilling from occurring in certain areas) allowed no other conclusion. The Court therefore found the bylaw *ultra vires* from at least two separate angles: if it was about water quality, it was precluded by legislation; if it was about drilling, it was simply *ultra vires* the Town's enabling statute.[47]

It is difficult to reconcile this with *Spraytech*. There, the SCC readily accepted that Hudson's purpose in regulating when/where pesticides could be used was concerned with health – not with wholesale regulation of the pesticide industry.[48] The practical consequences of the *Petrolia* reasoning seem absurd: is a bylaw to be found *ultra vires* every time it touches on an area not expressly delegated?

This appears to take a significant chunk out of a municipality's ability to regulate for general welfare. In particular, assuming the permissible goal of water quality was the Town's true object, how else could it have protected the water from potential negative effects of drilling except by restricting where drilling can take place? From a critical perspective, the Court's approach here really looks to be an awkward wedging of the bylaw's pith and substance into a box clearly not intended by the Council. Overall, this reasoning seems to be a step backward.

Nevertheless, this approach to pith and substance may be a useful reminder. In Stratford's case, it may be important to frame the bylaw's pith and substance in a way

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[46] *Petrolia*, *supra* note 41 at para 53.
[47] *Ibid*.
[48] *Spraytech*, *supra* note 2 at para 27.

that fits under "peace, order and good government." *Petrolia* is, at least, an example of how malleable that characterization can be.

Third, the licensing scheme in *Petrolia* is factually distinguishable from the pesticide cases and Stratford's situation. In *Petrolia*, the drilling company was specifically authorized to conduct drilling in the geographic area that the municipality sought to regulate. This might be called a 'positive right' to drill at a particular place and time. The pesticide licensing scheme in PEI, by contrast, is more general. As with the schemes at issue in *Spraytech* and *Croplife*, the PEI regime essentially licenses the party who wishes to apply pesticides – not the specific instances of application.[49] There is arguably less tension/conflict in this latter scenario.

Secondary sources regarding scope of municipal authority

Stanley M. Makuch et al. in *Canadian Municipal and Planning Law*, offer some principles to reinforce the above case law.[50] At pages 88-89 the authors introduce the "benevolent" and "rational" approaches to interpreting the breadth of municipal authority. Citing *R v Greenbaum,*[51] they note:

> More recently, the courts, particularly the Supreme Court of Canada, have recognized the distinct democratic nature of municipal government and, in a series of decisions, have…indicated a more purpose based approach to the interpretation of municipal enabling statutes.[52]

At page 90, the authors go on to say that, where more than one interpretation of a bylaw is possible,[53] courts should adopt the one that fits within the parameters of the enabling statute. However, they note also that courts have emphasized vigilance in ensuring that bylaws do not fall outside the purpose of the delegated powers. On this

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[49] *Pesticides Control Act*, RSPEI 1988 c P-4 [*Pesticides Control Act*].
General Regulations, PEI Reg EC761/05.
[50] MaKuch, *supra* note 6.
[51] [1993] 1 SCR 674.
[52] MaKuch, *supra* note 6 at 89.
[53] *Ibid* at 90.

point, the authors cite Justice Lebel's concurring opinion in *Spraytech*. Regarding general welfare provisions, Justice Lebel stated they "cannot be construed as an open and unlimited grant of provincial powers."[54] A pressing concern to the local community is not enough; instead, there must be a connection "closely related to the immediate interests of the community within the territorial limits defined by the legislature" (para 53).[55] However, while this language does place an outside limit on general welfare provisions, it still leaves considerable breadth for their interpretation.

Ian Rogers in *The Law of Municipal Corporations*,[56] adds commentary on the extent to which bylaws can coexist with provincial and federal legislative regimes on the same topic. At page 346, Rogers notes, "the fact that a bylaw invades a field which is shared by the Dominion and province does not necessarily render its subject matter *ultra vires*."[57] Citing *Uxbridge v Timbers Bros Sand & Gravel Ltd*,[58] he confirms that a bylaw may enhance statutory standards but must not conflict with them. In outlining the limits of this principle, Rogers says that where a bylaw and statute (1) cover the same subject matter; and (2) the statute is intended to exhaustively regulate that area, there is no room left in the field for the bylaw.[59] Barring this, an otherwise valid bylaw should stand.

