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The Town of Oakville's Health Protection Air Quality By-Law

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TABLE OF CONTENTS

Page No.

1. INTRODUCTION 1
2. SUMMARY OVERVIEW OF HPAQ BY-LAW 1
3. can municipalities regulate air quality? 3
   - A. SPECIFIC MUNICIPAL AUTHORIZATION: 7
   - B. ONTARIO MUNICIPAL ACT: 8
   - C. IS THERE OPERATIONAL CONFLICT? 10
4. HOW DOES THE HPAQ BY-LAW COMPARE TO OTHER ENVIRONMENTALLY-FOCUSSED BY-LAWS? 12
   - A. PESTICIDES BY-LAWS: 12
   - B. TORONTO ENVIRONMENTAL REPORTING AND DISCLOSURE BY-LAW: 14
5. KEY FEDERAL AND PROVINCIAL AIR QUALITY LAWS, ARE THEY DEFICIENT? 15
   - A. ONTARIO AIR LEGISLATION: 15
   - B. FEDERAL LEGISLATION: 16
6. TRANSCANADA'S JUDICIAL CHALLENGE 16
7. OTHER DEVELOPMENTS 18
   - A. HPAQ IMPLEMENTATION: 18
   - B. ENVIRONMENTAL BILL OF RIGHTS SUBMISSION: 18
   - C. SOUTHWEST GTA AIR QUALITY TASK FORCE: 18
8. STEPS FOR ADOPTING SIMILAR BY-LAWS 19
9. CONCLUSION 21

1. INTRODUCTION

In recent years, Canadian municipalities have increasingly used a variety of instruments available to them to protect the environment and the health and safety of its citizens. The latest to take an apparently unprecedented and controversial approach is the Town of Oakville, Ontario (the "**Town**"). On February 1, 2010 Council of the Town passed Health Protection Air Quality By-law 2010-035 (the "**HPAQ**") to protect the health of its residents by working to limit and reduce over time, emissions of fine particulate matter ("**$PM_{2.5}$**") and precursor pollutants[1] (collectively, "**health-risk air pollutants**") within its borders. The HPAQ is controversial because of its scope. It is the first of its kind in Ontario and possibly in Canada. It appears that Oakville may be the first jurisdiction in Ontario to regulate $PM_{2.5}$ and to aim to prohibit incoming new industries that are considered to be major emitters of health-risk air pollutants causing unacceptable health risks. It also gives Council the ability to deem existing facilities that are major emitters as public nuisances and refuse their approval to continue to operate unless emissions are reduced.

The HPAQ was passed fairly quickly, in what appears to have been a response to extensive public lobbying to stop TransCanada Energy's ("**TransCanada**") 900 megawatt (MW) gas-fired electric power plant from being located within Oakville in close proximity to residential areas. The Town and Council are of the view that the power plant will produce concentrations of $PM_{2.5}$ in the airshed at a level posing risks to human health. Not unexpectedly, on June 18, 2010 TransCanada launched a judicial review application in the Ontario Superior Court of Justice to quash the HPAQ.

This paper provides a summary overview of the HPAQ and discusses how it differs from other environmentally focused by-laws, particularly pesticides by-laws that have been the subject of various court decisions. It examines the extent to which municipalities may regulate air quality and whether the HPAQ operationally conflicts with Ontario's air legislation and whether Ontario and federal air legislation are deficient. It provides an update on developments since passage of the HPAQ, suggests steps that a municipality should take if it is intending to pass a similar by-law and concludes with a brief discussion of the risks to municipalities treading into this area.

2. SUMMARY OVERVIEW OF HPAQ BY-LAW

The HPAQ was passed pursuant to section 11(2) of the *Municipal Act, 2001* as amended (the "**Act**" or "**Municipal Act**") which permits municipalities to pass by-laws respecting the health, safety and well-being of persons and section 128 that permits municipalities to prohibit and regulate with respect to public

[1] These are substances which, when emitted into the air, are mixed in the atmosphere or through chemical transformation produce fine particulate matter, including: nitrogen oxides, ammonia, sulphur dioxide, volatile organic compounds. See section 1 definitions of the HPAQ.

nuisances; including matters that, in council's opinion, are or could become or cause public nuisances. The Town's stated purpose for the HPAQ was to protect human health from $PM_{2.5}$ due to scientific and government studies showing serious, fatal health effects from inhalation. It claimed that in Oakville, 80 premature deaths are attributable to $PM_{2.5}$ every year, based on annual concentrations of 10 micrograms per cubic metre.[2] It further justified the by-law on the basis of concerns from residents regarding air quality. It claimed there is no safe level of $PM_{2.5}$.

The HPAQ creates a complex regulatory regime for $PM_{2.5,}$ precursor pollutants and other pollutants the Town may specify (none have yet been specified). In a nutshell, the first key requirement is that all facilities within the Town that emit more than a "negligible quantity of any health-risk air pollutant" (low emitters) are required to report their emissions to the Town. For directly emitted fine PM the emission of less than one (1) kilogram (kg) in total per year and for precursor pollutants, the emission of less that ten (10) kg in total per year are considered to be negligible quantities. The Town is required to post a list of all reporting facilities as well as emitted rates and whether the facility is a major emitter. Failure to report is an offence that subjects the facility to fines of up to $100,000 for a first offence.

The second key requirement is that facilities within the Town's geographical limits (both proposed and existing) must obtain a facility-specific approval where they may cause a "major emission" of a health-risk air pollutant, regardless whether they may already hold an Ontario certificate of approval ("**C of A**") from the Ministry of the Environment ("**MOE**") for their emissions ("major emitters"). The same fine applies for failing to obtain an approval. The HPAQ sets threshold levels for all of the health risk air pollutants that would constitute a major emission. "Major emission" is defined as:

- direct emissions of fine PM over 300 kg per year (airborne particulate matter less than or equal to 2.5 microns in diameter)
- over 10,000 kg / year of volatile organic compounds
- over 20,000 kg / year nitrogen oxides (as NO_2 equivalents)
- over 20,000 kg / year sulphur dioxide
- over 10,000 kg / year ammonia

The Town estimates that 20-30 major emitters in Oakville would be subject to the higher reporting requirement and approval process (see Oakville Fact Sheet for Businesses).

[2] Oakville HPAQ Fact Sheet with Legal Focus.

