COURT OF APPEAL FOR ONTARIO

CITATION: Stelmach Project Management Ltd. v. Kingston (City), 2022 ONCA 741
DATE: 20221031
DOCKET: C69676

Feldman, Tulloch and Miller JJ.A.

BETWEEN

Stelmach Project Management Ltd. and 1880551 Ontario Ltd.

Applicants (Appellant)

and

City of Kingston

Respondent (Respondent)

Michael S. Polowin and Jacob A. Polowin, for the appellant

Tony Fleming, for the respondent

Heard: March 4, 2022 by video conference

On appeal from the order of Justice Sylvia Corthorn of the Superior Court of Justice, dated June 18, 2021, with reasons reported at 2021 ONSC 4343.

B.W. Miller J.A.:

[1] New housing development brings with it the need for additional municipal infrastructure such as sewers, roads, emergency services, and recreational facilities. New infrastructure comes at a cost, and municipalities impose these costs on the developing landowners rather than spreading it among existing ratepayers. The legal power to impose fees and charges of this nature has been

given to municipalities by provincial legislation, which also prescribes how this power can be exercised. This appeal concerns the legality of a by-law passed by the City of Kingston under the *Municipal Act, 2001*, S.O. 2001, c. 25, imposing charges for water and wastewater infrastructure on the appellant.

[2] The appellant is a land developer who built and owns two multi-unit residential properties in the City of Kingston. It has either paid or is required to pay $410,000 in impost fees to the City to cover the City's capital costs associated with the installation of water and sewer infrastructure needed to service the two buildings. The City imposed the impost fees under By-law 2014-136 (the "Impost By-law"), which City council passed under the authority of s. 391 of the *Municipal Act, 2001*. The appellant challenged the legality of the Impost By-law on various grounds. The application judge rejected the appellant's arguments and upheld the Impost By-Law.

[3] The appellant argued below that the Impost By-law was illegal because the City could only impose fees of this nature under the *Development Charges Act, 1997*, S.O. 1997, c. 27 ("*DCA*") and not under the *Municipal Act, 2001*. The application judge rejected this argument, and the appellant has raised a new argument on appeal: that because of the operation of the anti-circumvention provision in s. 15 of the *Municipal Act, 2001*, the City could only have passed the Impost By-law if it had provided the same procedural protections provided under the *DCA*, which it did not. The appellant argues that the City's compliance with

s. 15 was imperfect. Notwithstanding that it provided the requisite studies, heard submissions, and followed the methodology set out in the *DCA*, the City did not provide the appellant with a right of appeal to the (then) Ontario Municipal Board. As rights of appeal to the OMB were controlled by legislation, not only did the City not provide this important procedural protection, it did not have the power to do so. Because the City did not comply with the requirements of s. 15(1), the appellant argues, the Impost By-law is illegal.

[4] The appellant also renews its argument in the alternative that: (1) s. 394(1)(e) of the *Municipal Act, 2001* prohibits the City from imposing fees in respect of natural resources; (2) water and waste water are natural resources; (3) the Impost By-law therefore imposes a fee in respect of a natural resource; and (4) the Impost By-law is therefore illegal.

[5] The appellant argues that as a consequence of the illegality of the Impost By-law, it is entitled to a remedy on the basis of unjust enrichment.

[6] As I explain below, I do not agree that the application judge erred in her analysis. With respect to the appellant's new argument under s. 15(1), I would exercise this court's discretion to hear the argument, but nevertheless dismiss it. In what follows, in addition to providing a brief factual background, it will be necessary to set out in some detail the various statutory provisions at issue in this appeal before turning to the issues raised by the appellant.

Factual and legislative background

[7] It is uncontroversial that at the time the Impost By-law was passed, the more common practice among municipalities in Ontario was to fund wastewater and sewer infrastructure through charges under the *DCA*. Indeed, that is now the City's current practice, although there is nothing in the record to indicate the reason for the change, and the City maintains that it has the authority to impose the fees under either statute. At the time the City passed the Impost By-law, it also passed a by-law under the *DCA* imposing a charge to cover anticipated capital costs related to specific services including police and fire protection, roads, parks and recreation, library, transit, affordable housing, and administration. In respect of the *DCA* By-law, the City provided the panoply of procedures required by the *DCA* including providing a background study, holding public consultations, and following the prescribed methodology for calculating the charge. The *DCA* also provides that the by-law must be renewed every 5 years, supported by a new background study, and providing for a right of appeal to the OMB.

[8] With respect to the Impost By-law, the City relied on the same background study as it did for the *DCA* By-law, and followed all of the same procedures. The lone exception is that it could not provide a right of appeal to the OMB.

The relevant legislation

[9] The application judge comprehensively surveyed the relevant statutes and legislative history at paragraphs 31-71 of her reasons, and for the more limited purposes of this appeal only some of that work need be repeated here.

[10] The two statutes central to this appeal are the *Municipal Act, 2001* and the *Development Charges Act, 1997*. The two issues raised on this appeal relate to the interpretation and interrelationship of these two statutes. But because both statutes stand within an historical legislative context, it is necessary to consider some of the statutes and municipal practices that preceded them.

Lot Levies

[11] Prior to statutory reform in the late 1980s, municipalities in Ontario commonly raised the necessary revenue for development related infrastructure by imposing “lot levies” on landowners who sought development approvals. These levies were established through contracts between municipalities and the landowners and were a condition to obtaining the development approval. As explained in *Mississauga (City) v. Erin Mills Corp.* (2004), 71 O.R. (3d) 397 (C.A.), at para. 10, the lot levy regime left each municipality to implement its own policy “with a resulting diversity that caused confusion and dissatisfaction across the province.”