Howard Epstein in his article "Subsidiarity at Work – The Legal Context for Sustainability Initiatives at the Local Government Level: How an environmental agenda could be advanced by Canadian municipalities"[60] offers further analysis. Citing such cases as *Shell*, Epstein argues that courts have given a "broad endorsement" of

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[54] *Spraytech*, *supra* note 2 at para 53.
[55] *Ibid.*
[56] loose-leaf (consulted on 22 March, 2014) (Toronto: Carswell, 2009) [Rogers].
[57] *Ibid* at 346.
[58] (1975), 3 OR (2d) 107.
[59] Rogers, *supra* note 54 at 346.
[60] (2009) 63 Municipal and Planning Law Reports (4th) 56 [Epstein].

municipalities' authority to regulate on environmental matters.[61] He quotes Diane Saxe as having commented that

> municipalities in all provinces now have dazzling new powers, and must now decide what to do with them…For example, is there anything legally sold in their municipality that they ought to ban or regulate, for the health, safety and well-being of their inhabitants?[62]

On the other hand, Epstein does comment that *Spraytech* should not be over-read. Similar to the above passage by Rogers, Epstein writes at page 16 that the impossibility of dual compliance test is not the only consideration.[63] He notes that, post-*Spraytech*, it is tempting to think of any case that does not simply apply the dual compliance test to be wrongly decided. Instead, *Rothman's*, *supra*, holds that a bylaw will be quashed where a higher level statute is intended to be a complete code. This principle was recognized in *Spraytech*, but tends to be overshadowed by the dual compliance test.[64]

To add some empirical evidence into the mix, Pesticide Reform Ontario is documenting the widespread proliferation of pesticide bylaws currently taking place in Canada. Its website touts 1,286 municipalities as having passed cosmetic pesticide bans, although 1,141 of those are the result of Quebec's *Pesticide Management Code*,[65] (enacted subsequent to *Spraytech*). While not a legal argument per se, it may serve as useful evidence that pesticide bylaws are now standard practice across Canada.[66]

Finally, Sierra Legal (now Ecojustice) in *The Municipal Powers Report* [67] provides a useful checklist to consider in deciding whether a bylaw is properly enacted (which summarizes many of the above points):

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[61] *Ibid* at 11.
[62] *Ibid* at 14.
[63] *Ibid* at 16.
[64] *Spraytech*, *supra* note 2 at para 25.
[65] CQLR c P-9.3.
[66] Pesticide Reform*, supra* note 1.
[67] Ecojustice, *The Municipal Powers Report,* May 2007, online: <www.ecojustice.ca>.

1. Is there a specific legislative provision under provincial or territorial legislation that provides the power to a municipality to enact the by-law;
2. If no specific legislative provision exists, does the relevant provincial or territorial legislation have a general health and welfare provision that can be used to enact the proposed by-law; that is, if the by-law is genuinely being enacted for a purpose related to the health or welfare of municipal citizens;
3. Does provincial or federal legislation explicitly bar a municipality from enacting the by-law in question;
4. Does the by-law create a conflict with other provincial, territorial or federal legislation; and
5. Will the by-law otherwise interfere with a provincial, territorial or federal government program?[68]

In light of Epstein and Rogers' comments, perhaps another step should be added to consider whether the legislature intended to enact a complete code, thus leaving no room for a bylaw.

Legislation and regulations

Some additional clarity can be gleaned by looking directly to the PEI *Pesticides Control Act* [69] and its Regulations. The scheme in PEI is broadly similar to those at issue in *Spraytech* and *Croplife*. The Act sets out general prohibitions on the use of pesticides and provides some details about licensing individuals. The Regulations go into much greater detail on the licensing scheme.

One important difference between the schemes at issue in *Spraytech* and *Croplife* and the one in PEI is that the former are significantly more comprehensive. This is important because, despite that level of detail, the courts in those cases did not find the schemes were intended to exhaustively regulate the field.[70] It therefore seems less likely that the simpler PEI regime would be seen as a complete code.

In *Spraytech*, the SCC held that, because the legislation specifically stated that it would prevail over any municipal bylaw, the legislature envisioned that municipalities

[68] *Ibid* at 9.
[69] *Pesticides Control Act*, *supra* note 47.
[70] *Spraytech*, *supra* note 2 at para 35.
Croplife, *supra* note 3 at para 75.

might also regulate pesticides.[71] While the *Pesticides Control Act* does not have any provisions exactly like that one, section 6(d) gives some indication that the legislature did not intend to exhaustively regulate the field:

> 6. No person shall
> (a) dispose of any pesticide or mixture containing a pesticide; or
> (b) bury, decontaminate, burn or otherwise dispose of any container that has been used to hold a pesticide,
>
> except at a site or in a manner, as the case may be, that is
> (c) prescribed by the regulations; or
> **(d) recommended by the manufacturer of the pesticide or the Minister.**
> 1984, c.29, s.6.[72] (emphasis added)

By looking outside of the statutory scheme itself (i.e. to the Minister or the manufacturer), the legislature is arguably showing that there is still room to supplement the overall regime. Admittedly, this is not as compelling as the provision relied on in *Spraytech*.