Facilities that require an approval are required to pay a $25,000 application fee and submit various technical studies to the Town. Following the submittal, the Town will undertake a peer review of the application and undertake public and agency consultations. The application, peer review report and applicant comments will be posted on-line. At a scheduled Council meeting to hear the application, Council is required to decide:

(a) whether to approve the application, with or without conditions;

(b) refuse the application where the emissions may cause a significant public health effect and whether this constitutes a public nuisance;

(c) approve the application where it is in the public interest to do so; or

(d) for existing facilities, Council can approve an application even though the facility causes a significant public health effect where the facility proposes a 25% reduction in emissions and the peer reviewer agrees that the proposed reduction is attainable.

The HPAQ contains transitional provisions for existing facilities. There are no appeals provisions.

On June 1, 2010 the Town passed By-law 2010-118, amending the HPAQ. The amendment extends the first reporting deadline that applies to facilities who meet the reporting criteria and who hold an MOE air C of A from the prior August 1, 2010 deadline to no later than February 1, 2011. Additionally, the definition of "facility" was amended to clarify that a residential site containing less than 25 dwelling units is exempt from the by-law. (See Appendix A for a copy of the HPAQ as amended and the Town's Fact Sheets).

3. CAN MUNICIPALITIES REGULATE AIR QUALITY?

Typically, most federal and provincial regulation of air quality focuses on how much contamination is acceptable from a particular facility, based on specific contaminant limits or limits or desirable standards for ambient air quality. Under the *Canadian Environmental Protection Act* ("**CEPA**")[3] the federal government can add a pollutant, including an air pollutant, to the list of toxic substances in Schedule 1 of the CEPA, thereby giving it authority to take action to reduce such substance in the environment. Generally, the federal government has worked with the provinces and territories, particularly through the Canadian Council of Ministers of the Environment ("**CCME**"), to develop a management plan for such substances. The federal government can exercise its authority in the control of trans-boundary air pollution (inter-provincially or internationally), but its recent, most significant regulatory efforts have been setting standards for products or processes that produce air emissions and assisting provinces in developing

[3] *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33.

regulations for sources under their control. The provinces/territories for their part legislate domestically over local air emissions and participate in federal standard-settings relating to air quality. They can require that industries emitting contaminants into the natural environment obtain a permit or approval. Some provinces may also regulate air emissions through industry voluntary or approved codes of practice or may provide guidelines and standards for ambient air quality objectives. The latter frequently do not have legal force.

Municipal or local governments on the other hand tend to focus on where development of a potentially polluting industry can locate. The latter has occurred through official plans, development permit areas, zoning and other land-use by-laws.[4] Local governments also have a range of by-law-making powers that have, and can be used to regulate air emissions more directly. These include powers related to nuisances, environmental protection and public health. More recently, provincial governments have broadened municipal powers to permit more extensive law-making with respect to local concerns and Canadian courts have shown greater deference to municipal by-laws relating to health, safety and well-being of residence (e.g. pesticides, smoking by-laws). While the collective effect of these developments has widened the ambit of local municipal powers that can be used to regulate air quality, there are still some significant limitations on the municipal ability to regulate air quality. Limitations include the potential for direct conflict with federal/ provincial legislation and explicit legislated exclusion of municipal jurisdiction.

Municipal by-laws that are inconsistent with provincial legislation will be quashed as being *ultra vires*. As well, an enumerated municipal power cannot be enlarged by reference to general welfare/omnibus powers. As a general principle, the mere existence of a provincial (or federal) legislation in a given field does not oust municipal regulation of the subject matter.[5] The test for inconsistency spelled out in the leading *Spraytech* case, is whether with a provincial or federal statute, there is a direct conflict or "expressed contradiction" between the municipal by-law and the legislation. The Supreme Court of Canada in that case made it clear that if a matter falls within a municipality's statutory authority, the municipality will be free to establish policies and standards more restrictive than those established by provincial legislation. *Spraytech* adopted a strict "impossibility of dual compliance" test to determine whether there was a conflict between a municipal by-law and the provincial legislation. Thus, a conflict invalidating a by-law will only occur when one enactment compels that which the other forbids. Based on public presentations on the Town's HPAQ it appears that the Town was of the view that the HPAQ is not in conflict or inconsistent with provincial or federal laws because there are gaps in these laws such that fine PM is not regulated.

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[4] See Andrew Gage and Sagarika Saha, "The Clean Air Bylaws Guide", West Coast Environmental Law 2006, British Columbia, pp. 32-41 for more detailed discussion of municipal powers.

[5] *114957 Canada Ltée (Spraytech, Société d'Arrosage) v. Hudson (Town)*, 2001 S.C.C. 40, [2001] 2 S.C.R. 241).

The issue of conflict between municipal and provincial legislation was also discussed by the Ontario Court of Appeal in *Croplife Canada*.[6] That case involved a challenge to the then in force City of Toronto by-law that limited the application of cosmetic pesticides in the City. The federal *Pest Control Products Act* was found by the Court to be permissive regarding the use, import and manufacture of pesticides. It did not regulate how or where the pesticides could be used. Therefore, other levels of government could step in. The provincial *Pesticides Act* was found to deal with storage and licensing. Since neither of these pieces of legislation regulated pesticide use, the Court determined the municipality had authority to restrict or ban pesticides on land within its jurisdiction.

The Court applied the same two-part paramountcy test as had been used by the courts to determine whether a provincial law is inconsistent with the federal law:

(a) can a person simultaneously comply with both provisions? (the impossibility of dual compliance test); and

(b) does the provision frustrate Parliament's purpose in enacting its provision? If the answer to both questions is "no", then there is no conflict.

It concluded the by-law did not conflict with or frustrate the purposes of the co-existing federal and provincial laws. The Court further explained that had Parliament or the Ontario legislature intended to restrict the regulation of pesticides to the relevant federal or provincial acts, they would have used very clear language to do so. The case broadened and confirmed municipal powers to regulate the environment. It validated that a municipality is authorized to respond to citizen concerns regarding health risks associated with environmental contaminants and that authority extends beyond pesticides and encompasses any public health, safety or well-being danger to citizens.

The impossibility of dual compliance test is not the only test for inconsistency between municipal by-laws and provincial legislation. In the *Rothmans* case,[7] which dealt with advertising of tobacco products, the Supreme Court of Canada revisited the question of the incompatibility of dual regulation and indicated that it was not the only test. It stated that provincial legislation that displaces or frustrates Parliament's legislative purpose is also inconsistent for the doctrine of paramountcy. Accordingly, in assessing the validity of a municipal by-law, courts may examine not strict inconsistency alone but also the provincial or federal legislation at issue and whether it is intended to be a complete legislative code; in which case, the municipal by-law will not apply.

