

# Modern Municipal Statutory Frameworks in Canada

## Cadres législatifs contemporains pour le gouvernement municipal au Canada

Joseph Garcea

Volume 1, Number 1, 2004

URI: <https://id.erudit.org/iderudit/1039192ar>

DOI: <https://doi.org/10.7202/1039192ar>

[See table of contents](#)

Publisher(s)

Centre d'études en gouvernance de l'Université d'Ottawa

ISSN

1912-0362 (digital)

[Explore this journal](#)

Cite this article

Garcea, J. (2004). Modern Municipal Statutory Frameworks in Canada. *Revue Gouvernance / Governance Review*, 1(1). <https://doi.org/10.7202/1039192ar>

Article abstract

In this article, the author explains and assesses the modern municipal statutory frameworks in Canada. More specifically he examines the novel provisions that provincial and territorial governments are including in some of the emerging municipal statutory frameworks. The overarching purpose of such novel provisions is to supplant the restrictive features the traditional municipal statutory frameworks with permissive and empowering features. Such novel provisions include recognition of municipal governments as 'orders of government', 'spheres of jurisdiction', and 'natural person powers', as well as broader corporate powers and broader bylaw making powers. The author concludes that although the novel provisions constitute important steps in the right direction, they do not constitute a panacea either for municipal governments or, more importantly, for municipal governance. Indeed, he suggests that there is the potential for some negative ramifications for both if such novel provisions are not adopted and implemented with due care and attention to important matters such as the organizational capacity of various types of municipal governments to use them appropriately for various governance purposes.



# Cadres législatifs contemporains pour le gouvernement municipal au Canada

Vol.1, No. 1, mai 2004, Page 18

**Joseph Garcea**

Les articles publiés sur ce site le sont toujours dans la langue de l'auteur.

Within approximately the past decade, municipal governance systems in Canada have been subjected to some significant reform initiatives. One such initiative undertaken in some provinces and territories has resulted in the emergence of a modern statutory framework that has been characterized as a “permissive policy framework” in place of the traditional statutory framework that had been characterized as a restrictive regulatory framework (Saskatchewan, 2000:36). Ostensibly, the major differences between the traditional and modern statutory frameworks are stylistic and substantive. Stylistically, the former is a product of the civil code style in which key functions (i.e., roles and responsibilities) and powers (i.e., authority and autonomy) are listed in a relatively detailed and exhaustive manner. The latter is a product of the common law style in which they are articulated in a relatively broad and general manner. Substantively, the differences rest in the nature and scope of provisions related to one or more of three key matters of importance for municipal governments: their status, functions and powers. The novel provision related to their status is recognition of municipal governments as an “order of government”. The novel provision related to their functions is “spheres of jurisdictions”. The novel provision related to their powers is “natural person powers”. The purpose of those novel provisions is to provide Canadian municipal governments with a statutory framework that embodies some of the basic principles regarding the autonomy of municipal governments embodied in the American principle of municipal home rule and the European principle of municipal general competence (Tindal and Tindal, 2000: 249).

The central objective of this article is to explain the purpose, politics, nature and value of the novel provisions contained in emerging modern statutory frameworks. Such explanations and assessments are useful as other municipal, provincial and territorial governments are considering whether any or all of those novel provisions should be included in their respective statutory frameworks.

The major contentions and conclusions regarding the novel provisions are as follows: First, the purpose of the novel provisions is as much, if not more, to appease as to empower municipal governments. Second, the politics of the novel provisions are almost exclusively intergovernmental politics involving the representatives of provincial and municipal governments. Third, the nature of the novel provisions contained in the modern statutory frameworks does not constitute a radical departure from those contained in the traditional municipal statutory frameworks. Fourth, the value of the novel provisions is not as significant as some provincial and municipal officials have suggested either for empowering municipal governments or for clarifying the roles and responsibilities of the two orders of government. Although the novel provisions constitute important steps in the right direction, they do not constitute a panacea either for municipal governments or, more importantly, for municipal governance. Indeed, there is the potential for some negative ramifications for both if such novel provisions are not adopted and implemented with due care and attention to important matters such as the organizational capacity of various types of municipal governments to use them appropriately for various governance purposes.

## The purpose of novel statutory provisions

The fundamental purpose of the novel provisions in the emerging municipal statutory frameworks is to eliminate some features of the traditional statutory frameworks that municipal and provincial officials believed created programmatic and political problems for them in light of the existing and emerging political-economic contexts in which they operate.

