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Osgoode Hall Law Journal, Vol. 53(1), Forthcoming.

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Abstract:

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

Keywords:

Municipal powers, municipal purpose, rule of law, procedural safeguards, discretion, councilor, corruption, City of Toronto Act 2006, Municipal Act 2001

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

Stanley M. Makuch and Matthew Schuman

I. Introduction: An Exploratory Analysis of Corruption and Municipal Law

This article explores whether granting expanded powers to local government decision makers in Ontario without concomitant expansions of procedural safeguards may lead to an abuse of such powers, and whether such expanded powers (without safeguards) may lead to the corruption of local officials, by allowing them to use their powers for their own private gain. In summary, this article is concerned with whether the current state of Ontario municipal law lends itself to abuse by municipal councillors.

First, we define “private gain” here as not just financial gain, but also as gaining political capital. In other words, we consider local officials corrupt not just when they use their positions to enrich themselves, but also when they use their positions simply to stay in office and/or to reinforce their own status as local power players and persons of influence, rather than using such powers for a clear municipal purpose.

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

As shown below, under current municipal law and the resulting political structures, individual municipal councillors are key decision-makers who have the power to affect the outcome of municipal decisions. Moreover, as municipalities have gained broad discretion to act with few procedural safeguards, an individual councillor could use his or her power to affect a

municipal decision, and because municipalities have such broad discretion, it may be difficult to tell whether a particular municipal decision was made for a proper purpose. In other words, a councillor could act improperly, abusing his or her power for private gain, and there might not be any jurisdictional, political, or procedural limit on his or her action to demonstrate that such action is, in fact, improper. Thus, one unintended consequence of current municipal law might be the creation of conditions that allow for abuse of discretion and corrupt political patronage by municipal council members, without any penalty.

If our view of the current state of municipal law is correct, it would appear to be in tension with the concept of the “rule of law” -- the idea that law, not individual lawmakers, is supreme, and which the Supreme Court of Canada has stated is “ ‘ a fundamental postulate of our constitutional structure.’ ”¹ Yet, we are not suggesting that current municipal law gives local governments too much discretion, but rather that its lack of definition, coupled with a lack of procedural safeguards and rule of law values gives rise to a risk of corruption. In fact, this author has long argued in favour of local governments having local control over their decisions to address local needs.² Rather, we contend that the proper analytical framework to view the expansion of local discretion is as a shift away from “rule of law values” to “economic and political values.” Thus, we believe an expansion of procedural safeguards (which we argue make manifest the rule of law) to match expanded municipal powers, would help to return local

¹ *Reference re Secession of Quebec*, [1998] 2 SCR 217 (SCC) at paras. 70-71 (quoting *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142) (*Secession Reference*)^{ec}

² E.g. Stanley M. Makuch, Neil Craik & Signe b. Leisk, *Canadian Municipal and Planning Law*, 2d ed. (Toronto: Thomson Carswell, 2004) at p. 3 (“Makuch”).

government decision-making based on rule of law values and protect individuals from the potential arbitrary actions of powerful municipal councillors.

We divide our analysis into five parts. In Part II, we provide an overview of what we consider to be a dramatic change in Canadian municipal law -- in the past 20 years, Canadian municipalities have gained expanded powers through a less interventionist role of the courts in reviewing municipal decisions and through broad general grants of power to municipalities in Provincial legislation, with the result that municipal decision-makers now have broad discretion to act, allowing not only local decision-makers more flexibility to address local needs, but also expanding municipalities' subject matter jurisdiction and, thus, making it more difficult to judge whether any particular action is a proper use of municipal power (*i.e.* for a proper municipal purpose).

In Part III, we focus on the lack of political controls or procedural safeguards on such expanded municipal powers. We highlight the lack of political controls to demonstrate that the current structure of local government results in individual municipal councillors being the key decision-makers in local government, and thus gaining the most discretion and authority from the expansion of municipal powers. We highlight the lack of procedural safeguards because procedural safeguards are seen to evidence people's trust in government decisions,³ and thus, to embody the rule of law, which "provides a shield for individuals from arbitrary state action"⁴ (or, in our analysis, municipal action).

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

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

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

II. The Expansion of Municipal Powers

We begin with the scope of municipal powers because Canadian municipalities are creatures of statute. In other words, municipalities’ powers to act, such as the powers to enter into contracts, to pass and enforce bylaws, to create agencies, or issue licences, are found in

provincial legislation.⁵ Indeed, the mere existence of a municipality is dependant on provincial legislation.

In the past 20 years, Canadian municipalities have gained greatly expanded powers. In Ontario, Canada's most populous province, this wide jurisdiction allows municipalities to be more responsive to local values; to be more flexible in addressing local needs, and to act quickly, without seeking authority to act from a provincial government, and, thus to exercise almost the same jurisdiction as the province if they deem it to be in the public interest to do so.

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

Municipal powers have expanded in two ways: first, through a change in the way courts interpret the legislation governing municipalities and second, through changes in provincial legislation. We read both of these changes as evidencing a change in the way we think about local government decision-making. Underlying the expansion of municipal powers, and also

⁵ *R. v. Sharma*, [1993] 1 S.C.R. 650, 668 (S.C.C.) ("as statutory bodies, municipalities 'may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation'"); Makuch, *supra*, note 2, at 81-82.

⁶ See *Ottawa Electric Light Co. v. Ottawa (City)* (1906) 12 O.L.R. 290 (C.A.) at 299 (citing with approval Dillon, *Commentary on Municipal Corporations*, 4th ed.).

evident in the municipal decision-making process, is a shift away from rule of law values to what might be called political and/or economic values, such as efficiency, discretion and responsiveness. This shift is also based on the idea that local governments and local government officials should have the ability to easily respond to the needs of their citizens and should be efficient in making and implementing their decisions.

A. The Judicial View of Municipal Powers: From Dillon's Rule to Subsidiarity

For most of the 20th Century, Canadian municipal legislation was interpreted using the express authority doctrine, known as Dillon's Rule (as it was set out in *Dillon on Municipal Corporations*), which states that a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those powers essential to, and not merely convenient for, the effectuation of the purpose of the corporation.⁷ This meant that municipalities needed express authority clearly stated in provincial legislation before they could act. In practice, a municipality either had to seek the passage (or amendment) of a provincial statute to gain new powers or risk that courts would invalidate any action that was not expressly authorized, or that was not 'indispensable' or 'essential' under an implied grant of power. Moreover, the courts most often narrowly construed such implied grants of power in favour of anyone challenging the municipality's decisions.⁸ In sum, it was very difficult for municipalities to determine in advance whether they were properly exercising their powers. The courts or provincial legislatures had to decide in advance whether a municipality had the authority to enact new policy initiatives. The result was municipal

⁷ *Ibid.*

⁸ *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, 20 M.P.L.R. (2d) 1 (S.C.C.) at para. 97 ("Shell").

legislation with innumerable, specific provisions for every action municipalities wished to take, and numerous special acts for individual municipalities.

