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## Have We Legalized Corruption? The Impacts of Expanding Municipal Authority Without Safeguards in Toronto and Ontario

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# Have We Legalized Corruption? The Impacts of Expanding Municipal Authority Without Safeguards in Toronto and Ontario

## Abstract

This article discusses the importance of rule of law values such as predictability, certainty, equality, and procedural safeguards in controlling corruption at the municipal level of government and how those values are being replaced by political and economic values such as efficiency, discretion, responsiveness, and need. Particular attention is placed on how this change in values may lead to corruption and abuse of power in planning and other decisions made by municipal governments.

## Keywords

Municipal government; Municipal government--Corrupt practices; Toronto (Ont.); Ontario

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Special Issue Supplement: Perspectives from Practice

## Have We Legalized Corruption? The Impacts of Expanding Municipal Authority Without Safeguards in Toronto and Ontario<sup>†</sup>

STANLEY M. MAKUCH\* & MATTHEW SCHUMAN\*\*

This article discusses the importance of rule of law values such as predictability, certainty, equality, and procedural safeguards in controlling corruption at the municipal level of government and how those values are being replaced by political and economic values such as efficiency, discretion, responsiveness, and need. Particular attention is placed on how this change in values may lead to corruption and abuse of power in planning and other decisions made by municipal governments.

Cet article discute de l'importance des valeurs de la primauté du droit, telles la prévisibilité, la certitude, l'égalité et les garanties procédurales, pour combattre la corruption au niveau des administrations municipales et du fait que ces valeurs sont remplacées par des valeurs politiques et économiques telles l'efficacité, la discrétion, la réceptivité et le besoin. Il se penche plus particulièrement sur la manière dont ce changement de valeurs peut conduire à la corruption et à l'abus de pouvoir dans le cadre de la planification et des autres décisions faites par les gouvernements municipaux.

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**THIS ARTICLE ASKS WHETHER GRANTING EXPANDED POWERS** to local government decision makers in Ontario without concomitant expansions of procedural safeguards may lead to an abuse of such powers (or to corruption) by allowing these officials to use their powers for their own private gain. In summary, this article is concerned with whether the current state of Ontario municipal law lends itself to abuse by municipal councillors.

We define "private gain" here not only as financial gain but also as increased political capital. In other words, we consider local officials corrupt not only when they use their positions to enrich themselves but also when they use their positions simply to stay in office or to reinforce their own status as local power players and persons of influence rather than for a clear municipal purpose.

We consider such behaviours corrupt because they circumvent ordinary municipal decision making for individual gain. For example, if an individual councillor were to use his or her influence improperly to affect municipal decisions, it would no longer be possible simply to follow stable and predictable administrative processes to apply for and obtain a municipal approval. Instead, one would need to curry favour with the councillor to obtain the approval.

Under current municipal law and the resulting political structures, individual municipal councillors are key decision makers who have the power to affect the outcomes of municipal decisions. Moreover, as municipalities have gained broad discretion to act with few procedural safeguards, an individual councillor can use his or her power to affect a municipal decision. Because municipalities have such

broad discretion, it may be difficult to determine whether a particular municipal decision was made for a proper purpose. In other words, a councillor could act improperly, abusing his or her power for private gain, without any jurisdictional, political, or procedural limit on his or her action to demonstrate that such action is, in fact, improper. Thus, one unintended consequence of current municipal law may be the creation of conditions that allow for abuse of discretion and corrupt political patronage by municipal council members without any penalty.

If our view of the current state of municipal law is correct, it would appear to be in tension with the concept of the rule of law: the idea that law, not individual lawmakers, is supreme and which the Supreme Court of Canada (SCC) has stated is “a fundamental postulate of our constitutional structure.”<sup>1</sup> We are not suggesting that current municipal law gives local governments too much discretion but rather that its lack of definition, coupled with a lack of procedural safeguards and rule of law values, gives rise to a risk of corruption. In fact, one of the co-authors has long argued in favour of local governments having local control over their decisions to address local needs.<sup>2</sup> Rather, we contend that the expansion of local discretion should be viewed as a shift away from rule of law values to economic and political values. Thus, we believe that an expansion of procedural safeguards (which, we argue, manifest the rule of law) to match expanded municipal powers would help restore local government decision making based on rule of law values and would protect individuals from the potentially arbitrary actions of powerful municipal councillors.

We divide our analysis into three parts. In Part I, we provide an overview of what we consider to be a dramatic change in Canadian municipal law: over the past twenty years, Canadian municipalities’ powers have expanded as a result of increased judicial deference to municipal decisions, combined with broad, general grants of power in provincial legislation. Municipal decision makers now have broad discretion to act, which not only affords local decision makers more flexibility to address local needs but also expands municipalities’ subject-matter jurisdiction and makes it more difficult to judge whether any particular action is a proper use of municipal power.

In Part II, we focus on the lack of political controls on and procedural safeguards relating to such expanded municipal powers. We highlight the lack of political controls to demonstrate that individual municipal councillors are

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1. *Roncarelli v Duplessis*, [1959] SCR 121 at 142, 16 DLR (2d) 689. See also *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70, 161 DLR (4th) 385 [*Secession Reference*].
  2. See e.g. Stanley M Makuch, Neil Craik & Signe B Leisk, *Canadian Municipal and Planning Law*, 2d ed (Toronto: Thomson Canada, 2004) at 3.

the key decision makers in the current structure of local government and have thus gained the most discretion and authority from the expansion of municipal powers. We highlight the lack of procedural safeguards because procedural safeguards evidence people's trust in government decisions<sup>3</sup> and thus embody the rule of law, which "provides a shield for individuals from arbitrary state action."<sup>4</sup>

In Part III, we provide a series of examples of municipal decisions that demonstrate a shift away from decision making based on rule of law values to decision making based on economic and political values. In these examples, we also question whether the actions of municipal councillors might be considered abuses of power or the type of political patronage traditionally associated with corruption but for the fact that, under current municipal law, councillors have so much discretion that their actions cannot be considered improper. We conclude with an anecdote about a potential misuse of municipal power in which it appears to us that a city's policy is *ultra vires* and contrary to the power granted to it by the province. We therefore ask whether current municipal law—with the best of intentions—provides local decision makers with so much discretion that it creates a circumstance in which they might, knowingly or not, simply ignore provincial laws meant to prevent corrupt behaviour and other abuses of power. Further, recognizing that a few anecdotal accounts from a single city do not fully explain the effects of a major change in municipal law, we call for further investigation into the effects of granting broader authority to municipal councils without imposing concomitant limits on such authority.

## I. THE EXPANSION OF MUNICIPAL POWERS

We begin with the scope of municipal powers because Canadian municipalities are creatures of statute. In other words, municipalities' powers to act, such as the powers to enter into contracts, to pass and enforce by-laws, to create agencies, or

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3. See e.g. Tom R Tyler et al, *Social Justice in a Diverse Society* (Boulder, Colo: Westview Press, 1997) at 75; Robert J MacCoun, "Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness" (2005) 1 Ann Rev L & Soc Sci 171 at 182.

4. *Secession Reference*, *supra* note 1 at para 70.

to issue licences are found in provincial legislation.<sup>5</sup> Indeed, the mere existence of a municipality is dependent on provincial legislation.

Over the past twenty years, Canadian municipalities have gained greatly expanded powers. In Ontario, Canada's most populous province, this wide jurisdiction allows municipalities to be more responsive to local values, to be more flexible in addressing local needs, to act quickly without seeking authority to act from a provincial government, and, thus, to exercise almost the same jurisdiction as provinces if they deem it to be in the public interest to do so.

This is a radical change for municipalities, which previously had significantly limited powers and were subject to Dillon's Rule, a court-imposed doctrine that required a municipality to have express statutory authority for any action it took.<sup>6</sup> In the past, municipalities could not act unless they could find express authorization for their action. In practice, this meant that, if municipalities wished to undertake a new initiative, they most often had to seek the passage or amendment of provincial legislation before they could implement a new policy. Now, in contrast, municipal powers are so broad that municipalities have (except in the area of taxation), within their geographic boundaries, similar authority to that of provinces.

Municipal powers have expanded in two ways: first, through a change in the way courts interpret the legislation governing municipalities; and, second, through changes in provincial legislation. Both of these changes evidence a change in the way we think about local government decision making. Underlying the expansion of municipal powers, and also evident in the municipal decision making process, is a shift away from rule of law values to what might be called economic and political values, such as efficiency, discretion, and responsiveness. This shift is also based on the idea that local governments and local government officials should have the ability to respond easily to the needs of their citizens and should be efficient in making and implementing their decisions.

