

The Proposed Community Charter

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Donald Lidstone

lidstone@lya.bc.ca

THE PROPOSED COMMUNITY CHARTER

This paper identifies changes that would result from enactment of the proposed Community Charter. A reference in this Paper to the “proposed Charter” is a reference to the draft legislation attached to the White Paper tabled May 28, 2002 in the Legislative Assembly in anticipation of public input. This Paper is not a legal opinion. It is a summary of changes that would result from the proposed Charter.

1.0 MUNICIPAL PURPOSES AND POWERS (PART 2)

Municipal Purposes

Although the “municipal purposes” in section 6 remain the same as under the *Local Government Act* (similar to the recently enacted Alberta, Manitoba and Yukon legislation), there are several differences. The enactment of bylaws is not expressly stated to be fore the defined “municipal purposes”. As well, the “municipal purposes” are tied expressly in the Charter to the principles of municipal governance under section 1 and the “broad interpretation” provision in section 3.

Natural Person Powers

Under Section 7(1), municipalities would have natural person powers. That is, instead of having the list of delineated corporate powers, every municipality would have the capacity, rights, powers and privileges of a natural person of full capacity. Municipalities would not be limited to a list of express corporate powers. There is a significant body of case law addressing the scope of natural person powers in relation to other entities. A municipality could exercise natural person powers outside of its boundaries [section 11(2)].

Natural person powers do not give municipalities new service or regulatory authority. Natural person powers are, in effect, corporate powers that would enable municipalities to carry out routine legal transactions without additional express legislative authority. (For example, they could make agreements, acquire interests in land or other property, hire or dismiss employees, purchase shares or incorporate companies, enter into public-private partnerships, etc.). The exercise of natural person powers is subject to express provisions of the remainder of the Act.

Fundamental Powers

Section 7 and the other general powers set out in the rest of Part 2 would replace one hundred and seventeen detailed, express, prescriptive sections of the *Local Government Act* with respect to regulatory authority. The result would be “one-stop shopping” for basic municipal service and regulatory powers, authority and jurisdiction. The proposed Charter would provide for broader authority instead of detailed, prescribed powers. Municipalities would be able to use the fundamental and general building blocks (such as the authority to regulate or require within a sphere; establish conditions and variations; require a permit; impose a fee; and require security), rather than acting only pursuant to a particular power where all of those modalities are spelled out in relation to that power (e.g., where the *Local Government Act* specifically authorizes regulation of the sale of wildflowers).

Section 7(3) creates 15 spheres within which a council may by bylaw regulate, prohibit or impose requirements (e.g., “animals and activities in relation to animals”). These spheres are intended to enable municipalities to respond to future needs to regulate without requiring *ad hoc* amendments to the Charter in the future. These omnibus provisions are more generous than in any other provincial or territorial municipal legislation, and are worded on the basis of the empowerment thesis of the reasons for judgment in the Supreme Court of Canada decision in *Spraytech v. Hudson (Town)*. [See Appendix 1, *The Hudson Case*]

There is a new general authority to “require” by bylaw. This would empower a council, for example, to require persons to undertake work or incur expenses as provided in the bylaw (e.g., clear ice and snow from sidewalks in front of business premises). It would also include the power to require persons to use a municipal service (e.g., to connect to a sewer system) or to have insurance if providing a service on behalf of or in lieu of the municipality. Councils could impose requirements in relation to regulating, prohibiting or providing a service, or they could impose bare requirements.

Section 7(2) states that a municipality may provide any service. There are no limitations in regard to what services a municipality may provide (subject to the Charter and constitutionality). There are restrictions and limitations on services in the recent municipal legislation of other provinces. A municipality may provide any service directly or through another person. This, combined with natural person powers, facilitates public private partnerships, contracting out, cooperation with other municipalities or public authorities, and other approaches that the council considers desirable. A council is no longer required to establish every service by bylaw.

One of the spheres of regulatory authority (in respect of which a council may regulate, prohibit or require) is that of “municipal services”. Accordingly, a council could by bylaw impose prohibitions or requirements in relation to roads, parks, recreation facilities, solid waste, or other services.

[See Appendix 2, *A Comparison of New and Proposed Municipal Acts of the Provinces*]

Concurrent Authority

In addition to the 10 spheres of independent and autonomous jurisdiction within which a council may regulate, prohibit or require, there are four areas of provincial-municipal concurrent regulatory authority (public health, building regulation standards, protection of the natural environment, and prohibition of soil removal or deposit) [section 8(1)]. In regard to those four areas, the UBCM or individual municipalities may make an agreement with the applicable minister authorizing one or more municipalities to exercise authority within the “concurrent sphere” subject to conditions and restrictions set out in the agreement (e.g., air pollution) [section 8(3)].

In lieu of an agreement, the UBCM or a particular affected municipality could, further to the consultation provisions in Part 9 of the Charter, develop with the applicable minister a regulation to be made by the minister under which the municipality or municipalities could exercise authority in an area of concurrent regulatory authority subject to the terms, conditions and restrictions set out in the regulation (e.g., building regulation) [section 8(4)]. Certain regulations

could be developed in consultation with affected interests so that the regulations would be ready for enactment when this portion of the Charter comes into force (e.g., in relation to requiring sprinklers under building regulation bylaws).

In lieu of an agreement or regulation, an individual municipality could obtain approval for a specific bylaw in one of the areas of concurrent regulatory authority (e.g., a smoking or pesticide bylaw in relation to “public health”) [section 8(2)(a)].

One change that results in reduced autonomy for municipalities is the requirement that a bylaw addressing building standards be approved by the Minister (or under a regulation or agreement). Previously, a municipality could “top up” building standards (e.g., fire sprinklers) where the bylaw was not inconsistent with the provincial building code (e.g., where the code was silent) without provincial approval.

Section 277(2) provides that if the UBCM so requests, the minister responsible must engage in discussions respecting the making of a regulation or agreement under this section and make all reasonable efforts to reach agreement in negotiating an arrangement.

The restriction in section 8(2) with respect to the four areas of concurrent jurisdiction does not apply to a bylaw permitted under the fundamental powers that falls under one of the “autonomous and independent” municipal spheres of regulatory jurisdiction under section 7(3)(a) to (j) or that is specifically authorized in the Charter or another act. For example, section 60(b) deals expressly with the regulation or prohibition of “odour” and section 60(d) deals expressly with waste disposal and recycling. Although these deal with environmental protection, the requirement for a ministerial approval, regulation or agreement would not obtain.

Relationship with Provincial Laws

Section 10 is an interpretation tool for the benefit of the reader, including the courts. This section is a codification of the Supreme Court of Canada decision in the leading case *Spraytech v. Hudson (Town)*. That is, a municipal bylaw is not inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment. In other words, the municipal council can “meet or beat” the provincial statute or regulation, subject to express legislative language to the contrary [e.g., legislation that expressly pre-empts municipal law coexistence, such as section 8(1)].

Conditions and Variations

Under Section 12, there is a new comprehensive general authority to establish different classes, make different provisions for different classes, and make exceptions in relation to any situation where a council exercises its powers or makes a bylaw. It is no longer necessary to look for this authority in each empowering section or in relation to each power.

Intermunicipal Services and Regulations

Two or more municipalities may by agreement provide any services. There is a new power [section 14] for two or more municipalities to join together to establish and provide for a joint regulatory scheme. For example, the municipalities could enact the same building regulation

bylaw and one of the municipalities could enforce the bylaw throughout the area of its application. This enables sharing of regulatory services (if the parties consider this to be politically or financially desirable) without necessitating amalgamations.

Codes, Standards or Rules

A municipality may, when it is regulating, incorporate by reference a standard, code or rule [section 15(4)]. This could be a standard published by any body or standards association (e.g., disposal to a sewage system, water main lining, erosion control, building envelope standards, etc.). As well, a council may, when regulating, adopt a rule enacted by some other jurisdiction (e.g., fire sprinkler rules applicable in Phoenix). Subject to any applicable concurrent authority provisions, this would allow a municipality to proceed on the basis of the international “precautionary principle”. It would allow, for example, Vancouver to enact a “Georgia Basin Bylaw” that is the same as one adopted by other Lower Mainland municipalities and by Seattle area municipalities.

Such a standard may be adopted as is or with revisions, and may be adopted as frozen in time or as amended from time to time [section 15(5)]. The “as amended” provision would allow municipalities to embrace a standard that may be revised from time to time by the standard-maker, such that the constraining rule of law in *Canadian Occidental Petroleum v North Vancouver (District)* would no longer apply.

Entry on Property

The authority to enter on private property to inspect provides for “one-stop shopping” with respect to the municipal power to enter on property, and clarifies the rules that apply to protect private property interests while permitting reasonable access at reasonable times subject to appropriate notice for bylaw enforcement or service provision purposes [section 16]. There is also a streamlined provision for direct action to enforce on default of an owner or occupier, and to collect the cost of direct enforcement in the same manner as taxes [section 17]. Section 272 provides for entry warrants tailored to the needs of municipalities in relation to municipal responsibilities under any Act or as required under the Charter or *Local Government Act*. This is to address the difficulties associated with attempting to obtain warrants under the *Offence Act*.

Disconnection

There is a new authority [section 18] to discontinue a service (e.g., disconnect electrical service) if the applicable fees or taxes are unpaid, if the user breaches the applicable rules related to the service, or for some other reason related to the service.

Security

Section 19 sets out rules related to security in relation to a municipal service or as a condition on a permit, licence or approval. This clarifies that the security must be used only for the purpose provided and any amount left over must be returned to the provider.

Emergencies

Under the *Local Government Act*, a council in the event of an emergency (e.g., earthquake, terrorism, water contamination, etc.) must act by bylaw (i.e., requiring two council meetings at least one day apart) adopted by a vote of at least two-thirds of the council members. Under section 20 of the proposed Charter, a council may act by resolution (i.e., at one council meeting, including a special meeting called for that purpose) and may act by way of a simple majority if there is an emergency.

2.0 ADDITIONAL POWERS AND LIMITS ON POWERS (PART 3)

Highways

The proposed Charter would give municipalities the ownership of their highways within their boundaries (other than special cases, such as provincial arterial highways). Vancouver has enjoyed this ownership under the *Vancouver Charter*, which allows the municipality to treat the highway land as real estate in conjunction with other powers and services provided by the municipality. The new ownership and control rules are balanced by additional rights to protect highway users and nearby property owners and to give citizens expanded approval powers in situations where, for example, the highway provides access to a body of water.

There is a new authority to restrict the common law right of passage generally (e.g., to erect gates) [section 36(3)].

Section 35(12) of the Charter provides new authority for easements, encroachment agreements and licence agreements with respect to highway lands.

There is a clarification in section 41 of the rules governing highway closure in relation to the raising of title in the name of the municipality. The process is simplified, with no need for a crown grant.

There are new rules in section 41 protecting owners who would otherwise be deprived of access to their property by a highway closure or alteration. There is also in section 41 protection of highways that provide access to a body of water (the land must be exchanged for equal access to the same body, or the sale proceeds must be placed in a protected reserve fund for the sole purpose of acquiring at least equal access to the same body of water).

There is in section 42 a simplified power for a municipal council to make an agreement with a person for the payment of compensation for damage or expense caused by extraordinary traffic (e.g., where large trucks haul gravel from a pit, resulting in extraordinary damage to the municipal road).

Under the fundamental power to regulate, prohibit or require in relation to municipal services under section 7(3)(a), a municipality could regulate, prohibit and impose requirements in relation to highways. A council may regulate and prohibit in relation to all uses affecting a highway under section 36(1).

Many of the rules governing traffic and parking are found in the *Motor Vehicle Act*, and these are hopefully under review (with respect to providing general regulatory authority) in the second phase of the development of the Charter.

Business Regulations

Section 7(4) of the Charter preserves the *Local Government Act* (and previous *Municipal Act*) policy of not allowing a council to exercise its power to prohibit in relation to business, persons carrying on business, or business activities. The business prohibitions allowed under the existing legislation are grandparented under section 56(2).

What is new is the requirement that if a council believes a regulatory bylaw other than a business bylaw (e.g., a noise or nuisance bylaw) would have the effect of prohibiting a business or business activity, the council must, prior to adopting the bylaw, give notice and provide an opportunity for affected persons to make representations [section 56(1)].

Building Regulations

Under the *Local Government Act*, an occupancy permit may be withheld until the building complies with the health and safety requirements of the bylaws or of any statute. This would be expanded under section 53 of the proposed Charter to provide that the occupancy permit may be withheld until the building complies with provincial building relations, any requirements established under a building/structure regulatory bylaw, or any other applicable bylaw, any other health or safety requirements established by municipal bylaw, and any other federal or provincial enactment in relation to health or safety.

Under the *Local Government Act*, a council proposing to file a note against land title that a building regulation has been contravened may only do so after hearing the owner. Section 272(3) of the proposed Charter would clarify that the council must give the owner a reasonable opportunity to be heard.

Nuisances

In regard to nuisances, disturbances, unsanitary conditions and other matters, there is authority under section 7(3)(j) of the proposed Charter to regulate, prohibit or require by bylaw in relation to such disturbances and “nuisances” in addition to the existing authority to prohibit in special cases. The authority under section 7(3)(j) may be exercised in relation to the ten sets of enumerated matters under section 60.

One change that would reduce powers is the elimination of the express authority to control air pollution. This could be addressed indirectly under the Charter fundamental power respecting nuisances [s. 7(3)(j)] or directly under the fundamental power respecting the natural environment [s. 7(3)(l)] (requiring ministerial approval or an agreement or regulation).

Animals

The *Local Government Act* sets out special rules governing seizure of dogs and specific animals, along with the authority to deal with them. Under section 7(3)(c) of the proposed Charter, there

are also general regulatory, prohibitory and requirement powers respecting animals, along with additional powers to deal with them.

The authority to seize animals has been expanded under section 47 (to include all members of the animal kingdom other than humans). There is new authority to provide for the seizure and destruction of any important animal under section 47(d) or of any animal that is subject to suffering under section 47(e).

Cemeteries

The Charter provides for general authority in section 7(3)(h) to regulate, prohibit and require in relation to cemeteries, crematoria, columbaria, mausolea and the interment of the dead, as opposed to limited restricted authority.

Soil

In regard to the removal and deposit of gravel, soil and other such material, the approval required by the applicable ministers would now be subject to the proposed concurrent authority scheme under section 8.

Assistance to Business

The proposed Charter modernizes the language relating to the granting of exclusive or limited franchises (section 22).

In regard to the power to make agreements with a public authority with respect to joint activities and services, joint operation and enforcement, or joint management of property, the definition of “public authority” has been revised to clarify the references to health care, educational or local government bodies (section 23 and Schedule).

There is elector approval required for removal of a reservation or dedication of municipal property as a park or for heritage conservation purposes [section 30(3)].

There is a general clarification and streamlining of the rules governing partnership agreements.

3.0 PUBLIC PARTICIPATION AND COUNCIL ACCOUNTABILITY (PART 4)

In light of the expanded powers and authority granted to municipalities, the proposed Charter also contains expanded opportunities for public participation and increased requirements for council democracy and accountability.

Open Meetings

The *Local Government Act* rules requiring public access to open meetings are continued except for some clarifications to address circumstances where the rules have seemed unworkable under the LGA requirements. There is a proposal exemption in Section 75, allowing in-camera deliberations with respect to consideration of an administrative tribunal hearing affecting the municipality in addition to the “litigation or potential litigation” exemption. As well, there is

proposed authority to consider in-camera negotiations and related discussions respecting the proposed provision of a municipal service that are at their preliminary stages and that could harm the interests of the municipality if they were held in public. The proposed Charter also clarifies that council may consider in-camera whether a council meeting should be closed under a provision of the “open meeting” rules or whether there should be a determination as to whether other persons should be allowed to attend an in-camera meeting. Finally, there is some authority to discuss in camera with staff objectives and measures for the purposes of annual reports.

There is authority in Section 76 to allow municipal officers or employees to be excluded as well as to allow persons other than municipal officers and employees to attend an in-camera session if the council considers this appropriate or if the persons already have knowledge of the confidential information. This would apply, for example, in regard to interviewing auditing candidates prior to appointment.

The “open meeting” rules have been extended to apply to any body that under the Charter or another Act may exercise the powers of a municipality or a council.

Public Notice

Section 79 of the Charter contains one provision that sets out the requirements for posting and publishing notice. Accordingly, whenever the Charter refers to a requirement for notice, that notice must be posted and published in accordance with this “one-stop shopping” section that sets out the applicable rules. For example, if a notice is required in relation to a partnering agreement, this section would apply to require posting in the public notice posting places and publication in a newspaper distributed at least weekly in the area affected. The section provides that the publication must be once each week for two consecutive weeks.

There is a new provision [Section 79(6)] that a council may provide any additional notice respecting a matter that it considers appropriate, including by the internet or other electronic means.

