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April 18, 2023

**BY EMAIL [hamilton@acorncanada.org]**Olivia O'Connor  
Head Organizer  
Hamilton ACORN  
56 Mulberry St, Suite 8

Dear Ms. O'Connor:

**Re: Municipal Powers to Regulate Against Renovictions**

We write further to your request for our opinion regarding the scope of the City of Hamilton's powers to regulate against "renovictions", following a recent Report to the City's Emergency and Community Services Committee on this matter.

A renoviction is a type of eviction in which a tenant is displaced due to extensive renovations in the rental unit. While the *Residential Tenancies Act* (RTA) provides that a landlord may evict tenants in order to perform certain major renovations,<sup>1</sup> the RTA also invites municipalities to regulate in areas of local concern, for example, by appropriately limiting when permits for renovations can be issued. To this end, ACORN has emphasized the need for further regulation at the municipal level.

In this opinion, we were asked to assess whether the City of Hamilton's (the "City's") recent report accurately reflects its by-law making powers under the *Municipal Act*, and particularly, whether a by-law similar to the one in New Westminster would exceed the City's authority.

For the reasons which follow, it is our view that the City could enact a by-law similar to the one in New Westminster which regulates against renovictions by proactively disincentivizing them, and removing the costs of displacement from tenants. New Westminster's by-law was challenged twice in British Columbia, and upheld. In our view,

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<sup>1</sup> *Residential Tenancies Act*, SO 2006 c 17 [RTA], s 50.

the differences between British Columbia's legislation and Ontario's *Municipal Act* are unlikely to yield a different result if a similar by-law in Ontario was created and challenged. If properly drafted, such a by-law would be unlikely to run afoul of the City's authority within the *Municipal Act* and would be very unlikely to frustrate the purpose of the RTA. The case law has consistently confirmed that the scope of municipal authority is broad, and challenges to cities' by-law making powers are rarely successful.

## **FACTS**

In preparing this opinion, we have spoken with ACORN to understand the circumstances of recent tenant renovictions in Hamilton. We have also reviewed Enterprise Canada's April 3, 2023 document entitled "Renovictions: Stakeholder Consultation", which is Appendix A to the City's Housing Services Division Report (the "Report") to the Emergency and Community Services Committee. That Committee has a meeting scheduled on April 20, 2023.

We understand from ACORN that the issue of renovictions has become an increasing problem for tenants, who report that landlords are evicting them for cosmetic reasons rather than health and safety concerns.

Enterprise Canada's document notes that "Issuance of N13 notices began to climb sharply in 2016, and increased an astounding 775 per cent between 2010 and 2021."<sup>2</sup> Enterprise Canada further notes that some of Hamilton's buildings are old. The document also includes a section entitled "Legislative Situation" which states that the *Municipal Act* in Ontario and BC's comparable *Community Charter* are not the same.<sup>3</sup>

The City Report's "Analysis and Rationale for Recommendation" section indicates that the main reasons why the City will not pursue an anti-renovictions by-law are (1) unlike BC's *Community Charter*, the *Municipal Act* does not explicitly provide the City with authority to protect people and property in relation to rental units, and (2) the City cannot interfere with RTA requirements.

## **ANALYSIS**

Municipalities are empowered to regulate matters like housing which raise local concerns.

The Supreme Court has clarified that express authority is not required for municipalities to enact valid by-laws. Rather, to be valid, those by-laws must address areas of local concern. To the extent that the City is concerned about its express authority, section 10 of the *Municipal Act* confers both broad and specific authority to enact local by-laws.

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<sup>2</sup> Enterprise Canada, Appendix "A" to Report HSC23023, "Renovictions: Stakeholder Consultation" at 12.

<sup>3</sup> *Ibid* at 14.

The City's Report provides no basis for its conclusion that the *Municipal Act* is insufficient to allow it to enact a valid anti-renovictions by-law. Further, the *Residential Tenancies Act* in Ontario does not in any way oust the City's by-law making power. Rather, the RTA's express provisions invite municipal regulation.