In terms of programmatic problems, municipal officials perceived the traditional statutory framework as being highly problematic for them in fulfilling their mandates and missions of good governance and management. They maintained that the highly detailed and restrictive nature of the traditional municipal statutes did not provide them with sufficient authority and autonomy to perform their core functions such as various types of planning, development, service delivery, and bylaw enforcement. Municipal governments felt that the longstanding principle that underpinned the traditional statutory frameworks, namely that they could do only what was explicitly listed therein, and therefore anything that was not explicitly listed therein was in effect *ultra vires* or beyond the scope of their jurisdictional authority, was highly problematic in at least two important ways. First, it was problematic for them either in undertaking certain regulatory, policy, or service delivery initiatives that they deemed important, or at least

undertaking them in the way that they wanted to do so. Second, and related to the first, they were problematic for the municipal governments in ensuring that any initiatives that were undertaken, including the enactment and enforcement of important bylaws, would not be challenged in and reversed by the courts. In short, municipal governments felt that the lack of explicit statutory authority related to certain governance and management activities made it difficult for them to perform their key functions because they were vulnerable to legal challenges on the basis of whether they were acting *ultra vires*.

Many provincial officials recognized and acknowledged the programmatic problems that the traditional statutory frameworks were causing for municipal governments. They also recognized and acknowledged that they created some programmatic problems for their own governance and management purposes. The highly detailed and restrictive nature of the traditional statutory frameworks was highly cumbersome for municipal governments in a rapidly changing and complex world, and necessitated frequent statutory and regulatory changes by elected and appointed provincial and territorial officials. This was deemed to be a relatively heavy and costly burden on provincial and territorial systems of governance, which were experiencing what they perceived to be an overload or capacity crisis. Such a burden was deemed especially heavy and costly in an era of financial constraints. Moreover such a burden was deemed inappropriate in an era in which a public philosophy that was heavily influenced by neo-conservative principles supported the downsizing of the provincial government and municipal-provincial disentanglement. Under the guise of disentanglement, of course, there was not only the devolution of jurisdictional authority, but also a substantial amount of downloading of governance functions from the provincial and territorial governments to the municipal governments, which was guided by the “subsidiarity principle” (Graham et al., 1998: 173-174; Tindal and Tindal, 2000: 207-253).

In terms of political problems, both municipal and provincial officials felt that the traditional statutory frameworks created political irritants and tensions between them either because there was a lack of clarity therein regarding both the precise nature and scope of their respective roles and relationships or because of the nature of the legal and political relationship between them. Municipal officials implored their provincial counterparts to change both the statutory framework and also their traditional *modus operandi* as a means to eliminate such political irritants and tensions. The litanies of complaints on the part of municipal officials regarding those characteristics of the statutory framework were constant irritants in provincial-municipal relations. Indeed, in many instances they were also irritants between provincial governments and various local communities. Therefore, the decision of provincial elected and appointed officials to opt for the modern municipal statutory frameworks was part of an effort to preclude or at least minimize the perennial complaints by municipal governments and some members of their communities that the traditional ones were unduly restrictive.

## The politics of novel statutory provisions

The politics surrounding the inclusion of the novel statutory provisions within the modern statutory frameworks were largely inter-governmental in nature. The precise political dynamics related to those novel provisions varied across jurisdictions. In all cases the principal actors were the municipal, provincial and territorial governments, rather than local residents and ratepayers. The demands for the inclusion of such provisions and the debates regarding their precise nature and scope were driven by governmental interests and imperatives, rather than by demands emanating from societal interests and imperatives. Generally, those outside the governmental circles were much more interested in other facets of municipal reform than in the status, functions, and powers of municipal governments, which were the principal foci of these novel provisions.

The most striking feature of the intergovernmental politics surrounding the novel provisions was their relatively non-confrontational nature. This is contrary to what tends to be the norm for anything that does or could have any major implications for shifts in the powers and relationships between various orders of government. In provinces such as Alberta, British Columbia, and Ontario, the municipal associations requested such novel provisions and the provincial governments generally complied with most of their requests either in total or in part. Invariably all municipal associations favoured the inclusion of such provisions in their respective statutory frameworks. In none of the provinces or territories did municipal associations indicate that they were opposed to the inclusion of novel provisions in a modernized statutory framework. All municipal associations were supportive of a modernization of statutory frameworks as a means to enhance their respective authority and autonomy. Such support was rooted in what might be termed the fervor of “municipal-building” which flowed through the municipal sector.

Generally most municipal governments did not engage in any substantial or sustained initiatives designed to constrain provincial governments either to modernize or not to modernize the statutory framework beyond what the latter did willingly. The most notable exception was the city of Toronto which, both before and after the Ontario government adopted its modernized municipal act, argued that a special city charter which provided that particular municipality much more extensive authority and autonomy was warranted. Another notable exception was the cities in Newfoundland, which also continued to pursue their goal of a single city charter that enhanced their authority and autonomy beyond what they had under the modernized statutory framework. A comparable effort was also evident in Saskatchewan where, in the absence of any substantial modernization to the existent statutory framework, the cities produced a draft cities act that they submitted to the provincial government for introduction in the legislature in the

spring session of 2002 (Saskatchewan, 2002). In all of these cases the provincial governments have been either very cautious or reluctant to endorse all such initiatives. It remains to be seen whether any of those cities resort to confrontational tactics if the provincial governments are not responsive to their preferences for a modern statutory framework that enhances their authority and autonomy.