Access to Records

There is a new provision governing public access to municipal records [Section 80]. The proposed Charter provides that a council may, by bylaw, provide for public access to its records and establish procedures respecting that access. The Charter clarifies that if any statute or regulation requires a record to be available, that obligation is met by having the records available for public inspection at the municipal hall during regular office hours. A person is entitled to have a copy made or part of the record on payment of the applicable fee. The Charter clarifies that a person inspecting a record must not unless authorized remove a record from where it has been provided for inspection.

The proposed Charter also identifies in Section 82(1) other records to which public access must be provided (in addition to what is required under the freedom of information provisions of the *Freedom of Information and Protection of Privacy Act*) but subject to the protection of privacy provisions of that Act. For example, the annual report, council remuneration and expenses, the record of conflict of interest declarations, and written disclosures required under the *Financial*

Disclosure Act must be made available. The public is entitled to the record if it is made available at the municipal hall within seven days after it has been requested.

Annual Report and Performance Measurement

Section 83 of the Charter would require every municipality to prepare an annual report respecting the previous year. Notice of the report must be published in accordance with the “notice provision” in Section 80. The council must make the report available for public inspection under the public inspection provision and have the report available for public inspection at the annual public meeting of the council.

The report must contain any declarations of disqualification under the conflict of interest provisions, including identification of the council member or former council member involved and the nature of the disqualification.

The annual report must also include the annual financial statements and audit, the amount of property tax revenue forgone for each tax exemption provided, information respecting municipal services and operations, a performance measurement report (identifying municipal objectives for the year, the measures that will be used to determine whether these objectives were being met, and a report on accomplishments in relation to objectives and measures for the previous year).

Annual Meeting

Under Section 84 of the Charter, a council must hold an annual public meeting to present the annual report and consider submissions and questions from the public. Notice of the meeting must be given under the “notice provision”.

Conflict of Interest

The proposed Charter contains significant new rules governing council member gifts, contracts or abuse of position.

The *Local Government Act* provides that a council member must make a declaration and depart from a council meeting if he or she is not entitled to debate or vote on a matter because the member has a pecuniary interest “or for any other reason”. The words “or for any other reason” have created uncertainty at council meetings. These words are replaced in Section 82(2)(b) of the proposed Charter by the words “because the member has ...another interest in the matter that constitutes a conflict of interest”.

There is a new provision [Section 85(4)] that would allow a council member, after receiving legal advice on the matter, to determine that he or she was wrong respecting the member’s entitlement to participate in respect of the matter, in which case the member may return to the meeting or attend another meeting, withdraw his or her declaration of conflict, and then participate and vote in relation to the matter. This addresses the situations where council members have withdrawn because of doubt about whether they have a conflict, only to find later that there is no conflict but that they are not entitled to return to the meeting.

The public is protected by new provisions [Section 87] dealing with “inside influence”. The proposed Charter provides that a council member must not influence or attempt to influence a decision or action at a meeting, by an officer or employee, or by a delegate of council authority if the council member has a pecuniary interest in the matter. A person who contravenes this provision may become disqualified.

The public is also protected under Section 88 with respect to “outside influence”. A council member must not use his or her office to seek to influence any decision, recommendation or action to be made or taken by any other person or body if the member has a pecuniary interest in the matter. The penalty is disqualification from office.

Section 90 of the Charter proposes additional protection in that a council member would not be entitled to accept a fee, gift or personal benefit connected with the performance of duties of office (other than a gift received as a incidental of protocol, remuneration authorized by statute or a lawful campaign contribution). A gift exceeding \$250 in value must be disclosed under Section 91 (along with the total value of any gifts or benefits exceeding \$250 in any twelve month period). Contravention of the gift provisions could result in disqualification from office.

The public is further protected by a provision in the proposed Charter [Section 92] that would prohibit a council member or former council member from using information or a record obtained in the performance of the member’s office and not available to the general public for the purpose of gaining or furthering a pecuniary interest of the member or former member. The penalty for a sitting member is disqualification.

There are also proposed restrictions on contracts and benefits under Section 93. A council member or former member must not enter into a contract or accept a benefit that is awarded by the council. There are some exceptions to deal with the unique and practical situations of smaller municipalities: if the council in a public meeting considers that the contract is in the best interests of the municipality and adopts a bylaw to enter into the contract; if a benefit is specifically authorized by a statute to be provided to a council member; if a contract or benefit is awarded on conditions that are the same for all contracts similarly awarded or for all persons similarly entitled; or if in the case of a former member, six months have passed since he or she last held office.

Section 94 entitles the municipality or an elector to apply to the Supreme Court for an order that a council member or former council member give up their financial gain if the member has contravened the disclosure, pecuniary interests, inside or outside information, gift or contract/benefit restriction provisions.

Section 95 summarizes all of the situations resulting in disqualification from office and then sets out a procedure for disqualification.

The Charter proposes that ten or more electors may apply to the Supreme Court for a declaration of disqualification (as opposed to the current four, which has resulted in vexatious or frivolous “political” attacks on individual council members). As well, the municipal may apply for a declaration if this is approved by resolution of council identifying the grounds. This is different

from the *Local Government Act* procedure whereby the council disqualifies and then the member must appeal to the Supreme Court.

There is also clarification under section 96(3) that a member who is subject to a resolution of the council may appear and make submissions respecting the disposition of the matter even though the member has a pecuniary interest in the outcome.

4.0 MUNICIPAL GOVERNMENT AND PROCEDURES (PART 5)

Council Roles and Responsibilities

The proposed Charter sets out responsibilities for council members in section 99. The *Local Government Act* was silent on this.

Under section 101, the Mayor is given, in addition to existing responsibilities, the responsibility to provide leadership to the council, including by recommending bylaws, resolutions or other matters that the Mayor believes may assist the peace, order and good government of the municipality. The Mayor's role is now described as "responsibilities" instead of legal "duties". Otherwise, private law duties of care could be inferred from "duty" phraseology. The Mayor also has the new responsibility of reflecting the will of council and carrying out other duties assignment by the council.

The proposed Charter contains a new provision under section 102 requiring a council member or former council, unless council authorizes, to keep confidential any record held in confidence by the municipality or any information considered at an in-camera meeting until released by council. Contravention would be an offence under section 5 of the *Offence Act*.

The terms of office for council members are clarified under section 104.

Under section 105(2), the oath or affirmation of office is established by council bylaw instead of by the Lieutenant Governor in Council by regulation. This is another example of municipal autonomy.

Council Proceedings

There is a new requirement under section 108(3) that each council member present at that time of a vote must vote on any question before council.

Section 109 of the proposed Charter requires every council to adopt a bylaw establishing council meeting and committee meeting procedures, and the provision lists six matters that must be provided for in the bylaw. The proposed Charter clarifies that such a procedure bylaw must not be amended, or repealed and substituted, unless the council gives public notice of the changes in accordance with the "notice provision".

There is clarification in section 110 as to when the first council meeting must be held, to accommodate municipalities that must appoint regional district directors and to allow the inaugural meeting to take place during the first ten days of December instead of "on the first

Monday after December 1”. The section also clarifies that a special meeting is a meeting other than a first, regular or adjourned meeting.

There is clarification under section 111 that two or more council members may call a special meeting if both the Mayor and the person designated to act in place of the Mayor are absent or otherwise unable to act.

Section 112 of the proposed Charter requires a council to make available to the public a schedule of regular council meetings and to give notice of the availability of the schedule (according to the “public notice” provision). As well, notice of special meetings must be given to the public, including any requirement to post a copy of the notice at the public notice posting places.

There is new authority in section 113 for electronic meetings. If a council so authorizes by procedure bylaw, a special meeting may be conducted by means of electronic or other communication facilities if the meeting is conducted in accordance with the procedure bylaw, the facilities enable all participants to hear, or what and hear, each other, the notice is given in accordance with the “public notice” provision, the facilities enable the public to hear, or what and hear, the meeting, and the clerk is in attendance.

In the proposed Charter, the Mayor’s authority to require council reconsideration of a matter is clarified such that it does not preclude the council itself from reconsidering a matter according to the procedure bylaw and the common law [section 116(1)]. Instead of referring to consideration of a “bylaw, resolution or proceeding” (as under the *Local Government Act*), the Charter refers to a “matter”, which can include a defeated item.

Under the *Local Government Act*, the Mayor may not return a matter if it has been “acted on” by the municipality. There has been confusion about the meaning of this, so the Charter proposes that a matter may not be reconsidered if it has had the approval of the electors or there has already been a reconsideration under that section. There is also clarification that if the original decision was a bylaw or resolution that was rejected, the bylaw resolution is of no effect and is deemed to be repealed.

In regard to the existing authority for the presiding member to order that a person be expelled for improper conduct, section 117(2) of the proposed Charter provides that a peace officer may enforce the order as if it were a court order. This addresses circumstances where police forces stated that they would not enforce an improper conduct order without a court order, which often rendered the improper conduct order meaningless since a court order could not be obtained until some time after the meeting was over.

Bylaw Procedures

There is authority under section 122 for the adoption of a comprehensive municipal code or other general comprehensive bylaw, and clarification of the procedures for adopting such codes or bylaws.

The authority to revise bylaws under section 124, similar to the provincial enactments governing a statute revision, does not apply to municipal councils in any other jurisdiction.

Committees, Commissioners and other Bodies

There is clarification [section 129] that the authority to appoint a person to a committee or commission includes the authority to rescind the appointment and appoint another person. There is some clarification of the rules that apply to committees, commissions, advisory bodies and other entities.

Officers and Employees

The *Local Government Act* contains numerous provisions referring to the “municipal officer assigned responsibility under Section 196” or the “municipal officer assigned responsibility under Section 198”. The proposed Charter simplifies these references to, for example, “corporate officer”.

Termination of an officer would now require a vote of at least two-thirds of all council members, instead of a vote of only two-thirds of those present (section 137). The existing rule allows, for example, three out of seven council members to call a special meeting and, with a bare quorum of four, terminate the employment of the officer. This creates uncertainty, unpredictability and inequity for municipal officers, and in some cases major severance costs for the municipality concerned. The new rule would require two-thirds of all council members (e.g., five of a seven person council).

There is a new provision (section 138) prohibiting a person from hindering, obstructing or interfering with a municipal officer or employee in the exercise of their powers or the performance of the functions or duties. It would be an offence under Section 5 of the *Offence Act* for a council member to breach the confidentiality rule or for a person to hinder, obstruct or interfere with a municipal officer or employee in the exercise of their powers.

Under section 142 of the proposed Charter, a council may declare, or the Mayor may proclaim, a day of recognition to be observed in the municipality.

5.0 FINANCIAL MANAGEMENT (PART 6)

Financial Planning and Accountability

The proposed Charter would not alter the “financial management” provisions significantly, because there was a major rewrite that came into force in the year 2000 and because any substantial alterations might affect the integrity of the Municipal Finance Authority relationships with the bond rating agencies.

Under section 83(2)(a), the annual report must include the audited annual Financial Statements referred to in section 150(4).

The council remuneration and expenses reported under section 151 do not have to be included in the annual report.

Audit

Under the *Local Government Act*, the auditor could appeal termination to the inspector of municipalities, who could confirm or set aside determination. This appeal is not continued under the proposed Charter.

Expenditures, Liabilities and Investments

In light of the major rewrite that came into force in the year 2000, and the need to be sensitive to the integrity of the Municipal Financial Authority, there are no substantial changes in the area.

It is proposed, however, that the proposed Charter address two significant issues raised by numerous municipalities:

- ?? concerns about the approval process for borrowing under the *Local Government Act*, under which it is necessary to obtain four provincial approvals for one borrowing;
- ?? the requirement to obtain elector approval in respect of an agreement having a term in excess of five years if the Municipality incurs a liability under the agreement (section 334.1 of the *Local Government Act*). This applies to right of way agreements, covenants, agreements for letters of credit, easements, encroachment agreements, first nation servicing agreements and many other situations where a five-year limitation makes little sense. The five year limitation has also made it impossible to proceed with most proposed public private partnerships, under which developers expect a term of 25 or 30 years to repay financing and enjoy a return on investments (noting that the “partnering agreements” do not always work in the case of public private partnerships).

Accordingly, the Municipal Finance Authority, the Province of British Columbia and other interested persons are working on a major policy alternative that would protect the exceptional credit rating of the Municipal Finance Authority at the same time as making recommendations on substantive changes under the proposed Charter to:

1. establish a relationship between authorized debt and the capacity of the municipality to repay the debt;
2. streamline the borrowing process, so that, for example, only one provincial approval is required for each borrowing;
3. allow exemptions from electoral approval (formerly the counter petition initiative or the referendum, as the case may be), in the case of a number of classes of liabilities (e.g., liabilities incurred under agreements for more than five years);
4. facilitate public private partnerships;
5. change the counter petition initiative (now to be called the AAP) so that the new threshold is 10 percent instead of 5 percent, or consider thresholds that relate to community population (e.g., higher thresholds for communities having smaller populations).

Under section 169, the municipality would be able to invest in the securities of a greater board, even if it is not located within the geographical area or jurisdiction of the greater board.

Under the *Local Government Act* and the proposed Charter, a municipality requires the approval of the inspector to incorporate a corporation (other than a society) or acquire shares in a corporation. Under the proposed Charter, there is authority for a regulation to allow incorporation or share acquisition without the approval of the inspector. A municipality may under its natural person powers make arrangements for incorporation of a society. Section 170 makes it clear that the incorporation of the society does not require the approval of the inspector.

Although section 169 does not include the incorporation of a corporation or the acquisition of shares as a permitted investment, section 170(2) allows the incorporation or acquisition as an exception to the investment restriction under section 169.

Reserve Funds

The proposed Charter contains major changes. Under the *Local Government Act*, a reserve fund must be established for a statutory purpose, and a special reserve fund (e.g., operating funds or a fund to save money in anticipation of the Commonwealth Games) requires electoral approval. The proposed Charter would remove the requirement for electoral approval and that a reserve fund be for a statutory purpose. Section 171(1) says, simply, that a council may bylaw establish a reserve fund for a specified purpose. The two exceptions relate to park land and development cost charges. Section 171(2) provides that development cost charge receipts must be credited to a development cost charge reserve fund and park land receipts must be credited to a park land acquisition reserve fund.

On the expenditure side, reserve funds must be used only for the original purpose, except that a council may by bylaw transfer the amount to another reserve fund without any provincial approvals or electoral approvals if the amount is greater than required for the original purpose. The two exceptions, again, relate to park land and development cost charge reserves. Under section 172(5), a council may not transfer monies from a development cost charge reserve fund or park land acquisition reserve fund unless the bylaw is approved by the minister.

Otherwise, a transfer from a reserve fund established for a capital purpose may be made to another reserve fund established for a capital purpose under 172(4).

Under section 338(3) of the *Local Government Act*, a council member who is liable to the municipality for voting for a bylaw or a resolution authorizing the expenditure, investment or other use of money contrary to the Statute is subject to disqualification from holding municipal office for five years from the date of the vote. Under the proposed Charter, a council member would be disqualified from holding office for three years from the date of the vote.

6.0 MUNICIPAL REVENUE (PART 7)

Municipalities are providing, or are expected to provide, new services and facilities to fulfill local citizens' expectations, without having adequate powers or financial tools. The municipal share of the gross provincial product has increased during the past decade, while the provincial share has declined. Municipalities must finance many new services as a result of other

government offloading or abdication, yet municipalities continue to rely on property taxes and user fees. In some places, property taxes have hit a glass ceiling. Services such as public recreation are threatened by the absence of adequate financial resources. Municipalities do not have the money they need to replace infrastructure, promote or allow growth, treat sewage and drinking water, sustain transportation and transit systems, or provide the off-loaded services.

Previous provincial and federal governments have offloaded highways, bridges, law enforcement, emergency services, airports, ports and harbours. Previous provincial governments “confiscated” municipal revenues (e.g., speeding tickets) and eliminated other revenues (e.g., railway taxes).

In 1999, Professor Harry Kitchen presented a report to the Union of British Columbia Municipalities identifying new revenue sources to allow municipalities to diversify (that is, to become less reliant on the property tax and user fees).

Most of the recommendations in the Kitchen report are fulfilled by the recommendations in the white paper accompanying the proposed Charter. In the white paper, the provincial government acknowledges that municipalities require a more diverse spectrum of revenue sources. These include road tolls, hotel room tax revenue, fuel tax, local entertainment tax, resort tax, parking stall tax, and fees as a tax.

The provincial government is prepared to entertain other proposals.

In addition, the provincial government has reiterated its commitment to transferring 75 percent of traffic fine revenue to municipalities and to require crown corporations to make property tax grants in lien as if they were not exempt crown corporations.

In addition, it is anticipated that the forum for bylaw infractions (commonly referred to as “the bylaw Court”) would generate more revenues to participating municipalities.

Section 175 lists in one place all of the statutory revenue sources. Section 253 clearly provides that fines and penalties imposed and collected under municipal by-laws must be paid to the municipality and not kept in provincial general revenues.

