

“MUNICIPAL AUTONOMY”

Communities in an Urban Century Symposium

Federation of Canadian Municipalities

Date: Saturday, October 20, 2001
Time: 1:30 – 3:00 p.m.
Location: Toronto, Ontario

1.0 Introduction

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 provide municipalities with the powers, resources and autonomy to meet existing or future needs.

It is an injustice to taxpayers and other citizens, and a disturbance of order and practicality, to assign to a national or provincial government what autonomous municipalities can do best. In this regard, the Supreme Court of Canada has said that:

“... lawmaking 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.” [L’Heureux-Dube J., in *114957 Canada Ltee (Spraytech, Societe d’Arrosage) v. Hudson (Town)*, 2001 SCC 40].

What is needed at this time in history is reasonable consultation on the questions as to which order of government should provide which public services, and what powers and resources local governments ought to have to act autonomously to meet local needs.

The municipal want of autonomy 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, offloading, 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.

As discussed in the author’s two papers entitled “Comparison of New and Proposed Municipal Acts of the Provinces”, presented at the 1999 and 2001 FCM conferences, municipalities cannot be autonomous until they have adequate powers and financial resources to meet current and future needs of their citizens, and until the provincial and territorial legislation requires consultation prior to legislative changes and consent prior to boundary changes.

The Canadian courts and the federal government have recently changed the way they look at municipal autonomy.

The courts have during the past decade declared that the law 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. In the *Spraytech* case, quoted at the beginning of this paper, the Supreme Court of Canada referred to its previous decision in *Rascal Trucking v. Nanaimo (City)*: unless a municipal decision is clearly beyond its powers, the courts will uphold the decision. Further, the courts are willing to imply jurisdiction where powers are not expressly conferred. “Whatever rules of construction are applied, they must be not used to usurp the legitimate role of municipal bodies as community representatives” [Chief Justice McLachlin, *Shell Canada Products Ltd. v. Vancouver (City)* [1994] 1 S.C.R. 231, at p. 244].

The federal government during the past year established a task force on urban communities. Canada is entering into agreements directly with municipalities, without provincial involvement. The Green Municipal Enabling Fund and the Green Municipal Investment Fund were set up between the federal government and municipalities, again, without the provinces acting as intermediaries.

Provinces, territories and states in North America have taken two approaches to municipal autonomy and empowerment, with varying methods of addressing joint municipal-central sharing of jurisdiction. Under the first, “spheres of jurisdiction”, a municipality is empowered to make laws for municipal purposes in relation to delineated spheres of jurisdiction carved out of the provincial or state powers, combined with a general power to “regulate or prohibit”. The central government then claws back power in specific areas by way of several mechanisms.

Under the second, “home rule”, most of the state legislatures in the United States have established legislation enumerating specific powers, privileges and protections for local governments which empower local governments, subject to the assent of the electors, to establish home rule authority. Home rule is a deliberate and limited grant of authority by the state to municipalities and an acknowledgement that there are certain areas of purely local concern within which municipalities may operate free from state interference. Where there is a state interest, the states, using different mechanisms in different jurisdictions, have clawed back “state interests”.

2.0 Spheres of Jurisdiction

2.1 Alberta

The *Alberta Municipal Government Act*, enacted in 1994, defines the “purposes” of a municipality and then provides in Section 7 that a council may pass bylaws for municipal purposes respecting nine spheres of jurisdiction, including, for example, “the safety, health and welfare of people and the protection of people and property”. Section 8 provides that “*without restricting section 7*, a council may in a bylaw ... regulate or prohibit”.

Section 10 of the Act clarifies that if there is an inconsistency between a bylaw passed under Section 7 or 8 and one passed under a more specific bylaw passing power in another division or another statute, the bylaw passed under Section 7 or 8 is of no effect to the extent it is inconsistent with the specific bylaw passing power.

Other provisions in the Act limit municipal powers. Section 13 provides that if there is an inconsistency between a bylaw and any provincial statute, the bylaw is of no effect to the extent of the inconsistency.

Under the Supreme Court of Canada decision in *Spraytech*, a municipal bylaw would be inconsistent with a provincial enactment if a person cannot comply with both or if a person who complies with the bylaw by so doing contravenes the provincial enactment.

