



Me Vrouyr Makalian
Direct line: 514.787.0172
vmakalian@camlex.ca

August 3, 2015

Via email

LEGAL OPINION

Sender: Me Vrouyr Makalian
Recipient: Ms. Corinne Voyer, Coalition Poids
Subject: Municipal by-laws and children's free play

Background: a plethora of municipal by-laws prohibiting free play

A quick glance at the municipal by-laws in force in the Greater Montreal Area reveals that by-laws prohibiting children's free play in streets and alleys are the norm rather than an exception. These by-laws, often very old, were enacted to protect the rights of residents to peace and tranquility.

In light of the growing problem of sedentariness and obesity among children, the grounds for passing these regulatory provisions deserve to be reconsidered.

Questions

- Are the municipal by-laws prohibiting children's free play valid?
- Can municipalities repeal such by-laws while respecting existing legislation, namely, the Civil Code of Québec and the Highway Safety Code?

Analysis

1. Two areas where by-laws are brought to bear

There are two types of regulatory provision that prohibit children's free play in streets and alleys, namely, those concerning public nuisances and noise levels and those concerning traffic and the occupation of roadways.

These two types of municipal by-laws must be examined separately, as the application of one or the other constitutes a major barrier to children's free play.

2. Provisions concerning noise

2.a. General prohibition against noise in municipal by-laws

The right of residents to peace and tranquility is at the heart of municipal regulations in Québec cities and towns. For the purposes of this legal opinion, only the by-laws in effect in the Greater Montreal Area were examined. These are similar in large part to those found elsewhere in the province. The following section of the *Règlement sur le bruit à l'égard du territoire du Plateau-Mont-Royal* (Noise by-law in effect in the Plateau-Mont-Royal borough) clearly illustrates the spirit of municipal regulations:

9. In addition to the noises mentioned in section 8, the following noises are specifically prohibited when they can be heard outdoors or elsewhere, regardless of their destination, than on the premises whence they emanate:

4) yelling, clamouring, singing, quarrelling or cursing and any other form of disorderly conduct [...] [free translation]¹

The by-law also includes the following section:

15. The competent authorities that have reasonable grounds to believe that the tranquility of a person in a residential building is disturbed by noise that they deem excessive given the time of day, the place or any other circumstance and that is not specifically prohibited under Section 9 of this by-law, can ordain anyone causing said nuisance to cease immediately.

Whoever fails to comply straightaway with such an order given by the competent authorities in accordance with the first paragraph shall be in violation of this by-law. [free translation]²

This Section 15 affords the competent authorities a great deal of latitude. It allows security agents or police officers to intervene when the tranquility of a person is disturbed. Though the noise causing the disturbance must be excessive, there is a real risk of seeing the by-law applied in a generalized manner to any noise made by children. Indeed, further to a complaint by a resident, agents or officers can exercise the broad discretionary power they enjoy to warn children and ask them to limit the noise they make playing or quite simply to go elsewhere. This constitutes a real barrier to free play.

¹ Règlement sur le bruit à l'égard du territoire du Plateau-Mont-Royal R.R.V.M., c. B-3 (Codification administrative) [French only]

² Numerous other municipal by-laws, including those of the Sud-Ouest, Pointe-aux-Trembles-Rivière-des-Prairies, and Rosemont-La Petite-Patrie boroughs, contain these two provisions word for word. Other by-laws contain similar provisions. See Appendix A for a sample of other regulatory provisions concerning noise and nuisances.

Where it can very well be in the public interest to have such a general prohibition against yelling, quarrelling and any other disorderly conduct, we must ask ourselves whether such a prohibition should extend to noise made by children playing in the streets. An analysis of Québec legislation shows that the by-laws adopted by most municipalities are not rooted in Québec civil law.

2.b. Incompatibility of noise by-laws with Québec civil law

Article 976 of the Civil Code of Québec deals with neighbourhood disturbances and establishes the fundamental rule in this regard.

976. Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.

The question we must ask ourselves is the following: Is children's play in the streets a normal inconvenience or rather an inconvenience that exceeds the limit of tolerance?

By specifying that the nature or location of the neighbours' land and local custom must be taken into account, Article 976 stipulates quite clearly that it is important to consider context. An examination of the jurisprudence in this regard suggests that Québec courts in no way consider children's play in the streets to be a neighbourhood annoyance.