However, in the 20 years since the Supreme Court of Canada decided *Shell Canada Products Ltd v. Vancouver (City)* (“*Shell*”),⁹ in which Madam Justice McLachlin (as she then was), dissenting, stated that courts should exercise restraint in reviewing the powers of Canadian municipalities,¹⁰ the Supreme Court subsequently adopted Madam Justice McLachlin’s position and municipalities have gained greatly expanded powers as a result.¹¹

The *Shell* dissent, citing legal commentators, explains that modern municipalities need discretion to decide what is in the public interest¹² and need broad powers to be able to “respond to the needs and wishes of their citizens.”¹³ The Supreme Court subsequently adopted this approach, when reviewing the powers of municipalities,¹⁴ and as a result, courts now apply a ‘benevolent construction’ when reviewing municipal decisions, and emphasize the concept of subsidiarity, *i.e.* that services are best delivered by the level of government that is both effective and closest to the electorate.¹⁵ Now, under an approach that exercises judicial restraint and emphasizes subsidiarity, municipalities may exercise their powers broadly to decide what is good for the general welfare, and/or in the public interest. The shift to judicial restraint in considering municipal powers is a radical change for Canadian municipalities. Courts no longer substitute

⁹ *Ibid.*

¹⁰ *Ibid.* at para. 24.

¹¹ *Nanaimo (City) v. Rascal Trucking Ltd.* [2000] 1 S.C.R. 342, 9 M.P.L.R. (3d) 1 (S.C.C.) at para. 18; (“*Nanaimo*”) 114957 *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 SCR 241, at paras. 18-20 (“*Spraytech*”); Makuch, *supra*, note 2, at 92-93.

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

¹³ *Ibid.* at para. 20.

¹⁴ See *Nanaimo* and *Spraytech*, *supra*, note 11.

¹⁵ *Spraytech*, *supra*, note 11 at paras. 18-20; Makuch, *supra*, note 2, at 92-93.

their own judgment for the decision of a municipal council when reviewing a municipal decision. They now must interpret municipal powers broadly.

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

By economic values, we mean values such as efficiency, discretion, responsiveness, and need. These are the values emphasized by Justice McLachlin in the *Shell* dissent, which the dissent characterizes as important to the continued healthy functioning of democracy at the municipal level. For example, the dissent states in part: “If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values.”¹⁶

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

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

¹⁶ *Shell*, *supra*, note 8, at para. 20.

powers should be to accord municipalities the autonomy to undertake their activities without judicial interference unless clearly warranted.¹⁷

Finally, Justice McLachlin (citing commentators including this author) explains that the appropriate limit on municipal powers is a political one—councillors being voted out of office—rather than limits imposed by judicial review.

[McDonald] and other commentators (see Makuch and Arrowsmith) advocate that municipal councils should be free to define for themselves, as much as possible, the scope of their statutory authority: ... ‘The voters of a community give their elected council members the final judgment in this controversy. Whether the councillors are right or wrong in their judgment depends on the vantage point of the person making this assessment, but in any event, this is the decision they were elected to make. There may, in fact, be no right or wrong in the matter. Persons displeased with a council's decision have "a remedy at the polls".’¹⁸

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

¹⁷ *Ibid.* at para. 21.

¹⁸ *Ibid.* at para. 22.

B. General Grants of Municipal Powers in Provincial Legislation

In addition to the Supreme Court's exercise of judicial restraint, the provincial legislature of Ontario has also revised legislation governing municipalities to grant them broad powers. That legislation also allows for larger municipal boundaries and a move towards single-tier, centralized local governments, creating, for example, the amalgamated City of Toronto.¹⁹ Ontario's legislation governing other municipalities, now also seems to recognize the concept of subsidiarity, providing for municipalities to have broad discretion to respond to local needs with few built-in safeguards. For example, the *Municipal Act, 2001*,²⁰ provides in part:

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

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

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

The *City of Toronto Act, 2006*,²⁴ contains stronger statements regarding the authority of the City. First, s. 1(1) legislatively determines and recognizes that "the city council" is "responsible and accountable," and s. 1(2) provides in part, "that it is in the best interests of the Province and the City to work together in a relationship based on mutual respect, consultation

¹⁹ Makuch, *supra*, note 2 at 18-20.

²⁰ S.O. 2001, c. 25

²¹ *Ibid.*, s. 8(1)

²² *Ibid.*, s. 10.(1)

²³ *Ibid.*, s. 11(1)

²⁴ S.O. 2006, c. 11, sched. A

and co-operation.” Just as the courts have changed their view of municipal powers, the *City of Toronto Act*, also demonstrates that the Ontario government deems the City of Toronto to be a responsible partner. Again, this is a radical change, considering that previously the City of Toronto would have had to seek express authority in the form of provincial legislation before it could exercise any additional powers. Moreover, there is no question that the powers granted to the City of Toronto are meant to be extremely broad. Section 2 of the Act provides in part:

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

1. Determine what is in the public interest for the City.
2. Respond to the needs of the City.
- ...

s. 6(1) states:

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

s. 8(1) provides:

The City may provide any service or thing that the City considers necessary or desirable for the public.

and s. 8(2) provides:

The City may pass by-laws respecting ... [the] Economic, social and environmental well-being of the City.

The result of these broad grants of power to the City of Toronto and other municipalities is to give them nearly total discretion in exercising their powers in areas subject to constitutional constraints. Thus, under the *Municipal Act, 2001*, a municipality may “govern its affairs as it considers appropriate” and “provide any service or thing ... necessary or desirable for the

public.” *The City of Toronto Act, 2006*, similarly allows the City to govern its own affairs, but goes further, in allowing the City to determine what is in the public interest and the economic, social, and environmental well being of the City without limitation. Moreover, the *City of Toronto Act, 2006*, frequently pre-empts the application of other provincial statutes to the City, meaning that the *City of Toronto Act, 2006*, applies in lieu of the provisions of another statute, such as certain provisions in Ontario’s *Planning Act*, that would otherwise govern city decision-making.²⁵ In contrast to earlier, general grants of power, Ontario municipalities no longer need to act based on a “proper municipal purpose.” Instead, municipal councils now have almost as much discretion as the Province to decide what is necessary, appropriate, or in the “public interest”.

