

**LAW 651**

**MUNICIPAL PLANNING**

**NOCE**

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### *The Interpretation of Municipal Powers*

- There has been a notable shift in the proper approach to the interpretation of statutes empowering municipalities.
- Starting with Shell Canada (1994), the strict construction dichotomy has been set aside, and a **broad and purposive approach** to the interpretation of municipal powers has been embraced.
- We 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.
  - To allow for greater flexibility in fulfilling their statutory purposes (Shell).

### *Factors on Which to Challenge a Bylaw:*

- Prohibition vs. Regulation
- Ultra vires municipality’s jurisdiction:
  - Conflicts with Criminal Code → attempt to legislate morality.
  - Colourable attempt to legislate Federal matters
- Vague definitions in bylaw as per what it constitutes.
- Does it achieve municipal purpose/intention?
  - Purposive interpretation.
- Bad faith intentions

### *Municipality’s Basis to Uphold or Justify a Bylaw*

- Authority as given under MGA → **s. 7(a)**
- Licensing arrangement? **(s. 8(c))**
- Achieves municipal purpose or intention.
- Broad, purposive interpretation → start with United Taxi
  - Courts interpreting municipal legislation very broadly → deferential treatment to City.
- Not unconstitutional or incompatible → federal and municipal legislation can co-exist (Spraytech).
- Not outright prohibition on act, just regulating place it occurs to keep city streets safer.

## ***Shell v. Vancouver (1994) (p.6)***

### ***Interpretation of Municipal Powers***

- Resolutions can be challenged on basis of it not being under a municipal purpose as per **s. 3**.
  - The actions of a municipality can be said to be beyond its powers in one of two ways:
    - First, it may be alleged that the **ACTION** itself is beyond the authority's powers.
    - Second, it may be alleged that while the action is within the municipality's powers, the **PURPOSE** for which the action was taken was outside the municipality's powers, thereby rendering the action itself invalid (as in this case).
- Held that courts should adopt a generous, deferential standard of review toward the decisions of municipalities → unless a municipality's interpretation of its power is "patently unreasonable", in the sense of being coloured by bad faith or some other abuse, the interpretation should be upheld.
- No municipal purpose found for city's resolution to not do business with Shell until Shell pulled out of South Africa.
  - Unrelated to intent and purpose of Vancouver Charter → no municipal purpose found for resolution.
  - It was found to be not a business decision, but a foreign policy decision.
- Even if a municipal purpose had been found, the resolution would be quashed based on unauthorized discrimination, which is beyond the powers of the City of Vancouver.
- **Note:** things have changed since this case (1994), and today the resolution would likely stand.

## ***Rascal Trucking (2000) (p. 41)***

### ***Confirmed Courts' deference to Municipalities***

- Residents raised complaints of dirt and noise as per trucking company's disposition of dirt.
- City issued resolutions declaring soil pile a nuisance and ordered its removal.
- **ISSUE:** did the Municipal Act empower the city to pass the resolutions?
- Held that the Act empowered the City to issue resolutions declaring Rascal's pile of soil a nuisance and ordering its removal.
- A bylaw 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 → elected representatives thought to understand local requirements better than the judges.

## ***United Taxi (2004) (p. 52)***

### ***This is the case to start with when answering a question dealing with the powers of a municipality!***

- Question of the validity of Calgary's taxi bylaws.
  - Bylaws put a cap on the number of licenses issued, which made licenses a commodity with increased values.
- Start with **s. 3** to determine the purposes of a municipality, and **s.7** to determine what a municipality can pass bylaws in relation to.
- **S. 9** → the power to pass bylaws is meant to give council very broad authority.
- Applying a broad and purposive interpretation, **ss. 7 & 8** grant the City the power to pass

bylaws limiting the number of taxi licenses.

- City entitled to impose a specific limit on a licensed activity as per **s. 8(c)**.
- Enabling vs. restricting legislation.
- This case brought an end to Dylan's Rule whereby all of the powers of a municipality are specifically listed → now the powers are much broader and more discretionary.
  - The powers of a municipality are interpreted more liberally, and are more deferential to the municipalities.
- Municipalities, after the United Taxi decision, can now enter into areas they previously could not as per the broad authority given them by the Municipal Government Act.

## *City of Longueuil v. Godbout (p.61)*

### **Charter Applies to Municipalities**

- Even though municipalities have no constitutional status, the Charter does apply to them.
- Residency requirement of municipality that said employees had to reside within territorial limits infringed upon s. 7 of the Charter.

## *When are closed meetings authorized under the MGA?*

- **S. 197** → meetings conducted in public except as exempt under s. 197(2) & (3).
- FOIP → Freedom of Information Act – anyone has a right to ask to see documents (called 'foiping').
- Cannot make any decisions in private, and meetings cannot be unscheduled ("illegal meetings").
- Legal counsel's duty to ensure the MGA is adhered to.
- **S. 153** → general duties of councillors.
  - Keep privately discussed matters private until disclosed in public forum.

## *Tock v. St. John's Metro (1989) (p. 115)*

- Tock's basement flooded when sewer was blocked; blockage removed and the water left the basement immediately.
  - **ISSUE:** Is the municipality liable for damages in nuisance?
- **TWO PRINCIPLES:**
  - If the legislation imposes a duty and the nuisance is the inevitable consequence of discharging that duty, then the nuisance is itself authorized and there is no recovery in the absence of negligence.
  - If the legislation merely confers an authority but is specific as to the manner or location of doing the thing authorized and the nuisance is the inevitable consequence of doing the thing authorized in that way or in that location, the nuisance is itself authorized and there is no recovery absent negligence.
  - If the legislation confers an authority on a public body and also gives it a discretion, not only whether or not to do the thing authorized but also how to do it and in what location, then if that public body decides to do the thing authorized, it must do it in a manner and at a location which will avoid the creation of a nuisance.
    - If the public body implements the thing authorized in a way or at a location which gives rise to a nuisance, it will be liable therefore, whether there is

negligence or not.

- As a general rule, municipal authorities have not been held liable in nuisance by the courts if the municipality has been authorized by the Legislature to construct and maintain an undertaking or work, the nature of which may involve interference with the rights of individuals, where negligence has not been demonstrated.
- Recovery will be permitted unless it is shown that the interference was permitted by express language in the statute or by necessary implication from the language of the statute coupled with a factual finding that the damage was the inevitable consequence of the ordered or authorized action.
- Legislation here was permissive → city held not liable.

## ***Bowes v. Edmonton (2005) (See handout)***

### ***The Whitemud Landslide Case***

- Action by homeowners for damages for negligence and nuisance.
- Douglas owned lands adjacent to a river in Edmonton. In 1978, he executed a development agreement indemnifying the City from any cause of action or damages arising out of slippage or subsidence of the bank adjacent to the development site.
- In 1977, the City had commissioned geological reports with respect to the lands (Hardy Report). The reports, which were kept in the City's library, warned of the possibility of slides on the lands if more construction was undertaken.
- New owners of the lots subdivided from Douglas's lands were all aware of the riverbank's potential instability, but not of the City's geological report.
  - They all received permits from the City to construct homes on their lots.
- In March 1999, the land immediately west of their homes collapsed.
  - Experts disagreed whether or not the slide was reasonably foreseeable.
- **Action dismissed.** The City owed a duty of care to the homeowners to use reasonable care in determining whether to approve their construction permits, and was obliged to disclose any information it had which might bear on the risk associated with their proposed construction projects.
- It failed in its duty by not consulting and disclosing its geological report to the plaintiffs in approving their permits.
  - However, the breach was not willful but rather an oversight.
- The City had no obligation to warn the plaintiffs regarding the caveat Douglas was to have registered against the lands.
- The plaintiffs' claims were statute-barred because they were not brought within ten years of when the City's breach occurred, specifically when the City failed to consult the geological reports, in 1977.
- If the City was found liable, it would have been ordered to pay damages to compensate the plaintiffs for the full value of their homes less five per cent for their voluntary assumption of risk in constructing them.
- The City would not have been entitled to claim contribution from Douglas's estate, because Douglas was not liable to the plaintiffs.
- The City was not liable in nuisance because there was no evidence the City's use of the adjacent lands contributed to the plaintiffs' losses → if nuisance had been found, the limitation period would not have been a factor.
- Municipalities are now worried about making sure citizens have **ALL** pertinent information before developments proceed.