Part 3 of Division 8 of Alberta Act sets out limits on municipal powers. In regard to regulatory powers, Section 74 provides that the Minister must approve a bylaw prohibiting firearms. Section 75 provides that a Council may not pass a bylaw respecting fires in a forest protection area in most cases.

According to the Ministry of Municipal Affairs (Alberta), other limits on municipal powers are found in other statutes, such as legislation dealing with oil and gas exploration and production, provincial utilities and land development in the provincial interest.

2.2 Yukon Territory

The *Municipal Act* was enacted in 1998. Section 3 sets out the purposes of local governments and Section 255 provides that a council may pass bylaws for municipal purposes respecting 16 spheres of jurisdiction similar to the Alberta spheres. Section 266 provides that, without restricting Section 265, a bylaw may “regulate, control or prohibit”.

These general powers are limited in two ways. First, the territory can, subject to consultation, enact legislation or a regulation (eg., in regard to First Nation relations) such that a municipality could not enact a bylaw that would be inconsistent with the territorial enactment. Section 254 provides that if there is an inconsistency between a bylaw and any act, the bylaw is of no effect to the extent of the inconsistency. As well, there are some specific regulatory powers, such as those governing land use, that limit municipal powers to the extent the more specific provisions supersede the more general regulatory provisions. These are primarily in the areas of land use and finance, and are comparatively limited.

2.3 Manitoba

Manitoba enacted the “Municipal and Various Acts Amendment Act” in 1996. Section 2 defines municipal purposes. Section 227(1) provides that a council may pass bylaws for municipal purposes respecting 15 spheres of jurisdiction which are similar to the Alberta and Yukon spheres. These include, for example, the “safety, health, protection and well being of people, and the safety and protection of property”. Section 227(2) provides that without limiting the generality of Section 227(1), a council may in a bylaw passed under Section 227(1) “regulate or prohibit”.

Other provisions limit the general grant of power. Section 225 provides that a bylaw that is inconsistent with an act or regulation is of no effect to the extent of the inconsistency. As well, unlike the Alberta and Yukon models, the Manitoba legislation then sets out some limits in relation to some of the spheres of jurisdiction. For example, in Section 228, regulation or prohibition of activities or things in or on private property is limited to provisions dealing with

keeping land and improvements in a safe and clean condition; parking and storing of vehicles; removal of top soil; and activities or things that in the opinion of council could be a nuisance, unsightly, etc. These limitations are found only in relation to three of the spheres of jurisdiction (activities on private property, property adjacent to highways, and enforcement of bylaws). There are not such limitations, for example, in relation to “safety, health, protection and well-being of people, and the safety and protection of property”.

As well, there are specific provisions dealing with taxation, expropriation, and finance. In these limited areas, the specific authority supersedes the general authority.

2.4 Saskatchewan

In a 1998 report to the provincial government, the Task Force on Municipal Legislative Renewal recommended that all municipalities should have general powers set out in spheres of jurisdiction. According to the report, “spheres of jurisdiction is an approach to replacing specific grants of power to do certain things with a broad grant of powers (jurisdiction) in a number of specified areas (spheres) within which municipalities have the freedom to regulate, licence, etc.”

The report added that there is a clear and important role for provincial government regulation and involvement in some facets of municipal affairs. The Task Force concluded that there is a consensus that provincial involvement in municipal affairs should be limited to protecting both the public interest and individual rights, and establishing the parameters (*i.e.*, regulations and standards) within which municipalities are to operate.

2.5 Ontario

In a Bill introduced October 17, 2001, the province proposes to give municipalities “broader areas of authority, or ‘spheres of jurisdiction’ reflecting current municipal activities but expressed in a more general form to give councils more flexibility to deal with local circumstances. This would avoid the need for amendments to the act every time a new local issue emerges”. [Ontario, “New Directions”, August, 2001]

The province proposes 10 spheres of jurisdiction, focusing on service delivery and strictly *local regulatory activities*. The province has removed from the 1998 draft three “spheres” where the potential for overlap with provincial jurisdiction is the greatest. Accordingly, municipalities would be able to exercise broad regulatory powers within the 10 spheres, including, for example, waste management, transportation systems, drainage and flood control, parking, economic development services, structures not covered by the Building Code, animals, etc.