To ensure that municipalities have flexibility in exercising their powers, provincial legislation imposes few limits on municipal powers. For example, the primary limit on the City of Toronto’s power to create bylaws is that such bylaws cannot conflict with federal or provincial law. Viewed through the lens of *Shell* and the express authority doctrine, this is a radical change: municipalities no longer need authority to act; instead they have broad powers to act unless there is an express prohibition, or a more senior level of government has acted first with respect to the same issue. For example, the *City of Toronto Act, 2006*; s. 11, provides:

- (1) A city by-law is without effect to the extent of any conflict with,
 - (a) a provincial or federal Act or a regulation made under such an Act;or

²⁵ *E.g. Planning Act*, R.S.O. 1990, c. P.13, ss. 8(25), 34(3.1), 34(16.3), 41(16)

(b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or a provincial or federal regulation.

(2) Without restricting the generality of subsection (1), there is a conflict between a city by-law and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.²⁶

Section 14 of the *Municipal Act, 2001*, which applies to all Ontario municipalities other than Toronto, has a similar provision to s. 11 of the *City of Toronto Act, 2006*. The prohibition on conflicting with, or frustrating the purpose of, a federal or provincial law appears to mean only that an Ontario municipality cannot pass a bylaw, that if complied with, would create a violation of federal or provincial law. In other words, a municipality can regulate, for its purposes, the same areas as provincial or federal law, and can also pass any bylaw, that if complied with, would also allow compliance with provincial or federal law (such as a regulatory scheme that is more restrictive than one set out in a provincial statute).

Further, s. 4(2) of the *City of Toronto Act, 2006*, limits the province's ability to restrict the City's actions, and provides:

Except where otherwise expressly or by necessary implication provided,

- (a) this Act does not limit or restrict the powers of the City under a special Act; and
- (b) a special Act does not limit or restrict the powers of the City under this Act.

A "special act" is defined as "an Act, other than this Act, relating to the City in particular."²⁷ In other words, if the provincial legislature wants to specifically limit the City's powers under the *City of Toronto Act*, it must expressly impose such limits in other legislation (which it has not yet

²⁶ *City of Toronto Act, 2006*, *supra*, note 24, s. 11.

²⁷ *Ibid.*

done). This is a complete inversion of the express authority doctrine, in which municipalities needed provincial authority to take action.

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

25. (1) If the Lieutenant Governor in Council considers that it is necessary or desirable in the provincial interest to do so, the Lieutenant Governor in Council may make regulations imposing limits and conditions on the power of the City under sections 7, 8 and 267 or providing that the City cannot exercise the power in prescribed circumstances.

(2) A regulation made under subsection (1) is deemed to be revoked 18 months after the day on which the regulation comes into force, unless the regulation expires or is revoked before then. 2006, c. 11, Sched. A, s. 25 (2).

Restriction

(3) The Lieutenant Governor in Council does not have the power to renew, or extend in time, a regulation made under subsection (1) or to replace it with a regulation of similar effect. 2006, c. 11, Sched. A, s. 25 (3).

Thus, if the provincial government does not restrict the City's powers by statute, its ability to do so by regulation is limited as it can only do so for 18 months, and it cannot renew, extend or replace such restrictions.

While there are important differences between the City of Toronto and other Ontario municipalities which are codified in provincial legislation,²⁸ both the *City of Toronto Act, 2006*, and the *Municipal Act, 2001*, provide broad discretion to municipal councils to decide what is in their best interests, based on their knowledge of local conditions and informed by the idea that local governments are best positioned to respond to such local conditions (an idea based in economic and political values). These changes in provincial legislation are consistent with the changed judicial view of municipal powers, which provides that local governments should have

²⁸ E.g. the preemption of other statutory provisions by the *City of Toronto Act, 2006*, *supra*, note 25.

discretion with few limits to exercise their powers for nearly any purpose that they deem to be in the local interest.

Since provincial legislation now gives municipalities the ability to pass bylaws for almost any purpose, with the exception of finance powers (such as taxation), challenges brought under the *Canadian Charter of Rights and Freedoms*, and the division of powers between the federal and provincial governments, it may no longer be possible to claim that an Ontario municipality has passed a bylaw which is beyond its subject matter jurisdiction in those areas of law that are constitutionally granted to the provinces, although the bylaw is limited to the geographic area of the municipality.²⁹ Moreover, in some areas particularly important to municipal governments, such as land use regulation, even the *Charter* may not apply, since the *Charter* does not protect property rights.³⁰

Yet, giving such broad discretion to local decision-makers appears to raise a tension with the fundamental principle of the rule of law because, if local decision-makers have a nearly unchecked ability to decide what is in the local interest, it may no longer be possible for them, or the voters who elect them, to tell whether they are acting for a proper or improper purpose. For example, consider that in the City of Brampton, Ontario, following a forensic audit, municipal councillors were alleged to have violated the City's expense policy when they had the City pay for travel, tickets to events, and other business expenses.³¹ The Council had passed an expense

²⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

³⁰ *Cf. United States Constitution*, Amendment 5.

³¹ City of Brampton, *Report on a Simplified Dispute Resolution Process in the Matter of Amounts Repayable by Members of Council for the City of Brampton*, by Janet Leiper (Brampton: October 23, 2014), pp. 2-3. Online: City of Brampton <http://www.brampton.ca/EN/City-Hall/Council%20Expense%20Statements/Simplified_Dispute_Process_Report.pdf>.

policy that provided for councillors to review and approve the City's payment of their own expenses.³² Further, the expense policy, which was "values based" and not "rules based",³³ did not address all of the City's practices for reimbursing expenses. In particular, the City had a long-standing practice of paying for councillors' spouses to attend community events with them.³⁴ However, the practice was not codified in the policy, so when an auditor reviewed the expenses, the councillors were seen to have violated the City's policy when they sought city payments for such tickets.³⁵ It was not until the auditor subsequently revised the report and the City participated in a dispute resolution process, that the councillors themselves could be sure whether they had correctly followed city policies.³⁶ Further, some councillors were in fact required to reimburse the City for additional expenses that they had improperly incurred under the policy.³⁷ It was not until after the scandal that the City re-wrote its expense policy to have City staff review expenses, thus limiting the discretion of the councillors.³⁸

Yet, as discussed above municipal law grants broad powers to municipal councils to make decisions concerning their municipalities (including their own conduct), imposing few legislative or judicial limits on when their decisions are made for a proper purpose. Since these external limits on municipal decisions are no longer available, one might expect that the check on municipal powers would take the form of political controls or procedural safeguards, which would be built-in to the municipal decision-making process. Accordingly, in the next Part, we

³² *Ibid.* p. 3, 11.