It is also informative to compare section 139 of the CAMA to analogous legislation in other provinces. In particular, the Nova Scotia *Municipal Government Act*; Ontario *Municipal Act*; Saskatchewan *Municipalities Act*; Alberta *Municipal Government Act*; Yukon *Municipal Act*; and the Northwest Territories *Cities, Towns and Villages Act*, all contain specific reference to "health" in their respective general welfare provisions.[73] The following table sets out those provisions:

Table 1: General Welfare Provisions[74]

Legislation	General welfare provision
Nova Scotia *Municipal Government Act*	Power to make by-laws 172 (1) A council may make by-laws, for municipal purposes, respecting

[71] *Spraytech*, *supra* note 2 at para 40.
[72] *Pesticides Control Act*, *supra* note 47 at s 6.
[73] SNS 1998, c 18, s 172.
SO 2001 c 25, s 130.
SS 2005, c M-36.1, s 8.
SA 1994, c M-26.1, ss 3(c), 7.
RSY 2002, c 154, s 265.
RSNWT 1988, c C-8, s 70.
[74] *Ibid.*

	(a) **the health, well being, safety and protection of persons;**
Ontario *Municipal Act*	Broad authority, single-tier municipalities 10. (1) A single-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public. 2006, c. 32, Sched. A, s. 8. By-laws (2) A single-tier municipality may pass by-laws respecting the following matters: … 6. **Health, safety and well-being of persons.**
Saskatchewan *Municipalities Act*	Jurisdiction to pass bylaws 8(1) A municipality has a general power to pass any bylaws for the purposes of the municipality that it considers expedient in relation to the following matters respecting the municipality: (a) the peace, order and good government of the municipality; (b) **the safety, health and welfare of people and the protection of people and property**;
Alberta *Municipal Government Act*	Purposes, Powers and Capacity of Municipalities Municipal purposes 3 The purposes of a municipality are (a) to provide good government, (b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and (c) to develop and maintain safe and viable communities. … 7 A council may pass bylaws for municipal purposes respecting the following matters: (a) **the safety, health and welfare of people and the protection of people and property;**
Yukon *Municipal Act*	265 A council may pass bylaws for municipal purposes respecting the following matters

	(a) **the safety, health, and welfare** of people and the protection of persons and property, including fire protection, fireworks, other explosives, firearms, weapons or devices, ambulance services, emergency services and other emergencies;
Northwest Territories *Cities, Towns and Villages Act*	Spheres of jurisdiction 54.2. Subject to limitations on its powers in this or any other enactment, a council may pass by-laws for municipal purposes respecting the following matters: (a) **the safety, health and welfare** of people and the protection of people and property;

This again highlights the main sticking point in the present matter. While there is no authority suggesting a general welfare provision needs to make explicit reference to health, the fact that PEI seems to stick out in this regard will likely weigh against the validity of a pesticide bylaw. Nevertheless, if the purpose of a bylaw can be framed in terms that fit more comfortably under "peace, order and good government," then this shortcoming will be less damaging.

4. A ROLE FOR THE PRECAUTIONARY PRINCIPLE?

The precautionary principle is explicitly discussed in the pesticide cases, but does not seem to be given true legal force. In *Spraytech*, Justice L'Heureux-Dubé dealt with the principle at paragraphs 31-32. She noted its general importance at international law, but fell short on a true adoption of the principle. Instead, she wrote, "In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action."[75]

[75] *Spraytech*, *supra* note 2 at para 32.

In *Croplife*, the Court dealt with the role of the precautionary principle at paragraph 68.[76] It noted that the principle had been cited in two appellate decisions since *Spraytech* but that it was not determinative in either. The Court went on to suggest that, if the precautionary principle is to be given real weight in a decision, that there should be scientific evidence of potential harm. The Court then held at paragraph 71 that, if a municipality does not otherwise have power to enact a bylaw, the precautionary principle will not serve as authority to uphold it.[77]

Nevertheless, the principle can arguably still be used as an interpretive aid in strengthening the connection between the general welfare provision and a bylaw. Specifically, Stratford might argue that where its bylaw is consistent with the precautionary principle, this serves as evidence that the bylaw was enacted for the peace, order and good government of its territory and citizens. While that appears to be how the principle was used in *Spraytech*, there is no specific authority on this point.

