The Market Town: Municipal Regulation and the Competitive Balance between Businesses

by

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Abstract

The adoption of enabling statutes granting very broad powers to be applied for very general purposes has given Canadian municipalities substantial regulatory flexibility. This move away from a traditionally narrow regulatory role is notable, since broad statutory purposes will generally permit a municipality to regulate for the purpose of adjusting the competitive balance between businesses, or even between a business and a municipal service. From an administrative law perspective, a localist view supports municipal councils being broadly enabled to adopt regulatory policies that match local preferences. However, this framework of delegation does not abate concerns regarding inefficient regulation of business at the regional level. These concerns are compounded by the increased role of municipal service provision within the marketplace. Provincial legislatures should remain prepared to impose specific statutory limits on municipalities in response to regional inefficiencies that arise as a result of regulation based on purely local preferences.
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Plate 1 – Google Streetview - Highway 97, West Kelowna BC
1 Introduction- The Municipality and the Market

A “market town” once described a municipality that was a regional centre for trade, a geographic role it held as a result of the monarch granting the town the right to host a market.¹ Mere host of markets would not describe the current role that Canadian municipalities hold in relation to the businesses found within their boundaries. A recent legal shift towards a broad legislative grant of municipal powers that are deferentially interpreted by the court means that the “municipal purpose”² of regulation has changed significantly. One consequence of this shift is the greater potential for a municipality to regulate so as to affect the competitive balance between local businesses. For example municipal bylaws may both help and hinder a taxi driver who competes for local fares. The driver may benefit from a municipal licensing scheme that limits the number of local taxis, but feel hindered by a bylaw that allows pedi-cabs to collect fares in popular areas closed to motor vehicles. If the municipal council has imposed a surcharge on taxi fares to the airport that regulation could encourage residents to take the public bus service. That municipal regulation will have some effect on businesses is inevitable, however the taxi driver may query whether and when the municipal council may adopt a regulation for the purpose of affecting the competitive balance.

The legal issues driven by this query are the objectives for which a municipality can use its broad regulatory powers and the reasons why the legislature might still maintain a limit on the municipal power to tilt a market in favour or against certain businesses. These are administrative law questions that depend primarily on how municipal regulatory powers are delegated and judicially interpreted. In the last two decades, the provincial legislatures have generally moved

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from giving municipalities a “laundry list”\(^3\) of specific matters to regulate to giving a broad power to regulate in response to community issues. The Supreme Court of Canada has concurrently shifted its interpretation of the purposes to which municipal powers could be applied. The Court has moved away from a narrow and prescriptive interpretation of delegated powers that was generally protective of common law rights to trade and has moved towards deference to a council’s determination of how a municipality should regulate local businesses. This combined approach is consistent with the “localist” justification of municipal governance, one that considers democratically elected councils to be better able than the legislature to adopt policies reflective of local preferences.\(^4\) Localism is seen as providing increased legislative efficiency, because municipal councils are presumed to be better at identifying local problems and tailoring local regulatory solutions.\(^5\)

Included within this broader municipal regulatory purpose is the potential to impose local regulatory preferences on business operations. The importance of local regulatory preferences becomes starker when one also considers the increase in the breadth and depth of local services that a more empowered municipality can provide. As both a regulator of businesses and a provider of services that can be alternatives to commercial services, municipalities have been given the opportunity to take a very commanding role in a local market.

One question raised by this shift in power is whether the substantial faith that legislatures have placed in municipal governments to regulate in the “public interest”\(^6\) is appropriate. A deficiency of the localist framework of governance is that regional inefficiencies can arise because of the

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\(^4\) See 114957 Canada Ltée (Spraytech, Société) v Hudson (Town of), 2001 SCC 40 at para 3, [2001] 2 SCR 241 [Spraytech].

\(^5\) Ibid; and Reid Cooper, "Municipal Law, Delegated Legislation and Democracy" (1996) 39:3 Can Pub Admin 290 at 299.

external effects of regulations-based purely local preferences. The legislature, rather than the court or the market, is the institution that should temper localism in such cases by both identifying such inefficiencies and prescribing regionally-based statutory limits or requirements on the exercise of municipal powers.

For the purpose of canvassing the theoretical justification of municipal regulation, Part 2 of this thesis reviews academic literature that advocates localism and discusses regional efficiency concerns. A dominant factor is the ability of residents and businesses to migrate among multiple municipalities and such movement informs the institutional limitations of municipal governance.

Part 3 of this thesis provides a review of the statutory and judicial shift that has substantially increased the objectives that can be applied to municipal business regulation without a council being seen, under administrative law principles, to act beyond its powers. Parts 4, 5 and 6 of this thesis discuss the purpose of municipal regulation to affect local competition using reference to case law. More specifically, Part 4 discusses how a municipal council can sometimes pick a market winner among businesses that compete to provide perfectly substitutable goods or services market without acting arbitrarily. Part 5 of this thesis discusses how municipalities can generally use regulatory powers to favour a preferred type of business operation or land use. Part 6 of this thesis discusses how there appears to be no inherent limit on the use of a delegated regulatory power to favour a municipality’s own service in circumstances in which it competes with private business.

This new framework for local business regulation is considered in Part 7, including the legislature’s role in directing business regulation policies to serve regional interests that cannot be expected to be achieved through municipal governance.

2 Justifying Local Regulation

This thesis considers the particular purpose of a Canadian municipality seeking to regulate in order to adjust the competitive balance between businesses. Although local governments in Canada are not limited to those called “municipalities”\(^7\), this thesis focuses on the role of

\(^7\) See eg the *Local Government Act*, RSBC 1996, c 323, s 731 (“Incorporation by letters patent [of Improvement Districts]), s 766 (“Incorporation of Regional Districts).
regulation by those institutions incorporated by provincial legislatures to govern the cities, towns, districts and villages of Canada. Since such regulation is achieved through the sole use of delegated provincial powers,\(^8\) the municipal regulation of business in Canada has an administrative law context. It is therefore simplest to begin with the Willis’ traditional definition of administrative law powers:

> The discretionary powers which make up administrative law have…three distinguishing characteristics: (a) they are the creatures of statute law; (b) their purpose is the fulfilment of a social philosophy which sets public welfare above private rights; (c) they are vested in bodies other than parliament or the courts.\(^9\)

Three of the most general objectives of municipal government include the exercise of “police powers”\(^10\), which means regulating conduct for the purpose of imposing a community standard, the provision of municipal services\(^11\) and the collection of revenue to fund such municipal activities.\(^12\) The extent to which the regulatory powers associated with these welfare objectives should be used to affect the balance of competition engages theoretical justifications for the delegation of power to municipal governments.

### 2.1 The Localism and Economic Efficiency

It is trite to describe Canadian municipalities as creatures of provincial statute;\(^13\) and as corporations independent of the legislature and the court.\(^14\) The academic study of municipal law in Canada has often focused on explaining or justifying such delegation of regulatory power to a

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\(^8\) Rogers, *supra* note 2, ch 7 at 309.


\(^10\) Rogers, *supra* note 2, ch 7 at 324.


\(^12\) *Ibid* at 566.

\(^13\) *London (City of) v RSJ Holdings Inc*, 2007 SCC 29 at para 37, [2007] 2 SCR 588 [*RSJ Holdings*].

\(^14\) Rogers, *supra* note 2, ch 1 at 14–15.
municipal council with jurisdiction over a comparatively small geographic area. The institution of a municipal council is not strictly necessary. A centralized provincial authority could provide local services and impose community standards and may even do so with regional variation. The market can also provide local services and some level of community standards through social pressure and the court’s application of the common law in enjoining torts such as nuisance and trespass. It is nevertheless the norm in Canada that legislatures have designated locally-elected municipal councils as an institution over certain matters such as community standards and public services.

The “localist” argument in favour of such municipal governance is that a subsidiary council is better attuned at identifying local preferences than the parent legislature. A locally elected council can decide what regulation will be used to impose community preferences that do not occur under free-market conditions. Furthermore, a plurality of councils accommodates regional variation in those preferences throughout the province. This has been described as improving the “allocative efficiency” that flows from municipalities being better able than a large central government to ensure that the bundle of services, taxes and community are what the local electorate wants.

Although a number of economic efficiency theories that have been applied to explain municipal regulation, Charles Tiebout and William Fischel have each developed prominent theories that seek to explain the allocative and regulatory efficiency created by a plurality of municipal governments. In a seminal article, Tiebout theorized that municipalities shape their regulating, taxing and spending patterns to attract and retain businesses, since businesses increase


employment and the wealth of the electorate.\textsuperscript{19} This public choice theory predicts that local regulation will provide allocative efficiency as businesses and residents will locate in the municipality that provides the best fit of policies and voter preferences.\textsuperscript{20} One criticism is that some residents may not be able to afford to move,\textsuperscript{21} but the theory nevertheless depends on a general expectation of mobility. Mobility is also assumed to encourage “regulatory efficiency” as municipalities compete with each other to seek and retain residents and businesses with better quality of regulation and service provision.\textsuperscript{22} Such competition does not occur if local regulations are all set by the same Provincial institution.

Fischel modifies Tiebout’s analysis by characterizing the quality of municipal services as a driver of property values\textsuperscript{23} and by asserting that municipal regulatory decisions are made in order to provide residents with a form of “insurance” that the quality of their neighbourhood will be maintained.\textsuperscript{24} A local government can maintain property values by using community standards regulations to control those noxious and undesirable uses and activities that the market or the common law does not prevent.\textsuperscript{25} Fischel also describes resident-electors as relying on municipal governments to provide property-value enhancing public services.\textsuperscript{26} The local resident-electors have the greatest interest in ensure that community standards, taxes and services are supportive of property values.


\textsuperscript{22} Tiebout, supra note 19 at 422.


\textsuperscript{24} Hoi Kong, “The Deliberative City” (2010) 28 Windsor YB Access Just 411 at 413 citing Fischel, \textit{ibid}.

\textsuperscript{25} Fischel, \textit{ibid}; see also Kong, “Talk About”, supra note 20 at 511.

\textsuperscript{26} Fischel, \textit{ibid} at 145.
Both Tiebout’s and Fischel’s theories attempt to describe the motivation behind a municipality’s adoption of regulatory policies related to standards, services and taxation. Even without accepting a particular economic motivation, a municipal council can be expected to pursue what Ann McDonald described as the public interest:

Once elected … the council is entrusted with responsibility for governing, not just in the interest of those who elected them, but in the interest of the community generally, that is, in the public interest. This is a fairly vague and controversial concept, however. It is a generalized judgment of what is best for individuals, as a part of a community.

…

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”.

Critically, the municipal public interest is defined by the local electorate.

### 2.2 Regional Effects and Concerns

Municipal councils may be locally-minded, but the efficiency theories discussed above do not describe municipal governance as being purely local in effect. Intraregional mobility drives Tiebout’s theory of competing municipalities, since people and businesses are expected to move in or out of municipalities as they “vote with their feet” in response to regulation. Tiebout’s theory has also been criticized for ignoring the frequent crossing of municipal borders by

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27 McDonald, *supra* note 6 at 100 [emphasis in original].

workers and shoppers, yet this ‘voting’ with dollars further illustrates a regional effect of municipal regulation.

Intraregional movement also informs Fischel’s property value ‘insurance’ theory. A municipal council is expected to adopt regulations that prohibit densities or uses that devalue neighbouring property, possibly by limiting the extent to which land can be subdivided. Such regulations not only discourage migration into the municipality, since an outside landfill operator will not be permitted to move her landfill in, but also encourage emigration. If a local resident decides she wants to open a landfill, the municipal regulations require her to do so elsewhere.

Richard Schragger notes with regard to the American case that municipalities are resident-centric: “Indeed, the residence-based franchise is the primary feature of a local government law regime that is structured in numerous ways to prefer residents over non-residents.” Schragger also uses a colloquial description to show how resident-centric local government informs the use of low density residential land use to limit intraregional migration: “if Penfield could not keep out residents of Rochester, there would be no border, no Penfield and no Rochester”. Even without considering economic efficiency justifications, municipal governance should be expected to have at least some regional effect. In tasking two different municipal councils with representing neighbouring electorates, the difference in regulatory preferences that follow from that division of jurisdiction will influence anyone choosing between the two municipalities as a place to live, shop, recreate or run a business.

A consequence of such regulatory division is whether the regulatory differences at the local level create externalities that are detrimental to wider regional interests. The concern is that the policies that are optimal for the municipality in responding to local preferences have negative “agglomerative” effects on the region. What is considered normatively good policy locally is

29 Fischel, supra note 23 at 6.
31 Ibid at 422.
32 Schleicher, “The City”, supra note 19 at 1558.
33 Ibid.
normatively bad once the regional effects are considered. Academics have suggested that municipal regulations intended to protect property values result in the rejection of subsidized housing\textsuperscript{34} and larger minimum lot size requirements.\textsuperscript{35} This is argued as encouraging both environmentally inefficient “urban sprawl”\textsuperscript{36}, and a poor supply and poor regional distribution of housing for lower income families.\textsuperscript{37} American municipal road tolls are suggested to be harmful to inter-municipal travel.\textsuperscript{38} These types of concerns center on the expectation that by only representing local interest, a council is unable to effectively co-ordinate with other municipalities in the region.