## ***Murray Ryan v. Victoria (1999) (p. 143)***

- **ISSUE:** What would be considered a public nuisance?
  - Whether or not a particular activity constitutes a public nuisance is a question of fact.
    - Many factors may be considered, including the inconvenience caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others and the character of the neighbourhood.
- The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the “inevitable result” or consequence of exercising that authority (see *Tock v. St. John’s Metro*).
- The tracks found to have created an unreasonable interference with the public’s use and enjoyment of Store Street and therefore constituted a public nuisance.
  - It was not “practically impossible” for the Railways to avoid the nuisance which arose from the flangeways on Store Street. Because the Railways had discretion with regard to the width of the flangeways, their failure to minimize the hazard was not an “inevitable consequence” of exercising regulatory authority.
  - City held jointly and severally liable with railway.
- Municipalities have a duty under **s. 532** of MGA → liable for damage caused by their failing to perform duty under this section.
  - Under **s. 532(a)** → person must bring action within 30 days of the occurrence of the event.

**\*\*\*Read Article pp. 166-171\*\*\***

## ***Moin v. The Blue Mountains (2000) (p. 171)***

- Reeve promised road would be rebuilt in order to accommodate new development; it wasn’t and the new development suffered financial losses.
- Trial judge found that it was reasonable for the respondent to rely upon the statements of the Reeve.
- **ISSUES:**
  - ***Was the developer’s reliance on the Reeve’s statements unreasonable?***
    - Trial judge found that the statements by the Reeve were not mere political promises, which would be unenforceable
  - ***Were the Reeve’s statements representations regarding an existing fact?***
    - The statement that Council had already decided to upgrade the road was not a statement of intention or of future occurrences. There was an implicit representation of an existing commitment and ability to upgrade the road.
  - ***Could the municipality be bound by the representation of a single member of Council?***
    - The municipality was bound in the “special circumstances” that the statement by the single member was made in the presence of the full Council.
    - This was done in a formal setting, so circumstances meant promises were enforceable.
    - It was incumbent on other members of Council to speak up if they disagreed.
      - Their silence constituted a breach of duty to the plaintiff. They should

- have known that plaintiff was relying on the statements made by the Reeve and they did not correct this impression.
- A single member of Council could bind other members where representations were made with respect to the operational or business capacity of the Council.

### ***Windsor Motors v. Powell River (1969) (p. 182)***

#### ***Not definitive proof that City will be held to any promises it makes to developers.***

- Plaintiff visited Powell River to set up a used car business; met with licence inspector who pointed out five suitable locations.
- He selected one site, obtained a licence and commenced business.
- More than two months later the defendant advised the plaintiff by letter that the zoning in the area where the used car lot was located permitted only the selling of gas, auto accessories and making automotive repairs and the plaintiff would be forced to relocate.
- The plaintiff moved at considerable financial loss.
- **HELD:** City was liable for the damages suffered by the plaintiff.
- City representative was authorized to issue the licence as long as he was satisfied that the applicant complied with the requirements of the relevant by-laws → plaintiff was unfamiliar with the by-laws of the defendant municipal corporation regulating zoning and other requirements in reference to locations suitable for a used car business and was trusting the city rep to give him reliable information upon which he could act safely.
- The plaintiff could reasonably expect the city rep to exercise a degree of care by reason of his specialized knowledge.
  - The city rep failed to exercise the care required in the circumstances and vicariously, through him, the City was liable for the damages suffered by the plaintiff.

### ***Remmers v. Lipinski (2000) (p. 186)***

- An action brought by municipal ratepayers against the chief administrative officer (CAO) of the Municipality for investment losses (CAO is the head of the municipality as per **ss. 207-208**).
- Nichols was hired by the Municipality as treasurer/municipal administrator in charge of its investments under CAO's supervision. The investment policy, as approved by the municipal council, authorized the treasurer to invest surplus money prudently in investments authorized by the Municipal Government Act.
  - The investments made by Nichols did not comply with **s. 250** of the Act.
  - CAO did not attempt to independently verify the representations made.
- **ISSUES:**
  - ***Whether the ratepayers had standing to bring the action.***
    - Yes, due to trust relationship between CAO & ratepayers.
  - ***Whether the CAO failed to perform the duties imposed on him under the Act.***
    - The unsecured investments made by Nichols did not comply with the Act or Regulation, and were therefore unauthorized investments.
    - The supervision of Nichols was within the scope of CAO's functions, duties or powers failed in his duty under section **207(b)** of the Act to ensure compliance with the policy; he therefore failed to carry out his supervisory role to develop a procedure for proper internal financial controls as required under his employment agreement.

- **Whether CAO was entitled to the protection from liability under section 535(2) of the Act and whether his conduct amounted to gross negligence.**
  - CAO was not entitled to immunity from liability in the performance of his duties under section **535(2)** of the Act since his conduct was grossly negligent within section **535(3)** of the Act [**s. 535(3)(b)** has now been removed → therefore gross negligence is not necessary; you simply need to be proven negligent and don't need to prove beyond that.].
    - He accepted Nichols's explanations and incomplete documentation without further questions despite his apparent concerns.
- **HELD:** Action allowed

### *Moffat v. City of Edmonton (1979) (p. 208)*

- Moffat sought to operate a body rub parlour operated by female attendants with their upper torso bare.
- The municipal council passed a bylaw with regard to massage parlours.
  - The council members debating the bylaw made remarks regarding the legitimacy of the massage business.
  - The comments suggested that the operation of massage businesses could be fronts for prostitution and other illegal activities.
- Moffat argued that the provisions of the bylaw and accompanying license fees constituted a prohibition of parlours rather than regulation of them.
  - Moffat contended that the bylaw was made in bad faith.
- **ISSUES:**
  - That the bylaw was ultra-vires municipal powers.
  - That council considered matters they shouldn't have, and accordingly the bylaw should be set aside.
- **HELD:** The appeal was dismissed.
  - The comments made by council did not establish evidence of bad faith. Moffat was not prevented from operating his business.
  - The bylaw, despite the fact that it provided for a higher license fee and different regulations for body-rub parlours than for massage clinics, did not prohibit body-rub parlours but merely regulated them.
  - The city did not create a bylaw to establish moral conduct and criminal behaviour, and therefore the city was within its jurisdiction in passing the bylaw.
    - The bylaw is not directed at morality issue, but at the manner in which the trade should be carried on, which is not legislation in the field of criminal law.
- Today these bylaws wouldn't survive a Charter challenge → no justification under **s. 1** (regulation of clothing, etc. violates this)
- If you could find a connection between regulation of clothing and s. 7(a) of the MGA, it may override the above challenge (e.g. wearing certain clothes to maintain "safety, health and welfare of people...").

### *Hlushak v. Fort McMurray (1982) (p. 214)*

- Taxpayer sought to quash business license bylaw.
  - Imposed charges dependent on business class and size of premises, but NOT

- according to value on premises.
- **There are two objects of bylaws:**
  - Regulation
  - A form of revenue generation/taxation.
- Question of whether the charges imposed by the bylaw are authorized by what is now **s. 8(c)(i)** of MGA.
- **HELD:**
  - Not found that it was so unfair that it ought to engage the gears of judicial intervention.
  - The bylaw was valid; the result of the imposition of the tax was not disharmonious with the scheme and object of the MGA.
  - Neither did the bylaw offend the rule of reasonableness by being unfairly discriminatory in failing to have an independent review since there was nothing to review under the scheme of the bylaw.
  - A license fee may be in the nature of a reasonable tax for the privilege conferred by the license or for the purpose of raising revenue and may be computed in any manner accepted by the Council.
- Reasonableness/common sense must always come into play with setting of license fees, new bylaws, etc.

### *Falardeau & Parklane Trailer Court v. Hinton (1985) (p. 217)*

- Town of Hinton increasing business license fee for mobile park operators where MGA precludes increase in fees paid directly by mobile park owners.
  - Because the town felt that mobile home owners were not paying their fair share of the municipal costs for the services they enjoyed, the town increased the license fee to mobile home park owners, intending that the fee be passed on to the owners of the homes.
- **ISSUES:**
  - Argued that the bylaw was discriminatory, and therefore “unreasonable.”
  - The bylaw was argued to be unconstitutional, violating **s. 92** of the Constitution Act by levying an indirect tax.
    - Whether the charge is properly characterized as a tax.
- **HELD:** The appeal was dismissed → the by-law was not discriminatory or unreasonable.
  - The fee was constitutional because it was incidental to the regulation of business and reflected costs relating to the provision of services by the town to the residents.
    - **MUST be a connection between the fee and the services the municipality provides** (e.g. need to charge certain businesses more (such as higher licensing fees for night clubs), because greater costs are incurred in its operation such as greater police enforcement, garbage collection, etc.)
      - The fee reflects a determination that mobile home parks will only be permitted if they make a reasonable contribution to the costs of services made necessary by allowing those businesses to function.
    - The costs which the town seeks to recover here are not costs of administering the scheme but costs incurred as a result of permitting mobile home parks to function.