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[6] *Croplife Canada v. Toronto (City)*, (2005) 75 O.R. 3d 357.
[7] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188 (S.C.C.).

In *Ben Gardiner*, a decision subsequent to *Spraytech*, the Ontario Superior Court of Justice held that a municipality can impose environmental restrictions that are more vigorous than those set out in provincial and federal statutes.[8]

A more recent decision confirming municipal authority to pass by-laws relating to environmental matters is the *Halton Recycling*[9] case where the Court considered whether organic waste recycling activities of a facility that stored and processed organic waste amounted to a public nuisance. Following numerous odour complaints over many years, the town of Newmarket ordered the facility closed under section 433 of the *Municipal Act* (public nuisance impacts). Odours were not specifically listed as a public nuisance. In challenging the order, the facility argued that the odours did not fall within the ambit of section 433 and that MOE had jurisdiction under the EPA and MOE had issued two C of As for the facility's activities. It also argued that the odour emissions could constitute a private nuisance but not a public nuisance as it was not sufficiently widespread. The Court upheld the closure, finding that the town established that the criteria in section 433 to close were satisfied on a balance of probabilities. It specifically applied a purposive interpretation of section 433 and determined that although odours were not specifically listed as nuisances, relief was not limited to the enumerated categories. In this case, section 433 of the *Municipal Act* did not frustrate the purpose of the EPA or preclude compliance with environmental legislation. The Ontario legislature did not intend to occupy the field of public nuisances caused by odours by enacting the EPA. Had it intended to exempt MOE-regulated activities under a C of A from the nuisance provisions of section 433, it could have explicitly done so as it did in regard to municipal sewage plants. In affirming the decisions in *Spraytech* and *Croplife*, the Court held that provinces do not have exclusive jurisdiction over environmental regulation and that municipalities do have authority to make laws to protect the health of citizens from environmental dangers.

A case that dealt not with the impossibility of dual compliance test but with explicit legislated exclusion of municipal jurisdiction is "*Peacock v. Norfolk (County).* [10] The case concerned land owners operating an intensive hog operation who received approval of their nutrient management plan as required under the *Ontario Nutrient Management Act, 2002* and associated regulation. The provincial regulation required that the nutrient storage facility be located at least 100 meters from a municipal well. The municipality subsequently passed a by-law prohibiting siting intensive livestock operations and nutrient facilities within certain sensitive areas. It refused to issue a permit. The Ontario Court of Appeal determined that the impossibility of dual compliance test was not applicable where relevant provincial legislation does not specify a different test. In this case, Section 62 of the *Nutrient Management Act* stated that if the regulation and local by-law or provision of a by-law addressed the same subject matter, the by-law or

[8] *Ben Gardiner Farms Inc. v. West Perth (Township)* (2001), 24 M.P.L.R. (3d) 43 (Ont. S.C.J.).
[9] *Newmarket Town v. Halton Recycling Ltd.* (2007), 32 M.P.L.R. (4th) 74 (Ont. S.C.J.).
[10] (2006) 81 O.R. (3d) 530 (Ont. C.A.).

provision was "inoperative while the regulation was in force". Section 61 clearly ousted the dual compliance test.

In determining whether the provincial regulation and by-law addressed the same subject matter, the Court of Appeal indicated that it was necessary to look beyond the direct effect of the two provisions and to consider their object. The regulation and by-law had similar underlying purposes, to protect against water contamination of municipal wells although each attempted to achieve that purpose in different ways and with different emphasis. The by-law contained specific provisions regulating intensive livestock operations and nutrient storage facilities. The provisions addressed the same subject matter and had the same intent as the regulation. The dominant feature of the provisions of the by-law was the same as the purpose of the Ontario regulation. The Court held that the portion of the by-law prohibiting siting of intensive livestock operations and storage facilities within the municipal capture zone addressed the same subject matter as the Ontario regulation and was therefore inoperative. The provincial regulatory scheme in this case explicitly ousted the municipal jurisdiction.

Another example where provincial law ousts local municipal jurisdiction is the *Ontario Green Energy and Green Economy Act*, *2009*.[11] The Act amends the *Planning Act* by adding a provision which stipulates that renewable energy undertakings are excluded from the ambit of official plans and by-laws. Thus Ontario clearly intends to limit and oust municipal by-law powers over such matters. Any municipality considering passage of an air quality by-law will have to examine whether its authority to do so has been ousted or curtailed by legislation from other levels of government.

A. SPECIFIC MUNICIPAL AUTHORIZATION:

Provincial governments have the authority to delegate responsibility for air quality air management to regional or municipal authorities. For example, in British Columbia, such authority has been delegated to the Greater Vancouver Regional District ("**GVRD**"), a unique regional district. Pursuant to the British Columbia *Environmental Management Act* ("**EMA**"), the GVRD is authorized to prohibit, regulate, control and prevent discharges of air contaminants. The EMA specifically empowers the GVRD to enact by-laws relating to air quality. *Air Quality Management By-law No. 102, 2008* requires industries, trades and businesses that emit air contaminants to obtain a permit or approval from the regional district's staff. It also specifies that a person in compliance with the by-law and all applicable permits, approvals, orders and emission regulations is exempt from the application of specified provisions of the EMA in relation to discharge of air contaminants.

[11] S.O. 2009, c. C-12.

In Quebec, air quality management responsibility for the Island of Montreal has been delegated to the Montreal Urban Community ("**MUC**").[12] MUC's approach is primarily regulatory. By-law 90 pertaining to air purification is the main air quality legislation that governs emissions sources. It contains requirements for air permits, sets generic emission limits for selected sectors and ambient air quality standards.

The foregoing are but two examples demonstrating that municipalities can regulate air quality, where legislation specifically authorizes them to. In such circumstances, the problem of concurrent or conflicting jurisdiction between the municipal and provincial authorities may not arise. Where there is no specific authorization, regard must be had to provincial/territorial empowering legislation such as the *Municipal Act* or community charters and applicable case law.

Ontario's *Environmental Protection Act* ("**EPA**") does not delegate air quality regulation to any municipal government. Accordingly, authority for the Town to pass the HPAQ must be sought from the *Municipal Act*.

B. ONTARIO MUNICIPAL ACT:

The Act makes no specific mention of air quality regulation powers. However, it equips municipalities with other powers that may be used to regulate air quality. They include the following:

- section 2, purpose - specifies the responsibility and accountability of governments for providing good government regarding matters within their jurisdiction.

The inclusion of a purpose in a statute or by-law may be direct indication of intention regarding a matter but may ultimately only be useful in cases of conflict or interpretation.