A failure to co-ordinate locally-minded objectives with regional-objectives is thought to trigger what academics have called regulatory “races”, being either a “race to the top”\textsuperscript{39} or “race to the bottom”.\textsuperscript{40} Both Fischel’s and Teibout’s theories are amenable to regulatory races. For example, Fischel argues that a normatively positive race to the top occurs when municipalities, especially smaller municipalities, are more protective of the environment than a larger regional or provincial government.\textsuperscript{41} To protect the interests of locals, municipalities are expected to either spurn noxious industries or demand some form of payment that would effectively offset the loss in property values.\textsuperscript{42} The race is one to raise property values by either protecting the

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\textsuperscript{34} Ron Levi & Mariana Valverde, “Freedom of the City: Canadian Cities and the Quest for Governmental Status” (2006) 44:3 Osgoode Hall LJ 409 at 441.


\textsuperscript{38} Schleicher, “The City”, \textit{supra} note 19 at 1558.

\textsuperscript{39} Fischel, \textit{supra} note 23 at 162.


\textsuperscript{41} Fischel, \textit{supra} note 23 at 162–83.

\textsuperscript{42} \textit{Ibid} at 174.
environment or reducing the tax burden. A power to reject or extract payments from a noxious business puts the residents of a municipality in a better position than if the municipality was simply obliged to accept the industry.

The aggregate regional effects of such a race are not clearly positive. One fear is that the municipality that does allow a noxious use will place the use near a municipal boundary, thereby reducing the total impact on the municipality’s own residents by exposing some of the impact to residents of a neighbouring municipality.\textsuperscript{43} If the decision to site the noxious use was made by regional representatives, the interests of all residents would be considered. A second concern is the accommodation of a “locally unwanted land use” (“LULU”).\textsuperscript{44} All municipalities acknowledge the regional benefit of a LULU, but none are willing to accommodate it. The municipalities all race to regulate in a way that excludes the LULU in the hopes that another municipality will be host. Fischel cites the extreme example of the State of New Jersey seeking to place a nuclear waste storage site within a municipality in exchange for an annual benefit package worth $2 million.\textsuperscript{45} All 567 municipalities in the state refused.\textsuperscript{46} One could argue that the storage facility should be required to raise the offered payment until a municipality accepts, but this ignores the difference in regional and municipal preferences. It may be that the statewide preference is to impose a LULU on some municipality’s residents as it means both that the nuclear waste is stored somewhere and that the somewhere is on the other side of the state from where the supportive residents live.

A competitive race also occurs under Tiebout’s theoretical model. A council may decide between being a high-tax high-service municipality or a low-tax low-service municipality, but a council cannot sustain an inefficient government that has high taxes and low services because it will lose residents and businesses to its regional neighbours. Tiebout’s competing municipalities theory


\textsuperscript{44} Fischel, supra note 23 at 179.

\textsuperscript{45} Ibid at 6.

\textsuperscript{46} Ibid.
assumes that there is no sharing of services, since each municipality will regulate to achieve a level of service to match their own optimum city-size.47

Tiebout’s theory that councils regulate so as to attract businesses may also result in a race-to-the-bottom. Academics have suggested that municipalities will engage in beggar-thy-neighbour policies to attract businesses.48 A significant historic example is American municipalities competing for railways in the 19th century. David Schleicher noted that at this time, the primary driver of urban agglomeration was reducing transportation costs and that:

This created incentives for cities to provide subsidies to railroads in hopes of becoming hubs and also to subsidize local industry, as both would create increasing local returns. Although these policies could create local agglomerative benefits if only one local government engaged in them, they did not produce net national economic gain, as they created inefficient subsidy competition, political manipulation of the railroad industry, and overinvestment.49

The American historical response to controlling a municipality’s use of its delegated legislative authority has been the application of “Dillon’s rule”.50 Dillon’s rule is a common law rule ascribed to American judge Jon Dillon that holds that the purpose to which municipal regulation can be put is limited to those purposes and by exercising those powers that are expressly granted by statute, fairly implied by an express grant in a statute or otherwise implied by the essential objects of the municipal corporation.51 Schleicher observes that Dillon’s Rule reflects a limit imposed by State legislatures in the 19th Century who did not want municipalities to engage in beggar-thy-neighbour policies:52

47 Tiebout, supra note 19 at 419.
48 See supra note 43.
49 Schleicher, “The City”, supra note 19 at 1514 [footnotes omitted].
50 See John Dillon, Treatise on the Law of Municipal Corporations (Chicago: J Cockcroft, 1872) (the text associated with the rule).
51 Rogers, supra note 2, ch 7 at 309.
52 Schleicher, “The City”, supra note 19 at 1514.
As such, when Dillon’s Rule was first enacted, reducing transportation costs for goods was the primary driver of urban agglomeration. …

Dillon’s Rule promoted efficiency by removing from local governments the power to engage in these policies [of subsidies to railroads] without state approval, limiting this type of internecine battle for agglomeration.53

A more contemporary example of a failure of regional co-ordination could arise if there is a failure to co-operate on the location of a stadium or convention centre.54

Schleicher suggests that Dillon’s Rule is no longer necessary. Despite the increased empowerment of US local governments, “State legislatures retain control over those policies that limit the negative effect of Tiebout sorting on agglomerative efficiency and those public policies where the optimal provision would result in increased agglomerative efficiency.”55 This describes an inversion of how a municipality is controlled. Rather than being given narrow powers to regulate in a manner that the legislature views as desirable, the municipality is given broad powers to regulate that excludes regulation of those areas that the legislature considers undesirable.

Whether explained under Tiebout’s or Fischel’s analysis, the division of a region into local municipalities risks inefficiencies from a regional perspective—municipalities will not necessarily co-operate so as to achieve a regionally efficient agglomeration of uses or services if it is detrimental to a local interest.56 Disputes over the appropriate balance between local and regional level decision-making forms what Hoi Kong describes as a “localist” versus “regionalist” debate.57 A delegating legislature may be concerned that municipal councils

53 Ibid.
55 Schleicher, “The City”, supra note 19 at 1515.
56 See ibid at 1557–59; Polmateer, supra note 21 at 1117–20.
compete fiercely for the desirable businesses, and, or alternatively, they seek to reject the more noxious, noisy or unsightly businesses even though such businesses could be, in the aggregate, beneficial.

Municipal services also add an interesting dynamic to regional mobility. From an allocative efficiency perspective, both Tiebout’s and Fischel’s theories suggest that municipal services will cater to local preferences. However, if inter-regional travel is convenient, the users of these services may not the mirror the ratepayers who fund it. Open services such as parks, highways and public transport are not amenable to exclusive use by a municipality’s residents. If one municipality has a park with high regional popularity then the policy concerns for that municipality’s council will be the extent to which the municipality is able and willing to subsidize, limit, or charge regional users.

A proposed response to the localist-regionalist tension is the “new regionalist” approach.\(^\text{58}\) New regionalism suggests that municipalities should be encouraged to agree on inter-municipal services rather than having the legislature impose regional-level services on municipalities.\(^\text{59}\) To the extent that the regulatory discretion of municipal councils is not fettered, a framework that encourages municipalities to co-operate when mutually beneficial improves the quality of locally-minded regulation. The local preference in each municipality is for inter-municipal co-operation. However, if new regionalism includes measures which effectively direct councils to make decisions based on a regional perspective, it is a tempering of localism. In their purest form, the theories of Tiebout and Fischel do not describe such fettered discretion.

### 2.3 The Institutional Limits of Municipal Government

Canadian municipal governments are a form of local regulatory institution created by and subordinate to provincial legislatures. This status is criticized by those who call for a grant of municipal constitutional autonomy.\(^\text{60}\) Warren Magnusson boldly suggests that such

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\(^{59}\) Ibid.

\(^{60}\) See Levi & Valverde, *supra* note 34.
constitutional status already exists.⁶¹ This view resembles recognition under English common law of inherent municipal powers.⁶² Reid Cooper, in questioning whether it is still appropriate to treat municipal incorporating statutes no differently than a statute creating an administrative tribunal,⁶³ cites Jane Jacobs’ assertion that the city rather than the nation is the natural unit for many central political decisions.⁶⁴ Such views of inherent legitimacy challenge the perception of a municipal council as a delegate authority.

So long as Canadian municipalities are creatures of statute, they will be subject to limits inherent in the delegation of provincial powers. These limits will invariably restrict a municipality’s ability to regulate in relation to business. One limit is that a municipal council cannot exercise powers that the legislature, the delegating authority, does not have to give.⁶⁵ A municipality cannot possess any power to regulate businesses that the province does not have—an issue that arises when the business falls under the Federal jurisdiction for railroads,⁶⁶ aviation⁶⁷ or “Navigation and Shipping”.⁶⁸ A second limit, one described by Ian Rogers, is that a municipality’s legislative jurisdiction is limited by its geographic boundaries.⁶⁹ By creating a municipality, the province has described a distinct area to be regulated locally.

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⁶² Rogers, supra note 2, ch 7 at 310.
⁶³ Cooper, supra note 5 at 297.
⁶⁴ Ibid at 291.
⁶⁷ Quebec (Attorney General) v Lacombe, 2010 SCC 38, [2010] 2 SCR 453; Mississauga (City of) v Greater Toronto Airport Authority (2000) 50 OR (3d) 641, 16 MPLR (3d) 213.
⁶⁸ Lafarge, supra note 65.
⁶⁹ Rogers, supra note 2, ch 1 at 34 (“The system of municipal institutions in Canada is an outgrowth of the principle that the surest method of safeguarding rights of self-government is to entrust their exercise to representatives who are placed closest to the local scene in matters whose importance does not extend beyond the limits of a locality”).
A third limit is that, notwithstanding a grant of discretion by the legislature, a council cannot exercise this discretion in a manner differently from that envisioned by the legislation.\(^70\) In principle this means that a grant of regulatory power does not include the power to regulate unreasonably,\(^71\) arbitrarily,\(^72\) with intent to harm\(^73\) or for an improper purpose.\(^74\) In practice, judicial enforcement of the rule of law through judicial review of municipal regulation protects against such abuses of delegated power.\(^75\) The line that divides such proper municipal purposes from other ulterior purposes is rather tractable given that the legislature can define and redefine a municipal purpose. Any broadening of permitted municipal purposes reduces the scope of the ulterior.

The need for the legislature to prescribe an appropriate regulatory purpose is suggested by academics who are concerned with the quality and fairness of municipal decision-making. Some suggest that local councils are prone to engage in factionalism or be persuaded by special interests groups.\(^76\) Although Willis generally argued that the legislature and the cabinet, not the court, should scrutinize the exercise of delegated discretionary powers,\(^77\) David Mullan says that Willis’ view did not include municipalities:

Willis was not above advocating the very clear definition of permissible purposes and factors when this was necessary to prevent the courts from importing broader conceptions of the public interest or underlying constitutional values to check the use of discretionary power. It also appears that his trust of discretionary powers in

\(^70\) *Entreprises Sibeca Inc v Freleighsburg (Municipality of)*, 2004 SCC 61 at para 21, [2004] 3 SCR 304 [*Sibeca*].

\(^71\) *Catalyst*, *supra* note 6.

\(^72\) *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village of)*, 2004 SCC 48 at para 7, [2004] 2 SCR 650 [*St-Jérôme*].

\(^73\) *Sibeca*, *supra* note 70 citing *Roncarelli v Duplessis*, [1959] SCR 121 at 140, 16 DLR (2d) 689 at 140.

\(^74\) *Spraytech*, *supra* note 4 at para 20.

\(^75\) Willis, “Three Approaches”, *supra* note 9 at 79.

\(^76\) See e.g. Cashin, *supra* note 54.

the hands of wise civil servants in central government departments did not extend to municipalities. … This, he felt, was an area where the dangers were ‘so real’ as to necessitate a clear legislative statement of relevant factors and, following public hearings, a limitation on the number of licences that a municipality could issue for any particular occupational activity.\textsuperscript{78}

Such a view emphasizes statutory direction to limit delegated regulatory discretion.

The benefit of a clear statement of relative factors that the court can use to review municipal decisions is questionable. McDonald, in reviewing older cases, noted that the interpretation of municipal powers allowed for the imposition of the judiciary’s values:\textsuperscript{79}

\begin{quote}
It is not the court’s function to make these decisions – either directly or indirectly. Primary responsibility for deciding the welfare of the community belongs to the municipal corporation. If the courts take upon themselves the judgment of the rightness or wrongness of council’s decisions in these matters, they, as a body having no connection with local inhabitants, usurp the choice which the inhabitants conferred, by democratic process, on the council.\textsuperscript{80}
\end{quote}

Judicial review of delegated discretionary power can be seen as serving other goals. Hoi Kong endorses judicial review as providing citizens with protection against dominating factions within a municipality—A majority or influential minority are less likely to arbitrarily oppress an individual.\textsuperscript{81} Kong endorses a civic republicanism approach to local government, which he describes as allowing citizens to participate in rule-making so as to avoid domination by the state, as a justification for local councils.\textsuperscript{82} He suggests however that values supportive of civic

\begin{footnotes}

\textsuperscript{79} McDonald, supra note 6 at 63.