## ***Lafarge v. Foothills (1991) (p. 220)***

- **ISSUE:** question of whether bylaw constitutes a disguised indirect tax.
- Bylaw required mine operators to pay licence fees based on production levels.
- **HELD:** bylaw not an indirect tax
  - Indirect tax was one not borne by the person who first paid it.
    - In this case it was not clear that anyone other than mine operators would pay the fee so it could not have been indirect.
  - The fee was not closely enough tied to the annual volume of gravel to describe it as based on a yardage charge, which may have qualified as an indirect tax (based on a RANGE of volume).
    - Cannot be said that this is a yardage charge masquerading as an annual charge.
- The operation of some kinds of business is more costly to the municipality than others.
  - There were extra costs associated with gravel mining, and the municipality sought to minimize these concerns.
- Distinguish between a tax that is likely to be recouped only because, like other expenses, it is a cost of doing business, and, on the other hand, a tax that is likely to be “passed on” as an element of the very good or service, or transaction which is taxes.
  - Only the latter kind of tax is indirect.
- That a municipality can pass bylaws concurrently designed to generate revenue as well as to compensate for definable expenses will not bring them down provided the scheme is not wholly colourable.

## ***Passutto Hotels v. Red Deer (2006) (see handout)***

### ***Did the City have the jurisdiction to pass the bylaws?***

- **ISSUES:** The plaintiff sought to quash a bylaw enacted by the City of Red Deer that regulated drinking establishments. They alleged the bylaw was void for three reasons:
  - The purpose of the Bylaw was ultra vires the MGA.
  - The licensing imposed by the Bylaw was a tax that was not authorized by the MGA.
  - The Bylaw illegally delegated certain powers to the Inspections and Licensing Manager.
- An application for judicial review of a Bylaw passed by the Respondent City of Red Deer to regulate drinking establishments was dismissed.
  - a. **The Bylaw was not ultra vires the Municipal Government Act.**
  - b. **The City enacted the Bylaw for municipal purposes and without ulterior motive.**
    - i. The evidence established that the City had for some years had a concern about its citizens' safety arising from a conglomeration of drinking establishments in its downtown core.
    - ii. The City had the right under section 3 of the MGA to maintain a safe community and to pass bylaws respecting the safety and protection of people and property, activities in or near public places or places open to the public and business activities and persons engaged in business.
  - c. **The Bylaw did not confer unlimited or illegal power as the license fee authorized by the MGA.**
    - i. The license fee imposed under the Bylaw was done in good faith.
    - ii. The bulk of the licensing fees would relate to enhanced policing that was



4. If the City of Edmonton implemented a similar bylaw as in the Red Deer case, it would likely withstand a challenge.
- Bases that a bylaw can be challenged on:
    - Jurisdiction
    - Rational/factual foundation for bylaw

### ***Allard Contractors v. Coquitlam (1993) (p. 224)***

- Municipality introduced a variable rate volumetric permit fee for the removal of soil from the lands within the municipalities.
  - The fee was based on the volume of material removed with exceptions for certain persons and usages.
- **HELD:** Appeal dismissed.
  - The volumetric fees, if considered as a form of indirect taxation, were constitutional since the fees were intended to offset the costs of the regulatory scheme and the costs of repairing the roads used by the trucks carrying soil from the gravel pits.
  - Although the bylaws were discriminatory in that they distinguished between certain persons and usages, such discrimination was authorized by the Municipal Act which provided for discrimination based on volume.
  - This provision implied that a distinction between commercial and non-commercial users could be made.

**See p. 253 266 → Ten Commandments and Attacking Municipal Bylaws**

### ***Kent District v. Storgoff (1962) (p. 267)***

#### ***How far can a municipality go when facing an emergency?***

- **ISSUE:** does bylaw encroach on criminal legislation?
  - Bylaw enacted by Kent District provided for the arrest, summary conviction, fining and/or imprisonment of certain Doukhobors who entered the municipal district.
  - Attempt to forbid Doukhobors from entering municipality.
- Passed as emergency measures with the prospect of 1,000 “undesirables” coming into Kent.
  - Did such an emergency exist as would justify the exercise by Kent of the powers conferred by the MGA?
- Test as to what constitutes a crime → Is the act prohibited with penal consequences?
- The by-law attempted to create a crime and to prevent conditions arising which might lead to a breach of the peace or unlawful assembly, all of which were matters relating to criminal law, and as such, were within the exclusive jurisdiction of the Parliament of Canada.
- **HELD:** bylaw declared invalid.
  - Bylaw designed to prevent conditions arising which may lead to a breach of the peace or unlawful assembly.
    - Matters relating to criminal law and are within the jurisdiction of the feds.
- To meet the emergency, preventive measures could have been taken as soon as the Freedomites showed signs of leaving their camping grounds to march on Kent under the provisions of the Criminal Code (Unlawful assembly is one of those offences coming within the Criminal Code).

## Canada (Attorney General) v. Dupond (1978) (p. 272)

### A Questionable Decision → Pre-Charter

- City of Montreal passed bylaw regulating use of public domain to prevent riots and other violations of order, peace and public safety.
- **ISSUES:**
  - Was bylaw related to Criminal law and therefore ultra vires the City
  - Bylaws are in relation to and in conflict with the fundamental freedoms of speech, of assembly and association as part of the Constitution by the preamble of the BNA Act.
- **HELD:** The appeal was dismissed.
  - The legislation here in question was in the nature of a police or municipal regulation of a **merely local character** calculated to preserve peace and repress disorderly and riotous conduct in the municipality.
  - It was **not punitive but essentially preventative in nature.**
    - The suppression of conditions likely to favour the commission of crimes fell within provincial competence.
    - The purpose and effect of bylaw is the prevention of conditions conducive to breaches of the peace and detrimental to the administration of justice.
  - Bylaw is **preventing** assemblies which have yet to take place, whereas the Criminal Code is legislating the offence in assemblies **already** taking place.
    - Therefore they don't deal with the same subject matter, under the same aspect and for the same purpose.
- Pre-Charter → The Canadian Bill of Rights did not apply to provincial and municipal legislation.

**See Handout on Municipal Public Works & Claims Under s. 534 of the MGA  
Public Necessity vs. Property Rights**

## Ontario Attorney General v. Mississauga (1981) (p. 300)

### How far can a municipality go in the face of other legislation?

**\*\*Look at the PURPOSE of the Act\*\***

- **ISSUE:** the validity of 2 bylaws passed by the municipality which purported to prohibit the burning of fuel containing PCBs within the city limits.
  - Bylaws attacked as being discriminatory
  - Bylaws said to not be within the legislative power of the municipality
- **Discrimination Issue:**
  - A bylaw must treat all inhabitants or classes of inhabitants impartially, unless an express power to discriminate has been conferred by statute.
  - **BUT**, a bylaw is not invalid merely because its effect is to cause an incidental advantage to accrue to an individual, or because it adversely affects another.
  - The local council is assumed to be the best judge of what is or is not in the public interest, and the courts have refused to interfere with its decision unless good and sufficient reason has been established.
- **Legislative Power of the municipality Issue:**
  - A bylaw is ultra vires if it prohibits a condition or activity for which a conviction could be sustained under the criminal law.