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5. See e.g. Stanley M Makuch, *Canadian Municipal and Planning Law* (Toronto: Carswell, 1983) at 115. This author is also quoted by the Supreme Court of Canada in *R v Sharma*, [1993] 1 SCR 650 at 668, 100 DLR (4th) 167. The Court observed that municipalities "may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation."
  6. See e.g. *Ottawa Electric Co v Ottawa (City)*, [1906] OJ No 60 (QL) at para 40, 12 OLR 290 (CA) [*Ottawa Electric Co*]. The court cited with approval John F Dillon, *Commentaries on the Law of Municipal Corporations*, 4th ed (Boston: Little, Brown & Co, 1890).

#### A. THE JUDICIAL VIEW OF MUNICIPAL POWERS: FROM DILLON'S RULE TO SUBSIDIARITY

For most of the twentieth century, Canadian municipal legislation was interpreted using the express authority doctrine, known as Dillon's Rule, which states that a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the power expressed in the statute, and those powers essential to, and not merely convenient for, the effectuation of the purpose of the corporation.<sup>7</sup> This meant that municipalities needed express authority clearly stated in provincial legislation before they could act. In practice, a municipality either had to seek the passage (or amendment) of a provincial statute to gain new powers or risk that courts would invalidate any action that was not expressly authorized or that was not 'indispensable' or 'essential' under an implied grant of power. Moreover, the courts most often construed such implied grants of power narrowly in favour of anyone challenging the municipality's decisions.<sup>8</sup> In sum, it was very difficult for municipalities to determine in advance whether they were exercising their powers properly. The courts or provincial legislatures had to decide in advance whether a municipality had the authority to enact new policy initiatives. The result was municipal legislation with innumerable specific provisions for every action municipalities wished to take, and numerous special acts for individual municipalities.

In the twenty years since the Supreme Court of Canada reiterated this doctrine in *Shell*,<sup>9</sup> it has come to adopt the dissenting opinion by Justice McLachlin, as she then was, in that case: that courts should exercise restraint in reviewing the powers of Canadian municipalities.<sup>10</sup> Municipalities have gained greatly expanded powers as a result.<sup>11</sup>

The *Shell* dissent, citing legal commentators, explains that modern municipalities need discretion to decide what is in the public interest<sup>12</sup> and need broad powers to be able to "respond to the needs and wishes of their citizens."<sup>13</sup>

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7. *Ottawa Electric Co*, *ibid*.

8. See *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231, 110 DLR (4th) 1 at 34-35, McLachlin J, dissenting [*Shell*].

9. *Ibid*.

10. *Ibid* at 24.

11. See e.g. *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13 at para 18, [2000] 1 SCR 342 [*Nanaimo*]; 114957 *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at paras 18-20, [2001] 2 SCR 241 [*Spraytech*]; Makuch, Craik & Leisk, *supra* note 2 at 92-93.

12. *Shell*, *supra* note 8 at 22-24.

13. *Ibid* at 26.



The Court subsequently adopted this approach when reviewing the powers of municipalities.<sup>14</sup> As a result, courts now apply a “benevolent construction” when reviewing municipal decisions and emphasize the concept of subsidiarity, *i.e.*, that services are best delivered by the level of government that is both effective and closest to the electorate.<sup>15</sup> Now, under an approach that exercises judicial restraint and emphasizes subsidiarity, municipalities may exercise their powers broadly to decide what is good for the general welfare or in the public interest. The shift to judicial restraint in considering municipal powers is a radical change for Canadian municipalities. Courts no longer substitute their own judgment for the decision of a municipal council when reviewing a municipal decision. They must now interpret municipal powers broadly.

The expansion of municipal powers and the concept of subsidiarity are based on what might be characterized as economic and political values. The expansion is economic because it allows municipalities to decide for themselves what they need and to streamline their decision-making process. The expansion is political because it allows municipalities to respond to their citizens, subject to financial restraints. Using their expanded powers, municipalities are not restrained by higher levels of government and can act in response to the demands of their citizens.

By “economic and political values” we mean values such as efficiency, discretion, responsiveness, and need. Justice McLachlin, as she then was, emphasizes these values in the *Shell* dissent and characterizes them as important to the continued healthy functioning of democracy at the municipal level. For example, the dissent states in part: “If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values.”<sup>16</sup>

Further, the *Shell* dissent frames judicial restraint and municipal discretion in terms of efficiency and the avoidance of excess costs:

[A] generous approach to municipal powers will aid the efficient functioning of municipal bodies and avoid the costs and uncertainty attendant on excessive litigation. Excessive judicial interference in municipal decision-making can have the unintended and unfortunate result of large amounts of public funds being expended by municipal councils in the attempt to defend the validity of their exercise of statutory powers. The object of judicial review of municipal powers should be to

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14. See *e.g.* *Nanaimo*, *supra* note 11; *Spraytech*, *supra* note 11.

15. See *e.g.* *Spraytech*, *ibid* at paras 3, 23; Makuch, Craik & Leisk, *supra* note 2 at 92-93.

16. *Shell*, *supra* note 8 at 26.

accord municipalities the autonomy to undertake their activities without judicial interference unless clearly warranted.<sup>17</sup>

Finally, Justice McLachlin, as she then was (citing commentators, including one of the authors), explains that the appropriate limit on municipal powers is political—councillors being voted out of office—rather than judicial. She notes that “[Ann McDonald] and other commentators (see Makuch and Arrowsmith) advocate that municipal councils should be free to define for themselves, as much as possible, the scope of their statutory authority.”<sup>18</sup> Justice McLachlin, as she then was, goes on to quote McDonald at length:

The voters of a community give their elected council members the final judgment in this controversy. Whether the councillors are right or wrong in their judgment depends on the vantage point of the person making this assessment, but in any event, this is the decision they were elected to make. There may, in fact, be no right or wrong in the matter. Persons displeased with a council’s decision have ‘a remedy at the polls’.<sup>19</sup>

Thus, the *Shell* dissent describes municipalities’ exercise of their authority in expressly economic and political terms. It advocates that courts not impose particular policies on municipalities through the exercise of judicial review but rather take a deferential, or even laissez-faire, approach. Under such a deferential approach, local voters are left to elect officials who will decide what is best for the voters. Moreover, the deferential approach allows municipalities to avoid excess costs and interference with their decisions and allows the political process to serve as the remedy for bad decisions or the vehicle for change. This reasoning, however, does not consider how local governments function or what political controls or procedural safeguards exist—or ought to exist—in the local government decision making process.

## B. GENERAL GRANTS OF MUNICIPAL POWERS IN PROVINCIAL LEGISLATION

In addition to the SCC’s exercise of judicial restraint, the Ontario legislature has also revised legislation to grant broad powers to municipalities. The same legislation also allows for larger municipal boundaries and a move towards single-tier, centralized local governments, creating, for example, the amalgamated

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17. *Ibid.*

18. *Ibid.*

19. *Ibid.* at 26-27, citing Ann McDonald, “In the Public Interest: Judicial Review of Local Government” (1983) 9:1 Queen’s LJ 62 at 100.

City of Toronto.<sup>20</sup> Ontario's legislation governing other municipalities now also seems to recognize the concept of subsidiarity, providing for municipalities to have broad discretion to respond to local needs with few built-in safeguards. For example, the *Municipal Act, 2001* provides in part:

The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues;<sup>21</sup>

A single-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public;<sup>22</sup> and

A lower-tier municipality and an upper-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public, subject to the rules set out in subsection (4).<sup>23</sup>

The *City of Toronto Act, 2006* contains stronger statements regarding the authority of the City. First, subsection 1(1) legislatively determines and recognizes that "the city council" is "responsible and accountable,"<sup>24</sup> and subsection 1(2) provides in part "that it is in the best interests of the Province and the City to work together in a relationship based on mutual respect, consultation and co-operation."<sup>25</sup> Just as the courts have changed their view of municipal powers, the *City of Toronto Act* also demonstrates that the Ontario government deems the City of Toronto to be a responsible partner. Again, this is a radical change, considering that, previously, the City of Toronto would have had to seek express authority in the form of provincial legislation before it could exercise any additional powers. Moreover, there is no question that the powers granted to the City of Toronto are meant to be extremely broad. Section 2 of the *City of Toronto Act* provides in part:

The purpose of this Act is to create a framework of broad powers for the City which balances the interests of the Province and the City and which recognizes that the City must be able to do the following things in order to provide good government:

1. Determine what is in the public interest for the City.
2. Respond to the needs of the City.<sup>26</sup>

20. See Makuch, Craik & Leisk, *supra* note 2 at 18-20.

21. SO 2001, c 25, s 8(1) [*Municipal Act*].

22. *Ibid*, s 10(1).

23. *Ibid*, s 11(1).

24. SO 2006, c 11, Schedule A [*City of Toronto Act*].

25. *Ibid*.