[12] Concurrent with the lot levy practice, municipalities also had the power, since at least 1949, to charge developing landowners for deferred benefits from water and sewage works: *Municipal Act*, S.O. 1949, c. 61, s. 11; compare *Municipal Act*, R.S.O. 1990, c. M.45, s. 221, which granted the municipality authority to impose fees to offset capital costs for sewage and water infrastructure.

The Development Charges Act, 1989 **and amendments**

[13] The *Development Charges Act, 1989*, S.O. 1989, c. 58, was intended to replace the lot levy system. It was later amended as the *Development Charges Act, 1997*. This court explained the purpose of the new legislation in *Ontario Cancer Treatment and Research Foundation v. Ottawa (City)* (1998), 38 O.R. (3d) 224 (C.A.), *per* Osborne J.A.:

> It was intended to bring uniformity and order into development -- growth-related municipal costs. The DCA replaced, among other things, the existing lot levy system. By late 1989 lot levies had increased substantially, as municipal corporations grappled with reduced grants and increased growth-related costs and it was thought, at a political level, that a new system had to be devised to permit municipalities to recover growth-related capital costs. The new system is set out in the DCA. The underlying economic philosophy of the DCA is that growth (development) should pay for the infrastructure costs that it generates. Such costs, generally speaking, should not be borne by existing residents.

[14] Section 2 of the *DCA* provided the express authority for a municipality to impose development charges: John Mascarin and Paul De Francesca, *Annotated*

Land Development Agreements, loose-leaf (2022 Release 3), (Toronto: Thomson Reuters Canada Ltd., 2000) at §: 6.5. It also prescribed the circumstances in which those charges can be imposed. Subsections 2(1) and (2) currently provide:

> **2** (1) The council of a municipality may by by-law impose development charges against land to pay for increased capital costs required because of increased needs for services arising from development of the area to which the by-law applies.
>
> (2) A development charge may be imposed only for development that requires,
>
> (a) the passing of a zoning by-law or of an amendment to a zoning by-law under section 34 of the *Planning Act*;
>
> (b) the approval of a minor variance under section 45 of the *Planning Act*;
>
> (c) a conveyance of land to which a by-law passed under subsection 50 (7) of the *Planning Act* applies;
>
> (d) the approval of a plan of subdivision under section 51 of the *Planning Act*;
>
> (e) a consent under section 53 of the *Planning Act*;
>
> (f) the approval of a description under section 9 of the *Condominium Act, 1998*; or
>
> (g) the issuing of a permit under the *Building Code Act, 1992* in relation to a building or structure.

[15] Section 5 of the *DCA* sets out a method a municipal council must follow to determine the quantum of development charges that may be imposed, and the procedures that must be followed in developing the by-law. The method requires, for example, that council assess and calculate the increase in need for services

attributable to the anticipated development (s. 5(1)(2)) that cannot be met using excess capacity (s. 5(1)(5)). With respect to procedure, council is required to complete a development charge background study before it passes a development charge by-law (s. 10(1)), make the study public, and hold a public meeting (s. 12). Section 14 provides a right of appeal of a development charge by-law to the Ontario Municipal Board, now the Ontario Land Tribunal.

[16] The implementation of the *DCA* in 1989*,* did not, however, affect other tools municipalities possessed for raising revenue. Significantly, it made no changes to what was then s. 221 of the *Municipal Act*. As Robert Macaulay and Robert Doumani note in *Ontario Land Development: Legislation and Practice*, loose-leaf (1999 Release 3), (Scarborough, Ont.: Thomson Professional Publishing Canada, 1991) at §: 5.3, there is no reference to s. 221 of the *Municipal Act* in the *DCA* and the fact that a municipality could levy a special charge to pay for sewer and water works was not precluded by the *DCA*. They go on to note that "there cannot be two collections for the same purpose and if works are to be financed through this section of the *Municipal Act*, they ought not to be included within the growth demand of development charges."

Savings and Restructuring Act, 1996

[17] In 1996, the *Municipal Act* was amended by means of the *Savings and Restructuring Act, 1996*, S.O. 1996, c. 1. That Act added s. 220.1, the predecessor to the current s. 391, which governs the imposition of fees and charges.

***Municipal Act, 2001* and subsequent amendments**

[18] As this court explained in *Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357 (C.A.), leave to appeal ref'd, [2005] S.C.C.A. No. 329, the *Municipal Act, 2001* constituted a significant change in the province's approach to municipal powers, shifting from a prescriptive approach to a generous category or "sphere"-based approach, *per* Feldman J.A.:

> [6] The *Municipal Act, 2001* … was the first overhaul of the old Act and its predecessors in 150 years. The purpose of creating a new Act was to give municipalities "the tools they need to tackle the challenges of governing in the 21st century" (Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, 53 (18 October 2001) at 1350 (Hon. Chris Hodgson)), including more authority, accountability and flexibility so that municipal governments would be able to deliver services as they saw fit.
>
> [7] One of the ways in which the new Act introduces more flexibility is by giving municipalities two kinds of powers. Part II of the new Act, for the first time, gives municipalities the power of a natural person (s. 8) and as well, ten broad "spheres of jurisdiction" (s. 11) within which municipal councils have wide discretion to enact by-laws. Part III of the new Act gives municipalities specifically defined by-law making powers, as under the old Act.

[19] The broad “spheres of jurisdiction” are set out in Part II of the *Municipal Act, 2001*, headed “General Municipal Powers”. Within this part, s. 10(2) confers on single-tier municipalities such as Kingston the general power to pass by-laws for 11 enumerated purposes considered necessary or desirable for the public good. Relevant to this appeal, these purposes include, in s. 10(2)(7), the power to pass by-laws in respect of services a municipality is authorized to provide.