For general certainty, section 177 provides that a council may impose a fee in respect of the use of municipal property, in respect of a service (which includes a work, facility, activity or service under the definition of “services”), or in regard to the exercise of regulatory authority.

[See Appendix 3, *A Comparison of New and Recent Municipal Acts of the Provinces and Territories: Revenue, Financial Powers and Resources*

Local Service Taxes

The proposed Charter would delete the archaic schemes relating to local improvement areas, specified areas and business improvement areas, and replace them with a simplified mechanism for imposing taxes on an area of the municipality for services, activities, work or facilities provided in relation to that area. The new streamlined scheme is entitled “local area services”.

With the approval of the electors under section 200, borrowing in relation to a local area service could be recovered outside the local service area.

Section 201 would simplify and clarify the procedure for enlarging, reducing or amalgamating local service areas.

Under section 181 the complex and always changing rules relating to assessment averaging and phasing will be included in a regulation instead of the statute.

Under Division 4, it will only be necessary to establish a “parcel tax roll review panel” if the municipality receives a complaint about the roll.

In keeping with the authority to provide services jointly with other municipalities or to establish regulatory schemes jointly with other municipalities, section 215 would allow a council to enter into a tax collection agreement with other taxing authorities.

Permissive Exemptions

The increased authority to make provision for property tax exemptions for governmental and not-for-profit land owners is new (section 207). More significantly, the Charter would eliminate the obligation to seek elector approval for permissive exemptions. The term of an exemption may not exceed ten years following notice of the proposed exemption by law under section 210.

The proposed Charter streamlines the statutory exemption authority in relation to heritage or riparian and property and partnering agreements (section 208). The section further expands a council’s authority to make an exemption agreement.

Section 209 proposes tax exemptions for industrial enterprises (major industry or light industry) if the industry is a new industry in British Columbia, the existing industry is proposing an expansion, or the existing industry requires the assistance in order to continue.

Under section 210, a council must give notice of a proposed permissive tax exemption bylaw in accordance with section 79 (the public notice section). The notice must identify the property, the exemption, the term and an estimate of the property tax that will be foregone. It is also necessary to include in the annual report under section 83(2) the amount of property tax revenue foregone in the year for each tax exemption provided by the council.

7.0 LEGAL PROCEEDINGS AND BYLAW ENFORCEMENT (PART 8)

Indemnity

Under section 249, there would be clear authority for a council to indemnify its municipal officials in respect of a fine imposed in relation to a strict or absolute liability offence. The procedure for indemnifying municipal officials has been clarified and streamlined.

Bylaw Enforcement

Under section 251, there is new authority to establish a minimum fine. Despite the *Offence Act*, there is also authority to establish a maximum fine up to \$10,000.00. As well, section 251 clearly allows imposition of a fine for each day that the offence continues (if it is a continuing offence).

Under section 281(4) of the *Local Government Act*, the municipality must serve the attorney general in relation to a civil proceeding to enforce, or prevent the breach of, a bylaw or resolution, relating to any damage to or interference with municipal property. The Charter would eliminate this requirement.

Municipal Ticket Informations

A council may designate any bylaw offence as an offence subject to the municipal ticket information scheme (unless the bylaw relates to firearms or a matter prescribed by regulation)[section 254(1)(a)]. There is no longer a requirement for approval of the provincial court chief Judge for the quantum of a fine under a municipal ticket information if the fine is less than the maximum established by regulation [section 251(3)]. As well, a municipal ticket information may now clearly result in the liability of the accused for a fine for each day that the offence continues (if it is a continuing offence).

Remedial Action

The section formerly referred to as “dangerous erections “, which was the subject of the Supreme Court of Canada decision in *Rascal Trucking v. Nanaimo (City)*, has been expanded to include buildings, structures, erections, openings in the ground, drains, ditches, water courses, ponds, surface water or other matters or things, as well as any matter or thing that is in or about any matter or thing referred to in the previous list. The proposed Charter has combined the “bringing up to standard” authority under section 698 of the *Local Government Act* with the “removal of dangerous buildings and other structures” provisions under section 727 of the *Local Government Act*, to create a simplified, streamlined code (section 264 – 271). The remedial action is subject to notice and timing rules, the right of a person affected to seek a review by the council or by the Supreme Court, and stipulation of deadlines for compliance.

There is authority in section 265 for the council to declare that restoration work is required if a person has obstructed, filled up or damaged a ditch, drain, creek or water course or has damaged or destroyed a dike or other drainage or reclamation work.

Entry Warrants

There is new authority for a council to obtain a warrant authorizing a municipal official or agent to enter on property and conduct an inspection (section 272). (This process is currently subject to a time consuming, expensive and complex scheme under the *Offence Act*).

Bylaw Courts

The Ministry of Attorney General has released a report, in relation to the Charter process, dealing with the creation of a bylaw court to be established in the nature of a “community based forum” to hear disputes arising from bylaw infractions.

The forum for bylaw infractions would not require provincial court judges to sit on matters and would not require lawyers to prosecute or defend bylaws. A bylaw infraction forum could be established in an informal setting in times convenient to the public. The forum would have the authority to impose monetary levies.

Building Regulation Liability

Municipalities and the municipal insurance association have raised concerns about joint and several liability [as a result of the *Canlan v. Delta* case and other cases]. The Ministry of Attorney General is reviewing joint and several liability as well as limitation periods.

Further to the experience of the City of Vancouver in relation to certified professionals and the experience of other municipalities in relation to registered professionals, the Ministry for Advanced Education is preparing a paper in the question of professional liability insurance for design professionals. Further to this, the Ministry of Community, Aboriginal and Women's Services is reviewing provincial policy in relation to municipal reliance on certified or registered professions for inspections and product certification.

8.0 GOVERNMENTAL RELATIONS (PART 9)

Municipal – Provincial Relations

The Nova Scotia and proposed Ontario municipal legislation require unlimited consultation between the provincial and local governments. Part 9 of the proposed Charter would require and facilitate consultation between the municipal and provincial governments in a way that is unprecedented in any provincial or territorial legislation.

Under section 276, the minister responsible must consult with representatives of the Union of British Columbia Municipalities before the provincial government proposes the amendment or repeal of municipal legislation or reduces the amount of revenue transfers. "Consultation" is defined as the provision of sufficient information respecting the change and allowing the UBCM representatives sufficient time to consider the proposed change and provide comments to the minister. Section 273 obligates the minister to consider the comments provided by the representatives and, if requested, to respond to the comments.

Section 277 empowers the minister responsible and the UBCM to enter into an arrangement respecting consultation on inter-provincial, national or international issues or agreements; provincial or municipal enactments, policies and programs; or any other matter that affects local governments (including municipalities and regional districts).

If the UBCM requests, the minister must engage in negotiations respecting an arrangement made under section 277 and must use all reasonable efforts to reach agreement in negotiating an arrangement under that section.

Under section 278, any municipality affected may apply to court to enforce an obligation under section 276 or 277.

Section 279 provides that the lieutenant governor council may not incorporate a new municipality (amalgamating two or more existing municipalities) unless the incorporation is approved by a vote in each of the existing municipalities.

Dispute Resolution

Under section 285, if a dispute arises between a municipality and either another municipality or regional district or a provincial government (or a crown corporation) and the parties can not resolve the dispute, one or more may apply to a provincially designated officer to help resolve the dispute. The officer acts as a "traffic cop" to refer the matter to the appropriate avenue, and he or she may assist the parties to allocate costs.

If the parties agree, they may proceed by way of binding arbitration to a final proposal arbitration process under section 288 or a full arbitration under section 289.

Under section 287, mandatory binding arbitration applies to disputes between municipalities dealing with inter municipal boundary highways, transecting highways, bridges and water courses. The former involvement of the minister of highways (now the minister of transportation) would be eliminated.

Provincial Regulations

Under section 280, the lieutenant governor in council may by regulation provide exemptions of approval requirements under any enactment.

9.0 PRINCIPLES AND INTERPRETATION (PART 1)

Principles of Local Self Government

The principles of local self government, based on the principles articulated by the Union of British Columbia Municipalities in 1991, the International Union of Local Authorities in 1994 and the Federation of Canadian Municipalities in 1997, are set out in section 1. These principles are contained in the legislation itself. They are not in an enforceable instrument such as the 1996 Recognition Protocol, and not in a mere Bill provision that is deleted from the new legislation itself on proclamation in force (as in the case of Bill 31, 1998). This is the first local government legislation in Canada that contains the principles of local self government in a provision of the statute.

Section 1(1) of the proposed Charter provides that municipalities and their councils are recognized as an order of government within their jurisdiction. Under the *Constitution Act 1867*, the provincial order of government is given responsibility for "municipal institutions" among other things. Municipalities are not recognized in the Constitution as an order, and the courts have held that municipalities are creatures of the province having only the powers granted by the province. Since the proposed Charter is subject to the Constitution, the effect of section 1(1) is that the Province of British Columbia is enacting legislation that has the effect of treating municipalities as if they were an order of government to the extent they act within their powers and jurisdiction. This is the first provincial or territorial municipal act that contains such recognition.

The recognition is not contained in a mere recital. It is open to a court to consider the weight of section 1 when considering the validity of municipal bylaws or resolutions. This recognition arises in the context of recent Supreme Court of Canada decisions addressing municipal regulator powers. The courts have said:

- ?? this is an era in which municipal powers are viewed through the “lens of the doctrine of subsidiarity”. That is, such powers ought to be held by that government that is nearest to those served, and closest to the distinctiveness of local preferences.
- ?? the courts should not usurp the powers of democratically elected local government officials.
- ?? municipal powers should be interpreted broadly to give municipal councils adequate powers and discretion.

The principles are:

- ?? municipalities are democratically elected, responsible and accountable; democracy, responsibility and accountability are amplified in Part 4 (Public Participation and Council Accountability) and throughout the proposed Charter to balance expanded powers;
- ?? municipalities are established and continued by the will of their residents; this has a number of implications, including that the legislation makes it clear that the provincial government will not force amalgamations without the consent of the electors in the affected municipalities (section 279);
- ?? municipalities and their councils provide for “municipal purposes” of their communities; this principle reinforces that the “municipal purposes” set out in section 6 that govern the Act are subject to the discretion of the municipalities and their councils;
- ?? municipalities need adequate powers and discretion to deal with community needs, now and in the future; although existing legislation is based on the traditional policy of legislating in an express, detailed, prescriptive manner,
 - the broader grants of power and discretion found in the proposed Charter will enable councils to meet future needs without going back to the legislature for major amendments every year, and
 - the courts may take into account the provision that the powers and discretion are intended to be adequate without more;
- ?? municipalities have authority to determine the public interest of their communities; the proposed Charter would eliminate most provincial government approvals of local government actions and provide for increased and broader powers and discretion (and this provision echoes the indications by the Supreme Court of Canada that it will not interfere with the local government determination of its own public interest when acting within its powers);

- ?? adequate financial and other resources; the proposed Charter (noting the discussion in the White Paper) will provide for additional financial and other resources to enable municipalities to diversify revenue sources, become less dependent on the property tax and fees, and compete on a level playing field with other municipalities in a world that is becoming increasingly characterized by globalization;
- ?? municipalities have autonomy to determine their own levels of municipal expenditures and taxation; this is carried out in the proposed Charter, particularly Part 6 (Financial Management);
- ?? municipalities may provide effective management and service delivery in response to their unique community needs; the proposed Charter contains numerous changes allowing flexibility and autonomy with respect to management and service delivery.

Municipal-Provincial Relations

Other provincial statutes are silent on the question of municipal-provincial relations. (The Nova Scotia and Ontario Acts call for some degree of consultation in general terms.) Section 2(2) sets out the principles governing the relationship between municipalities and the provincial government, including that of mutual respect [section 2(2)(a)]. Further to this principle, for the first time in Canada, the provincial government will be causing Crown corporations to pay the equivalent of municipal taxes, charges, fees and levies (page 19 of White Paper), and the provincial government has, prior to preparation of the draft Charter, directed Crown corporations to comply with local government bylaws and to develop a long term compliance program (page 25 of White Paper).

The second principle on municipal-provincial relations calls for consultation on matters of mutual interest [section 2(2)(b)]. The proposed Charter provides for consultation in relation to changes to the Charter [section 276(1)(a)]; changes to other legislation or regulations, policies or programs [section 276(1)(a) and 277(1)(a)]; revenue transfers [section 276(1)(b)]; interprovincial, national or international issues or agreements [section 277(1)(b)]; or other matters that affect local governments. As well, the minister responsible and the UBCM are required to engage in negotiations respecting arrangements for consultation and must use all reasonable efforts to reach agreement [section 277(2)(b)].

The third intergovernmental principle is that of ensuring that there will be provision for resources for municipalities to fulfill any new responsibilities assigned to them [section 2(2)(c)]. Under our constitution, there is no legal mechanism for “outlawing offloading”. The Legislature cannot fetter its discretion. The principle of the Province being obligated to provide for resources related to new responsibilities will, however, address some concerns expressed by municipalities with respect to offloading and will, in some cases, provide municipalities with an argument that a provincial administration decision is vulnerable on the basis of the doctrine of “legitimate expectations”.

The other new principle is that of the provincial government and municipalities attempting to resolve conflicts by consultation, negotiation, facilitation and other forms of dispute resolution [section 2(2)(g)]. Dispute resolution processes are set out in the proposed Charter, providing

avenues for the provincial government and municipalities to attempt to resolve conflicts without necessarily going to the courts. In some cases, this might result in speedier and more cost effective dispute resolution.

Interpretation

Section 3(1) gives the reader (including the courts) a clear statement of the intent of the legislature with respect to how the proposed Charter and remaining provisions of the *Local Government Act* must be interpreted. This interpretive tool is in keeping with the recent decisions of the Supreme Court of Canada in cases such as *Spraytech v Hudson (Town)*. In recent years, the courts have moved in the direction of giving local government legislation a broader interpretation. The legislative intent is much more clear and much more directed to broad interpretation than under Section 3 of the *Local Government Act*. The new section 3(1) not only provides that the legislation must be interpreted broadly but provides further that the legislation must be interpreted broadly to give municipalities and councils adequate power and discretion to address existing and future community needs, determine local public interest, and otherwise fulfill their municipal purposes [again tying the interpretation to the broad definition of municipal purposes set out in Part 2 that is in turn subject to the will and discretion of the council under section 1(1)(c)].

The definitions and other interpretation rules are set out at the end of the draft Charter in a schedule. This gives the Charter special status in comparison with almost all other provincial legislation and, with the Principles, Purposes and Fundamental Powers, gives the Charter the “look” of a constitution as opposed to a routine Act of the legislature.

Donald Lidstone

APPENDIX “1”

THE HUDSON CASE

Case Comment by Donald Lidstone of Lidstone, Young, Anderson

The case arises in an era in which matters of government are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. ...the so-called “Brundtland Commission” recommended that “local governments [should be] empowered to exceed, but not to lower national norms”. [L’Heureux-Dube J., Reasons for Judgment, Hudson]

Introduction

The Supreme Court of Canada in *114957 Canada Ltee (Spraytech, Societe d’arrosage) v. Hudson (Town)* 2001 (S.C.C.) 40 (June 28, 2001) (“*Hudson*”) confirmed that local government “omnibus” powers ought to be given a broad interpretation. The Supreme Court also confirmed that federal or provincial enactments supersede a local government bylaw only if there is a direct conflict between the local government bylaw and the laws of the other governments, or if the provincial legislation precludes local government regulation in the field.

Hudson is a landmark municipal law decision because it is indicative of the scope of a local government’s powers under “omnibus” or “general welfare” empowerment provisions of a provincial statute governing municipal authority. Such provisions are found in recent municipal legislation enacted by Yukon Territory, Alberta, Manitoba and Nova Scotia, as well as in the proposed British Columbia Community Charter. Although the *Hudson* bylaw addressed pesticides, the *Hudson* reasons for judgment set out principles for discerning the validity of local government bylaws under an omnibus grant of authority.

The case is also a valuable precedent in that it diminishes the extent to which a collision will be found between local government bylaws and legislation or regulations of the federal or provincial governments. Unless the provincial legislation is intentionally pre-emptive of municipal regulation in the field, or a citizen must violate a federal or provincial enactment in order to comply with the bylaw, the bylaw may be found to co-exist with the other governments’ laws in the same field.

The Supreme Court of Canada applied the “precautionary principle” of international law, on the basis that statutory or bylaw construction should reflect values of international law. The principle is that environment measures must foresee and prevent future environmental degeneration, despite the absence of full scientific certitude. This part of the decision may be applied in future cases dealing with validity of health or environment laws.

Facts

In 1991 the Town of Hudson, located 40 km west of Montreal, enacted a bylaw to limit pesticide use to prescribed locations and for specified purposes. The Quebec municipal legislation, the *Cities and Towns Act* (“CTA”) empowered a Council to make bylaws to “secure peace, order, good government, health and general welfare in the territory of the municipality”.