³³ *Ibid.* p. 11.

³⁴ *Ibid.* p. 3.

³⁵ *Ibid.*

³⁶ *Ibid.* p. 2-3.

³⁷ *Ibid.* p. 2.

³⁸ *Ibid.* p. 3.

undertake a brief review of the political structure of municipalities to determine whether there are political controls that check the power of individual decision-makers and we discuss the role of procedural safeguards, which not only might check the discretion of individual decision-makers, but are also commonly seen to embody procedural fairness and the rule of law.

III. Few Political Controls or Procedural Safeguards to Check Expanded Powers

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

A. The Political Structure of Municipal Councils: Individual Councillors as Key Decision-Makers

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

Even when not required by a statute such as Ontario's *Municipal Act, 2001*, the general rule in Canadian municipalities is to elect municipal councillors by ward:³⁹ "For the most part, municipalities have opted for elections based on ward representation" ⁴⁰ In addition, municipal council members have no formal affiliation with a political party. For example, in the City of Toronto:

Toronto city councillors are not bound by party discipline ... Toronto local politics has traditionally had only the weakest of left-wing and right-wing groupings. Councillors are individually elected and pay for their own expenses individually. Their electoral campaigns usually feature only one or two local issues on which they express definite views.⁴¹

and

The ward-based electoral system and the absence of parties or slates are meant to encourage independence and prevent the emergency of party "machines" such as Chicago's Democratic establishment; but the political system strongly encourages seat-of-the-pants decision-making and a reactive style of governance.⁴²

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

³⁹ *City of Toronto Act, 2006*, *supra*, note 24, s. 135(3); *Municipal Act, 2001*, *supra*, note 20, s. 217(4).

⁴⁰ Makuch, *supra*, note 2, at 8-9.

⁴¹ Mariana Valverde, *Everyday Law on the Street* (Chicago: University of Chicago Press, 2012) at 80.

⁴² *Ibid.*

Such a system seems to exemplify representational and responsive politics. However, it also lends itself to a councillor acting in his or her own interest, merely to gain political capital, in which the “reactive style of governance” may benefit the councillor’s core constituency, but does not actually reflect any sort of long range plan or broader platform. Such lack of vision is arguably not in the best interests of the municipality because the councillor is not considering the municipality (or its people) as a whole, and thus not acting in the local interests.⁴³ In addition, because the political structure of municipal councils encourages quid-pro-quo decision-making by councillors trading votes that benefit their own wards and own interests, a municipal council could become a very permissive body, allowing its members to act completely in their own interests, rather than in the interests of the municipality or the public, or even contrary to law.

Further, in contrast to the “strong mayor” system used by some U.S. cities, in which a mayor has executive powers such as a veto, or a Westminster system of government, in which a majority of council members would vote to elect a mayor, many mayors in Canadian municipalities have little political capital and relatively few powers to reign in individual municipal council members’ discretion or impose limits on municipal decisions.

A mayor in Canada does not have the same political authority of a party leader at the senior levels of government. He or she is, in fact elected at-large and therefore, is elected by a constituency different from that of the councillors. The mayor is not elected by a majority vote of the council through the support of a group in that body. This often results in a lack of cohesive and consistent policy development. ... Unlike the American strong mayor system where the mayor effectively has some executive powers to guide the direction of council, mayors in the Canadian model have few real powers which enable them to perform an executive function.⁴⁴

⁴³ *Ibid.* at 80-81.

⁴⁴ Makuch, *supra*, note 2, at 11.

In contrast to senior levels of government, “The absence of any true executive powers detracts from the mayor’s ability to be a strong spokesperson for the local values of the community or to influence policy direction on his or her own.”⁴⁵ “This diffusion of power ... is perhaps indicative of the traditional view of local government as being less overtly political and more oriented towards administrative functions. ... [T]he reality of modern local government is that legislative priorities and consistent policy directions must be set.”⁴⁶

The result of the weak mayor system is that a mayor does not have express powers to direct council action, but rather functions as little more than a figurehead or someone whose political capital might be of use when it benefits individual council members. A mayor serves as just another vote on council, in addition to exercising formal *ex officio* functions. Moreover, since a different constituency elects the mayor than elects the councillors, the mayor is not guaranteed the political capital to direct the council to take action or to stop the council from acting—the issues and positions important to the mayor may be radically different from the issues and positions important to a particular ward.

As a general rule, municipal law requires the council as a whole to make decisions for the City, but as a result of the weak mayor system and lack of party affiliations or formal coalitions on municipal councils, individual municipal councillors become the key decision makers at the municipal level of government. First, this lack of coalitions or party affiliations may undermine the policy of having the council as a whole determine municipal decisions, and might result in decisions that are not well reasoned or fully debated, since the council may vote based on the

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

interests of an individual councillor. Second, this lack of structure on municipal councils means that individual councillors (rather than the municipality, or the council as a whole) are the ones gaining expanded discretion and power in their decision-making from the expanded discretion and powers granted to municipalities, and thus have very powerful tools to act in their own interests. Stated another way, if the broad discretion that municipal law provides to local decision-makers gives individual councillors the opportunity to improperly act in their own interest, the political structure of municipalities, which makes individual councillors the key decision-makers in municipal decisions, gives individual councillors the motive to improperly act in their own interests by giving them the opportunity to use all of the powers and resources of a municipality for their own purposes.

B. Procedural Safeguards and the Rule of Law

Another potential check on the abuse of municipal power might be procedural safeguards in municipal decision-making because procedural safeguards are seen to manifest the idea of the rule of law—the idea that a positive system of laws exists, is supreme above the power of individual decision-makers, and, thus, protects individuals from arbitrary government action, in part because government decisions must be based in law.⁴⁷ Procedural safeguards literally impose an order on government decision-making (often requiring formal notice of government action, hearings, and the ability to cross examine evidence or appeal). In this way, procedural safeguards manifest the idea of the rule of law because the rule of law, among other things, is the idea that the system of laws reflects an orderly (and fair) society, in which laws and procedures

⁴⁷ *Secession Reference*, *supra*, note 1, at paras. 70-71.

are followed consistently, and even government decision-makers are accountable to the system of laws.⁴⁸

Thus, we associate procedural safeguards with what we call “rule of law” values. The Supreme Court of Canada has described the rule of law as “a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.”⁴⁹ We consider procedural safeguards to be an important part of the rule of law and of protecting the rule of law values we associate with good government and procedural fairness, such as predictability, certainty, and equality, which are enshrined in administrative law and create limits on municipalities (and other levels of government) decision-making authority. Many of these safeguards were cited by a seminal report published in 1968, *A Royal Commission Inquiry into Civil Rights in Ontario*, also known as the McRuer Commission Report, which examined why and how individual rights, liberties and freedoms could be protected from infringement by provincial government action,⁵⁰ and which suggests that a “standard of justice” is needed for our legal system to ensure justice and freedom under the law.⁵¹ In this view, no matter how broad the government’s powers (such as the expanded powers of municipalities), or which part of the government makes a decision (municipal councillors or others), the rule of law and/or a “standard of justice” is protected by procedural safeguards.