In a 2009 ruling, for example, Court of Québec Judge Michèle Pauzé explained:

The Court does not hold that the children of the defendant are such as to disturb the peace or the residents of the neighbourhood. When in a group, children tend to speak loud and yell. It is their wont to do so. The Court cannot hold their actions to be in violation of any law or regulation. (free translation)³

In 2013, the Court of Québec was called upon to rule further to a complaint by a person regarding a neighbour's swimming pool. After hearing audio recordings submitted as evidence, Judge Simard explained that even though "we can clearly hear children making considerable noise as they jump into the pool [...] this does not constitute a sufficient element to find the defendant at fault" (free translation). She reminded the parties, in closing, that they "would do well to keep in mind what Article 976 stipulates". (free translation)⁴

As we can see, Québec courts are conscious of the reality of children and recognize, at least implicitly, their right to make noise when they play.

The Québec courts have been guided also by the rulings of the Supreme Court of Canada in their interpretation of matters concerning problems between neighbours. According to the Supreme Court, the determining factor in identifying a true problem between neighbours is whether the inconvenience caused is abnormal and excessive.⁵ To determine whether a situation is truly

³ Massicotte c. Bentivegna, 2009 QCCQ 6353 (CanLII), <<http://canlii.ca/t/24h0v>> [French only]

⁴ Gauthier c. Côté, 2013 QCCQ 6201 (CanLII), <<http://canlii.ca/t/fzg6s>> [French only]

⁵ Massicotte c. Bentivegna, 2009 QCCQ 6353 (CanLII), <<http://canlii.ca/t/24h0v>> [French only]

abnormal, the Court can consider, among other things, the severity of the problem, the nature of the setting, the legality of the activity, the collective well-being, and the behaviour of the defendant.⁶

In short, the near absolute right to peace and tranquility, such as advanced in municipal by-laws, has no basis in Québec or Canadian jurisprudence. The courts, on the contrary, recognize that situations must be assessed contextually. Moreover, when they have had to make such assessments, Québec judges have regularly ruled that the normal noise resulting from children's free play in their neighbourhood is in no way abnormal or excessive.

2.c. Possible solutions

Adopt the terminology of CCQ Article 976

Adopting a more flexible and tolerant regulatory framework in respect of children's free play would bring us more in line with Québec law, not less. Municipalities that would like to adopt a more balanced framework can adopt provisions reflecting Québec legislation and the teachings of the Supreme Court of Canada.

While maintaining a prohibition on excessive noise, municipal regulations can include, either in their preamble or in their body, a provision specifying that residents must accept normal neighbourhood noises that do not exceed the limit of tolerance. An explicit reference to children's play could also be included.

2.d. Introducing exceptions to the law

Municipalities can also introduce exceptions to the law to authorize children's play explicitly. Such exceptions, clearly laid out, would serve to counter the negative effects of numerous municipal by-laws, which are often formulated rather vaguely and afford a great deal of latitude to the competent authorities to prohibit noise of any type.

Many boroughs, for example, prohibit "yelling, clamouring, singing, quarrelling or cursing and any other form of disorderly conduct".⁷ One bylaw, in Ville-Saint-Laurent, entitled "Règlement sur la paix publique et l'ordre social" (By-law on public peace and social order), prohibits anyone from disturbing the public peace and quiet "by yelling, cursing, singing, insulting or swearing at people, fighting, organizing or taking part in a brutal or depraved spectacle or gathering, and from refusing to cease the disturbance when ordained to do so by a peace officer" (free translation).⁸

It would be necessary to specify, by way of an exception provision, that the noise made by children playing is not noise of the sort to disturb the public peace and quiet.

Ville Saint-Laurent's nuisance by-law⁹ sets a precedent for just such an exception provision. Section 1 of the by-law defines "disturbing noises" as "any noise that can be distinctly discerned from

⁶ Caron c. Farina, 2009 QCCQ 3487 (CanLII), <<http://canlii.ca/t/23bd3>> [French only]

⁷ Numerous municipalities and boroughs, including the Plateau-Mont-Royal, Sud-Ouest, Pointe-aux-Trembles-Rivière-des-Prairies, and Rosemont-La Petite-Patrie boroughs, have this section 9, paragraph 4 in their noise by-laws.⁷

⁸ Ville de Saint-Laurent – Règlement no. 915 – Règlement sur la paix publique et l'ordre social (Codification administrative) [French only]

the ambient noise, whether the noise is stable, fluctuating or intermittent.” However, the section also specifies exceptions: not considered disturbing are noises resulting from public utility work, from road, rail and air traffic, from domestic maintenance, and from construction work between 7 a.m. and 5 p.m. on weekdays. In light of the mission that many municipal administrations have adopted to foster physical activity among children, it would be entirely in keeping with this to pass a provision specifying that noises resulting from children playing, during normal hours, shall not be considered disturbing noises.