\textsuperscript{80} Ibid at 101–02.

\textsuperscript{81} Kong, “Talk About”, supra note 20 at 505–09; see also Cashin, supra note 54.

\textsuperscript{82} Kong. “Talk About”, ibid.
\end{footnotes}
republicanism are achieved through judicial review doctrines such as bad faith\footnote{Ibid at 522–24.} and \textit{ultra vires} (beyond its powers)\footnote{Ibid at 526–27.} preventing “unjustifiable” or factional preferences from defining local policies. Judicial review provides an additional check to ensure the fair exercise of delegated municipal power even in an aura of deference.\footnote{Montréal (City of) v 2952-1366 Québec Inc, 2005 SCC 62 at paras 41–42, [2005] 3 SCR 141 [2952-1366 Québec].} The manner in which such judicial review applies to regulatory decisions that affect the competitive balance of business depends on the scope of powers granted to municipalities and the deference with which they are interpreted.

3 The New Municipal Power to Regulate Businesses

Determining whether a delegated power can be used by a municipality for the purpose of giving a business an advantage or hindrance requires some discussion of the nature of municipal regulatory powers. Rather than pursue the unwieldy task of reviewing statutory grants of powers across Canada, this part of the thesis will describe in very general terms key types of powers granted to municipalities that are used to regulate in response to local preferences. This thesis will also discuss the recent increase in judicial deference in interpreting the application of these powers as it informs any analysis of the purposes to which the powers can be put.

3.1 Statutory Purposes

Municipal enabling legislation differs from province to province, however a Canadian municipality is invariably empowered to engage in some form of community regulation, service provision and revenue generation. The power to license or regulate private activities is commonly described as the “police power”.\footnote{Rogers, supra note 2, ch 7 at 324; Meredith, supra note 36 at 471.} This power can be applied to protect and enhance community standards and includes the grant of power to regulate land use.\footnote{Fischler, ibid at 679.} A municipality controls land use in order to shape development in a manner that will not necessarily be achieved by the market. Municipal enabling statutes traditionally empowered councils to regulate a
“laundry list” of specific matters,\textsuperscript{88} an approach that does not accommodate an inability by the legislature to foresee all the issues that will befall municipalities.\textsuperscript{89} It is notable that in granting regulatory powers, Canadian provincial legislatures have moved towards \textit{omnibus} provisions that authorize regulation in very general terms.\textsuperscript{90} These broad regulatory powers combined with “natural person” powers\textsuperscript{91} have been described as giving municipalities “the tools they need to tackle the challenges of governing in the 21st century”.\textsuperscript{92}

3.1.1 General Municipal Purposes

This thesis does not focus on the particular form municipal regulation of business takes, but the reasons why the regulation was adopted. Canadian municipal enabling statutes typically state vague purposes such as pursuing “good government”\textsuperscript{93}, “safe and viable communities”\textsuperscript{94} and “economic, social and environmental well-being”\textsuperscript{95}. The Quebec \textit{Municipal Powers Act}, incorporates similar objectives into a broad supplementary clause: “In addition to the regulatory powers under this Act, a local municipality may adopt a by-law to ensure peace, order, good government, and the general welfare of its citizens.”\textsuperscript{96} Although vague these purposes are consistent with the localist theory of municipalities catering to the general preferences of its citizens.

\textsuperscript{88} Supra note 3.

\textsuperscript{89} Levi & Valverde, supra note 34 at 424.

\textsuperscript{90} Spraytech, supra note 4 at para 19; Croplife Canada \textit{v} Toronto (City of) (2005), 75 OR (3d) 357, 254 DLR (4th) 40 [Croplife cited to DLR].

\textsuperscript{91} Rogers, supra note 2, ch 7 at 310.1; Lidstone, “Recent Legislation”, supra note 4 at 419.

\textsuperscript{92} Croplife, supra note 90 at para 34, citing Ontario, Legislative Assembly, Official Report of Debates (Hansard), 53 (18 October 2001) at 1350 (Hon. Chris Hodgson).

\textsuperscript{93} \textit{Municipal Act}, 2001, SO 2001, c 25, s 2; \textit{Municipal Government Act}, RSA 2000 c M-26, s 3(a); \textit{Community Charter}, SBC 2003, c 26, s 7(a); \textit{Municipalities Act}, SS 2005, c M-36.1, s 4(2)(a); \textit{Municipal Act}, CCSM c M-225, s 3(a); Halifax Regional Municipality Charter, SNS 2008, c 39, s 2(c)(i).

\textsuperscript{94} \textit{Municipal Government Act}, ibid, s 3(c); \textit{Municipalities Act}, ibid, s 4(2)(c); \textit{Municipal Act}, ibid, s 3(c); Halifax Regional Municipality Charter, ibid, s 2(c)(iii).

\textsuperscript{95} Community Charter, supra note 93, s 7(d); \textit{Municipalities Act}, ibid, s 4(2)(d).

\textsuperscript{96} CQLR c C-47.1, s 85.
3.1.2  Particular Municipal Purposes

Both Tiebout’s and Fischel’s theories describe achieving efficient municipal regulation as providing a bundle of regulatory policies and services to satisfy the public interest in either fostering enterprise and employment or preserving the value of land. In ascribing broad municipal purposes to govern well and improve welfare, Canadian municipal statutes express and imply particular purposes consistent with such bundles.

3.1.2.1  Business Regulation

One of the longstanding purposes of Canadian municipalities is to regulate the conduct of local businesses, revealing the legislature’s intention for locally-minded regulatory intervention with some market activities. Canada’s first municipal enabling statute allowed for the imposition of regulatory measures on enumerated businesses. Some current enabling statutes continue to prescribe powers to regulate specific businesses, but most allow for the regulation of businesses generally. For example, British Columbia’s Community Charter provides: “A council may, by bylaw, regulate in relation to business”. Municipal regulation that imposes community

97 See e.g. An Act to provide, by one general law, for the erection of Municipal Corporations, and the establishment of Regulations of Police, in and for the several Counties, Cities, Towns, Townships and Villages in Upper Canada, S Prov C 1849 (12 Vict) c 81, s 60:

And be it enacted, That the Municipality of each village…shall moreover have power and authority to make By-laws for each or any of the following purposes, that is to say:

… for regulating the place and manner of selling and weighing butcher’s meat, hay, straw, fodder, wood, lumber and fish…. For regulating the assize of brad, and preventing the use of deleterious materials in the making thereof; and for the seizure and forfeiture thereof;…. For regulating or preventing the erection or continuance of slaughter houses, gas works, tanneries, distilleries or other manufactories or trades which may prove nuisances; … For preventing or regulating the use of fire, lights or candles in livery or other stables, cabinet-makers and carpenters’ shops and combustible places; … For regulating inns, taverns, ale houses, victualing houses, ordinaries and all houses where fruit, oysters, clams, victuals or spirituous liquors or any other manufactured beverage may be sold, to be eaten or drank therein…. 

98 See e.g. Municipalities Act, RSNB 1973, c M-22, ss 11(1)(c)–(k)), City of St John’s Act, RSNL 1990 c C-L, ss 162(g), 167, 170(1)(b).

99 See e.g. Municipal Government Act, supra note 93, s 8; Community Charter, supra note 93, s 8(6); Municipal Act, supra note 93, s 232(1)(n), Halifax Regional Municipality Charter, supra note 93, s 188(1)(f), Municipal Act, 2001, supra note 93, s 10(2)(11); Charlottetown Area Municipalities Act, RSPEI 1988, c C-4.1, s 21(v); Municipal Powers Act, supra note 96, s 2; Municipalities Act (Saskatchewan), supra note 93, s 9.

100 Community Charter, ibid, s 8(6).
standards on matters such as noise, visual character, and noxious fumes should be seen as applying to businesses and non-commercial activities alike. Implicit with the government imposition of community standards is that regulation, in addition to the local market conditions of supply and demand, will determine how businesses operate.

It is also notable that Canadian enabling statutes do not contain language that specifies the municipality’s particular role regarding the competition among businesses. In the division of the Alberta Municipal Government Act that enables a council to pass bylaws respecting a wide variety of matters, including “businesses, business activities and persons engaged in business” the Act also provides that:

The power to pass bylaws under this Division is stated in general terms to

(a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and

(b) enhance the ability of councils to respond to present and future issues in their municipalities.

This statutory silence on how competition among businesses should treated for municipal purposes contrasts with the statutory purposes of acts such as the Competition Act, which include seeking to “maintain and encourage competition in Canada” or the Ontario Securities Act, which includes fostering “fair and efficient capital markets”.

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101 2952-1366 Québec, supra note 85.
102 Vann Media Inc v Oakville (Town of), 2008 ONCA 752, 95 OR (3d) 252 [Vann Media].
103 Nanaimo (City of) v Rascal Trucking Ltd, 2000 SCC 13, [2000] 1 SCR 342 [Rascal Trucking].
104 Supra note 93, s 7.
105 Ibid, s 9.
106 RSC, 1985, c C-34.
107 RSO 1990, c S-5, s 1.1.
There are nevertheless a few statutory restrictions that recognize the potential municipal influence on the competitive balance. The British Columbia Community Charter generally prohibits municipalities from granting “assistance to business”. 108 This provision has been interpreted by the court as applying to grants of financial assistance or particular assistive rights109 rather than merely regulating in a manner that benefits a business, such as approving a development.110 The Ontario Municipality Act, 2001 also provides: “that a person shall not confer on any person the exclusive right of carrying on any business, trade or occupation unless specifically authorized to do so under any Act.”111 Such specific prohibitions on the gifting of municipal money or granting of exclusive rights, while limiting a particular method of assistance, do not prescribe any particular objective that municipalities should pursue when regulating in a manner that affects the competitive balance.

3.1.2.2 Land Use Planning

Canadian municipalities are commonly tasked with imposing regulatory limits on the private use of land for what has been judicially described as a “planning purpose”.112 Regulating the location of businesses is consistent with both Tiebout’s and Fischel’s approach, as municipalities will regulate in response to both businesses wishing to be in commercially attractive locations and the desire of people to move into and continue to reside in areas that share their preferred community standards. Under these theories, the individual property owners who wish to pursue land uses that are not welcomed by the community majority should simply move. Enabling statutes suggest that residents in such a minority are more entrenched. For example, Ontario’s Planning Act includes the “resolution of planning conflicts involving public and private interests” within the 18 “matters of provincial interest” to be considered in planning decisions.113

108 Community Charter, supra note 93, s 25.
109 Misty Mountain Charters Ltd Revelstoke (City of), 2010 BCSC 1246, 75 MPLR (4th) 221.
110 Dales Properties Ltd v Surrey (City of), 2010 BCSC 1196 at para 84, 323 DLR (4th) 438.
111 Supra note 93, s 18.
113 RSO 1990, c P.13, s 2.
Similarly, that part of Alberta’s *Municipal Government Act* providing for powers related to “Planning and Development” prescribes particular purposes which, while consistent with providing a bundle of regulations that balances the fostering of economic development with the maintenance of community standards, also uses language prohibiting infringements on private rights unless necessary for the “overall greater public interest”:

The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted

(a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and

(b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,

without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.114

Such a statutory purpose suggests a measure of provincial protection for individual rights. Localism suggests that the accountable municipal council is better suited than the ‘distant’ legislature or the unelected judiciary in determining the locally preferred balance between private and public interests rights. Indeed, if one assumes a municipal council to be immune to factionalism or the caprice of special interest groups, the “overall greater public interest” will be pursued by all municipal regulation.

Whether land use regulations pursue proper “planning purposes” has nevertheless been a basis for judicial review.115 This provides the court with some framework upon which to evaluate the municipality’s balancing of public and private rights. Ed Morgan argues, however, that in attempting to describe these purposes, “[t]he courts on their own provide little more than a framework for overlapping wrinkles and contradictory folds; the real test is to be ironed out by

114 *Supra* note 93, s 617.
comprehending the planning theory that currently governs our urban and suburban growth.\textsuperscript{116} Notwithstanding an assessment of the quality with which the court evaluates a particular approach to land use regulation, such legislated imposition of “planning purposes” is narrower than the general municipal purposes associated with localist regulation. This is because a municipal council must exercise a narrower set of objectives in responding to land use preferences than to other preferences related to municipal standards.

\subsection*{3.1.2.3 Service Provision}

The municipal objective in providing services is commonly described as a broad one in municipal enabling statutes.\textsuperscript{117} Under the \textit{Ontario Municipal Act, 2001}, a so-called “single-tier” municipality “may provide any service or thing that the municipality considers necessary or desirable for the public.”\textsuperscript{118} Similarly, the Alberta \textit{Municipal Government Act} includes within the statutory purposes of a municipality that it is: “to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality”.\textsuperscript{119} Such a broad statutory purpose contrasts with the traditional laundry list approach of prescribed municipal services. If the legislature specifies which municipal services may be offered, the Legislature is concurrently reserving all other services for supply by the private sector or another government body. A general authority to provide “any service” means that the council, rather than the legislature, decides whether the municipality will enter that market—a market within the municipality’s own boundaries for that matter.

