

Pesticide By-Laws and the Courts

Informed Decision-Making on Cosmetic Pesticide Use Conference

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CELA's history on pesticides

- CELA has been working on issues related to pesticides for twenty-five years
- Over the years, we've worked on pesticides at the international, federal, provincial and municipal levels
- Our work includes the POPs Treaty, municipal by-laws, law reform at provincial, federal and international levels

Precautionary principle

- A constant theme in our work is that of including the precautionary principle in case and policy decisions, as well as in statutes, regulations and by-laws
- The statement of the precautionary principle that we prefer was formulated in Bergen, Switzerland, in 1990, and Canada was a signatory to that statement

Precautionary Principle

- “Where there is a threat of serious or irreversible harm, a lack of full scientific certainty shall not be used as a reason to postpone or avoid measures to reduce or eliminate the risk.”
- (paraphrase of precautionary statement as stated at Bergen, 1990)

Rio's version

- At the Earth Summit in 1992, the precautionary statement was modified to include “cost effective measures”. This is the version that Canada has since incorporated in the Canadian Environmental Protection Act, the Oceans Act, recently in the amended Pest Control Products Act, and in other legislation

Our work on pesticides

- We have extensive work on children's environmental health, including the soon to be released report from the CEC, the North American Commission on Environmental Cooperation, a trilateral body under NAFTA
- We've also worked on pesticides at the federal level, including submissions to the Standing Committee on Environment, leading to Charles Caccia's report on cosmetic use of pesticides

Children's Health Study

- Part of the impetus for that review by the federal standing committee was CELA's study, published in May, 2000, "Children's Health and Standard Setting," prepared by CELA and the Ontario College of Family Physicians, Environment Committee
- That study included detailed case studies comparing lead regulation and pesticide regulation in Canada

Pest Control Products Act

- The federal government had for several years been promising to revise the 30 year old Pest Control Products Act, and finally after the Caccia report, the newly appointed Minister of Health, Anne McLellan introduced the legislation as Bill C-53
- CELA participated in submissions to the Commons and Senate Committee reviewing the Bill and after amendments, it was passed last year

Law reform leads to case work

- Regulations under the PCPA which will be necessary to put the new legislation into effect are under development and we have been commenting on some of them over the last two years
- CELA also represented 11 Intervenors in the case of Hudson and Spray Tech, which involved a by-law controlling use of pesticides in the municipality

Intervening in the Hudson case

- That intervention was motivated after we were asked to prepare a generic opinion about whether Ontario municipalities could pass pesticide control by-laws under the provincial Municipal Act
- Our intervention was primarily directed to bringing the implications of the Hudson case for other provinces to the Court's attention

Hudson ruling

- The Court agreed with CELA's submissions that many other provinces have substantially similar municipal legislation which allows municipalities to pass by-laws for the general health and welfare of the community
- This was the case under Ontario's Municipal Act in 2001 and is still true under Ontario's new Municipal Act

Ontario municipalities

- Since the Hudson decision was released, dozens of Ontario municipalities have begun the process of public consultation as to whether to pass by-laws to control use of pesticides in their communities
- Several Ontario municipalities have now passed by-laws similar to Hudson Quebec's by-law and many many others are under consideration

Toronto's By-law

- Notably, the City of Toronto Council requested that its Board of Health develop a Hudson-style by-law for council's consideration and following extensive study, research and public consultation the City did so.

Prohibition with exceptions

- The Toronto by-law which is now in effect, prohibits the use of pesticides in the City of Toronto, with a list of exceptions for allowed uses.
- For example, pesticides are not prohibited for swimming pools, inside buildings, or for infestations, among other things

Effect of by-law

- Toronto's proposed by-law came into effect immediately, but prosecutions were only to begin after the education phase was conducted, where home owners and others were given information about the by-law
- Toronto public health was hopeful that the existence of a by-law itself would send a strong message that routine use of pesticides on lawns and gardens is no longer acceptable

Parallels

- The situation is comparable to the smoking by-laws, which were developed after many years of allowing smoking in almost all locations, based on improved understanding of the effects of smoking on public health
- Similarly, more and more studies on health impacts of pesticides and advances in understanding development, neurotoxicity and other health issues provoke action on pesticides

Literature Reviews

- In its preparation for public consultation concerning a by-law, Toronto Public Health conducted an extensive literature review of much of the available science on pesticides, children's health and related issues
- Their report, "Lawn and Garden Pesticides: A Review of Human Exposure & Health Effects Research" is available on the City's Public Health web site

Extent of exposure

- A backgrounder highlighting their findings from the review noted that U.S. EPA biomonitoring studies are finding trace amounts of pesticide break down products in most people's urine. This indicates extremely widespread exposure to pesticides in the population
- Occupational and animal studies have shown associations between pesticide exposure and adverse health effects.

Health Effects

- The Ontario College of Family Physicians also conducted an extensive literature review and their findings are available on their website.

Science plus precaution

- The Toronto Medical Officer of Health at the time, Sheila Basrur was of the opinion that based on the information available, it is prudent to reduce the exposure of Toronto residents to pesticides
- This approach, the precautionary approach, was endorsed by the Supreme Court of Canada in the Hudson decision as an appropriate course of action on the part of municipalities

Cause for concern

- It is not necessary for municipalities to prove or decide that it has been proven the exact health effects of pesticides
- That there is cause for concern and that it is considered prudent to reduce pesticide exposure is sufficient to pass a by-law controlling pesticides in the community

Municipal history of controlling private action

- There has been a long history of municipalities dealing with activities of its citizens in the communities, both on public spaces, and on private property
- The former Municipal Act, replaced in 2001 with a new version, was over 100 years old and had long lists of such activities that municipalities could control

New Municipal Act

- The new Municipal Act takes a different approach, similar to the approach that Alberta initiated several years ago, by giving municipalities broader powers within “spheres”
- However, Ontario’s municipal legislation still retains the general health and welfare residuary clause analogous to Quebec’s Cities and Towns Act

Hudson still applies

- Accordingly, the reasons of the Supreme Court of Canada in that decision still prevail
- This includes an analysis by the Court as to whether the municipal by-law conflicts with the relevant provincial or federal pesticide legislation

Is there a conflict?