## The nature and value of novel provisions

For analytical purposes, the novel provisions in the emerging municipal statutory frameworks can be grouped into three major categories: (a) status of municipal governments (i.e., orders of government and municipal-provincial relations), (b) functions of municipal governments (i.e., spheres of jurisdiction) and (c) powers of municipal governments (i.e., natural person powers). Each of these is discussed in turn below.

### Status of municipal governments

The first type of novel provisions in the emerging municipal statutory frameworks consists of two major sub-types of provisions that relate to the legal and political status of municipal governments. The first sub-set of novel provisions relates to their legal and political status as orders of government. At least three of the existing statutory frameworks contain provisions that recognize municipal governments as orders of government (Saskatchewan, 2000: 53). This includes British Columbia's Municipal Act of 1998, which recognizes municipal government as an "...independent, responsible and accountable order of government;" Yukon's Municipal Act of 1999, which recognizes them as a "responsible and accountable level of government;" and Nova Scotia's Municipal Act of 1999, which recognizes them as a "responsible order of government". Such a provision has also been included in the Cities Act being developed jointly by the cities in Newfoundland, which recognizes them as an "order of government... [that] is responsible... accessible, democratic and accountable". Moreover, such a provision is also envisioned by Toronto officials in their background documents for a proposed city charter for their municipality (Toronto, 2000: 4). Contrary to what Toronto's municipal officials may envision, the Ontario provincial government seems reticent to recognize municipal governments as orders of government. Ontario's draft legislation avoids the phrase "orders of government" in favour of the phrase "responsible and accountable governments operating within the jurisdiction given to them" (Ontario, 2001: 5).

The words "order of government" in existing and proposed statutes have much more of a symbolic value than a substantive value at this point in time. The reason for this is that those provisions exist in basic municipal statutes rather than constitutional or quasi-constitutional documents. As such they do not have any value or significance at the constitutional level. Their value or significance at the statutory level is also questionable. Currently there are no significant explicit statutory provisions regarding how the words "order of government" are to be applied or what significance they have for various facets of municipal governance, including intergovernmental relations.

The legal significance that they may achieve in the future will depend largely either on the results of any statutory reforms undertaken in the future that would include such provisions or on court-challenges or decisions that hinge or impinge on those particular words. In the latter case, they will only become legally significant if during some court proceedings judges either accept *prima facie* or make legal arguments that indeed the existence of the words "order of government" has some substantive rather than merely symbolic meaning and importance that bears on the nature and scope of the authority, autonomy, responsibility, or accountability of municipal governments (Makuch, 1997: 2). It may take considerable time for courts to move beyond the traditional view that, notwithstanding the intentions of legislators for including those words within statutory frameworks, they in no way change the constitutionally subordinate status of municipal governments and their laws *vis-à-vis* provincial governments and their laws.

Clearly, at this point in time being identified as an order of government in municipal statutes does not raise either their constitutional or legal status to the level of that which applies to the federal and provincial governments by virtue of their designation as orders of government within the constitutional framework. Municipal governments can be called whatever they or their respective provincial or territorial governments choose. This however does not in itself change what they have been and what they continue to be within the Canadian constitutional framework, namely local or regional governing authorities that are subordinate to the provincial and federal governments, which are the constitutionally recognized orders of government. The obvious question therefore is what is the purpose for including such wording in the statutory framework? This is a matter of perspective. Provincial governments see this as a relatively non-problematic means to appease municipal governments for enhanced status and power. Municipal governments see it both as a first step in the right direction in enhancing their political status within the political system and as a potentially valuable provision to strengthen their legal status within the judicial system.

The second sub-set of novel provisions that relate to their legal and political status focus directly and explicitly on the nature and scope of municipal-provincial relations. To date the only statute in which such provisions are found is British Columbia's Municipal Act of 1998. That statute contains the following key principles and undertakings regarding the relationship between the provincial and local governments: Governmental cooperation will be fostered... and ... local government will be consulted by the province prior to the implementation of decisions impacting local government, and the province recognizes that different approaches may be necessary to meet the needs of each



community. That section embodies the spirit of both the “Protocol Agreement Amongst Government of British Columbia and Union of British Columbia Municipalities” signed in 1996 and a sub-agreement that flowed from it a year later, the “Protocol of Recognition Sub-Agreement on a Emerging Legislative Foundation for Local Government Between the Government of British Columbia and Union of British Columbia Municipalities.” Those protocol agreements are supplementary policy instruments, rather than statutory instruments, in defining the nature and scope of the provincial-municipal relationship. Together they articulate a set of principles regarding that relationship and the nature of any municipal statute that might impinge on it. The most significant principles therein that impinge directly on the municipal-provincial relationship relate to matters such as:

- › notification and consultation on any significant changes to any legislation, regulations, policies, programs and projects;
- › information sharing on various aspects of governance and management;
- › dispute resolution mechanisms for municipal-provincial disputes;
- › appropriate provincial involvement on municipal matters and respect for municipal jurisdiction (i.e. authority and autonomy);
- › matching resources and responsibilities for municipal governments; and
- › providing municipalities with adequate authority and autonomy to fulfill their responsibilities.