26. *Ibid*, s 2.

Section 6(1) states:

The powers of the City under this or any other Act shall be interpreted broadly so as to confer broad authority on the City to enable the City to govern its affairs as it considers appropriate and to enhance the City's ability to respond to municipal issues.<sup>27</sup>

Section 8(1) provides:

The City may provide any service or thing that the City considers necessary or desirable for the public.<sup>28</sup>

And section 8(2) provides:

The City may pass by-laws respecting ... [the] [e]conomic, social and environmental well-being of the City.<sup>29</sup>

The result of these broad grants of power to the City of Toronto and to other municipalities is to give them nearly total discretion in exercising their powers in areas within provincial jurisdiction and subject to limits imposed by the *Charter*. Thus, under the *Municipal Act*, a municipality may “govern its affairs as it considers appropriate”<sup>30</sup> and “provide any service or thing ... necessary or desirable for the public.”<sup>31</sup> The *City of Toronto Act* similarly allows the City to govern its own affairs but goes further in allowing the City to determine what is in the public interest and the economic, social, and environmental well-being of the City without limitation. Moreover, the *City of Toronto Act* frequently pre-empts the application of other provincial statutes to the City, meaning that the *City of Toronto Act* applies in lieu of the provisions of another statute (such as certain provisions in Ontario's *Planning Act*) that would otherwise govern the City's decision making.<sup>32</sup> In contrast to earlier, general grants of power, Ontario municipalities no longer need to act based on a “proper municipal purpose.”<sup>33</sup> Instead, municipal councils now have almost as much discretion as the Province to decide what is a proper municipal purpose.

To ensure that municipalities have flexibility in exercising their powers, provincial legislation imposes few limits on municipal powers. For example, the primary limit on the City of Toronto's power to create by-laws is that such

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27. *Ibid*, s 6(1).

28. *Ibid*, s 8(1).

29. *Ibid*, s 8(2).

30. *Supra* note 21, s 8(1).

31. *Ibid*, s 10(1).

32. *Planning Act*, RSO 1990, c P.13, ss 8.1(25), 34(3.1), 34(16.3), 41(16) [*Planning Act*].

33. Compare *supra* notes 24, 25, and 31 with *Shell*, *supra* note 8 at 34-35.

by-laws shall not conflict with federal or provincial law. Viewed through the lens of *Shell* and the express authority doctrine, this is a radical change: municipalities no longer need authority to act; instead, they have broad powers to act unless there is an express prohibition or a more senior level of government has acted first with respect to the same issue. For example, section 11 of the *City of Toronto Act* provides:

- (1) A city by-law is without effect to the extent of any conflict with,
  - (a) a provincial or federal Act or a regulation made under such an Act; or
  - (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or a provincial or federal regulation.
- (2) Without restricting the generality of subsection (1), there is a conflict between a city by-law and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.<sup>34</sup>

Section 14 of the *Municipal Act*, which applies to all Ontario municipalities other than Toronto, has a similar provision. The prohibition on conflicting with or frustrating the purpose of a federal or provincial law appears to mean only that an Ontario municipality cannot pass a by-law compliance with which would constitute a violation of federal or provincial law.<sup>35</sup> In other words, a municipality can regulate, for its purposes, the same areas as provincial or federal law and can also pass any by-law compliance with which would also allow compliance with provincial or federal law (such as a regulatory scheme that is more restrictive than one set out in a provincial statute).

Further, section 4(2) of the *City of Toronto Act* limits the Province's ability to restrict the City's actions and provides:

- Except where otherwise expressly or by necessary implication provided,
  - (a) this Act does not limit or restrict the powers of the City under a special Act; and
  - (b) a special Act does not limit or restrict the powers of the City under this Act.<sup>36</sup>

A "special Act" is defined as "an Act, other than this Act, relating to the City in particular."<sup>37</sup> In other words, if the provincial legislature wants to specifically

34. *Supra* note 24, s 11.

35. *Municipal Act*, *supra* note 21, s 14.

36. *Supra* note 24, s 4(2).

37. *Ibid*, s 4(1).

limit the City's powers under the *City of Toronto Act*, it must expressly impose such limits in other legislation (which it has not yet done). This is a complete inversion of the express authority doctrine, under which municipalities need provincial authority to take action.

Another example of the Province's limited ability to block the City of Toronto's powers is section 25, which provides in part:

- (1) If the Lieutenant Governor in Council considers that it is necessary or desirable in the provincial interest to do so, the Lieutenant Governor in Council may make regulations imposing limits and conditions on the power of the City under sections 7, 8 and 267 or providing that the City cannot exercise the power in prescribed circumstances.
- (2) A regulation made under subsection (1) is deemed to be revoked 18 months after the day on which the regulation comes into force, unless the regulation expires or is revoked before then.
- (3) The Lieutenant Governor in Council does not have the power to renew, or extend in time, a regulation made under subsection (1) or to replace it with a regulation of similar effect.<sup>38</sup>

Thus, if the provincial government does not restrict the City's powers by statute, its ability to do so by regulation is limited, as it can only do so for eighteen months, and it cannot renew, extend, or replace such restrictions.

While provincial legislation codifies important differences between the City of Toronto and other Ontario municipalities,<sup>39</sup> both the *City of Toronto Act* and the *Municipal Act* provide broad discretion to municipal councils to decide what is in their municipalities' best interests based on their knowledge of local conditions and informed by the idea that local governments are best positioned to respond to such local conditions (an idea based in economic and political values). These changes in provincial legislation are consistent with the changed judicial view of municipal powers, which provides that local governments should have discretion with few limits to exercise their powers for nearly any purpose that they deem to be in the local interest.

Since provincial legislation now gives municipalities the ability to pass by-laws for almost any purpose with the exception of finance powers (such as taxation), it may no longer be possible to claim in *Charter*<sup>40</sup> challenges or division-of-powers cases that an Ontario municipality's by-law is beyond its jurisdiction in those

38. *Ibid.*, ss 25(1)-(3).

39. See *e.g. ibid.* The *City of Toronto Act* pre-empts other statutory provisions.

40. See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

subject matters that are constitutionally granted to the provinces provided that the by-law is limited to the geographic area of the municipality. Moreover, in some areas particularly important to municipal governments, such as land use regulation, the *Charter* may not even apply, since the *Charter* does not protect property rights.<sup>41</sup>

Yet giving such broad discretion to local decision makers appears to raise a tension with the fundamental principle of the rule of law. If local decision makers have a nearly unchecked ability to decide what is in the local interest, it may no longer be possible for them—or for the voters who elect them—to tell whether they are acting for a proper or improper purpose. For example, following a forensic audit, municipal councillors in Brampton, Ontario were alleged to have violated the City's expense policy when they had the City pay for travel, tickets to events, and other business expenses.<sup>42</sup> The Council had passed an expense policy that provided for councillors to review and approve the City's payment of their own expenses.<sup>43</sup> Further, the expense policy, which was "values based [and not] rules based,"<sup>44</sup> did not address all of the City's practices for reimbursing expenses. In particular, the City had a long-standing practice of paying for councillors' spouses to attend community events with them.<sup>45</sup> However, the practice was not codified in the policy, so, when an auditor reviewed the expenses, the councillors were seen to have violated the City's policy when they sought city payments for such tickets.<sup>46</sup> It was not until the auditor subsequently revised the report and the City participated in a dispute resolution process that the councillors themselves could determine whether they had correctly followed City policies.<sup>47</sup> Further, some councillors were required to reimburse the City for additional expenses that they had improperly incurred under the policy.<sup>48</sup> It was not until after the scandal that the City rewrote its expense policy to have City staff review expenses, thus limiting the discretion of the councillors.<sup>49</sup>

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41. Compare US Const amend V.

42. See City of Brampton, *Report on a Simplified Dispute Resolution Process In the Matter of Amounts Repayable by Members of Council for the City of Brampton* by Janet Leiper (Brampton: 23 October 2014) at 2-3.

43. *Ibid* at 3, 11.

44. *Ibid* at 11.

45. *Ibid* at 3.

46. *Ibid*.

47. *Ibid* at 3-5.

48. *Ibid* at 2.

49. *Ibid* at 3.

As discussed above, municipal law grants broad powers to municipal councils to make decisions concerning their municipalities (including their own conduct) imposing few legislative or judicial limits on when their decisions are made for a proper purpose. Since these external limits on municipal decisions are no longer available, one might expect that the check on municipal powers would take the form of political controls or procedural safeguards, which would be built into the municipal decision making process. Accordingly, in Part II, below, we undertake a brief review of the political structure of municipalities to determine whether there are political controls that check the power of individual decision makers. We also discuss the role of procedural safeguards, which might check the discretion of individual decision makers and which are also commonly seen to embody procedural fairness and the rule of law.