[20] Part III, headed “Specific Municipal Powers” sets out specific municipal powers to make by-laws addressing a litany of matters such as highways, transportation, waste management, public utilities, and health and safety. A frequent verbal formulation used in the drafting of these provisions has them begin with the statement “[w]ithout limiting sections 9, 10 and 11, a municipality may pass by-laws …” This convention suggests that these specific powers are, in a sense, elaborations or specifications of the more general “spheres of jurisdiction” catalogued in Part II. The general powers co-exist with specific powers which may restrict or enlarge the broad general powers in s. 10 or set out requirements or procedures to be followed in exercising those general powers: John Mascarin and Christopher J. Williams, *Ontario Municipal Act & Commentary*, 2023 ed. (Markham: LexisNexis Canada Inc., 2022) at pp. 41-42.

[21] Section 15, included in Part II under the heading, “Restrictions Affecting Municipal Powers”, codifies one aspect of the common law rule against circumvention:

> **Specific powers, by-laws under general powers**
>
> **15**(1) If a municipality has power to pass a by-law under section 9, 10 or 11 and also under a specific provision of this or any other Act, the power conferred by section 9, 10 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision. 2001, c. 25, s. 15 (1); 2006, c. 32, Sched. A, s. 11 (1).

[22] Part XII, headed “Fees and Charges”, defines “fee or charge” to include a fee or charge imposed under ss. 9, 10, and 11. It continues, under s. 391, the user fee provisions first enacted in s. 220.1 of the *Savings and Restructuring Act, 1996* and establishes that municipalities have the authority to impose fees and charges “[d]espite any Act.” Section 391(d) provided the power to charge for deferred benefits from water and sewage capital works, expressly referencing sewage and water works:

> The council of a local municipality, in authorizing the construction of sewage works or water works, may be by-law impose a sewer rate or water works rate upon owners or occupants of land who derive or will or may derive a benefit therefrom sufficient to pay all or such portion of the capital costs of the works as the by-law may specify.

[23] This deferred benefit provision was later replaced (by way of *The Municipal Statute Law Amendment Act, 2002*, S.O. 2002, c. 17) with s. 391(2), which read:

> **Deferred Benefit**
>
> (2) A fee or charge imposed under subsection (1) for capital costs related to sewage or water services or

> activities may be imposed on persons not receiving an immediate benefit from the services or activities but who will receive a benefit at some later point in time.

[24] The express reference to "capital costs related to sewage or water services" was removed in amendments from the *Municipal Statute Law Amendment Act, 2006*, S.O. 2006, c. 32, which also added the introductory phrase "without limiting sections 9, 10 and 11". Thus, the version in effect at the time of the Impost By-law read:

> **By-laws re: fees and charges**
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> **391** (1) Without limiting sections 9, 10 and 11, those sections authorize a municipality to impose fees or charges on persons,
>
> (a) for services or activities provided or done by or on behalf of it;
>
> ***
>
> **Deferred benefit**
>
> (2) A fee or charge imposed for capital costs related to services or activities may be imposed on persons not receiving an immediate benefit from the services or activities but who will receive a benefit at some later point in time. 2006, c. 32, Sched. A, s. 163 (2).
>
> ***
>
> **Conflict**
>
> (5) In the event of a conflict between a fee or charge by-law and this Act, other than this Part, or any other Act or regulation made under any other Act, the by-law prevails. 2006, c. 32, Sched. A, s. 163 (3).

[25] Section 391 also provides express limits on the power of municipalities to impose fees and charges. Of relevance to this appeal is s. 394(1)(e):

> No fee or charge by-law shall impose a fee or charge that is based on, is in respect of or is computed by reference to,
>
> …
>
> (e) the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources.

ISSUE ONE – The rule against circumvention

The application judge's reasons

[26] The application judge held that the City was permitted to impose fees for the growth-related capital costs of water and sewer infrastructure under s. 10 of the *Municipal Act, 2001*, as specified in s. 391. Implicit in her reasons is that s. 391 is a determination or specification of the s. 10 power – specifying one aspect of what is included in the s. 10 power – rather than a freestanding source of power.

[27] The application judge found that as the City had exercised its power under s. 10 to pass the Impost By-Law, it was required by s. 15(1) to observe the procedural requirements, if any, set out in "the specific provision (i.e. s. 391)." On her review of the legislative scheme, the application judge concluded that there was no impediment to the City proceeding under the *Municipal Act, 2001*. That is, the City had the option of imposing the fees and charges under either the *Municipal Act, 2001* or the *DCA*, and validly proceeded under the former.

The appellant's argument on appeal

[28] The appellant argues that the *DCA* provided specific by-law making powers, and accordingly, the City was required to use these instead of the general power under s. 10 of the *Municipal Act, 2001*. The appellant submits that it was an error for the application judge to have found otherwise. Case law establishes that municipalities ought not to rely on general by-law making powers to extend the express powers set out in specific provisions, or to circumvent restrictions expressly placed on the use of more specific by-law making powers: *R. v. Greenbaum*, [1993] 1 S.C.R. 674. The appellant also points to s. 15(1) of the *Municipal Act, 2001*, which codifies one aspect of the non-circumvention principle:

> **Specific powers, by-laws under general powers**
>
> **15** (1) If a municipality has power to pass a by-law under section 9, 10 or 11 and also under a specific provision of this or any other Act, the power conferred by section 9, 10 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision. 2001, c. 25, s. 15 (1); 2006, c. 32, Sched. A, s. 11 (1).