In assessing the value and significance of the foregoing provisions it is important to distinguish between those contained in the statutory framework and those contained in the policy framework. The most significant statutory provision regarding the municipal-provincial relationship is the one enacted in British Columbia obligating the provincial government to consult municipal governments “prior to the implementation of decisions impacting local government.” The extent to which such a provision is legally binding and enforceable is open to question. Moreover, regardless of how legally binding it may prove to be, that particular statute is not very specific as to what constitutes appropriate, timely and efficacious consultations. This is left open to political and ultimately legal interpretation. At this point in time, therefore, the major value of that particular statutory provision is that it may serve as a guide regarding what type of municipal-provincial relationship is desirable, but its legal enforceability is either unlikely or highly problematic. This is evident in the fact that shortly after that statutory provision had been enacted, the municipal association in that province suspended its participation in the joint provincial-municipal council that was established specifically to facilitate collaboration and coordination between the provincial and municipal governments because it felt that the provincial government had acted in changing fiscal transfers without adequate or appropriate consultations with its members (Tindal and Tindal, 2000: 252).

It remains to be seen what effect those provisions in British Columbia’s Municipal Act of 1998 have for municipal-provincial relations. It is still too early to determine how they will be interpreted and applied by municipal and provincial officials. To date the meaning and application of those provisions has not been subjected either to close political or judicial review and interpretation. In the time since that municipal statute was enacted, the municipal and provincial governments have been engaged in a continuing joint effort to reform various facets of the municipal system including municipal-provincial relations. Only when the municipal officials or others challenge the way that a provincial or territorial government is proceeding on certain initiatives that impinge on municipal governance will the political and legal importance of those particular provisions become clear.

The foregoing analysis regarding the provisions on the nature of municipal-provincial relations contained within British Columbia’s statutory framework applies a-fortiore in the case of such provisions contained within the aforementioned policy instruments (i.e., the protocol agreements). Those provisions are largely of symbolic, rather than substantive, value. They are statements of intent rather than legal requirements per se. While they provide some valuable guidelines for municipal-provincial relations, the precise nature of such relations depends much more on the will of the municipal and provincial governments than on the inclusion of such provisions either in protocol agreements or even in legislation.

### Functions of municipal governments

The second types of novel provisions in the emerging municipal statutory frameworks are ‘spheres of jurisdiction’ (see Saskatchewan 2000: 66 and 96). This is a novel approach for assigning governance and management functions to municipal governments. The key characteristic of this approach is that it consists of a relatively short list of broad or general categories of functions, rather than a long detailed list of specific roles and responsibilities that must be performed pursuant to each general category of governance function. Generally the spheres of jurisdiction embody the traditional municipal activities, but they are identified in a more general way than in the existing legislation. The identification of these activities in a general way provides municipal governments with substantially more discretion to deal with their particular or unique local circumstances free from unduly restrictive provisions contained in traditional statutory frameworks.

This convention or approach was first articulated and recommended in a 1990 statement of the Alberta Municipal Statutes Review Committee. To date the spheres of jurisdiction approach has been used in two of the statutes that have been enacted for all municipalities (i.e., Alberta and Ontario), and two of the statutes that have been drafted but have still not been enacted for cities (i.e., Newfoundland and Saskatchewan). All of those statutes list several spheres of jurisdiction. Indeed, there is considerable similarity in the spheres of jurisdiction that are listed (see Appendix A).

The verdict on the value of the “spheres of jurisdiction” approach is still out. The concerns that prevailed on the part of provincial, territorial and municipal officials when it was first considered and adopted persist today. Their major concern has been that it has the potential of creating a delegation of powers that is much too broad and which, at least in some instances, could compromise even if only temporarily their ability to act in the broader provincial or territorial interest. Another concern among some provincial officials is that such an approach could actually contribute to increased entanglement, rather than disentanglement, for various matters that fall within some spheres of jurisdiction. This would run counter to their recent special efforts to reduce entanglement.

Another major concern of provincial and territorial governments has been that not all municipalities are equally able to operate according to the spheres of jurisdiction approach effectively for their governance purposes. This particular concern was substantiated by Alberta’s experience where, shortly after the emerging municipal statute was enacted, municipal officials began demanding that it be either amended or supplemented to include explicit provisions regarding certain key jurisdictional matters that were not explicitly or adequately addressed therein. The result was that several hundred amendments were enacted within the six months that the Municipal Act was proclaimed (Tindal and Tindal, 2000: 251).

Ironically, therefore, the lack of precision on the specific roles and responsibilities that fell within the jurisdictional authority of the municipal governments in the various spheres of jurisdiction made it difficult for some municipalities to act decisively or quickly because they were not sure whether such action would be deemed *ultra vires*. This was particularly true of smaller municipalities that did not have legal advisors readily available to deal with various jurisdictional issues (Gagnon and Lidstone, 1998: 10).

