

# Can municipalities regain power over renewable energy projects?

The removal of municipal planning powers over renewable energy generation projects has made Ontario's *Green Energy and Green Economy Act (GEGEA)*<sup>1</sup> very unpopular with those seeking to oppose renewable energy projects, especially wind turbines, in their neighbourhood.

In an effort to reverse this loss of control, some municipalities are considering introducing by-laws to regulate the development of renewable energy projects. The battle lines between municipality and province are centred around the municipal power granted by the *Municipal Act, 2001*<sup>2</sup> to pass by-laws relating to the health, safety and well-being of its citizens; and the right under section 7 of the *Canadian Charter of Rights and Freedoms* to life, liberty, and the security of the person in accordance with the rules of natural justice.<sup>3</sup>

The first mover in this battle is the Municipality of Arran-Elderslie, which passed By-law 14-10, *Health Provisions Respecting Locating and Erecting Wind Generation Facilities*, on May 10, 2010. That by-law requires wind farm developers to provide the municipality's chief building official with certificates supported

by health studies from a number of provincial ministries and from Health Canada, stating that the type of wind facility will benefit, or not harm, the health, safety, and well-being of residents. It appears that other municipalities may take similar action.

This article is not intended as a critique of the Arran-Elderslie by-law, nor to discuss the wide-ranging implications of the *Charter* arguments that it prays in aid. Instead, the focus is on whether the power of municipalities to pass by-laws concerning the health, safety, and well-being of their citizens survives the withdrawal of planning powers for renewable energy facilities.

## Municipal Act, 2001

Municipalities are "creatures of the provinces," deriving all of their powers from specific provincial grants. In Ontario, much of this power is delegated to municipalities through the *Municipal Act, 2001*. Under the Act, municipalities across Ontario are given the power to enact by-laws relating to the "health, safety, and well-being of persons."<sup>4</sup>

Despite this broad grant of power, by-laws are subordinate to provincial and federal legislation. A by-law

cannot contradict the intent of the provincial or federal legislation.<sup>5</sup> Ontario's *Municipal Act, 2001* explicitly states that a by-law will be inoperative if it conflicts with a provincial or federal Act, regulation, or instrument, so as to frustrate the purpose of that Act, regulation, or instrument.<sup>6</sup>

## Spray-Tech Case

The decision of the Supreme Court of Canada in *Spray-Tech*<sup>7</sup> sets out the test for validity of by-laws where provincial or federal legislation exists.

In 1991, the Town of Hudson, Quebec enacted a by-law under the Quebec equivalent of the *Municipal Act*, banning the use of cosmetic pesticide applications within its borders. The Province of Quebec had already enacted the *Pesticide Act*,<sup>8</sup> which

1 S.O. 2009, c. 12. In this article, the *GEGEA* will refer to the *GEGEA* and all its associated regulations.

2 S.O. 2001, c. 25.

3 Part I of the *Constitutional Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c. 11 [*Charter*].

4 *Supra*, note 3 at s. 10 (2) and s. 11 (2).

5 *Superior Propane Inc. v. York (City)*, (1995), 23 O.R. (3d) 161 (CA).

6 *Supra*, note 2 at s. 14.

7 114957 *Canada Ltee (Spray-Tech, Societe d'arrosage) v. Hudson (Ville)*, 2001 SCC 40 [*Spray-Tech*].

8 R.S.Q. c. P-9.3.



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banned the use of certain pesticides. Federal legislation, the *Pest Control Products Act*,<sup>9</sup> dealt with the regulation, importation, exportation, sale, and manufacture of pesticides. In response to a charge under the by-law for application of pesticides, *Spray-Tech* challenged the validity of the by-law, arguing that it was inoperative due to the presence of the federal and provincial legislation.

The Supreme Court held that, in determining if a by-law is valid, courts must consider if the by-law is enacted for a legitimate purpose, specifically a purpose set out in enabling provincial legislation.<sup>10</sup> By-laws must not be incompatible with provincial Acts; open-ended provisions conferring powers on municipalities, such as the power to enact by-laws for the health of citizens, “do not confer unlimited power” on municipalities.<sup>11</sup>

The court held that the test for incompatibility between provincial legislation and municipal by-laws is where there is an “impossibility of dual compliance”; where compliance with one Act would be a violation of the other.<sup>12</sup> A by-law that simply sets a more stringent standard will not be incompatible with the provincial legislation. The presence of any evidence that provincial legislation is intended to preclude municipal regulation of the activity will weigh against the operation of the by-law.<sup>13</sup>

*Spray-Tech* has been upheld in subsequent cases involving the creation of municipal by-laws to reduce or eliminate the use of cosmetic pesticides, including in Ontario.<sup>14</sup>

### Toronto's Toxics Reporting By-law

In a more recent example, the City of Toronto enacted a by-law requiring

the reporting of the manufacture, use, or release of toxic chemicals above a prescribed quantity.<sup>15</sup> The by-law was passed in December 2008, and became effective January 2010. To date, there have been no court challenges to the by-law.