\subsubsection*{3.1.2.3.1 Revenue Collection}

The revenue required to pay for the bundle of services and regulatory enforcement provided by a municipality is described by Rogers as “lifeblood”.\textsuperscript{120} Canadian municipalities typically fund

\textsuperscript{116} \textit{Ibid} at 174.

\textsuperscript{117} See e.g. \textit{Municipal Act, supra} note 93, ss 3, 232(1); \textit{Community Charter, supra} note 93, s 8(2).

\textsuperscript{118} \textit{Supra} note 93, s 10(1).

\textsuperscript{119} \textit{Supra} note 93, s 3(b).

\textsuperscript{120} Rogers, \textit{supra} note 2, ch 14 at 566.
their operations through taxes, fees, provincial subsidies and revenue from municipal undertakings. The manner with which municipalities are authorized to raise revenues varies significantly across provinces, and is often criticized by municipalities as being too limited. The common legislated requirement is that municipal budgets be generally balanced. This means that the purpose of municipal revenue generation is to fund the bundle of services, administration and enforcement activities rather than simply collect revenue to be transferred to the province or some other entity.

3.2 The Increase in Judicial Deference

Concurrent with the wider grant of municipal powers is the increase in deference shown by the court in how and why a municipal council may regulate. Some enabling statutes have sought to codify a deferential interpretation of municipal powers, however a review of decisions of the Supreme Court of Canada shows a significant shift in its consideration of whether a municipal regulation of business is ultra vires for being unlawfully discriminatory. Although these decisions relate to the tension between the public and private interests, the facts center on regulations that give or deny a particular business or type of business a competitive advantage.

Over a century ago the decision Virgo v Toronto (City of) revealed the Supreme Court of Canada to be a bit taken aback by the extent to which a regulatory power could limit free enterprise. In that case, the Court considered a municipal bylaw that prohibited hawkers and peddlers from peddling on a certain busy street. Gwynne J. commented that such vendors “are still entitled to the protection of the law in carrying on their humble trade equally as all other traders so long as they comply with the law.” The Court advocated that enabling statutes that interfered with the

121 Ibid.
122 Ibid.
123 Ibid.
124 Community Charter, supra note 93, s 4; Municipal Act, supra note 93, s 231; Municipal Act, 2001, supra note 93, s 8; Municipalities Act (Saskatchewan), supra note 93, s 6.
126 Ibid.
common law right to carry on a business be strictly construed.\textsuperscript{127} Such a narrow interpretation of municipal powers minimized the extent to which a council can guide local affairs. The market and compliance with the common law determined the competitive balance between businesses.

A reluctance by the Supreme Court of Canada to allow a municipal service to be supplied differently to different businesses was evident in the 1906 decision of \textit{Hamilton (City of) v Hamilton Distillery Co.}\textsuperscript{128} Although the Court recognized that some municipal enabling statutes should be given a benevolent construction in order to achieve their purpose, this did not imply a power to discriminate amongst businesses absent a grant of specific authority. Such an approach meant that a municipality could not charge a distillery a different metered rate by volume even though the distilleries consumed substantially more municipal water.\textsuperscript{129} Again, the Court was reluctant to find that a municipality can regulate different businesses differently—the implication being that although a legislature has delegated regulatory power to a municipality, that delegation does not include much power to adjust the balance of competition amongst businesses.

The maxim of narrowly interpreted municipal powers was repeated in \textit{Verdun (City of) v Sun Oil Co},\textsuperscript{130} a case in which the Supreme Court of Canada found that power to decide where gas stations and other “specially restricted buildings” were placed could only be regulated under the particular form of land use planning bylaw prescribed by the provincial legislature.\textsuperscript{131} Fauteux J. held for the Court that “municipalities derive their legislative powers from the provincial Legislature and must, consequently, frame their by-laws strictly within the scope delegated to them by the Legislature”.\textsuperscript{132} The continued emphasis that municipalities act strictly within the scope of their power continues a judicial expectation that municipal councils will apply

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\textsuperscript{127} \textit{Ibid} at 468–69; See also \textit{Stronach (Re)} (1928), 61 OLR 636, [1928] 3 DLR 216 at paras 15 (Sup Ct-App Div).
\textsuperscript{128} (1906), 38 SCR 239.
\textsuperscript{129} \textit{Ibid} at 248–52; McDonald, \textit{supra} note 6 at 66.
\textsuperscript{130} [1952] 1 SCR 222, [1952] 1 DLR 529 \textit{[Sun Oil]}; see also \textit{Montreal (City of) v Civic Parking Center Ltd}, [1981] 2 SCR 541, 18 MPLR 239.
\textsuperscript{131} \textit{Sun Oil}, \textit{ibid}.
\textsuperscript{132} \textit{Ibid} at 228.
\end{flushleft}
municipal regulations in a manner consistent with the nature of business regulation that the court ascribes to the legislature’s intent and not in deference to local preferences.

A judicial assessment of how much discrimination amongst businesses should be implied in a municipal regulatory power also featured prominently in the 1993 decision of *R v Greenbaum*.133 In that case, the Court considered a bylaw that allowed operators to obtain licences that permitted the business to use the sidewalk in front of their business, but prohibited someone from using any part of the sidewalk for a stand-alone business.134 Notwithstanding recognition of the fact that the power to discriminate could be implied in a municipal statute under a benevolent construction, Iacobucci J. found:

> I am not persuaded that, in the case at bar, to draw a distinction between free-standing street vendors and owners/occupants of abutting property was absolutely necessary to the exercise of the licensing power such that the power to draw such a distinction must be inferred from the enabling legislation ([citation omitted]) by necessary inference or implicit delegation.135

Despite occurring almost a century later, the tenor of *Greenbaum* is similar to *Virgo*. Peddlers and shop owners should be allowed to compete freely and municipalities should not be viewed as being empowered to regulate so as to pick a market winner.

Critics responded to *Greenbaum* by noting that the choice between a broad or narrow interpretation of an enabling statute depended on whether the court preferred to support the power of municipalities to govern their territories or to protect the private rights of property owners.136 McDonald correctly criticized the ease with which the court switched between axioms of narrow interpretation and benevolent construction, commenting “a court decides whether a

133 [1993] 1 SCR 674, 100 DLR (4th) 183 [*Greenbaum*].
council is doing what it is supposed to be doing, by the interpretation of statutes.”

This criticism is not about the amount of regulation in a local market, but the fact that it is the court who is deciding how much regulation is appropriate. If the Supreme Court of Canada had viewed “free-standing” vending on a sidewalk as an unquestionable nuisance, then the conclusion that prohibiting such vendors was necessary could be easily drawn.

The 1994 decision of Shell Canada Products Ltd v Vancouver (City of) provided a stark example of the debate over deference. Shell related to a policy decision of a municipal council to boycott particular brands of products. The objective of the policy, as stated in the council’s resolution, was that the City of Vancouver would “not do business with Royal Dutch/Shell and Shell Canada until Royal Dutch/Shell completely withdraws from South Africa”. The intended objective of the resolution may have been international, but the expected market effect of such aversion to Shell branded products in procurement would advantage local competitors.

It was council’s objective rather than the local market effect that the majority of the Supreme Court of Canada focused on when it quashed the resolution for being beyond the municipality’s powers. Sopinka J., for the majority, contrasted the purpose of the procurement policy with the statutory “municipal purposes”:

The explicit purpose is to influence Shell to divest in South Africa by expressing moral outrage against the apartheid regime and to join the alleged international boycott of its subsidiaries and products until Shell “completely withdraws from South Africa”. There is no mention as to how the good government, health or welfare of the City or its citizens is affected or promoted thereby.

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137 McDonald, supra note 6 at 101.
138 Shell, supra note 6.
139 Ibid at paras 3, 74.
140 Ibid at para 74.
141 Ibid at para 99.
For Sopinka J., the purpose of influencing “matters beyond its boundaries” was not within the jurisdiction of the municipality—such external focus must be expressly authorized by statute regardless of whether the effect of council’s intention is expected to “redound to the benefit of the inhabitants of the City.”\textsuperscript{142}

In notable dissenting reasons for judgment,\textsuperscript{143} McLachlin J. (as she then was) questioned whether it was the court’s role to conclude, as Sopinka J. had done, that the policy was “a boycott based on matters external to the interests of the citizens of the municipality.”\textsuperscript{144} McLachlin J. described how municipalities have changed in their representation of community values:

Thus, even if the expression of collective values was not traditionally seen as a function of municipal authorities, the growing sophistication and stature of a contemporary city such as Vancouver requires that the scope of “municipal purposes” be determined with reference to this current reality.\textsuperscript{145}

Localism suggests that municipalities are best suited to representing community preferences, and McLachlin J’s view of a sophisticated city acknowledges that governments are better suited to sophisticated regulation.

In seeking to chart the approach the Court should take in reviewing the purposes for which municipalities exercise power, McLachlin J. cited the commentary of McDonald,\textsuperscript{146} Stanley Makuch\textsuperscript{147} and Sue Arrowsmith\textsuperscript{148} and the rationale of benevolent construction:

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\item \textsuperscript{142} \textit{Ibid} at paras 99–100.
\item \textsuperscript{143} \textit{RSJ Holdings, supra} note 13 at para 38; see also \textit{Toronto (City of) v 1105867 Ontario Inc}, 2005 ONCJ 13 at para 36, 5 MPLR (4th) 127 [\textit{1105867 Ontario}].
\item \textsuperscript{144} \textit{Shell, supra} note 6 at para 44 (Mclachlin J) citing para 101 (Sopinka J).
\item \textsuperscript{145} \textit{Ibid} at 44.
\item \textsuperscript{146} \textit{Supra} note 6 at 64.
\item \textsuperscript{147} \textit{Supra} note 136 at 5–6.
\item \textsuperscript{148} Sue Arrowsmith, \textit{Government Procurement and Judicial Review} (Toronto: Carswell, 1988) at 219.
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Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the “benevolent construction” which this Court referred to in \[R v Greenbaum^{149}\], and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.\(^{150}\)

McLachlin’s call to judicial deference in her dissent contrasts markedly with Iacobucci J’s scrutiny, just a year earlier, of a provision regulating the use of sidewalks for commercial activities in \textit{Greenbaum}.\(^{149}\)

Three subsequent Supreme Court of Canada decisions illustrate the momentum of the view towards greater judicial deference as to what are proper municipal purposes. In \textit{Nanaimo (City of) v Rascal Trucking Ltd}, the Court considered whether a council was within its jurisdiction in a quasi-judicial proceeding relating the remediation of a nuisance pile of soil.\(^{151}\) Although he was not prepared to be deferential on the question of the municipal council’s jurisdiction in quasi-judicial matters,\(^{152}\) Major J. noted, for the unanimous Court, that “municipalities exercise a rather plenary set of legislative and executive powers, a role that closely mimics that of the provincial government from which they derive their existence”.\(^{153}\) Furthermore, he observed that

\begin{itemize}
  \item \(^{149}\) \textit{Supra} note 134.
  \item \(^{150}\) \textit{Shell}, \textit{supra} note 6 at 244.
  \item \(^{151}\) \textit{Rascal Trucking}, \textit{supra} note 103.
  \item \(^{152}\) \textit{Ibid} at 30.
  \item \(^{153}\) \textit{Ibid} at paras 31–32.
\end{itemize}
municipalities are political bodies with municipal councillors being elected to further a political platform.\textsuperscript{154}

In \textit{114957 Canada Ltée (Spraytech, Société) v Hudson (Town of)},\textsuperscript{155} the Supreme Court of Canada upheld a municipal bylaw that prohibited the “aesthetic” use of pesticides was within a municipality’s general power to regulate in relation to health\textsuperscript{156} notwithstanding Parliament’s jurisdiction to regulate pesticides under the \textit{Pest Control Products Act}.\textsuperscript{157} The regulation significantly impacted a business that offered commercial spraying of lawns.\textsuperscript{158} In considering the municipal power to interfere with business in the public interest, L’Heureux-Dubé observed that:

\begin{quote}
The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.\textsuperscript{159}
\end{quote}

This comment represents judicial recognition of two aspects of the localist justification. One, that local government is best suited to respond to the local preferences, and two, that a plurality of local governments accommodates regional variations in preferences.

L’Heureux-Dubé’s assessment of the focus of municipal regulation was nevertheless supportive of the traditional, locally-minded view of Sopinka J’s majority opinion in \textit{Shell}:

\begin{footnotes}
\item[154] \textit{Ibid.}
\item[155] \textit{Spraytech, supra} note 4.
\item[156] \textit{Ibid} at para 34.
\item[157] RSC 1985, c P-9.
\item[158] \textit{Spraytech, supra} note 4 at para 5,
\item[159] \textit{Ibid} at para 3.
\end{footnotes}
This concern must relate to problems that engage the community as a local entity, not a member of the broader polity. It must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene. In Shell … the Court emphasized the local ambit of such power. It does not allow local governments and communities to exercise powers in questions that lie outside the traditional area of municipal interests, even if municipal powers should be interpreted broadly and generously.\textsuperscript{160}

A view that a municipality should stick to its “traditional interests” is not only conservative, it counteracts the freedom to intervene in new areas in response to new challenges implied by omnibus regulatory powers or to create novel municipal services deemed to be in the public interest.