It was concerns regarding the potential for confusion or problems stemming from a lack of clarity on alignment of functions and jurisdictional authority as well as a concern for the safeguarding of the provincial interest on important matters that led the Manitoba Municipal Review Panel to recommend that the spheres of jurisdiction approach not be used in that province’s municipal statutes. Indeed, it was also these types of concerns that led the Ontario government to reduce the number of spheres of jurisdiction as it moved toward the introduction of the draft legislation in the legislature. A few months prior to introducing the legislation, it decided to eliminate the following matters from the list of spheres of jurisdiction and move them to a section on specific bylaw making powers: natural environment; economic development (i.e., matters other than economic development services *per se*); health, safety, protection and well being of people and protection of property; and nuisance, noise, odour, vibration, illumination and dust (Ontario 2001a: 8-10; and Ontario 2001b). In theory, the movement of those functions from the spheres of jurisdiction list to the specific bylaw making powers list should reduce the latitude of municipal discretion in matters related to those functions. Whether it will actually do so, of course, depends on many factors including the nature and scope of the municipal governments’ will to act and provincial government’s will to circumscribe their actions.

Some municipal governments, and particularly smaller ones, have shared some of the aforementioned concerns of their provincial counterparts. Another major concern among municipal officials has been and remains that the spheres of jurisdiction approach might not only increase their governance powers, but also their governance roles and responsibilities and liabilities in an era in which there is a substantial amount of provincial-municipal disentanglement and provincial devolution and downloading to municipalities. That particular concern was amplified as they either began to see or at least fear that provincial and territorial governments were intent on reducing their traditional level of commitment in providing some of the municipal support services related to statutory and regulatory matters. Municipal officials from smaller municipalities were concerned that an increase in municipal functions and a reduction in financial and administrative support by the provincial or territorial governments would constitute double jeopardy for them (Graham et al., 1998: 177).

It was also these types of concerns that led Saskatchewan’s Task Force on Municipal Legislative Renewal to caution against using the spheres of jurisdiction approach in assigning functions on a uniform basis for all municipal governments regardless of their organizational capacities. Instead, it suggested that the nature and scope of functions and powers assigned to any municipal governments should be contingent upon their capacity to perform those functions and exercise those powers effectively, efficiently and equitably with the requisite degree of responsibility and accountability (Saskatchewan, 2000: 3-4, 89,107).

### Powers of municipal governments

The third major type of novel provision is “natural person powers”. Such powers are contained in the Alberta Municipal Act, 1994, Ontario’s new Municipal Act, which came into force on January 1, 2003, and Saskatchewan’s

proposed City Act. The fundamental purpose of including this type of provision within the statutory framework is to enhance the nature and scope of the powers of municipal governments. Natural person powers can be delegated to municipal governments for dealing with what might be termed corporate management matters such as for example, entering into contracts, including contracts of indemnity, suing and being sued, purchasing and disposal for property (Gagnon and Lidstone, 1998: 10). Natural person powers are rooted in a legal doctrine related to the powers of persons, which have been articulated by the courts in case law. The doctrine enables municipal governments to perform governance, management and administrative activities that fall within the general scope of their jurisdictional authority without the need for expressed or explicit legislative authority regarding either precisely what to do or precisely how to do it (Gagnon and Lidstone, 1998: 10).

Natural person powers have been included within the emerging statutory frameworks for essentially the same reason as spheres of jurisdiction. That is to provide municipal governments with greater scope and flexibility in exercising their jurisdictional authority for performing various roles and responsibilities that fall within the scope of any one or more of the following: spheres of jurisdiction, specific bylaw making powers, or corporate powers related to the management of their resources and the conduct of their corporate affairs without having to stipulate when and how they may do so in an explicit and highly-detailed fashion within the statutes. More specifically, natural person powers provide municipal governments a higher degree of freedom and flexibility when dealing with governance and management matters such as:

- › hiring and terminating employees;
- › delegating administrative tasks to staff members and committees;
- › engaging in legal proceedings such as suing and being sued;
- › undertaking commercial activities such as entering into contracts and purchasing, owning and using property; and
- › entering into innovative public-private partnerships with private sector entities in undertaking important commercial ventures either designed to generate profits or to provide services.

Alberta's Municipal Government Act of 1994, for example, unlike the one it supplanted, makes it possible for municipal governments to form partnerships with private enterprises to develop housing projects without having to acquire express or explicit statutory authority for that purpose (Gagnon and Lidstone, 1998: 11).