[29] On appeal, the appellant adds the alternative argument that if the City were nevertheless entitled to rely on the general power from the *Municipal Act, 2001*, it would be required to import the procedural protections of the *DCA*. The corollary to this latter argument is that if the City failed to provide these protections, the Impost By-law would be illegal. The appellant extends the argument to the

conclusion that because the City lacks the legal authority to provide all of the procedures provided by the *DCA* – namely that it cannot supply a right of appeal to the OMB (as it was) – s. 15(1) is a barrier to the use of the s. 10 power and the City is foreclosed from using the *Municipal Act, 2001* to impose fees and charges for the capital costs associated with sewer and water infrastructure. Regardless of the fact that it voluntarily adopted most if not all of the procedures required by the *DCA*, the City could not provide a right of appeal to the OMB, and therefore fell short, rendering the by-law illegal, and the City cannot fall back in the alternative on the general power under s. 10, as specified in s. 391.

Analysis

Dual legislative regimes

[30] As I explain below, the application judge made no error in her interpretation and application of the *Municipal Act, 2001*. Her conclusion that the City has multiple sources of power to impose fees to recover capital costs and that it was not compelled to rely on the *DCA* is correct.

[31] The appellants argued before the application judge that the City was compelled to use its power under the *DCA* because it is a more specific power than that provided by s. 10 of the *Municipal Act, 2001*. I do not agree that the application judge erred in rejecting this argument.

[32] As the application judge explained, the power relied on by the City is the general power in s. 10 that was more fully specified by the legislation in s. 391(2) and s. 394. The City satisfied the requirements of these specific provisions. The City's reliance on ss. 10 and 391(2) is not like cases such as *Greenbaum*, in which a municipality fell back on a general power after failing to satisfy the requirements of a specific provision.

[33] There is more than one statute that provides municipalities with the power to impose development fees. This has long been the case. The *DCA* replaced the lot levy system, but not the entire set of tools municipalities have traditionally used to fund infrastructure. That the *DCA* did not supplant the *Municipal Act, 2001* in this regard is evident from a close reading of the two statutes and their legislative histories.

[34] First, as the legislative survey at the beginning of these reasons establishes, the use of the *Municipal Act, 2001* (and its predecessors) for imposing fees and charges for capital costs for sewer and water infrastructure has a long history. That survey amply demonstrates that the legislature contemplated and accepted recourse to either legislative regime.

[35] The existence of dual regimes is particularly evident in the evolution of s. 391(2), especially in the version immediately preceding the current iteration which specifically referenced water and wastewater infrastructure before being replaced

by the broad language of the current text that encompasses charges and fees to recoup *all* capital costs payable by a municipality.

[36] It is also significant that by the time of the introduction of the *Municipal Act, 2001*, which broadened the powers of municipalities, the supremacy clause contained in the *DCA* had been removed, suggesting that the *Municipal Act, 2001* conferred power on municipalities to pass by-laws imposing fees or charges for capital costs payable by it for sewage and water services despite similar provisions in the *DCA*.

[37] Furthermore, when regulations passed under the *Municipal Act, 2001* are considered, it is evident that the legislative scheme contemplated that a municipality could levy charges for capital costs for wastewater and sewer under either the *Municipal Act, 2001* or the *DCA*, and this could potentially create a situation where a municipality could impose the same fees twice, once under the *DCA* and once under the *Municipal Act, 2001*. *Fees and Charges*, O. Reg. 584/06, expressly addresses this possibility and prohibits a municipality from “double dipping”:

> **Capital costs**
>
> **2.** (1) A municipality and a local board do not have power under the Act to impose fees or charges to obtain revenue to pay capital costs, if as a result of development charges by-laws or front-ending agreements under the Development Charges Act, 1997 or a predecessor of that Act that was passed or entered into before the imposition of the fees or charges, payments have been,

> will be or could be made to the municipality or local board to pay those costs. O. Reg. 584/06, s. 2 (1).

[38] Third, the powers granted by the two statutes are different. Section 391 of the *Municipal Act, 2001* does not empower a municipality to impose taxes on land, while development charges under the *DCA* have been judicially recognized as a form of land tax. In *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641, 192 D.L.R. (4th) 443 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 83, this court stated, at para. 22:

> The Development Charges Act authorizes municipalities to pass by-laws that would impose development charges against land whose development would increase the need for municipal services. A development charge is defined in the statute as "a charge imposed with respect to growth-related net capital costs against land" and thus is a form of tax on land. [Emphasis added.]

[39] For these reasons, I do not agree with the appellant's argument that the City was compelled to use its power under the *DCA* in preference to the *Municipal Act, 2001*.

The s. 15/anti-circumvention argument

[40] To recall, the appellant argues that the reference in s. 15(1) to "any other Act" refers, in the context of an impost by-law passed under s. 10 (and in conjunction with s. 391(2)), the *DCA*. The *DCA*, it argues, is an act that provides the same power to pass a by-law that is provided under s. 10, and does so under

a more specific provision. Section 15(1), on the appellant's interpretation, therefore directs that the Impost By-law provide the same procedures set out in the *DCA*.

[41] The appellant argues that because the City is unable to duplicate all of the procedures of the *DCA*, the Impost By-law fails to observe the requirements of s. 15(1) and is therefore illegal. The argument, to repeat, is not that the City could have provided the requisite procedural protections but failed to do so in this particular instance, but that it is impossible for the City to do so given the City's incapacity to provide the right of appeal to the OMB that is supplied under the *DCA*.

[42] I do not agree with the appellant's interpretation of s. 15(1).