The bylaw prohibited pesticides generally, and then by way of exceptions permitted pesticide use by farmers for agriculture or horticulture; on a golf course for a grace period of five years; to control or destroy insects biologically; or in certain enumerated cases (eg, in a swimming pool or to purify water).

In 1992, the appellant landscaping and lawn care businesses were prosecuted by the Town and commenced an application for a declaration that the bylaw was invalid and beyond the powers of the Town. The Quebec Superior Court and Court of Appeal refused the application for the declaration, holding that the pesticide bylaw was enacted within the Town’s statutory powers.

Authority to Enact Bylaws

The Supreme Court of Canada held that a general welfare provision may be interpreted broadly to find a municipal bylaw valid. The Court relied on the omnibus provisions of the CTA. The Court identified analogous provisions in the local government enabling statutes of other provinces and territories, and confirmed that such “opened ended” provisions empower municipalities to respond promptly to immediate local needs without the necessity of amending provincial or territorial municipal statutes.

The Court started with the traditional premise that local governments may only exercise powers granted by the legislatures. They do not have residual or plenary powers of the provinces or territories unless such powers are conferred by statute. A “general welfare” or omnibus provision, however, empowers local governments to act within “the ambit of normal local government activities”. In this case, there was a “general welfare” provision in the CTA [“peace, order, good government, health and general welfare”], and the subject bylaw was accordingly valid because it addressed the protection of “health” (the local environment) within the community.

The authority for a provincial government to delegate residual or plenary powers to a municipality can be traced to the decision of the Judicial Committee of the Privy Council in 1883 in *Hodge v. The Queen*. In that case, which dealt with the authority of the Ontario Legislature to delegate to a Board of Commissioners authority to enact liquor regulations, the JCPC stated that the *British North America Act* (now the *Constitution Act*, 1867) conferred:

“...authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make bylaws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into

operation and effect... How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for the courts of law, to decide.”

The JCPC decision in *Shannon v. Lower Mainland Dairy Products Board* (1938) was to the same effect. In *Hudson*, the CTA was enacted within the authority of the Quebec Legislature and the province had the authority to delegate the “health” legislative power to the municipalities.

The majority judgment, written by L’Heureux-Dube J., quoted with approval the statement of now Chief Justice McLachlin in *Shell v. Vancouver* [also quoted in the Supreme Court of Canada decision in *Nanaimo v. Rascal Trucking*] as follows:

Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold...Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

Although the CTA contained express, detailed powers to prohibit the storage or use of listed dangerous or toxic materials such as gun-powder, nitro-glycerine, and other “combustible, explosive, corrosive, toxic or radioactive or other materials that are harmful to public health or safety”, the Court found that the bylaw did not deal with the types of materials enumerated. This is because the bylaw repeated the definition of “pesticides” set out in the provincial *Pesticides Act* and because pesticides are different from the toxic materials listed in the bylaw both in the way they were described in the bylaw and according to the evidence before the Court. If a matter is specifically provided for in the statute, the specific provisions apply instead of the “general welfare” provisions [*R. v Greenbaum* (Supreme Court of Canada)]. Accordingly, since the specific powers did not apply to pesticides, the Court found that the bylaw was enacted under the general welfare or omnibus provision.

This rule of statutory construction, to the effect that the specific supersedes the general, is subject to express interpretative provisions in statutes. For example, section 3(2) of the *Local Government Act* (British Columbia) provides that if the statute confers a specific power on local governments in relation to a matter that can be read as coming within a general power also conferred by the Act, the general power is not to be interpreted as being limited by the specific power. This interpretative approach has been continued in the proposed *Community Charter*, which contains a number of omnibus, general welfare empowerment provisions in respect of municipal regulatory bylaws.

In the reasons for judgment, the Supreme Court of Canada identified provincial and territorial municipal legislation provisions analogous to the omnibus provision in the CTA:

...see *Municipal Government Act*, S.A. 1994, c. M-26.1, ss. 3(c) and 7...*Municipal Act*, S.M., 1996, c. 58, C.C.S.M. c. M-225, ss. 232 and 233; *Municipalities Act*, R.S.N.B. 1973, c. M-22, s. 190(2), First Schedule; *Municipal Government Act*, S.M.S. 1998,

c. 18, s. 172; *Cities, Towns and Villages Act*, R.S.N.W.T. 1988, c. C-8, ss. 54 and 102; *Municipal Act*, R.S.O. 1990, c. M 45, s. 102; *Municipal Act*, R.S.Y. 1986, c. 119, s. 271.

This will enable municipalities to consider enacting bylaws under general welfare provisions that the Supreme Court of Canada has identified.

Conflict with Federal and Provincial Legislation

The court applied the “impossibility of dual compliance” test in response to the appellants’ submission that there were operational conflicts between the bylaw and the federal *Pest Control Products Act* (and regulations) and the *Quebec Pesticides Act*. The test applied was whether there is an actual conflict such that compliance with one order of government’s enactment would necessitate a contravention of another. In this regard, L’Heureux-Dube J. quoted with approval the following statement from *B.C. Lottery Corp. v. Vancouver*:

A true and outright conflict can only be said to arise when one enactment compels what the other forbids.

The federal legislation was permissive, dealing with import, export, sale, manufacture, registration, packaging and labelling. There was no operational conflict with the bylaw. The provincial legislation set up a permit and license scheme for vendors and commercial applicators. Accordingly, the Town’s pesticide bylaw was valid because compliance with the bylaw would not require a breach of the provincial legislation.

The “impossibility of dual compliance” test was applied since no provincial statute precluded municipal regulation in the field. This test determines whether compliance with one law necessitates breach of the other. This allows bi-level or tri-level regulation over the same subject matter by different orders of government. This was applied in a 2001 case respecting smoking bylaws: *Pub and Bar Coalition of Ontario v. Ottawa (City)*.

In regard to other enactments precluding municipal occupation of the field, the court quoted with approval Dickson J. in *Multiple Access Ltd. v. McCutcheon* in relation to conflicts with federal laws:

...there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says “yes” and the other says “no”; the same citizens are being told to do inconsistent things; compliance with one is defiance of the other.

In regard to the issue of express provincial statutory preclusion of municipal regulation in the field, the court found no evidence that the Legislature intended to pre-empt municipal regulation of pesticide use.

Discrimination

The court found that, although there was no express statutory authority for the council to discriminate by bylaw, the bylaw was enacted to prohibit purely aesthetic pesticide applications

and to allow other uses (e.g., for agriculture). The distinctions in the bylaw were valid since they were necessarily incidental to the exercise of the express powers granted by the province.

Precautionary Principle

The Supreme Court of Canada in *Hudson* for the first time invoked the “precautionary principle” of international law:

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. (Berger Ministerial Declaration on Sustainable Development, para. 7)

In *Hudson*, the court noted that, in the context of the precautionary principle, the Town’s intent in its bylaw to anticipate and prevent deleterious impacts of pesticides satisfied the principle of “preventive action”. Accordingly, the Court found that Hudson could exercise its powers in relation to the health of the community whether or not there was scientific proof that pesticides were an environmental risk.

Principles

The *Hudson* decision is significant for a number of reasons.

First, the case is authority for the proposition that municipalities may rely on “general welfare” provisions to pass bylaws relating to health and the environment (eg, pesticides, pollution, etc.). The case indicates how the courts might interpret these sorts of provisions in the future. Second, municipal bylaws are less likely to be struck down simply because their subject matter is already addressed by other orders of government. Third, a court may imply from the empowering statute necessarily incidental powers for a Council to discriminate by bylaw. Finally, the domestic courts to uphold health or environmental bylaws may invoke the precautionary principle of international law.

The case reinforces previous Supreme Court of Canada decisions that local government powers must be given a broad interpretation. Further to this deference, the Court stated that the principle of subsidiarity might be called upon to emphasize the important role of municipal government in addressing the needs and desires of citizens.

APPENDIX 2

A Comparison of New and Proposed Municipal Acts of the Provinces

May 31, 1999

Prepared for the 1999 Annual Conference of the
Federation of Canadian Municipalities
held in Halifax, Nova Scotia
by Kristen Gagnon, Colleen Burke and Donald Lidstone
of Lidstone, Young, Anderson, Barristers & Solicitors
1616 - 808 Nelson Street, Box 12147 Nelson Square
Vancouver, British Columbia V6Z 2H2

**COMPARISON OF NEW AND PROPOSED
MUNICIPAL ACTS OF PROVINCES**

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1.0 INTRODUCTION

1.1 Introduction

This is the first in a series of three comparisons of recent or proposed provincial statutes governing municipal institutions. This deals with the principles of local self-government. The second will compare the enactments on the basis of financial issues. The third will analyze in detail the delegation of powers.

The Canadian constitution does not recognize local governments as an order of government, despite expectations on the part of local citizens that municipal institutions act as if they constituted a level of government. That municipalities are mere creatures of provincial statute has resulted in collisions between local interests and provincial policy in a number of areas.

In order to meet emerging local needs, municipalities are forced to ask their provincial governments for new powers (e.g., public private partnership agreements), yet their provincial creators' response is too often to refuse or delay. Recently, provinces have eroded local powers or confiscated local tax revenues (e.g., British Columbia municipal taxation on railways) without effective consultation. The absence of rich consultation on matters affecting communities (e.g., First Nation treaty negotiations); the increased transfer of senior level services (e.g., airports, ports, health and welfare); and the reduction or elimination of revenue sharing or transfer payments have further eroded the capacity of municipal institutions to manage local public affairs.

In the context of proposals for future constitutional change, local governments must be careful to articulate local interests and needs in a way that will result in formal recognition as an order of government with enumerated powers. In the meantime, it will be necessary for the provinces to enact legislation to expand the jurisdiction and capacity of municipal institutions, permit greater local autonomy, force meaningful consultation and permit greater innovation.

1.2 Bill of Rights for Local Government

"Local self government" refers to the liberty of a local governing body to act autonomously to provide for local needs (IULA, Article 2; European Charter, Article 3(1)).

The principles of local self government are:

1. local bodies may act or exercise power in relation to any matter that is not expressly excluded from their competence or exclusively delegated to another entity (IULA, Article 3(2); European Charter, Article 4(2); AMO, 1994, p. 8);
2. local governments must participate in decision making by other levels of government which has local implications (IULA, Article 3(6); European Charter,

Article 4(6); AMO, 1994, p. 9; UBCM, 1992, Article b);

3. powers given to local bodies must be complete and exclusive so as not to be subject to adverse intervention by other levels of government (IULA, Article 3(3); European Charter, Article 4(4); UBCM, 1992, Article d);
4. local governments must have full discretion to exercise their powers to meet local conditions and the powers must be adequate to meet local needs (IULA, Article 3(5); European Charter, Article 4(5); AMO, 1994, p. 9);
5. the dissolution of local elected bodies or changes in local authority boundaries must only be made in accordance with due process of law, with full consultation with the local authority, and by way of a referendum where permitted by the law (IULA, Article 4; European Charter, Article 5);
6. local bodies must have adequate financial and legal resources to provide good government and services locally (IULA, Article 8; European Charter, Article 9; AMO, 1994, p. 9; UBCM, 1992, Article c).

Generally, these principles of local self government have not been recognized in the Canadian Constitution or in the provincial legislation governing local authorities (with the exception, in respect of several of the principles, of the Alberta *Municipal Government Act* and the Manitoba *Municipal Act*).

During the past 15 years, the Canadian obsession with the constitutional division of powers has directed the attention of local governments to their subordinate legal and constitutional status. Local authorities' concerns have been elevated by the widespread acceleration of senior government delegation of duties and responsibilities to local governments (e.g., airports, ports and harbours, highways and bridges, health and welfare).

In response to these trends, the UBCM 1991 to 1993 conventions approved a policy paper entitled "Local Government and the Constitution" (UBCM, 1991) which recommended seven elements that would constitute legal recognition of local government:

1. guaranteed access to provincial decision making;
2. consultation on all matters affecting local governments;
3. an amending formula for local government legislation;
4. joint decision making on areas of shared responsibility;
5. negotiation of conflicts;

6. ensuring local government jurisdiction is respected by provincial ministries, crown corporations and agencies; and
7. ensuring adequate financial resources are provided for any new delegated responsibilities.

In response to concerns about the subordinate legal and constitutional status of local authorities and about federal and provincial downloading, AMO has published the "Ontario Charter: A Proposed Bill of Rights for Local Government". "The Charter would ... establish a municipal agenda for reform which would be implemented through provincial legislation, policies, programs and practices" (AMO, 1994, p. 1). This agenda comprises the following:

1. local autonomy, local participation in provincial decision making, and the principles of local self government;
2. permissive legislation for local authorities;
3. formalization of the provincial-municipal relationship; and
4. enabling local citizens and authorities to provide good government and services in effective and innovative ways.

Local authorities may only accede to autonomy and to recognition as an order of government through constitutional change. Most of the principles of local self government enunciated by IULA and the Council of Europe can only be realized as a result of an amendment to the *Constitution Act, 1867*. To the extent there is not an adequate public appetite for such change during the next round of constitutional talks, local citizens and authorities will have to be satiated with protocols and entrenchment structures that strive to approximate the international principles of local self government in the context of the existing Constitution, pursuant to which local governments suffer a subordinate, delegated legal status.

1.3 Historical Evolution

The duties and responsibilities of local authorities across Canada differ from those reflected in the 1849 *Baldwin Act*. The Act first established the role, function and structure of local authorities in what became Canada. Every provincial statute across Canada that creates and empowers local governments (with the exception of the *Alberta Municipal Government Act*) derives from the *Baldwin Act*.

When the *Baldwin Act* was enacted, the principal local government issues were drunkenness and profanity, the running of cattle or poultry in public places, itinerant salesmen, the repair and maintenance of local roads, and the prevention or abatement of charivaries, noises and nuisances.

Today, local authorities own and operate hospitals, waste treatment plants, airports, public housing, hydroelectric plants, telecommunication systems, libraries, computer labs and performing arts centres. Local authorities now provide such services as AIDS hospices, homeless shelters, hot lunch programs for school children, economic development, toxic waste remediation, recreation programs and building inspection.

These duties and responsibilities are evolving in the face of legislation and structures that have not varied from a model anchored to the needs of the mid-1800's.

1.4 Constitution

Section 92(8) of the *Constitution Act, 1867* assigns control over "municipal institutions in the Province" to the provincial governments. The provinces have delegated to local governments the power to control local matters.

Constitutionally, the municipal institutional authority to regulate the private use of land is a provincial power under the "property and civil rights" heading in Section 92(13) of the *Constitution Act, 1867*. Accordingly, the laws controlling land use are primarily provincial, although there are exceptions created by federal control over lands used for Indian reserves, airports, railways, harbours and other purposes regulated by federal law.

The delegation to local governments is not absolute. The Province of British Columbia, for example, has retained power to regulate subdivision and land use through its own officers and boards in specific situations (e.g., under the *Agricultural Land Commission Act R.S.B.C. 1979, c. 9*) and has also retained a general exemption for its own activities, through Section 14 of the *Interpretation Act R.S.B.C. 1979, c. 206*:

- 14.(1) Unless it specifically provides otherwise, an enactment is binding on Her Majesty.
- (2) An enactment that would, except for this section, bind or affect the Crown in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, does not bind or affect the Crown.

Although the primary source of authority for local government is the *Municipal Act* in most provinces, there are also hundreds of other provincial statutes and regulations that delegate power to communities. "Approximately 150 pieces of provincial legislation dictate the operation of municipal government in Ontario" (AMO, 1994, p. 7).

Individual municipalities also receive unique powers through special Acts. The City of Vancouver has a unique system of land use control, established under the *Vancouver Charter S.B.C. 1953, c. 55*. Part 27 of the Charter grants planning powers to the City in terms

substantially different from those set out in the British Columbia *Municipal Act*.

A province may confer on a local government only the powers the province holds under the *Constitution Act, 1867*. Municipal corporations are merely instrumentalities of the senior level of government for the more convenient administration of local government [*Lynch v. Can N.W. Land Co.* (1891) 19 S.C.R. 204 (Supreme Court of Canada)].

There is no constitutional recognition of municipal institutions as a level of government. They are creatures of provincial statute with only the powers conferred on them by the province. Municipal authority is restricted either through the withholding of powers or the imposition of limits on the exercise of the powers granted to them: *McCutcheon v. Toronto* (1983) 41 O.R. (2d) 652.

Limits on the exercise of municipal powers include requirement to obtain the approval of the provincial Lieutenant Governor in Council, Minister or other authority and express prohibitions or conditions applicable to the exercise of powers. Accordingly, a municipality under the traditional regime of provincial "Municipal Acts" is nothing more than a "public corporation created by the government for political purposes and having subordinate or local powers of legislation": *Hatch v. Rathwell* (1909) 12 W.L.R. 376 (Manitoba Court of Appeal).