Natural person powers do not provide municipalities with more jurisdictional authority than is granted to them in legislation. Instead, they merely provide them with greater scope in choosing the timing, means and modes for exercising any jurisdictional authority that is assigned to them. As one analyst explains: "Generally, natural person powers do not give municipalities more jurisdiction than they otherwise have: such powers merely amplify the corporate capacity in relation to already delegated powers" (Gagnon and Lidstone, 1998: 11). Moreover, such powers do not give them more status. In the words of one legal analyst, "natural person powers do not enhance either the regulatory powers of municipalities or their constitutional or Charter status". The same analyst adds that "...given the approach that the courts have traditionally taken in reviewing municipal decisions, it seems unlikely that the doctrines limiting municipal authority will lose their importance. Therefore municipal decisions may still be struck down on such grounds as:

- › lack of express authority;
- › discrimination or unauthorized sub-classification;
- › improper delegation;
- › failure to conform to provincial legislative policy; and
- › fettering.

As a result it will continue to be very difficult for municipalities to exercise authority and make policy decisions as senior levels of government do" (Makuch, 1997: 2-3).

The value ascribed to natural person powers by provincial and municipal officials rests in two key areas: first, in eliminating a large mass of very prescriptive and detailed legislation; and second, in providing municipal governments with the requisite degree of freedom and flexibility to undertake certain matters that fall within the scope of their jurisdictional authority (Makuch, 1997: 2).

Although natural person powers have the potential to be beneficial, they also have a potential for problems. Provincial and municipal officials in various jurisdictions have been concerned about the potential for problems for some time. The most significant concern has been that although it can provide municipalities with greater freedom and flexibility, it can also create confusion regarding what municipalities can or cannot do within the scope of their jurisdictional authority. Such confusion could not only have a paralytic effect on municipal governments but it could

make them more vulnerable both to court challenges from residents and ratepayers, and to increased municipal-provincial conflict over jurisdictional issues.

It is still too early to ascertain whether the concerns expressed by provincial and municipal officials in the past regarding natural person powers will be substantiated. To date the Alberta experience has caused more consternation than actual problems. Apart from some relatively minor problems related to the clarity of the precise jurisdictional authority of municipal governments regarding land use and zoning matters that have had to be rectified through amendments either to the statute or regulations and policies promulgated pursuant to it, the most significant problem has actually been the difficulty that some municipalities have had sorting out what does or does not fall within the scope of natural person powers and spheres of jurisdiction. However, this has not led to any major problems that are likely to lead either the provincial government or the municipal associations to eliminate natural person powers from the statutory framework. It will be interesting to monitor Ontario's experience with natural person powers to see if it differs from Alberta's experience. In both cases, it will also be interesting to monitor whether there are any significant differences between large and small municipalities in their respective experiences with natural person powers.

Finally, it should be noted that natural person powers is not the only means by which the general management or administrative powers of municipal governments have been enhanced. The emerging statutory frameworks have also included expanded corporate powers and bylaw making powers. Although they are very important in understanding the precise nature and scope of changes to the functions and powers of municipal governments, those particular provisions are somewhat beyond the scope of this article because they are not novel statutory instruments per se. Nevertheless, it is noteworthy that corporate powers have been included in a distinct and explicit manner both in the municipal acts of British Columbia and Manitoba. British Columbia's Municipal Act of 1998 grants municipal governments such powers for the following matters:

- › agreements and contracts;
- › buying and selling property;
- › employee management;
- › delegation of authority; and
- › granting aid.

Manitoba's Municipal Act contains broader corporate powers than existed in the previous act for matters such as:

- › acquiring and mortgaging property;
- › entering into agreements;
- › taxation;
- › regulation; and
- › expropriation.

The Manitoba government's decision to broaden municipal corporate powers was based on the recommendation of the Municipal Review Panel. The Panel indicated that for the purpose of expanding the powers of municipal governments it favoured both this approach and the explicit by-law making powers approach, over the natural person powers approach. It did so because in its opinion it was much more efficacious in providing such governments with the requisite powers in performing some key governance and management functions, while safeguarding both the local interest and the provincial interest. The Northwest Territories Municipal Legislation Review Committee made the same recommendation for essentially the same reason (see Saskatchewan, 2000: 95).

## Conclusion

This article has provided an explanation and assessment of the purpose, politics, nature and value of each of the three types of novel provisions included in some of the emerging statutory frameworks. The objective in this concluding section is fourfold:

- › to provide a brief assessment of the value of those novel provisions collectively in light of the programmatic and political purposes that they were intended to serve;
- › to reflect on the politics that have produced these novel provisions well as the politics produced by the novel provisions;
- › to provide a prognostication on the likelihood that such novel provisions will be included in other emerging municipal statutory frameworks in the future; and



- ▶ to proffer some caveats for those considering the inclusion of such novel provisions within their respective municipal statutory frameworks.

Brief preliminary assessments of the value of each of the novel statutory provisions have been provided in the body of this article. The objective here is to provide such an assessment of their collective value. The novel provisions examined in this article that are contained in the emerging statutory frameworks are useful to a point for the programmatic and political purposes identified in this article, but they do not constitute a panacea. In terms of the programmatic purposes the novel provisions within the statutory frameworks eliminate some potential obstacles for some municipal governments in fulfilling their governance functions. In terms of the intended political purposes, it is unlikely that they will have much of an effect on improving substantially either the incidence of lack of clarity on the nature and scope of jurisdictional authority and autonomy or the resulting problems of municipal-provincial coordination and conflict.