## **II. FEW POLITICAL CONTROLS OR PROCEDURAL SAFEGUARDS TO CHECK EXPANDED POWERS**

As discussed above, Canadian municipalities now have broad powers in provincial legislation and are no longer subject to the express authority doctrine in judicial review proceedings. Instead, they are seen as responsible partners with provincial government and are entrusted to act properly to decide what is in the public interest. Yet, while this shift is based in economic and political values, there are few political controls in the municipal decision making process that might ensure that municipalities do not abuse their new, broad powers. Rather, in practice, individual municipal councillors may control the outcome of a municipal decision. Further, while this shift is based in economic and political values such as responsiveness and efficiency, reforms meant to make a seemingly cumbersome and opaque local government more efficient and responsive compete with—and may even replace—procedural safeguards that protect individual freedoms.

### **C. THE POLITICAL STRUCTURE OF MUNICIPAL COUNCILS: INDIVIDUAL COUNCILLORS AS KEY DECISION MAKERS**

The expansion of municipalities' powers is overlaid on a political system that already imposes few limits on the actions of individual municipal council members. A councillor's vote (and the resulting municipal decision) frequently reflects only the wishes of the electors of the councillor's ward (or frequently a small, powerful group within the ward) and is not tied to a broader vision for the city or political platform or limited by an executive's veto. This is the result of a lack of party discipline and a weak-mayor system.



Even when not required by a statute, such as Ontario's *Municipal Act*, the general rule in Canadian municipalities is to elect municipal councillors by ward.<sup>50</sup> In addition, municipal council members have no formal affiliation with a political party. For example, in the City of Toronto,

Toronto city councillors are not bound by party discipline ... Toronto local politics has traditionally had only the weakest of left-wing and right-wing groupings. Councillors are individually elected and pay for their expenses individually. Their electoral campaigns usually feature only one or two local issues on which they express definite views.<sup>51</sup>

In addition to the absence of formal party affiliation,

[t]he ward-based electoral system and the absence of parties or slates are meant to encourage independence and prevent the emergence of party sed electoral system and the absence of parties or slates are meant to encourage independence and prevent the emergency elected and pay for their expenses individually.<sup>52</sup>

The combination of councillors being elected by ward and the lack of party affiliation results in municipal decision making that is not based on the consistent application of known and publicized positions. Instead, municipal decisions are based on what each councillor wants for his or her supporters in his or her own ward. As a result, if a ward councillor approves of a decision relating to the councillor's own ward, then other councillors will approve, expecting that the councillor whose ward is at issue will reciprocate and likewise support them in votes affecting their respective wards.

Such a system seems to exemplify representational and responsive politics. However, it also lends itself to a councillor acting in his or her own interest, merely to gain political capital. In this system the 'reactive style of governance' may benefit the councillor's core constituency but does not actually reflect any sort of long-range plan or broader platform. Such lack of vision is arguably not in the best interests of the municipality because the councillor is not considering the municipality (or its people) as a whole and is thus not acting in the local interest.<sup>53</sup> In addition, because the political structure of municipal councils encourages quid pro quo decision making by councillors trading votes that benefit their own

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50. See *City of Toronto Act*, *supra* note 24, s 135(3); *Municipal Act*, *supra* note 21, s 217(1); Makuch, Craik & Leisk, *supra* note 2 at 8.

51. Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (Chicago: University of Chicago Press, 2012) at 80.

52. *Ibid.*

53. *Ibid* at 80-81.

wards and own interests, a municipal council could become a very permissive body, allowing its members to act completely in the interest of their respective wards or of re-election, or even in a manner contrary to law, rather than in the interests of the municipality or the public.

Further, in contrast to the strong-mayor system (used by some US cities), in which a mayor has executive powers such as a veto, and in contrast to a Westminster system of government in which a majority of council members vote to elect a mayor, many mayors in Canadian municipalities have little political capital and relatively few powers to rein in individual municipal council members' discretion or impose limits on municipal decisions:

A mayor in Canada does not have the same political authority of a party leader at the senior levels of government. He or she is, in fact, elected at-large and, therefore, is elected by a constituency different from that of the councillors. The mayor is not elected by a majority vote of the council through the support of a group in that body. This often results in a lack of cohesive and consistent policy development. ... Unlike the American strong mayor system where the mayor effectively has some executive powers to guide the direction of council, mayors in the Canadian model have few real powers which enable them to perform an executive function.<sup>54</sup>

In contrast to senior levels of government,

The absence of any true executive powers detracts from the mayor's ability to be a strong spokesperson for the local values of the community or to influence policy directions on his or her own. The result can be a council that lacks a strong centre around which political opinion coalesces. At the senior levels of government, the executive tends to control very tightly the agenda and direction of the legislative activities of the government. This diffusion of power cannot be said to be normatively good or bad, but it is perhaps indicative of the traditional view of local government as being less overtly political and more oriented towards administrative functions. Moreover, the reality of modern local government is that legislative priorities and consistent policy directions must be set. In the absence of a strong executive function residing with the mayor, this function must be found elsewhere.<sup>55</sup>

The result of the weak-mayor system is that a mayor does not have express powers to direct council action but rather functions as little more than a figurehead or someone whose political capital might be of use when it benefits individual council members. A mayor serves as just another vote on council and exercises formal *ex officio* functions. Moreover, since a different constituency elects the mayor than elects the councillors, the mayor is not guaranteed the political

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54. Makuch, Craik & Leisk, *supra* note 2 at 11.

55. *Ibid.*

capital to direct the council to take action or to stop the council from acting. The issues and positions important to the mayor may be radically different from the issues and positions important to a particular ward.

As a general rule, municipal law requires the council as a whole to make decisions for the city, but, as a result of the weak-mayor system and lack of party affiliations or formal coalitions on municipal councils, individual municipal councillors become the key decision makers. This state of affairs has two important implications. First, the lack of coalitions or party affiliations may undermine the policy of having the council as a whole make municipal decisions and might result in decisions that are not well-reasoned or fully debated, since the council may vote based on the interests of an individual councillor. Second, this lack of structure on municipal councils means that individual councillors themselves (rather than the municipality, or the council as a whole) are the ones gaining expanded discretion and power in their decision making and thus have very powerful tools to act in their own interests. Stated another way, if the broad discretion that municipal law provides to local decision makers gives individual councillors the opportunity to act improperly in their own interest, the political structure of municipalities, which makes individual councillors the key decision makers in municipal decisions, gives individual councillors the motive to do so by giving them the opportunity to use all of the powers and resources of a municipality for their own purposes.

#### D. PROCEDURAL SAFEGUARDS AND THE RULE OF LAW

Procedural safeguards may provide another potential check on the abuse of municipal power because they manifest the idea of the rule of law: the idea that a positive system of laws exists and is supreme over individual decision makers and thus protects individuals from arbitrary government action in part because government decisions must be based in law.<sup>56</sup> Procedural safeguards literally impose an order on government decision making, often requiring formal notice of government action and hearings and the ability to cross-examine evidence or to appeal decisions. In this way, procedural safeguards manifest the idea of the rule of law because the rule of law, among other things, is the idea that the system of laws reflects an orderly (and fair) society, in which laws and procedures are followed consistently, and government decision makers are accountable under a system of laws.<sup>57</sup>

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56. *Secession Reference*, *supra* note 1 at paras 70-71.

57. *Ibid.*

Thus, we associate procedural safeguards with what we call rule of law values.<sup>58</sup> The Supreme Court of Canada has described the rule of law as “a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.”<sup>59</sup> We consider procedural safeguards to be an important part of the rule of law and of protecting the rule of law values we associate with good government and procedural fairness, such as predictability, certainty, and equality, which are enshrined in administrative law and create limits on the decision-making authority of municipalities (and other levels of government). Many of these safeguards were cited by a seminal report published in 1968 entitled the *Royal Commission Inquiry into Civil Rights* (also known as the McRuer Report), which examined why and how individual rights, liberties, and freedoms could be protected from infringement by provincial government action<sup>60</sup> and which suggested that a “standard of justice” is needed for our legal system to ensure justice and freedom under the law.<sup>61</sup> In this view, no matter how broad the government’s powers (such as the expanded powers of municipalities), or which part of the government makes a decision (municipal councillors or others), the rule of law and a standard of justice are protected by procedural safeguards.

The McRuer Report set out a number of characteristics of a legal system that uses such a standard of justice in the exercise of government power. They include:

- (1) Government interference with the actions and rights of individuals should only occur where necessary and to the extent necessary;
- (2) Elected representatives to whom a citizen may appeal for help;
- (3) Wide dissemination of information to inform individuals of their rights;
- (4) A fair procedure before the exercise of government authority;
- (5) Reasons to be given to an individual explaining and justifying the government’s action;

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58. For an overview of some key writings on defining the rule of law, see Robert Stein, “Rule of Law: What Does it Mean?” (2009) 18:2 Minn J Int’l L 293.