### **The *Municipal Act* confers broad powers of municipal regulation**

The Supreme Court and courts of appeal have repeatedly emphasized that municipalities have a broad scope of power to regulate local concerns, as authorized by the legislation under which they operate.<sup>4</sup> The City's authority to enact by-laws is derived from Ontario's *Municipal Act*.<sup>5</sup>

In Canada's leading case on municipal authority, *Spraytech*, the Supreme Court ruled that a town in Quebec had jurisdiction to prohibit pesticide use through a by-law.

The Court in *Spraytech* decided that express authority was not required. The municipality's by-law was within its authority even without an express legislative provision that it could regulate pesticide use.<sup>6</sup>

The Court further analyzed whether any provincial legislation conflicted with that by-law and found that it did not. The Court ruled that "[a]s a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter".<sup>7</sup> The Court emphasized that a by-law would have to "directly" contravene the purpose of a provincial statute in order to be inoperable. By-laws that aim to "enhance" the purpose of the statutory scheme or provide "stricter" regulations that "coexist" with other legislation are appropriate exercises of municipal authority.<sup>8</sup> The Court found that the pesticide by-law did not contravene any statute and its enhancement of existing legislation was entirely within the scope of the municipality's regulatory power.

### **A by-law limiting renovictions would not conflict with the RTA**

A by-law limiting renovictions would not frustrate the purpose of the RTA because the RTA does not require or even encourage renoviction, it merely provides conditions for permissible renoviction. Meanwhile, municipalities may enact valid by-laws in addition to provincial legislation where "dual compliance" is possible. The "dual compliance" test requires that courts first attempt to read the statutory instruments together before deciding to quash a by-law.<sup>9</sup>

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<sup>4</sup> 114957 *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 ["*Spraytech*"] at para 42; *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at paras 6-7; *Toronto Livery Association v Toronto (City)*, 2009 ONCA 535 at paras 44-49; *Croplife Canada v Toronto (City)*, 2005 CanLII 15709 (ON CA) at paras 36-37; 1193652 *BC Ltd v New Westminster (City)*, 2021 BCCA 176 (CanLII) ["*New Westminster BCCA*"] at para 79; *Toronto & City of Hamilton v Goldlist*, 2003 CanLII 50084 (ON CA) ["*Goldlist*"] at paras 55-56 and 67.

<sup>5</sup> *Municipal Act*, SO 2001 c 25 ["*Municipal Act*"], ss 7 and 8-10.

<sup>6</sup> *Spraytech*, *supra* at paras 22-23.

<sup>7</sup> *Ibid* at para 39.

<sup>8</sup> *Ibid* at paras 36-37 and 42.

<sup>9</sup> *Ibid* at 20.

The “dual compliance” test, as articulated by the Ontario Court of Appeal and reiterated in cases involving landlord licensing by-laws, is as follows:<sup>10</sup>

- 1) Is it impossible to comply simultaneously with the by-law in question and provincial legislation (in this case the RTA)? and;
- 2) Does the by-law frustrate the purpose of the Ontario Legislature in enacting the provincial legislation in issue?

In general, by-laws are rarely struck down on the basis that they were enacted outside of the scope of municipal authority. Even when a city’s by-law does frustrate provincial legislation, it will only be invalidated to the extent of its breach. For example, in *Cash Converters*, Oshawa’s by-law requiring second hand stores to collect personal information from customers was invalid only to the extent that its provisions conflicted with the *Municipal Freedom of Information and Protection of Privacy Act*, and only the offending sections were quashed.<sup>11</sup>

### **The RTA expressly contemplates concurrent municipal regulation**

The City’s Report is premised on the idea that the RTA limits the City’s authority to enact a by-law. This is incorrect. The RTA itself contemplates that municipal by-laws could be enacted regarding maintenance issues<sup>12</sup> and vital services.<sup>13</sup> Further, the City has engaged in a pilot project to license landlords, which contradicts its implicit assertion that it cannot regulate in housing matters while the RTA exists.<sup>14</sup> Many other municipalities have engaged in landlord licensing, and efforts to strike down these by-laws consistently fail.<sup>15</sup>

The section of the RTA governing evictions for the purposes of renovations explicitly invites municipal regulation. Section 50 provides that eviction for the purpose of renovation is only allowed if the landlord requires possession of the unit to “(c) do repairs or renovations to it that are so extensive that they require a building permit and vacant possession of the rental unit”.