In the context of the ongoing constitutional debates and concerns about senior government downloading and about municipal responsibilities exceeding express powers, the UBCM and AMO would like to see local governments recognized as an order of government. This object is inimical to the existing paternalistic constitutional structure and the traditional top-down approach to addressing social and political issues. It is the position of the UBCM and AMO that the existing structures and approaches do not reflect citizens' increasing reliance on local government to act on matters that were traditionally the province of senior levels of government. In *Local Government and the Constitutions* (UBCM, 1991), the UBCM expressed the need for constitutional amendments that recognize municipal institutions as an order of government. Provincial prerogatives to legislate in the local government sphere would be preserved and Canada would be required to take into account the interests of local government in exercising federal powers.

In "Ontario Charter: A Proposed Bill of Rights for Local Government" (AMO, 1994), AMO proposed a municipal agenda for reform to recognize municipalities as an order of government and to revitalize local political institutions (AMO, 1994, Preface). AMO, and the Provinces of Alberta, Manitoba, Ontario, Nova Scotia and Newfoundland have approached municipal institution modernization by way of reforming provincial legislation respecting local authorities under the existing Constitution.

Whether the revitalization and modernization of local government institutions occurs by way of constitutional change or mere legislative reform will depend on the capacity of local citizens to alter the constitutional amendment agenda.

1.5 Recent and Proposed Municipal Acts of the Provinces

Some provinces have taken steps to adjust their legislative regime to permit local self government. In 1994, Alberta enacted the *Municipal Government Act* which gives municipalities "natural person" powers and broadly enables municipalities to exercise, in their discretion, a wide range of permissive powers (as opposed to a limited number of express powers, as found in the legislation of other provinces). The problems with the Alberta approach are that it does not amount to a fundamental change of the Alberta Constitution, there is no entrenchment of the municipal legislation (e.g., by way of an amending process), there is no commitment to consultation prior to future change, and many powers require provincial approvals.

In October 1996, Manitoba enacted the *Municipal Government Act*. The Manitoba legislation is less empowering than Alberta's. The Manitoba Act does not give municipal governments "natural person" powers. Although the Manitoba legislation broadly enables municipalities to exercise their discretion by a wide range of permissive powers, the range is narrower in scope than is the case in Alberta.

Amendments to Nova Scotia's *Municipal Government Act* through Bill 47, which passed 3rd reading on December 3, 1998 followed a review of a "Working Paper in Legislative Form" proposed in 1997. The stated purpose of the new Act is to "give broad authority to councils" respecting bylaw making and to enhance their ability to respond to present and future issues. It does not give municipal governments "natural person" powers, or broad spheres of jurisdiction, but rather continues to authorize a limited number of specified and express powers.

British Columbia executed a "Recognition Protocol" in 1996 with the Union of British Columbia Municipalities (UBCM) that recognized local government as an "independent, responsible and accountable order of government". During the same years, however, the province unilaterally eliminated municipal grant guarantees, reduced grants, transferred major highway responsibilities and closed local courthouses without meaningful prior consultation with municipalities. The wording of the Protocol was incorporated into the *Municipal Act* through amendments which came into force in September, 1998. Its stated purpose is to provide a legal framework for local governments to gain power, and flexibility to represent and respond to the various and changing needs of their communities.

On March 10, 1997 Ontario released a discussion paper outlining a new *Municipal Act* and in 1998 the province released a draft *Municipal Act*. The proposed legislation would give municipalities "natural person" powers and broadly enabling spheres of jurisdiction (e.g., public utilities). Within those spheres, municipal governments could act or exercise powers from a comprehensive "tool kit" (e.g. expropriate).

In 1997, the Newfoundland Minister of Municipal and Provincial Affairs asked the cities to propose new legislation to be considered by the province for enactment in the fall of 1998

respecting cities. Any city could opt into the new legislation once enacted. The province and the provincial association struck a committee to develop a separate statute governing the smaller committees.

Yukon Territory assented to Bill 69 in December, 1998, for a *Municipal Act* which states in its preamble its goals of establishing "partnership, mutual respect and trust between the Government of the Yukon and the Association of Yukon Communities." The former is stated as wishing to "empower municipal governments with the authority necessary to effectively govern in the new millennium". In Section 2 of the Act, the purpose is worded somewhat more modestly: It is to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, to represent and respond with flexibility to the various interests, needs, and changing circumstances of their communities.

2.0 ISSUES

2.1 Introduction

Whether a provincial enactment gives effective legal recognition to local government under the principles of local self government may be determined by looking at the criteria developed by the UBCM in the policy paper *Local Government and the Constitution*, UBCM 1991. These are, to paraphrase, whether the delegating statute provides for:

1. consultation on matters affecting local government,
2. amending local government legislation,
3. joint decision-making powers in areas of shared responsibility,
4. provincial compliance with municipal regulations, and
5. delegation of adequate powers.

2.2 Consultation on Matters Affecting Local Government

If local governments are to be effective under the principles of local self government, they must be recognized as authoritative within the sphere of delegated power in the eyes of the populace they serve and of the courts. This authority is undermined if local government representatives are excluded from provincial decision making which affects operations at a local level. The legitimacy of provincial decisions or arrangements is also undermined where lack of local consultation results in policies which are hostile to the interests of particular (e.g., local) segments of the provincial population. Conversely, the democratic process is enhanced through decision making in which the voices of local governments are heard.

While numerous statutes provide for consultation between the province enacting the legislation and the parties affected, provincial statutes cannot remove the provincial prerogative to act, despite the outcome of the consultation. Under the existing constitution, the discretion of the provincial legislatures cannot be fettered. The provinces may, however, impose procedures on themselves.

The British Columbia *Miscellaneous Statutes Amendment Act*, Bill 55, 1995, for example, provides in Section 3, with respect to an amendment to the *Assessment Act*, that the Lieutenant Governor in Council may make related regulations only after consultation with the Union of British Columbia Municipalities. It should be noted, however, that this mention of consultation does not remove the provincial prerogative to act. Instead, it prescribes how the legislation is to be implemented and how affected communities may minimize negative implications. A 1998 amendment to the *Municipal Act*, at Section 4, describes a recognized "need" for notice and consultation for Provincial government actions that directly affect local government interests. There is no overarching requirement for the province under the Act to consult with affected communities before making legislative changes.

2.3 Amending Local Government Legislation

As the body that serves the needs and meets the expectations of local citizens, it is crucial that a local government has input into the amendment of local government legislation. Consultation lends legitimacy to the actions of both the provincial authorities and the local governments they empower. Input which need not be incorporated into decision-making, however, may only legitimize, and thereby entrench, a process without substance.

This concern is not addressed by Alberta's otherwise progressive *Municipal Government Act*. In the Canadian Parliamentary tradition, the Alberta Legislature has reserved to itself the prerogative to amend the local government legislation. In fact, six months after the *Municipal Government Act* came into force, Alberta enacted several hundred amendments.

2.4 Joint Decision Making in Areas of Shared Responsibility

Where a matter comes within the purview of both the provincial and local governments, the local government's empowering statute should be explicit as to shared responsibility. Furthermore, it should ensure that the local government is involved in decision making on such matters. It should provide mechanisms by which joint planning and decision making takes place, and provide for dispute resolution.

It is open to provincial legislatures to enact laws to enable communities and groups of communities to enter into bilateral agreements and policy consultations with the province or other entities.

Section 16 of the *British Columbia Constitution Act* provides that the Lieutenant Governor in

Council may authorize an official on behalf of the province or an agency of the province to enter into an agreement authorized by an enactment with a municipality or other local authority.

Municipalities in British Columbia and the Union of British Columbia Municipalities have entered into bilateral agreements with provincial ministries, evidencing that it is possible to achieve major elements of recognition by agreement as opposed to legislation; or even as a preliminary step towards legislative amendments. In the preamble to the *Protocol on Sharing Environmental Responsibilities, 1993*, the province also recognized that local governments are an "independent, responsible and accountable level of government". Consultation requirements were set out in the document. The agreement did not bar the province from acting, since no bilateral agreement can have the legal effect of fettering the discretion of the Legislature to act.

The consultative language in the agreement suggests that there are opportunities to implement elements of a bilateral agreement policy, provided the Provincial will exists to recognize the contribution of local government. As noted above, British Columbia's current *Municipal Act* speaks of consultation as a need, rather than a right or a requirement. Other examples in British Columbia include the formal invitation from the province to local governments to participate in the First Nations treaty making process by acting as formal participants to advise and make recommendations to the Crown provincial.

2.5 Provincial Compliance with Municipal Regulations

Legislation which empowers municipalities should make explicit reference to the responsibility of the province to comply with municipal regulations, subject to necessary exemptions to this general rule (such as exemption from local government expropriation). This is preferable to a provincial statute (such as the *Interpretation Acts* of most of the provinces) simply stating the province will not be bound by local government enactments. It is contrary to the principles of local self-government for crown corporations or provincial agencies to be exempt from local government property taxes, land use regulations or other exercises of power.

2.6 Delegation of Adequate Powers

Provincial legislatures have a number of options for granting powers to the local governments they create. These include the grant of provincial residual powers in addition to traditional municipal powers, the transfer of general powers within spheres of jurisdiction or the express grant of rigid regulatory powers.

2.6.1 Grant of Broad Provincial Powers

Assignment to local governments of the plenary powers of the province, or of the residual powers of the province in addition to traditional municipal powers, would provide local governments with autonomy and adequate financial and other resources. This option would be nearest to the concept of local self-government if the constitution remains unchanged. Pursuant to this option, a province could grant its powers to local governments, except where the exercise of a power by a local government would be inconsistent with a lawful statute or regulation of the province. This approach is based on the decisions of the Judicial Committee of the Privy Council in *Hodge v. The Queen* (1883) 9. App. Cas. 117 and *Shannon v. Lower Mainland Dairy Products Board* [1938] A.C. 708.

The proposed *Community Charter* introduced as a draft Member's Bill by the Hon. Gordon Campbell, Leader of the Official Opposition, in the 1995 British Columbia Legislative Session (*Community Charter*, 1995), stated (on the basis of *Hodge* and *Shannon*) that a local government may act or exercise power in relation to any matter that is not expressly excluded from its competence by an enactment or limited by the *Charter* itself, within the legislative competence of the province, and not inconsistent with an enactment of the province or Canada. The *Charter* then went on to enumerate illustrative spheres of jurisdiction without limiting the ambit of the broad, plenary and residual powers. A similar proposal was set out in the *AMO Ontario Charter* (AMO, 1994, p. 8).

The concept was also set out in a 1989 policy statement published by the Alberta Municipal Statutes Review Committee. Alberta local governments expressed concern that this approach would result in the transfer to local governments of hitherto provincial duties and responsibilities. Some Alberta local government leaders were concerned that the transfer of broad powers would give rise to increased calls from the public for services and facilities (Inlow, 1994, p. 2).

The broad bestowal of powers under the *Community Charter*, 1995 was rejected by the British Columbia Minister of Municipal Affairs on the basis that, in her opinion, there would be insufficient certainty for local governments and their citizens, as well as excessive litigation (*Monday Magazine*, Sept. 23, 1995, p. 5). In the 1998 amendments to the British Columbia *Municipal Act*, however, Section 3 provides that "the powers conferred on local governments by this Act are to be interpreted broadly in accordance with the purposes of this Act and the purposes of local government, subject to the specific limitation and conditions established by or under this Act".

Despite the policy concerns noted above, local government must recognize that the broad grant of the plenary powers of the province is the option nearest to the concept of local self-government under the existing Constitution.

2.6.2 Spheres of Jurisdiction

The second approach to granting powers to local governments is to prescribe spheres of jurisdiction within which local governments are free to regulate, require or prohibit. This approach was promoted in the 1990 policy statement of the Alberta Municipal Statutes Review Committee. The paper recommended that instead of detailing express powers, the provincial legislation should merely enumerate areas of jurisdiction and then set out a code of regulatory powers.

The Alberta *Municipal Government Act* describes the "purposes" of a municipality as providing good government, providing necessary or desirable services and other things, and developing and maintaining safe and viable communities (MGA, Section 3, S.A. 1994 cM26.1). Section 7 then provides that a council may pass bylaws for "municipal purposes" respecting a number of enumerated matters, such as the "safety, health and welfare of people and the protection of people and property".

This approach was received in Alberta "with reluctance by smaller centres which were beginning to see the Provincial Government withdrawing its historical rural support service such as model bylaws and regulatory advice. Now even the legislation would be providing no guidance as to regulatory content" (Inlow, 1994, p. 2). Nonetheless, the Alberta *Municipal Government Act* sets out in Section 7 the spheres of jurisdiction which must be approached from the perspective of the "municipal purposes" defined in Section 3.

New legislation in British Columbia and the Yukon each state the purposes of local government as to provide "good government" and the services, facilities and things that the local government considers are necessary or desirable for all or part of its community (B.C. *Municipal Act*, s.2; Yukon *Municipal Act*, Section 3).

The generality of these statements gives no clear boundaries of jurisdiction which the provincial government is bound to respect. For example, although the Yukon Act states at Section 5 that the Government of the Yukon is bound by municipal by-laws, this is immediately limited by the qualification, "except as otherwise established by the Commissioner in Executive Council by regulation."

2.6.3 Express Detailed Powers

The traditional approach to granting powers to local governments is to provide in a provincial statute for detailed, express empowering provisions for each type of local bylaw or resolution. This is the approach described in *Re Howard and Toronto* [1928] 1 D.L.R. 952 (Ontario Court of Appeal).

This approach is the furthest from the concept of local self government in terms of autonomy,

jurisdiction, the capacity to meet local needs, and freedom from direct control by a paternalistic provincial government. However, it continues to dominate most provincial legislation. Exceptions are found in the Alberta *Municipal Government Act*, Manitoba *Municipal Act*, and in some areas of the new British Columbia *Municipal Act* respecting corporate powers.

In the new Nova Scotia *Municipal Government Act*, the purpose of local government is not stated in a general way, but is confined to Part 7 respecting powers to making by-laws. There, in Section 174, the purposes are listed in categories; some of which are broadly stated, and others so narrowly as to prescribe highly specific procedures for certain matters.

2.6.4 Corporate Natural Person Powers

One of the tools available to provincial legislatures to invest municipal institutions with attributes of the concept of local self-government under the existing Constitution is the delegation of "natural person powers". This means that a province may constitute a municipality as a corporation that has the capacity, rights and powers of a natural person. This enables the courts to construe municipal powers on the basis of court precedents respecting natural person powers. The courts have held that natural person powers include the powers to "purchase, own and use property, sue and be sued, enter into contracts ... and enter into contracts of indemnity" (Liteplo, 1994, p. 4).

Corporate natural person powers would increase the capacity of local governments to meet local needs and emerging issues in creative ways. With such powers, a local government could incorporate a subsidiary, buy shares in an existing corporation or create or buy shares in not-for-profit organizations. As well, a corporation with natural person powers may (subject to other provincial legislation) give grants in aid or transfer municipal resources in order to meet local needs.

Most existing *Municipal Acts* effectively prohibit public private partnerships between municipalities and the private sector. The limitation on lease or service contract terms, requirements for the assent of the electors, prohibitions against aiding private commercial enterprises and other provisions have resulted in many proposed public private partnerships not proceeding except where the applicable province has enacted special enabling legislation.

The Alberta *Municipal Government Act*, Section 1(1)(t) defines "natural person powers" as meaning "the capacity, rights, powers and privileges of a natural person". The proposed *Community Charter*, 1995 provides for similar powers. In 1995 the Columbia Basin Trust was vested with natural person powers under Section 2 of the *Columbia Basin Trust Act* (British Columbia).

Under the Alberta Act, the "scope for innovative new 'partnership' arrangements is vastly increased. For example, under the old MGA, a public housing project had to be wholly owned by the municipality or a statutorily authorized housing authority or "municipal housing

company": Sections 128, 129. Under the new MGA a municipality could form a partnership or joint venture with a private enterprise for the same purposes, and tailor the obligations to suit the individual circumstances" (Liteplo, 1994, p. 8). The Minister of Municipal Affairs has the authority under Section 603(1)(a) of the Act to make regulations to restrict the ambit of municipal grants.

Amendments made in 1998 to the British Columbia *Municipal Act* broaden the corporate powers of local governments. Although municipal and regional district corporations are not given "natural person" powers, Section 176 sets out general categories of powers, subject to specific limitations, to enter agreements with private and public bodies, to grant assistance, to acquire, manage and dispose of property and to delegate more powers, duties and functions than previously. These powers are subject to certain requirements and limits.

The new Yukon *Municipal Act* provides under Section 4 for municipalities as corporations to have the rights, powers and privileges of a natural person, although it may not establish or hold shares or memberships in another corporation that does anything the municipality does not itself have the power to do:

Generally, natural person powers do not give municipalities more jurisdiction than they otherwise have: such powers merely amplify the corporate capacity in relation to already delegated powers. From a policy perspective, greater corporate powers are generally balanced by greater "shareholders' remedies" (i.e., public participation, accountability, transparency). For example, the new British Columbia legislation provides that if a local government intends to incur liability through entering a public-private partnering agreement for longer than 5 years, a public "counter-petition" opportunity must be provided.