- subsection 8(1), scope of powers - requires the powers to be interpreted broadly to enable municipalities to govern and respond to municipal issues

- subsection 8(3), scope of by-law making power - specifies that a by-law under sections 10 and 11 respecting a matter may regulate or prohibit it or require persons to do things respecting the matter or provide for a system of licences respecting the matter

- section 9, powers of a natural person - grants natural person powers to municipalities

[12] National Round Table on the Environment and the Economy, "*Developing Ambient Air Quality Objectives for Canada*" 2008, available online at www.nrtee-tree.com/eng/publications/ambient-air-report/nrtee-ambient-air.php.

- subsection 10 (2) item 6 and 11(2) item 6, by-laws - provide authority for single and upper-tier municipalities to pass by-laws for the health, safety and well-being of persons

- section 128, public nuisances - provides that a local municipality may prohibit and regulate with respect to public nuisances, including matters that in the opinion of council, are or could become or cause public nuisances. If arrived at in good faith, subsection 128(2) provides that it is not subject to review by any court.

The authority to make by-laws under specific spheres of jurisdiction in section 11(3) of the Act does not include air quality although it includes waste management and business licensing (not environmental licensing). As well, the specific municipal powers in the Act do not address air quality or air approvals although they include reference to health, safety and nuisance powers which again is not specific to air quality. The licences part of the Act similarly makes no mention of authority to licence air emissions.

Section 128 allows municipalities wide scope to define behaviour that constitutes a nuisance and may thus be a useful tool to regulate air quality. There are numerous cases of municipalities addressing nuisances such as noise, odour, fumes. The extent to which a nuisance power may be exercisable directly for air quality control remains to be seen and the common law notions of what is or can be a nuisance will guide a court when there is a challenge to a municipal nuisance power. In *Nanaimo (City) v. Rascal Trucking Ltd.*,[13] a provincial statute granted municipal jurisdiction to prevent, abate and prohibit nuisances and also provided that council may declare a building, structure or erection of any kind … to be a nuisance and may direct that it be removed, pulled down. The Supreme Court of Canada determined that a municipality must be correct in understand that a pile of soil (which was the structure or erection at issue), was in fact a nuisance. If it was not, the municipality would not have authority to deal with the matter. Accordingly, municipal councils need to carefully consider the case law before declaring that air emissions or a facility's operations constitute a public nuisance.

In the *Mississauga* case,[14] the City passed a by-law under its nuisance powers, imposing higher standards for burning PCBs than those in Ontario legislation. The Court of Appeal held that the by-law was inoperative because the provincial law was so comprehensive in nature as to leave no room for the municipal by-law. There was an operational conflict.

In *Spraytech*, the Supreme Court of Canada unanimously upheld municipal authority over health and environmental protection by-laws pursuant to general welfare powers conferred by provisions in provincial enabling legislation. The case involved interpretation of the *Quebec Cities and Towns Act* which granted municipalities power to make by-laws "to secure peace, order, good government,

[13] *Nanaimo*, (2000) 1 S.C.R. 342.
[14] *Ontario (Attorney General) v. Mississauga* (1981), 33 O.R. (2d) 395 (Ont. C.A.).

health and general welfare in the municipality" (analogous to sections 10 and 11 of the *Municipal Act*). The Town of Hudson used this general power to pass a pesticides-control by-law. The Court found the by-law to be *intra vires* the municipality even though some aspects of the pesticides were regulated federally and provincially. The case opened the door for broader interpretation of municipal powers under omnibus or general powers provisions which could include air quality by-laws. However, a court assessing a by-law like the HPAQ may examine it to determine whether the goal of health and safety of citizens was the true or genuine purpose for its passage. If it was passed for ulterior purposes, it may not withstand judicial scrutiny. It may also consider whether, in relying on its power over health, safety and well-being, the Town was correct in its assessment that there is no safe level of $PM_{2.5}$ and that prior to passage of the by-law Council had sufficient factual and scientific evidence on which to base its decision. Presumably, the type of documents available to municipal councillors will be important. That being said, a court may show deference and respect for the precautionary principle as in the *Spraytech* case and not be too perturbed by any weaknesse+s in scientific studies if it determines the Town acted in good faith to promote the health of its residents.

Croplife further confirmed that the residual scope of municipal authority encompasses public health, safety or well-being danger, not only pesticides.

C. IS THERE OPERATIONAL CONFLICT?

On its face, based on the above-noted *Municipal Act* provisions and case law, the HPAQ appears to be a valid exercise of municipal authority because it was framed to focus on the public health of its residents, not on air emissions per se. It does not set any specific emission limits for contaminants but uses certain thresholds as triggers for required facility approvals. However, it does give Town Council through its air approval process, authority to deem a facility that discharges emissions posing an unacceptable degree of health risk, to be a public nuisance. The effect of the HPAQ essentially gives councillors the ability to stop the TransCanada power plant (and other incoming new industries) from establishing in Oakville. That raises the question of whether the HPAQ frustrates Ontario environmental legislation. The *Municipal Act* does not contain a provision like section 61 in the *Peacock* case. However, section 14 does make it clear that if a by-law frustrates the purpose of an instrument such as a licence or approval issued under provincial or federal legislation, there is a conflict.

> *"14(1) A by-law is without effect to the extent of any conflict with,*
> *(a) a provincial or federal Act or a regulation made under such an Act; or*
> *(b) an instrument of a legislative nature, including an order, licence or* ***approval****, made or issued under a provincial or a federal Act or regulation.*

> *(2) Without restricting the generality of subsection (1) there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law* ***frustrates*** *the purpose of the Act, regulation or instrument."*

A MOE C of A is an approval instrument issued under the EPA. It is therefore entirely possible that an operational conflict may arise between the EPA licensing scheme and the Town's approval process under the HPAQ.

The purpose of the EPA is to provide for the protection and conservation of the natural environment, which is defined to include air. The EPA section 14 prohibition against discharge of contaminants into the natural environment that may cause an adverse effect is aimed, among other things, at protecting the health and safety of any person. Section 9 of the EPA is a C of A licensing regime aimed at ensuring that the nature of the discharge source and manner in which the level or concentration of contaminants is discharged into the environment is minimized.

The HPAQ is similarly aimed at protecting human health from health-risk air pollutants. In making a decision on an application for an approval, Council will be required to consider whether the major emission has a significant public health effect in the Town. The HPAQ can therefore be seen as dealing with the same subject matter as the EPA - air emissions, even if the specific contaminants that the Town seeks to regulate, may not be the same as those currently regulated under the EPA and regulations.