- A bylaw is ultra vires if it is repugnant to the general law.
  - A bylaw is not repugnant to the general law merely because it creates a new offence and says that something shall be unlawful which the law does not say is unlawful.
    - It is repugnant if it makes unlawful that which the general law says is lawful.
    - It is repugnant if it expressly or by necessary implication professes to alter the general law of the land.
- A bylaw is ultra vires if the same subject matter is dealt with in a comprehensive way in a statute passed in the interest of all the inhabitants of the Province, and **this is true even in the absence of repugnancy.**
  - To the extent to which the ground is covered by Provincial legislation, municipal legislation over the specific subject covered by such Provincial legislation is inoperative, so long as the Provincial legislation shall remain in force.
- **HELD:** The appeal was allowed and the by-laws were held inoperative.
  - The appeal must succeed not on the ground advanced by the appellants that the impugned by-laws were discriminatory or that they were ultra vires the Municipal Act, but on a narrower ground:
    - There was an operative conflict between a provision in the Environmental Protection Act and one of the impugned by-laws → **the absolute prohibition in the by-law clashed with the legislative scheme embodied in the statute. The two pieces of legislation were repugnant to each other.**

## *Kuypers v. Langley (1992) (p. 314)*

### **A Municipality's Use of Emergency Powers**

- Municipality resorting to “emergency powers” provisions of MGA to pass bylaw authorizing the seizure and destruction of any “dangerous dog.”
- Court concluded there was no evidence to support the claim of an emergency, and bylaw declared void.
- **STEPS:**
  - Inquire as to whether there was an emergency.
  - Then decide if a municipal council can declare an emergency does exist, regardless of what any sane view might be of the problem, so that their actions, otherwise somewhat shy on authority and circumstances, can become law without any inquiry as to their justification.
- S. 290 of the BC Municipal Act provides that if the powers conferred on a municipality are inadequate to deal with an emergency, council may, by a two-thirds majority vote declare that an emergency exists and enact appropriate powers.
  - Although it was alleged that there was an emergency relating to dangerous dogs, and the by-law itself suggested that there was, there were no reports submitted to council when it considered the by-law concerning the alleged emergency and council appears not to have considered that there was an emergency.
  - Further, it was not credible that there was an emergency, since council took at least six months to enact the by-law.
- Hence, there was no emergency. Nor can council declare that an emergency exists unless there is a factual basis for the declaration.
- A by-law enacted to deal with an emergency must be designed to deal with a specific situation

which exists or is immediately expected → must be limited in duration and cannot be made of general application into the indefinite future.

### ***Maple Ridge v. Meyer (2000) (p. 323)***

#### ***Colourable Attempt to Regulate Morality***

- Meyer alleges a bylaw disallowing her to be topless in City parks was ultra vires since it sought to regulate matters of criminal law that were exclusively within federal jurisdiction.
- **HELD:** The Municipality's park bylaw was ultra vires since it regulated matters that were exclusively within federal jurisdiction.
  - The matter or pith and substance of the park bylaw placed it within federal legislative competence as being a matter for criminal law.
    - The effect and purpose of the park bylaw was an attempt to stiffen the existing Criminal Code provisions aimed at nudity, indecency and obscenity.
    - The bylaw imposed strict liability and removed important defences permitted in criminal law, including the fundamental defence of showing a lawful excuse.
    - Further, it was not subject to a community standard of tolerance and a breach could lead to imprisonment.
  - The ***bylaw lacked a clear provincial object and suggested a colourable attempt to regulate morality*** and therefore displace the federal jurisdiction of criminal law.
- Courts must apply consideration of policy along with legal principle → flexible and not technical approach.
- Federal & Provincial legislation may overlap in certain areas.
- Indecency is not defined in the Criminal Code → measured on an objective, national, community standard of tolerance.

### ***Ontario Adult Entertainment Bar Assn. v. Toronto (1997) (p. 333)***

#### ***Municipality may pass bylaws for REGULATION, NOT prohibition of adult entertainment***

- Bylaw prohibited contact between performers and patrons of adult entertainment parlours.
  - Enacted to address the health and safety concerns associated with the escalating activity of lap dancing.
- **ISSUES:**
  - Whether the by-law was in substance a criminal law enactment
  - Whether the by-law was overly broad so as to prohibit rather than regulate
  - Whether the by-law was contrary to the freedom of expression guaranteed in section 2(b) of the Canadian Charter of Rights and Freedoms.
- **HELD:**
  - The bylaw was a valid exercise of municipal regulatory authority.
  - Notwithstanding some overlap with Criminal Code provisions dealing with nudity and indecent acts, there was no direct conflict in the application or enforcement of the respective laws → paramouncy doctrine was therefore not engaged.
  - Bylaw was purely regulatory and did not legislate on matters of morality, although touching on such matters was an ancillary effect.
  - The bylaw was not an attempt to raise the level of the permitted standard for indecent or immoral acts proscribed by the Criminal Code.

- The by-law was not overly broad in its application to adult entertainment parlours given the health, safety and crime prevention concerns posed by lap dancing.
- The expression sought to be protected was trivial and insubstantial and thus was not a constitutionally protected right.
  - Even if lap dancing was a form of expression within the meaning of the Charter, and the by-law violated the right to freedom of expression, then this was a justifiable limit under section 1.

### ***Spraytech v. Town of Hudson (2001) (p. 345)***

***Follows line of cases where municipalities given greater authority → SCC reaffirmed ability of municipalities to enter into areas many thought they had no jurisdiction in.***

- **ISSUE:** whether town had authority to enact bylaw that concerned environmental issue (conflict with federal and provincial legislations).
- The appellants used pesticides in the course of their business activities → Town adopted a bylaw which restricted the use of pesticides within its perimeter to certain essential situations where the use was not for purely aesthetic reasons.
  - **S. 410(1) [same as s. 7 in AB]** of the Quebec Cities and Towns Act empowered the council to make bylaws to secure peace, order, good government, health and general welfare.
  - **S. 412(32)** of the Act empowered the council to make bylaws to regulate or prohibit the use of materials that were harmful to public health or safety, including toxic materials.
- **HELD:** As a statutory body, a municipality had only those powers expressly conferred by statute.
  - The bylaw did not fall within the ambit of **s. 412(32)**, as it contained no specific provision referring to pesticides, and pesticides could not be equated to toxic materials.
  - However, the Town's purpose in enacting the bylaw was to limit the use of pesticides to essential situations, in order to promote the health of its inhabitants.
    - This purpose fell within the health component of **s. 410(1)** of the Act, which was a general welfare provision that supplemented the specific grant of power in **s. 412**.
    - The resulting restrictions on the appellants' businesses were necessary incidents to the power delegated under the Act.
    - Bylaw held to be passed for a municipal purpose – contrast with Shell case, where the enactments' purpose was found to be “to affect matters beyond the boundaries of the City without any identifiable benefit to its inhabitants.”
  - This interpretation was consistent with the precautionary principle of international environmental law.
  - The bylaw did not conflict with federal or provincial legislation, as there was no impossibility of compliance between them → the provisions could co-exist.
    - The mere existence of federal or provincial legislation in a given field does not oust municipal prerogatives to regulate the subject matter.
    - The legislation envisioned the enactment of complementary municipal bylaws → provincial legislature did not intend to abolish the municipality's power to regulate.

## *Crop Life Canada v. City of Toronto (2005)*

- Upheld Spraytech decision.
- Broad, purposive interpretation of municipal powers embraced.
- **Precautionary principle** → available, but must be based on credible research.

## **Planning Law Overview → Part 17 MGA (starting p. 316)**

- Under MGA, variance sought in permitted use triggers notice to the community.
- The USE and not the USER is the relevant piece of information.

## *Greater Toronto Airports (2000) (p. 392)*

- **ISSUE:** whether fed's legislative authority over aeronautics precludes the City of Mississauga from regulating construction of new buildings at the airport.
- Airport authority required building permits to construct → challenged the city's jurisdiction to impose charges at the airport.
- **HELD:** provincial law cannot affect a federal undertaking → entire project came under aeronautics (feds).
  - Ontario building scheme would affect vital part of Aeronautics undertaking, and the city has no jurisdiction to do so.
- **TEST** for interjurisdictional immunity → broader test of immunity or exclusivity:
  - If a provincial law affects a vital or essential or integral part of a federally regulated enterprise, then the otherwise valid provincial law does not apply to that enterprise (does not require impairment).
  - To find that a provincial law does not apply to a federal undertaking "it is sufficient that the provincial statute...affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it."
    - If a province seeks to apply its law directly to a federal undertaking, the provincial law will not apply if it affects a vital part of that undertaking.
    - If a provincial law only indirectly or incidentally affects a federal undertaking, it will apply unless it impairs, paralyzes or sterilizes the undertaking.