- In Hudson, the Court concluded that the federal legislation is primarily a registration system, and the provincial legislation is primarily a means of controlling commercial activity concerning pesticides
- A municipality may pass a pesticides by-law and it will not be in conflict with the provincial or federal laws as they stand

Old Approvals

- It is also important to note that most pesticides registered federally were not subjected to current requirements and standards when they were originally permitted.
- The back log for review and re-evaluation is many years long, unless the Pest Management Regulatory Agency receives vastly increased resources

Meeting the Rhetoric

- It is therefore not correct to say that federal acceptance for registration carries with it any guarantee of safety
- Even for more recently reviewed pesticides, only very recently have children's health effects begun to be expressly considered
- In addition, the reviews make many assumptions such as the conditions of use that may not be true in actual use

New PCPA

- The Pest Control Products Act was revised and passed but is not yet in force (we are expecting it to be in force for early in 2006)
- In the meantime, the new legislative requirements that include improvements for protection of children and other vulnerable populations are not yet fully in force, although some of them may be followed in practice by the federal agency

Terminology

- Recently, NGO's and others working on pesticide issues have begun to use the term "unnecessary use of pesticides" instead of "cosmetic use of pesticides." In part this is to differentiate between lawn and garden "cosmetic" use and agricultural "cosmetic" use. Most municipal by-laws so far do not deal with agricultural use

Un-necessary = reduce exposure

- The use of the term “un-necessary” is to highlight that despite the ongoing research into determining exactly which pesticides cause which human health impacts, it is imprudent to continue exposing almost the entire population to large enough quantities of pesticides that they can be routinely measured as part of our body-burden

Impact on Toronto residents

- In the City of Toronto, polling showed that most residents did not use pesticides in any event
- Before passing their by-law, Toronto found that even a large majority of those residents who did use pesticides supported a pesticide use by-law!

But Impacts still measurable

- However, pesticide use was still high enough that typical lawn and garden pesticides were able to be measured in urban streams and rivers during the spring and summer months

Changing the Norm

- Pesticide by-laws provide the needed impetus to actually change behaviour
- Instead of having neighbourhoods where residents are embarrassed by dandelions in their lawn, we may soon have neighbourhoods where residents are embarrassed to be seen using pesticides

Ontario Courts Support Toronto

- In the current challenge to Toronto's pesticide by-law by CropLife Canada, two levels of courts, echoing the results in the Quebec trial and Appeal Courts in Hudson, the Ontario Superior Court of Justice and the Ontario Court of Appeal so far have up-held Toronto's by-law under Ontario's new Municipal Act and have applied the Hudson decision.

Ontario Superior Court

- Mr. Justice Somers noted that the area of pesticides is one of multiple examples of topics over which different levels of government work legislate and thus “work together co-operatively to produce a desirable common end.”
- For example, federal, provincial and municipal governments all deal with elements of health protection.

“Subsidiarity”

- Justice Somers quoted with approval the statement by Madam Justice L’Heureux-Dube in stating that “lawmaking 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.”

Conflict & Other matters

- Similarly, on the question of whether there is a conflict between the provincial and federal legislation governing pesticides and the Toronto by-law, Justice Somers applied the Supreme Court's ruling and found that those other statutes do not conflict with the operation of the Toronto by-law.

Ontario Court of Appeal

- Appeal Justices Goudge, Feldman and Lang heard the appeal from Justice Somers' decision in November 2004 and issued their ruling this past May, 2005.
- In upholding Mr. Justice Somers' decision, they reviewed the history of the courts' views on municipal jurisdiction over the last dozen years, and noted that the courts now show deference to, and respect for the decisions of locally elected officials.

Modern Municipalities

- The Appeal Court quoted Mr. Justice Bastarache in a case dealing with Alberta's new municipal legislation, *United Taxi*, where he explained that the more modern drafting of municipal legislation reflects "the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes."

Purpose of the by-laws

- In the Hudson case, the court found that the purpose was to address 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.”
- Similarly, the Toronto by-law was passed under the health component of section 130.

Ontario's new Municipal Act

- In rejecting the argument of counsel for CropLife, Madam Justice Feldman of the Ontario Court of Appeal stated, “it would be a retrograde step to apply the former, restrictive approach ... 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.”

Interpreting Ontario's section 130

- Concluded Feldman, “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.”
- The meaning of the phrase “matters not specifically provided for in this Act or any other Act” said the court, is its historical meaning, ie. “the rule against circumvention”, that is so long as no other specifically related by-law making power elsewhere in the new Municipal Act or any other Act.

Leave sought

- This past summer, CropLife sought leave from the Supreme Court of Canada to appeal the Ontario Court of Appeal decision. The leave decision is pending.

Back to the Supreme Court?

- If leave is granted, we expect that the Interveners we represented will seek leave to intervene again at the Supreme Court of Canada, but our clients' hope is that the SCC will deny the leave application on the basis that they have already determined the matter and that there is no error in the Ontario Court of Appeal's analysis of the revised Ontario Municipal Act.

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