In the 1979 *Essex (County).*[15] case, the Ontario Court of Justice, General Division, dismissed the County's application for a declaration that BFI, the waste management company, must obtain consent of the County to operate a waste processing facility. The County had passed a by-law taking over waste management powers, previously held by its constituent municipalities as permitted pursuant to the *Municipal Act*. When so assumed, consent of council of the County was required if a person proposed to provide services or facilities of the type authorized by the powers assumed by the County. The Court concluded on the facts that the services provided by BFI (under an expired agreement with the County) covered the same ground as that contained in BFI's MOE C of A. The objectives of the C of A and by-law were compatible as both were directed towards the same public good. Since by implication the two dealt with the same issues, the by-law was in conflict with the provisions of the C of A, and provincial legislation took precedence. One of the rights of a C of A holder is to be subject to punitive measures (i.e., for non-compliance) only at the provincial level and not by the municipality for the same compliance default.

Although the HPAQ appears to be valid on its face, it is vulnerable to attack on the basis of operational conflict. The conflict may arise when the MOE issues an

[15] *Essex (County) v. Browning-Ferris Industries Ltd.* ("BFI") (1998), 49 M.P.L.R. (2d) 152.

air C of A to a facility (authorizing it to operate the facility or equipment) and the Town either refuses to issue its approval or imposes terms and conditions that conflict with the MOE approval. The conflict may arise not only for proposed new facilities but also existing ones applying to amend their C of As. Key for a court will be consideration of whether the Town's approval system for air emissions deals with different aspects than Ontario's EPA such that there is no incompatibility. The different aspect may be what the Town suggests, that the HPAQ simply sets a stricter standard for a contaminant that is not regulated by superior levels of government. However, a court may view the HPAQ as a duplication of the provincial licensing system for air emissions and subjecting facilities to potential "double jeopardy" in cases of non-compliance. The judicial review application on the by-law (discussed below) will hopefully determine whether the Town properly exercised its by-law making authority and the extent to which municipalities may regulate air quality in Ontario.

4. HOW DOES THE HPAQ BY-LAW COMPARE TO OTHER ENVIRONMENTALLY-FOCUSSED BY-LAWS?

A. PESTICIDES BY-LAWS:

In 2008 the Ontario government enacted the *Cosmetic Pesticides Ban Act*[16] which outlined province-wide restrictions on the use and sale of pesticides for cosmetic purposes. It was proclaimed in force on April 22, 2009 when implementing *Regulation 63/09*[17] was filed. The legislation was prompted by municipal by-laws introduced in many municipalities across Ontario to restrict pesticide use to protect health and the environment. The effect of the Ontario pesticides legislation was to override and render inoperative, all municipal by-laws on the sale and use of cosmetic pesticides, with minor exceptions. This included City of Toronto Pesticides By-law (Municipal Code C. 612) which the City successfully defended in the *Croplife* case. The Ontario regulation is more restrictive than Toronto's by-law. Had the City and other municipalities not taken the lead on this issue, however, Ontario may not have enacted the same type of pesticides restrictions. The significant cost and expense that the City of Toronto incurred in passing its Pesticide By-law, implementing it and defending it all the way to the Supreme Court of Canada is a warning to all municipalities that when it comes to environmental or health regulation, the province has the ability to pre-empt municipal jurisdiction and render their by-laws of no force and effect (See section 451.1(5) of the *Municipal Act*).

In considering the scope of the HPAQ, it is useful to consider how it compares to Toronto's prior Pesticides By-law and Quebec's pesticides legislation.

The Toronto by-law was closely patterned after a similar by-law passed by the Town of Hudson, Quebec, which by-law was upheld in the landmark *Spraytech* case. The Toronto by-law prohibited the use of certain pesticides on public and

[16] *Cosmetic Pesticides Ban Act*, S.O. 2008.
[17] *Ontario Regulation 63/09* under the *Pesticides Act*.

private properties in Toronto, with exceptions. It also permitted the use of certain lower-risk products. It applied to anyone who used pesticides outdoors and provided for its enforcement by public health inspectors and penalties. Of significance is that the by-law did not regulate how stores displayed or sold pesticides, which was under provincial legislation.

The Hudson pesticide by-law at the heart of the *Spraytech* case aimed to substantially reduce the non-essential use of pesticides. It prohibited the use of pesticides throughout the territory of the town, except for certain permitted circumstances. It did not attempt to deal with approval of the import, export and manufacture of pesticides or registration for their use or labelling which was regulated by the Federal pesticides legislation. Similarly, it did not attempt to set up a system of permits and licensing for vendors and applicators of pesticides which was regulated by Quebec's pesticides legislation. At the time, the Quebec *Pesticides Management Code* was not yet in effect, but could eventually "occupy the field" of provincial pesticides matters depending on its content.

One aspect of apparent importance to the Supreme Court of Canada in *Spraytech* was the fact that the Hudson by-law did not impose a total prohibition on all pesticide use. The distinction between essential and non-essential pesticide uses allowed the Court to reasonably conclude that the town's by-law purpose was to minimize the use of allegedly harmful pesticides in order to promote the health of its inhabitants. That purpose fell squarely within the health component of the *Quebec City and Towns Act*.[18]

Quebec's Pesticide Management Code[19] which has been in force since April 3, 2003 set standards to control the use and sale of pesticides, with limits on non-essential use of pesticides. The Quebec *Pesticides Act*[20] defines the primacy of the Code regarding municipal by-laws by stating that any provision of the provincial legislation prevails over any *inconsistent* provision of any by-law passed by a municipality or metropolitan community. In fact, the *Pesticides Act* allows municipalities or metropolitan communities to adopt municipal by-laws; however, the latter must ensure that the provisions are not inconsistent with the Code. The City of Toronto would have preferred that the Ontario Cosmetic Pesticides Ban Act and regulation would have followed the Quebec Code approach so as to allow more restrictive provisions of municipal by-laws to prevail. However, it was not successful.

The HPAQ is distinguishable from the above-discussed municipal pesticides by-laws in that it goes beyond merely regulating air quality in Oakville for health protection. It asserts the right to stop the operations of, or shut out industries that do not obtain municipal air approvals or reduce major emissions of health-risk air pollutants. It sets up a parallel approval process to Ontario's EPA, something that was not attempted in the pesticides by-laws.

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[18] *Cities and Towns Act*, R.S.Q. c. C-19.
[19] C. P-9, 3r 0.01 made under the *Pesticides Act*, R.S.Q. c. P-9.3.
[20] *Pesticides Act*, R.S.Q. c. P-9.3.