The completion of the shift towards substantial deference of the court advocated by McLachlin J’s dissent in Shell was confirmed in United Taxi Drivers Fellowship of Southern Alberta v Calgary (City of).\textsuperscript{161} In that case the court considered whether a very “general power to provide for a system of licences” granted under the Alberta Municipal Government Act\textsuperscript{162} included the power to pass a bylaw for the purpose of restricting the number of taxi licensed to operate within a municipality. As part of his conclusion in finding that the purpose should be included, Bastarache J. provided a summary of the legislative and judicial shift towards allowing municipal councils to be flexible in the purpose to which they apply their powers to regulate:

The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in [Shell]. The “benevolent” and “strict” construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of

\textsuperscript{160} Ibid at para 53 citing Shell, supra note 6 and Hoehn, supra note 2 at 17–24 [emphasis in original].

\textsuperscript{161} 2004 SCC 19, [2004] 1 SCR 485 [United Taxi Drivers].

\textsuperscript{162} Supra note 93, s 9.
municipal powers has been embraced: [Rascal Trucking]. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: … This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes.\textsuperscript{163}

Here the Supreme Court of Canada recognizes a tempering of the court’s ability to use the interpretation of municipal purposes to determine if “council is doing what it is supposed to be doing”.\textsuperscript{164}

A municipal council is not free from all judicial scrutiny. The court may still review a municipal regulation on the basis that the council exercised a power it did not have. The court may also find that a power was improperly applied because council acted in an “arbitrary fashion in the discharge of its public function”\textsuperscript{165} or with an intent to harm.\textsuperscript{166} Subject to statutory exception,\textsuperscript{167} municipal regulation must also be reasonable when viewed with substantial deference. In \textit{Catalyst Paper Corp v North Cowichan (District of)}, the Supreme Court of Canada considered the claim of an industrial paper producer that bylaws that imposed parcel tax rates were unreasonable.\textsuperscript{168} The paper producer was “required to foot a grossly disproportionate part of the District’s property tax levy”,\textsuperscript{169}

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\textsuperscript{163} United Taxi Drivers, supra note 161 at para 6.
\textsuperscript{164} McDonald, supra note 6 at 101.
\textsuperscript{165} St-Jérôme, supra note 72 at para 7; see also Kong, “Talk About”, supra note 20 at 521–22.
\textsuperscript{166} Sibeca, supra note 70 at para 26.
\textsuperscript{167} McDonald, supra note 6 at 96; see e.g. Vancouver Charter, SBC 1953, c 55, s 148; Municipal Government Act, supra note 93, s 539 (“No bylaw or resolution may be challenged on the ground that it is unreasonable.”); Municipal Act, 2001, supra note 93, s 272.
\textsuperscript{168} Catalyst, supra note 6.
\textsuperscript{169} Ibid at para 4.
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and although the impact of the bylaw on the paper producer was found to be harsh, the Court found the bylaw to be reasonable. In doing so, McLachlin CJ., for the Court, noted the importance of the legislative rationale in applying a reasonableness analysis:

It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have carte blanche.

Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw.

Again the nature of judicial deference follows from the rationale of the statutory regime that enables municipal regulation.

A conception of the role municipal regulation is supposed to play in local governance informs whether the court can question a particular purpose to which council has put its regulatory powers. The reasoning of the Supreme Court of Canada in United Taxi Drivers and Catalyst is consistent with a localist justification—a locally elected council should effect regulatory preferences based on a “wide variety of factors” and not a statutory or judicial prescription of the appropriate level of regulatory involvement. It is this framework that determines whether a municipality may use its power for the specific purpose of adjusting the balance of business competition. Such a purpose is not expressly included or excluded in enabling statutes, but is one that can allow community preferences to prevail over individual freedoms or regional concerns.

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170 Ibid at para 34.
171 Catalyst, supra note 6 at paras 33–34 [emphasis in original].
4 Regulation Affecting Competition between Similar Businesses

The question of how a municipal council might seek to affect the balance of competition between two businesses that provide near-identical goods or services provides a starting point. Such similar businesses are distinguished by their different owners, operators, location, branding, employees or clientele. As an illustration, consider the potential for competition among two hypothetical convenience stores. The first is called “A’s Convenience” and it does a good trade serving a residential neighbourhood. The second store, to be called “B’s Convenience”, is proposed by an entrepreneur. The entrepreneur applies to the municipal council to rezone residential land so that B’s Convenience can be opened near A’s Convenience.

In evaluating the application, the council will consider the planning purpose of locating convenience store uses. The council will also recognize that a zoning amendment that permits B’s Convenience to open means that A’s Convenience would face increased competition. Council’s decision will affect the balance of competition. The issue is whether the council’s delegated power includes regulating for the purpose of affecting the competitiveness of businesses. It should be emphasized that although the municipality is regulating so as to affect competition, a municipal bylaw that is adopted under a Provincial grant of authority, is currently exempted from scrutiny under the Competition Act.172

In considering the conflicting interests of the two businesses with identical operations, the council and the community may have preferences that attach to the people involved in the business, possibly because they are considered more local, more patriotic, more socially responsible or of a higher social class. The facts in Shell, viewed from Sopinka J’s perspective, illustrate such a preference. Rather than distinguishing between how a company’s products serve the citizens of Vancouver, the council focused on the global dealings of the company selling them. Another example is the classic judicial hypothetical of dismissing a teacher because she has red hair.173 Canada’s most famous example of a delegate’s preference that went beyond the

172 Supra note 106, s 45(1).
173 Short v Poole Corp, [1926] Ch 66 (CA) at 91 (Warrington LJ) cited in Mills v York (Regional Municipality of) (1975), 9 OR (2d) 349, 60 DLR (3d) 405 at para 6 (HCJ (Gen Div)); and Associated Provincial Picture Houses v
“perspective within which a statute is intended to operate” occurred in Roncarelli v Duplessis. In that case, the Supreme Court of Canada held that the licensing body could not revoke a commercial liquor license on the basis that the licensee was assisting Jehovah’s Witnesses facing criminal proceedings. Although the Canadian Charter of Rights and Freedoms now provides alternative protections, the rationale remains that the statutory regime that creates municipal regulation does not authorize such personal discrimination.

This approach overlaps with the common law rule, often codified, that a municipality may not regulate to effect a preference based on the land user or business operator. A judicial finding of bad faith, in some cases because the council acted arbitrarily, has followed from regulatory discrimination based on the character or brand of the user, be it the operator or the customer rather than a distinguishable land use or activity. Here the court is imposing a different standard than that of the market. Individuals might avoid a particular business because they do not like the look of the owner or do not like the usual customers. The localist question is whether such discrimination should be codified as local regulatory preference. This regulatory response has an air of tyranny to it, but the theory simply suggests a market result under which the presumably mobile business operators and resident/customers would leave those municipalities in which they were unpopular. In practice, a rule against such personal discrimination offers

\[\text{Wednesbury Corporation, [1948] 1 KB 223 at 229 (Greene MR [Wednesbury]. See also Reese v Alberta (Minister of Forestry, Lands and Wildlife) (1992), 87 DLR (4th) 1 at 26, 85 Alta LR (2d) 153 (QB) citing Wednesbury, ibid; and Pinsonnault-Flinn v Nova Scotia (Minister of Environment and Labour), 2004 NSSC 206 at para 79, 353 DLR (4th) 675 citing Wednesbury, ibid.}\]

174 Supra note 73.

175 Ibid.


179 Ibid.
some protection to those who cannot, will not, or who the legislature or the judiciary concludes should not, move from a municipality because of an arbitrary local preference.

In practice, showing that a municipal bylaw makes an arbitrary distinction between essentially identical businesses has often been a matter of convincing the court that a bylaw is not treating different “classes” of businesses differently. Rather, the regulation discriminates among operators of the same type of business. In one case, an Ontario court found arbitrariness in a bylaw that imposed different business licensing fees for male and female topless dancers. The same court has found that a bylaw that distinguished between videocassette stores by the ratio of adult movies they offered for sale or rent as being unlawful as it was treating “retailers in the same business differently.”

This is not to say that a council may never place one business in a better position than some other business with identical operations. A municipality may be able show that a preference relating to a person is not arbitrary. A criminal record check requirement may effectively deny some prospective operators a business licence. The past conduct of the operator may reasonably justify a refusal to issue or renew a business licence. The court has also recognized that regulation of competition is within the provincial, and therefore municipal, head of power over “Property and Civil Rights in the Province”.

A municipality can, in good faith, regulate to prevent too many of a particular type of business within its boundaries. For example, it could limit taxi licences in response to a fear of that too many taxis will recklessly compete for too few fares. Such a policy is justified as protecting everyone from what is perceived as too much competition, even if the result is licence holders winning the market. Case law suggests that even

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180 2211266 Ontario Inc. (cob Gentlemen’s Club) v Brantford (City of), 2012 ONSC 5830 at para 51.
181 913719 Ontario Ltd (cob Adults Only Video) v Cambridge (City of) (1996), 34 MPLR (2d) 213 at para 11.
182 See Jess v Estevan (City of), 2013 SKQB 99, 9 MPLR (5th) 213.
183 See 377050 B.C. Ltd. dba the Inter-City Motel v Burnaby (City of), 2007 BCCA 162, 64 BCLR (4th) 1.
184 Constitution Act, 1867, s 92(13); General Motors (Canada) Ltd v City National Leasing, [1989] 1 SCR 641, 58 DLR (4th) 255.
185 Associated Cab Limousine Ltd v Calgary (City of), 2009 ABCA 181, 457 AR 124 [Associated Cab]; Toronto Livery Assn v Toronto (City of), 2009 ONCA 535, 58 MPLR (4th) 11 [Livery]; Common Exchange Ltd v Langley (City of), 2000 BCSC 1724, 16 MPLR (3d) 85 [Common Exchange].
under earlier, more narrowly construed powers, it was reasonable and within council’s jurisdiction to conclude that limiting the market to a single business is in the public interest. For example, in *R v New Westminster (City of)*, the court accepted as a reason for refusal of a business licence: “That it would not be economically sound for more than one company to operate cablevision in the city.”\(^\text{186}\) Given a power to regulate competition in an impartial manner, there is a question of whether a common law rule against creating a monopoly absent express statutory authority continues to apply.\(^\text{187}\) Enabling statutes do provide examples of statutory limits or elector-consent requirements for the granting of local franchises.\(^\text{188}\)

Notwithstanding the increase in trust in municipal governance implicit in the deferential shift, the fact that a municipal council’s authority is delegated means that the legislature continues to prohibit using regulation to adjust the competitive balance between identical businesses for purely personal, and therefore municipally arbitrary, purposes. While this approach can be seen as protective of unpopular business operators within a municipality, it also limits a regional effect since it precludes bases with which to discriminate against outside operators who wish to move their business into the municipality.

5 Regulation Affecting Competition between Businesses with Distinguishable Operations

If a municipal council is expected to react neutrally to the people involved in the businesses being regulated, municipal regulation that caters to local preferences must discriminate on how businesses are operated. As the minority decision in *Shell* suggests, if a conduct and use affects a municipal interest, there is a municipal purpose to regulation of that conduct or use. A wider grant of municipal powers means greater opportunity to tailor regulations—the statutory scheme of regulation of local matters means that councils can differentiate among businesses by how they use land, use public highways, or serve local customers. A significant consequence of the

\(^\text{186}\) (1965), 55 DLR (2d) 613 (BCCA).


\(^\text{188}\) See e.g. *Community Charter*, *supra* note 93, s 22; and *Vancouver Charter*, *supra* note 167, s 153.
broad grant and interpretation of municipal powers is deference to a municipal council to use its regulatory powers to prefer or hinder different types of businesses as the council chooses.

Reconsider the hypothetical example given above except that in this case the potential competitor to A’s Convenience is “C’s Megamart”. C’s Megamart is a proposed “big box” format retailer that will be far larger than a convenience store and will be set back a substantial distance from the street in order to provide a large parking lot. In considering a rezoning application, the council will be mindful of both proposed change in land use but also the effect of the competition between the stores. The purported effect of big box retailers on the viability of smaller retail stores can be a significant political issue. The council may fear that C’s Megamart will make A’s Convenience unviable.

If the council identifies the preferred business format from a planning perspective, the council will not be arbitrarily picking a winner among similar businesses. If the local preference is for smaller stores lining a pedestrian-oriented street, then a council can protect those types of businesses by regulating to restrict operations that would be seen to detract from planning purposes. Although a council is not regulating based on an arbitrary “personal” characteristic, the distinction may be subtle. A council that opposes drive-thru restaurants could be viewed as either rejecting a particular land use or fast-food culture.