The Notice that a landlord must provide when evicting a tenant due to renovations under section 50 of the RTA is clear that building permits—issued by a municipality—may be required before a renovation is possible.

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<sup>10</sup> *Cash Converters Canada Inc et al v The Corporation of The City of Oshawa*, 2007 ONCA 502; *London Property Management Association v City of London*, 2011 ONSC 4710 at paras 35-37.

<sup>11</sup> *Cash Converters Canada Inc et al v The Corporation of The City of Oshawa*, 2007 ONCA 502.

<sup>12</sup> RTA, *supra*, s 224.

<sup>13</sup> RTA, *supra*, ss 215-216.

<sup>14</sup> City of Hamilton, “Rental Housing Licensing Pilot Program”, online: <https://www.hamilton.ca/build-invest-grow/starting-small-business/business-licences/rental-housing-licensing-pilot-program>.

<sup>15</sup> *Toronto & City of Hamilton v Goldlist*, 2003 CanLII 50084 (ON CA); *London Property Management Association v City of London*, 2011 ONSC 4710; *Fodor v North Bay (City)*, 2018 ONSC 3722; *1736095 Ontario Ltd v Waterloo (City)*, 2015 ONSC 6541.

The eviction Notice form, N13, includes the following section [emphasis added]:<sup>16</sup>

Necessary permits

I have shaded the circle to indicate whether

- I have obtained any necessary building permits.
- I have obtained the necessary building permits or other authorization to convert, demolish **or repair** the rental unit.
- I will obtain the necessary building permits or other authorization to convert demolish **or repair** the rental unit.
- No permits or other authorization are necessary in this case to convert the rental unit or demolish it.

The RTA, both as a whole and within section 50, contemplates that municipalities can play a role in regulating renovations.<sup>17</sup>

### **The Anti-Renoviction By-Law in New Westminster and the *Municipal Act***

New Westminster's anti-renovictions by-law required landlords to maintain their buildings and obtain all necessary permits before the municipality would authorize a landlord to renovate or repair the building.<sup>18</sup> The by-law further required that the landlord enter into a new tenancy agreement with the tenant "on the same terms as the tenancy agreement pertaining to the dwelling unit being renovated or repaired, or, terms that are more favourable to the tenant, in respect of a comparable dwelling unit in the same building...", or, make "other arrangements in writing for the tenant's temporary accommodation during the course of the renovation or repair, and for their return to the original dwelling unit following completion of the renovation or repair..."<sup>19</sup> The New Westminster by-law also prohibited a rent increase after the renovation was complete.

This by-law was challenged twice in BC, and courts found that the municipality did not exceed its authority.<sup>20</sup> Particularly, the British Columbia Court of Appeal found that the by-law did not frustrate BC's *Residential Tenancy Act*, which limits bad faith evictions for renovations in a similar manner as Ontario's RTA.<sup>21</sup> Rather, the Court found that the city was within its authority when it enacted its by-law which legislated additional requirements alongside BC's *Residential Tenancy Act*. We have quoted at length from this case because

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<sup>16</sup> Landlord and Tenant Board, "Notice to End your Tenancy because the Landlord Wants to Demolish the Unit, Repair it or Convert it to Another Use N13", online: <https://tribunalsontario.ca/documents/lrb/Notices%20of%20Termination%20&%20Instructions/N13.pdf>.