2.6.5 Entrenchment of Legislation

A number of the principles of local self government are based on basic powers being prescribed by constitution or statute without being undermined or limited by central or regional authorities. In the absence of amendments to the Canadian Constitution, entrenchment of legislation granting powers to municipal institutions is unprecedented.

2.7 Delegation of Adequate Financial Resources

Where local governments are granted a power or duty from the province, it is critical they have adequate financial resources to carry out their responsibilities as they see fit. The statute conferring power upon the municipality ought to be explicit that no community is obliged to accept a transfer of new power or duties from the province unless the community consents to that transfer on the basis of allocation of new financial or other resources required by the community to exercise the new power or fulfil the new duty. This goes with the proposition that local governments be able to confer with the province about any proposed new power, and have their submissions considered and given significant weight.

3.0 COMPARISON

3.1 Consultation on Matters Affecting Local Government

3.1.1 Newfoundland *Cities Act*

Part 2 of the proposed *Cities Act* is called "Intergovernmental Relations". This part creates a Municipal Governance Advisory Council representative of the province and the local governments and describes its duties. Section 12(2) indicates "the purpose of the Municipal Governance Advisory Council is to see that the principles of local self government set out in Section 1 are carried out." Section 13 sets out the responsibilities of the Municipal Governance Advisory Council, including the following:

13. The Municipal Governance Advisory Council may
 - (a) advise the Province on proposed amendments to this Act;
 - (b) recommend timetables for advice to the Province on proposed amendments to this Act;
 - (c) recommend, and help the Province implement, measures and procedures pursuant to which
 - (i) the Province consults with cities affected before amending or creating provincial legislation, regulations, policies, programs or orders that affect cities;
 - (ii) the Province's legislation, regulations, policies, programs or orders that affect cities will respect the varying needs and conditions of the cities;

Note that this provision is mandatory in relation to matters that directly affect local governments.

Part 2 of the *Cities Act*, "Intergovernmental Relations", provides a mechanism for consultation with the province on matters affecting local government. The responsibilities of the Municipal Governance Advisory Council, as set out in Section 13, include recommending and helping the province implement measures and procedures pursuant to which

- 13.(c) (i) the Province consults with cities affected before amending or creating provincial legislation, regulations, policies, programs or orders that affect cities;
- (ii) the Province's legislation, regulations, policies, programs or orders that affect cities will respect the varying needs and conditions of

the cities;

and the Council may

...

- (d) review and advise on enactments, agreements or acts of the Province that address interprovincial, national or international issues and that impact the jurisdiction of the cities;

These provisions reflect the principles of local self government by providing for consultation on matters that affect cities.

3.1.2 Nova Scotia *Municipal Government Act* - Bill No. 47

The Nova Scotia Act explicitly subordinates the purpose of municipalities to that of the Province. Section 192 states the purpose of Part 8 (Planning and Development) as being primarily to identify and protect the interests of the province. It also purports to establish a consultative process which would serve the public's interest in accessing information and participating in planning. Consultation with municipalities appears to be mandatory. Section 196 provides:

- (1) When preparing or amending a statement of provincial interest, the Minister shall seek the views of councils affected by the proposed statement.

Statements of provincial interest are set out in Schedule B to the Act. They may be reviewed at any time by the Minister, and may be adopted or amended by regulation. The statement becomes a regulation. The Minister need only send a copy of the statement to the clerk of each affected municipality and publish notice of its adoption in a local newspaper.

Section 194(1) mandates the Minister to appoint a provincial director of planning, and Section 199 provides that a provincial department must consider a municipality's planning documents before carrying out or authorizing any development in a municipality. However, these sections do not indicate the weight to be given to council's views or plans.

Sections 194 and 196 do not indicate the weight to be given to a council's views or plans.

Part 19 of the Act, "Municipal Affairs", empowers the Minister to unilaterally do various things which detract from local government independence, including minimum fines and prison sentences.

For instance, Section 451 refers to acts which require Ministerial approval or consent and indicates that the Minister may approve all or part of the resolution, regulation, bylaw, plan, borrowing, or other act or matter that the local government purports to make, may attach conditions subject to which approval or consent may become effective, or may alternatively

rescind, vary or revoke approval.

Section 457(1) empowers the Minister to "order a municipality to do anything required by law or by agreement with the Minister or Her Majesty, or necessary or desirable in the interests of the municipality, or necessary or desirable for the due accounting for, collection or payment of any of a municipality's assets, liabilities, revenues, funds or money".

Anyone failing to comply with such an order of the Minister, or who votes for a motion that would result in a failure to obey such an order, is liable on summary conviction to a penalty of between \$1,000 and \$10,000 or, in default, to imprisonment for a minimum of 3 months and a maximum of 12 months. There are no minimum sentences for various offences under the Act listed in Sections 505 and 508. Minimum imprisonment penalties in Criminal Code are restricted to serious or repeat offences.

Part 19 also sets out the various powers of the Minister relating to the collection of information, prescription of systems of accounting, the waiver of time restrictions pertaining to municipal actions, and the power of examination of a municipality or its representatives.

The Minister has discretion to consult with municipalities on matters affecting local government. Under Section 453,

453. (1) the Minister may

- (a) collect and analyze information relating to municipalities;
- (b) prepare and publish information and advice relating to municipal affairs;
- (c) study and advise upon the system of municipal institutions and the administration of municipal affairs;
- (d) effect improvement in the conduct and administration of municipal affairs;
- (e) consult with, assist and advise municipalities in the conduct and administration of municipal affairs; and
- (f) do anything necessary or incidental to the foregoing or directed to the improvement of municipal government in the Province.

Subsection (f) encapsulates the purpose of this section, namely, to allow the Minister to have a hand in improving municipal government in Nova Scotia. In the absence of express provisions which allow the local governments to shape their own policies and assist in shaping provincial policies, the legitimacy of the local government itself is undermined in favour of centralized control by the province through the Minister.

3.1.3 Ontario *Municipal Act*

The proposed Ontario Act has no broad mechanism providing for consultation with provincial authorities on matters affecting local government. However, particular sections allow for municipalities to make proposals to provincial authorities about matters affecting them. For instance, Part 6, "Municipal Restructuring", provides that a municipality or local body in a geographic area may make a restructuring proposal by submitting to the Minister a restructuring report containing a number of specific pieces of information including an enumeration of the municipalities and local bodies which support this restructuring proposal. Section 191(4) of this part appears to endow the Minister with a "rubber stamping" function: "If a restructuring proposal and report under subsection (2) meet the requirements of this section, the Minister *shall* by order implement the restructuring proposal in accordance with the regulations made under subsection (13)" (italics added). However, subsection (13) provides that "The Lieutenant Governor in Council may make regulations setting out the powers the Minister may exercise in relation to implementation of a restructuring proposal", so the Minister's authority might be expanded in this area if the Lieutenant Governor in Council sees fit.

For the most part, however, various sections in this proposed Act empower municipal bodies to do particular things and then simply add that the Minister "may make regulations" in regard to these powers. Many sections set out the particular way in which the Minister may restrict the municipalities' exercise of their powers.

3.1.4 Manitoba *Municipal Act*

There appears to be no explicit provision providing for consultation between the province and municipalities on matters affecting local government.

3.1.5 Alberta *Municipal Government Act*

Again, there do not appear to be any blanket provisions providing for consultation with the province on matters affecting local government. It should be noted the Act reserves to the Minister numerous powers respecting local government authority (e.g., grants in aid).

3.1.6 Yukon *Municipal Act*

Section 11 of Bill 69, amending the *Municipal Act*, assented to in December 1998, provides that the Government of the Yukon must consult with the Association of Yukon Communities on any direct amendments the Minister proposed to the Act.

3.1.7 British Columbia *Municipal Act*

A 1998 amendment, Section 4 sets out principles for relationship between local governments and the Provincial government which recognize the need for notice and consultation when Provincial government actions directly affect local government interests. The province may balance this need with the interests of the general populace of British Columbia. There is no statutory

requirement to consult or to act on input from local government.

3.2 Amending Local Government Legislation

3.2.1 Newfoundland *Cities Act*

Part 2 of the proposed Act, "Intergovernmental Relations", contemplates that the province will consult the Municipal Governance Advisory Council on amendments to local government legislation. Section 13 provides:

13. Without limiting section 12(2), the Municipal Governance Advisory Council may
 - (a) advise the Province on proposed amendments to this Act;
 - (b) recommend time tables for advice to the Province on proposed amendments to this Act;

The provisions respecting incorporation, amalgamation and dissolution require the consent of affected cities and a referendum prior to Cabinet taking action.

3.2.2 Nova Scotia *Municipal Government Act*

Part 21 of the Act, "General", refers to the right of municipalities to consultation with the province regarding amendment of local government legislation *per se*. Section 518 provides:

518. The Minister shall consult with the executive of the Union of Nova Scotia Municipalities respecting any proposed amendment to this Act.

This reflects a change from the Working Paper of September 1997, which used permissive rather than mandatory language.

3.2.3 Ontario *Municipal Act*

There appears to be no mechanism in this proposed Act providing for local governments in Ontario to take initiative or be consulted with respect to changes in local government legislation.

3.2.4 Manitoba *Municipal Act*

The Act has no express mechanism for consultation with municipalities as to the amendment of the Act.

3.2.5 Alberta *Municipal Government Act*

Part 4 of the Act, "Formation, Fundamental Changes and Dissolution", contains several sections which provide for permissive consultation with local authorities regarding various changes to a municipality's status. For instance, Section 94 reads:

94. Before the status of a municipality is changed, the Minister
 - (a) must notify the council of the municipality of the proposed change;
 - (b) may invite comments on the proposed change in status from all local authorities that the Minister considers would be affected by the change and from any other person the Minister considers necessary.

The sections on amalgamation and dissolution of municipalities contain similar provisions. There do not appear to be any blanket provisions allowing for general consultation of a local government before amending local government legislation. Indeed, after the last version of the Act was passed, the province made *hundreds* of amendments to it.

3.2.6 Yukon *Municipal Act*

The new *Municipal Act* of the Yukon at Section 11 provides:

"The Government of the Yukon must consult with the Association of Yukon Communities on any direct amendments that a Minister proposes to this Act."

3.2.7 British Columbia *Municipal Act*

As noted in the previous section, the principles governing the relationship between local and provincial government in Section 4 acknowledges the need for notice and consultation, but there is no explicit requirement.

3.3 Joint Decision Making on Areas of Shared Responsibility

3.3.1 Newfoundland *Cities Act*

Section 13(e) provides that the Municipal Governance Advisory Council may "encourage consultation between the Province and cities and further encourage the sharing of decision making with cities where the Province and the cities wish to act or exercise power in relation to any matter that is within the jurisdiction of the Province and the cities".

Subsection 13(c)(v) is also relevant, wherein the Municipal Governance Advisory Council may recommend and help the province implement measures pursuant to which "the Province and cities resolve conflicts with each other by consultation, negotiation and, if necessary, arbitration."

3.3.2 Nova Scotia *Municipal Government Act*

In developing or amending the statements of provincial interest, Section 196 provides the municipalities with a right to involvement:

196. (1) When preparing or amending a statement of provincial interest, the Minister shall seek the views of councils affected by the proposed statement.

Section 199 provides that a provincial department must consider a municipality's planning documents when considering developments occurring within a municipality. Also, Section 518 requires the Minister to consult with the Union of Nova Scotia Municipalities respecting proposed amendments to the Act. However, the Minister may or may not consult, assist and advise municipalities respecting matters affecting local governments, by virtue of the discretionary power set out in Section 453(1)(e).

The statements of provincial interest contained in Schedule B contemplate that municipalities should develop management strategies in regard to the various areas of provincial interest laid out therein, with an eye to the stated goals in those statements. In this regard, there is some implicit suggestion that municipalities should consult with the province in terms of implementing plans that will impinge upon the areas of stated provincial interest, although the statements themselves are not intended to be rigid rules but rather guidelines.

Section 200(1) provides that "planning documents adopted after the adoption of a statement of provincial interest shall be reasonably consistent with the statement". These guidelines apply to provincial action, as well, by virtue of Section 198:

198. The activities of the Province shall be reasonably consistent with a statement of provincial interest.

Section 200(2) allows the Minister to make an order that council adopt or amend its planning documents so that they are reasonably consistent with the statements of provincial interest.

The Minister may also by order establish an "interim planning area" for a prescribed area when a council does not comply with a request that they amend planning documents to be consistent with a statement of provincial interest. Where it appears that a development inconsistent with the statement of provincial interest may occur, if satisfied that there are compelling reasons to establish an interim planning area, the Minister may order one to protect the provincial interest.

Although other sections provide for some consultation with local authorities, Section 200 clearly

establishes that the province's decision is determinative on issues that affect both provincial and municipal interests.

3.3.3 Ontario *Municipal Act*

There appears to be no mechanism in this proposed Act that contemplates joint decision-making in the areas of shared responsibility between the province and local government. On the contrary, Part 27, "Regulations", contemplates that the Lieutenant Governor in Council may, by regulation, *limit* municipal authority where, in the opinion of the Lieutenant Governor in Council, it is unnecessary or represents "duplication" (see section 4.6 below regarding Part 27). In this way it may be possible for the province to override the authority of the municipalities where that authority may be under the shared jurisdiction of the province and the municipality.

However, Part 2, "Municipal Powers", specifically contemplates that a municipality may provide systems that it would not otherwise have the power to provide if it does so in accordance with an agreement with the Crown in Right of Ontario under a program established and administered by the Crown (see Section 26).

3.3.4 Manitoba *Municipal Act*

There do not appear to be any explicit references to joint decision making on areas of shared responsibility in this Bill.

3.3.5 Alberta *Municipal Government Act*

The Act does not refer explicitly to any joint decision making between municipalities and the province, except as regards activities which a municipality may carry out with the "authorization" of the Minister.

3.3.6 Yukon *Municipal Act*

Part 2 of the Act, dealing with the formation, dissolution and alteration of boundaries, provides for input from a local council and from the electorate at Section 17, which provides:

- 17.(1) A proposal to form, dissolve or alter the boundaries of a municipality may be initiated by the Minister, the council of a municipality, or at least 30% of the persons who would be or who are electors of the municipality of the area proposed to be formed, dissolved, or altered [by petition, as described in subparagraphs (4) and (5)].

Under Section 27, municipalities may establish common administrative or planning structures within a community, region or area of the Yukon with other local governments, First Nations, provincial and federal governments. The participating governments retain control of the

structures according to agreed-upon processes and include direct representation by participating governments.

The Yukon Municipal Board, established pursuant to Section 328, has representation from the Association of Yukon Communities and the Council of Yukon First Nations as well as appointees nominated by the Minister. It has jurisdiction to perform duties assigned to it under the *Municipal Act* and other Acts, to hear appeals, make inquiries, adjudicate and recommend generally under Section 330 and as to specific areas in Section 331. It may negotiate respecting municipal expropriation and make recommendations on boundary changes.

3.3.7 British Columbia *Municipal Act*

The new Act does not refer specifically to joint decision-making or areas of shared responsibility. Section 176 empowers municipalities to form agreements with other "public authorities", which Section 5 defines as including federal and provincial governments, other local governments, first nations, bodies in other provinces and countries that provide local government services, and a range of boards and bodies prescribed by regulation. Out-of-province agreements are subject to the Minister's approval, and out-of-country agreement must be approved by the provincial Cabinet.

3.4 Provincial Compliance with Municipal Regulations

3.4.1 Newfoundland *Cities Act*

Section 13, setting out the duties of the Municipal Governance Advisory Council, deals with this area of concern. Section 13(c) sets out that the Municipal Governance Advisory Council may recommend and help the province implement measures and procedures pursuant to which:

- (iii) the Province, its crown corporations and agencies will comply with the city authority in the areas of city jurisdiction.

3.4.2 Yukon *Municipal Act*

The effect of the new Act is set out in Section 5:

- 5. The Government of the Yukon is bound by the by-laws of a municipality, except as otherwise established by the Commissioner in Executive Council by regulation.

3.4.3 Other Provinces

There do not appear to be any mechanisms compelling provincial compliance with municipal regulations under Nova Scotia, Ontario, Manitoba, Alberta or British Columbia Acts. However, the common law and provincial Interpretation Acts provide for when and where the province and provincial agents are not bound by delegated legislation.

3.5 Delegation of Powers

3.5.1 Newfoundland *Cities Act*

The proposed Newfoundland *Cities Act* deals with powers under Part 4. Section 48 sets out that a city is a corporation and has the broad corporate powers of a natural person of full capacity except to the extent expressly limited under the Act. Section 48 also sets out that the powers of the city must be exercised by its council, which may by regulation delegate any of its executive or administrative powers to one or more elected members of that council or to an employee, committee or commission of the city. Section 49, regarding interpretation, indicates that powers are stated in broad terms such as to give the city adequate power to provide good government and services in response to existing and future local issues and needs and to give council" (a) full discretion in the exercise of its powers to meet local conditions; and (b) the right to determine the local public interest."