On the other hand, the presence of the precautionary principle in arguments about the breadth of a general welfare provision may really be an irrelevant distraction. The core question is whether the provision is broad enough to encompass a particular type of regulation. Does the application of the principle really augment a general welfare provision? As noted above, the Court in *Croplife* seems to say no.[78] In that sense, the real usefulness of the precautionary principle in this area might be limited to scenarios where it is already established that a municipality has authority to regulate. Where that is the case, the precautionary principle can be used to suggest that, despite a lack of scientific certainty on the harmful health effects of certain pesticides, a municipality should feel secure to regulate anyway.[79]

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[76] *Croplife*, *supra* note 3 at para 68.
[77] *Ibid at para 71.*
[78] *Ibid.*
[79] *Spraytech*, *supra* note 2 at paras 31-32.

This begs the question of whether the precautionary principle is useful at all if it only applies where a municipality is already determined to have authority. If that is the case, what work is the principle really doing? The simple answer is that councils might look to the principle for guidance where a scientific ambiguity makes it difficult to justify regulation.

In short, the principle may only be useful to justify the use of authority where it exists – not to create authority where its existence is uncertain.[80] Add to this the reluctance of Canadian courts to truly adopt the precautionary principle as the law, and the result is a rather tenuous connection between the principle and general welfare provisions. Apart from being a highly general interpretive aid, its practical application in this area seems limited. Therefore, in terms of constructing an effective legal argument, Justice L'Heureux-Dubé's mention of the precautionary principle may be something of an *obiter* red herring.[81]

5. CONTEXT – TRENDS IN ADMINISTRATIVE LAW

The past several decades have seen increased deference to administrative decision makers. As noted by Flood and Dolling, The Supreme Court of Canada decision in *C.U.P.E. v N.B. Liquor Corporation*[82] marked the beginning of a transition toward greater judicial deference, albeit a rocky one.[83] This is the backdrop against which any question of municipal authority is considered. Of the numerous administrative values responsible for this trend, at least three are directly at play when considering

[80] *Croplife*, *supra* note 3 at para 71.
[81] *Spraytech*, *supra* note 2 at para 31.
[82] [1979] 2 SCR 227.
[83] Flood*, supra* note 5 at 29.

authority under general welfare provisions: subsidiarity, democratic legitimacy and relative expertise.[84]

The principle of subsidiarity holds that governance should be conducted by the most localized level capable of addressing that matter.[85] Naturally this principle tends support municipal authority. Specifically, subsidiarity would hold that general welfare provisions perform a gap-filling function where the legislature fails to expressly delegate a matter best suited to a more local level.

Where subsidiarity is concerned with the relationship between levels of government, democratic legitimacy is concerned with the relationship between municipalities and courts. In this context, democratic legitimacy is about maintaining a respectful distance from a council's exercise of general welfare power given its mandate as elected representatives. Citizens should be able to expect that elected officials will carry out their wishes without unduly formalistic interference from the judiciary.[86]

Similarly, the value of relative expertise recognizes that courts should not lightly interfere where a municipality makes a decision. In this instance, the seemingly broad discretion granted to a municipality to determine what is in the 'general welfare' of its citizens should be a message from the legislature to the courts that the municipality is entitled to considerable deference.[87]

A comparison between two municipal law cases demonstrates the evolution of the above values. The 1993 SCC decision *R v Sharma*[88] involved a vendor selling flowers on the street contrary to a municipal bylaw. Mr. Sharma challenged the bylaw on the basis that it created an impermissible distinction between classes of street vendors (in this instance those who owned shops and those who did not). The SCC agreed with

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[84] *Ibid* at ch 10.
[85] *Spraytech*, *supra* note 2 at para 3.
[86] Flood*, supra* note 5 at 56-57.
[87] *Ibid* at 294-98.
[88] [1993] SCJ No 1 [*Sharma*].

Mr. Sharma that the bylaw amounted to discrimination in the municipal law sense. In coming to that conclusion, the Court cited the "well-established" rule of administrative law that a bylaw cannot discriminate unless its enabling statute specifically allows.[89] The Court recognized a municipality might have a laudable goal in creating a distinction, but nevertheless held the bylaw *ultra vires*. This case represents a formalistic application of strict administrative rules proscribing municipal authority.