In the C’s Megamart hypothetical, the policy question is whether council will protect convenience stores from big box stores because convenience store operations match the local preference for land use. The applicant seeking to open C’s Megamart may still buy A’s Convenience and assume control of that convenience store. However, a deferential approach to municipal regulation does not require the council to concede that a big box store is entitled to compete with smaller stores. If council prefers small stores to those set back on large parcels with ample parking, then a council may use its regulatory powers to prohibit “[l]arge scale, stand-alone retail stores and ‘power centres’” in certain neighbourhoods while still permitting

smaller stores.\textsuperscript{190} The critical consideration is whether the preferred or unacceptable manner in which the business operates is a matter the municipality is permitted to regulate. If so, then just carrying on some of the business is enough to bring a business within the jurisdiction of a municipality.\textsuperscript{191}

As stated by the Supreme Court of Canada in \textit{Catalyst}, a municipal council is expected to balance a wide variety of factors in regulating. Discrimination is often required to do so effectively.\textsuperscript{192} The degree to which councils have relied on delegated regulatory power to shape the manner in which businesses operate is remarkable. Numerous cases confirm that the scope of proper municipal discrimination includes distinguishing between different uses.\textsuperscript{193} It is a question of distinguishing a difference in how and where they do business rather than who by and for whom. Examples of such distinctions include selling prepared food from a mobile cart rather than a restaurant;\textsuperscript{194} selling dogs from a pet store rather than private sale;\textsuperscript{195} requiring transaction registries for second hand stores but not for vendors of new goods;\textsuperscript{196} permitting a large sign to advertise a business located on site but not a business located elsewhere;\textsuperscript{197} and permitting smoking in casinos but not in restaurants or bars.\textsuperscript{198} Such discriminatory rules can vary for livery depending on whether the passengers are carried by rickshaw,\textsuperscript{199} taxicab, or limousine,\textsuperscript{200} and

\begin{footnotes}
\item[190] \textit{Toronto (City of) v Home Depot Holdings Inc}, 2010 ONSC 6071, 78 MPLR (4th) 204.
\item[191] \textit{1105867 Ontario Inc}, \textit{supra} note 143 at paras 39–41 citing \textit{Mississauga (City of) v Gray} (1997), 34 OR (3d) 487, 149 DLR (4th) 193 (CA).
\item[192] \textit{Filos Restaurant Ltd v Calgary (City of)}, 2007 ABQB 97, 413 AR 374 \[\textit{Filos}\].
\item[193] See e.g. \textit{Langille (c.o.b. Rickshaw Runners of Toronto) v Toronto (City of)} (2007), 33 MPLR (4th) 136 (Ont Sup Ct J) \[\textit{Langille}\]; \textit{1105867 Ontario, supra} note 191; infra notes 194 to 201 \[and accompanying text\].
\item[194] \textit{Rojem v Kelowna (City of)}(1995), 27 MPLR (2d) 68 (BCSC).
\item[195] \textit{International Bio Research (c.o.b. Pet Habitat) v Richmond (City of)}, 2011 BCSC 471, 83 MPLR (4th) 80.
\item[196] See e.g. \textit{Cash Converters Canada Inc v Oshawa (City of)}, 2007 ONCA 502, 86 OR (3d) 401 (CA) rev’g (2006), 18 MPLR (4th) 153, 50 Admin LR (4th) 184 (Ont Sup Ct); \textit{Business Watch International Inc v Alberta (Information and Privacy Commissioner)}, 2009 ABQB 10 at para 69, 468 AR 362.
\item[197] \textit{Vann Media}, \textit{supra} note 102.
\item[198] \textit{Filos, supra} note 198; \textit{1318706 Ontario Ltd v Niagara (Regional Municipality of)} (2005), 75 OR (3d) 405, 9 MPLR (4th) 161 (CA).
\item[199] \textit{Langille, supra} note 193.
\end{footnotes}
can prohibit only one class of carriers from certain streets at certain times or from using “aggressive solicitation”.\textsuperscript{201} Such regulation effects local operational preferences.

Judges have been reluctant to find arbitrariness in operational rules where the motives behind the regulation are transparent as a result of bylaw adoption procedure and consultation with affected businesses.\textsuperscript{202} Stakeholder consultation is statutorily required in some cases.\textsuperscript{203} Consultation procedures articulate reasons for a policy decision to regulate the operation of different types of businesses differently. They provide the court with evidence that the purpose of the regulation was not simply to help or hinder particular operators or customers based on purely personal preference. If there is public debate on a matter that the court accepts as relating to a municipal objective it dissuades a finding of arbitrary regulation. For example, in a decision regarding a change to municipal licensing requirements for both taxis and limousines in the City of Toronto, Cronk J.A. for the Ontario Court of Appeal noted:

The taxicab and limousine industries are both important components of the public transportation services available to the public in Toronto. The evidential record supports the City’s claim, detailed in its factum, that the City “was cognizant of the need to balance the interests of the two industries to prevent the limousine industry from being flooded with additional operators, potentially to the ultimate detriment of the travelling public and the City as a whole”.\textsuperscript{204}

\textsuperscript{200} Associated Cab, supra note 185; Toronto Livery, supra note 185.

\textsuperscript{201} Langille, supra note 193 at para 8.

\textsuperscript{202} Ibid at para 48.

\textsuperscript{203} See e.g. Community Charter, supra note 93, s 59(2) (Before adopting a bylaw under subsection (1) or section 8 (6) [business regulation], a council must

(a) give notice of its intention in accordance with subsection (3), and

(b) provide an opportunity for persons who consider they are affected by the bylaw to make representations to council.)

\textsuperscript{204} Toronto Livery, supra note 185 at para 46.
Importantly, the City of Toronto was authorized to discriminate in how it regulated a business, since the \textit{City of Toronto Act} provided that “a by-law under this Act may be general or specific in its application and may differentiate in any way and on any basis the City considers appropriate.”\textsuperscript{205} “Thus” as Cronk J.A. said for the Ontario Court of Appeal, “the City had the statutory power to take steps, by by-law, that advantaged the taxicab industry over the limousine industry, so long as the City acted honestly in so doing and the steps taken were rationally connected to a legitimate municipal objective.”\textsuperscript{206} Since a municipal objective does not include arbitrary personal preferences, it was critical that the court found that the council of the City of Toronto did not simply like the taxicab operators more.

6 Competition between a Business and a Municipal Service

This paper has so far considered the distinction between municipal regulation to favour businesses with operations that are considered preferable to the public interest and regulation to prefer particular businesses because of an arbitrary “personal” preference for the businesses’ operators or clients. A further consequence of a broad grant of powers is the exclusion of arbitrariness from any regulation that prefers a municipal service to a business that provides a commercial substitute. This exposes the business operator to the possibility of regulation intended to prefer a municipality’s own service. Such a preference should not be considered arbitrary. Rather, it is a possible municipal objective that the legislature has implicitly authorized within the broad municipal purposes. Of course the legislature may impose an express prohibition of such a preference. A concern over negative regional effects provides a justification for such a limit on municipal powers.

The perception that municipal services and private businesses generally do not occupy the same markets might be a tenable one in instances where a municipality limits its services to a few public utilities, such as roads, or domestic water and sewerage in urban areas, for which a private sector alternative might be highly impractical. Yet municipalities can provide a wide variety of

\textsuperscript{205} \textit{Ibid} at para 48 citing SO 2006, c 11, Schedule A, s 10(1).

\textsuperscript{206} \textit{Ibid} at para 49.
services. Municipal services such as bicycle rental and wireless internet service are typically provided by the private sector. Private companies offer to collect waste or junk in municipalities that have municipal garbage collection. Similar equipment can be found at the work-out room at the community centre and the commercial gym. Car rental companies and taxicabs offer an alternative to public transit. Municipal parking lots compete with commercial parking lots. The realm of potential competition is not clearly limited—whenever the municipality seeks to provide a new service there is the potential for an existing commercial service to lose many of its customers without any compensation to the service provider.

To draw on the earlier hypotheticals, suppose that a municipality operates a few recreational facilities on municipal park land. The park also contains a small store primarily offering drinks, snacks, sunscreen, and other items that park users are likely to buy. The store could be operated by the municipality or it could be operated privately under licence. In either case, the use and enjoyment of the municipal park service is presumably enhanced by the conveniently located store. In pursuit of the market for park users, an applicant applies to council to amend the zoning of a residential lot next to the park so as to allow a convenience store to open.

The hypothetical facts are similar to those involving A’s Convenience and B’s Convenience, except that in this case the council will be mindful of the effect of competition on municipal

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208 See e.g. City of Toronto, By-law No 1505-2013, A Bylaw to amend City of Toronto Municipal Code Chapter 179, Parking Authority, to delegate to the Toronto Parking Authority the responsibility and authority for the ownership, acquisition, management, maintenance and operation of the bike share program on behalf of the City of Toronto (15 November 2013).

209 See e.g. City of Sault Ste Marie, By-law 2013-136, A by-law to authorize the execution of a Licence Agreement between the City and Shaw Communications Inc. allowing for the installation of the “Go-WiFi” service in City owned buildings and on City owned properties (12 August 2013).

210 People Recycling Inc v Vancouver (City of), 2002 BCSC 1395, 33 MPLR (3d) 87 [People Recycling].


212 See e.g. WMI Waste Management of Canada Inc v Edmonton (City of) (1996) 178 AR 384, 31 MPLR (2d) 251 (CA) [WMI Waste]; People Recycling, supra note 210.
 revenues. By placing a store in the park, the municipality receives revenue through the store’s operation, whether directly from sales or indirectly from licensing fees paid by the private operator. The revenue from the store could supplement the operation of the park facilities and offset funds that might otherwise be raised by taxation. The proposed rezoning might increase the property tax base, but that might not offset the loss of revenue associated with the reduced competitive advantage of the store in the park.

The applicant will also be aware that by seeking a zoning amendment from council, it is dealing with both the market regulator and a competitor within the market. The applicant may be concerned about the council’s apparently conflicting interest. The claim that regulation is being used to make a public project more competitive does occur from time to time. 213 To illustrate this tension, this thesis will discuss three cases involving municipalities and the market for bingo hall facility rental, third party advertising sign rental and waste disposal. The services involved may be of very different nature and scale, but are exemplary of broader possibilities given that a municipality can be permitted to provide “any service or thing that the municipality considers necessary or desirable for the public.” 214

6.1 Parks West Mall Ltd v Hinton (Town of)

*Parks West Mall Ltd v Hinton (Town of)* 215 is a 1994 decision of the Alberta Court of the Queen’s Bench that was rendered before the shift towards greater judicial deference to municipal councils confirmed in *United Taxi Drivers*. The decision involves the tension of municipal regulation for planning purposes and municipal service provision. In the early 1990’s the Town of Hinton had a community centre that it leased to an association to operate. 216 The association rented the facility to community groups who wished to run bingo events, with the rent paid by

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213 See e.g. *Johnston v Prince Edward Island* (1995), 128 Nfld & PEI R 1, 26 MPLR (2d) 161 (SC - T Div).

214 *Municipal Act, 2001, supra* note 93, s 10(1).

215 (1994), 148 AR 297, 19 MPLR (2d) 20 (QB) [*Parks West Mall*].

216 *Ibid* at para 17.
these groups being collected for the benefit of the Town.\textsuperscript{217} The community centre, a public facility on municipally owned property, was one of only two venues for bingo in the Town.\textsuperscript{218}

In 1993 a representative of a shopping mall owner advised the mayor by telephone call\textsuperscript{219} of an intention to develop a third bingo hall within its shopping mall.\textsuperscript{220} The application judge described the mayor’s testimony regarding that telephone call as follows:

\begin{quote}
I discussed the current situation with bingo in Hinton and the fact that funds were going to community groups from such bingos. I at that time advised ... that I was very sympathetic to community groups and would resist change that would put community dollars into the private sector.\textsuperscript{221}
\end{quote}

The shopping mall owner and its joint-applicant nonetheless sought a development permit from the municipality to develop a bingo hall. They did not receive one because the Town’s council quickly moved to amend its zoning bylaw to prohibit a bingo hall use.\textsuperscript{222} The applicants applied to the superior court to quash the bylaw amendment, claiming that the mayor had acted in bad faith, or alternatively, that the amendment had been adopted for an improper purpose.

Interestingly, the Town’s General Municipal Plan, a policy document that the council had previously been adopted to guide planning decisions, addressed the issue:

\begin{quote}
Recreation facilities and programs can be provided by both the private sector and the Town. This may result in wasted resources, and in most cases can place the private sector at a disadvantage. The Town wishes to minimize any overlap in the provision of recreational services while ensuring that Hinton and district residents have available as wide a range of opportunities as possible.
\end{quote}

\begin{itemize}
\item \textsuperscript{217} Ibid.
\item \textsuperscript{218} Ibid.
\item \textsuperscript{219} Ibid.
\item \textsuperscript{220} Ibid at para 4.
\item \textsuperscript{221} Ibid at para 14.
\item \textsuperscript{222} Ibid at para 9.
\end{itemize}
POLICY: While recognizing that some overlap may be difficult to avoid because of efficiencies in delivery, the Town will generally not compete in recreational facility or program areas where the private sector can offer a similar service at a reasonable cost.\textsuperscript{223}

The Town had made a declaration regarding the appropriate balance of competition between municipal and private recreational services.