Section 51 delineates broadly defined spheres of power in which a city council may act. Thirteen spheres are listed including land use, heritage conservation, natural environment and transportation. The broad nature of these spheres of power is curtailed by Section 50 which provides that

50. ... a regulation, resolution or order made by council that is
- (a) inconsistent with an enactment of the Province or Canada;
 - (b) not within the legislative competence of the Province; or
 - (c) expressly excluded from the city's competence by an Act;

is of no force and effect and is deemed to be repealed.

Section 52 goes on to delineate services and regulations that cities may provide or make, based on the recommendations of the FCM/CAMA Task Force on the Future Role of Local Government. Sections 53 through 80 then specify particular aspects of the exercise of powers conferred.

3.5.2 Nova Scotia *Municipal Government Act*

The new Act recognizes that a local council needs broad authority to pass bylaws and to need an enhanced ability to respond to present and future issues by virtue of its purpose statement at Section 2. The nature of the power held by a municipality under the Act is not defined or described at the relevant Parts, however, and the wording at these Parts does not invite a broad interpretation of power in practical application.

Part 1 of the Act, "The Municipality" merely provides at Section 4 that every municipality now incorporated is subject to the Act.

Part 3, "Powers", at Section 47(1) provides:

47(1) The council shall make decisions in the exercise of its powers and duties by resolution, by policy or by by-law.

Section 47(5) authorizes council to

"make and carry out a contract, perform an act, do anything or provide a service for which the municipality or the council is authorized by an Act of the Legislature to spend or borrow money."

The Province may thus control local decision-making through economic allocation, presumably as broadly or narrowly as it sees fit.

Section 48(3) authorizes council to adopt policies "on any matter that the council considers conducive to the effective management of the municipality" in addition to matter specified in the Act or another statute. Read with Section 47(1), this could conceivably be interpreted as providing municipalities with some autonomy to regulate in a co-existent manner with provincial authority as long as their policies were not in conflict. Section 173(2) of Part 7 "Bylaws" appears to affirm this principle in stating

"A by-law shall not be inconsistent with an enactment of the Province or of Canada."

The sections which follow Section 48, however, follow the tradition of specifically authorizing council to acquire, sell, lease, expropriate, hold plebiscites, provide certain services and assistance to specified entities within defined procedures and limits.

Part 7 is also highly specific as to purposes and procedures by which council may regulate through bylaws. Section 174 lists categories of purposes for which council may make by-laws, which are stated broadly, as in 174(1)(e), "transport and transport systems"; or narrowly as in

174(1)(j)(ii), where "council may make by-laws, for municipal purposes, respecting

- 174(1) (j) regulation of the use of pesticides for the maintenance of outdoor trees, shrubs, flowers, other ornamental plants and turf on the part of a property used for residential purposes and on property of the municipality and, without restricting the generality of the foregoing, the by-law may ...
 - (ii) establish a registration scheme, that is open to the public, in which a resident who has a medical reason for objecting to pesticides being so used may file with the clerk an objection to pesticides being so used in the vicinity of the property on which the person resides..."

A "purpose" which in practical terms becomes a prescription for a complaint procedure is somewhat inconsistent with the language of "broad authority" and need for "enhanced ability to respond" as stated in Section 2 of the Act.

3.5.3 Ontario *Municipal Act*

The proposed Ontario *Municipal Act* has at its heart a revision of the nature of the powers assigned to the municipalities. Rather than designating particular powers as former Acts have done, this Act sets out 13 separate and very general spheres of jurisdiction in which a municipality may act. It is contemplated that municipalities would exercise their governmental and natural person powers in the 13 subject areas. Natural person powers are expressly conferred by Section 8, while additional governmental powers are conferred in Section 9. The very broad spheres of municipal jurisdiction (e.g., waste management, natural environment and public utilities) are curtailed not by specific exemption but simply by paramountcy. That is, a given bylaw is without effect to the extent of any conflict with a provincial or federal act or regulation or an instrument of a legislative nature made or issued under a provincial or federal act.

The proposed Act also creates three different types of municipalities: upper tier, lower tier and single tier. The paramountcy principle applies here also, in that a bylaw passed by a lower tier municipality is ineffective to the extent that it conflicts with a bylaw passed by an upper tier municipality. (See the definition section and Sections 6 and 7 regarding the creation of upper, lower and single tier municipalities).

Part 27, "Regulations", empowers the Lieutenant Governor in Council by regulation, to restrict the power of municipalities under this or any other Act including their capacity, right, powers and privileges laid out under Section 8. Such regulations may apply differently to different municipalities and may be retroactive. However, a regulation made under this part expires after three years, and the Lieutenant Governor in Council does not have the power to renew or extend such a regulation or to replace it with a regulation of similar effect.

3.5.4 Manitoba *Municipal Act*

A Manitoba municipality is, under this Act, endowed with the rights and subject to the liabilities of a corporation and may exercise these powers for municipal purposes. Without limiting the generality of that endowment (which is found in Section 248), the sections following go on to delineate some particular powers which are inherent in this corporate power. This part also goes on to address powers more particular to municipalities such as expropriation, collection of fees, the ability to enter upon land, etc.

Part 7, which deals with bylaws, indicates the spheres of jurisdiction in which a council may pass bylaws for municipal purposes. Section 226 of that part states:

226. The power given to a council under this Division to pass bylaws is stated in general terms
- (a) to give broad authority to the council and to respect its right to govern the municipality in whatever way the council considers appropriate within the jurisdiction given to it under this and other Acts; and
 - (b) to enhance the ability of the council to respond to present and future issues in the municipality.

Section 226 should be helpful in terms of how courts will interpret the broad powers conferred under Part 7 as it shows a legislative intention to grant the municipalities powers that are broad and remedial.

3.5.5 Alberta *Municipal Government Act*

The Alberta Act defines the purposes of a municipality. Section 3 describes them as:

- 3. (a) to provide good government;
- (b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or part of the municipality; and
- (c) to develop and maintain safe and viable communities.

Under Section 6 of the Act, Alberta has given municipalities natural person powers except to the extent they are expressly limited in the Act or any other enactment. Section 5 also states that municipalities have powers granted by "both this and other enactments of the Alberta Legislature". Part 2, "Bylaws", deals with the matters for which council may pass bylaws and

what those bylaws may do. Both the jurisdiction and the powers under the Bylaw section are extremely broad. This is confirmed in Section 9, as follows:

9. The power to pass bylaws under this Division is stated in general terms to
 - (a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate within the jurisdiction given to them under this or any other enactment; and
 - (b) enhance the ability to councils to respond to present and future issues in their municipalities.

The two concerns about this approach under the Alberta legislation are that

1. if the courts continue to uphold local government bylaws or resolutions where supported by express authority or by necessary implication, as opposed to taking a liberal and remedial interpretation of the broad authority, delegated municipalities will only be able to act pursuant to the eight specific powers, as those powers are expressly articulated, and
2. the restriction of Section 7 to "municipal purposes" may be construed to limit the legislative powers of local governments to only the three enumerated purposes.

The Act also draws a distinction between the natural person powers with which the municipality is endowed and specific "bylaw passing powers". Section 10(1) states

- 10(1) In this section, "specific bylaws passing power" means a municipality's power or duty to pass a bylaw that is set out in an enactment other than this Division but does not include a municipality's natural person powers.
- (2) If a bylaw could be passed under this Division and under a specific bylaw passing power the bylaw passed under this Division is subject to any conditions contained in the specific bylaw passing power.
- (3) If there is an inconsistency between a bylaw passed under this Division and one passed under a specific bylaw passing power the bylaw passed under this Division is of no effect to the extent that it is inconsistent with the specific bylaw passing power.

Part 3 then goes on to delineate particular special municipal powers and limits on them, for instance, the municipality's power of expropriation and limits and how and where it can expropriate.

3.5.6 Yukon *Municipal Act*

Through amendments in Bill 69 assented to on December 7, 1998, the Act provides at Section 4:

4. (1) A municipality is a corporation and has, for the exercise of its powers under this or any other Act, all the rights and liabilities of a corporation.
- (2) A municipality has, for the exercise of its powers under this or any other Act, the capacity and, subject to this Act, the rights, powers and privileges of a natural person.
- (3) Despite subsections (1) and (2), a municipality cannot establish, or be a shareholder or member of, another corporation that does anything that the municipality does not itself have the legal power or right or duty to do.

3.5.7 British Columbia *Municipal Act*

Corporate powers are not described as those of a natural person in the new Act. Recent amendments in Part 5, however, appear to broaden the authority of local government to enter agreements with private and public bodies, subject to certain limits and requirements, in Sections 176 through 185. A local government may enter a "partnering agreement" to provide or manage a facility or work, or provide a service on behalf of the local government, which may include providing assistance and granting tax exemptions to industrial, commercial or business undertakings. These powers are limited, however, by requirements for public notice, disclosure, and vote or counter-petition opportunity.

Dispositions of land are subject to similar requirements in Sections 186 through 189. Disposal of sewer and water systems, being vital services, are circumscribed by Section 190, which requires not only the assent of the electors or a counter petition opportunity, but also an agreement that continues the service.

Section 176(1)(f) affirms the authority to engage in commercial, industrial and business undertakings and to incorporate a corporation to do so, subject to approval of the inspector of municipalities, who is appointed by Cabinet and is under the control of the minister (Section 1019).

Delegation powers have been expanded somewhat by Section 176(1)(e), which authorizes local government generally to delegate powers, duties and functions to officers, employees, committees or members, or "to other bodies established by the local government". These powers are specifically limited in Section 191. Council may not delegate a power or duty only exercisable by bylaw; to appoint or terminate a local government officer or auditor; or to approve, consent to, hear an appeal of, or reconsider an action, decision or other matter.

4.0 CONCLUSION

Local governments in Canada, until recently in Alberta and Manitoba, have been constituted with powers, objects and procedures appropriate to earlier centuries. Incremental, *ad hoc*, revisions to provincial legislation respecting local authority have reflected the chaotic nature of greater societal change but have failed to keep pace with the needs of local citizens.

Local governments are witnessing integration, resulting in fewer and larger units reflecting different communities of interest; devolution of other government responsibilities without the financial resources or legal powers; and an explosion of incremental additions to existing powers (except under the new Alberta and Manitoba Acts and the Newfoundland and Ontario legislative proposals).

In the context of the objects of the International Union of Local Authorities and the Council of Europe, the new blueprints must not mirror the present but must constitute genetic codes for creatures that can evolve to serve local residents and ratepayers in the future.

APPENDIX 3

**A Comparison of New and Proposed
Municipal Acts of the Provinces:
Revenues, Financial Powers and Resources**

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**Prepared for the 2001 Annual Conference
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held in Banff, Alberta**

by Donald Lidstone
LIDSTONE, YOUNG, ANDERSON
Barristers and Solicitors
1616-808 Nelson Street
Vancouver, B.C.
V6Z 2H2
Phone: (604) 689-7400 Fax: (604) 689-3444
lidstone@lya.bc.ca

A Comparison of New and Proposed Municipal Acts of the Provinces: Revenues, Financial Powers and Resources

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1.0 INTRODUCTION

This is the second in a series of three comparisons of recent or proposed provincial statutes governing municipal institutions. This document compares the enactments on the basis of financial issues.

The functions, responsibilities and duties of Canadian municipalities are increasing while the diversity of fiscal resources and revenue sources is in decline. Although a number of provinces and territories have enacted new legislation governing municipal institutions, the new legislation fails to empower municipalities with the fiscal tools to meet existing or future needs.

This failure arises in part from the constitutional context. That is, although Canadian cities are the engines of our well being, they have no formal role in governance under our constitution. Local governments are the most accessible and responsive of all orders of government in Canada, yet they are not recognized as an order of government in the Canadian Constitution.

The powers and resources of municipalities derive from the 1849 *Baldwin Act* of Canada and the distribution of powers under the *Constitution Act, 1867*. Municipal functions, responsibilities and duties have changed dramatically since 1849 and 1867. There are a number of trends which are giving rise to the need for more municipal autonomy, powers and resources. These trends include federal and provincial disengagement from services (described as decentralization, downloading, and abdication of responsibility); provincial grant reductions; rapid growth rates in some urban centers; the need for infrastructure upgrades; and demands and needs for new services that were not contemplated in the mid 1800s.

Ironically, the more autonomy, powers and resources municipalities have, the more they will collide with the apprehended threats of globalization.

2.0 CONSTITUTIONAL CONTEXT

The duties and responsibilities of local authorities across Canada differ from those reflected in the 1849 *Baldwin Act*. The Act first established the role, function and structure of local authorities in what became Canada. Every provincial statute across Canada that creates and empowers local governments (with the exception of the more recent “Spheres of Jurisdiction” legislation) derives from the *Baldwin Act*.

When the *Baldwin Act* was enacted, the principal local government issues were drunkenness and profanity, the running of cattle or poultry in public places, itinerant salesmen, the repair and maintenance of local roads, and the prevention or abatement of charivaries, noises and nuisances. Today, municipalities own and operate hospitals, welfare systems, waste treatment plants, airports, public housing, hydroelectric plants, telecommunication systems, forensic laboratories, AIDS hospices, homeless shelters, hot lunch programs for school children, economic development, toxic waste remediation and fiber optic transmission.

These duties and responsibilities are evolving in the face of legislation and structures that have not varied from a model anchored to the needs of the mid-1800's.

Section 92(8) of the *Constitution Act, 1867* assigns control over "municipal institutions in the Province" to the provincial governments. The provinces have delegated some powers and resources to local governments.

The courts have held that municipal corporations are mere instrumentalities of the senior level of government for the more convenient administration of local governments [*Lynch v. Canada Northwest Land Co.* (1981) 19 S.C.R. 204 (S.C.C.)].

There is no constitutional recognition of municipal institutions as a level of government. They are creatures of provincial statute with only the powers conferred on them by the province. Municipal authority is restricted either through the withholding of powers or the imposition of limits on the exercise of the powers granted to them: *McCutcheon v. Toronto* (1983) 41 O.R. (2d) 652.

Limits on the exercise of municipal powers include centralized approvals.

The Federation of Canadian Municipalities has on a number of occasions embraced the principles of local self government articulated by the International Union of Local Authorities, as refined by the FCM and Canadian Association of Municipal Administrators' Task Force on the Future of Local Governments.

The principles of local self-government are described in the first of these three comparison papers [A Comparison of New and Proposed Municipal Acts of the Province, May 31, 1999, prepared for the 1999 annual conference of the Federation of Canadian Municipalities by Donald Lidstone, Colleen Burke and Kristen Gagnon]. In that paper, the authors concluded that none of the traditional or recently enacted provincial or territorial local government legislation has satisfied the principles of local self government.

One of the principles is "adequate financial and legal resources to provide good government and services locally. Municipalities in Canada do not have adequate financial and legal resources to provide good government and services locally, for the reasons set out in this discussion paper.

3.0 DISENGAGEMENT FROM SERVICES

Canada federal and provincial governments are, in the context of massive debts and deficits, withdrawing from areas of public policy and service. They are privatizing; downloading; and disengaging from certain functions, such as highway maintenance and social programs. In order to meet emerging local needs, the municipalities are forced, by legislation or practicality, to fill the void resulting from the federal and provincial abdication.

In a report prepared for the Union of British Columbia Municipalities on September 27, 1999, Harry Kitchen, of the Department of Economics, Trent University came to the following conclusions:

1. the federal and provincial governments have disengaged from a number of areas of spending and the municipalities have filled the vacuum in the absence of other transferees, noting that the size of the municipal sector as a percentage of gross domestic provincial product increased from 4.6 to 4.9 percent from 1988 to 1998 while federal spending declined from 23 to 19 percent and provincial spending from 21.3 to 20.6 percent;
2. the property tax has “increased noticeably in relative importance as a revenue generator”;
3. user fees fund a growing proportion of public transit and recreation;
4. provincial grants to municipalities have declined, causing municipalities to increase reliance on property taxes and other “own source revenues”;
5. in the future, property taxes and user fees will become even more important as a revenue source for municipalities;
6. nonetheless, municipalities are constrained by provincial legislation, centralized approvals, legislation and policy [Harry Kitchen, Department of Economics, Trent University, Provincial-Municipal Fiscal Trends: An Interprovincial and Intertemporal Comparison, September 27, 1999, presented at UBCM 1999 Convention].

Ontario is an interesting case study. Since 1995, the province has shifted what were previously provincial responsibilities or provincial-municipal responsibilities to the municipalities. These responsibilities include property assessment; airports; ferries; GO transit; municipal transit; child welfare; social housing; and other services and facilities.

According to Harry Kitchen, although Ontario off-loaded increased liability, the municipalities in return received negligible control over public policy or standards with respect to most of these responsibilities (especially social housing, ambulance services, highways, policing and assessment).

At the same time, grants were reduced significantly. All of this resulted in greater pressure on the property tax and user fees.