## *Federation of Canadian Municipalities v. AT&T (2002) (p. 414)*

### **Certain limits to municipality's power when dealing in area of telecommunications**

- Ledcor Industries was seeking access to the City's roadways to install fibre optic lines.
- The City sought to impose certain terms and commissions on the access, including excessive license fees, revenue sharing, giving the City exclusive use of four fibre strands, and other onerous restrictions that were more severe than those imposed by other municipalities and railways.
  - Ledcor then made an application to the CRTC for an access order, and the City then in turn applied for an order setting access terms and conditions.
- **ISSUE:** did the CRTC have jurisdiction to adjudicate on the issues before it.
- **HELD:** The Commission assumed exclusive jurisdiction over the dispute → the pith and substance of the decision related to telecommunications and that any effects on property and civil rights were incidental.

- CRTC had jurisdiction to embark upon the enquiry and did not lose or exceed its jurisdiction.
- Even if it erred in law in the exercise of its jurisdiction or improperly exercised its discretion in fixing the conditions, the issues fell squarely within the Commission's domain of expertise, and the court deferred to the Commission.
- The CRTC decided that Ledcor was to be granted access to municipal lands subject to conditions, including that it pay \$7,616 to the City for the recovery of costs to provide access.
- Ledcor was not required to pay land charges, access fees or fixed common costs to the City as the City had sought.
- This case is PRE-United Taxi, though the outcome post-United Taxi likely wouldn't change → more of a constitutional issues (no leeway for constitutional issues).
  - Already a regulatory scheme in place by the feds in this area.

**See p. 442 CB → Hierarchy of Planning Law in Alberta & p. 447 Flowchart**

### *Re Schekter (1979) (p. 443)*

- Schekter was the owner of a quarter section of land who applied for subdivision.
  - The quarter section was situated within the County of Strathcona, and within the jurisdiction of the Commission.
  - There had already been a subdivision of part of the south half of the quarter section → the proposal was to further subdivide 151 acres in two parcels, one which was intended to be sold to Schekter.
- The Commission refused the application on the ground that any further subdivision of the quarter represented a fragmentation of agricultural land contrary to the spirit and intent of the Regional Plan - low density agricultural zone.
- The owner appealed to the AB Planning Board, which denied the appeal.
  - It found that the 151 acre parcel had a soil capacity rating for agriculture and that the land was in a low density agricultural zone and was currently being farmed and cultivated in one unit.
- The Court was limited in its inquiry as to whether the interpretation and application of the Regional Plan by the Board were ones that it could reasonably bear.
  - **HELD:** The Board's interpretation and application were reasonable.
- Appeals must be based on issues of law or jurisdiction → CA refused leave as it was neither.

### *Smith v. Tiny (Township) (1980) (p. 448)*

- Municipality passed a zoning bylaw restricting certain areas to seasonal residential occupation.
  - "Family" was defined in part to mean one or more human beings related by blood or marriage, or common-law marriage, or a group of not more than three human beings who need not be related by blood or marriage, living together as a single housekeeping unit.
- **ISSUE:** was the bylaw ultra vires?
- **HELD:** bylaw upheld
  - Land use restricted to a particular type or group of persons may be unreasonable or discriminatory and thus ultra vires, BUT, this restriction in its definition of family is not confined to persons related by blood or marriage, as common law relationships and

unrelated groups are also included.

- With the broad definition, no dire results or inequitable applications of the bylaw would arise.
- Definitions under bylaw not held to be unreasonable or discriminatory or to constitute zoning based on the relationship of the occupants.
- The definition of family is a valid zoning device to regulate the use and character of residential premises.
- The bylaw is not void from vagueness and uncertainty in defining “Dwelling unit” and “seasonal dwelling unit.”
- No reason why a municipality may not regulate the use of land deemed appropriate for seasonal or cottage-type use.
- These regulations relate to the use of land → municipalities use zoning to regulate what happens on different types of land.
- While the bylaw may provide little guidance as to what a unit “not used for continuous habitation...” may be, and although questions of interpretation may arise, this does not render the bylaw invalid.

### ***Canmore Property Management v. Canmore (Town) (2000) (p. 454)***

#### ***Look at the land USE, not the USER.***

- Practice of tourist homes where non- resident owners in residential districts rented their homes to tourists on a daily or weekly basis in Canmore.
- Town adopted by-laws that set minimum penalties for operating a tourist home without a permit.
  - MGA requires every municipality to pass a land use bylaw, dividing the municipality into districts, etc. → Legislative intention to allow municipality to oversee the development and use of land, and maintain the quality of the physical environment with a care to the extent to which public interest infringes the rights of individuals.
- Bylaws challenged on basis of following **ISSUES**:
  - Is this an attempt by municipality to regulate **users** and not **uses** of land.
  - Is the definition of tourist home absurd or contradictory
  - Is the bylaw ultra vires the town based on non-residential purposes and the setting of minimum fines for running a tourist home without a permit.
- **HELD:** Bylaws upheld.
  - Municipality can oversee the development and use of land and maintain the quality of the physical environment.
    - As long as the town acted within its authority it could pass whatever by-laws it wished → the by- laws enacted were within the respondent's jurisdiction.
    - See **s. 640** → what a land-use bylaw may and may not contain.
  - The definition of family did not mean that the by-laws should be impugned as unreasonable or ultra vires.
  - This was not an attempt to limit the users of the premises but was a bona fide attempt by the respondent to regulate the use of the premises.
  - The definition of tourist home was not absurd or contradictory when read in the context of the planning definitions.
    - **Difficulties of interpretation or enforcement alone could not render a by-law invalid (Smith v. Tiny).**
  - The basis of the class of tourist home, being short-term occupancy, was not ultra vires

the town's powers.

- The applicant had not proved bad faith or distortion of the process.
- The Act gave the town the authority to create offences and fines.
  - The fact that the Act set out a specific offence of breaching a by-law and set a maximum penalty did not preclude the respondent from passing minimum penalty by-laws.

- **When examining a situation where two levels of government have the ability to pass legislation, a court must look specifically at the provisions → if one level has dealt with a matter completely and exhaustively, the subordinate legislation must give way, just as it must give way if there is a conflict, or it is at cross purposes with the superior legislative body.**

### *Nelson v. Brazeau (2000) (p. 466)*

***A municipality that would amend its land use bylaw to change the designation for a specific parcel exercises powers granted to it under the MGA, and in so doing must act on sound planning principles.***

- Application to quash a bylaw that changed the permitted usage of lands from agricultural to an industrial maintenance facility.
- Small town dispute, and one of the players was the son of the Reeve, who was employed by one of the parties to the rezoning dispute.
- There were concerns whether Reeve Schwab would be impartial in participating in any applications dealing with his son's employer when other property owners objected to any approval for a development permit authorizing industrial use on the Keori lands.
- Members of the Council attended at the Keori lands with the two principals of Dial Oilfield without notice to the other property owners.
- The power of a municipal government to enact land use bylaws, and to designate permitted uses for specific parcels, can and often does raise a narrow planning issue between competing citizens: the persons who propose a re-designation of their land and the neighbours who oppose.
- 3 aspects of the procedure before Council came under fire:
  - Whether the rule about relevant planning factors binds Council
  - Whether the "reasonable bias" rule applies to disqualify individual councillors, and
  - Whether the public hearing was inclusive → meaning the Councillors were bound to decide the case on what they heard at that hearing, and not on any other information or arguments.
- **HELD:** The bylaw was quashed on the ground that it was invalid.
  - Because the municipality was managing a dispute between 2 parties, function of zoning application became quasi-judicial, which triggered all new set of rules.
  - Taking a view of the site with one party in the absence of the other by the Council amounted to a denial of procedural fairness and natural justice of the type that required a remedy.
  - See **s. 169** on Pecuniary Interest
- Noce doesn't like this decision → very fact-specific case that has not changed the practices of any municipalities.

## *Congregation des temoins de Jehovah de St-Jerome-Lafontaine v. Lafontaine (Village) (2004)(p. 489)*

### **Decisions should be based on sound planning principles.**

- JW's sought to acquire a parcel of land in the Municipality of Lafontaine upon which it could establish a place of worship → purchased a lot and applied twice for a zoning change, but the municipality refused both applications without giving reasons.
- **ISSUE:** whether the municipality lawfully denied an application for rezoning to permit the JW's to build a place of worship
  - At issue is the **CONTENT** of duty of fairness owed to the JW's → does duty require municipality to give the JW's reasons for refusing the rezoning application?
- **HELD:** the matter was remitted to the Municipality for reconsideration.
  - In weighing the JW's rezoning requests, the Municipality was bound to exercise the powers conferred upon it fairly, in good faith, and in the public interest.
  - When making an administrative decision affecting individual rights, privileges or interests, a public body was bound by a duty of procedural fairness.
    - In this case, that duty was heightened by the aggravating potential for abuse of discretionary statutory authority, the lack of an appeal provision, the expectations created by the way in which the Municipality responded to the JW's first rezoning application, and the importance of the decision to the JW's.
  - The second and third rezoning applications were not entitled to much deference because there was no indication that the Municipality had utilized its expertise in dismissing these applications.
  - The Municipality was required to carefully evaluate the applications and to give reasons for refusing them → by refusing to justify its decisions, the Municipality breached its duty of procedural fairness.
- If no land were available in the regional community use zone, this would constitute an infringement of freedom of religion under the Charter.
  - Determined that neither the purpose nor the effect of the zoning bylaw had been to infringe the freedom of religion of the JW's.