The proposed legislation provides that a municipal bylaw cannot conflict with a provincial act or regulation. Municipal bylaws under the spheres of jurisdiction or natural person powers would be subject to express restrictions specified in provincial enactments (including the new municipal act). As well, there would be express limitations on licensing and user fee powers.

In regard to the spheres that are of significant provincial interest as well as local interest, limits would be imposed with respect to specific powers for municipal bylaws dealing with the natural environment; facilitation of economic development; health, safety, protection and well being of people and protection of property; and nuisances, noise, odour, vibration elimination and dust.

As in the case of the other provincial and territorial statutes, there would be express provisions dealing with such matters as taxation, financial administration and land sales, in which case the more specific would supersede the more general authority.

The province has eliminated, at the request of the Association of Municipalities of Ontario, a number of the limits that had been imposed on regulatory powers under the 1998 draft act, including:

1. the previously proposed restriction that if the matter is subject to provincial regulation, a municipal bylaw passed under the general spheres of jurisdiction is without effect to the extent it prohibits or regulates the matter in substantially the same way or in a more restrictive way;
2. the previously proposed section that would have stopped municipalities from prohibiting or regulating with respect to certain defined areas of provincial jurisdiction such as human rights, workplace health and safety, the relationship between employers and employees, and certain cost share programs;
3. the previously proposed section that would have empowered cabinet to make regulations to restrict the municipal power; and
4. the previously proposed constraint on incorporating corporations (the section now proposed would allow municipalities to incorporate corporations subject to a regulation establishing purposes for and limits on such corporations).

3.0 Home Rule Authority

3.1 General

In the United States, municipalities derive their authority from the state, and their autonomy is subordinate to state interests.

Home rule is a statutory, express grant of authority by the state to municipalities and an acknowledgement in the legislation that there are certain areas of purely local concern in which local governments may operate free from state interference. As stated, most of the home rule schemes (other than, for example, the Illinois scheme) are based on state statutory and constitutional provisions under which municipalities, subject to the assent of the electors, adopt home rule authority to pass local laws relating to municipal affairs, governance and property, so long as the laws are consistent with the constitution and general statutes of the state. The details of home rule authority are as different as the thousands of cities and dozens of states involved. Home rule is defined as "... an essential part of a flexible dialectic of autonomy, interdependence, and reciprocity between centre and periphery (*i.e.*, between the state and the local government)". (Libonati, Michael, "Home Rule: An essay on pluralism", 1989, Washington Law Review, at page 51).

3.2 Illinois

The dialogue between the municipalities and the state governments is complex. Under the Illinois Constitution, Article VII, Section 6(i), “home rule units may exercise and perform concurrently with the state any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the state’s exercise to be exclusive”. There must be a deliberate act of the legislature to displace home rule authority.

In *Chicago v. Pollution Control Board* (1974), Chicago failed to convince the Supreme Court that the City under home rule was exempt from Illinois pollution controls. Although pollution control is not exclusively a state concern, the court found that the home rule city could at most enact ordinances to meet the minimum standards established by the state. In *Des Plaines v. Chicago and North Western Railway Company* (1976), the court found that regulation of train whistles was a matter of state-wide concern, and not a local matter that related to municipal governance and affairs under home rule. The state had enacted the 1975 Illinois Environmental Protection Act, establishing a state-wide concern. In *Cook County v. John Sexton Contractors* (1979), the court found that sanitary landfill operators were subject to a Cook County ordinance, noting that a home rule local government may legislate concurrently with the state on environmental control so long as the minimum standards established by the legislature are met.

In 1988, the Supreme Court applied three tests for establishing “state-wide concern”:

1. To what extent does the conduct in question affect matters outside home rule?
2. What units of government have the more vital interest in its solution?
3. What role is traditionally played by local, as opposed to state wide, authorities in dealing with it?

The court held that the municipality could not under its home rule jurisdiction pre-empt the state minimum wage legislation even in respect to the municipality’s construction of its own intake extension for its water treatment plant. In regard to the first test, the court found that reduced wages for public works could depress prevailing wages in the county and thereby affect matters outside the home rule municipality. In regard to the second test, the court found that the state has a more vital state-wide interest in respect of minimum wages, as established under the state minimum wage legislation. In regard to the third test, the court confirmed that the state traditional role in respect of minimum wages superseded any interest of the county.