B. TORONTO ENVIRONMENTAL REPORTING AND DISCLOSURE BY-LAW:

The HPAQ can also be contrasted to the City of Toronto E*nvironmental Reporting and Disclosure By-law*[21] that came into effect on January 1, 2010. Sometimes referred to as "community right-to-know", the by-law requires facilities and businesses located in the City of Toronto to annually report on any of the twenty-five toxic chemicals listed in the by-law that were released, manufactured, processed or otherwise used. A facility must report any amount equal to or above the threshold level for the chemicals as set out in the by-law. Reporting is phased in over four years and there are supports for businesses to track and report chemicals and to adopt measures to prevent pollution and reduce chemicals.

The by-law's aim is to improve public health by reducing toxic chemicals in the environment. A key distinction between this by-law and the HPAQ is that it is strictly an environmental reporting and disclosure law; there is no attempt to impose any municipal approvals for toxic chemicals. In addition, the Toronto by-law is targeted at small and medium-size Toronto businesses.[22] Ontario's *Toxics Reduction Act*[23] in force as of January 1, 2010 requires Ontario facilities that meet specified criteria to complete toxic substances accountings, prepare toxic substance reduction plans and report results to the government and the public. Although the Ontario and Toronto legislation appear to be the same, Toronto has focussed its by-law on smaller facilities whose emissions are not captured under Ontario's thresholds. In that regard, the Toronto by-law appears intended to complement programs and legislation at the federal and provincial level by filling gaps in their programs/legislation. Currently, the Toronto by-law does not appear to overlap or conflict with federal or provincial programs or legislation.

The HPAQ goes further than the Toronto by-law in that it sets up a municipal approval regime that appears to conflict with the air approval regime set up by the MOE under the EPA. It is not simply a reporting and disclosure requirement regime. Overall, the HPAQ impacts proposed and existing facilities with or without MOE C of As for air emissions. In that regard, the HPAQ is more far reaching than other environmentally focused by-laws made by the City of Toronto and the Town of Hudson, Quebec. Whether it will be upheld on judicial review remains to be seen.

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[21] *Toronto Municipal Code*, Chapter c. 423

[22] See Toronto Environmental Reporting and Disclosure By-law, Guide to Reporting, November, 2009 and Toronto's website Healthy People Healthy Environment www.toronto.ca/health/HPHE/enviroinfo.htm for further details.

[23] *Toxics Reduction Act*, 2009, S.O. 2009, c. 19.

5. KEY FEDERAL AND PROVINCIAL AIR QUALITY LAWS, ARE THEY DEFICIENT?

A. ONTARIO AIR LEGISLATION:

The EPA establishes provincial authority to regulate contamination, including air contaminants. It provides that the director may issue a C of A to approve the discharge of a contaminant and regulations prescribe conditions and criteria that apply to such discharges. There is no specific authorization in the EPA for regulation of $PM_{2.5}$.

Regulation 419/05[24] under the EPA came into force on November 30, 2005 and is being phased-in by sector with full implementation by February, 2020. It is the primary tool for regulating air quality in Ontario. It establishes point of impingement (POI) standards for over 100 contaminants that applicants must comply with in order to obtain an air C of A under the EPA and specifies the air modelling requirements to determine compliance at the POI. The regulation addresses suspended particulate matter for visibility issues but does not regulate smaller suspended particulate matter represented by $PM_{2.5}$ or PM_{10}. An additional aspect is that it does not routinely consider cumulative impacts during the C of A process. In other words, in municipalities where airsheds have particularly poor air quality, the MOE approval process does not currently require consideration of the facility's impact on the municipality's overall air quality.

As a result of the Environmental Review Tribunal decision in *Lafarge*[25] the MOE has recently begun to consider cumulative impacts on a case-by-case basis. *Lafarge* had applied to the MOE for C of As to operate a waste disposal site to accept, process and incinerate alternative fuels and for the resulting air emissions. Local residents opposed the application and challenged it under the *Environmental Bill of Rights Act* ("**EBR**")[26] when the approval was granted. The Environmental Tribunal hearing the challenge accepted the argument that the director's decision in issuing the C of A failed to take into account the MOE's "Statement of Environmental Values ("**SEV**")" on an ecosystem approach as well as its precautionary approach. The EBR required the MOE to develop SEVs to describe how it will apply the EBR's purposes when making decisions. The Tribunal found that no reasonable person would have issued the C of A, without regard to the SEVs and the precautionary principle and ecosystem approach. Such approach would have required consideration of the cumulative environmental health effects of the proposed alternative fuels project. The Ontario Divisional Court denied Lafarge's application for judicial review of the Tribunal's decision. Lafarge then sought leave to appeal that decision to the Ontario Court of Appeal. On November 26, 2008, the Ontario Court of Appeal denied the leave application; accordingly the Divisional Court's decision stands as

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[24] *Air Pollution - Local Air Quality*, O. Reg. 419/05.
[25] *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal),* (2008), 36 E.E.L.R. (3d) 191 (Ont. Div. Ct.), leave to appeal to C.A. refused Nov. 26, 2008.
[26] Environmental Bill of Rights, 1993, S.O. 1993, c.28.

a precedent upholding citizens' participatory rights under the EBR and the importance of SEVs on environmentally significant decisions concerning approvals. It appears that the MOE is now considering what is needed to support the application of an ecosystem approach, including consideration of cumulative effects in environmental decision-making.[27]

The MOE also protects air quality through ambient air quality criteria (AAQC) that are used to assess contaminant specific effects-based levels to evaluate the general quality of the air. This is different from POI limits on air emissions from individual industrial sources through the C of A process. The AAQC are not a regulation and do not provide for $PM_{2.5}$. Since it is only a guideline, it does not have legal force and there are no legal consequences to exceeding any applicable AAQCs. As well, the MOE is not legally required to consider AAQC or existing ambient air quality when deciding on an air C of A application under the EPA.

In passing the HPAQ, the Town relied heavily on the Clarkson Airshed Study initiated by the MOE. That study (which included Oakville and part of Mississauga) confirmed the airshed was "taxed" with respect to concentrations of $PM_{2.5}$. The Town was concerned that TransCanada's plan to establish a gas-fired power plant in Oakville would worsen air quality within the airshed.

Based on the above-noted regime, it does appear that the Town is correct in concluding that there is a gap in provincial air quality protection insofar as $PM_{2.5}$ is concerned.