## *Robertson v. Edmonton (1990) (p. 522)*

### **Strict compliance with service requirements when exercising power of expropriation.**

- The city changed bylaws to enable land owned by a 3<sup>rd</sup> party to be used as a dump → rezoning application triggered a public hearing.
- Prior to passing the by-laws, the city published notices of a public hearing and sent notice to parties with an assessable interest and those who advised the city that they were interested in the by-laws.
- The notices did not indicate that there would be a five-minute time limit on submissions nor did they include the name of a place where a copy of one of the by-laws could be inspected.
- **ISSUES:**
  - Claimed failure to comply by not specifying the five-minute rule nor a place for inspection of one of the by-laws.
  - Also contended that council breached the rules of natural justice in failing to give them a reasonable opportunity to be heard and in failing to conduct the hearing impartially and without bias → did council pre-judge the issue?

- **HELD:** Bylaws quashed; city couldn't build a dump on the land.
  - There was no evidence that anyone was prejudiced by the failure to include the place for inspection.
  - The five-minute rule was not per se contrary to the principles of natural justice → question was whether the applicants were given a reasonable opportunity to be heard.
  - Failure to take into account relevant considerations constituted a jurisdictional error and provided a basis for judicial review.
    - Council ought to have allowed B to speak for his five minutes on anything relevant.
    - Furthermore, the Society was misled on the five-minute issue.
  - City exercising a quasi-judicial function → failed to acquire jurisdiction to pass the by-laws by breaching its duty of fairness to persons affected and by failing to give an effective hearing and to give accurate notice of the procedures to be followed at the hearing.
- Because of the extraordinary nature of the power granted to a municipality under the Expropriation Act, **STRICT** compliance with the service requirements of that Act was considered to be a condition precedent to the exercise of that power.

## *Petherbridge v. Lethbridge (2000) (p. 538)*

### ***A procedural error does not automatically vitiate a proceeding.***

- Land rezoned to allow for highway/commercial development, which opposed by the owner of a neighbouring property.
  - He applied to set aside the by-law alleging the procedure followed in passing the by-law was unfair.
- **ISSUE:**
  - Did council commit a procedural error in the following:
    - Was bylaw contrary to **s. 35** of the Land Use Bylaw → didn't wait 12 months to reapply.
    - Failing to provide an opportunity for all interested parties to examine and respond to the reports.
    - Procedural error for Council to look at material after a public hearing has been held → if you are a member of Council and haven't participated in any of the hearings, you cannot vote on the issue. IF, however, you've heard the entire hearing, you **MUST** vote.
- **S. 536** → procedure for challenging validity of bylaws.
  - Be aware of strict timelines involved in these applications; when you file originating notice, you set the date.
- **S. 607** → how documents must be served on a municipality.
- **HELD:** Bylaw upheld.
  - The decision in relation to the by-law was quasi-judicial with a strong legislative component → therefore the standards in relation to procedural fairness were not as stringent as they were in relation to more formal tribunals.
  - ***A procedural error does not automatically vitiate a proceeding*** → a procedural defect, whether contrary to statute or common law, does not vitiate a proceeding unless:
    - A statute prescribes such an effect.
    - A real possibility of prejudice to the attacking party is shown, or

- The procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.
- The applicant did not demonstrate any of these factors or that prejudice resulted from the alleged procedural errors.
- M's presence at the public hearing did not give rise to a reasonable apprehension of bias.
  - **S. 172(1)(iv)** → councillors should not be present in public hearings when they have a pecuniary interest; if they do, they are disqualified.
  - For these reasons, the test should only be somewhat relaxed → question is whether a reasonable and right-minded person would not find that it was more likely than not that council would not decide fairly in these circumstances.

### *Pacific National Investments v. Victoria (2000) (p. 550)*

#### **Where a municipality enters a contract with a legitimate purpose, that contract must be honoured.**

- The City down-zoned waterfront property → reduced number of rights or use classes the property has.
  - Affects value of property, and City can do this with or without owner's consent.
- Developer suffered damages as down-zoning occurred mid-development.
  - Developer made upgrades to the land prior to the down-zoning, so claim of unjust enrichment as City takes benefit of those upgrades as development could no longer go ahead under changed plans.
  - Developer claimed breach of contract → the zoning change was in breach of the City's implied obligations under the agreement.
- **HELD:** The Municipal Act provided for the power to zone by by-law → it provided for no power to constrain the future use of that power.
  - Therefore, the City did not have the capacity to make and be bound by an implied term to keep the zoning in place for a number of years and to pay damages if it modified the zoning.
  - Any such term would have been ultra vires and contrary to legislatively established public policy.
  - The City could not agree to terms that fettered its legislative power, directly or indirectly, unless there was legislation expressly permitting it to do so.
- Where a municipality enters a contract with a legitimate purpose, that contract must be honoured.
  - The City should not be able to terminate with impunity a contract that it uniquely crafted, thoughtfully entered into, received the full benefit of, and concedes is lawful.
  - Developer entitled to damages for breach of contract → awarding compensation does not amount to a fettering of the municipal power over zoning that adversely affects the public's interest in local government.

#### **See Flowchart on Development Permit Approval – p. 600**

- **S. 685(3)** → each zoning includes both permitted uses and discretionary uses.
  - Development officer has no discretion if use falls within permitted use in zoning → MUST grant development permit.
  - If asking for a variance or relaxation, the development officer can exercise discretion in

- issuing permit.
- **S. 686** → if you're not happy with decision of development officer, recourse is to appeal decision within 14 days.
  - Subdivision & Development Appeal Board (SDAB) will provide notice of hearing date and give notice to all neighbours within 60 metres of property.
  - **S. 687** → within 15 days of hearing, they're to provide you with a written decision.
  - SDAB has broad discretion.
- **S. 643(2)** → if a non-conforming use, then if not used for 6 consecutive months, the use is discontinued and new zoning bylaw kicks in.
- Don't deal with zoning issues at SDAB.

### ***Chase v. New Brunswick (Prov. Planning Appeal Board) (1985) (p. 601)***

***Conditions imposed on development must be reasonably related to development, otherwise they're ultra vires.***

- Lands already subdivided in 1958; applicant only looking to change boundary line in 1984.
- Municipality approved the subdivision, subject to a number of conditions, one of which was that 8% cash in lieu of land be paid to fulfill the requirements of the Planning Act.
- **HELD:** The decision of the appeal board, and corresponding conditions, was quashed.
  - Conditions imposed on development must be reasonably related to development, otherwise they're ultra vires.
  - The payment demanded by the municipality was purely revenue producing taxation for it had no relevance to orderly community planning.
  - The Board was in error because the applicants did not at any time request a subdivision within the meaning of the statute, but merely a relocation of a dividing line between two existing and approved lots.
    - The Community Planning Act was not intended to apply to such applications.

### ***Subdivision Approval Process – p. 608***

- **S. 654** → can have conditions attached to subdivision; i.e. may have to satisfy certain conditions before issuing subdivision.
- Neighbours don't have right to be heard in SDAB hearing on subdivision (different from development hearing).
- **S. 678** → neighbours can't appeal or speak at hearing (don't have standing to appeal).
- Condominium Property Act → inserts extra steps into process for strata/condo development.

### ***Morris v. Wetaskiwin (2002) (p. 609)***

***Imposing conditions on a subdivision permit is NOT an improper delegation of council's authority.***

- Application for judicial review of a decision of the Wetaskiwin city council approving a subdivision of land.
- The applicants were summer cottage owners in Summer Village, which was adjacent to the subdivided land.
- **ISSUES:** approving the subdivision subject to Water Act compliance was an error in law and an improper delegation of its statutory duty to ensure a suitable water supply.