It should be pointed out that there is nothing revolutionary about such a proposal. It would merely allow municipal by-laws to better reflect the reality of children’s play—a reality that the courts already understand.

Limit the discretionary power of the competent authorities

Sections 9(4) and 15 of the noise by-law in effect in the Plateau-Mont-Royal borough given above are provisions that can be found also in the by-laws of many other boroughs. The prohibition stipulated in section 9 against any noise stemming from “yelling, clamouring, singing, quarrelling or cursing and any other form of disorderly conduct” is vague in its formulation. The same is true of section 15, which allows the competent authorities with “reasonable grounds to believe that the tranquility of a person in a residential building is disturbed by noise that they deem to be excessive given the time of day, the place or any other circumstance and that is not specifically prohibited under section 9 of this by-law” to ordain “anyone causing said nuisance to cease immediately”.

In both cases, the authorities enjoy a great deal of latitude. In fact, though the noises expressly prohibited should normally be measured using instruments, such a provision allows the authorities, inspectors or police officers to ordain anyone to immediately cease disturbing another person’s tranquility solely because they believe, on reasonable grounds, that the person is being disturbed. Does filing a complaint not provide the competent authorities with reasonable grounds to intervene?

Clearly, it is in the public interest to maintain a general prohibition against yelling, quarrelling and disorderly conduct in a borough. However, though the ample latitude granted agents and officers can be useful, this discretionary power can also serve to unduly restrict the right of children to free play.

3. Provisions concerning the use of roadways

3.a. Existing restrictions on the use of roadways

Most municipalities prohibit the occupation of roadways in any way. Others expressly prohibit play in streets and alleys.

This is the case in Outremont, where a by-law specifies that: “It is prohibited to play or practise sports in streets, except in streets or sections thereof designated as “play streets” by the municipal council.” This same by-law adds that: “Two (2) or more persons cannot assemble in a public road or on the sidewalk in such a manner as to obstruct passage.” [free translation]

For its part, the regulation in Pierrefonds-Roxboro specifies as prohibited “using the median of a boulevard or of public property not specifically reserved for sports to practise a sport or a game of whatever nature it may be” and “troubling the peace and tranquility of people and without limiting the generality of the foregoing, strolling, blocking the passage of vehicles or of pedestrians by staying in their way or by refusing to circulate when ordained to do so by an agent of the peace, uttering insults, indecent or obscene words, or to cause disorder by yelling, singing, or being drunk”.¹⁰

3.b. Legitimacy of a complete ban

Challenging the legitimacy of municipal by-laws that are overly restrictive concerning free play is warranted.

The issue was examined by Judge Nathalie Haccoun in the highly publicized case of David Sasson, a family man in Dollard-des-Ormeaux fined when caught supervising a game of street hockey involving his children. Judge Haccoun reiterated a principle often times recognized by the Supreme Court of Canada: In the sphere of delegated legislation, a by-law cannot be prohibitive and discriminatory unless such a thing is authorized under the terms of the enabling legislation.

Judge Haccoun analyzed section 24 of the Dollard-des-Ormeaux by-law in question. The section reads as follows:

The municipal council has the power to designate, at any time, any street or section thereof as a “play street” and close it to general traffic for a set period of time.

It is prohibited for children to play in the street except in streets or sections thereof designated as “play streets” by the municipal council pursuant to this section. [free translation]

The judge explained that the municipality could, under sections 4 and 62 of the *Municipal Powers Act*, regulate play in the streets to ensure safety but could not, according to the principles of delegated legislation, ban such activity entirely. According to the judge, the objective of safety could be achieved in different ways without having to maintain an entirely prohibitive by-law:

[16] Dollard-des-Ormeaux could amend section 24 in order to force the municipal council to designate a set number of streets as “play streets”. Alternatively, the municipality could enact a by-law similar to the “By-law to Regulate the Use of City Streets” in force in Kingston, Ontario. This by-law allows street hockey to be played during daylight hours, when there is good visibility, in residential neighbourhoods with low traffic volumes, and where the posted speed limit is 50 km/h or less. The by-law includes also a code of conduct to respect. [free translation]

Judge Haccoun’s analysis is convincing: Municipalities cannot prohibit children’s free play in the streets outright, but they can regulate it. In her ruling, Judge Haccoun struck down the \$75 fine. However, as the Municipal Court does not have the power to declare a by-law unconstitutional, it is up to the municipality to react by legislating amendments to the by-law. It should be noted that the by-law in question has yet to be amended to this day.