59. *Reference re Questions Concerning Amendment of Constitution of Canada as Set out on OC 1020/80*, [1981] 1 SCR 753 at 805-806, 125 DLR (3d) 1.

60. See Province of Ontario, The Lieutenant Governor of the Province of Ontario, *Royal Commission Inquiry into Civil Rights: Report Number One*, vol 1 (Toronto: Queen’s Printer, 1968) at viii [McRuer Report]. The Honourable James Chalmers McRuer served as the Commissioner to the Inquiry.

61. *Ibid* at 4.

- (6) Judicial supervision to ensure legality and rationality; and
- (7) Administrative appeals to review decisions.<sup>62</sup>

In the view of the McRuer Report, these procedural safeguards provide important protections in government decision making to ensure that people perceive decisions to be fairly made and that government power is exercised for a proper purpose. Conversely, when procedural safeguards compete with or are replaced by other values, there is a greater risk that government power can be abused and result in poorer decision making.

Further, procedural safeguards are important manifestations of the rule of law not only because they change the process of how government decisions are made but also because they are effective. People believe that the use of procedural safeguards will result in fair outcomes.<sup>63</sup> Studies of the American judicial system by social psychologists have demonstrated that people are more satisfied with court decisions when they feel they have been treated fairly.<sup>64</sup> Thus, in court, people care more about being treated fairly than whether they win or lose a particular case<sup>65</sup> and are more willing to accept a losing outcome if they feel they have been treated fairly.<sup>66</sup> Similarly, people are more likely to comply with the law when they feel that a police force is legitimate.<sup>67</sup> In these contexts, people perceive procedural fairness as a way to obtain fair outcomes and perceive that fair treatment produces fair outcomes.<sup>68</sup> As a result, we see procedural safeguards as embodying the kinds of rule of law values set forth in the McRuer Report and as an important check on arbitrary government decision making, whether in court or in another context (such as a legislative, administrative, or quasi-judicial proceeding at the municipal level of government).

Yet, municipalities' broad power to pass by-laws gives them broad authority to set the rules for the other kinds of decisions they can make. Unless set out in provincial legislation (such as the *Planning Act*),<sup>69</sup> municipalities can set

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62. *Ibid* at 5-6.

63. See *supra* note 3 and accompanying text.

64. *Ibid*.

65. See Tyler et al, *supra* note 3 at 82-84. They observe that "procedural justice significantly affect[s] personal satisfaction with outcomes received from third parties." See *ibid* at 83.

66. See Tom R Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2006).

67. See Jason Sunshine & Tom R Tyler, "The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing" (2003) 37:3 Law & Soc'y Rev 513 at 525-26. The authors demonstrate that the legitimacy of police forces influences compliance with the law.

68. See Tyler et al, *supra* note 3 at 75.

69. See e.g. *Planning Act*, *supra* note 32, ss 34(10.4)-(10.6). These sections set notice provisions with respect to amendments of zoning by-laws.

their own rules for administrative and quasi-judicial proceedings, including what information must be included in an application for a municipal licence or approval, how much notice individuals get, what opportunities they have to present a case or be heard by council, and whether they can appeal a decision. It does not matter whether the applicant is a hot dog vendor,<sup>70</sup> a taxi driver,<sup>71</sup> or a national corporation.<sup>72</sup> Municipalities' broad power to pass by-laws gives them broad powers and broad discretion to govern their own administrative processes and enforcement proceedings. Further, Ontario municipalities have broad powers to delegate their authority.<sup>73</sup> Thus, decisions in administrative processes and enforcement proceedings do not have to be made by the municipal council but can be made by a variety of officers, officials, agencies, boards, commissions, and committees.

The expansion of municipalities' administrative discretion does not, however, necessarily include a concomitant expansion of procedural safeguards. Rather, even as municipal powers have expanded, few new procedural safeguards have been introduced.<sup>74</sup> Instead, municipalities are only required to include those procedural safeguards recognized by common law or set out by statute, which are the same procedural safeguards that were in place when municipalities had much more limited powers. Further, while section 12(1) of the *City of Toronto Act* provides that new by-laws are subject to procedural safeguards, section 12(1.1) also provides that the City's powers should be interpreted broadly, and section

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70. See Valverde, *supra* note 51 at 144-47.

71. *Ibid* at 172-74.

72. See the discussion of sign by-laws in Part III, below.

73. See *Municipal Act*, *supra* note 21, s 23.1; *City of Toronto Act*, *supra* note 24, s 20.

74. An important exception to the lack of protections against the abuse of municipal powers is the relatively recent appointment of: an Integrity Commissioner, to enforce a code of conduct for the council; an Auditor General, to ensure the council's good stewardship of the municipality's finances; and a Lobbyist Registrar. These positions are required by the *City of Toronto Act* and are being adopted by a number of other Ontario municipalities on a voluntary basis. Yet, these accountability officers face a daunting potential conflict of interest as they report to the same municipal council whose members they must investigate, and who are not above filing complaints against each other for political purposes. As a result, having an accountability officer in place is not a guarantee of good behaviour by council members. Instead, the burden of acting in a truly independent manner, and not being taken advantage of by council members, is on the individual appointed to each accountability office. For example, the current City of Toronto Ombudsman announced that she would leave her office after a single term of seven years to avoid harming the office. See David Rider & Jennifer Pagliaro, "Ombudsman Fiona Crean says she is quitting to 'avoid harming my office'" *The Toronto Star* (23 March 2015), online: <[www.thestar.com/news/gta/2015/03/23/ombudsman-fiona-crean-to-step-down-in-november.html](http://www.thestar.com/news/gta/2015/03/23/ombudsman-fiona-crean-to-step-down-in-november.html)>.

12(5) contains a list of nine types of by-laws (including sign by-laws, discussed further in Part III, below) to which procedural safeguards do not apply. As a result, in some cases, while municipalities have actually gained expanded powers, they have restricted procedural protections for those subject to their decision-making processes.<sup>75</sup>

The change in municipal powers, then, is not just a matter of gaining much broader jurisdiction to make a wide variety of types of decisions and pass a wide variety of policy enactments. It also includes both a political structure in which individual municipal councillors become key decision makers able to influence the outcomes of municipal decisions and a lack of procedural safeguards to check arbitrary decision making by individuals and make them accountable to the rule of law. We characterize this change as a shift away from the rule of law values embodied in procedural safeguards and towards a set of economic and political values that emphasize responsiveness and efficiency in decision making.

### III. ECONOMIC AND POLITICAL VALUES REPLACE RULE OF LAW VALUES IN MUNICIPAL DECISION MAKING

While there is a serious concern about the need for responsiveness and efficiency in municipal decision making and the exercise of municipal powers, responsiveness and efficiency alone do not necessarily foster corruption or abuse of discretion. In fact, one of the authors has previously advocated that the purpose of local government “must ... be to ensure that political decisions reflect *local* values” to ensure that local government has the tools to effect its decisions, and to ensure that local government (and not a more senior level of government) is accountable for such decisions.<sup>76</sup> Yet, accountability as described in this context is not a day-to-day check on power enforced by political controls or procedural safeguards. Rather, it is accountability to the voters at the end of an elected official’s term. In terms of day-to-day decision making, broad discretion, combined with a lack of political controls or procedural safeguards in the municipal decision-making process, may mean municipal decision makers are not accountable for their

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75. See e.g. *Public Sector and MPP Accountability and Transparency Act, 2014*, SO 2014, c C-13, Schedule 9, amending *Ombudsman Act*, RSO 1990, c O-6. The Act may result in more oversight of municipal decision-making processes. See also *Ombudsman Act*, RSO 1990, c O-6, ss 14(1), 14(4.2)-(4.3). These sections provide the Ombudsman broad jurisdiction to investigate complaints about government decisions, including municipal decisions, but not if a complaint is within the jurisdiction of the City of Toronto Ombudsman or being investigated by another municipal ombudsman.

76. Makuch, Craik & Leisk, *supra* note 2 at 3 [emphasis in original].

decisions on an ongoing basis. Instead, individual municipal council members freely exercise the discretion gained from the expansion of municipal powers and may—knowingly or not—be more likely to use their powers for an improper purpose or, stated another way, to abuse their powers. Thus, as economic and political values compete with—and in some cases appear to replace—the rule of law values underlying procedural safeguards in the decision-making process, one unintended consequence may be the creation of conditions that allow for abuse of discretion and corrupt political patronage by municipal council members without any penalty.