- Also argued that municipality erred by approving the subdivision despite the fact that it could not be accessed legally.
- **HELD:** Application dismissed and subdivision upheld.
  - **S. 678** doesn't apply to neighbours (different from development appeal) → no statutory right of appeal to the SDAB.
  - The applicants failed to discharge their onus of establishing that municipality took into account irrelevant considerations or failed to take into account relevant considerations.
  - The decision to grant subdivision approval was not clearly irrational.
  - Approval of the subdivision subject to compliance with the Water Act complied with all statutory requirements and was not an error of law.
  - Municipality retained its decision-making authority by rendering its approval void if the Water Act was not complied with.
  - **S. 22(3)** → with regard to the closure or blocking of road, court concluded that **decision based on proper planning considerations**.
    - All statutory and planning requirements were complied with by ensuring that each lot had road access and was not landlocked.
- **TWO avenues of appeal from decision of subdivision authority:**
  - **S. 678** (though doesn't apply to neighbours).
  - Through judicial review, which must be based on some legal or jurisdictional issue.
    - Decision should be upheld unless found to be patently unreasonable.
    - Deferential standard will not save a municipal council if it has committed a pure error of law or jurisdiction.

### ***David Everett Holdings v. Red Deer (1974) (p. 634)***

- Application for development permit for non-conforming building was refused and appeal made by owner of building.
  - Non-conforming building vs. non-conforming use.
  - The owner wanted to change the non-conforming use of the non-conforming building (height and setback) to a conforming use, namely, that of a restaurant → and to make certain alterations.
- Application for alterations was granted on appeal by the Board with some conditions.
- **ISSUES:**
  - Was the building a non-conforming building within the meaning of the Act.
  - If so, did the Development Appeal Board err in law in determining that the development as proposed amounted to a structural change of the building.
  - If so, did the Board have the jurisdiction to make a decision allowing structural change of the building.
  - If so, did the Board have authority under the MGA to impose conditions to the granting of the development permit?
- **HELD:** The by-law did not have a retrospective effect on a non-conforming building
  - However the Board had no jurisdiction to permit any structural alterations as it was bound by the mandatory provisions of **s. 125(1)**.
    - The alterations as proposed were structural in nature since they involved floors, walls, etc.
    - It is the degree of change relative to the structure of the building that is determinative in each case.
  - The condition imposed by the Board was invalid as being confiscatory in nature and

therefore improper.

## *Granville Savings v. Calgary (1995) (p. 648)*

**S. 643(2)** → ***Look to INTENTION of property owner when deciding if and when a non-conforming use has been discontinued.***

- **S. 643(2)** at issue → The non-use of premises exceeded 6 months → owner sought declaration that no discontinuance of the pre-existing non-conforming use of the property had occurred, and that the non-conforming use status should continue to allow for the sale of the property.
- Owner defaulted on loan obligations, and the city seized all of the chattels, which resulted in the restaurant ceasing to operate.
- Owner continued its efforts to sell the property as a restaurant, but was unsuccessful because the city refused to confirm that the premises could remain a legal non-conforming use.
- **HELD:** Not a question that the property had not actually been used as a restaurant for over six months.
  - HOWEVER, it was the city's own conduct in seizing the restaurant fixtures, and in refusing to confirm that the non-conforming use continued, that directly resulted in the owner's difficulty in selling the property and continuing the non-conforming use in a timely fashion.
  - The City's seizure and G Corp.'s inability to give assurances regarding non-conforming use to prospective purchasers frustrated its ability to make practicable use of the property.
  - No discontinuance occurred within the meaning of the Planning Act and the permit remained valid → the non-conforming use would continue for six months to allow a sale.
  - **TEST:** 2-pronged requirement:
    1. No actual use of a period of six months, and
    2. There must be an ***intention*** to end the non-conforming use for a discontinuance of such use.

## MUNICIPAL PLANNING: Issues Summary

### Factors on Which to Challenge a Bylaw:

#### **ULTRA VIRES JURISDICTION**

##### **Conflicts with Criminal Code**

- **Moffat v. Edmonton** argued bylaw directed at morality issue, and therefore attempted to establish moral conduct and criminal behaviour.
- **Kent District v. Storgoff** → The by-law attempted to create a crime and to prevent conditions arising which might lead to a breach of the peace or unlawful assembly, all of which were matters relating to criminal law, and as such, were within the exclusive jurisdiction of the Parliament of Canada.
  1. Test as to what constitutes a crime → Is the act prohibited with penal consequences?
- **Maple Ridge v. Meyer** → Pith and substance of the bylaw placed it within criminal law → bylaw lacked a clear provincial object and suggested a colourable attempt to regulate morality.
  1. Bylaw not subject to a community standard of tolerance and a breach could lead to imprisonment.

##### **Colourable attempt to legislate Federal or Provincial matters**

- Where there is an operative conflict between a provision in a Federal Act and one of the impugned bylaws, the 2 pieces of legislation are repugnant to each other (**Ontario AG v. Mississauga**).
- A bylaw is ultra vires if the same subject matter is dealt with in a comprehensive way in a statute passed in the interest of all the inhabitants of the Province, and this is true even in the absence of repugnancy (**Ontario AG v. Mississauga**).
- **Spraytech** attempted to argue that municipality had no authority to enact bylaw that concerned environmental issue (conflict with federal and provincial legislation).
- **Greater Toronto Airports** → If a provincial law/bylaw affects a vital or essential or integral part of a federally regulated enterprise, then the otherwise valid provincial law does not apply to that enterprise.
  - It is sufficient that the provincial statute/bylaw affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it.
- **Federation of Cdn. Municipalities v. AT&T** → no leeway for constitutional issues.
  - The CRTC assumed exclusive jurisdiction over telecommunications dispute, as the pith and substance of the decision related to telecom (Federal), and any effects on property and civil rights were incidental.
- **Canmore Property Management** → When examining a situation where two levels of government have the ability to pass legislation, a court must look specifically at the provisions → if one level has dealt with a matter completely and exhaustively, the subordinate legislation must give way, just as it must give way if there is a conflict, or it is at cross purposes with the superior legislative body.

##### **Not Authorized by MGA / unconstitutional**

- **Spraytech** → as a statutory body, a municipality only has those powers expressly conferred by statute.
- **Falardeau & Parklane Trailer Court** that bylaw to increase fees for mobile park were unfair →

didn't feel charge was properly characterized as a tax.

- **Lafarge v. Foothills** → argued that bylaw constituted a disguised indirect tax; mine operators paid license fees based on production levels.
- **Kuypers v. Langley** → could not support the claim of an emergency.
  - A by-law enacted to deal with an emergency must be designed to deal with a specific situation which exists or is immediately expected → must be limited in duration and cannot be made of general application into the indefinite future.

## ***RATIONAL / FUNCTIONAL FOUNDATION FOR BYLAW***

### **Does it achieve municipal purpose/intention?**

- **Shell v. Vancouver** → action can be argued to not be under a municipal purpose as per **s. 3**.
  - The purpose for which the action was taken was outside the municipality's powers, thereby rendering the action itself invalid.
  - Purpose of enactment was found "to effect matters beyond the boundaries of the City without any identifiable benefit to its inhabitants."
- Purposive interpretation.

### **Prohibition vs. Regulation**

- **Moffat v. Edmonton** attempted to argue bylaw was prohibiting their trade.

### **Vague or Uncertain Definitions in bylaw as per what it constitutes.**

- Bad faith intentions.
- **Canmore Property Management** → argued that definition of "tourist home" absurd or contradictory, again alleged to be looking at the user as opposed to the use (Bylaws withstood challenge).
- **Smith v. Tiny** → difficulties of interpretation or enforcement.
  - Argued bylaw was void from vagueness and uncertainty in its definitions.

### **Unreasonable/Discriminatory**

- Argued in **Smith v. Tiny** → definitions under bylaw argued to be unreasonable or discriminatory and constituted zoning based on the relationship of the occupants (allegedly looked at the USER and not the USE, which is backwards). Not found to be so, however!
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## ***Municipality's Basis to Uphold or Justify a Bylaw***

### **MGA → Process to Determine What municipality Can Pass Bylaws in Relation To:**

- Start with **s. 3** to determine the purposes of a municipality.
- **Ss. 7-8** → to determine what a municipality can pass bylaws in relation to.
  - Licensing Arrangement as per **s. 8(c)**?
  - If you can find a connection between the regulation of something and **s. 7(a)** (regulation would maintain the "safety, health and welfare of people..." then it would likely override a challenge.
  - As per **s. 8(c)**, a license fee may be in the nature of a reasonable tax for the privilege conferred by the license or for the purpose of raising revenue and may be computed in any reasonable manner accepted by the council (**Hlushak v. Fort McMurray**).