B. FEDERAL LEGISLATION:

$PM_{2.5}$ and PM_{10} have been categorized as toxic and added to the List of Toxic Substances in Schedule 1 of the CEPA. As a result, the substances can be regulated by the federal government; however it has not yet done so. Instead, it has worked with provinces and territories through the CCME to accept Canada-wide Standards (CWS). Such standards have been set for $PM_{2.5}$ and for ozone. The numerical targets that were established must be developed and implemented in the jurisdictions. Although Ontario has endorsed the Standards, it has not yet legally implemented them although it targeted to do so by 2010 for PM and 2015 for ozone.

Based on the above-noted description, the federal laws respecting air quality similarly appear to be deficient insofar as $PM_{2.5}$ is concerned.

6. TRANSCANADA'S JUDICIAL CHALLENGE

GROUNDS:

On June 18, 2010 TransCanada launched a judicial review application in the Ontario Superior Court of Justice to quash the HPAQ. No responding materials

[27] EBR Registry Number PA05E0016, on-line www.ebr.gov.on.ca.

have been filed as of August 11th. The application included request for a declaration that:

(a) the HPAQ is *ultra vires* the Town and in particular, in conflict with several Ontario environmental statutes including the EPA and the *Green Energy Act*;

(b) the HPAQ was enacted in bad faith and for an improper purpose of preventing, delaying or frustrating the construction and operation of the Oakville generating station. Numerous public, oral and written statements opposing the generating station and other steps had been taken by the Town to delay and interfere with the station from proceeding;

(c) the Town has failed to properly exercise its by-law making authority under the *Municipal Act*. The approval process established under the HPAQ provides absolute and unfettered discretion to Council of the Town, which is contrary to its powers under the *Municipal Act*;

(d) the HPAQ is invalid due to vagueness including but not limited to the definitions of "significant", "public health effect", "health-risk air pollution" and "precursor pollution";

(e) the HPAQ is in conflict with several environmental statutes including the EPA, the *Green Energy Act* and the *Electricity Act* and associated regulations;

(f) the HPAQ should be quashed for illegality pursuant to section 273(1) of the *Municipal Act*.

The Town is endeavouring to have the application heard in October and is proposing to consolidate this application with another application to quash an interim control by-law passed on March 30, 2009. The latter prohibited use or expansion of TransCanada's power generation facility greater than 10 megawatts until the Town is able to complete a detailed study determining what Oakville lands can best accommodate such power plants. On March 29, 2010, the interim control by-law was extended to March 31, 2011.

The judicial review application is certainly not unexpected and had in fact been predicted by a number of environmental lawyers commenting on the HPAQ immediately following its passage. Whether the Court upholds the by-law remains to be seen.

7. OTHER DEVELOPMENTS

A. HPAQ IMPLEMENTATION:

Since passage of the HPAQ, Town staff developed an implementation strategy to facilitate awareness and compliance with the by-law. That included development of a guidance document to explain the HPAQ, including reporting requirements and forms for reporting facility emissions.[28] In addition, public workshops for facilities reporting under the HPAQ were scheduled for July and August to assist facilities in complying with the by-law. According to the Report of Council Meeting of June 1, 2010, the Town's implementation efforts will be supported by a contract staff resource to oversee all aspects of by-law implementation and transition to by-law reporting, including outreach, education and data management.[29]

B. ENVIRONMENTAL BILL OF RIGHTS SUBMISSION:

Prior to passage of the HPAQ, the Town submitted a request to the Environmental Commissioner of Ontario under the EBR on December 14, 2009 for a new air pollution act or regulation for $PM_{2.5}$ and PM_{10}. The submission included several supporting documents including: relevant studies on PM_{10} and $PM_{2.5}$; various government publications concerning ambient air quality and particulate matter; various government publications on health aspects of air pollution and an overview of various Ontario laws and regulations. On April 12, 2010, the Town submitted supplementary submissions and reference material for the EBR application. It included a summary of evidence on the adverse health effects from $PM_{2.5}$, the need for immediate action and a distinctive regulatory approach for $PM_{2.5}$. The documentation stated that there are no safe ambient levels of $PM_{2.5}$, such that mandatory reduction plans are required for any emitters exceeding a specified threshold of concern.

As of August 16, 2010 the MOE had not rendered a decision on the need for a new act or regulation to limit the level of concentration of fine PM in an affected airshed, based on health risks. A decision is expected some time in September.[30]

C. SOUTHWEST GTA AIR QUALITY TASK FORCE:

On September 29, 2009 the Southwest Greater Toronto Area Air Quality Task Force was established to produce an action plan to make recommendations to improve air quality and manage air pollution impacts in the Oakville-Clarkson Airshed. Committee members included representatives from the Town of

[28] See Preliminary Guidance for Compliance with the HPAQ, July 14, 2010 and Reporting Forms available on the Town's website at www.oakville.ca/healthairqualityby-law.

[29] Oakville Report Council Meeting, June 1, 2010 from Legal Department Environmental Policy. See Report at Appendix A.

[30] See Town of Oakville website for the Environmental Bill of Rights Submission at www.oakville.ca/24930.htm.

Oakville, the City of Mississauga, Peel Region, Halton Region, business and industry and residential representatives. On June 24, 2010 the Task Force unveiled more than thirty recommendations for an Action Plan to reduce vehicular, industrial and residential emissions. Oakville's mayor endorsed the recommendations outlined in the report. Of significance to Oakville's situation is recommendation 4 that stated:

> *"all applications for Certificates of Approval for new or modified industrial activities, which will increase emissions within the airshed, must be considered in light of the current capacity of the airshed. This recommendation would apply to the issuance of a Certificate of Approval for the power plant".*[31]

The Report went on to state that the approval of new emissions in the Oakville-Clarkson Airshed should only be granted if there is no new net contribution to existing pollution levels. It stated that no new major pollution sources should be permitted within the already taxed airshed unless there is some kind of plan to fully offset key air contaminants like $PM_{2.5}$, PM_{10}, nitrogen oxide and volatile organic compounds.

From the Town's perspective, this Report supports the need for means to address $PM_{2.5}$ loadings. However, the Task Force stated that pollution from transportation, industrial and residential sources must be reduced and that municipal and regional governments, local industry and residents all have to participate in order to make these reductions happen. The Task Force set out the roles and responsibilities of various parties for short-term, medium and longer-term actions. It recommended that the MOE publish PM 2.5 standards or other standards and work on air quality monitoring networks. The recommended actions on the part of municipalities did not include any suggestion for municipal air approvals or development of air quality standards. Instead, the focus was on municipal reporting and disclosure by-laws, traffic improvements, setback provisions in regional official plans, dust suppression initiatives, anti-idling campaigns and other proactive steps. Accordingly, although the Task Force Report is helpful to the Town's air quality initiatives, it clearly does not support a municipal air approval process for the contaminants of concern, although admittedly, the Task Force's terms of reference did not include such consideration.