Furthermore, these novel provisions have not transformed the statutory frameworks in the way that some anticipated or hoped. Although the emerging statutory frameworks that embody the less restrictive model of legislative drafting are somewhat different than the traditional statutory frameworks, the differences between them in terms of their net effect on empowering and liberating municipal governments should not be overestimated. Although there has been a slight broadening of some functions and powers of municipal governments, there has not been a radical paradigm shift that has produced new blue-prints on such matters (Gagnon and Lidstone 1998: 23). The provincial and territorial governments still exercise considerable oversight and control over municipal governments. Prometheus has not been unbound; at best his shackles have been loosened a little (Graham et al., 1998: 177). As stated in a leading textbook on Canadian municipal government, “preliminary indications are not entirely encouraging” that these novel provisions constitute the breakthrough that many municipal governments have sought to give them the discretion and recognition as orders of government that they have sought (Tindal and Tindal, 2000: 250-253).

The novel provisions contained in the modern statutory frameworks are at once products of politics and producers of politics. As products of politics such novel provisions are the outcomes of intergovernmental politics involving provincial and municipal governments. More importantly, they are the outcomes of relatively harmonious provincial-municipal negotiations. Invariably such negotiations are the products of the efforts on the part of municipal governments to enhance their authority and autonomy in dealing with what they perceive as the challenges posed by trends such as increasingly complex communities, litigious populations, devolution or delegation of roles and responsibilities from senior orders of government and a shrinking resource base. To some extent, however, they are also the products of the provincial governments’ own efforts to provide municipal governments with the requisite degree of authority and autonomy to exercise greater authority and autonomy in performing various functions.

As producers of politics such novel provisions have the potential of contributing not only to the nature of intergovernmental politics between municipal governments and their respective provincial and territorial governments, but also to the nature of politics both between those governments and the federal government as well as all governments and their respective communities. The nature of the politics, of course, will depend both on the nature of issues that emerge in relation to each of those novel provisions and, more importantly, on how each of the aforementioned governments and their communities choose to deal with the same. The provincial and territorial governments may be acquiring some goodwill for themselves among municipal governments by including those novel provisions within their statutory frameworks. However, any goodwill that they may have acquired is relatively limited and confined to a particular facet of the intergovernmental dimension of the municipal sector. All indications are that it has also not had much of an effect on other facets of the intergovernmental dimensions of the municipal sector, especially those involving various financial matters such as taxation, property assessments and fiscal transfers. There is also little reason to believe that it will have much effect on such matters in the future. Similarly, such novel provisions have not had a profound effect on the nature of politics between governments and their respective communities, and there is little reason to believe that they will in the future. The only thing that could change this is if the municipal governments were to use their powers that flow from those novel provisions to do things that they or their communities either strongly support or oppose.

The likelihood that such novel provisions will be included within the statutory frameworks of other provinces and territories is substantial. Although the precise nature of those provisions may not be identical to those that have been included in the emerging statutory frameworks, they are likely to be relatively similar. This will happen both for reasons of function and fashion. In addition to the fact that a case can be made for including such provisions on the basis of some functional value, they have acquired a fashionable profile within the municipal sector as being interesting and important. Consequently, the majority of municipal and provincial officials are likely to advocate and accept their inclusion within municipal statutory frameworks with only a modicum of reflection and resistance. This is especially true if the novel provisions in existing modernized statutory frameworks do not become unduly problematic either for municipal or provincial governments.

Municipal and provincial officials who are contemplating the inclusion of such novel provisions within their statutory frameworks should be cognizant of the following three interrelated caveats. First, all governmental officials should be cognizant that there are advantages and disadvantages to everything. There is no panacea and no statutory

arrangement is likely to produce one. The advantages and disadvantages of the various novel statutory provisions and drafting conventions must be carefully evaluated in deciding whether to use them. Second, all governmental officials should be cognizant that these novel statutory provisions are not likely to be equally useful or valid for all types of municipalities. Differences in the functions and capacities of various types of municipal governments may necessitate differences in the nature and type of statutory provisions or drafting conventions. Third, all governmental officials and their respective constituents should be cognizant that the novel statutory provisions which, ostensibly, are designed to provide municipal governments with enhanced status and power may not be as efficacious for such purposes as it may seem *prima facie*. After all, the status and power of municipal governments, and increases to the same, may depend less on the inclusion of such provisions within the statutory framework, than on their governance and management capacity. In short the status and power of municipalities may depend much more on their ability to perform their core functions at the *de-facto* level, than the precise nature of statutory provisions regarding their status and at the *de-jure* level.