In order to assess whether council’s powers could be put to such a purpose, Smith J. cited two statutory purposes. One was the planning purpose reproduced in Part 3.1.2.2\textsuperscript{224} above as imposed under the now-repealed Alberta \textit{Planning Act}.\textsuperscript{225} The second was section 112 of the \textit{Municipal Government Act}, which then read:

A council may pass bylaws that are considered expedient and are not contrary to this or any other Act,

(a) for the peace, order and good government of the municipality,

(b) for promoting the health, safety, morality and welfare thereof, and

(c) for governing the proceedings of the council, the conduct of its members and the calling of meetings.\textsuperscript{226}

In assessing the actual purpose of the zoning bylaw amendment, Smith J. held: “I find the purpose of the bylaw amendment was to protect community funds and to limit competition.”\textsuperscript{227} Given this finding, Smith J. went on to hold: “The real issue … is whether the protection of

\begin{footnotes}
\item[223] \textit{Ibid} at para 11.
\item[224] \textit{Municipal Government Act, supra} note 93, s 617.
\item[225] RSA 1980, c P-9.
\item[227] \textit{Parks West Mall, supra} note 215 at para 42.
\end{footnotes}
community funds and the limiting of competition is a permissible objective for the land use bylaw amendment which took place in this case. I find that it is not.”\textsuperscript{228}

In explaining why there was no planning objective to an amendment that denied the applicant the right to develop a bingo hall, Smith J. said:

In so concluding, I consider Section 2 of the \textit{Planning Act} which sets out in subsections (a) and (b) the objectives of planning. I also consider the historical right of the land owner to use his private property subject to the legislated rights of public officials. Section 2 of the \textit{Planning Act} also make reference to this right.

I accept that the public interest objectives of Council in the planning context encompass a broader range of considerations than those made by Council’s planning advisors. However, Council is still limited by the \textit{Planning Act} which focuses on patterns of human settlement and by its own General Municipal Plan. The plan advocates a balance between minimizing overlap of recreational services and a general attitude of non competition.\textsuperscript{229}

With regard to the competing positions of those groups who were using the community centre for bingo and those who wanted more opportunity to fund raise, Smith J. noted: “Once again, I see the emphasis on money concerns.”\textsuperscript{230}

It is unclear whether Smith J. needed to consider anything other than council’s own General Municipal Plan to conclude that preventing the development of a commercial bingo hall was not part of the planning of service distribution within the Town. The localist, post-shift perspective suggests that the court should not impose its own assessment of the appropriate balance between public and private interests, meaning that a reviewing court should just look to the consistency requirements applicable to the General Municipal Plan and rezoning decisions.

\begin{itemize}
\item \textsuperscript{228} \textit{Ibid} at para 43.
\item \textsuperscript{229} \textit{Ibid} at para 44.
\item \textsuperscript{230} \textit{Ibid}.
Deference to the council is encouraged by the possibility that a particular private interest may not even be at issue at the time the regulation is adopted. The Town could decide to amend the zoning bylaw to preclude competing bingo halls when there is no compositing private proposals. Opponents might still seek to preserve a right to use private land for bingo in the future and supporters might believe that generating higher community centre rents through the exclusive right to host bingo is a desirable method of raising municipal revenue, especially if attracting out-of-town bingo players increases the rent that the community centre can charge. In such a case there may be no aggrieved owner in particular, and the policy question of whether the Town’s should use of zoning to control a market is better left to the electorate or the legislature.

A challenger to the regulation could argue that the court could review such a policy on procedural grounds. A council considering the location of recreational uses should wear its ‘planning purpose hat’ and ignore the municipality’s revenue concerns in service provision. Disregarding the revenue aspect of the community centre places the municipality in a worse position than a private business. A competing business operator can make revenue-based objections to a council on planning decisions; small stores will say they are not viable if placed next to big box stores.\(^{231}\) If the delegated authority to regulate is to be viewed as constituting multiple regulatory ‘hats’ then the public interest represented by one ‘hat’ will not be represented in consideration of decisions made under the other. This is worse than simply acknowledging through policy the dual planning and service-provision interests of council. Localism suggests that the municipal council should determine the appropriate balance between private and public interest rather than having certain public interests, such as fees generated from services, being diminished through the judicial interpretation of particular regulatory purposes.

### 6.2 Pattison Outdoor Advertising LP v Toronto (City of)

The temptation to pursue a multiple ‘hat’ view of municipal regulation resisted by the Ontario Court of Appeal in the post-shift decision *Pattison Outdoor Advertising LP v Toronto (City of)*\(^ {232}\) muddies the water further. That case related to a City of Toronto tax imposed by bylaw on the

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\(^{231}\) *Supra* note 189 [and accompanying text].

\(^{232}\) 2012 ONCA 212, 96 MPLR (4th) 167 var’ing 2011 ONSC 537, 81 MPLR (4th) 1.
person “who owns or controls” what is displayed on the signs.\textsuperscript{233} Concurrent with this taxation of displays, Toronto also sold rights to display advertising signs on municipal property through a revenue sharing scheme that exempts displays under such a scheme from the tax.\textsuperscript{234} A competitor, Pattison Outdoor Advertising LP (“Pattison”), to a revenue-sharing sign owner, Astral Media Outdoor, claimed that this regulatory scheme was unlawfully discriminatory. Sharpe J.A. described Pattison’s claim as follows:

Pattison’s attack on the by-law as discriminatory focuses on the exemption for “an Owner who has entered into a revenue sharing agreement with the City of Toronto.” Toronto has a revenue sharing agreement with Astral Media Outdoor (“Astral”), Pattison’s competitor, whereby Astral supplies for public use “street furniture” - transit shelters, benches, garbage containers, public washrooms and information kiosks - and is permitted to sell space on these structures for advertising. Toronto receives not only the benefit to its residents of the facilities provided by Astral but also a share of the advertising revenue. This represents a significant source of revenue for Toronto.

Pattison complains that Astral has an unfair competitive advantage because it does not have to pay the third party sign tax. This, Pattison submits, constitutes a form of discrimination that renders the by-law vulnerable to attack.\textsuperscript{235}

Sharpe J.A., for the majority, then affirmed the application judge’s identification of multiple municipal objectives:

The application judge described the Sign Tax by-law … as “one of several policy initiatives relating to signs and billboards and that, while seeking to raise revenues, the City also had to balance a number of competing interests, claims and other policy objectives.” These policy objectives include not only raising

\textsuperscript{233} Ibid at para 7.

\textsuperscript{234} Ibid at paras 22–23.

\textsuperscript{235} Ibid at paras 23–24.
revenue for municipal purposes, but also controlling and regulating the display of signs and enhancing the quality and character of shared public spaces. The revenue sharing exemption allows Toronto to enter an arrangement that significantly benefits the city and its residents.

…

The fact that this arrangement may give Astral a competitive advantage over Pattison renders neither the by-law nor the exemption vulnerable to attack. The revenue sharing agreement with Astral is simply a different arrangement, fully authorized by the Act and the by-law, that permits Toronto to advance and achieve legitimate municipal objectives.236

This reasoning recognizes that the balancing of competition between the market for third party-advertising on public and private land is for the municipality to set in conjunction with the balancing of advertising and aesthetics.

The temptation to give advertising on public property a competitive advantage may be especially strong if, unlike the City of Toronto, the municipality has limited taxation powers and is unable to tax persons who control the display of commercial billboards. Consider the billboard advertising, shown below, located on the Westbank First Nation’s land between the much larger municipalities of City of Kelowna and the District of West Kelowna shown below.

236 Ibid at paras 28–29 [citation omitted].
From a community perspective, a government representing a small population gains all the billboard revenue.\cite{238} However, from a regional perspective, the aesthetic impact is borne by the much larger regional population that travels along the highway. If the decision to generate revenue from such billboards in exchange for enduring the aesthetic impact was considered from a regional perspective, the outcome could be the reverse. The location of municipal boundaries can affect the commercial considerations associated with a municipal service.

### 6.3 Halifax (Regional Municipality) v Ed DeWolfe Trucking Ltd

Regional considerations feature most prominently in the Nova Scotia Court of Appeal case of *Halifax (Regional Municipality of) v Ed DeWolfe Trucking Ltd.*\cite{239} Not only does the decision provide a clear example of the court upholding a municipal regulation designed to prefer a service over a business, the municipality at issue was incorporated largely in response to a lack of regional co-ordination. The Halifax Regional Municipality (“HRM”) is a municipality

\begin{itemize}
\item \cite{237} “Google Street View-Okanagan Hwy BC-97” Google (July 2012), online: Google Maps < https://www.google.com/maps/@49.885208,-119.53006,3a,75y,34.34h,83.31t/data=!3m4!1e1!3m2!1spe6SbxdaXlabb5zoqXzdWw!2e0 >.
\item \cite{238} Ron Manz, “Billboards Coming Down” (27 March 2007) Castanet, online: Castanet < www.castanet.net/news/Kelowna/27407/Billboards-Coming-Down > (“Chief Louie says the band and [its] members earn roughly $250,000 a year from those signs”).
\item \cite{239} 2007 NSCA 89, 257 NSR (2d) 276 [*DeWolfe Trucking*], rev’g 2006 NSSC 287, 247 NSR (2d) 364.
\end{itemize}
incorporated in order to amalgamate four smaller municipal governments.\textsuperscript{240} Andrew Sancton reports that two of the drivers towards amalgamation were dissatisfaction with waste disposal within the region and a perception of a race-to-the-bottom being engaged by the neighboring cities of Halifax and Dartmouth in selling off municipal land for industrial development.\textsuperscript{241}

The case of \textit{DeWolfe Trucking} related to the fact that the newly incorporated HRM operated a municipal waste disposal site that processed both publically collected and, for a tipping fee, privately collected solid waste.\textsuperscript{242} The HRM’s council passed a bylaw incorporating a “flow control” provision\textsuperscript{243} into its waste management regulations such that all solid waste generated within the HRM’s boundaries could only be disposed within the HRM.\textsuperscript{244} This frustrated private waste collectors, including a challenger of the bylaw, because waste disposal sites beyond the HRM’s boundaries charged lower tipping fees. Even though the HRM was a “regional municipality”, the regional market for waste disposal extended beyond the HRM’s borders.

The judge hearing the challenge was asked to consider whether the HRM had the power to prohibit the export of solid waste. As summarized by Cromwell J.A. of the Nova Scotia Court of Appeal:

\begin{quote}
The judge at first instance held that [the HRM] does not. He concluded that, because the by-law had extra-territorial effects, created a monopoly and interfered with contracts, it must be expressly authorized by provincial law and that these laws must be interpreted strictly. In his view, there was no express authority for HRM to pass this by-law and none should be implied.\textsuperscript{245}
\end{quote}

This view is consistent with the pre-shift grant and interpretation of municipal powers.

\begin{itemize}
\item \textsuperscript{240} \textit{Halifax Regional Municipality Charter, supra} note 93.
\item \textsuperscript{241} Sancton, \textit{Merger Mania, supra} note 58 at 90
\item \textsuperscript{242} \textit{DeWolfe Trucking, supra} note 239 at para 8.
\item \textsuperscript{243} \textit{Ibid} at para 8.
\item \textsuperscript{244} \textit{Ibid}.
\item \textsuperscript{245} \textit{Ibid} at para 2.
\end{itemize}
The Court of Appeal also considered the market effects of “flow control”. Cromwell J.A., for a unanimous court, noted that “[f]rom the perspective of the market place, flow control provisions are not about protecting the environment, but about ensuring that HRM can keep all the tipping fee revenue for HRM waste and exclude competition from waste disposal sites elsewhere.” He added further that:

For haulers of solid waste, such as the respondent, flow controls limit their ability to operate in the market place. The controls prevent the haulers from seeking out and taking advantage of cheaper disposal (“tipping”) fees at provincially approved facilities operated outside HRM.

The fact that the bylaw was adopted to enable the HRM run disposal site to avoid competing with private sites was unquestioned.

What Cromwell J.A. objected to was the application judge’s failure to consider why the HRM might want to protect, and should be enabled to protect under its broad powers, revenues generated by one of its services:

The judge erred, in my view, in concluding that this by-law has impermissible extra-territorial purposes or effects. In addition, when characterizing the scope and purpose of the by-law, the judge failed to view the revenue generating aspects of flow controls in their broader context. This by-law is not about raising money for its own sake. Rather, the by-law protects fees as a component of solid waste-resource management. In his interpretation of the municipality’s powers under the M.G.A. [Municipal Government Act], the judge failed to take the required purposive and contextual approach. Instead, he wrongly insisted both that there must be an express grant of authority and that the M.G.A. provisions authorizing

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246 Ibid at para 14.
247 Ibid.
248 Supra note 93.
municipal powers to affect contractual and property rights must be strictly construed against the municipality.\textsuperscript{249}

If a municipality may regulate local waste disposal as part of its services, it may choose to monopolize waste disposal in order to increase the revenue associated with the service. The monopoly, however, will only cover the boundaries of the municipality. A regional regulator of waste disposal might prefer to allow waste to be sent to cheaper disposal sites beyond the HRM’s boundaries, but the HRM’s flow control scheme is determined with reference to the HRM’s jurisdiction. It is for the legislature to consider prohibiting such autarkic behavior for services that is not spurned by the electorate.