⁴⁸ *Ibid.*

⁴⁹ *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 805-806, 1981 CanLII 25 (SCC)

⁵⁰ *Royal Commission Inquiry into Civil Rights, Report No. 1*, vol. 1 (Toronto: Queen’s Printer, 1971), (“McRuer Report”) at viii.

⁵¹ For an overview of some key writings on defining the rule of law, *see, e.g.*, Robert Stein, “Rule of Law: What does it Mean?” (2009) 18 *Minn. J. Int’l. L.* 293.

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

- (1) Government interference with the actions and rights of individuals should only occur where necessary and to the extent necessary;
- (2) Elected representatives to whom a citizen may appeal for help;
- (3) Wide dissemination of information to inform individuals of their rights;
- (4) A fair procedure before the exercise of government authority;
- (5) Reasons to be given to an individual explaining and justifying the government's action;
- (6) Judicial supervision to ensure legality and rationality; and
- (7) Administrative appeals to review decisions.⁵²

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

Further, procedural safeguards are not only important manifestations of the rule of law because they change the process of how government decisions are made, but also because they are effective – people believe that the use of procedural safeguards will result in fair outcomes.⁵³ Studies of the American judicial system by social psychologists have demonstrated that people are more satisfied with court decisions when they feel they have been treated fairly. Thus, in court, people care more about being treated fairly than whether they win or lose a particular case,⁵⁴ and are more willing to accept a losing outcome if they feel they have been treated

⁵² McRuer Report, *supra*, note 50 at 5.

⁵³ Note 3, *supra*.

⁵⁴ Tyler, et al, *supra*, note 3 at 82-84 (“[P]rocedural justice significantly affect[s] personal satisfaction with outcomes received from third parties.”).

fairly.⁵⁵ Similarly, people are more likely to comply with the law when they feel that a police force is legitimate.⁵⁶ In these contexts, people perceive procedural fairness as a way to obtain fair outcomes and perceive that fair treatment produces fair outcomes.⁵⁷ As a result, we see procedural safeguards as embodying the kinds of rule of law values set forth in the McRuer Commission Report, and as an important check on arbitrary government decision-making, whether in court or in another context (such as a legislative, administrative, or quasi-judicial proceeding at the municipal level of government).

Yet, municipalities' broad power to pass bylaws gives them broad authority to set the rules for the other kinds of decisions they can make. Unless set out in provincial legislation (such as the *Planning Act*),⁵⁸ municipalities can set their own rules for administrative and quasi-judicial proceedings, including what information must be included in an application for a municipal license or approval, how much notice someone gets and what opportunities they have to present a case, or be heard by council, or whether they can appeal a decision. It doesn't matter whether the applicant is a hot dog vendor,⁵⁹ a taxi driver,⁶⁰ or a national corporation.⁶¹ Municipalities' broad power to pass bylaws gives them broad powers and broad discretion to govern their own administrative processes and enforcement proceedings. Further, Ontario

⁵⁵ Tom R. Tyler, *Why People Obey the Law* 23 (2006).

⁵⁶ Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *Law & Soc S Rev.* 513, 525-26 (2003) (showing that legitimacy of police forces influences compliance with the law).

⁵⁷ Tyler, et al, *supra*, note 3, at 75.

⁵⁸ *E.g.* R.S.O. 1990, c. P.13, *supra*, note 25, ss. 34(10.4) – 34(10.6) (setting notice provisions with respect to amendments of zoning bylaws).

⁵⁹ Valverde, *supra*, note 41 at 144-147.

⁶⁰ *Ibid.* at 172-174

⁶¹ *See* discussion of sign bylaw, below, part III.C.3.

municipalities have broad powers to delegate their authority.⁶² Thus, decisions in administrative processes and enforcement proceedings do not have to be made by the municipal council, but can be made by a variety of officers, officials, agencies, boards, commissions, and committees.

However, the expansion of municipalities' administrative discretion does not necessarily include a concomitant expansion of procedural safeguards. Rather, even as municipal powers have expanded, few new procedural safeguards have been introduced.⁶³ Instead, municipalities are only required to include those procedural safeguards recognized by common law or set out by statute, which are the same procedural safeguards that were in place when municipalities had much more limited powers. Further, while the *City of Toronto Act, 2006*, s. 12(1), provides that new bylaws are subject to procedural safeguards, s. 12(1.1) also provides that the City's powers should be interpreted broadly, and s. 12(5) contains a list of nine types of bylaws (including sign bylaws, discussed further in Part IV, below) to which procedural safeguards do not apply. As a result, in some cases, while municipalities have actually gained expanded powers, they have restricted procedural protections for those subject to their decision-making processes.

⁶² *Municipal Act, 2001*, *supra*, note 20 s. 23.1; *City of Toronto Act, 2006*, *supra*, note 24, s. 20.

⁶³ An important exception to the lack of protections against the abuse of municipal powers is the relatively recent appointment of "n important exception to the lack of protections against the abuse of municipal powers is the relatively recent appointment of n Integrity Commissioner, to enforce a code of conduct for the council; an Auditor General, to ensure the council's good stewardship of the municipality's finances; and a Lobbyist Registrar. These positions are required by the *City of Toronto Act, 2006*, and are being adopted by a number of other Ontario municipalities on a voluntary basis. Yet, these accountability officers face a daunting potential conflict of interest as they report to the same municipal council whose members they must investigate, and whom are not above filing complaints against each other for political purposes. As a result, having an accountability officer in place is not a guarantee of 'good behaviour' by council members. Instead, the burden of acting in a truly independent manner, and not being taken advantage of by council members, is on the individual appointed to each accountability office. For example, the current City of Toronto Ombudsman announced that she would leave her office after a single term of seven years to avoid harming the office. Jennifer Pagliaro, pted by a number of other Ontario municipalities on a voluntary basis. Yet, these acr (23 March 2015) online: Toronto Star <<http://www.thestar.com/news/gta/2015/03/23/ombudsman-fiona-crean-to-step-down-in-november.html>>.