Stated another way, we take issue with the commentary, quoted by Justice McLachlin, as she then was, in the *Shell* dissent, that there may be no right or wrong municipal decision.<sup>77</sup> In our view, a wrong decision, or one that is improperly made, is a decision that circumvents ordinary municipal decision-making processes and might be seen as merely arbitrary or as satisfying the whims of an individual councillor. Such decisions are not based on the rule of law when they are not transparent, reasoned, predictable, or made for a proper municipal purpose.<sup>78</sup>

In each of the following examples, economic and political values compete with, and appear to replace, rule of law values that create limits on municipalities' decision-making authority. Each example also shows the expanded discretion of municipal council members and behaviour by council members that might in principle be associated with abuse of discretion and corruption. Yet, in each example, there is no evidence of a municipal council member using his or her office for private financial gain, and there is no allegation of a crime. However, in these examples, municipal decision makers, and in particular individual municipal councillors, use their powers to influence municipal decisions and are so concerned with responsiveness and efficiency to protect and grow their own political capital (and potential for re-election) that they may not make decisions that are in the best interests of the municipality. As a result, the question arises: does current Ontario municipal law create a system which lends itself to improper, or even abusive or corrupt, decision making by local elected officials or, at the very least, benefit those officials more than it benefits the public?

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77. *Supra* note 8 at 22.

78. We believe that providing well-articulated reasons for a decision may go a long way to clearly articulating a municipal purpose.



#### E. SECTION 37 OF THE PLANNING ACT, POLITICAL CAPITAL, AND WARD COUNCILLORS: EQUALITY GIVES WAY TO RESPONSIVENESS

The principle, stated by the McRuer Report, that individuals should have the ability to appeal to elected officials gives way to the economic and political value of responsiveness when ward councillors respond to their constituents. On the one hand, this may appear to be subsidiarity or representative democracy in action, but, as a multi-year study of Toronto concludes, in fact it results in the failure of ward councillors to take long-term policy positions because, instead, they merely react to short-term, citizen-led campaigns (and the resulting press coverage) to “[s]ave X.”<sup>79</sup> In other words, the councillor is fulfilling a ‘market need’ for a local champion, and the local councillor’s political capital depends on responding to local anger.<sup>80</sup> As a result, while the councillors are not engaged in ‘money-for-votes’-style corruption, they are using many of the same practices—diverting the City’s resources to a small group of homeowners or even to individuals—that have historically been associated with ward-heeling (the receipt or distribution of political patronage) or the machine-style politics of New York City’s Tammany Hall.<sup>81</sup> This behaviour occurs despite the fact that ward councillors have been denied formal associations with political parties in a specific attempt to prevent machine-style politics.

One example of councillors’ responsiveness to local needs competing with rule of law values is the determination of community benefits in exchange for ‘density bonuses’ under section 37 of the *Planning Act*.<sup>82</sup> Under section 37, municipalities may provide increases in density or height of proposed real estate developments above what is allowed in the zoning by-law (known as a “bonus”) in return for the provision of facilities, services, or any matter provided by the developer applicant.<sup>83</sup> The only limitation on this power required by the *Planning Act* is that the municipality’s official plan contain policies for ‘bonusing.’<sup>84</sup> However, this requirement is meaningless because most official plans provide for bonusing without any standards whatsoever. Further, these bonuses generally take the form of agreements between the municipality and the developer.<sup>85</sup> The result is that

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79. See Valverde, *supra* note 51 at 83. See also *ibid* at 80, 82.

80. *Ibid* at 80, 82-83.

81. *Ibid* at 93.

82. *Supra* note 32.

83. *Ibid*, s 37(1).

84. *Ibid*, s 37(2).

85. *Ibid*, s 37(3). The practice is not to finalize a planning report until the benefits for the City have been finalized.

increases in height and density are given in exchange for any matters that the local councillor may favour.<sup>86</sup> In many cases, these agreements are not appealed to the Ontario Municipal Board (OMB), which has oversight of planning and other municipal matters. However, as the OMB both encourages settlement and seeks to ensure that section 37 benefits being provided to a municipality are in the public interest, even on appeal there is a structural incentive for the OMB to defer to the interests of the municipality (and thus the interests of the local councillor). Most infamous is an OMB decision that approved a height increase on the condition that the developer provide a drinking fountain for dogs in a local park.<sup>87</sup>

A study of section 37 bonuses granted in Toronto shows that they were split between cash and in-kind benefits.<sup>88</sup> First, consider the effect of a cash payment in lieu of constructing a specific community amenity. This system allows a municipality to accumulate a fund to be used at the discretion of the municipal councillors. Further, since community benefits are frequently tied to the neighbourhood in which a bonus is granted, a council member in whose ward a section 37 bonus is paid has a discretionary fund that he or she can use as a form of patronage, providing improvements (such as the dog fountain) desired by politically powerful groups of residents in his or her ward.

Similarly, the in-kind benefits (specific improvements or amenities provided by developers) conferred were “mainly ‘desirable visual amenities’ such as parks, roads and streetscapes, and public art” and were always within the same ward as the proposed project.<sup>89</sup> As with cash payments, these very visible amenities represent a kind of political patronage in which a councillor requests that a developer provide a specific benefit that reflects the desires of ward residents. In the case of both cash payments and in-kind benefits, the councillor’s actions are public and legal. Yet, the true beneficiaries are local councillors and existing neighbourhood residents, as section 37 benefits are conceived of as a “tangible benefit” to area

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86. The power in section 37 of the *Planning Act* is so ill-defined that councillors in Toronto have suggested particular architects to be used for development applications (*ibid*).

87. See *1430 Yonge Street Inc v Toronto (City)*, [2003] OMBD No 926 (QL), 46 OMBR 63 [1430 Yonge Street cited to OMBR]. In that case, the OMB imposed a condition that the developer, 1430 Yonge-St. Clair Inc., donate \$25,000 to construct a dog drinking fountain that local residents wanted. In the case of section 37 benefits, it is typical for OMB decisions, even though not made by the City Council directly, to merely approve a negotiated agreement between the developer and the City.

88. See Aaron A Moore, “Trading Density for Benefits: Section 37 Agreements in Toronto” (2013) 2 *IMFG Perspectives*, Executive Summary.

89. *Ibid*.

residents in exchange for “put[ting] up with increased height, massing and congestion caused by the developer getting additional development rights.”<sup>90</sup>

While the *Planning Act* provides no clear requirement for a nexus or relationship between the density or height increase and the required community benefit, the City of Toronto recently passed requirements for the implementation of section 37 that impose additional criteria on where a benefit can be located.<sup>91</sup> The benefit now needs to be located near the contributing development and available to the occupants of the new project (which in recent years has been predominantly residential development). As a result, the new amendments attempt to tie the new benefit to the contributing project. But, nevertheless, the councillor determines what the benefit will be before the project is built, and, thus, the owners of the units in the new building have no say in the nature of the benefits but may pay for them in their purchase price.<sup>92</sup> Most importantly, the granting of a broad power means that there is no direct connection between the benefit the developer confers and the increase in height or density. For example, there is clearly no relationship between an increase in height and density and the benefit of a fountain for dogs to drink out of in a neighbouring park, but such a benefit was required.

The resulting benefits are chosen by the ward councillor, in direct response to his or her supporters, with no guarantee that they will benefit the residents of new developments who may well bear the cost. Further, the benefits, even if paid in cash, generally result in visual or physical improvements that the councillor can point to as improvements he or she has brought to the ward, benefiting and or rewarding certain groups of voters within the ward and building the councillor’s political capital in preparation for re-election.

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90. *1430 Yonge Street*, *supra* note 87 at 70.

91. See Item PG31.4, *Improvements to the Section 37 Implementation Process*, City of Toronto, 2014 (adopted by Toronto City Council 1-3 April 2014).

92. In the context of development charges, the Ontario Municipal Board has recently acknowledged that fees paid by developers to municipalities are passed through to homeowners. See *Hamilton Halton Home Builders’ Association v Regional Municipality of Halton*, [2015] OMBD No 414 (QL), 2015 CarswellOnt 6926 (WL Can) at para 33. In that case, the OMB stated, “Development charges, by their very nature, add to the cost of housing. The home purchaser pays those costs and to assert anything to the contrary is a fiction.”

## F. ZONING BY-LAWS: DISCRETION VERSUS CERTAINTY AND PREDICTABILITY

Section 37 benefits are indicative of a larger trend in municipal planning decisions in Ontario and Canada because they show that the political value of discretion has replaced the rule of law values of certainty, predictability, and equality.<sup>93</sup> While a basic principle of zoning is that a proposed building must comply with the zoning by-laws, municipalities have discretion to amend the by-law for a specific site or provide variances (in Toronto, this takes place at the Committee of Adjustment) and thus have the ability to impose site-specific development criteria on a building's layout, design, and aesthetic characteristics. Such changes must comply with the municipality's official plan, which functions as a framework for development, but they also impose new, individualized site-specific conditions on development.