[43] It is useful to reproduce the text of s. 15(1) here:

> **15** (1) If a municipality has power to pass a by-law under section 9, 10 or 11 *and also under a specific provision of this or any other Act*, the power conferred by section 9, 10 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision. 2001, c. 25, s. 15 (1); 2006, c. 32, Sched. A, s. 11 (1).

[44] Statutory interpretation is a matter of ascertaining the intention of the enacting legislature. It requires attention to text, context, and purpose: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para 21; *Canada v. Cheema*, 2018 FCA 45, [2018] 4 F.C.R. 328, at para. 73. With respect to s. 15(1), the words used provide no particular difficulty, and the meaning of the section becomes clear when

the broad legislative context – including the history canvassed above – is considered.

[45] To recap, a municipality's power to pass an impost by-law under the *Municipal Act, 2001* comes from the general by-law making power in s. 10, as specified by the terms of Part XII of the Act, particularly ss. 391 and 394. In enacting an impost-bylaw under s. 10, a municipality must, by the operation of 15(1), observe all procedural requirements set out in ss. 391 and 394. What is less obvious is whether the words "or any other Act" in s. 15(1) must be interpreted as *also* requiring compliance with all of the procedural requirements of the *DCA* in addition to the specific provisions of Part XII. As explained below the answer must be no.

[46] The s. 15(1) inquiry in this particular context can only be directed at the *Municipal Act, 2001* provisions. I say this for two reasons. The historical legislative context in which s. 15(1) was enacted demonstrates why the words "or any other Act" became necessary. Second, the presumption of coherence in statutory interpretation prevents the importing of the appeal provisions from the *DCA*.

[47] First, the historical legislative context: the reference to "any other Act" in s. 15(1) has to be understood in the context of the statutory reform accomplished by the *Municipal Act, 2001*. Among the changes accomplished with the *Municipal Act, 2001* was to spin off several specific powers from it to new legislation such as

the *Fluoridation Act*, R.S.O. 1990, c. F.22 and the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4: see *Croplife* at paras. 46-47. Section 15 may be triggered where a specific power is not contained in the *2001 Act*, but instead is found in related municipal legislation. The inclusion of the words "or any other Act" in s. 15 became necessary in 2001 when specific powers were transferred from the old *Municipal Act* to other legislation: see *Croplife* at paras. 46-47.[1]

[48] The *DCA* stands on a different footing entirely. It pre-dates the *Municipal Act, 2001* and did not have its genesis in the old *Municipal Act*. The powers it confers are underived and unrelated to the powers conferred by the *Municipal Act, 2001* and its predecessors.

[49] Second, the presumption of legislative coherence supports the view that the specific provisions of the *DCA* and Part XII of the *Municipal Act, 2001* are not interchangeable for s. 15 purposes. The coherence presumption is based on the proposition that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, and that each provision is capable of operating without coming into conflict with any other: Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Markham: LexisNexis Canada Inc., 2022) at p. 323.

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[1] The appellant has not directed the Court to any other example in the *Municipal Act, 2001* where the words "or any other Act" might possibly engage a parallel by-law making power under a separate statute.

[50] Section 2 of the *DCA* does not confer the same power to pass a by-law that is provided under ss. 10 and 391. Section 391(2) permits a charge on a *person* receiving a defined benefit, while s. 2(1) of the *DCA* authorizes charges against *land*. As stated, the *DCA* power is a taxing power, while the power authorized by s. 10 and modified by s. 391 is not.

[51] If the two regimes confer different by-law making power, then the specific provisions applicable to each regime should not be interpreted as interchangeable for s. 15 purposes, particularly if to do so results in inconsistency or conflict.

[52] Reading the words “or any other Act” as requiring the appeal provisions of the *DCA* to be imported into the *Municipal Act, 2001* raises an inherent contradiction with respect to the mechanisms specifically chosen to review impost charges and development charges.

[53] When the *Municipal Act, 2001* was enacted (and in 2014 when the impost by-law was passed) that Act contained a specific mechanism for reviewing fees and charges levied under s. 391. What was s. 399 of the *Municipal Act, 2001*[2] in

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[2] Section 399 was repealed by s. 53 of Schedule 5 of the *Building Better Communities and Conserving Watersheds Act, 2017*, S.O. 2017, c. 23, which came into effect in 2018. The *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28 was repealed by s. 45 of Schedule 1 (the *Local Planning Appeal Tribunal Act, 2017*) of the *Building Better Communities and Conserving Watersheds Act, 2017*. What was s. 71(c) in the *OMB Act* became s. 30(1)(b) in the *Local Planning Appeal Tribunal Act, 2017.* The *Local Planning Appeal Tribunal Act, 2017* was revoked and replaced with a new statute in 2021 by the *Accelerating Access to Justice Act, 2021*, S.O. 2021, c. 4: see Schedule 6 s. 59(1). Schedule 6 set up what is now the Ontario Land Tribunal. That 2021 statute also made changes to a number of other statutes, including the *Municipal Act, 2001,* by adding “PART XVII.0.1 Ontario Land Tribunal — Jurisdiction And Powers”. The substance of what was s. 71(c) in the *OMB Act* seems to now be found in in s. 474.10.16(1)(b) of Part

combination with what was s. 71(c) of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, prevented applications[3] to the Ontario Municipal Board on the grounds that the fees or charges were unfair or unjust. Accordingly, there was a limited mechanism for reviewing fees and charges under the *Municipal Act, 2001*.[4]

[54] Conversely, an appeal of a development charge by-law under the *DCA* permitted the OMB to consider whether the municipality acted fairly and reasonably, within its powers, in accordance with the process set out in that legislation: *Whiteley v. Guelph (City)* (1999), 14 M.P.L.R. (3d) 146 (Ont. OMB), at para. 100.[5]

[55] In sum, the legislature has set up what can best be described as separate and self-contained by-law making regimes; the two regimes address different juridical relations, provide for different powers, and expressly contemplate different mechanisms of review. Given these differences, the legislature could not have

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XVII.0.1 of the *Municipal Act, 2001*: "The Ontario Land Tribunal has jurisdiction and power…to hear and determine any application with respect to any tolls charged by any person, firm, company, corporation or municipality operating a public utility in excess of those approved or prescribed by lawful authority, or which are otherwise unlawful." Persons charged impost fees would continue to be permitted to bring an application to the Ontario Land Tribunal to argue that the fees charged are unlawful.