These three cases involve different activities: bingo facility rental, billboard advertising and solid waste disposal, however in all cases bylaws that intended to regulate the location of such activities impacted revenues collected from municipal services. There is an incentive to protect the viability of the revenue stream from competing private services. The importance of such revenue can be significant. One study observed that in 2012, 33.2\% of revenue for municipalities in the Greater Vancouver Regional District came from the sale of services and user fees (excluding developer contributions), whereas 47\% of revenue came from taxes.\textsuperscript{250} The incentive to protect or enhance such a revenue source is particularly significant if a municipality feels politically limited by its taxation power.\textsuperscript{251} A municipal council can have bigger budgets and offer more services if it is not limited to funding its operations through ‘unavoidable’ property taxes.

\begin{itemize}
\item \textsuperscript{249} DeWolfe Trucking, supra note 239 at para 29.
\item \textsuperscript{250} Charles Lammam & Hugh MacIntyre, “The State of Municipal Finances in Metro Vancouver” (2014) Fraser Institute, online: Fraser Institute < www.fraserinstitute.org/> at 27.
\end{itemize}
7 The New Framework for Municipally-Shaped Markets

The shift in municipal empowerment has seen the Provincial legislatures and the court in Canada both increase their deference to municipalities in assessment of local preferences and the tailoring of regulatory solutions. This has given municipalities a more prominent role in regulating the local market place. Despite such deference, legislatures should still be imposing statutory limits on municipal regulatory discretion to respond to identified risks of regional inefficiencies. This is required to avoid regulatory races that can result from a plurality of municipal councils within a region. The need for such a response follows from the localist structure and therefore differs from intervention by the legislature to otherwise dictate the local balancing of public and private interests through business regulation. The court, having increased its deference towards this local balancing should not expand its role of judicial review intervene on regional policy matters.

7.1 The Municipality’s Role

It is not novel that a government can have a significant impact on the market. A provincial legislature in Canada has always been able to regulate property and civil rights or form Crown corporations to compete on the market. The big change is the increased delegation of this government role to municipal governments. If localism offers the most efficient method of matching policies to preferences, then local community preferences regarding the balancing of public and private interests would also be included. Even if municipal councils are sometimes viewed with the suspicion that informed Willis’ lack of trust in municipalities to regulate businesses, the fact that the councils are elected makes them subject to similar electoral demands for fairness as the legislature. The difference is that the local electorate will vary among the plurality of municipalities.

Even if a council is locally-minded, it is not necessarily ignorant of the efficiencies that can be gained from working with neighbouring municipalities. Service provision is one area in which neighbouring municipalities might choose to co-ordinate. Kong argues that the creation of

253 Mullan, supra note 77 at 546.
regional districts, a regional body composed of representatives of municipalities and electoral areas, in British Columbia enhances regional allocation of service provision:

The system’s mechanisms for intraregional agreements facilitate the matching of citizen preferences with government services, and therefore achieve the new regionalist aim of fiscal equivalence. Citizens of political units [incorporated municipalities and unincorporated electoral areas] within the system in general only receive and pay for those services to which they, through their representatives, have consented.²⁵⁴

So long as the consent of the local electorate is required and maintained, such regional cooperation is consistent with the localist theories that describe choosing a bundle of goods, services and taxes.

What municipal councils should not be expected to do is identify regional inefficiencies and sacrifice local interests for the benefit of a wider regional public interest. Localist theory suggests that residents will choose to live in a municipality that regulates to match their own preferences: maybe the boutique friendly city or the suburb that fosters big box shopping. This might satisfy the local electorate, but a regional planner may find regional inefficiency in such a clustering of land uses, since many shoppers must travel across the region to do a particular type of shopping. The representative councils of the municipality should not be expected to modify their own preferences to benefit outsiders. Regional efficiency must be considered by someone with a regional perspective.

### 7.2 The Legislature’s Role

The legislature, or a regionally-minded delegate, is the preferred institution to identify and impose policy responses to regional inefficiencies. Unlike the court, the legislature is an elected government that can assess the “wide variety of factors” that drive regulation in the public interest. Compared to municipal councils, the legislature represents public interests covering a wider geographic area. The legal shift means that the legislatures do not protect the regional

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interests through narrow grants of municipal authority, but instead grant municipalities a broad authority to govern locally that is subject to regionally-minded policies imposed through Provincial statutes. This shift is similar to the post-Dillon’s Rule situation in the US described by Schleicher.\textsuperscript{255}

An example of such legislature-driven policy is the provincial statutory direction as to the regional location of development density in southern Ontario under the \textit{Places to Grow Act, 2005}.\textsuperscript{256} Under that statute a provincial minister prepares a regional development plan, which plan can prescribe: “intensification and density”, “land supply for residential, employment and other uses,” and “the location of industry and commerce.”\textsuperscript{257} Provincial-level direction of land use stifles municipal regulatory races.

Land use is not the only forum for regionally-minded intervention to modify local regulatory preferences. The British Columbia decision of \textit{Yellow Cab Company Ltd v Passenger Transportation Board} illustrate how a provincial-level administrative board whose statutory authority\textsuperscript{258} can include permitting inter-municipal taxi services to increase to a level greater than that set by the local government.\textsuperscript{259} That particular case dealt with decisions of the board that authorized a higher number of regional taxis to collect fares during peak periods in the City of Vancouver than the council of the City of Vancouver allowed.

The legislature’s imposition of regionally-minded policy direction can be done in a manner that is partially local. Kong describes the British Columbia regional district scheme as also having a voting regime for regional regulatory matters that imposes some degree of majority rule:

There are different voting rules for different kinds of issues: on issues that affect the entire region, each member of the board has one vote; for matters that affect a

\textsuperscript{255} Schleicher, “The City”, supra note 19 at 1515.

\textsuperscript{256} SO 2005, c 13.

\textsuperscript{257} Ibid, s 6.

\textsuperscript{258} Passenger Transportation Act, SBC 2004, c 39.

\textsuperscript{259} 2013 BCSC 1930, aff’d 2014 BCCA 329.
sub-area of the region, only members from political units in the affected sub-areas vote and the voting is weighted; and for some financial matters, all members of the board can vote, and the voting is again weighted.\textsuperscript{260}

This division of issues into local, sub-regional, and regional issues on which members vote is inconsistent with the localist theory of regulation. Localism suggests that municipal regulation should have some regional effect because it adopts a distinct local preference that is valued because it differs from regional neighbours. The legislature seeks to find the right size of municipality for the local preferences that are to be regionally diverse. The legislative identification of a regulatory matter as being suitable for a regional vote among municipalities is a prescriptive limit on localist governance—a purely local preference must heed to the regional preference for that matter. Amalgamation of municipalities has a similar effect as it enlarges the area covered by the representative electorate.\textsuperscript{261}

Such legislative intervention has clearly recognizable regional objectives. This distinguishes them from other statutory limits such as restrictions on assistance to businesses that could be used to govern the interplay between local private and public interests where there is no regional concern. For example, municipal enabling legislation proposed in Ontario in 1998 included a clause that permitted the Lieutenant Governor in Council to, by regulation, “limit municipal power to engage in commercial activities that, in the opinion of the Lieutenant Governor in Council, represent inappropriate competition with private commercial activities.”\textsuperscript{262} Although no such scheme for executive review was adopted, the question of “inappropriate” municipal competition could be based on regional efficiency, an issue raised by \textit{DeWolfe Trucking}, or it could just reflect a desire by the legislature to impose a balancing of interests between private and municipal enterprise that is distinct from that chosen by the municipal council.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{260} Kong, “Federal Theory”, \textit{supra} note 15 at 507.
\item \textsuperscript{261} See generally Sancton, \textit{Merger Mania}, \textit{supra} note 58 and Meredith, \textit{supra} note 36 at 498 (for the debate over resolving regional inefficiency among municipalities through amalgamation).
\item \textsuperscript{262} Ministry of Municipal Affairs and Housing, \textit{A Proposed New Municipal Act} (Toronto: Queen’s Printer for Ontario, 1998) at 267.
\end{enumerate}
\end{footnotesize}
The ability of a municipal council to tilt the market to favour a municipal service is a controversial aspect of Canadian localism. It is notable that the fairness of a municipal service competing with a business was discussed as early as Carman Randolph’s observation in 1913 with regard to nascent municipal utilities: “It would seem, however, that in case a public corporation should compete in a manner which the law condemns as unfair between private parties it could be called to account.”\(^{263}\) Localist theory suggests that it would be most appropriate for representatives of the local electorate to decide what they consider to be fair free-market intervention from a municipal perspective. However, where such decisions create regional inefficiency, possibly as a result of the municipal service extracting revenue from regional visitors, the legislature should intervene on behalf of the regional perspective.

### 7.3 The Judiciary’s Role

The court is no more suited for resolving the policy tension between regional and local interests than the tension between public-private. Although the court might be able to identify that the regulations of a plurality of municipal councils is regionally inefficient, judicial review is not the appropriate method to impose corrective regionally-minded policies. Just as the judiciary has deferred to municipal councils in the assessment of the wide variety of factors that influence local government policy, the court should defer to the legislature in the assessment of appropriate regional policy for business regulation.

The court continues to have a role in reviewing in the process of forming local regulation in relation to businesses. A municipal council cannot act in bad faith, which is to say, use its regulatory power for the purpose of harming a particular business owner or operator. Proving an intent to harm is likely challenging. In *Entreprises Sibeca Inc v Frelighsburg (Municipality of)*, Deschamps J. noted that a municipality cannot perform “acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith.”\(^{264}\) The legislative context provides for some protection of private interests from capricious regulation.


\(^{264}\) *Sibeca, supra* note 70 at para 26.
The decision in *Catalyst* confirms, at least for some municipalities,\(^{265}\) that a regulatory power cannot be exercised unreasonably.\(^{266}\) A municipal council cannot seek to favour or hinder a business for reasons unacceptable to any reasonable council informed of the wide variety of factors.\(^{267}\) Regulating to give preferred business operations a market advantage *per se* is not inherently unreasonable. Since municipalities have a business regulation purpose, it is implicit that a council should be able to regulate so as to favour those business operations that operate in conformance with those standards imposed in the local public interest.

Another administrative law limit is that the municipality cannot pursue such a purpose where it exceeds a statutory limitation contained in the enabling statute.\(^{268}\) This includes rules against circumvention—relying on a broad power when a narrower power is statutorily prescribed,\(^{269}\) as well as using regulation to effect an unauthorized taking.\(^{270}\) These administrative law limits ensure that a municipality does not exceed its delegated role as a local regulator. None of these administrative law limits translate into a general entitlement to competition unfettered by the preferences of a municipal council. A business operator, or prospective business operator, may find that duly-adopted municipal regulations are tilted against his or her business. Rather than complain to the judiciary, the complaint is a political one that should be made to either the council or the legislature. This is in addition to the market response of relocating the business to a more favourable jurisdiction.

8 Conclusion

The legal shift towards greater empowerment means that Canadian municipalities now possess a greater power to control local markets, including regulating to affect the balance of competition. Government regulatory involvement in the market is nothing new—the change is that the

\(^{265}\) See *supra* note 167.

\(^{266}\) *Catalyst*, *supra* note 6 at para 24.

\(^{267}\) *Ibid*.

\(^{268}\) See e.g. *Royal City Jewellers & Loans Ltd v New Westminster (City of)*, 2007 BCCA 398, 11 WWR 622.

\(^{269}\) *Croplife*, *supra* note 90 at para 40.

\(^{270}\) *WMI Waste*, *supra* note 212.
legislature and the judiciary have adopted a much more deferential role regarding regulation of local businesses. This reflects localist theories of legislative efficiency, an elected local government is best suited to identifying and tailoring regulatory responses to local problems. Implicit in this shift is a decision at the legislative level that if the balance of competition should be affected by regulation in order to give a competitive advantage to a particular type of business or a public service, then that decision should be made at the municipal-level. Such municipal-level regulation is consistent with Tiebout’s and Fischel’s theoretical justifications, which suggest that intraregional mobility prevents businesses and residents from being beholden to decisions they do not like.

The regional concern arising from such a legal shift is that the mobility of businesses might mean that municipal councils engage in regulatory races to attract the desirable businesses and repel the noxious. These races can lead to regionally inefficient results. A second inefficiency can arise from municipal empowerment over local services. Whereas the owner of an efficient business might seek to expand and steal market share from an inefficient competitor in a neighbouring town, public services can be insulated from such inter-municipal competitive encroachment. While a new regionalist approach might try and encourage co-operation among municipalities, regional direction from the legislature ensures a regionally-minded response.

Given the court’s response to criticism regarding the imposition of judicial values in balancing of private property rights and local public interest, it seems that the court would be equally adverse to reviewing the policy balance between locally-minded and regionally-minded regulation. The court should continue to review the process by which municipal regulation of businesses is adopted to ensure that the limits of delegated municipal powers are respected. This is a much more deferential role than one in which the court seeks to impose the balancing of public and private interest that the court interprets as following from strictly construed enabling statutes.
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