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

IV. Economic Values Replace Rule of Law Values in Municipal Decision-Making

While there is a serious concern about the need for responsiveness and efficiency in municipal decision-making and the exercise of municipal powers, this alone does not necessarily foster corruption or abuse of discretion in municipal decision-making. In fact, this author has previously advocated that the purpose of local government: “must ... be to ensure that political decision reflect local values;” to ensure that local government has the tools to effect its decisions, and to ensure that local government (and not a more senior level of government) is accountable for such decisions.⁶⁴ Yet, accountability as described in this context is not a day-to-day check on power enforced by political controls or procedural safeguards. Rather, it is accountability to the voters at the end of an elected official’s term. In terms of day-to-day decision-making, broad discretion, combined with a lack of political controls or procedural safeguards in the municipal decision-making process may mean municipal decision-makers are not accountable for their decisions on an on-going basis, and that instead, individual municipal council members freely

⁶⁴ Makuch, *supra*, note 2, at 3-4.

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

Stated another way, we take issue with the commentary, quoted by Justice McLachlin in the *Shell* dissent that there may be no right or wrong municipal decision.⁶⁵ In our view, a wrong decision, or one that is improperly made, is a decision that circumvents ordinary municipal decision-making processes and might be seen as merely arbitrary, or satisfying the whims of an individual councillor. Such decisions are not based on the rule of law when they are not transparent, reasoned, or predictable, or clearly made for a proper municipal purpose.⁶⁶

In each of the following examples, political/economic values compete with, and appear to replace, rule of law values that create limits on municipalities' decision-making authority. Each example also shows the expanded discretion of municipal council members and council member behaviour that is associated with abuse of discretion and corruption. Yet, in each example, there is no evidence of a municipal council member using his or her office for private financial gain (such as pocketing cash) and there is no allegation of a crime. However, in these examples, municipal decision-makers, and in particular individual municipal councillors, use their powers to influence municipal decisions, and are so concerned with responsiveness and efficiency to

⁶⁵ Note 18, *supra*.

⁶⁶ We believe that providing well-articulated reasons for a decision may go a long way to clearly articulating a municipal purpose.

protect and grow their own political capital (and potential re-election), they may not make decisions that are in the best interests of the municipality. As a result, the question arises: does current Ontario municipal law create a system which lends itself to improper, or even abusive or corrupt, decision-making by local elected officials, or at the very least, benefit those officials more than it benefits the public?

1. S. 37, Political Capital, and Ward Councillors: Equality Gives Way to Responsiveness

The principle stated by the McRuer Commission Report that individuals should have the ability to appeal to elected officials gives way to the economic/political value of responsiveness when ward councillors respond to their constituents. On the one hand, this may appear to be subsidiarity, or representative democracy, in action, but as a multi-year study of Toronto puts it, in fact results in the failure of ward councillors to take long term policy positions, instead merely reacting to short-term, citizen-led campaigns (and the resulting press coverage) to “save X.”⁶⁷ In other words, the councillor is fulfilling a “market need” for a local champion and the local councillor’s political capital depends on responding to local anger.⁶⁸ As a result, while the councillors are not engaged in money-for-votes style corruption, they are using many of the same practices—diverting the City’s resources to a small group of homeowners or even to individuals—that have historically been associated with ward-healing (the receipt or distribution of political patronage) or the machine style politics of Tammany Hall.⁶⁹ This behaviour occurs despite the fact that ward councillors lack formal associations with political parties in a specific attempt to prevent machine-style politics.

⁶⁷ *Valverde, supra*, note 41, at 80, 82-83

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* at 93.

One example of councillors' responsiveness to local needs competing with rule of law values is the determination of community benefits in exchange for 'density bonuses' under s. 37 of the *Planning Act*.⁷⁰ Under s. 37, municipalities may provide increases in density or height of proposed real estate development above what is allowed in the zoning by-law (known as a "bonus") in return for the provision of facilities, services or any matter provided by the developer applicant. The only limitation on this power required by the *Planning Act* is that the municipality's Official Plan contain policies for bonusing.⁷¹ However, this requirement is meaningless because most Official Plans provide for bonusing without any standards whatsoever. Further, these bonuses generally take the form of agreements between the municipality and the developer.⁷² The result is that increases in height and density are given in exchange for any matters that the local councillor may favour.⁷³ In many cases, these agreements are not appealed to the Ontario Municipal Board (the "OMB"), which has oversight of planning and other municipal matters. However, as the OMB both encourages settlement, and also seeks to ensure that s. 37 benefits being provided to a municipality are in the public interest, even on appeal there is a structural incentive for the OMB to defer to the interests of the municipality (and thus, the interests of the local councillor). Most infamous is an OMB decision

⁷⁰ R.S.O. 1990, c. P.13, *supra*, note 25 s. 37.

⁷¹ *Ibid.* s. 37(2).

⁷² *Ibid.* s. 37(3). The practice is not to finalize a planning report until the benefits for the City have been finalized

⁷³ The power in section 37 of the *Planning Act* is so ill-defined that councillors in Toronto have suggested particular architects to be used for development applications.

that approved a height increase on the condition that the developer provide a drinking fountain for dogs in a local park.⁷⁴

A study of s. 37 bonuses granted in Toronto shows that they were split between cash and in-kind benefits.⁷⁵ First, consider the effect of a cash payment in lieu of constructing a specific community amenity. This system allows a municipality to accumulate a fund to be used at the discretion of the municipal councillors. Further, since community benefits are frequently tied to the neighbourhood in which a bonus is granted, a council member in whose ward a s. 37 bonus is paid has a discretionary fund that he or she can use as a form of patronage, providing improvements (such as the dog fountain) desired by politically powerful groups of residents in his or her ward.

Similarly, the in-kind benefits (specific improvements or amenities provided by developers) conferred were “mainly ‘desirable visual amenities’ such as parks, roads and streetscapes, and public art” and were always within the same ward as the proposed project.⁷⁶ As with cash payments, these very visible amenities represent a kind of political patronage in which a councillor requests that a developer provide a specific benefit that reflects the desires of ward residents. In the case of both cash payments and in-kind benefits, the councillor’s actions are public and legal. Yet, the true beneficiaries are the councillors (who gain political capital) and their supporters (who get to shop for new neighbourhood amenities with a developer’s

⁷⁴ In the case of *6347 Yonge Ltd. v. Toronto*, the OMB imposed a condition that the developer donate \$50,000 to construct a dog drinking fountain that local residents wanted. In the case of s. 37 benefits, it is typical for OMB decisions, even though not made by the City Council directly, to merely approve a negotiated agreement between the developer and the City.

⁷⁵ Aaron A. Moore, “Trading Density for Benefits: Section 37 Agreements in Toronto” (2013), 2 Institute on Municipal Finance and Governance Perspectives, Executive Summary.