¹⁰ Pierrefonds-Roxboro – By-law CA29 0010 – By-law concerning nuisances and good order

3.c. Incompatibility with the Highway Safety Code

Some municipalities allege that they cannot permit children's free play in the street because this would run counter to section 500 of the Highway Safety Code, which falls under provincial jurisdiction.¹¹ Section 500 of the Highway Security Code reads as follows:

500. No person may occupy the roadway, shoulder or any other part of the right of way of or approaches to a public highway or place a vehicle or obstacle thereon so as to obstruct vehicular traffic on the highway or access to such a highway[.]

The interpretation according to which this section prohibits any form of play in the streets is, to our eyes, wrong. Jurisprudence tells us that municipal by-laws cannot be incompatible with a law. As it happens, the language in municipal by-laws that outright prohibit playing on roadways is way more restrictive than the one in section 500 of the Highway Safety Code. By playing in residential streets, children do not really obstruct traffic, which is already moving slowly. The language used in section 500 of the Highway Safety Code is flexible enough to allow municipalities to adapt to it.

Municipalities can draw inspiration, for example, from existing provisions – such as the one given below, taken from the Outremont borough's traffic and parking by-law, concerning the precautions that drivers must take in school zones and in places marked by certain road signs:

5.9. Precautions to take to be able to comply with road signs

All drivers must at all times have control of their vehicle and, if the roadway is slippery, they must slow down and maintain a sufficient distance to be able to comply with traffic signals and road signs.

In places marked by "DANGER" or "LENTEMENT" (SLOW DOWN) signs, any driver of a road vehicle must slow down to a speed at which they can come to an immediate stop if necessary.

5.13. School and quiet zones

In school zones and quiet zones, all road vehicles must be driven cautiously and quietly.
[free translation]

The Rosemont-La Petite-Patrie borough's traffic and parking by-law specifies, for its part, that traffic cannot exceed a speed of 20 km/h in alleys, parks, and public or private parking lots.¹²

¹¹ This explanation was provided, among others, by the municipality of Longueuil further to a fine issued in 2011.

<http://www.myvirtualpaper.com/doc/rive-sud-express/rs02regu20110531/2011060301/46.html#46>

¹² Rosemont-La Petite-Patrie – R.R.V.M., c. C-4.1 – Règlement sur la circulation et le stationnement (Codification administrative) [French only]

Such “limitations” on traffic are not – and rightly so – considered obstacles to traffic as described under section 500 of the Highway Safety Code. These limitations could serve as a model to ensure the safety of children that engage in free play in residential streets with low traffic volumes.

3.d. Limitations of “play streets”

Some municipalities have granted themselves the power to designate a street or section thereof a “play street”. This is the case, for example, for the borough of Outremont and the municipality of Roxboro. The provisions of interest, respectively, are the following:

5.8. Play streets

The municipal council can, by resolution, designate any street or section thereof a “play street” and close it to general traffic for the period of time indicated in the resolution.

[free translation]¹³

SECTION 50

No child shall be permitted to play in any roadway, unless the street is declared a “play street”. (By-law 402)¹⁴

In her ruling, Judge Haccoun addressed the issue of “play streets”. She explained that they could be part of the solution, provided that the municipality took the pains to designate certain streets as such. In her opinion, the ban on free play overstepped the limited powers of municipalities in terms of delegated legislation. If the municipality failed to designate “play streets”, the by-law in question would continue to be prohibitive and discriminatory.

We submit, however, that there is no need to designate play streets in order to allow free play in residential streets with low traffic volumes. Indeed, adding more regulations does not seem to be the answer to a problem caused in the first place by an overabundance of overly restrictive regulations. Given the importance of encouraging children to play spontaneously and extemporaneously in their neighbourhood, municipalities must instead consider allowing free play in general and merely specifying, by regulation, a series of norms to be respected in order to ensure everyone’s safety.

¹³ Outremont – Règlement 1171 – Règlement relatif à la circulation et au stationnement [French only]

¹⁴ Roxboro – Règlement 159 – Règlement concernant la circulation routière et la sécurité publique (By-law 159 concerning traffic and public security).