In British Columbia, the province eroded local powers and confiscated local tax revenues. For example, the province eliminated the municipal taxation on railways (averaging 7 percent of revenues for railway communities). The province also confiscated revenues from speeding ticket fines.

The federal government has also transferred services and responsibilities to municipalities, including airports and ports and harbours. In many cases, this imposition has had a devastating effect on the affected communities. In the Town of Fort Nelson, five hours from the next airport, taking on the new airport responsibility would cost the equivalent of a tax increase of 50 percent. In Port Hardy, four and a half hours from the next airport, keeping the airport open would cost the equivalent of a 24 percent tax increase.

The increased transfer of government services and the reduction or elimination of revenue sharing or transfer payments have eroded the capacity of municipal institutions to manage local public affairs.

4.0 RAPID GROWTH RATES

According to the FCM's Second Report on the Quality of Life in Canadian Communities, dated March, 2001, population growth for a number of municipalities has imposed challenges. York, Peel, Waterloo and Calgary have all grown up to four times the rate of Canadian population growth from the same period. As a result, there is significant demand for municipal services and facilities, including water and sewer systems, roads, health and social service and accommodation.

As well, the investment in transportation and other infrastructure lags population growth, and responding to the challenges of growth becomes more and more difficult as time goes on.

Various pundits from Allan Artibise to Arthur Eriksson have predicted that the Georgia Basin population will increase by anywhere from 2 to 5 million additional people over the next 20 years. Despite this, the Province of British Columbia has given municipalities no additional powers or sources of revenue to meet imminent demands.

5.0 INFRASTRUCTURE UPGRADES

According to the FCM federal budget submission to Finance Minister Paul Martin on October 12, 1999, capital for municipal infrastructure has fallen far behind needs. According to the Canadian Water and Wastewater Association, the capital investment deficit is \$16.5 billion for water facilities and \$36.8 billion for wastewater facilities. This is becoming more and more obvious as raw sewage is flushed into the sea in Greater Victoria, Greater Vancouver and other municipalities, and water quality issues have arisen in Walkerton, North Battleford and hundreds of other Canadian municipalities. As well, approximately 200 toxic pollutants are released to the environment every year according to the Sierra Legal Defence Fund.

The National Research Council has suggested there is a capital investment deficit for roads in the order of \$9 billion. The Canadian Urban Transit Association estimates an investment shortfall in public transit of more than \$8 billion.

According to the June 1999 FCM Report on Homelessness and Affordable Housing, Canadian Municipalities will need nearly half a million more rental housing units to meet estimated demand over the next 10 years.

As well, policing and firefighting costs increase as a function of labour relations, population growth and the emergence of such new issues as hazardous material fires or explosions.

While business corporations generally create reserves against future capital, repair and maintenance costs, municipalities are struggling to catch up with overwhelming existing needs for replacing, repairing and maintaining infrastructure.

6.0 MEETING FUTURE NEEDS

Future trends indicate additional powers, responsibilities, duties and costs for municipalities, without new or adequate powers or resources.

The rate of unilateral imposition by provinces of amalgamations of former municipalities is increasing dramatically. Greater Sidney, Greater Halifax, Greater Montreal, Greater Toronto, Greater Sudbury, Greater Ottawa, Greater Hamilton and others have been witnessing this phenomenon. The current mania for forced amalgamations is a direct result of disengagement and globalization. The thesis is "bigger is better". Forced amalgamations are the perfect tool for carrying out disengagement, since massive, unaccountable municipalities that have populations and budgets greater than most provinces can take over programs from which provinces withdraw (eg., housing and social programs) and pick up the pieces resulting from off-loading. Nonetheless, the provinces have failed to grant new or adequate powers or resources.

Other trends include the need for addressing new classes of services. Municipalities have become involved in providing or participating in fiber optic networking and communications convergence; Olympic and other sports infrastructure; environmental cleanups; increased health care costs arising from aging and pollution; tort and other liability for building inspection and airport crashes; increasing public sector wage costs; alternative fuel and advance transit technology; treatment for drug and related, mental, environmental and other illness; new regulations such as airport rescue; and others.

7.0 RECENT AND PROPOSED MUNICIPAL ACTS OF THE PROVINCES

Some provinces have taken steps to adjust their legislative regime to permit local self government. In 1994, Alberta enacted the *Municipal Government Act* which gives municipalities "natural person" powers and broadly enables municipalities to exercise, in their discretion, a wide range of permissive powers (as opposed to a limited number of express powers, as found in the legislation of other provinces). The problems with the Alberta approach are that it does not amount to a fundamental change of the Alberta Constitution, there is no entrenchment of the municipal

legislation (e.g., by way of an amending process), there is no commitment to consultation prior to future change, and many powers require provincial approvals.

In October 1996, Manitoba enacted the *Municipal Government Act*. The Manitoba legislation is less empowering than Alberta's. The Manitoba Act does not give municipal governments "natural person" powers. Although the Manitoba legislation broadly enables municipalities to exercise their discretion by a wide range of permissive powers, the range is narrower in scope than is the case in Alberta.

Amendments to Nova Scotia's *Municipal Government Act* through Bill 47, which passed 3rd reading on December 3, 1998 followed a review of a "Working Paper in Legislative Form" proposed in 1997. The stated purpose of the new Act is to "give broad authority to councils" respecting bylaw making and to enhance their ability to respond to present and future issues. It does not give municipal governments "natural person" powers, or broad spheres of jurisdiction, but rather continues to authorize a limited number of specified and express powers.

British Columbia executed a "Recognition Protocol" in 1996 with the Union of British Columbia Municipalities (UBCM) that recognized local government as an "independent, responsible and accountable order of government". During the same years, however, the province unilaterally eliminated municipal grant guarantees, reduced grants, transferred major highway responsibilities and closed local courthouses without meaningful prior consultation with municipalities. The wording of the Protocol was incorporated into the *Municipal Act* through amendments which came into force in September, 1998. Its stated purpose is to provide a legal framework for local governments to gain power, and flexibility to represent and respond to the various and changing needs of their communities. The resulting *Local Government Act* failed to provide any new financial powers or resources to address the erosion of resources caused by previous provincial policies.

On March 10, 1997 Ontario released a discussion paper outlining a new *Municipal Act* and in 1998 the province released a draft *Municipal Act*. The proposed legislation would give municipalities "natural person" powers and broadly enabling spheres of jurisdiction (e.g., public utilities). Within those spheres, municipal governments could act or exercise powers from a comprehensive "tool kit" (e.g. expropriate). Ontario has scrapped the draft *Municipal Act* and is proposing to release a new draft which is more responsive to the needs and expectations of residents and municipalities.

In 1997, the Newfoundland Minister of Municipal and Provincial Affairs asked the cities to propose new legislation to be considered by the province for enactment in the fall of 1998 respecting cities. Any city could opt into the new legislation once enacted. The province has indicated it will introduce the legislation in the fall 2001 session of the legislature. The proposed legislation gives municipalities nature person powers, spheres of jurisdiction and more autonomy.

Yukon Territory assented to Bill 69 in December, 1998. The new *Municipal Act* states in its preamble its goals of establishing "partnership, mutual respect and trust between the Government of the Yukon and the Association of Yukon Communities." The former is stated as wishing to

"empower municipal governments with the authority necessary to effectively govern in the new millennium". In Section 2 of the Act, the purpose is worded somewhat more modestly: it is to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, to represent and respond with flexibility to the various interests, needs, and changing circumstances of their communities.

8.0 COMPARISON

A comparison of the provincial and territorial legislation across Canada that empowers municipalities indicates that Canadian municipalities do not have adequate financial powers or resources in comparison with their counterparts in the United States and Europe. Municipalities in Canada rely principally on the real property tax, user fees, and a number of other tools that raise comparatively small amounts compared to the property tax and user fees.

According to Harry Kitchen, (Provincial-Municipal Fiscal Trends, September 27, 1999), municipal "own source revenue" increased significantly between 1988 and 1998, from 77 percent to 85 percent. At the same time, provinces gave municipalities no new sources of revenues. Accordingly, according to Harry Kitchen, property taxation increased from 48.6 percent of all municipal revenues to 56.7 percent between 1988 and 1998. In Nova Scotia, property taxes in 1998 accounted for 70.4 percent of all municipal revenues.

User fees, according to Harry Kitchen, grew from 20 percent of all municipal revenues in 1988 to 20.7 by 1997. Grants, on the other hand, declined significantly between 1988 and 1998. Grants amounted to 23 percent of municipal revenues in 1988 and just over 15 percent in 1998. Since 1998 the provinces have further reduced grants.

In 2001 the federal infrastructure program was initiated. Infrastructure Canada agreements are in place with the provinces and territories to administer the program and recommend projects for funding. The program will not, however, enable municipalities in a major way to catch up with the infrastructure capital deficits, to displace property taxation or user fees, or to afford a new opportunity for expanding revenues.

8.1 Newfoundland *Cities Act*

The *Cities Act* contains authority for real property tax; sewer and water tax; business tax; home based business tax; specified service areas (to raise monies for any municipal service by way of any form of tax fee, levy or charge); poll tax; and user fees. There is a vast array of collection mechanisms. The legislation also includes innovative approaches to service delivery. Although the legislation eliminates many of the paternalistic, centralized controls under the current legislation, the greater autonomy, flexibility and powers are combined with increased requirements for accountability, transparency and public participation.

8.2 Nova Scotia *Municipal Act*

The Nova Scotia *Municipal Act* sets out express, limited authority for expenditures on the model of the *Baldwin Act*. The Act provides authority for property tax; charges for services; a rate for a water system; charges for waste water or storm water system; water system capital costs; highway and transportation infrastructure, and future expenditure; and sewage system supercharges for “over users”.

8.3 Ontario *Municipal Act*

Under the existing *Municipal Act*, a council of a local municipality may by bylaw levy an annual tax. There is authority for a special rate on farm ratepayers. A local government may establish a reserve fund and money may be raised for the fund. According to the FCM analysis of the proposed Ontario legislation, there was no new authority to impose fees and charges; no power to incorporate or acquire an interest in security of a corporation; restrictions affecting the operations of municipal services; and provincial cabinet limitations on municipal powers to engage in commercial activities resulting in competition with private commercial activities [Federation of Canadian Municipalities “Early Warning: Will Canadian Cities Compete?”, May 2000, prepared for the National Round Table on the Environment and the Economy].

8.4 Alberta *Municipal Government Act*

Under the Alberta *Municipal Government Act* enacted in 1994, municipalities may exercise power within spheres of jurisdiction. The legislation also grants “natural person” powers. Such powers give the municipality the capacity, rights and powers of a natural person. This enables the courts to construe municipal powers on the basis of court precedents respecting natural person powers. The courts have held that natural person powers include the powers to purchase, own and use property, sue and be sued, enter into contracts and enter into contracts of indemnity. Business corporations have natural person powers. Benefits include entering into public-private partnerships, providing incentives to businesses, incorporating subsidiaries and enhancing existing powers.

The Alberta legislation also expands local government powers by setting out spheres of provincial jurisdiction within which the municipalities may exercise power for municipal purposes. Nonetheless, the legislation does not expressly give municipalities any greater financial resources.

8.5 British Columbia *Local Government Act*

The *Local Government Act*, the result of three years of amendments further to the Recognition Protocol entered into between the Union of British Columbia Municipalities and the Province, contains a number of financial tools: entering into public private partnerships; affording more flexible revenue-raising authority; clearer authority for user fees, parcel taxes and specified areas; and an increase in the scope of development cost charges.

The Community Charter for British Columbia, proposed by the new government of British Columbia, will reportedly provide all municipalities in British Columbia with the full autonomy and flexibility to exercise the residual powers of the Province in the manner of “home rule” municipalities in the United States and Europe. In particular, the government has proposed a large number of new revenue sources and financial tools, including full taxation of provincial, crown corporation and provincial agency property and services; a return to the municipalities of 75 percent of revenues from moving violations; and new taxes, fees, levies and charges that will be announced in June, 2001.

9.0 OPTIONS FOR THE FUTURE

There is an excellent summary of additional and alternative financial powers and resources municipalities should have in the FCM paper entitled “Early Warning: Will Canadian Cities Compete?”, prepared in May 2001 for the National Round Table on the Environment and the Economy. These include:

- “? legal authority for local self government, available to US municipal governments through home rule charters;
- ? fiscal authority to engage in public private partnerships through such mechanisms as municipal permission to hold a mortgage;
- ? access to growth, such as a sales tax, which underpins much of the locally-generated revenue in New York City; or local income taxes, as imposed in Europe and in the U.S.;
- ? opportunities to leverage private sector investment, through direct tax incentives (tax-exempt municipal bonds in the U.S.) or through national fiscal policy (France’s Transport Contribution Tax);
- ? access to permanent lending programs for infrastructure, such as state-run infrastructure banks for transportation, and clean water/drinking water revolving funds widely available in the U.S.” (page 23)

10.0 CONCLUSION

A comparison of the provincial and territorial legislation across Canada that empowers municipalities indicates that Canadian municipalities do not have adequate financial powers or resources in comparison with their counterparts in the United States and Europe. Municipalities

in Canada rely principally on the real property tax, user fees, and a number of other tolls that raise comparatively small amounts compared to the property tax and user fees. This situation has not changed for decades, despite the recently adopted municipal governance legislation in Nova Scotia, Manitoba, Alberta, British Columbia and Yukon Territory.

The FCM and the provincial municipal associations have been lobbying the federal and provincial governments for additional municipal financial tools and resources consistent with the principles of local self government articulated by the International Union of Local Authorities, the Federal of Canadian Municipalities, the Union of British Columbia Municipalities and others. To date, none of the provinces or territories have responded, although the new government of British Columbia has promised new legislation to provide municipalities with full autonomy and flexibility to exercise the residual powers of the Province in the manner of “home rule” municipalities, along with a broad range of new financial powers and revenue sources.

Ironically, the pressing municipal demand for increased autonomy and additional powers and resources collides with the growing trend toward globalization. International trade agreements will have a significant impact in municipal governance and the exercise of municipal powers.

The GATS (the General Agreement on Trade in Services) agreement expressly applies to services provided by or on behalf of municipalities, and requires the federal government to ensure that local authorities fulfill the obligations and commitments made by the federal government. The GATS also applies to all services “except those provided in the exercise of governmental authority”. The exception is defined as any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers. In other words, both tests must be satisfied. Although this would seem to preserve strictly municipal public services, such as a water treatment, it would appear that public private partnerships, contracting out, design build agreements or privatization would be subject to the GATS agreement. The question also arises whether charging a fee for service by a municipality could mean that the service is being delivered on a commercial basis and therefore subject to the agreement.

A number of municipal services could be subject to the GATS, including sewer, water, solid waste and drainage; building inspection and planning regulations; regulation of retail and commercial business operations; regulation of signage; and transit and transportation infrastructure. Under the language of the GATS, the prohibition or restriction of “big box” stores could be considered a restriction of trade. The GATS raises questions about the extent to which a municipal council must balance the expectations of its community with internal business interests without contravening the GATS agreement.

GATS negotiators have also commenced a review of a proposed “transparency” objective. This would require notification of new measures affecting services, time to respond (taking control of the legislative timetable away from municipalities), consideration of the missions of foreign governments, and justification of measures in relation to a world trade organization menu of “illegitimate objectives”. The transparency objective contradicts the municipal purposes set out

in the provincial and territorial municipal acts. Instead of being accountable to the ratepayers and residents, municipal councils would be subject to the WTO transparency objectives.

In Canada, the federal and provincial governments have not resolved what would happen if a local government acts contrary to the GATS agreement. What is known is that trade agreements trump other powers. Under the international agreements, the federal governments pay, despite local transgressions. In the *Salmon* case, although the tribunal said that the World Trade Organization authority supercedes local autonomy, Tasmania refused to reimburse Australia for the compensation Australia had to pay under the international trade agreement.

In the May 2, 2001 decision of the Supreme Court of British Columbia in *United Mexican States v. Metalclad Corporation* (an appeal from the North American Free Trade Agreement tribunal), the court did not alter the tribunal's extremely broad definition of expropriation. The tribunal had held that expropriation under the NAFTA includes incidental interference with the use of property which has the effect of depriving the owner, in whole or in part, of the use or reasonably to be expected economic benefit of property. Accordingly to Mr. Justice Tysoe of the British Columbia Supreme Court, "This definition is sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority". In the end, the court found in favour of Metalclad, with Metalclad being awarded \$16 million (U.S.) and 75 percent of the costs of the proceeding.

Metalclad is a wakeup call for municipalities throughout North America. The enactment of regulatory bylaws that could have the effect of interfering incidentally with the use of property so as to deprive the owner of the use or economic benefit of the property could result in compensation for expropriation under Chapter 11 of the NAFTA and the analogous provision in the proposed FTAA.

The FCM is at this annual meeting considering a proposed resolution (A14) from the Union of British Columbia Municipalities, which is attached as Appendix A.