8. STEPS FOR ADOPTING SIMILAR BY-LAWS

If a municipality decided to pass a by-law similar to Oakvillle's HPAQ, it would have to undertake a significant amount of work and employ considerable staff and financial resources to do so in order to maximize the chances of its council's by-laws surviving judicial scrutiny. Set out below are some suggestions of steps that may be considered.

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[31] Action Plan, Report of the Air Quality Task Force to the Honourable John Gerratsen, Minister of the Environment, Southwest Greater Toronto Area, Oakville-Clarkson Airshed, June 24, 2010, p. 14.

	STEPS FOR ADOPTING SIMILAR BY-LAW
PRELIMINARY STEPS - CONSIDER THE FOLLOWING:	
1.	Does the municipality have jurisdiction to pass the by-law? (a) express statutory authority under enumerated powers or sphere specifically assigned to a municipality; (b) authority under general welfare provisions or powers implied from express powers granted; (c) does municipal enabling legislation oust municipal by-law making powers on the matter or state by-laws can exist so long as not incompatible with provincial/territorial legislation.
2.	What is the municipal purpose? (a) is the proposed by-law rationally connected to the objectives? (b) if for health and environmental concerns, is there evidence of citizen concerns documented in council minutes, letters or petitions?
3.	Will the by-law conflict with provincial/federal/territorial legislation? (a) direct conflict - impossibility of dual compliance; (b) operational conflict - can the by-law and superior jurisdiction laws co-exist? (c) do they deal with same subject matter? (d) is the by-law stricter than superior legislation? Is the superior legislation intended to be a complete code on the subject-matter?
4.	Is the municipality acting in good faith?
5.	Does the by-law threaten or interfere with Charter of Rights and Freedom? If yes, is it justified and does it interfere with rights as little as possible to attain the municipal purpose?
6.	Has due regard been given to the public consultation process and procedural fairness accorded to affected persons?
FURTHER STEPS:	
1.	Establish a working group.
2.	Set a reasonable timeframe to analyze, consult and develop the by-law.
3.	Retain independent air quality experts to assist in undertaking studies, reviewing data in development of a technically sound by-law.
4.	Retain external environmental legal counsel to work with municipal legal, staff and retained air experts in development of a legally supportable by-law.
5.	Designate staff who will take the lead on development of the by-law.
6.	Review what other municipalities have done.
7.	Undertake any recommended ambient air studies to define the problem facing the municipality or update existing data.
8.	Consult with the Medical Officer of Health regarding the proposed by-law if for health protection.
9.	Consult with provincial, federal, territorial ministries.

	STEPS FOR ADOPTING SIMILAR BY-LAW
10.	Undertake public consultation on community concerns for air quality and health impacts e.g. resident and business surveys.
11.	Evaluate economic impact of the by-law. Who will be affected.
12.	Report to council on public surveys and data and provide draft by-law and recommendations.
13.	Public consultation on draft by-law. Widely disseminate meeting notices.
14.	By-law revisions if necessary. Post revised by-law on municipal website and disseminate to public consultation participants.
15.	Final report to council including on financial and operational demands on municipal resources. If approved, passage of new air quality by-law.
16.	Given the number of businesses expected to be impacted, develop a plan on how to enforce the by-law and finance it on a sustainable basis.
17.	Develop policies, guidelines, fact sheets and other guidance to assist impacted parties in complying with the by-law.

9. CONCLUSION

The effects of air emissions are wide ranging and include effects on both human health and the environment. While air quality impacts all age groups, it impacts the elderly, vulnerable individuals with cardio-respiratory problems and the very young the most. Given the link between air quality and health referred to in numerous studies, including those of the Ontario Medical Association and Canadian Medical Association, it is understandable why the Town of Oakville wanted to seize the initiative to pass a by-law aimed at improving air quality within its area. It may even be lauded for petitioning the provincial government to enact new legislation to deal with fine PM. Whether it chose the right way to go about it with the HPAQ remains to be seen. Additionally, whether the Ontario Superior Court of Justice decides that it acted in good faith in so doing and not for the ulterior purpose of stopping the TransCanada power plant also needs to be determined. Even if upheld on judicial review it is possible that, like *Spraytech* and C*roplife* the case will be appealed further. Ultimately, the Town's jurisdiction to pass a novel by-law like the HPAQ may be upheld and if so, will add to the increasing body of law in support of municipal authority to make by-laws to protects residents, particularly if a specific risk has not been addressed by superior levels of government.

The municipal role in responding to health and environmental concerns of their citizens appears likely to continue to increase. McLachlin J. (as she then was) in the *Shell Canada* case (referred to in *Syraytech*) certainly recognized the proximity of locally elected officials to concerns of their citizens and the need for courts not to interfere with decisions of municipal councils unless they have run afoul of the limits to their municipal powers. That being said, when it comes to air

quality regulation the question to be asked is, is the municipality the most appropriate level of government to make by-laws to regulate such emissions and the industries and other contributors to air contamination? The contributors include the transportation sector including vehicular sector, residential and other sources, including long-range transport from other jurisdictions such as the U.S Midwest (trans boundary air pollution) . Municipalities need to assess the significance of impacts an air quality by-law like the HPAQ may really have on actual air quality in their territories in light of the other contributors to air contamination if these are similarly not targeted or cannot be targeted because of jurisdictional and other challenges. Will there be an overall true net benefit to the community? A municipality will be put to additional work, monitoring and enforcement and paperwork. Is it up to the challenge? Does it have the subject matter experts in-house to deal with the scientific and technical documentation provided by regulated entities? if not, what is the cost of retaining outside experts and is the cost sustainable? is it experienced in air permitting? what new staffing and budget allocations will be required to effectively implement and enforce the by-law? how much time will be required for council to regularly and appropriately deal with air permit applications? will appeals from council decisions be permitted in the by-law? These are but a sampling of some of the types of question a municipality may wish to consider before embarking on regulation of air quality in its territory.

Provinces have the ability to step in and render a municipal by-law of no effect, much as Ontario has done with the City of Toronto pesticides by-law. Given the numerous questions noted above, the cost and work entailed in passing such by-law and subject to their provincial/territorial empowering legislation, municipalities may wish to tread with care into the arena of air quality legislation particularly if they propose a by-law similar to the HPAQ. No doubt the Ontario judicial review proceedings launched by TransCanada will be followed with great interest.

APPENDIX A

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