3.3 New Jersey

The New Jersey approach is based on two precepts. First, the state legislature can pre-empt local regulatory authority. Second, on the other hand, home rule municipalities can be given local veto authority over specified matters, such as the location of hazardous waste facilities. The state legislation further provides for state grants to capacitate municipalities (eg., to obtain consultants and lawyers to participate in the administrative tribunal hearings dealing with hazardous waste facility siting).

3.4 New York State

In the State of New York, home rule is based on the bill of rights for local governments recognized in the constitution of the state. The bill of rights sets out express powers, privileges and protections for local governments which are to be “provided for by the legislature and liberally construed by the courts” (*Stinson, Joe* “Home Rule Authority of New York Municipalities in the Land Use Context”, 1997, Pace University School of Law Review, at page 2). According to Stinson, home rule municipalities have the authority to pass local bylaws under home rule and the authority to supersede certain general state statutes. The state legislation supersedes municipal legislation if the state statute specifies it is applicable only to certain municipalities, if the state statute does not apply similarly to all cities, or where the state legislature has pre-empted local authority by stating an express or implied intention to do so. It is Mr. Stinson’s opinion that the home rule authority of municipalities is a more flexible source of authority for regulating locally than is found under the older general municipal legislation that expressly delegates regulatory authority.

In New York, local laws must not be inconsistent with the constitution or general state laws. The state may pre-empt local authority by expressly stating that it wishes to occupy the field or by setting out a comprehensive detailed statutory scheme. For example, the New York Court of Appeals declared a municipal ordinance invalid which required power plant developers to obtain a licence from the municipality. The court found that the ordinance was pre-empted by general state law and inconsistent with other state enactments.

In New York, as well, there are limited circumstances where a municipality may exercise “supersession” authority even if the local ordinance is inconsistent with a general state statute. In *Kamhi v. Town of Yorkton* (1989), the Court of Appeals found, first, that a municipal parkland dedication ordinance was inconsistent with the state law. The court, second, had to determine whether the municipal ordinance is a proper exercise of “supersession” authority. That is, the home rule authority contemplates a limited exception for municipal laws that fall within constitutional authority to supersede state laws. Supersession is allowed only in a very narrow, expressly defined area of purely local concern. In *Kamhi*, the court found that the local parkland dedication requirement was permitted under the narrow wording of the municipal home rule supersession authority.

Under the New York State Constitution, municipal powers may be diminished by approval of the governor during one calendar year and reapproved in the following year [*New York Constitution*, Article IX, Section 1(a)]. The state may pre-empt local regulatory authority by an act of the legislature, subject to public debate [*New York Constitution*, Article IX, Section 2(b)(ii)].

One of the leading home rule cases in the United States is the New York Court of Appeals’ decision in *Adler v. Deegan* (1929). In that case, the court considered the relationship between the state *multiple dwelling law* of 1929 and the municipality’s authority under home rule. The court found that the home rule provisions of the constitution do not restrict the power of the legislature to enact laws relating to matters other than property, municipal affairs or government of cities, if the subject is substantially a matter of state concern. The legislature has the authority to act even if the subject matter is “intermingled with” issues of a parochial nature. The court held further that if a matter is partly of state-wide interest and partly of local interest, the

municipality is free to act until the state has intervened. Nonetheless, the power of a municipality is, in the case of dual jurisdiction, subordinate to the power of the state, and the state power may be exerted without restraint to the extent that the two can work in harmony together.

4.0 British Columbia Community Charter

4.1 Why Change is Needed in British Columbia

For years, municipalities in British Columbia have criticized the legal and institutional restrictions on their decision-making powers and ability to raise revenue. During the past decade, municipalities and the Union of British Columbia Municipalities have asked the Province for several hundred amendments to enable municipalities to do their jobs. Most requests were refused by the government during the past 10 years. Nonetheless, the Province has made hundreds of other amendments to municipal legislation, with the existing *Local Government Act* comprising more than a thousand provisions. More than 80 other provincial statutes also deal with municipal powers, duties and responsibilities.

In 1991 the UBCM at its annual meeting, chaired by then president, and current Premier, Gordon Campbell, adopted the “Municipal Bill of Rights”, which set out the principles of local self government, including that municipalities must have adequate powers and financial resources to respond to communities’ needs, the Province must respect municipal authority in areas of municipal jurisdiction, and the Province must consult with municipalities before taking actions that affect them. These principles were contained in the 1994 International Union of Local Authorities Principles of Local Self Government and the 1998 Model Resolution of the Federation of Canadian Municipalities.