APPENDIX A – Provisions concerning noise and nuisances

MONTREAL NORD - RÈGLEMENT NO 1500 sur l'ordre général dans la ville [French only]
(By-law 1500 concerning the general public order in the city) [free translation]

SECTION 16. Disturbing neighbours and passers-by

Commits a violation any person who makes noise or who allows noise to be made in the city such as to disturb neighbours or passers-by.

SECTION 17. Loitering in public places

Commits a violation any person who loiters, wanders, lies down, hangs about or lingers idly in a field, a street, a park or a public place and who cannot give a satisfactory account of him/herself.

SECTION 18. Loitering in private places

Commits a violation any person who loiters, wanders, lies down, hangs about or lingers idly in a private place in the city and who cannot give a satisfactory account of him/herself.

SECTION 20. Causing a commotion in public places

Commits a violation any person who causes noise or a commotion by yelling, singing, swearing or cursing in the streets, parks or public places of the city.

SECTION 21. Causing a commotion in private places

Commits a violation any person who causes noise or a commotion by yelling, singing, swearing or cursing in private places of the city.

SECTION 23. Marches, assemblies, gatherings

a) It is prohibited to hold an assembly, a march or any other gathering in the streets, on the sidewalks, in the parks or in the public places of the city without first obtaining the express authorization of the municipal council. Under this section, the terms "assembly", "march", and "any other gathering" designate any group of more than three (3) people;

b) It is prohibited also in the course of an assembly, march or gathering in the streets or on the sidewalks of the city to bother or jostle other citizens or in any way hinder their movement, passage or presence there;

c) Commits a violation any person who attends or takes part in an assembly, march or gathering in the course of which this by-law is violated or whose conduct or utterances breach the public peace or order in the streets, parks or public places of the city;

d) Commits a violation any person who fails to comply with the order of a peace officer to leave the premises of any assembly, march or gathering held in violation of this by-law.

SECTION 33. Gatherings

It is prohibited in the streets, parks and public places of the city for any person to make any noise likely to cause a gathering and to disturb the peace.

SECTION 55. Gatherings

It is prohibited at any time for any person, party, company or corporation to hold an assembly of persons, a march, a procession, a convoy of vehicles on boulevards, streets, alleys or public places, except during an electoral period and provided that a permit is obtained beforehand from the Director of Services and that the requirements of section 23 of this by-law are respected.

OUTREMONT

RÈGLEMENT NUMÉRO 1063 (By-law 1063)

Règlement concernant les prohibitions et nuisances (By-law concerning prohibitions and nuisances)

2. Is prohibited and constitutes a nuisance:

f) any noise produced in any way whatsoever likely to disturb the peace, well-being, comfort, tranquility, or rest of persons in a neighbourhood, including, without limiting the general application of the foregoing, the noise produced by a road vehicle needlessly accelerating or braking abruptly or taking a turn at high speed, or running a motor without a muffler or with a muffler that does not prevent the noise defined hereunder [.] [free translation]

VILLE SAINT-LAURENT

RÈGLEMENT NUMÉRO 915 SUR LA PAIX PUBLIQUE ET L'ORDRE SOCIAL

CHAPITRE II - TROUBLER LA PAIX PUBLIQUE ET L'ORDRE SOCIAL

(By-law 915 on public peace and social order – Chapter 2: Disturbing public peace and social order)

3. It is prohibited for any person on the territory of the City to disturb the public peace and tranquility by yelling, cursing, singing, insulting or swearing at people, fighting, organizing or participating in a gathering or a public display of brutality or depravity, and to refuse to cease the disturbance when ordained to do so by a peace officer.

4. A peace officer who believes, on reasonable grounds, that the tranquility of a person in a residential building is disturbed by a noise that the peace officer deems excessive given the time of day, the place or any other circumstance, may ordain anyone causing the nuisance to cease doing so immediately.

17. Constitutes a nuisance any situation or state of affairs that disturbs or effectively threatens or violates any provision concerning public health, safety, order or peace. [free translation]

SAINT-LÉONARD BOROUGH

REGLEMENT NO 1827 CONCERNANT LES NUISANCES, TEL QU'AMENDÉ PAR LES

RÈGLEMENTS NUMÉROS 1827-1, 1827-2, 1827-3, 1827-4, 1827-5, 1827-6, 1827-7, 1827-8 ET 1948

(By-law 1827 on nuisances, as amended by by-laws 1827-1, 1827-2, 1827-3, 1827-4, 1827-5, 1827-6, 1827-7, 1827-8 and 1948)

SECTION 6: Causing noise of the sort to disturb the peace, comfort and well-being of the neighbourhood constitutes a nuisance. [free translation]