[3] By-laws could also be quashed in whole or in part for illegality pursuant to s. 273 of the *Municipal Act, 2001.*

[4]The OMB and its successors have held that while it has the jurisdiction to determine unlawful fees and charges, its jurisdiction under s. 399 of the *Municipal Act, 2001* in combination with s. 71(c) of the *OMB Act* does not extend to determining the validity of a capital charge by-law passed by a municipality under section 391 of the *Municipal Act*, *2001* for failure to comply with the City's Official Plan and the *Planning Act*, R.S.O. 1990, c. P.13: *J. Stollar Construction Ltd. and The Orsi Land Group v. Kawartha Lakes (City)* (2018), 2 O.M.T.R. 333 at paras. 85-89 (Ont. LPAT).

[5] Section 20 of the *DCA* also provides a separate mechanism to permit a person required to pay a development charge to complain to council regarding the amount of the charge.

intended that both regimes would govern the procedures to be followed for passing an impost by-law. The specific provisions applicable to the by-law making powers under both statutes are capable of operating without coming into conflict with each other if the words of s. 15(1) are not interpreted as requiring the appeal provisions of the *DCA* to be applicable to impost by-laws.

[56] Finally, I note that this interpretation does not frustrate the anti-circumvention purpose of s. 15(1). The anti-circumvention rule in s. 15(1) prohibits a municipality from using its general by-law making powers in s. 10 to circumvent specific provisions established to govern the enactment of by-laws addressing particular subject-matters. It is not intended to create a scenario where municipalities must evaluate which of two competing sets of specific powers affords the greater level of procedural protection. For these reasons, I reject the appellant's argument that the Impost By-law is illegal because it fails to observe the requirements of s. 15(1).

ISSUE 2 – the restrictions in s. 394(1)(e)

The application judge's reasons

[57] The appellant argued that water and wastewater are a "natural resource" within the meaning of s. 394(1)(e) of the *Municipal Act, 2001*, and accordingly, the City was specifically prohibited from enacting the Impost By-law under sections 10 and 391(2). S. 394(1)(e) provides:

> No fee or charge by-law shall impose a fee or charge that is based on, in respect of or is computed by reference to, … the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources.

[58] Noting that the *Municipal Act, 2001* does not define "natural resources", the application judge sought to ascertain and apply the "ordinary meaning and grammatical sense" of the term. Two aspects of s. 394(1)(e) drew the application judge's attention: (1) the basis for the fee or charge ("… is based on, in respect of or, or computed by reference to"); and (2) the concepts of "generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources."

[59] With respect to the first, the application judge found based on the evidence before her that the impost fees under the Impost By-Law were "calculated and charged based on the capital cost of installing water and sewer works infrastructure" and were "related specifically to the distribution and treatment systems for water and wastewater (i.e., not any of the activities listed in s. 394(1)(e))." The application judge concluded that the Impost By-law imposed a fee to recoup the costs of the construction of infrastructure and was not a metered fee for the use or transportation of any resource.

[60] With respect to the second question, although the application judge accepted (in passing) that water is a natural resource for the purposes of the *Municipal Act, 2001*, given her conclusion above, she found it unnecessary to address the submission that wastewater constitutes a natural resource.

The appellant's argument on appeal

[61] The appellant argued on appeal that the application judge's interpretation was erroneous. In particular, the application judge drew an artificial distinction between "transportation" of a natural resource, which cannot be the basis for an impost fee, and "distribution", which can. Similarly, the application judge drew an artificial distinction between "treatment" and "processing". The appellant argued that the distinction drawn by the application judge between charging for infrastructure that will transport a resource and charging for the actual use of that resource was artificial, and that even if the impost fees were not calculated "by reference to" the distribution/transportation of water, they were nevertheless charges that were "based on" or "in respect of" transportation and thus came within s. 394(1)(e).

Analysis

[62] A key to interpreting s. 394(1)(e) is placing it in the broader context of s. 394(1) as a whole. Section 394(1) prevents municipalities from imposing fees and charges on transactions, income, and property interests that are unrelated to matters of municipal governance:

> **Restriction, fees and charges**
>
> **394** (1) No fee or charge by-law shall impose a fee or charge that is based on, is in respect of or is computed by reference to,

> (a) the income of a person, however it is earned or received, except that a municipality or local board may exempt, in whole or in part, any class of persons from all or part of a fee or charge on the basis of inability to pay;
>
> (b) the use, purchase or consumption by a person of property other than property belonging to or under the control of the municipality or local board that passes the by-law;
>
> (c) the use, consumption or purchase by a person of a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law;
>
> (d) the benefit received by a person from a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law; or
>
> (e) the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources. 2001, c. 25, s. 394 (1); 2006, c. 32, Sched. A, s. 166.