In September, 1996, British Columbia executed a “Recognition Protocol” with the UBCM to recognize municipalities as an order of government. Unfortunately, since the protocol was executed, the Province unilaterally reduced revenue sharing and other grants, transferred major highway responsibilities, eliminated the railway tax and “expropriated” speeding revenues, all without meaningful consultation.

British Columbia municipalities’ concerns have been elevated by the widespread acceleration of federal and provincial delegation of duties and responsibilities to local governments (*eg.*, airports, harbours, policing, health, welfare, highways, bridges, economic development, public transportation, affordable housing, environmental protection, etc.) without the legislation or financial tools to deal with these duties and responsibilities.

The federal government is withdrawing from many former urban policy and program areas. This has compromised the economic and social stability of many urban governments. This trend accompanies a rapid provincial devolution of financial responsibilities. The problem is that, with some exceptions, the withdrawal of other orders of government from municipal programs and the devolution of financial responsibilities has occurred without any vision with respect to the cooperation by the orders of government in the delivery of public services and without an adequate expansion of local government powers, resources and autonomy.

An emerging problem for municipalities is the fact that they are providing, or are expected to provide, so many new services and facilities to fulfil local citizens' expectations, without required financial tools or revenues. 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 governmental off-loading or abdication, yet municipalities continue to rely on the property tax and user fee powers. (Harry Kitchen, Report to UBCM, September 27, 1999). In many places, property taxes have hit a glass ceiling. Services such as transit 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.

4.2 What Principles Should Govern Who Does What?

Canadians are all citizens of the federal, provincial and municipal governments. Most are also taxpayers of all three governments. Canadians rightfully expect all orders of government to cooperate in regard to public services, facilities and regulations.

The British Columbia government is developing a Community Charter to give communities the powers and resources to make local decisions locally and to get the Province out of municipal governance. The Charter will strike an unprecedented partnership between municipalities and the Province where municipal councils will look after community governance and the Province will address the public interest of British Columbia as a whole.

The Charter will recognize in law municipalities for what they are in fact: an order of government in British Columbia. The Charter will give municipalities adequate powers and financial tools to take action and make decisions without first seeking provincial approval or new legislation.

The Charter will be based on respect for local governments. It will enable municipalities to become more autonomous and empowered by providing them with greater independence, new powers and better financial and other tools for governing communities and delivering services.

There are two ways for the Province to satisfy these principles: the Province can continue to legislate a limited number of express powers, and add to or amplify these powers on request, or the Province can enact legislation that broadly enables municipalities to exercise their discretion by way of a wide range of powers. Attached is a copy of the Province's Discussion Paper on autonomy for British Columbia municipalities.

It is also necessary to balance the public interest of the Province with the jurisdictional ambitions of the municipalities. It is clear that British Columbians do not want to have 160 sovereign city states with 160 building codes. Provincial standards are valuable tools to protect the natural environment, provide certainty to businesses wishing to relocate or expand in British Columbia, and to protect the interests of citizens of British Columbia as a whole as compared with the parochial interest of a number of individuals in one region.

Balanced against this provincial public interest are the needs of local governments to respond to existing and future expectations of their citizens – in this regard, the UBCM's 1991 Municipal

Bill of Rights sets out the principles that municipalities believe ought to govern local autonomy. These principles, subject to the need to balance the division of powers under the Canadian Constitution, are set out in the *Community Charter Council Act, 2001*, which governs the preparation of the Charter itself.

Increased powers and autonomy must also be balanced with increased public participation and expanded accessibility, accountability, transparency and democracy.

5.0 Conclusion

Municipalities are the engines of our well-being. Municipal councils are closest to the people and, more and more, are providing the public services and works that meet citizens' needs. Despite expectations on the part of local citizens that municipal institutions act of if they constituted a level of government, the Canadian Constitution does not recognize municipalities as an order of government. As a result, municipalities do not have adequate powers or resources to meet local needs or expectations.

This can be resolved, in the short term, by way of adjustments to existing provincial legislation. In the process, it will be necessary to balance the provincial public interest with the need to allow municipalities to what they can do better than the provincial government within our communities.