## References

- Boswell, Peter G. "Provincial-Municipal Relations," in Christopher Dunn, ed., *Provinces: Canadian Provincial Politics*. Toronto: Broadview Press, 1996.
- Canadian Federation of Municipalities. "Future Role of Municipal Government", 1998. [Mimeographed]
- Graham, Katherine, Susan D. Phillips with Allan M. Maslove. *Urban Governance in Canada: Representation, Resources, and Restructuring*. Toronto: Harcourt Brace, 1998.
- Graham, Katherine and Susan D. Phillips. "Emerging Solitudes: The New Era in Provincial-Municipal Relations," in Martin W. Westmacott and Hugh P. Mellon, eds., *Public Administration and Public Policy: Governing in Challenging Times*. Scarborough: Prentice Hall, 1999.
- Gagnon, Kristin and Donald Lidstone. "A Comparison of New and Proposed Municipal Acts of the Provinces," (Prepared for the 1998 Annual Conference of the Federation of Canadian Municipalities held in Regina), 1998. [Mimeographed]
- Makuch, Stanley M. "Case Comment: The Corporation of the Borough of East York et al. and Attorney General for Ontario 34 O.R. (3d) 789", 1997. [Mimeographed]
- Ontario Municipal Affairs and Housing. *New Directions: A New Municipal Act for Ontario*, 2001. [Mimeographed].
- Ontario, Municipal Affairs and Housing. *A New Act for Ontario*, Backgrounder released October 18, 2001. Retrieved November 18, 2001, from <http://www.mah.gov.on.ca/inthnews/background/200011018e.asp>
- Sancton, Andrew. "The Municipal Role in the Governance of Canadian Cities," in *Canadian Cities in Transition*. Second edition. Bunting, Trudy and Pierre Filion, editors. Don Mills: Oxford University Press, 2000.
- Saskatchewan, Task Force on Municipal Legislative Renewal. *Options 2000: A Framework for Municipal Renewal (Rural and Urban Sectors) - Final Report*, 2000.
- Saskatchewan, City Mayors and City Managers/Commissioners, *Draft Urban Legislation for Cities*, September 6, 2001.
- Saskatchewan, City Mayors and City Managers/Commissioners, *Proposed City Act*, February 12, 2001. [Mimeographed]
- Siegel, David. "Reinventing Local Government: The Promise and the Problems," in Leslie F. Seidle, ed., *Rethinking Government: Reform or Reinvention*. Montreal: Institute for Research on Public Policy, 1993.
- Tindal, Richard C. and Susan Nobes Tindal. *Local Government in Canada*. Fifth edition. Scarborough: Nelson, 2000.
- Toronto (2000). "Towards a New Relationship with Ontario and Canada (Press Release)."[Mimeographed]
- Toronto (2000). "Towards a New Relationship with Ontario and Canada (Staff Report)."[Mimeographed]
- Toronto (2000). "The Time is Right for New Relationships with Ontario and Canada (Background Report)."[Mimeographed]
- Toronto (2000). "Power of Canadian Cities-The Legal Framework (Background Report)."[Mimeographed]
- Toronto (2000). "Comparison of Powers and Revenue Sources of Selected Cities (Background Report)."[Mimeographed]

## Appendix A: 'Spheres of jurisdictions'

### Newfoundland draft cities legislation

- Municipal services, including waste management, parks, recreation and culture
- Transportation other than in respect of roads

- › Roads, including traffic and parking on roads
- › Drainage
- › Natural environment
- › Economic development
- › Business and business activities and persons engaged in business
- › Safety and protection of people and protection of property
- › Noise, odour, vibration, dust, emissions, and nuisances including unsightly property
- › Animals and activities in relation to them
- › Structures, including buildings, fences and signs
- › Land use
- › Heritage conservation, except in respect of lands held by Canada or the province

### Saskatchewan draft cities legislation

- › Peace, order and good government of the municipality
- › The safety, health and welfare of people and the protection of people and property
- › People, activities, and things in on or near a public place or place that is open to the public
- › Nuisances, including property, activities, or things that affect the amenity of a neighbourhood
- › Transport and transportation systems
- › Subject to the Highway Traffic Act, the use of vehicles, and the regulation of pedestrians
- › Streets, including temporary and permanent openings and closings
- › Businesses, business activities and persons engaged in business
- › Services provided by or on behalf of the municipality
- › Wild and domestic animals and activities in relation to them
- › The enforcement of bylaws made under this or any other act

### Alberta legislation

- › Safety, health and welfare of people and the protection of people and property
- › People, activities and things on or near a public place or place open to the public
- › Nuisances
- › Wild and domestic animals
- › Transport and transportation systems
- › Services provided by or on behalf of municipality
- › Public utilities

### Ontario legislation

- › Animals
- › Transportation systems (e.g. transit, ferries and airports)
- › Public highways
- › Parking
- › Public utilities
- › Drainage and flood control
- › Structures, not covered by the Building Code Act, including fences and signs
- › Waste management

- › Economic development services
  - › Culture, parks, recreation and heritage
-