⁷⁶ *Ibid.*

funds), rather than new residents who have not yet moved in to the development that was granted a density bonus, or even the surrounding neighbourhood.

While the *Planning Act* provides no clear requirement for a nexus or relationship between the density or height increase and the required community benefit, the City of Toronto recently passed requirements for the implementation of s. 37 which impose additional criteria on where a benefit can be located.⁷⁷ The benefit now needs to be located near the contributing development and available to the occupants of the new project (which in recent years has been predominantly residential development). As a result, the new amendments attempt to tie the new benefit to the contributing project, but nevertheless, the councillor determines what the benefit will be before the project is built and thus, the owners of the units in the new building have no say in the nature of the benefits but may pay for them in their purchase price. Most importantly the granting of a broad power means there is no direct connection at all between what the developer gives and the increase in height or density. For example, there is clearly no relationship between an increase in height and density and the benefit of a fountain for dogs to drink out of in a neighbouring park, but such a benefit was required.

The resulting benefits are chosen by the ward councillor, in direct response to his or her supporters, with no guarantee that they will benefit the residents of new development who may well bear the cost of them. Further, the benefits even if paid as cash generally result in visual, or physical improvements that the councillor can point to as improvements he or she has brought to

⁷⁷ Toronto City Council Item PG31.4, “Improvements to the Section 37 Implementation Process” (adopted April 1, 2014) available at <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2014.PG31.4> (last accessed December 10, 2014).

the ward, benefiting and or rewarding certain groups of voters within the ward and building the councillor's political capital in preparation for re-election.

2. Discretion v. Certainty and Predictability

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

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

The lack of uniformity and the ability of a municipality to exercise discretion on a case-by-case basis is statutorily authorized by s. 41 of the *Planning Act*, which gives broad powers to impose conditions on all development in addition to the provisions of the applicable zoning bylaw. In the past, courts were sceptical of this broad power as it was not clearly defined and

uniformly applied. In *Canadian Institute of Public Real Estate Companies (CIPREC) v. City of Toronto*,⁷⁸ the Supreme Court of Canada invalidated a City of Toronto bylaw that repeated verbatim language from the *Planning Act* as being *ultra vires*. However the Court also addressed an argument made by the City that each piece of real property is so unique that it is impossible to draft a general bylaw that imposes specific conditions on all development. The Court stated in part:

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

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

The alternative, a system which lacks predictability and certainty, is a system in which conditions can be imposed on municipal approvals for any reason, even a condition that does not specifically relate to the approval, thus resulting in behaviour that is an abuse of power because a condition is imposed which is not for a legal purpose. In one instance, a developer sought a minor variance to slightly increase the width of building for technical reasons. The building otherwise complied with the bylaw and could be built as of right. City staff informed the developer that it would be able to obtain the variance subject to a condition that the developer

⁷⁸ [1979] 2 S.C.R. 2, 10-11.

provide the City with a payment of \$50,000.⁷⁹ The payment bore no relationship to any planning concern. One explanation might be that the payment was arbitrarily imposed because the councillor wanted it.

As Toronto's new development permit pilot project⁸⁰ shows, the imposition of a broad range of conditions on new development is alive and well and has the potential to be entirely dependent on the whims of local groups of supporters and the local councillor for an affected area, which would affect both what the project applicant needs to know and the process that must be followed to obtain new planning approvals. Ostensibly, the proposed system is an attempt to limit "site-specific" or "spot" zoning and variances, by replacing that zoning with a permit. However, it is certainly unclear that it will limit discretion and decisions made on a case-by-case basis; rather the opposite is much more likely to occur. The new system would allow the City to impose conditions and also would likely give more power to the local councillor and small, powerful groups of constituents to control the design of new buildings. As with section 37 benefits, this would emphasize responsiveness and local discretion, without providing the certainty and predictability considered by the Court in *CIPREC*.

3. Discretion and Efficiency v. Procedural Safeguards

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

⁷⁹ This was a 2010 development application for the Hazelton Hotel, located in Toronto's Yorkville neighborhood. The correspondence is on file with the author's former law firm.

⁸⁰ "Reset TO," available at www.toronto.ca/planning/reset (last accessed November 4, 2014).

As discussed above, the City has broad authority to regulate signs as it wishes and to set up procedures to enforce such regulations. As a result, the City lessens the risk of allegations that it has not acted fairly or provided adequate procedural protections unless it violates its own rules. Even then, the onus is on the affected person to challenge the City's action in court on the basis of a denial of natural justice, or lack of fair treatment. Further, the standard imposed by the courts is a vague one, which varies from situation to situation. In practice, this results in significant protection for the City and a significant demand of time and resources for any potential challenger.

In one case, *Strategic Media Outdoor Inc. v. Toronto (City)*,⁸¹ a sign company argued that the City, in exercising its powers under the *Municipal Act, 2001*, instead of the *Planning Act*, had deprived the company of its right to notice and a hearing before passing the sign bylaw, and that therefore the bylaw was invalid. Without any finding on the bylaw's validity, the City undertook enforcement proceedings against the company and put it out of business.⁸² The sign company also argued that the bylaw was contrary to the *Canadian Charter of Rights and Freedoms* and was not passed for a proper planning purpose. Yet, the pre-emptive enforcement of the bylaw was upheld by the court notwithstanding that these issues were to be adjudicated.⁸³ The case raises the question of whether municipalities fail to follow legal requirements and procedural safeguards because they have been given so much discretion and are so eager to be efficient and respond quickly.

⁸¹ [2009] O.J. No. 451, 57 M.P.L.R. (4th) 241 (ONSC).

⁸² *Ibid.* at paras 2, 29, 42 (the bylaw at issue was passed under the *Municipal Act*, as the *City of Toronto Act* was not yet in effect).

⁸³ *Ibid.* at paras. 29, 42.