[63] In the only judicial consideration of s. 394(1) to date, specifically in the context of s. 394(1)(c) – addressing fees and charges based on consumption and purchase of services other than those provided by a municipality – the court characterized s. 394(1) as restricting "a municipality from imposing charges that are external to its relationships with its ratepayers, including (*a*) their income, (*b*) how a person uses property outside the municipality's control, (*d*) consideration of benefits received from a party other than the municipality, or (*e*) how natural resources are retrieved or processed by the ratepayer" and (c) "the use or consumption of services *not provided by the municipality*": *Nylene Canada*

Inc. v. Corporation of the Town of Arnprior, 2017 ONSC 795, 136 O.R. (3d) 599, at paras. 43-44 (emphasis original).

[64] The appellant argues that it is significant that s. 394(1)(e) is structured differently from the other four paragraphs, and should therefore be read differently. First, the appellant notes that ss. (c) and (d) expressly exclude services provided by municipalities, and s. (e) does not. Second, unlike all of the other subsections, s. (e) speaks of the generation, etc. of natural resources at large, rather than specifying generation, etc. "by a person". The appellant asks the court conclude that the difference in wording suggests that the legislature intended for the limits in (e) to apply to the transportation of natural resources by municipalities and not just by third parties. As such, the appellant contends that the *Nylene* reading of s. 394(1) as restricting fees and charges based on transactions and other legal relations to which a municipality is not a party, ought not to include s. 394(1)(e).

[65] I do not agree. Paragraphs (a)-(d) are part of the context in which s. 394(1)(e) must be interpreted and they inform the meaning of s. 394(1)(e). Section 394(1)(e) does not restrict a municipality from imposing fees and charges on land developers for the cost of providing infrastructure that transports water and wastewater for the benefit of its ratepayers. Were the appellant's argument accepted, it would also entail that the City would be enjoined from imposing water and wastewater user fees on ratepayers. This would be an absurd result.

[66] It is not necessary to address the appellant's further argument that the application judge erred by not finding that the Impost By-law was "based on" or made "in respect of" transportation of a natural resource.

DISPOSITION

[67] I would dismiss the appeal and award costs to the respondent in the amount of $17,500 including disbursements and HST.

Released: October 31, 2022 "K.F."

"B.W. Miller J.A."
"I agree. K. Feldman J.A."
"I agree. M. Tulloch J.A."

APPENDIX

***Development Charges Act*, 1997, S.O. 1997, c. 27**

2 (1) The council of a municipality may by by-law impose development charges against land to pay for increased capital costs required because of increased needs for services arising from development of the area to which the by-law applies. 1997, c. 27, s. 2 (1).

(2) A development charge may be imposed only for development that requires,

(a) the passing of a zoning by-law or of an amendment to a zoning by-law under section 34 of the *Planning Act*;

(b) the approval of a minor variance under section 45 of the *Planning Act*;

(c) a conveyance of land to which a by-law passed under subsection 50 (7) of the *Planning Act* applies;

(d) the approval of a plan of subdivision under section 51 of the *Planning Act*;

(e) a consent under section 53 of the *Planning Act*;

(f) the approval of a description under section 9 of the *Condominium Act, 1998*; or

(g) the issuing of a permit under the *Building Code Act, 1992* in relation to a building or structure. 1997, c. 27, s. 2 (2); 2015, c. 26, s. 2 (1); 2015, c. 28, Sched. 1, s. 148.

5 (1) The following is the method that must be used, in developing a development charge by-law, to determine the development charges that may be imposed:

1. The anticipated amount, type and location of development, for which development charges can be imposed, must be estimated.

2. The increase in the need for service attributable to the anticipated development must be estimated for each service to which the development charge by-law would relate.

3. The estimate under paragraph 2 may include an increase in need only if the council of the municipality has indicated that it intends to ensure that such an increase in need will be met. The determination as to whether a council has indicated such an intention may be governed by the regulations.

4. The estimate under paragraph 2 must not include an increase that would result in the level of service exceeding the average level of that service provided in the municipality over the 10-year period immediately preceding the preparation of the background study required under section 10. How the level of service and average level of service is determined may be governed by the regulations.

5. The increase in the need for service attributable to the anticipated development must be reduced by the part of that increase that can be met using the municipality's excess capacity, other than excess capacity that the council of the municipality has indicated an intention would be paid for by new development. How excess capacity is determined and how to determine whether a council has indicated an intention that excess capacity would be paid for by new development may be governed by the regulations.

6. The increase in the need for service must be reduced by the extent to which an increase in service to meet the increased need would benefit existing development. The extent to which an increase in service would benefit existing development may be governed by the regulations.

7. The capital costs necessary to provide the increased services must be estimated. The capital costs must be reduced by the reductions set out in subsection (2). What is included as a capital cost is set out in subsection (3). How the capital costs are estimated may be governed by the regulations.

8. Repealed: 2019, c. 9, Sched. 3, s. 3 (2).

9. Rules must be developed to determine if a development charge is payable in any particular case and to determine the amount of the charge, subject to the limitations set out in subsection (6).

10. The rules may provide for full or partial exemptions for types of development and for the phasing in of development charges. The rules may also provide for the indexing of development charges based on the prescribed index. 1997, c. 27, s. 5 (1); 2019, c. 9, Sched. 3, s. 3 (1, 2).

(2) The capital costs, determined under paragraph 7 of subsection (1), must be reduced, in accordance with the regulations, to adjust for capital grants, subsidies and other contributions made to a municipality or that the council of the municipality anticipates will be made in respect of the capital costs. 1997, c. 27, s. 5 (2).

10 (1) Before passing a development charge by-law, the council shall complete a development charge background study. 1997, c. 27, s. 10 (1).

12 (1) Before passing a development charge by-law, the council shall,

(a) hold at least one public meeting;

(b) give at least 20-days notice of the meeting or meetings in accordance with the regulations; and

(c) ensure that the proposed by-law and the background study are made available to the public at least two weeks prior to the meeting or, if there is more than one meeting, prior to the first meeting. 1997, c. 27, s. 12 (1).