- **S. 9** → the power to pass bylaws is meant to give council very broad authority.
- After **United Taxi**, municipalities could now enter into areas they previously could not as per the broad authority given them under MGA, and the end of Dylan's Rule (whereby all powers of municipality were specifically listed).

### Deference to Municipalities

- Courts have adopted a generous, deferential standard of review toward the decisions of municipalities → unless a municipality's interpretation of its power is "patently unreasonable," in the sense of being coloured by bad faith or some other abuse, the interpretation should be upheld (**Shell v. Vancouver, Rascal Trucking, United Taxi**).

### Achieves municipal purpose or intention

- **Passutto Hotels v. Red Deer** → found that the City enacted the bylaw for municipal purposes (concern for its citizens' safety) and without ulterior motive.

### Not Restrictive Legislation

- Enabling vs. restricting legislation (**United Taxi**).
- Not outright prohibition on act, just regulating place it occurs to keep city streets safer.
- Bylaw does not prohibit activity/trade, but merely regulates it (**Moffat v. Edmonton**).
- **Ontario Adult Entertainment Bar Assn.** → bylaw was a valid exercise of municipal regulatory authority.

### Not Unreasonable or Discriminatory

- A bylaw 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 → elected representatives thought to understand local requirements better than the judges (**Rascal Trucking**).
- Difficulties of interpretation or enforcement alone could not render a bylaw invalid (**Smith v. Tiny**).

### Jurisdiction Under MGA

- **Passutto Hotels v. Red Deer** → license fee set out by bylaw was genuinely (in good faith) related to the operation of the drinking establishments and is permitted under **s. 8(c)(i)**.

### No Conflict with Federal or Provincial Legislation

#### **CRIMINAL LAW CONFLICT**

- **Moffat v. Edmonton** upheld bylaw as it was not directed at morality issue (not Criminal Law), but at the manner in which the trade should be carried on, which is not legislation in the field of criminal law.
- Argue the legislation is in the nature of a police or municipal regulation of a **merely local character** calculated to preserve peace and repress disorderly and riotous conduct in the municipality (**Dupond**).
  1. Not punitive, but essentially **preventative** in nature.
- A bylaw is ultra vires a municipality if it prohibits a condition or activity for which a conviction could be sustained under the criminal law (**Ontario AG v. Mississauga**).
- **Ontario Adult Entertainment Bar Assn.** → Notwithstanding some overlap with the Criminal Code provisions dealing with nudity and indecent acts, there was no direct conflict in the

application or enforcement of the respective laws → paramouncy doctrine was therefore not engaged.

1. Bylaw was purely regulatory and did not legislate on matters of morality, although touching on such matters was an ancillary effect.

### FEDERAL LEGISLATION CONFLICT

- Not unconstitutional or incompatible → federal and municipal legislation can co-exist (**Spraytech, Crop Life Canada**).
  1. The mere existence of federal or provincial legislation in a given field does not oust municipal prerogatives to regulate the subject matter.
  2. The legislation envisioned the enactment of complementary municipal bylaws → provincial legislature did not intend to abolish the municipality's power to regulate.
- If a municipal law only indirectly or incidentally affects a federal undertaking, it will apply unless it impairs, paralyzes or sterilizes the undertaking (**Greater Toronto Airports**).
- **Passutto Hotels v. Red Deer** → not at conflict with GLA as the over-arching purpose of each piece of legislation was different → no proven danger of double-policing which would render the bylaw invalid.
- **Canmore Property Management** → When examining a situation where two levels of government have the ability to pass legislation, a court must look specifically at the provisions → if one level has dealt with a matter completely and exhaustively, the subordinate legislation must give way, just as it must give way if there is a conflict, or it is at cross purposes with the superior legislative body.

### NOT UNCONSTITUTIONAL (No indirect tax)

- **Falardeau & Parklane Trailer Court** → must be a connection between fee and the services the municipality provides → recovering costs here that were incurred as a result of permitting mobile home parks to function, and not recovering costs of administering the scheme.
- A municipality can pass bylaws concurrently designed to generate revenue as well as to compensate for definable expenses without bringing them down, provided the scheme is not wholly colourable (**Lafarge**).
  1. Distinguish between a tax that is likely to be recouped only because, like other expenses, it is a cost of doing business, and, on the other hand, a tax that is likely to be “passed on” as an element of the very good or service, or transaction which is taxes.
  2. Fees intended to offset costs of the regulatory scheme and the costs associated with industry taxed (**Allard Contractors**).
    1. Although bylaws were discriminatory in distinguishing between certain persons and usages, such discrimination was authorized by the MGA, which provided for discrimination based on volume.

### Recovery Against Municipality in Nuisance

- **Tock v. St. John's Metro** → As a general rule, liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the “inevitable result” or consequence of exercising that authority, and in absence of negligence.
- Recovery will be permitted unless it is shown that the interference was permitted by express language in the statute or by necessary implication from the language of the statute coupled with a factual finding that the damage was the inevitable consequence if the ordered or authorized action (is legislation permissive?).

- Municipalities COULD be held liable for nuisance if they do not provide citizens with ALL pertinent information before developments proceed, and a nuisance claim results (**Bowes v. Edmonton**).
  1. The City owed a duty of care to the homeowners to use reasonable care in determining whether to approve their construction permits, and was obliged to disclose any information it had which might bear on the risk associated with their proposed construction projects.
- What is considered a public nuisance?
  1. Question of fact → many factors may be considered, including the inconvenience caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others and the character of the neighbourhood (**Murray Ryan v. Victoria**).
- See **s. 532** → duty imposed on municipalities, and resulting liability for damages if duty not honored.

## ***How are Municipal Planning Decisions Evaluated?***

- The Board's interpretation and application of zoning bylaws must be reasonable (**Re Schekter**).
- Definitions under zoning bylaw must be reasonable and not discriminatory and must not constitute zoning based on the relationship of the occupants (**Smith v. Tiny**).
- Must look at the land USE, and not the USER (**Canmore Property Management**).
  - With broad definitions, no dire results or inequitable applications of the bylaw are likely to arise.
- A municipality that would amend its land use bylaw to change the designation for a specific parcel exercises powers granted to it under the MGA, and in so doing must act on sound planning principles (**Nelson v. Brazeau, Congregation des temoins de Jehovah de St-Jerome-Lafontaine**).
  - **Morris v. Wetaskiwin** echoed this sentiment → decisions must be based on proper planning considerations.
    - **Decision to grant subdivision approval cannot be clearly irrational.**
- When exercising the power of expropriation under the MGA, the municipality must STRICTLY comply with the service requirements of the Act (Robertson v. Edmonton).
- **Petherbridge v. Lethbridge** → A procedural error does not automatically vitiate a proceeding, unless:
  - A statute prescribes such an effect.
  - A real possibility of prejudice to the attacking party is shown, or
  - The procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.
- Where a municipality enters into a contract with a legitimate purpose, that contract must be honoured (**Pacific National Investments**).
  - City should not be able to terminate with impunity a contract that it uniquely crafted, thoughtfully entered into, received the full benefit of, and concedes is lawful.
  - Developer entitled to damages for breach of contract → awarding compensation does not amount to a fettering of the municipal power over zoning that adversely affects the public's interest in local government.
- Conditions may be imposed on a subdivision permit by the Board → not an improper delegation of council's authority (**Morris v. Wetaskiwin**).

- Conditions such as those imposed by the board in **David Everett Holdings** can be found to be invalid as being confiscatory in nature and therefore improper.
- Board has no jurisdiction to permit any structural alterations → bound by the mandatory provisions of s. 125(1) (**David Everett Holdings**).
  - Degree of change relative to the structure of the building is determinative.
- Look to intention of property owner when deciding if and when a non-conforming use has been discontinued (**Granville Savings**).
  - Municipality cannot frustrate ability to make practicable use of the property (as within non-conforming or conforming use).
  - **TEST:** 2-pronged requirement:
    1. No actual use of a period of six months, and
    2. There must be an **intention** to end the non-conforming use for a discontinuance of such use.