Conditions on development frequently mitigate potential problems between different kinds of adjacent land uses or address common sense concerns such as requiring traffic controls for driveways emptying onto congested streets, requiring that service or trash areas be enclosed or masked, or requiring cameras or other security measures for bars or nightclubs. The potential problem with conditions is that they can vary so often that they lack the predictability or certainty associated with as-of-right zoning, in which a proposed development that complies with the zoning by-law may be built without conditions so that developers are treated equally and the rules of the by-law are uniform and apply to all in the same manner.

The lack of uniformity and the ability of a municipality to exercise discretion on a case-by-case basis is statutorily authorized by section 41 of the *Planning Act*, which gives broad powers to impose, in addition to the provisions of the applicable zoning by-law, conditions on all development. In the past, courts were skeptical of this broad power, as it was not clearly defined and uniformly applied. In *Canadian Institute of Public Real Estate Cos v Toronto (City)*,<sup>94</sup> the Supreme Court of Canada invalidated as being *ultra vires* a City of Toronto by-law that repeated verbatim language from the *Planning Act*. However, the Court also addressed an argument, made by the City, that each piece of real property is

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93. Proposed amendments to the *Planning Act* would impose additional accountability requirements on the use and reporting of section 37 funds. See Bill 73, *Smart Growth for Our Communities Act*, 2015, 1st Sess, 41st Leg, Ontario, 2015, s 26 (second reading 21 April 2015).

94. [1979] 2 SCR 2, 103 DLR (3d) 226 [CIPREC].

so unique that it is impossible to draft a general by-law that imposes specific conditions on all developments. The Court stated in part:

The developers ... are entitled to know not only the method by which the owners may develop the lands presently owned by them but are entitled to know what use a prospective purchaser may make of certain lands if he completes the purchase of them, and inability to have that information, in my opinion, puts the real estate developers' business in a position of unnecessary hazard.<sup>95</sup>

The decision in *CIPREC* emphasizes the value of certainty: knowing what the law means, and thus knowing what it will take to comply, in this case, to obtain a development approval. Also mentioned is the value of predictability: knowing the process that must be followed to obtain a result.

The alternative, a system that lacks predictability and certainty, is a system in which conditions, even conditions that do not relate specifically to the approval, can be imposed on municipal approvals for any reason. There is thus reason for concern that this system might result in behaviour that is an abuse of power because a condition that is not for a legal purpose can be imposed. In one instance, a developer sought a minor variance to increase the height of a building and the size of its balconies by around half a metre.<sup>96</sup> Both increases were necessary for technical reasons discovered after construction commenced. The building, which already had site-specific zoning, otherwise complied with the by-law and could be built as of right.<sup>97</sup> City staff informed the developer that it would be able to obtain the variance subject to a condition that the developer provide the City with a payment of \$25,000 to improve a nearby subway station.<sup>98</sup> However, the technical increases in the building's size did not increase the number of people in the building, and thus could not possibly create a need for an improvement to the subway entrance. Thus, in our view, the condition was imposed arbitrarily and failed to take into account the purpose of the statutory power to grant minor variances to the zoning by-law or the grounds for conditions to be imposed when granting variances. Imposing such a condition could therefore be construed as an abuse of the City's broad authority.

This example suggests the potential for municipalities to abuse the broad powers granted to them to impose conditions on land use and development

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95. *Ibid* at 232.

96. Toronto East York Committee of Adjustment, *Notice of Decision: Minor Variance/Permission*, File No A0047/06TEY (23 February 2006) [Committee of Adjustment, *Notice of Decision*].

97. The earlier re-zoning was subject to an OMB appeal. See *York Rowe Ltd v Toronto (City)*, [2003] OMBD No 929 (QL), 2003 CarswellOnt 7217 (WL Can).

98. Committee of Adjustment, *Notice of Decision*, *supra* note 106.

approvals (here, applications for minor variances under section 45(9) of the *Planning Act*).<sup>99</sup> While such conditions must remain within the purview of the *Planning Act*, section 45(9) does not require any procedural safeguards to guarantee that municipalities provide a planning basis for conditions, such as written reasons to explain why a condition might be imposed.<sup>100</sup> In this example, we believe the municipality would have been unable to provide such an explanation.

As Toronto's new development permit pilot project<sup>101</sup> shows, the imposition of a broad range of conditions on new development is alive and well and has the potential to be entirely dependent on the whims of local groups of supporters and the local councillor. These whims would affect both what the project applicant needs to know and the process that must be followed to obtain new planning approvals. Ostensibly, the proposed system is an attempt to limit site-specific, or 'spot', zoning and variances by replacing them with a permit that must comply with a detailed plan. It is unclear, however, that it will limit discretion and decisions made on a case-by-case basis; rather, the opposite is much more likely to occur. The new system would allow the City to impose conditions and also would likely give more power to the local councillor and small, powerful groups of constituents to control the design of new buildings. As with section 37 benefits, this would emphasize responsiveness and local discretion without providing the certainty and predictability considered by the Court in *CIPREC*.

#### G. SIGN BY-LAWS: DISCRETION AND EFFICIENCY VERSUS PROCEDURAL SAFEGUARDS

The lack of predictability is also at issue in the granting of variances and administrative enforcement decisions under the City of Toronto's sign by-law. Here, the City has also favoured efficiency and discretion over the use of procedural safeguards.

As discussed above, the City has broad authority to regulate signs as it wishes and to set up procedures to enforce such regulations. As a result, the City lessens the risk of allegations that it has not acted fairly or provided adequate procedural protections unless it violates its own rules. Even then, the onus is on the affected

99. *Supra* note 32, s 45(9). This section, which grants authority to impose conditions on minor variances, states: "Any authority or permission granted by the committee under subsections (1), (2) and (3) may be for such time and subject to such terms and conditions as the committee considers advisable and as are set out in the decision."

100. *Ibid.*

101. See "Reset TO: Towards Neighbourhood Planning" *City of Toronto* (2015), online: <[www.toronto.ca/planning/reset](http://www.toronto.ca/planning/reset)>.

person to challenge the City's action in court on the basis of a denial of natural justice or lack of fair treatment. Further, the standard imposed by the courts is a vague one which varies from situation to situation. In practice, this results in significant protection for the City and a significant demand on time and resources for any potential challenger.

In one case, *Strategic Media Outdoor Inc v Toronto (City)*,<sup>102</sup> a sign company argued that the City, in exercising its powers under the *Municipal Act* instead of the *Planning Act*, had deprived the company of its right to notice and a hearing before passing the sign by-law and that the by-law was therefore invalid. Without any finding on the by-law's validity, the City undertook enforcement proceedings against the company and put it out of business.<sup>103</sup> The sign company also argued that the by-law was contrary to the *Charter* and was not passed for a proper planning purpose. The court upheld the pre-emptive enforcement of the by-law, notwithstanding that these issues were still to be adjudicated.<sup>104</sup> This case raises the question of whether municipalities fail to follow legal requirements and procedural safeguards because they have been given so much discretion and are eager to be efficient and respond quickly.

#### H. PUBLIC PARTICIPATION AT CITY COUNCIL MEETINGS: EQUALITY GIVES WAY TO EFFICIENCY

When seeking an application for a sign variance under the same by-law, the value of equality gives way to the value of efficiency. The McRuer Report cites both an individual's ability to appeal to elected officials and a fair procedure before the exercise of government authority as hallmarks of the standard of justice. Accordingly, it is standard practice for members of the public to be able to make presentations to municipal councils before decisions are made, and for councils to limit the time of presentations to five minutes to try to ensure that all members of the public have an opportunity to speak.<sup>105</sup> However, this rule is also about efficiency. The time for a presentation is limited regardless of the circumstances of the presenter. In the case of applications allowing variances to permit signs which would otherwise be illegal, applicants, who have a very significant interest in the approval of their application, have no greater rights than anyone who

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102. [2009] OJ No 451 (QL), 174 ACWS (3d) 1186 (Sup Ct) [*Strategic Media*].

103. *Ibid* at paras 2, 29, 42. The by-law at issue was passed under the *Municipal Act*, as the *City of Toronto Act* was not yet in effect.

104. *Ibid* at paras 29, 42.