14 Any person or organization may appeal a development charge by-law to the Ontario Land Tribunal by filing with the clerk of the municipality on or before the last day for appealing the by-law, a notice of appeal setting out the objection to the by-law and the reasons supporting the objection. 1997, c. 27, s. 14; 2021, c. 4, Sched. 6, s. 41 (1).

20 (1) A person required to pay a development charge, or the person's agent, may complain to the council of the municipality imposing the development charge that,

(a) the amount of the development charge was incorrectly determined;

(b) whether a credit is available to be used against the development charge, or the amount of the credit or the service with respect to which the credit was given, was incorrectly determined; or

(c) there was an error in the application of the development charge by-law. 1997, c. 27, s. 20 (1).

***Municipal Act*, 2001, S.O. 2001, c. 25**

10 (2) A single-tier municipality may pass by-laws respecting the following matters:

1. Governance structure of the municipality and its local boards.

2. Accountability and transparency of the municipality and its operations and of its local boards and their operations.

3. Financial management of the municipality and its local boards.

4. Public assets of the municipality acquired for the purpose of exercising its authority under this or any other Act.

5. Economic, social and environmental well-being of the municipality, including respecting climate change.

6. Health, safety and well-being of persons.

7. Services and things that the municipality is authorized to provide under subsection (1).

8. Protection of persons and property, including consumer protection.

9. Animals.

10. Structures, including fences and signs.

11. Business licensing. 2006, c. 32, Sched. A, s. 8; 2017, c. 10, Sched. 1, s. 1.

15 (1) If a municipality has power to pass a by-law under section 9, 10 or 11 and also under a specific provision of this or any other Act, the power conferred by section 9, 10 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision. 2001, c. 25, s. 15 (1); 2006, c. 32, Sched. A, s. 11 (1).

(4) Subsection (1) applies to limit the powers of a municipality despite the inclusion of the words “without limiting sections 9, 10 and 11” or any similar form of words in the specific provision. 2006, c. 32, Sched. A, s. 11 (4).

273 (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality. 2001, c. 25, s. 273 (1).

390 In this Part,

"by-law" includes a resolution for the purpose of a local board; ("règlement municipal")

"fee or charge" means, in relation to a municipality, a fee or charge imposed by the municipality under sections 9, 10 and 11 and, in relation to a local board, a fee or charge imposed by the local board under subsection 391 (1.1); ("droits ou redevances")

"local board" includes any prescribed body performing a public function and a school board but, for the purpose of passing by-laws imposing fees or charges under this Part, does not include a school board or hospital board; ("conseil local")

"person" includes a municipality and a local board and the Crown. ("personne") 2001, c. 25, s. 390; 2006, c. 32, Sched. A, s. 162.

391 (1) Without limiting sections 9, 10 and 11, those sections authorize a municipality to impose fees or charges on persons,

(a) for services or activities provided or done by or on behalf of it;

(b) for costs payable by it for services or activities provided or done by or on behalf of any other municipality or any local board; and

(c) for the use of its property including property under its control. 2006, c. 32, Sched. A, s. 163 (1).

(2) A fee or charge imposed for capital costs related to services or activities may be imposed on persons not receiving an immediate benefit from the services or activities but who will receive a benefit at some later point in time. 2006, c. 32, Sched. A, s. 163 (2).

(5) In the event of a conflict between a fee or charge by-law and this Act, other than this Part, or any other Act or regulation made under any other Act, the by-law prevails. 2006, c. 32, Sched. A, s. 163 (3).

394 (1) No fee or charge by-law shall impose a fee or charge that is based on, is in respect of or is computed by reference to,

(a) the income of a person, however it is earned or received, except that a municipality or local board may exempt, in whole or in part, any class of persons from all or part of a fee or charge on the basis of inability to pay;

(b) the use, purchase or consumption by a person of property other than property belonging to or under the control of the municipality or local board that passes the by-law;

(c) the use, consumption or purchase by a person of a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law;

(d) the benefit received by a person from a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law; or

(e) the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources. 2001, c. 25, s. 394 (1); 2006, c. 32, Sched. A, s. 166.

474.10.16 (1) The Ontario Land Tribunal has jurisdiction and power,

(a) to hear and determine any application with respect to any public utility, its construction, maintenance or operation by reason of the contravening of or failure to comply on the part of any person, firm, company, corporation or municipality with the requirements of any Act, or of any regulation, rule, by-law or order made under any Act, or of any agreement entered into in relation to such public utility, its construction, maintenance or operation; and

(b) to hear and determine any application with respect to any tolls charged by any person, firm, company, corporation or municipality operating a public utility in excess of those approved or prescribed by lawful authority, or which are otherwise unlawful. 2021, c. 4, Sched. 6, s. 64 (7).

O. Reg. 584/06: FEES AND CHARGES

2. (1) A municipality and a local board do not have power under the Act to impose fees or charges to obtain revenue to pay capital costs, if as a result of development charges by-laws or front-ending agreements under the Development Charges Act, 1997 or a predecessor of that Act that was passed or entered into before the imposition of the fees or charges, payments have been, will be or could be made to the municipality or local board to pay those costs. O. Reg. 584/06, s. 2 (1).

(2) For the purpose of subsection (1),

“capital costs” has the same meaning as it has in the Development Charges Act, 1997; (“dépenses en immobilisations”)

“payments” do not include amounts the municipality or local board has refunded or is required to refund under the *Development Charges Act, 1997*. (“paiements”) O. Reg. 584/06, s. 2 (2).