<sup>17</sup> See multiple case law examples in which landlords have tried and failed to quash licensing by-laws at footnote 15, above.

<sup>18</sup> Corporation of the City of New Westminster, Bylaw No 8085, 2019, "A Bylaw to Amend Business Regulations and Licensing (Rental Units) Bylaw No 6926, 2004".

<sup>19</sup> *Ibid.*

<sup>20</sup> *New Westminster BCCA, supra; VIT Estates Ltd v New Westminster (City)*, 2021 BCSC 573.

<sup>21</sup> *New Westminster BCCA, supra; Residential Tenancy Act*, SBC 2002 c 78, s 49; *RTA, supra*, s 50. Note: In the condominium context, a similar by-law was upheld in Ontario in *Toronto & City of Hamilton v Goldlist*, 2003 CanLII 50084 (ON CA).

it represents a sound assessment of how a similar by-law would likely be analyzed by a court in Ontario:<sup>22</sup>

[79] To repeat, under the subsidiarity principle the level of government closest to a subject matter may choose to respond to local needs by introducing complementary legislation in an area of jurisdictional overlap. The City has a long-standing concern with the need to preserve local affordable rental housing and has recently become particularly concerned with a perceived increase in the risk of renovations in New Westminster. In my view, the City's conclusion that it was authorized by the *Community Charter* to address those local concerns by enacting the Impugned Bylaw aligns with Justice L'Heureux-Dubé's statement in *Spraytech* that "the mere existence of provincial ... legislation in a given field does not oust municipal prerogatives to regulate the subject matter": at para. 39. It also aligns with Chief Justice McLachlin's statement in *Reference re Assisted Human Reproduction Act* that, so long as complementary local laws do not frustrate other legislation, "in an area of jurisdictional overlap, the level of government that is closest to the matter will often introduce complementary legislation to accommodate local circumstances": at para. 70.

[80] In addition, as the Chief Justice [of the BC court below] recognized, s. 10 of the *Community Charter* contemplates overlapping municipal and provincial jurisdiction by providing that a municipal bylaw is inconsistent with a provincial enactment only if it requires contravention of that enactment: at paras. 70, 75–77. Accordingly, it was reasonable for the City to conclude that the Impugned Bylaw would not frustrate the *Residential Tenancy Act* scheme unless it required contravention of the provisions of that Act, which it did not.

[81] Further, as the Chief Justice [of the BC court below] stated, regardless of whether the *Residential Tenancy Act* scheme is all-inclusive regarding the circumstances in which a landlord may terminate a residential lease, that Act contemplates the applicability of other legislative and regulatory schemes in the residential tenancy context. In other words, like the *Community Charter*, the *Residential Tenancy Act* contemplates the prospect of overlapping and complementary jurisdiction. In addition, regardless of what the common practice may be among landlords, the *Residential Tenancy Act* does not expressly grant them a statutory right to charge market rent when a tenant exercises the right of first refusal following a renovation. Had the Legislature intended to grant such a significant right, in my view it is reasonable to conclude that it would have said so. In the absence of an express provision to this effect, there is no "statutory disharmony" or operational conflict of potential concern.

We note that the court's analysis above did not turn on the specific provision of the *Community Charter* which allowed New Westminster to pass its by-law. New Westminster had not exceeded its authority for the same reasons that the City likely would not: municipalities have broad authority to regulate in areas of local concern. Ontario's *Municipal Act* conveys a similarly broad scope of by-law making power.<sup>23</sup>

### **Hamilton's Authority as a Single Tier Municipality**

Section 10 of Ontario's *Municipal Act* provides explicit authority to pass by-laws in a broad range of circumstances. British Columbia's *Community Charter*'s provisions are not the same, but the relevant subsection is similar. Further in section 8, the *Community Charter* grants licensing powers. Relevant subsections are emphasized below:

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<sup>22</sup> *New Westminster BCCA*, *supra*.

<sup>23</sup> *Municipal Act*, *supra*, ss 8-10, and in particular ss 8(1) and 151.