4. Public Participation At City Council Meetings: Equality Gives Way to Efficiency

Similarly, when seeking an application for a sign variance under the same bylaw, the value of equality gives way to the value of efficiency. The McRuer Commission Report cites both an individual's ability to appeal to elected officials and a fair procedure before the exercise of government authority as hallmarks of the "standard of justice." Accordingly, it is standard practice for members of the public to be able to make presentations to municipal councils before decisions are made, and for councils to limit the time of presentations to five minutes, to try to ensure that all members of the public have an opportunity to speak.⁸⁴ However, this rule is also about efficiency. The time for a presentation is limited regardless of the circumstances of the presenter. In the case of applications allowing variances to permit signs, which would otherwise be illegal, applicants, who had a very significant interest in an approval of their application had no greater rights than anyone who wished to appear before the committee, were generally restricted to speak for only five minutes, had no right of appeal, received no reasons for the decision, often had no notice of opposition to their application, and had no right of response to those who spoke after them. Thus, while the rule ostensibly seems to give everyone an equal voice, it does not necessarily result in the participants' equal treatment or in a decision perceived to be fair, or known to be for a proper municipal purpose. Moreover, as discussed above, while the City of Toronto has broad powers to pass a sign bylaw, establish an administrative process, and conduct enforcement proceedings to regulate signs, it has not incorporated any procedural safeguards for applicants or others with a specific interest in the matter.⁸⁵

⁸⁴ See, e.g. City of Toronto Municipal Code, s. 27-15(C) (limiting time of public presentation to council committee).

⁸⁵ See, *City of Toronto Act, 2006, supra*, note 24, s. 12(5).

Here, the lack of procedural protections risks the poor-quality decision making with which the McRuer Commission Report is concerned. Without a right of appeal, any staff recommendation may be less vigorously analyzed and well-reasoned as there is no challenge possible as long as the ward councillor agrees with the recommendations. Indeed, many staff reports contained significant errors as an examination of the reports regarding signs clearly indicated. The quality of the decision-making must suffer. Furthermore, in the absence of an appeal, the reasons for a decision can be virtually irrelevant to any planning concerns. Instead, as in the case of section 37 benefits, individual municipal council members act as key decision-makers when it comes to allowing variances to permit signs. A survey of the City of Toronto Community Council showed that 103 of 115 sign variance decisions were determined by the Ward Councillor.⁸⁶ In three other meetings surveyed, 100% of the decisions were determined by the Ward Councillor⁸⁷ Yet in the 2006 election, only 39% of those having the right to vote did so and the winners in the 44 wards averaged 46.5% of the vote in the ward.⁸⁸ Therefore, such decisions were made by persons who obtained only a very small percentage of the votes cast in the City. Thus, as in the case of Section 37 benefits, when it comes to sign permits, in Toronto, the individual ward councillor acts as the key decision-maker and other councillors will vote the same way as the councillor in the affected ward, expecting reciprocity when their wards are likewise affected. In this way, an individual's right to participate in a public decision gives way

⁸⁶ This survey was undertaken by Robert Jefferson and Lionel Feldman as part of the research for *Strategic Media Outdoor Inc. v. Toronto (City)*, *supra*, note 81. The research was undertaken in June 2008 and is on file with the author's former law firm.

⁸⁷ *Ibid.*

⁸⁸ City of Toronto 2006 Municipal Election Voter Statistics, online: City of Toronto <http://www1.toronto.ca/static_files/city_clerks_office/elections/docs/Results_PDFs/2006/2006voterturnout.pdf>

to concerns of efficiency, a councillor's discretion, and the councillor's responsiveness to his or her core constituents.

5. Need v. Purpose of legislation/Limits on Power

A final example of the misuse of municipal power, like the sign bylaw enforcement case, raises the issue of whether municipalities have so much discretion, with so few limits, that they ignore their legal obligations. It also addresses the economic value of "need." The City of Toronto has a parking authority, which is appointed by the City Council, and manages City parking lots.⁸⁹ The Authority has established a surcharge of 42 cents on each dollar that it charges for parking and explains on its receipts and its website that this surcharge is not for the cost to operate and maintain the parking lots, but for parks, infrastructure, and other city needs.⁹⁰ Stated another way, the City has imposed a charge not based on the actual cost to provide the service (the operating costs to make the parking lots self-sufficient), but based on the discretion given to the City to determine what the City needs (or stated another way, to determine what is in the public interest).

The authority characterizes this as "giving back" to the City. However, one of the few limits on the City's power under the *City of Toronto Act, 2006*, is the express prohibition that the City may not impose a tax.⁹¹ The Parking Authority may only exercise those powers that are granted to the City,⁹² yet the Parking Authority's surcharge is not paying for its operating costs, but is providing revenue to the City for general purposes. This is an illegal tax that is contrary to

⁸⁹ City of Toronto Municipal Code, ss. 179-1(A), 179-7.

⁹⁰ Toronto Parking Authority, Code, ss. 179-1(online: Toronto Parking Authority <<http://parking.greenp.com/about/did-you-know.html>>).

⁹¹ *City of Toronto Act, 2006*, *supra*, note 24 s. 13(1).

⁹² City of Toronto Municipal Code, s. 179-7, *supra*, note 89.

the City's powers. Does this mean that the City's regard for the law and the rule of law has given way to a need for revenue to provide essential services? According to a study of the City's finances, the City is not in such a dire situation, but has enough revenue to provide its existing services.⁹³ If the issue is not one of need, then perhaps the answer lies in the City's broad discretion to exercise its powers and make decisions with little oversight. The Parking Authority members are appointed by City Council, and as shown above, the Councillors have broad discretion, and in our view make decisions within a paradigm of political and economic forces rather than one based on rule of law values. If this culture of discretion can result in the imposition of illegal taxes and disregard for legal limits, it also risks the use of public authority for illegitimate private gain.

V. Conclusion

In this essay, we begin to explore the idea that a confluence of factors has expanded the powers and broadened the discretion of Canadian municipalities and individual municipal council members: the exercise of judicial restraint in reviewing city decisions; the creation of larger, single-tier cities with centralized power with few legislative limits; the lack of political limits on the power of individual city council members; a lack of procedural safeguards; and the privileging of economic and political values over rule of law values in city decision-making. These changes allow municipalities to ensure that political decisions reflect local values, that local government has the tools to effect its decisions, and that local government (and not a provincial government) is accountable for such decisions. For municipalities and municipal councils that in the past had to seek express authority to take action, this represents a radical

⁹³ Enid Slack and André Côté, "Is Toronto Fiscally Healthy? A Check-up on the City's Finances" (2014) 7 Institute on Municipal Finance and Governance Perspectives, Executive Summary.

change. Further, the expansion of power and discretion includes few administrative or procedural limits, since municipalities can make their own rules, set their own administrative procedures, and impose their own conditions, unless there is a conflict with federal or provincial legislation. Moreover, as a result of a weak-mayor system, lack of party affiliations, and elections by individual districts or wards, individual municipal council members and their core constituents have become not only the key decision-makers in municipal government, but also the primary beneficiaries of expanded municipal powers and discretion in municipal decision-making.

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

We have raised the idea that the unintended consequence of this almost limitless discretion may be that Ontario municipal law lends itself to corrupt decision-making and call for further investigation into the effects of a dramatic change in municipal law. It is not clear that

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

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