By contrast, the 2012 SCC decision in *Catalyst Paper Corp. v North Cowichan (District)*[90] represents an approach more in keeping with subsidiarity, democratic legitimacy and relative expertise. In that case, the municipality levied wildly disproportionate taxes on Catalyst to compensate for lower taxes on residents. This was part of an effort to keep the region affordable for long-term fixed-income residents. In upholding the tax, the Court crafted a narrative at paragraph 21 about the long history of judicial deference toward municipal bylaws.[91] Whether or not this is entirely accurate, the Court drew in such old cases as *Provincial Picture Houses Ltd. v Wednesbury Corp*[92] which essentially establishes an extra high level of deference. Challenges to the decision, including failure to consider relevant factors and adequacy of reasons, gave way to the idea that municipal councils are accountable to the ballot box, not the courts.[93]

Relating back to the matter at hand, *Sharma* might also be contrasted with the approach taken in *Spraytech*, specifically with regard to discrimination. As mentioned, the Court in *Spraytech* decided that some discrimination was acceptable because there was no other way for Hudson to carry out its purpose. When compared to *Sharma*, it is almost as though the Court in *Spraytech* blithely ignored the law on municipal

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[89] *Ibid* at para 19.
[90] 2012 SCC 2 [*Catalyst*].
[91] *Ibid* at para 21.
[92] [1948] 1 KB 223 (CA).
[93] *Catalyst*, *supra* note 88 at para 19.

discrimination. This demonstrates the changing judicial attitudes toward municipal authority. Practically speaking, this frees up councils from having to worry about compliance with anachronistic rules. The Court itself admitted in *Sharma* that such formal rules often lead to innocuous bylaws being struck down.[94]

6. CASE STUDY – CONCLUSION

The general welfare provision under section 139 of the CAMA is probably sufficient authority to allow Stratford to pass a bylaw restricting cosmetic pesticide use. *Spraytech*, the foundational case in this area, affirmed that general welfare provisions can be used for such purpose. That being said, not all general welfare provisions are the same. In particular, section 139 of the CAMA lacks specific reference to "health" as found in the *Spraytech* provision. This difference in language may present problems for Stratford. Specifically, it may be an interpretive stretch to say that "peace, order and good government" grants the power to make bylaws related to health. The fact that most other municipal statutes in Canada do contain specific reference to "health" casts some additional doubt. Nevertheless, a number of points weigh in favour of Stratford's authority to restrict cosmetic pesticide use.

First, a pesticide bylaw could easily pass the "impossibility of dual compliance test." Set out in numerous leading cases, the test states that unless compliance with a bylaw makes it impossible to comply with a provincial or federal legislative provision, the bylaw will be valid. On these facts, dual compliance would be possible because the bylaw would simply set out stricter standards than the provincial or federal statutes. Compliance with a pesticide bylaw would automatically mean compliance with the statutes.[95]

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[94] *Sharma*, *supra* note 86 at para 19.
[95] *Spraytech*, *supra* note 2 at para 36.

Second, the case law illustrates a broad trend toward maximizing municipal powers. Courts are less interested in a formalistic application of enabling statutes and, instead, are taking a more purpose-based approach to the construction of municipal authority. This trend is bound up with moves in administrative law toward greater deference on substantive review. Values of democratic legitimacy and subsidiarity are becoming more popular.[96]

Third, bylaws restricting pesticide use are now commonplace in Canada. Dozens of municipalities have passed unique bylaws eliminating cosmetic pesticide use (though some have been superseded by provincial legislation, as with Ontario and Quebec). Many of these bylaws were passed pursuant to general welfare provisions. While this trend is not legal argument per se, it nevertheless demonstrates what is now standard practice in Canada.

Fourth, there appears to be nothing in the PEI provincial legislation on pesticides that would preclude a municipal bylaw on the same subject matter. There is no evidence that the *Pesticides Control Act* or its regulations were intended to be a complete code governing all aspects of pesticides in the province. On the contrary, the language of at least one section of that Act, combined with the existence of federal legislation on the same subject, indicates the legislature did not envision the provincial scheme to be a comprehensive one.[97]

Fifth, the precautionary principle may be a useful interpretive aid. Particularly where section 139 of the CAMA lacks specific reference to “health,” the precautionary principle may strengthen the connection between a potential bylaw and the general welfare provision. On the other hand, the precautionary approach may actually be

[96] Flood, *supra* note 5 at 29.
[97] *Pesticides Control Act*, *supra* note 47.

irrelevant to the determination of whether a municipality has authority act. Instead, it may only be useful in determining whether to act once authority is established.

Taking the above arguments into account, municipalities should feel confident in their expanding scope of authority under general welfare provisions. Where these provisions were once thought to offer little in addition to a municipality's expressly delegated authorities, contemporary trends in the case law have now proved otherwise.[98] In light of this developing authority, it is encouraging to see municipalities and community groups working to improve their local environment.

[98] Rogers, *supra* note 54 at 63.11.

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