Ontario's <i>Municipal Act</i> section 10(1) <sup>24</sup>	British Columbia's <i>Community Charter</i> section 8(3) <sup>25</sup>
<p>1. Governance structure of the municipality and its local boards.</p> <p>2. Accountability and transparency of the municipality and its operations and of its local boards and their operations.</p> <p>3. Financial management of the municipality and its local boards.</p> <p>4. Public assets of the municipality acquired for the purpose of exercising its authority under this or any other Act.</p> <p><b>5. Economic, social and environmental well-being of the municipality, including respecting climate change.</b></p> <p><b>6. Health, safety and well-being of persons.</b></p> <p>7. Services and things that the municipality is authorized to provide under subsection (1).</p> <p><b>8. Protection of persons and property, including consumer protection.</b></p> <p>9. Animals.</p> <p>10. Structures, including fences and signs.</p> <p><b>11. Business licensing.</b></p>	<p>(a) municipal services;</p> <p>(b) public places;</p> <p>(c) trees;</p> <p>(d) firecrackers, fireworks and explosives;</p> <p>(e) bows and arrows, knives and other weapons not referred to in subsection (5);</p> <p>(f) cemeteries, crematoriums, columbariums and mausoleums and the interment or other disposition of the dead;</p> <p><b>(g) the health, safety or protection of persons or property in relation to matters referred to in section 63 [protection of persons and property];</b></p> <p>(h) the protection and enhancement of the well-being of its community in relation to the matters referred to in section 64 [nuisances, disturbances and other objectionable situations];</p> <p>(i) public health;</p> <p>(j) protection of the natural environment;</p> <p>(k) animals;</p> <p>(l) buildings and other structures;</p> <p>(m) the removal of soil and the deposit of soil or other material.</p>

<sup>24</sup> *Municipal Act, supra*, s 10(1).

<sup>25</sup> *Community Charter*, SBC 2003 c 2, s 8(3).

Section 10 of Ontario's *Municipal Act* includes a marginal note: "Broad authority, single-tier municipalities". A leading annotated guide to the *Municipal Act* clarifies just how broad municipalities' authority is:<sup>26</sup>

Section 10 (together with subs. 11(1) and (2)) represents a significant expansion of municipal powers. The authority for single-tier municipalities to provide any service or thing that they consider necessary or desirable for the public under subs. 10(1) not only encompasses the various traditional areas of municipal jurisdiction as enumerated under the spheres of jurisdiction in subs. 11(3) of the Act but potentially extends to other areas and subject matters. There is therefore no need to retain the spheres of jurisdiction for single-tier municipalities.

A single-tier municipality is one which does not have a two-tiered structure, rather, all jurisdiction is contained within just one tier.<sup>27</sup> In other words, while the term "single-tier" refers to the municipality's jurisdiction, it is broad, not limited.

The City's Report argues that the tier system in the *Municipal Act* differs from the framework in BC's *Community Charter*. While there are differences, these differences are not determinative of the City's authority to enact a valid by-law regulating renovations. A close review of both province's provisions, in the table above, shows the City has multiple bases for authority to enact a by-law to limit renovations.

## **CONCLUSION**

The City has taken the position that its authority is limited under section 10 of the *Municipal Act* and that the RTA further limits its authority. However, our review of the extensive case law on these issues shows that the City's authority is broad, and that, with a properly drafted by-law, the City *can* take action to prevent renovations.

We trust this is responsive to your request. Please do not hesitate to contact the undersigned in the event that you have any questions regarding any aspect of this opinion.

Yours truly,

**RAVENLAW LLP/s.r.l.**



Claire Michela

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<sup>26</sup> John Mascarin & Stephen Auerback, *The Annotated Municipal Act*, 2nd Ed (online: Thomson Reuters) at § 99.1.

<sup>27</sup> See Ontario, "List of Ontario Municipalities", online: <https://www.ontario.ca/page/list-ontario-municipalities>.