Early commentary suggested that the by-law may be invalid due to the existence of the federal National Pollutant Reporting Inventory (NPRI)<sup>16</sup> and provincial Toxic Reduction Strategy Program (TRSP)<sup>17</sup> reporting schemes. Although the Toronto by-law targets many of the same substances,<sup>18</sup> in practice, it has been accepted by industry and commentators as valid.

The by-law appears to satisfy the test in *Spray-Tech* because it was enacted for a valid purpose under the *Municipal Act, 2001* namely for the health and safety of the citizens of Toronto, and because it is more stringent than the federal and provincial requirements.

The medical officer of health for the City of Toronto released several reports regarding the effect of toxic chemicals on the long-term health of citizens, and recommending the creation of a reporting system.<sup>19</sup> The city has reasoned that the by-law will allow citizens to see where toxic substances are being manufactured, used or emitted, and through public scrutiny and pressure, force companies to work towards reducing the use of toxic substances.<sup>20</sup>

It is noteworthy that the city commissioned numerous studies and reports to examine a wide range of issues, including the health effects of toxic substances, the success of other reporting systems in reducing toxic emissions and potential overlap with existing reporting schemes. During the

draft phase of the by-law, Toronto Public Health commissioned a report examining the extent of duplication with existing schemes, including the NPRI and TRSP, to determine if the reporting system contemplated under the by-law would have any added benefits.

The Toronto by-law is more stringent than its federal and provincial counterparts because it targets not only the large facilities captured by the NPRI and TRSP, but also small- and medium-sized facilities that are otherwise not required to report.

9 R.S.C. 1985, c. P-9.

10 *Supra*, note 8 at 20, 26-27.

11 *Ibid.* at 16, 20.

12 *Ibid.* at 36-38.

13 *Ibid.* at 39.

14 See *Croplife Canada v. Toronto (City)*, (2003) 68 O.R. (3d) 520 (Ont. S.C.J.).

15 City of Toronto, By-law No. 1293-2008, *Environmental Reporting and Disclosure* (3 December 2008).

16 Under the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

17 Under the *Toxic Reduction Act, 2009*, S.O. 2009, c. 19.

18 Toronto Public Health. November 2009. *Environmental Reporting and Disclosure By-law (Municipal Code Chapter 423): Guide to Reporting*. Toronto: City of Toronto online: <[www.toronto.ca/chemtrac/pdf/bylawguide.pdf](http://www.toronto.ca/chemtrac/pdf/bylawguide.pdf)>.

19 See for example Medical Officer of Health, Staff Report: City of Toronto Environmental Reporting, Disclosure and Innovation Program, October 30, 2008 <[www.toronto.ca/health/hphe/pdf/bohreporterdi.pdf](http://www.toronto.ca/health/hphe/pdf/bohreporterdi.pdf)> and Medical Officer of Health, Staff Report: Community Right-to-Know Strategy for the City of Toronto, January 4, 2005 <[www.toronto.ca/health/hphe/pdf/boh\\_case\\_study\\_riverdale.pdf](http://www.toronto.ca/health/hphe/pdf/boh_case_study_riverdale.pdf)>.

20 City of Toronto, Backgrounder: A Proposed Environmental Reporting, Disclosure and Innovation Program for the City of Toronto, November 6, 2008 <[www.toronto.ca/health/hphe/pdf/backgroundernov2008.pdf](http://www.toronto.ca/health/hphe/pdf/backgroundernov2008.pdf)>.

## Conclusion

It is certainly arguable that the purpose of the *GEGEA* in removing municipalities' planning powers over renewable energy projects was to create a single streamlined approval system in which municipalities play no regulatory role. Having said that, the removal of planning powers was achieved by amending the *Planning Act* not the *Municipal Act, 2001*, which grants municipalities the power to pass by-laws protecting human health, safety and well-being.

The streamlined approval regime introduced by the *GEGEA* acknowl-

edges the importance of human health. Third parties, who appeal the grant of a renewable energy approval must prove, *inter alia*, that serious harm to human health will result from the renewable energy project.<sup>21</sup>

On the basis of the decision in *Spray-Tech*, a by-law that sets a more stringent standard than that, namely one that protects "harm to health, safety and well-being of persons" whether or not it is serious, arguably does not frustrate the purposes of the provincial legislation.

Depending on the view taken by the courts of the purposes of the *GE-*

*GEA*, there may still be a role for municipal regulation of renewable energy projects provided that it is a legitimate exercise of the municipal power to pass by-laws concerning the "health, safety and well-being of persons." The courts will likely be watchful for NIMBY inspired by-laws that are disguised as pieces of human health and safety legislation or which make arbitrary demands that are impossible of performance. [MW](#)

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21 Under s. 142.1(3)(a) *Environmental Protection Act*, R.S.O. 1990, c. E.19.

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