105. See e.g. *City of Toronto Municipal Code*, art 27-15(C) [CTMC]. This article limits the time of public presentation to council committee members.

wishes to appear before the committee. They are generally restricted to speaking for only five minutes, have no right of appeal, receive no reasons for the decision, often have no notice of opposition to their application, and have no right of response to those who speak after them. Natural justice requires that those with a direct stake in a decision have such procedural protections.<sup>106</sup> Thus, while the rule ostensibly seems to give everyone an equal voice, it does not necessarily result in the participants' equal treatment or in a decision perceived to be fair or known to be for a proper municipal purpose, since the applicant has no right of reply and receives no specific reasons for the decision. Moreover, as discussed above, while the City of Toronto has broad powers to pass a sign by-law, establish an administrative process, and conduct enforcement proceedings to regulate signs, it has not incorporated any procedural safeguards for applicants or others with a specific interest in the matter.<sup>107</sup>

Here, the lack of procedural protections risks the type of poor-quality decision making with which the McRuer Report is concerned. Without a right of appeal, staff recommendations (if any) may be of poorer quality than they might otherwise be, as there is no challenge possible as long as the ward councillor agrees with the recommendations. Indeed, the authors' personal experience with reports regarding signs suggests that many staff reports contain significant errors. The quality of the decision making must suffer. Furthermore, in the absence of an appeal, the reasons for a decision can be virtually irrelevant to any planning concerns. Instead, as in the case of section 37 benefits, individual municipal council members act as key decision makers when it comes to allowing variances to permit signs. A survey of the City of Toronto Community Council showed that the Ward Councillor determined 103 of 115 sign variance decisions.<sup>108</sup> In three of the meetings surveyed, the Ward Councillor determined 100 per cent of the decisions.<sup>109</sup> Yet in the 2006 City of Toronto election, only 39 per cent of eligible voters voted, and the winners in the forty-four wards received on average

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106. See *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at para 25, 174 DLR (4th) 193. According to the Supreme Court of Canada, "The more important [an administrative] decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated [by the common law duty of procedural fairness]."

107. See *City of Toronto Act*, *supra* note 24 s 12(5).

108. This survey was undertaken by Robert Jefferson and Lionel Feldman as part of the research for *Strategic Media*, *supra* note 102. The research was undertaken in June 2008 and is on file with the authors.

109. *Ibid.*



46.5 per cent of the votes cast in their respective wards.<sup>110</sup> Therefore, sign variance decisions were made by people who obtained only a very small percentage of the votes cast in the City. Thus, in the case of section 37 benefits and sign permits in Toronto, the individual ward councillor acts as the key decision maker. In this way, an individual's right to participate in a public decision gives way to concerns of efficiency, a councillor's discretion, and the councillor's responsiveness to his or her core constituents.

#### I. THE TORONTO PARKING AUTHORITY: NEED VERSUS PURPOSE OF LEGISLATION AND LIMITS ON POWER

A final example, like the sign by-law enforcement case, raises the issue of whether municipalities have so much discretion, with so few limits, that they are able to ignore their legal obligations. It also addresses the economic value of 'need.' The City of Toronto Parking Authority is appointed by the City Council and manages City parking lots.<sup>111</sup> The Authority has established a surcharge of forty-two cents on each dollar that it charges for parking and explains on its receipts and its website that this surcharge is not for the cost to operate and maintain the parking lots but is for parks, infrastructure, and other city needs.<sup>112</sup> Stated another way, the City has imposed a charge not based on the actual cost to provide the service (the operating costs to make the parking lots self-sufficient) but based on the discretion given to the City to determine what the City needs (or stated another way, to determine what is in the public interest).

The Authority characterizes this surcharge as "giving back" to the City.<sup>113</sup> One of the few limits on the City's power under the *City of Toronto Act*, however, is the express prohibition that the City may not impose a tax.<sup>114</sup> The Parking Authority may only exercise those powers that are granted to the City,<sup>115</sup> yet the Parking Authority's surcharge is not paying for its operating costs but is providing revenue to the City for general purposes. This appears to be an *ultra vires* sales tax by virtue of subsection 267(2)(5) of the *City of Toronto Act*, which prohibits

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110. See "City of Toronto 2006 Municipal Election Voter Statistics" City of Toronto (2006), online: <[www1.toronto.ca/static\\_files/city\\_clerks\\_office/elections/docs/Results\\_PDFs/2006/2006voteturnout.pdf](http://www1.toronto.ca/static_files/city_clerks_office/elections/docs/Results_PDFs/2006/2006voteturnout.pdf)>.

111. See *supra* note 105, arts 179-1(A), 179-7.

112. "Did you Know?" *Toronto Parking Authority*, online: Green P Parking <[www.parking.greenp.com/about/did-you-know.html](http://www.parking.greenp.com/about/did-you-know.html)>.

113. *Ibid.* The website states, "Green P gives back to the city to help within your own community."

114. *Supra* note 24, s 13(1).

115. See *supra* note 105, art 179-7.

such a tax.<sup>116</sup> Does this mean that the City's regard for the law and the rule of law has given way to a need for revenue to provide essential services? According to a study of the City's finances, the City is not in such a dire situation and has enough revenue to provide its existing services.<sup>117</sup> If the issue is not one of need, then perhaps the answer lies in the City's broad discretion to exercise its powers and make decisions with little oversight. The Parking Authority members are appointed by City Council, and as shown above, the Councillors have broad discretion, and, in our view, make decisions within a paradigm of economic and political values rather than one based on rule of law values. If this culture of discretion can result in the imposition of illegal taxes and disregard for legal limits, it also risks the use of public authority for illegitimate private gain.

#### IV. CONCLUSION

In this article, we have explored the idea that a confluence of factors has expanded the powers and broadened the discretion of Canadian municipalities and individual municipal council members: the exercise of judicial restraint in reviewing city decisions; the creation of larger, single-tier cities with centralized power and few legislative limits; the lack of political limits on the power of individual city council members; the lack of procedural safeguards; and the privileging of economic and political values over rule of law values in city decision making. These changes allow municipalities to ensure that political decisions reflect local values, that local government has the tools to effect its decisions, and that local government (not a provincial government) is accountable for such decisions. For municipalities and municipal councils that in the past had to seek express authority to take action, this represents a radical change. Moreover, the expansion of power and discretion includes few administrative or procedural limits, since municipalities can make their own rules, set their own administrative procedures, and impose their own conditions, unless there is a conflict with federal or provincial legislation. Moreover, as a result of a weak-mayor system, lack of party affiliations, and elections by individual districts or wards, individual municipal council members and their core constituents have become not only the key decision makers in municipal government but also the primary beneficiaries of expanded municipal powers and discretion in municipal decision making.

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116. *Supra* note 24, s 267(2)(5).

117. See Enid Slack & André Côté, "Is Toronto Fiscally Healthy? A Check-up on the City's Finances" (2014) 7 *IMFG Perspectives*, Executive Summary.

Thus, a municipal decision typically emphasizes the economic and political values of efficiency, discretion, responsiveness, and need, and may be made based on the whim of an individual councillor and a small group of politically powerful members of the councillor's ward (or merely the small number of voters favouring a winning candidate). As a result, councillors' behaviour may sometimes appear similar to behaviour that in the past was associated with the illegal distribution and receipt of political patronage.<sup>118</sup> Yet, under the current system, the patronage takes the form of legal, specialized municipal funds, community benefits, improvements, and conditions on municipal approvals, all of which strengthen the relationship between a councillor and the councillor's core constituents and increase the political capital of each. Nevertheless, councillors have so much discretion that it is possible for them to make municipal decisions and to use municipal power for almost any purpose, rather than a purpose that specifically improves the general welfare or benefits the public interest.

We have raised the idea that the unintended consequence of this almost limitless discretion may be that Ontario municipal law lends itself to corrupt decision making. This possibility calls for further investigation. It is not clear that municipalities use their broad powers to create broad public benefits, nor is it always clear who actually benefits from municipal decisions. Further, since municipalities are frequently able to control their own administrative procedures, it is not only difficult for municipal decision makers to abuse their discretion (which would require demonstrating that they had violated their own rules and procedures) but it is also costly and time-consuming to challenge municipal decisions. Thus, perhaps municipalities and individual municipal councillors have gained so much discretion with so few limits that we may have legalized the abuse of discretion in municipal government, allowing municipal councillors to make decisions for almost any purpose, and may have provided legal mechanisms for political patronage.

In our view, further investigation and additional procedural safeguards are necessary. Without the imposition of limits, such as additional procedural safeguards, municipal decision making will suffer. Decisions made without the type of well-considered reasoning needed to withstand review and scrutiny at public hearings and appeals will not necessarily achieve broad public benefits, and decisions made without procedural safeguards will very likely suppress individual freedoms. The result is a system of local government that provides (sometimes hidden) benefits to only a few members of the public and has the potential to erode the public's trust.

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118. See Part III(A), above; *supra* note 73.